NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

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Many of our environmental problems arise from the well-meaning but ill-advised work of ecological Neanderthals. Pesticide abuse is a classic example. Throughout the history of modern agrichemical methods, agribusiness has ignored the potential value of integrated control techniques where specific chemical bullets are used to augment the armory of natural and biological insect control. The indiscriminate use of broad-spectrum, long-persistant pesticides such as DDT, dieldrin endrin, aldrin, toxaphene, and heptachlor have so altered the ecology of agricultural ecosystems that more resistant pest species have evolved and new species have become pests.

Utilizing our water resources for waste disposal is still another example. Oceans and rivers, lakes and streams, are just like any other sink—they have a finite capacity for waste, after which they back up. Moreover, they fight back as algae blooms quickly decay into sulfurous miasmas. Our atmosphere is not a limitless sink into which we can pour countless tons of noxious gases and poisonous particulates. The atmosphere, too, has a finite capacity for waste, and we are rapidly reaching that limit today.

Our high-speed air transportation system has begun to alter our weather patterns and climatological cycles. High altitude clouds from commercial jet contrails have begun to reduce the amount of incident solar radiation received by green plants on the ground.

Man's apparent dominion over the environment is but a license from nature with the fee yet to be paid. We should have learned from the

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disastrous effects of radionuclide fallout that what we sow we must also reap; yet the fallout of lead and other heavy metals, chlorinated hydrocarbons, and other toxicants continues at an increasing rate. Mankind has ears, yet does not hear the warnings shouted from the environment all around him. More and more noise is tolerated, increasing the toxic environmental stresses already imposed on urban and ghetto dwellers throughout the nation.

We are proceeding to develop a commercial supersonic jet transport, even though it seems that continued random awakenings can produce transient psychoses in stressed populations.

Man has been warned. Man has been given the unique opportunity to choose whether his species will drown in its own sewage, be buried under its own garbage, choke to death on air we cannot breathe, or be driven to homicide or suicide by the noise around.

During the spring of 1968, the alumni of Yale Law School—who claim among their numbers half of the Justices of the United States Supreme Court, 10 percent of the nation's law teachers, and any number of distinguished attorneys—held a reunion. The intellectual theme for that reunion weekend was "Law and the Urban Crisis." Five prominent legal educators, deans at their respective law schools and distinguished urban legal scholars in their own right, were invited to address the alumni on this urgent question. But just as the proceedings were to begin, a group of black law students, together with members of New Haven's Black Coalition, entered the auditorium and began to address themselves to the all-white speakers platform and the all-white alumni audience.

"You just don't understand the problem at all," they said. "The problem is not Law *and* the Urban Crisis; Law *is* the Urban Crisis!"

And now when we look to the law for answers to many of our social and environmental problems, we find that the law itself *is* the cause of many of those problems.

It is "the law" which zones the housing patterns which lead to building too many highways for too many autos.

It is "the law" that expropriates public property for private profit.

It is "the law" which permits environmental degradation.

It is "the law" which guarantees equal protection of that law for the corporation—that fictional bastard child of the law endowed by the United States Supreme Court with all the God-given rights of a human being but without any soul to save or tail to kick; while effectively denying such equal protection of the law to the poor, the Indian, the black, women, the inarticulate, and the politically weak or ineffective.

It is "the law" which forbids the public distribution of birth control information in many states.

inary injunction. Meanwhile, Congress had cleared the bill through a subcommittee and the bill was pending before the entire committee prior to release on the House floor for action. Nevertheless, the District Court again held that there is nothing in the Constitution to prevent a landowner from making whatever use of his property he chooses, and if the fossils were to be saved they had to be purchased at the speculators' price.

Again it was necessary to appeal to the Tenth Circuit Court of Appeals. At the hearing the speculators contended that they only intended to scrape off the top layer of the fossil shales and that would still leave more than 16 feet of fossils remaining. We told the Court, "You could just as well say scraping the paint off the Mona Lisa would cause no real damage because the canvas was left." Again the 34-million-year-old fossils were rescued by a last-minute court order. A preliminary injunction was granted by the Court of Appeals just as the bulldozers were poised at the boundary of the national monument.

Although Congress finally passed the bill, the difficulty with the legislative approach to environmental protection is best summed up in the words of the Clerk of the Court of Appeals: "Will you please get that bill through Congress soon and give us some rest."

If the legislature is too slow, try an administrative agency.

Recognizing the delay inherent in the legislative process, legislatures attempted to meet the needs of our modern technological society by creating administrative agencies to which they ceded some of the powers of the legislative, executive, and judicial branches of government in order to give speedy effect to the will of the people as manifest by Act of Congress.

Unfortunately, the administrative approach carried within itself the seeds of its own abuse. Any administrative agency, no matter how well intentioned, is not a court; it is a star chamber—its own judge, jury, and executioner—all in the public interest of course! The narrow jurisdiction and mission-oriented viewpoint of administrative agencies, particularly those charged with industry regulation, make them inherently incapable of considering environmental matters with the requisite degree of ecological sophistication.

The Scenic Hudson Preservation case marked the fork in the road for those concerned with the legal defense of the biosphere. There the United States Court of Appeals for the Second Circuit decided that the Federal Power Commission (FPC)—the federal regulatory agency charged with the mission of regulating the generation and distribution of electric power in the United States—should hear and consider evidence on natural values in addition to the usual evidence on the economics of electric power generation and distribution.

The tragedy of the Scenic Hudson Preservation case occurred when the Scenic Hudson Preservation Commission, a local special interest conservation organization primarily concerned with protecting the view of Storm King Mountain from the exclusive residential neighborhoods on the east side of the Hudson River north of New York City, yielded to the FPC jurisdiction to hear and determine the environmental impact of the Consolidated Edison Electric Utility Company application to build a pumped storage generating facility on Storm King Mountain.

A reactionary coalition of preservationists and esthetically concerned "conservationists," in their all-consuming desire to avoid challenge to established bureaucracy, thus yielded to the FPC the ultimate authority to make ecological judgments binding on generations yet unborn, cloaking the FPC with a mantle of ecological competence it does not possess and cannot attain within the narrow limits of its statutory mission.

The Federal Power Commission did, in fact, perform as might be expected. After lengthy and expensive hearings (costing the conservationists more than $1 million to date), the FPC effectively ignored the testimony on the ecological impact of the project and approved the permit application. Since the conservationists were given their "day in court" and chose to take that day before an administrative agency rather than in a court of equity, the findings of fact made by the FPC are now binding on the conservationists.

The administrative agencies are legislative creations. Although appointed, in theory they exist to effect policy established by the elected representatives of the people. To accomplish this the legislature ceded rule-making power from its legislative mandate under the Constitution; the executive ceded a certain amount of administrative power; and the judiciary ceded certain judicial functions, in particular fact-finding and preliminary hearings. As a result of this tripartite grant of power, administrative agencies represent not so much a fourth branch of government as some seem to think, but the foundation of all practical government operations. Administrative agencies provide the substantial bulk of bureaucracy.

Bureaucracy

Bureaucracy has been defined as organization incapable of correcting its own course of conduct, and it is now clear that the worst offenders in the process of environmental degradation are not the ruthless entrepreneurs dedicated to wanton exploitation of our natural resources—the profiteers and abusers of the public's air and water—but the shortsighted, mission-oriented, allegedly public interest agencies such as the Department of Transportation, its Federal Highway Administration and Federal Aviation Administration, the Department of Agriculture and its Division of Pesticide Registration, the Army Corps of Engineers, the Atomic Energy Com-

mission, and their many regional counterparts. The mission-oriented, statute-enshrined determinations of these agencies preclude any consideration of the long-term ecological consequences of their decisions.

If we have to find a common denominator for the serious, environmental crises facing all technologically developed countries, regardless of their nominal form of government, it would have to be entrenched bureaucracies essentially immune from criticism or public action. These self-perpetuating, self-sufficient, self-serving bureaus are power sources unto themselves, effectively insulated from the people and responsible to no one but themselves.

One of the strange inconsistencies of bureaucracy is the reluctance of administrative agencies to expose themselves to public scrutiny. A review of the published reports of Nader's Raiders and similar citizen vigilante investigative groups chronicles tales of evasion, suppression of information, and a general policy of restricting public information. Assuming the best of motives on the part of bureaucrats and politicians, this course of conduct can only be explained by a kind of totalitarian paternalism inconsistent with Constitutional concepts of American Government.

Pesticide Litigation

The bankruptcy of bureaucracy and administrative agency protection of the environment is most easily demonstrated by resort to the courts in litigation seeking to substitute the citizen as representative of other citizens—the class action—for the administrative regulatory agency.

We need look no further than the Division of Pesticide Registration of the U.S. Department of Agriculture and its handling of the DDT controversy to understand the failure of the existing regulatory agency system and at the same time sense the power of the courtroom and the effectiveness of equity litigation in the struggle to protect the environment.

In 1966, a citizen sought equitable relief from a toxic insult to the community ecosystem and sued not just a local mosquito control commission using DDT, but 1,1,1-trichloro-2,2-bis (para-chlorophenyl ethane), the chemical DDT itself.

Finally, in a New York court of equity the full weight of scientific evidence against DDT was presented to the social conscience of the community in a forum protected from the political, economic, and bureaucratic pressures that for 20 years had successfully suppressed the evidence of DDT's worldwide damage to the environment. At long last the agrichemical-political complex was forced to put its propaganda to the test in the crucible of cross-examination.

The New York State Supreme Court issued a temporary injunction restraining the County of Suffolk from using DDT in mosquito control on

August 15, 1966, and continued this "temporary" injunction until Dec. 6, 1967, holding:

> DDT has, by its inherent chemical stability, become a continuing factor in some ecological life cycles so as to profoundly alter them and the environmental equilibrium. Thus, it is reasonably apparent that DDT is capable of and actually has to some extent caused extraordinary damage to the resources of this country. If in no other way, the chemical by its very stability has introduced an element of instability in the general ecosystem. For instance, by reducing a food source of some of the larger wildlife and so reducing the over-all larger wildlife population, lesser elements multiply more quickly. These lower forms are presumably more of a nuisance, assuming they in turn survive. Furthermore, DDT affects wildlife directly. Its ingestion, from whatever source, has the capability, it seems, to disrupt reproductive processes or even more simply act as a poison. It is fairly apparent then that the application of DDT in Suffolk County has and is continuing to have a demonstrable effect on local wildlife, reducing it slowly but surely, either directly across the board or indirectly from the top down, but reducing it nevertheless.
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> We have a situation where plaintiff has at least minimally sustained a massive effort to validate the allegation that DDT does in fact do biological harm.

Although the Court dismissed the complaint on procedural grounds, it continued the temporary injunction pending legislative review of the entire matter. That review culminated in a determination by the Suffolk County Legislature to discontinue the use of DDT for mosquito control throughout the county in July, 1968. From the date of that temporary injunction in 1966, DDT was finished for mosquito control in the state of New York.

In 1969 at Madison, Wis., in another courtroom challenge of DDT, Dr. Harry W. Hays, director of the Pesticide Registration Division of the U.S. Department of Agriculture, testified:

> If the data appear to us . . . to be adequate . . . the product is registered. We look at the data furnished by the manufacturer, but we don't look at it analytically . . . . We don't check it by the laboratory method.

At long last the people were told that the Department of Agriculture relies entirely upon data furnished by the pesticide manufacturers.

The incredible lack of concern for the safety of the American people became apparent on further cross-examination when Doctor Hays admitted that if a pesticide was checked at all, it was checked by an entomologist only for its effectiveness against the target insect and not for its

effect on beneficial insects or fish and wildlife. "We don't assume that the intended use will cause any damage," he explained.

Moreover, Doctor Hays further admitted that although he had personal knowledge of published scientific studies showing damage to fish and wildlife from DDT, the Division of Pesticide Registration is not doing anything about possible environmental hazards from the pesticide.

Doctor Hays had proudly testified previously, on behalf of the Industry Task Force for DDT of the National Agricultural Chemicals Association, that the U.S. Department of Agriculture is solely responsible for the registration of pesticides and for determining whether they may be shipped in interstate commerce. He also testified that these determinations are not subject to revision except on appeal by the pesticide manufacturer. Doctor Hays then reluctantly admitted that the public had no access to USDA records of pesticide registration.

Thus, only in an adversary judicial proceeding was it finally demonstrated that the U.S. Department of Agriculture is really serving the agrichemical industry and not the American people, while remaining at the same time essentially immune from responsibility to the American people.

Damage Litigation

Conventional tort litigation-suits for money damages on behalf of private citizens represent another avenue of appeal to the law on behalf of the environment; yet this avenue also leads inevitably to questions without answers.

What do you do about a toxicant like DDE—that metabolite of DDT which is ubiquitous—distributed throughout the lipid tissues of every living element of the biosphere? What do you do about a toxicant whose toxic effects cannot be demonstrated as the proximate cause of any particular personal injury or disease?

In the struggle to protect natural resources against the predations of such short-sighted, limited-vision government agencies as the Army Corps of Engineers, the Department of Agriculture, the Federal Aviation Administration, or the Atomic Energy Commission, any attack on their agency decisions must *not* be based on damage to any particular private economic interest.

The Everglades will never be saved from the Army Engineers and the Central and South Florida Flood Control District by showing potential loss of income to the hot-dog vendors at the Everglades National Park, as the National Audubon Society attempted to do in the Canal 111 case.

The futility of any attempt to protect the environment by alleging private damage in a court of law is best illustrated in the history of the

rape of Pennsylvania by the coal industry during the 19th and early 20th centuries.

Now, in spite of the lessons of more than 50 years of nuisance law development, timid lawyers and timid conservationists are still hoping that, "through conventional damage suits, such as those downstream property owners might bring against upstream polluters, what amounts to a citizen's right to a clean environment may be established."

That kind of wistful, wishful thinking has been put to rest by a recent New York case involving a notorious cement plant and quarry near Albany, the state capital.

> Involved in this appeal are eight separate actions commenced by residents of the Town of Coeymans whose homes and businesses are in the immediate vicinity of defendent's main cement plant and quarry located in the Town of Coeymans, Albany County, adjacent to U.S. Route 9W. The relief sought in these actions was an injunction restricting defendant from emitting dust and other raw materials and conducting excessive blasting operations in such a manner as to create a nuisance and the recovery of damages sustained as a result of the nuisance so created.
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> Despite its conclusion that the defendent in the operation of its plant had, in fact, created a nuisance with respect to plaintiffs' properties, the trial court refused to issue an injunction. In reaching its decision on the propriety of granting the injunctive relief sought, the court carefully considered, weighed, and evaluated the respective equities, relative hardship, and interests of the parties to this dispute and the public at large. Re-examining the record, we note the zoning of the area, the large number of people employed by the defendant, its extensive business operations and substantial investment in plant and equipment, its use of the most modern and efficient devices to prevent offensive emissions and discharges, and its payment of substantial sums of real property and school taxes. After giving due consideration to all of these relevant factors, the trial court struck the balance in defendant's favor and we find no reason to disturb that determination.
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> The trial court did award damages based upon the loss of usable value sustained. Plaintiffs' contention to the contrary notwithstanding, we find no ground for interfering with either . . . .

The damages awarded now amount to a license fee enabling the cement company to continue its pollution. This is the same effect that the proposed $10,000-per-day fine to be levied on polluters of Lake Michigan would have. Upon payment of a mere $3.65 million per year, industries with gross-sales in excess of *billions* of dollars each year would have

a license to continue polluting Lake Michigan, which already hangs like a festering appendix on the great bowel of Midwest civilization.

Environmental Legislation

Before we abandon the attempt to make the legislative process relevant to environmental protection, let us consider the problem of pesticide contamination of the biosphere. But let us look at this particular environmental problem through the eyes of the legislature for a change. There are cries now throughout the country to "Ban DDT!" and a public hue and cry has been raised against this compound that was once hailed as the savior of all mankind. But if we have to wait until we have accumulated the kind of evidence we now have against DDT before we can restrict the use of other broad-spectrum, persistent chemical toxicants, we will always be reacting with too little action, too long after the damage has been done. The problem is to draft a law that is ecologically sophisticated, environmentally responsible, socially relevant, and politically feasible.

Political Feasibility of Legislation

The Supreme Court's ruling on "one man–one vote" and even the subsequent reapportionment of many state legislatures have not eliminated voting blocs from the political structure of the states. There are still Italians, Irish, Poles, Germans, Slavs, blacks, Jews, Spaniards, Puerto Ricans, Mexicans, teachers, steel workers, miners, farmers, ranchers, cattlemen, sheepmen, oilmen, gasmen, city dwellers, suburbanites, commuters, industrialists and industries of all kinds, public power interests, private utility companies, the highway men, the senior citizens, the teenagers, the young people, students, the middle-aged, the hawks and the doves, the hippies, the yippies, the YAFs, the conservatives, the liberals, and yes, even Democrats and Republicans.

Each individual voting group must be at least partially satisfied with the overall legislative program of the administration in office or that administration just won't be re-elected and returned to office. Even scientists and conservationists are beginning to understand that a governor, a senator, a congressman, or a state representative is only effective while in office. The best intentioned governor, senator, congressman, or state representative in the country can do little good if he is unable to steer effective legislation through the legislature or if he cannot be re-elected.

Historically, conservation as a social movement has been an upper- and upper-middle class phenomenon. Under the early leadership of such American aristocrats as Theodore Roosevelt and Gifford Pinchot, it appeared that all the "conservationists" wanted were ducks in the marsh, deer in the forest, trout in the streams, salmon in the rivers, robins on the

lawn, a few parks here and there, some scenic highways to get there, and a conservation commissioner, just so that they had the ear of government. Today, the conservationists demand wilderness in sight of the city and clean air and clean water—now!—while conveniently forgetting that government action programs cost public monies which, in large measure, are derived from the very activities being challenged.

Consider the DDT problem. Any law simplistically banning the use, sale, manufacture, or distribution of DDT in your state, county, city, or even the United States, without at the same time establishing an ecologically sophisticated pesticide regulation program, is a bad law. It won't satisfy anyone very long and will permanently polarize agriculture and conservation to such an extent that common problems can no longer be considered in rational discourse.

While it has long been obvious that existing pesticide regulation laws at the federal, state, and local levels are inadequate, the initial reaction from conservationists throughout the country is merely to demand conservationist representation on existing pesticide control boards, or insist that any new pesticide control agency have conservationist representation. In 1968, we began to search for a way to write a pesticide control law that would be essentially immune to the makeup of the body administering the law. A law that would protect the environment whether the board administering it was made up entirely of farmers or entirely of bird-watchers or entirely of agricultural chemical company executives. A law that would encourage efforts to maximize agricultural production over a long period of time while minimizing disturbance to the environment and cost to the farmer over similarly long periods of time. A law that would encourage application of systems concepts in entomology, ecology, political science, and agronomy.

The key to such a law is the criteria for administrative action. The criteria for administrative judgment must be written into the law so that the determination of the administrative bodies could be later tested in a court of law, if necessary, against some kind of objective standard.

The conservationists would have us prohibit the use of any material that killed anything other than target insect organisms. This of course would reduce insect control methods to the flyswatter; the hammer; and certain specific biological control processes.

Again the DDT lawsuits furnished the answer.

Economic entomologists supplied by the Industry Task Force for DDT of the National Agricultural Chemicals Association told us about the damage from insects, and entomologists from the University of California told us about biological controls and indicated that the ultimate control would be an integrated combination of biological controls and selected chemicals. It became obvious that the key definitions for any pesticide

allegedly non-political, and all elected politicians have an established policy of non-interference in judicial matters, whatever the courts decide, the politicians will have done their best, and they will have done it in the highest and best political spirit of non-partisan government. In other words, whatever the courts decide, it won't be the politicians' fault.

The model pesticide regulation law provides for a speedy, summary industry appeal through familiar administrative review channels, while the citizen is afforded a declaratory judgment procedure through the courts. Provision also is made to protect industry from harassment or frivolous litigation.

Equity

The really unique element of our legal system is the concept of equity. Some scholars would have you believe that equity is unique to the Anglo-American system of jurisprudence, but that statement is more supported by Chauvinism than history.

Equity jurisprudence as a system of remedial law evolved from a number of common sources. It can be found in the Talmud and the earliest writings of the Roman Law. It can be found today, though somewhat less than obvious, in the current systems of civil jurisprudence derived from the Code Napoleon and used throughout much of Europe.

In its most elementary form, the fundamental principle of equity jurisprudence is the command: "So use your own property as not to injure that of another."

And the law, in order to give effect to this right, provides for appeal to the ultimate power of society, be it king, parliament, state, or people, with a corollary maxim: "Equity permits no wrong to be without a remedy!"

The effective assertion of equitable rights by an individual or group of individuals is limited only by the rule that a party seeking equitable relief must come forward with "clean hands"—the party must be morally right as well as legally justified.

There is an additional rule of restraint self-imposed by courts of equity: the relief granted will be commensurate with the injury suffered by the party seeking relief and tempered by the needs of society.

Popular Sovereignty

There is one vestige of the ancient concept of sovereignty that does innure to the benefit of the people. From time immemorial, land—all land—was the absolute personal property of the sovereign and could be used, abused, given, or taken at the whim of the sovereign. In some societies the king was the sovereign, in others the state was the sovereign,

and in the United States, the people, collectively in common, are the sovereign. Throughout the history of civilization, wars and revolutions have been fought over land, its control, or its utilization.

In the United States, all powers over land once held by the kings of England, France, or Spain, are now held by the people of the United States collectively, and exercised, by permission of the people, by the executive, legislative, and judicial branches of the federal government, and the governments of the several states, with these governmental systems acting as the agents, trustees, or keepers of the power of the people.

The Constitution of the United States provides that the rights not explicitly given by the people of the United States to the federal government are retained by the people of the United States as collectively assembled in the several states. The second repository of sovereign powers is in the people of the several states.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (United States Constitution, Ninth Amendment)

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (United States Constitution, Tenth Amendment)

As state constitutions were formulated, the rights of the individual owners of private property were strengthened, but at no time did the sovereign, the people of the United States, give up the ultimate right to determine the highest and best use of land on behalf of the American people. Neither did the people of the individual states give up their rights collectively as the sovereign state, to provide for the common good and insist on behalf of all the people that land use be according to the highest and best use of the land as determined by the physical and environmental parameters of the land and the region of which it is a part.

The justification for any restriction on the individual use of land is found in the concept of sovereignty.

Zoning—Master Planning Manifest in Law

If we are to live in harmony with that which has been given to us from preceeding generations and from the earth before man, we must make certain assumptions with respect to every available piece of open land in the United States:

- The area is vulnerable.
- Development of some kind is inevitable.
- Development of the land to its highest and best use as an element of human ecology must be accommodated.

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- The area is vulnerable.
- Development of some kind is inevitable.
- Development of the land to its highest and best use as an element of human ecology must be accommodated.

- Development must be determined by the environment of the region and its inherent ecological characteristics.
- The area should contain all prospective growth without limiting its highest and best use as an element of human ecology.
- Planned growth towards the highest and best use of land and its associated environment is more profitable to the region and its population than unplanned growth.
- The police power of the state, the ultimate sovereignty of the people, and the maintenance of traditional American concepts of private property ownership are all compatible and can join together in the harmonious, mutually benenficial development of the area.

Because of the limited availability of land itself and the place of land as the basic capital asset and fundamental natural resource of civilized man, land use historically has been limited by executive, legislative, and judicial process.

The judiciary in the United States has upheld the attempts of the several states, and at the local level, municipalities, to restrict the use of land in accordance with some rational plan, usually designated euphemistically as the community or regional master plan.

> Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert, and also the other professions concerned with urban problems . . . .
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> This fundamental conception of zoning has been present from its inception. The almost universal, statutory requirement that zoning conform to a "well-considered plan" or "comprehensive plan" is a reflection of that view (see Standard State Zoning Enabling Act, U.S. Department of Commerce, 1926.) The thought behind the requirement is that consideration must be given to needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a common deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority in the community . . . . Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.

Zoning laws have been upheld by the courts on the grounds that they represent an attempt by an individual community, government agency, or state to determine the highest and best use of its limited land resources for the greatest good of the greatest number of people without any undue infringement on the individual rights of property owners.

Ecologically Sophisticated Zoning Legislation

The key to successful zoning legislation is the determination of the highest and best use of land resources. Of necessity this must be done by a team of individuals trained in the various disciplines necessary to define the environmental parameters of a regional ecosystem. The community itself, particularly its people, constitute elements of that regional ecosystem just as surely as do the basic land area, its topography, hydrology, meteorology, and climatology.

The determination of the highest and best use of the land in a regional ecosystem will never be made by traffic engineers who call themselves master planners, or by architects who call themselves city planners.

The adequate determination of the highest and best use of the limited land resources of a regional ecosystem mandates a systems approach supported by modern computer capabilities in order to determine the boundary value solutions and elemental optimizations of the complex nonlinear higher order relationships that describe the region as it actually exists, in real time, rather than as a stylized formalization which is little more than a figment of the imagination of some self proclaimed expert.

Nevertheless, even when the analysis of inter-relationships has been made and the matrix of functional relationships described, it will still be necessary to procede with the process of optimization and a thorough study of information transfer within the regional system.

Now just what does all this esoteric talk of sovereignty really mean to the local municipality, the homeowner, or the state official? It means that any zoning law which *does not* fully reflect the ecological verities of the region in which it intends to operate is fatally defective in the legal sense. Such a zoning law *can not* be sustained in the courts in the face of an ecologically sophisticated attack.

It means that any zoning law which *does* in fact reflect the ecological elements of the region in which it intends to operate *can* be sustained in the public interest, even if it appears to infringe upon the sacrosanct right of private property ownership.

It means that any master plan which fails to consider the ecological integrity of the region and fully determine the interrelationship for each element of the land and the landscape and each natural resource is scientifically incomplete and legally defective.

It means that any master plan which does in fact consider the ecological integrity of the region and does fully determine the interrelationships among each element of the land; the landscape and each natural resource is complete and can be sustained as the basis for legal restraints on land use even when they appear to violate the sacrosanct right of private property.

Any so-called master plan, be it for village, town, city, county, state, or region, which fails to evaluate fully the effects of any proposed land use on the overall ecological integrity of the system is an inadequate plan at best and is ultimately doomed to become a costly and deadly hoax on the community.

Any zoning law, local, state, or federal, based upon such inadequate evaluation must fail. It should fail as legislation and it will fail in the courts, just as every attempt to ignore the natural limitations imposed on man's use of his natural resources must fail.

Attorneys sometimes shudder at the temerity of challenging the sacrosanct right of private property, the concept upon which great fortunes have been built, governments established, legislatures suborned, and courts misled; but before you dismiss the foregoing material as the figment of the imagination of some dewy-eyed revolutionary, remember the success of the arguments which saved the Florissant fossil beds.

Recovery of Public Property

As a second example of the potential application of equity jurisprudence and the concept of popular sovereignty, consider the California Redwoods. There is considerable national sentiment favoring some protection of these magnificent trees for the enjoyment of future generations. There is already on the record Congressional action seeking to establish Redwood National Park so that these trees can be protected. Unfortunately, the Redwood forests are now owned in large measure by commercial forest product development corporations which consider them a source of income through harvesting and reforestation with faster growing, shorter lived, more commercially valuable species. The timber companies apparently have no objection to losing the Redwood forests, provided they are compensated at the reasonable market value of the trees as commercial lumber. This so raises the cost of the land acquisition to the public agencies, Congress, the state legislatures, or non-profit public benefit organizations such as the Nature Conservancy, that only inadequate areas can be acquired and protected. What can be done?

There is no doubt that under our existing concepts of justice the owner of the land taken for a public use is entitled to just compensation. The issue is, what is "just compensation?" Is it the fair market value of the forest as commercial timber? No! It is an amount equal to the original cost of the land to the present owner plus the taxes the present owner has paid

on the land since it was acquired plus the reasonable rate of interest on such an investment, together with the cost of removal of the owner's operations. But isn't the landowner entitled to the reasonable lawful use of his property and shouldn't the condemnation award reflect the most profitable use of the land to the owner—in the case of a redwood forest, timber?

Yes, but only if the property was the owner's personal property originally, and this is where the concept of popular sovereignty is needed. The timber company is not the real owner of property that has been vested with the public interest. The timber company acquired the property—if we trace the chain of title far enough back—from the sovereign, and now the sovereign wants its property back. Before the Constitution furnished the citizen with some protection of his property from seizure by the sovereign, the sovereign would simply take the property and usually the head of the subject at the same time in order to limit protest. Today we require that the sovereign pay just compensation. How much is "just compensation?" It is certainly not an unconscionable profit at the expense of the sovereign. In this country the sovereign is the people of the United States and the people are obligated only to make the property owner whole—the people have no obligation to furnish the property owner with a windfall profit at the expense of the people.

The principles of equity jurisprudence can be asserted by the people under the concept of popular sovereignty and the people can take direct legal action to protect national natural resource treasures and the environment of man, while at the same time assuring wise use of such resources in a salubrious environment by the people of this generation and safeguarding those generations yet unborn.

Today there is a desperate need for acquisition of park lands and development of recreational facilities in our densely populated urban areas. Without additional open space, park lands, and recreational facilities to alleviate the toxic environmental stresses already focused on the people who live in the urban ghettoes, there is little hope for the survival of the cities or the people trapped within them.

"Where are we going to obtain the money to condemn property in the hearts of our major cities? How are we going to obtain government support for such programs?" I can hear your municipal attorneys reminding us that the cost of acquiring this property is beyond reason because the government must pay the fair market value of the property.

The time has come to make a professional distinction among the kinds of property that you recommend for acquisition as open space, park land, or recreation facilities. Each of you, as professionals, must distinguish between that property which should be acquired because it would be nice

to have—the property that you wish you had—and that property which the people need if they are to survive as human beings rather than human animals.

I doubt that any of you would have difficulty on the witness stand in a court of equity demonstrating that open space, park lands, and recreational facilities in the center of major urban ghettoes in New York, Chicago, Philadelphia, Los Angeles, and our other major cities are not luxuries but necessities to the people who live there; that park lands, open space, and recreational facilities are not merely nice things to have nearby, but are the ameliorating influences necessary to reduce the toxic stresses of urban living—air pollution, water pollution, overcrowding, noise, and social injustice.

At that point the municipality can say to the court, "We, the duly elected government of the village, town, county, or city of _____, on behalf of all our resident citizens need—not merely want—but need this property. It is essential to the survival of the people who live here."

When the municipality has made this determination, the price of the property is very simply determined. The people, in justice and in accordance with our Constitutional protection of private property, owe the property owner just compensation, as defined earlier. Of course, if you cannot establish that the property is really needed, then you must pay the property owner the fair market value of the property just as any other purchaser would.

You who are professionals serving the public need for open space, parks, and recreational facilities must make these determinations and distinguish among the alternatives. It is you who must identify that property which our people *must* have if they are to survive as human beings. Once you have identified that property then you must move to acquire it before it is too late. You must take appropriate legal action to protect that property which is so vested with the public interest as to be an element of human survival.

Legal defense of the environment today depends in large measure on a sense of history. If the environmental defender accepts that historical position which asserts the king can do no wrong and the state is sovereign and immune from suit, then we must sit back and wait for the Congress or the state legislatures or the President of the United States or the governors of the several states to act.

Reliance upon such ill-founded legal principles has led to the ridiculous proposition that we must amend the Constitution to assure each citizen certain basic environmental rights such as the right to clean air, potable water, and the maintenance of diverse viable populations of plants and animals. Nonsense! Just think of the affront to our founding fathers that such a proposed constitutional amendment represents. Think of the true

meaning of such a constitutional amendment. What the proposers of such an amendment are really saying is that those men who were far-sighted enough to have guaranteed freedom of religion, freedom of speech, freedom of press; the right to peacefully assemble to petition for redress of grievances; the right to be secure against unreasonable search and seizures; the privilege against self-incrimination; protection against double jeopardy; trial by jury; due process and equal protection; reasonable bail and protection from cruel and unusual punishments—the men who were visionary enough to secure all those rights for the generations yet unborn and then wise enough to state in the Ninth Amendment that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" just in case there might be future assaults on the citadel of liberty—those men were not concerned enough to guarantee the American citizens of the 20th century the right to breathe. All right, all of you who sincerely believe that we need a constitutional amendment in order to secure our right to breathe, stop breathing!

What can you do when a government agency decides to drown the Grand Canyon or most of Central Alaska, or when a combination of government agencies act in concert to destroy the delicate ecological balance of the entire state of Florida?

What can you do when a municipality decides that the highest and best use of a mighty interstate river system is a local, open sewer?

What can you do when the U.S. Department of Agriculture refuses to consider the effects of chlorinated hydrocarbon pesticides on non-target organisms, and the manufacturers of DDT and the other persistent, broad-spectrum chlorinated hydrocarbon pesticides refuse to furnish the American people with the information from their own research on the long-term toxic effects of their products?

What can you do when an entire industry, such as the non-ferrous metals industry, continues to avoid installation of state-of-the-art pollution control systems on their smelters, refineries and foundries?

What can you do when timber and paper companies cut down entire forests of Redwood and other exotic species in order to "reforest" the area with fast-growing pulp wood trees?

What can you do when builders and developers insist on dredging estuaries to fill salt marshes or strip the topsoil from prime agricultural land in order to plant houses?

What can you do about an automobile industry that insists on major style changes every three years while continuing to reproduce the same inefficient, air-polluting internal combustion engine?

Just what can you do?

Today; while there is still time, you can *sue the bastards!*

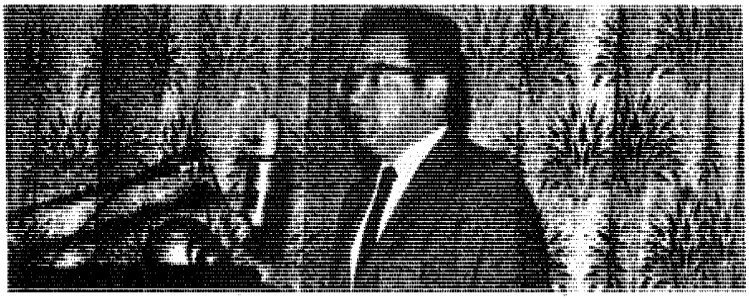
You must knock on the door of courthouses throughout this nation and seek equitable protection for the environment. You must not wait for Congress or state legislatures or local government to pass laws. You must assert the fundamental doctrine of equitable jurisprudence—so use your own property as not to injure that of another—a doctrine as old as civilization, as old as the Talmud, or the New Testament, or the Roman Law, or the Middle Ages—a doctrine as new as today and as advanced as tomorrow.

At this time in history the environment must be defended by direct legal attack on environmental degradation asserting the fundamental human right to life and demanding air clean enough to breathe and water potable enough to drink safely, as well as diverse populations of plants and animals dynamically stable enough to provide a supporting ecological system for mankind.

As far as industry is concerned, this means demanding the cleanest air and the cleanest water that the existing state-of-the-art in pollution control technology can provide. As far as government is concerned, this means insisting that government is the trustee for the sovereign people and that all of our natural resources are held in trust for the full benefit, use, and enjoyment of all the people, not only of this generation, but of those generations yet unborn, subject only to wise use for the advancement of civilization in each generation.

Conventional conservation education will not save the Everglades, the Oklawaha, the Grand Canyon, the Yukon, or any other national natural resource treasure which has become the object of private greed or public blundering. Only imaginative legal action on behalf of all the people entitled to the full benefit, use, and enjoyment of such national natural resource treasures—class actions for equitable relief, declaring the rights of the people, and seeking injunctions which prohibit actions which can infringe such rights—will present the facts and raise the issues in a forum where the conscience of the community in the person of a court of equity can resolve the conflict essentially free of the political, economic, and bureaucratic influences which have controlled our national environmental policy to date.

In matters of heated environmental controversy, there is considerable difficulty in presenting information, especially scientific data, in a forum where it can be received in an unemotional and objective atmosphere. Some consider mass demonstrations the most effective way to carry the environmental message and move the public to demand action from elected officials and government bureaus. Such experts also consider public demonstrations the best way to secure media coverage of the information presented. Perhaps such methods once had a value. There is no doubt that informational picketing during the early days of labor organization was effective—but today one must contrast the effect of a student demonstrator lying in a pool of blood in the gutter holding a picket sign for 30



Victor Yannacone, Jr., nationally known attorney specializing in environmental law, at his general session speech.

seconds of coverage on the late night TV news with the same student sitting in a witness chair giving evidence in a courtroom. Industry and government can ignore protests and informational picketing; government can certainly repress demonstrations, but no one in industry or government ignores that scrap of legal foolscap that begins:

> You are hereby summoned to answer the allegations of the complaint annexed hereto within 20 days or judgment will be taken against you for the relief demanded!

No one, from government bureaucrat to corporate officer, ignores a summons from a Court.

Rest assured that the corporation president reads it; the chairman of the board reads it; their house counsel reads it; their wall-street counsel reads it; and most important to the citizen, the defendant named must answer it. And it must be answered in court, not in the media where public relations budgets can influence coverage; not in the marketplace where concentrated economic power is effective control; but in the courtroom where, as far as facts and evidence are concerned, the individual citizen is the equal of any corporation or government agency.

All of the major social changes which have made America a reasonable place to live have had their basis in fundamental constitutional litigation. Somebody had to sue somebody before the legislature, in enlightened self-interest acted (for the public benefit, of course). Our adversary system of trial litigation has been the means of presenting facts and evidence to the conscience of the community since Magna Charta.

The courtroom is the last arena where the individual citizen can meet big business or government and hope to survive. Litigation is civilization's only alternative to revolution. If you do not forsake your courts they will not forsake you—the citizen—in your hour of need. Thomas á Becket and Thomas More are only two of the many who gave their lives that you, the citizen, could have your day in court.