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ENVIRONMENTAL CONTROL: GUIDE OR ROADBLOCK TO LAND DEVELOPMENT?

A SYMPOSIUM*

INTRODUCTION

DONALD W. DOWD†

A TENTH ANNIVERSARY is a time for reflection, assessment and, hopefully, for congratulations. It is, therefore, with particular pleasure that I have the opportunity to write this introduction to and to moderate the Tenth Annual Law Review Symposium. Continued association over the years with the Law Review symposia has been a great source of satisfaction and pride to me. To have met and worked with a distinguished group of participants including judges, lawyers, and legal scholars, as well as prison officials, school administrators, doctors, newspapermen and this year's experts on land use problems, has provided not only a basis for friendship and admiration with those in widely diverse fields, but also has kept me constantly aware of the vital and exciting interplay between those of us in law and those in other disciplines. Indeed, one of the primary purposes of these symposia has been to provide a forum for discussion of current legal problems with those actually affected by possible legal solutions to the problems and to make the papers presented and the discussions about them available to readers of the Law Review.

My pleasure over the years has been by no means limited to dealing with those who presented papers, but has extended to all of those who have taken part in these symposia. As in many avant-garde plays, the audience is indeed a vital part of the show. I am gratified by the

* This symposium was conducted in two parts. At the afternoon session, the panelists presented their papers and discussed the positions adopted among themselves and with members of the *Law Review* and invited guests. During the evening session, which was open to the public, the panel members made brief statements which were followed by a general discussion and question-answer period. The panelists' papers and the more salient portions of both panel discussions are reproduced here.

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intelligent, active interest shown by those who have attended these symposia. Moreover, the symposia could not have taken place without the hard work of successive Law Review editors and I should like to take this opportunity to let them know their efforts have been appreciated. I wish future editors well in carrying on their work in presenting such symposia.

Perhaps the only misgiving I have had in introducing prior symposia has been some reluctance to just hint at or oversimplify the points made by the participants in a short introduction. The papers speak eloquently for themselves and, with a symposium on a topic as compelling as this year's, there is little need to provide a foretaste of the papers. Therefore, I shall forego introducing the papers in summary fashion, but rather say that the reader of this year's proceedings will find that it has fulfilled its objective of presenting diverse points of view forcefully stated. Papers were presented by Mr. Charles W. Bowser, Executive Director of the Philadelphia Urban Coalition and the Chairman of the National Association of Urban Coalition Directors; Mr. William M. Eichbaum, Jr., Deputy Secretary for Enforcement and General Counsel of the Pennsylvania Department of Environmental Resources; Mr. Daniel J. Snyder, III, Regional Administrator of the United States Environmental Protection Agency; Mr. R. Marlin Smith, a noted land use attorney; and Professor John M. Hyson, academician.¹

If any topic is not subject to simple resolution it is that of this year's symposium. Conflicts between immediate needs and long-range plans; development and conservation; federal, state, and local considerations; urban and rural values — all must be, if not resolved, at least balanced. Arguments supporting conflicting interests must be heard and weighed. Dreams and fears must be put into perspective and perhaps the solutions, though imperfect, made after such consideration will help us all in achieving a more livable environment. Consideration of such problems, of course, neither starts with this symposium nor ends with it, but it is to be hoped this symposium will advance past discussions and illuminate future examination of these problems.

Although I have taken the opportunity in the past to show my appreciation for our symposia in a general way, I would like especially to thank the participants of this year's symposium: those who presented papers; those who attended; and the editors who planned the symposium and have made possible its publication.

1. Leon N. Weiner, Past President, National Association of Home Builders, was a member of the panel but failed to submit a paper.

PREROGATIVES OF THE POWERFUL — PLIGHT OF THE POOR

CHARLES W. BOWSER†

THOSE whose environment traditionally has been influenced by the proximity of railroad tracks, the city dump and the wanton disregard of health, housing, and building codes, view the new ecological concern with suspicion. They know that their families have been restricted to dangerously poor environments for generations. While expert ecologists predict eventual health hazards for the majority of the population if the environment is not cleaned up and protected, the nation's poor and minorities actually live with those hazards now.

In 1969, the average yearly death rate for white males, ages 25-34, was 1.8 per 1000 population, but it was 5.2 per 1000 for non-white males.¹ White females in the same age group had a yearly death rate of 0.9 per 1000, but it was 2.4 for non-white females.² Since 1940 the infant mortality rates for minorities consistently have been nearly twice as high as those for whites.³ An indication of the influence of the environment upon these statistics may be seen in federal census statistics which reveal that although minority citizens inhabited only 9.7 percent of all occupied housing units in 1970, they occupied more than 27.6 percent of all the housing with incomplete plumbing, an increase from 27.0 percent in 1960.⁴ A 1968 Cornell University Medical Center study of anemia in young children revealed that over 21 percent of black children and 11 percent of Puerto Rican children in New York City had severe anemia, compared with 2 percent of white children.⁵ For those who immediately decide that deprived and dangerous environments are limited to big-city ghettos, there is the New York Times Report that 50 percent of black-occupied housing in rural areas is substandard, compared to only 8 percent of white-occupied housing.⁶

While additional data regarding the deprived environment of the poor and minorities might increase the public's awareness of these terrible conditions, no further proof is needed of the traditional presence

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1. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 56 (93d ed. 1972).

2. *Id.*

3. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1971, at 113 (Current Population Reports No. 42, 1972).

4. *Id.* at 93.

5. IMPEACED EDUCATION: RACE AND SCHOOLS, Sept/Oct 1971, at 13.

6. N.Y. Times, July 27, 1971, at 15, col. 1 (city ed.).

of the American underclass⁷ in this deprived environment. The deprived environment exists, and its existence is not accidental. The fatal error of most efforts to alleviate and change these conditions is that they proceed from the assumption that the deprivation is inadvertent and contrary to governmental policy and societal intent.

The rhetoric our forefathers used to describe a free republic of free men has remained the expression of national aims, but its mere repetition does not prevent the specific policies and practices which have asserted the prerogatives of the powerful and intensified the plight of the poor. It is, therefore, essential that those who would rectify past injustice and prevent its repetition must discover the unspoken purposes and unexpressed policies camouflaged by the new social and legal adjustments propounded to protect the environment.

Land development has provided the clearest expression of American racism and economic discrimination because it allows for the segregated solution of common problems. America's residential apartheid of virtually all-white suburbs surrounding predominantly black cities and exclusively black inner cities is the result of the efforts of land developers. The nationwide consistency of this apartheid convinces me that it is also the goal of land developers. The racist goals of private and public policies are hidden beneath glowing legislative pronouncements and private advertising code words such as "Planned Communities." My concern, therefore, is not whether environmental protection will serve as a guide or roadblock to land development, but whether it will aid, abet, and expand the policies and practices which have made land development synonymous with racial and economic injustice.

The cholera epidemics of the nineteenth century were some of the first indications of what results when environmental factors are ignored and areas where people live are allowed to sink below levels acceptable for human existence. They occurred when great numbers of people were attracted to American cities to seek the jobs created by rapid industrialization. Farmers and immigrants crowded the older sections of towns which lacked the necessary health and sanitation systems to accommodate them. During the first half of the nineteenth century, cholera epidemics were confined to urban slums, where the poor laborers and unemployed immigrants lived in unparalleled filth. As long as the

7. The "underclass" is defined for the purposes of this paper as consisting of those who are so economically deprived that they are unable to maintain the minimum standard of living for the region in which they live. The minimum standard is determined by the Bureau of Labor Statistics and is not the much lower standard for defining poverty. Also included in the underclass are those who can maintain the minimum standard of living, but whose opportunities for career advancement and better living conditions are limited by racial or ethnic barriers.

poor were the only victims of cholera, the popular view was that the disease was God's retribution for the sin of poverty.⁸

In 1849, cholera epidemics hit every large city in America and spread from the slums into more affluent neighborhoods. Since the affluent certainly could not be sinners, local governments began to listen to the doctors who had been asserting that cholera was a communicable disease. Cities began to enact health laws and make determined efforts to clean up the filth which polluted the environment. Despite an enormous increase in population, deaths from cholera in New York in 1866 were one-tenth the number of those of 1849.⁹ Clearly, the action was not motivated by the realization that cholera posed a threat to life generally, but by the realization that it had become a threat to the lives of those who controlled the economic resources and political power of society. Similarly, it is the spread of the dangers of a deteriorating environment from the enclaves of the underclass to the community at large which now spurs the drive to protect and improve the environment.

If the eventual result is a better environment for all, perhaps motivation is not a critical consideration. However, where the solutions of common problems are divided to reinforce the prerogatives of the powerful, the consequences of these solutions express an unstated design to further restrict and confine the poor. Housing and urban renewal legislation in this century is a good example. In 1949, Congress set a 6-year goal for construction of low-income housing units as a part of legislation which pledged "a decent home and suitable living environment" to every American.¹⁰ By 1969 only two-thirds of that goal had been met.¹¹ The Federal Housing Administration (FHA) was intended to play a major role in the fulfillment of this "decent housing" pledge. Although the legislative intent was universal, administrative regulations excluded millions of citizens from the benefits of an FHA mortgage guarantee by establishing minimum financial criteria which determined whether the FHA would insure a mortgage. These criteria gave priority to mortgagors in undeveloped suburban areas and eliminated those in older city core areas.¹² Thus, the explosive development of suburban America must be viewed as the result of conscious government policy. Since exclusion of minorities was, and remains, an infamous local practice and policy of suburban communities and their developers, the failure to enact fair housing provisions in the FHA regulations until

8. M. CABLE, *AMERICAN MANNERS & MORALS* 291 (1969).

9. *Id.* at 292.

10. Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1970).

11. NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*

14 (1969).

1962,¹³ or in separate national legislation until 1968,¹⁴ was indicative of a federal policy not merely to develop suburbs, but to develop only suburban communities which excluded minorities.¹⁵ Land developers and their sales agents played central roles in this racial exclusion. Their practices, which evaded state fair housing laws, forced minority purchasers to bear the burden of proving racial discrimination on a case-by-case basis, while other purchasers merely had to establish their ability to buy.

In addition to the direct federal subsidies of the FHA, benefits denied the underclass, national fiscal policies expressed through tax laws provided enormous indirect housing subsidies. Alvin Schorr, an official of the United States Department of Health, Education and Welfare has written :

In 1962, the Federal Government spent \$820 million to subsidize housing for poor people — roughly 20 percent of the population. For the uppermost 20 percent of the population (with incomes over \$9000), the subsidy was \$1.7 billion. Thus, a family in the uppermost fifth received about twice as much, on the average, as a poor family.

. . . [T]he income tax deduction is by far the Government's largest direct subsidy for housing. It gives more to those who have more.¹⁶

These inequities were never the announced intent of the legislative or executive branches of government, but the specific legislation and regulations leading to them make it clear that they were not accidental. Thus, as of 1970, public funds had supported about 800,000 housing units for low-income families and more than 10 million units for middle- and upper-income families.¹⁷ The exclusion of minorities from full participation in these subsidies was almost absolute.

However, it became apparent that federally subsidized suburban housing was not enough to create strong suburban communities because the opportunities for jobs and social living were in the city, and state highway access was inadequate. The result was the federal Interstate Highways legislation which provides states with a 90–95 percent subsidy to build parts of the interstate system,¹⁸ most of which links city and suburbs.

13. 24 C.F.R. § 200.300 (1973).

14. 42 U.S.C. §§ 3601–19 (1970).

15. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 100–01 (1969).

16. *Id.* at 57, quoting A. SCHORR, POWER, POVERTY AND URBAN POLICY 145–46 (W. Blomberg, Jr. & H. Schmandt eds. 1968).

17. J. Georges, Jr., *Foreword to THE POOR: A CULTURE OF POVERTY OR A POVERTY OF CULTURE?* at 14 (J. Winter ed. 1971).

18. 23 U.S.C. § 120(c) (1970).

Finally, with the passage of the first federal urban renewal law, the Housing Act of 1949, the stated intention and the popular assumption was that it would serve to help rebuild the cities.¹⁹ Many of the nation's poor and minorities naively thought that it was their neighborhoods which were to be rebuilt. Instead, the result of urban renewal has been the glamorous rebuilding of central city business districts and high-income, Society Hill-type neighborhoods, as well as the spread of industrial parks.²⁰ Furthermore, the availability of government subsidies to decrease the net cost of land in suburban communities²¹ lured industry from the cities. The results were predictable: new jobs were not created in the inner cities. Instead, they were created in the suburbs, a trend one national commission has said is likely to continue indefinitely.²²

Political reality partially explains the quick solution of the housing problems of the powerful while the same problems of the poor remain unsolved. It is, perhaps, inevitable that those who control or exercise the most influence on government decisions and financial resources will satisfy their own needs first. There is no reason to suspect that this tendency will not be an integral part of the movement for environmental control, and that environmental considerations in land development will also include the same unexpressed policies which favor the middle and upper classes. However, past policies have not merely placed the underclass last, they have also enforced restrictions which have left the underclass isolated and excluded from the societal mainstream. The history of riots by the poor and disenfranchised in America, whether they were European immigrants, unreconstructed southern rebels, or urban blacks, establishes beyond peradventure that Isolation + Exclusion = Explosion.²³

The use of local governmental power to isolate and exclude the underclass from better housing environments was the common finding of two prestigious national studies of urban housing. In 1965, the Congress authorized the creation of the National Commission on Urban Problems, chaired by the former United States Senator from Illinois, Paul Douglass. Three years later, President Lyndon Johnson appointed the President's Committee on Urban Housing, chaired by industrialist Edgar F. Kaiser. These groups conducted independent studies. The Douglass Commission concluded that urban problems

19. 42 U.S.C. § 1441 (1970).

20. Cf. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 479-80 (N.Y. Times ed. 1968).

21. D. MENDELKER, MANAGING OUR URBAN ENVIRONMENT 663 (1971).

22. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 392 (N.Y. Times ed. 1968).

23. *Id.* at 203-06.

could not be solved unless government could effectively deal with issues of race and poverty,²⁴ and that this could not be accomplished, particularly in providing housing, without special inducements to overcome the zoning laws and other local legislation used to restrict and confine the poor and minorities.²⁵ It was the Kaiser Committee's finding that the nation needed to avoid high concentrations of racial and low-income groups.²⁶ Based upon its study of local government practices, the committee recommended the exercise of federal eminent domain power to overcome the obstacles local governments uniformly used to confine and restrict the poor and minorities.²⁷ The conclusion reached by both studies was inescapable: the power of government has been used not merely to give disproportionate assistance to the powerful, but to severely limit and confine the underclass.

Urban homesteading programs, whereby local governments give, or sell for a dollar, vacant tax-delinquent properties to individuals who agree to rehabilitate the properties and occupy them, have uniformly developed criteria which militate against the poor. Philadelphia, Wilmington, Baltimore, Boston, and Washington, D.C., are developing urban homestead programs which require homesteaders to prove either financial ability or the skills necessary to rehabilitate property. I submit that it is the absence of both these abilities that is one of the primary reasons thousands of families are trapped in poverty. Thus, the impact of urban homesteading is likely to be just as inequitable as that of the FHA regulations or urban renewal laws.

Since land development in this country is still laced with policies and practices which continue existing inequities, the challenge to those who oppose these inequities is to scrutinize the stated goals and policies of environmental control to ascertain its unstated policies. We must scrutinize the apparent and latent costs of environmental requirements to be sure that price is not used as the great segregator, as it has been so effectively used in urban renewal. We must be alert to both the future as well as the present impacts of environmental control requirements, to make certain the short term gains of the underclass are not a planned long term liability. We must demand that the best environment affordable be equally available without artificial barriers and that subsidies for environmental improvement be disbursed according to need. We must insist that the restoration and upgrading of deprived

24. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 30 (1969).

25. *Id.* at 23.

26. THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME FOR ALL (1969).

27. *Id.* at 146.

environments receive equal, if not preferred, treatment with the creation of new and better environments. This will mean that relocation policies, which now arbitrarily force the underclass from a poor environment to an even worse one in order that the powerful might have the advantages of an improved environment in a preferred location, must be changed to provide absolute guarantees that the underclass will share the new preferred environment, no matter how large a subsidy is required.

Lastly, we must convince all elements of society of the inseparability of our finite environment, and that environmental deterioration anywhere, if untreated, inevitably leads to deterioration everywhere. If concern for environmental control is used to continue the present injustices in land development which dishonor our democracy, it will not matter whether environmental protection is a guide or roadblock to land development. Further isolation and exclusion of the underclass can only guarantee the inevitability of a cataclysmic explosion which will bring national development and growth to an end.