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Urban Environmental Law: Emergent Citizens' Rights for the Aesthetic, the Spiritual, and the Spacious

Cover Page Footnote

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URBAN ENVIRONMENTAL LAW: EMERGENT CITIZENS' RIGHTS FOR THE AESTHETIC, THE SPIRITUAL, AND THE SPACIOUS†

Nicholas A. Robinson*

I. Introduction

The issues in environmental law which have been championed in recent years by conservationists, ecologists, lawyers, and legislators have been largely directed toward the natural environment. However, very recently and with growing force, new law has been channeled into the service of our nation's urban centers as well as its wilderness. The need to redress urban ills has been widely appreciated, but the gap between intellectual awareness and responsive action has remained substantial.

The now traditional responses to urban problems have involved the creation of zoning laws,¹ public housing programs,² and urban renewal.³ While these laws have given rise to a host of litigations involving property rights⁴ and personal liberties,⁵ little attention had been given to the vindication of individual citizen rights to a healthy urban environment. The emphasis has been on broad schemes to redress urban ills, not on self-enforceable rights.⁶

† *Berman v. Parker*, 348 U.S. 26 (1954) (Douglas, J.).

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1. The constitutional validity of reasonable local zoning regulations was upheld in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926). The reasonableness of a regulation varies with individual "circumstances and conditions." *Id.* at 387.

2. 42 U.S.C. §§ 1401-35 (1970).

3. The National Housing Act of 1949 provided for slum clearance projects, in which slum areas were cleared and then redeveloped for new uses. In 1953, a Presidential Advisory Committee on housing policies recommended the extension of the slum clearance program to include neighborhood conservation and rehabilitation. PRESIDENT'S ADVISORY COMM. ON GOV'T HOUSING POLICIES & PROGRAMS, A REPORT TO THE PRESIDENT OF THE UNITED STATES 115 (1953). The term "urban renewal" was coined for the new program, and the 1954 federal statute reflects these changes. For the definition of "urban renewal project," see 42 U.S.C. § 1460(c) (1970). See generally, Mandelker, *The Comprehensive Planning Requirement In Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

4. See R. ANDERSON, *THE AMERICAN LAW OF ZONING* § 2.19 (1968).

5. See 1 CCH POVERTY L. REP. ¶¶ 2855, 2860 (1972).

6. See generally O. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* (2d ed. 1963).

The last few years, however, have heralded a change in this pattern. The development of personally held and asserted citizen rights to a quality urban environment can be traced to two developments. The first development was the gradual expansion of standing to sue. This expansion in the federal courts was the result of claims pressed by environmentalists,⁷ and other public litigants.⁸ In state courts, the broader standing followed the federal trend either by statute⁹ or by case law.¹⁰

The second development was the increasing public concern for maintaining and restoring the quality of the environment. Local legislators responded to this concern by adopting new laws for maintaining open space, protecting parks, preserving historic monuments, averting litter, eliminating noise, and requiring air pollution abatement.

Simultaneously, federal and state laws for environmental protection evolved, and added to the substantive law structuring government and citizen rights in the cities. Most prominent among these laws was the National Environmental Protection Act¹¹ (NEPA) and the equivalent environmental assessment laws enacted in two-thirds of the states.¹²

7. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970); *Scenic Hudson Preservation Conference v. Federal Power Comm.*, 354 F.2d 608 (2d Cir. 1965).

8. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1972). See also *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970) (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Reade v. Ewing*, 205 F.2d 630, 631-32 (2d Cir. 1953) (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration).

9. See, e.g., *The Thomas J. Anderson-Gordon Rockwell Environmental Protection Act of 1970*, 127 MICH COMP. L. ANN. §§ 691.1201-.1207 (Supp. 1975).

10. *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974). *But see* *Abrams v. New York City Transit Auth.*, 48 App. Div. 2d 69, 368 N.Y.S.2d 165 (1st Dep't 1975) (parents' group denied opportunity to challenge excessive subway noise near school for lack of standing to press public rights). See *Robinson, Groping Toward Standing To Sue*, 174 N.Y.L.J. 1 (Jan. 27, 1976).

11. 42 U.S.C. §§ 4321-47 (1970).

12. See, e.g., *New York Environmental Quality Review Act (SEQRA)*, N.Y. ENVIRONMENTAL CONSERVATION LAW §§ 8-010 to -0115 (McKinney Supp. 1975); Tryzna, *A Comparative Review of State Environmental Impact Laws Within a Federal System*, 1 EARTH L.J. 133 (1975). At the municipal level, New York City has enacted its own environmental impact analysis. New York, N.Y. Executive Order No. 87 (October 18, 1973). This order requires environmental review for "major projects" such as the construction of a new building with

Recently citizens finding these new environmental laws ignored by government agencies have sued to enforce them, and have called upon courts to fashion decrees and to require that legislative mandates be implemented, not subverted. The day has arrived when a citizen's right to a healthy urban setting should command as much attention as the safeguarding of natural areas¹³ or wildlife.¹⁴ Indeed, urban environmental law has emerged as a subcategory within the field of environmental law itself.¹⁵

While articles on the urban environment often deal with statutory and administrative action, this article presents a different perspective, that of citizen enforcement and the judicial consequences of such a development. Illustrative of the emergent role of courts in enforcing citizens' claims are the areas of historic preservation, noise regulation, and the use of environmental impact statements.

II. Historic Preservation

When the Supreme Court recognized "aesthetic considerations" as a significant element of the public welfare, it provided a potential litigant with an argument that aesthetics, and, specifically, historically preserved sites, are necessarily part of one's right to a sound environment. Indeed, since the constitutionality of historic preservation has been firmly established, a "burgeoning awareness that our heritage and culture are treasured national assets . . ."¹⁶ has evolved. A brief description of preservation laws and their genesis usefully sets the stage for a discussion of a citizen's suit to enforce such rights.

A. Federal Legislation

Although the United States Supreme Court upheld the constitutional propriety of the government's power to preserve landmarks as long ago as 1896,¹⁷ it was not until after World War I that the

more than twenty floors, new residential buildings with forty-two or more dwelling units, or designation of right-of-way for an expressway.

13. *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting opinion).

14. *Udall v. Federal Power Comm.*, 387 U.S. 428 (1967).

15. For a discussion of the origins and definition of Environmental Law, see Robinson, *Methods and Framework of Environmental Law in the United States*, 1 *EARTH L.J.* 323 (1975).

16. *Penn Central Transp. Co. v. City of New York*, 174 N.Y.L.J. 1 (1st Dep't Dec. 18, 1975).

17. *United States v. Gettysburg Electric Co.*, 160 U.S. 668 (1896).

government began inventorying its historic property and enacting preservation laws. Skilled manpower available in the 1930s produced the Historic American Buildings Survey which had catalogued some 12,000 buildings by 1933. In 1935, Congress enacted an Historic Sites Act.¹⁸ However, the pace of urban change quickened and one building after another was replaced.

In the face of rapid razing of historical buildings or areas, Congress established the National Trust for Historic Preservation in 1938 to encourage state and local preservation.¹⁹ The use of specialized local zoning legislation has developed in communities across the nation.²⁰ To such local laws have been added some federal enactments, most of them with little or no teeth. Chief among these are the Historic Preservation Act of 1966,²¹ the historic protection sections of the Housing Acts of 1961 and 1965,²² and the Department of Transportation Act of 1966.²³ These federal laws set historic preservation as a government responsibility. The 1966 Historic Preservation Act authorizes a National Register of Historic Places containing landmarks nominated by state governments, provides for grants in aid, and requires that the agency involved in any federal action affecting a registered landmark must "take into account the effect" of the action and "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment" on such effect.²⁴

More forceful is the Transportation Act, which mandates that no historic site can be used unless there is "no feasible and prudent alternative" and "all possible planning to minimize harm" has been accomplished.²⁵ The section has been construed to bar any resort to historic sites for highway use, and has been used by urban dwellers to save urban park lands.²⁶

The Housing Acts encourage historic preservation but lack the prohibitive bars of the highway legislation. The 1966 Demonstration Cities and Metropolitan Development Act provides funds for local

18. Act of Aug. 1, 1935, ch. 593, 49 Stat. 666 (codified at 16 U.S.C. §§ 461-70 (1970)).

19. Act of Oct. 26, 1949, ch. 755, 63 Stat. 927 (codified at 16 U.S.C. §§ 468-68e (1970)).

20. See R. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* §§ 8.46-8.53 (2d ed. 1973).

21. 16 U.S.C. § 470 (1970).

22. 42 U.S.C. § 1500d-1 (1970).

23. 49 U.S.C. §§ 1651-59 (1970).

24. 16 U.S.C. § 470(f) (1970).

25. 49 U.S.C. § 1653(f) (1970).

26. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

surveys of historic sites,²⁷ and has provided grants for urban beautification and open space. But the Department of Housing and Urban Development (HUD) has been criticized for functioning "with apparent indifference to the destruction of historic sites . . . whenever local development authorities are prepared to sacrifice those properties in the interests of urban renewal or other housing programs."²⁸

Essentially, then, historic preservation in the man-made environment can expect little except aid and comfort from administrative federal sources. Commitment and action necessarily occurs at the state and local level.

B. New York Legislation

In an urban context, preservation laws are singularly directed to the unique and historically significant architecture of a city. The New York City legislation is, in essence, urban land use regulation for preserving a key component of environmental quality. Historic preservation laws, however, tend not to be as encompassing or as stringent as laws developed to protect the natural environment.²⁹ This is somewhat anomalous for certainly there is a strong rationale for enacting comprehensive historic preservation laws locally. Moreover, historic preservation, unlike some natural area preservation often involves economic benefits which help minimize the due process problems of such legislation.³⁰

New York City's Landmark Preservation Law was first enacted in 1965. Adopted pursuant to state enabling legislation,³¹ the local law recognized that the protection of historic buildings and districts enhances the city's aesthetic, economic, cultural and educational values. Historic preservation can stabilize property values and advance civic pride and reputation.³² Without the Landmark Preserva-

27. 16 U.S.C. § 462 (1970).

28. Gray, *The Response of Federal Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. 314, 325 (1971).

29. N.Y. ENVIRONMENTAL CONSERVATION LAW art. 25 (McKinney Supp. 1975); Robinson, *N.Y. Land Use: Legislature Bans Development On Wetlands*, 174 N.Y.L.J. 6 (July 25, 1973).

30. See Note, *Land Use Controls in Historical Areas*, 44 NOTRE DAME LAW. 379, 387-88 (1969).

31. Law of April 19, 1965, No. 46, [1965] N.Y. Local Laws 261 (codified at New York, N.Y. ADMIN. CODE ANN. ch. 8-A, §§ 205-1.0 to 207-21.0 (1975)) [hereinafter cited as Landmarks Act]. The Act was passed under the New York Historic Preservation Enabling Act of 1956. Law of April 2, 1956, ch. 216, [1956] N.Y. Laws 246 (now N.Y. GEN. MUNIC. LAW § 96-a (McKinney Supp. 1975)).

tion Law, this heritage was bereft of any legal safeguard.

While some of the preservation techniques have not been tested in the courts, the statute has weathered and survived attacks on its constitutionality.³³ The Landmark Commission's authority is more directed and explicit than the powers exercised by other city agencies under the Zoning Resolution. Any site, building or other structure or area of the city with special character can be designated as a landmark³⁴ after approval by the Board of Estimate. Staff reports are prepared on all proposed landmarks, whereupon a public hearing is held,³⁵ and the Commission renders a final report and decision.

Any alteration to a designated landmark requires application to the Commission,³⁶ which then examines whether the proposed act is consistent with the landmark's architectural mien.³⁷ Public hearings are provided, but informal consultations on changes are encouraged so that, through conferences, an agreed course of action may be achieved. The Preservation Law includes enforcement provisions and criminal sanctions for altering or demolishing a landmark without permission of the Commission. Fines and imprisonment are provided for as ultimate sanctions.³⁸

This sort of regulatory scheme is the administrative answer to private suits grounded in aesthetic nuisance theories.³⁹ While private suits are a costly and imprecise tool, the landmark designation process is not. It permits a sophisticated balancing of interests within a mandate to preserve the historic, architectural milieu.

As historic preservation laws are strengthened, their relationship

32. The purposes of the Landmarks Act as set out in § 205-1.0(b) are to strengthen the economy of the city, and promote the use of historic districts for the education, pleasure, and welfare of the city's residents.

33. See *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); *Trustees of the Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. 1967), *rev'd*, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968); *Manhattan Club v. Landmarks Preservation Comm'n.*, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

34. Landmarks Act § 207-1.0(k).

35. *Id.* § 207-12.0(b).

36. *Id.* § 207-3.0.

37. *Id.* § 207-8.0(G)(2).

38. *Id.* § 207-16.0.

39. Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L. Q. 1 (1939); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075 (1970).

to other regulation of the human environment must be considered. While historic preservation was one of the earliest instances of "amenity" legislation, it is increasingly recognized as an integral component of the environmental lawyer's tools. Recently, citizens have invoked New York City's Landmark Preservation Law to serve their urban aesthetic goals.

Thus far most private suits in the preservation area have been brought against the Landmark Commission by owners of landmark property not realizing a sufficient return. If the plaintiff in such a case proves an unreasonable economic burden in maintaining the landmark status, the Act places upon the Commission the burden of devising a plan whereby the landmark may be preserved and rendered "capable of earning a reasonable return."⁴⁰ The thrust and focus of the Act is to empower the Commission to act on its own initiative in preserving the city's architecture.

On the other hand, when the relevant agency fails to designate or protect the landmark, citizens may bring an administrative law proceeding which is more manageable than a plenary suit at Common Law. Indeed, it is in this area that citizen suits on behalf of landmark property have been most appropriate and most frequent.

In *Neighborhood Association to Preserve Fifth Avenue Houses, Inc. v. Spatt*⁴¹ a property owners association and other plaintiffs challenged the denial by the Landmarks Preservation Commission of their application to designate East 82nd Street between Fifth and Madison Avenues in Manhattan an historic district.

Although the Commission had held hearings regarding designation on a house by house basis, it had denied the block "district" landmark status without holding a public hearing which would have given the Association an opportunity to present its views. In defending its action, the Commission relied on its exercise of discretion and cited insufficient public interest in the application. When the Commission moved to dismiss the Association's Article 78 proceeding, the court denied its motion, holding that:⁴²

40. Landmarks Act § 207-1.0(c). A valuation of the "reasonable return" shall be "the current assessed valuation established by the city, which is in effect at the time of the filing of the request for a certificate of appropriateness" *Id.* § 207-1.0(q)(2).

41. 174 N.Y.L.J. 7 (Sup. Ct. Aug. 15, 1975).

42. *Id.*

There is demonstrated interest on the part of a group which is directly concerned with the future of this area and its role in conveying an image of this city and in preserving a part of its past for the citizens of the future. This is a group, varied in makeup, which has performed a substantial feat at great expense in time and effort in documenting and publishing the history of the area in question and in obtaining the support of civic and community leaders in aid of its goal. There is no question that the issue raised is one of public interest

The vigor of such citizen enforcement is also shown in a matter which has as yet avoided a court test, the effort to preserve the Villard Houses in Manhattan. These late 19th century mansions, which are located immediately behind St. Patrick's Cathedral have a unique role in the City's history and current atmosphere.⁴³ They were designated as landmark exteriors by the Commission in 1965.⁴⁴ The Commission failed to designate the gilded music room or "Gold Room" of the Whitelaw-Reid Wing of the Villard Houses as an interior landmark despite its status as the only example of such architecture in the City.

A developer, the New York Palace Hotel, appeared with a proposal to tear down the back half of the Villard Houses, including the Gold Room, in order to erect a hotel. The local Community Planning Board opposed the move,⁴⁵ but the developer persisted and filed its application for a variance with the Board of Standards and Appeals for the City of New York,⁴⁶ the City's zoning appeals board.

At this point the New York Landmarks Conservancy, a not-for-profit corporation dedicated to the preservation and wise use of landmarks, intervened in the variance proceedings. Although the site of the Villard Houses is located near both the Special Fifth Avenue and Madison Avenue Districts, it is located in neither one. Nonetheless, the Conservancy invoked a provision of the city Zoning Resolution giving the City Planning Commission rather than the

43. The Villard Houses were designed by McKim, Meade & White, Architects, patterned after the Roman Palazzo Delle Chancelleria, at the request of Henry Villard, in 1883. Their history and value have been frequently noted, Ellis, *Very Special Place For Special People—Church Publisher Neighbors*, N.Y. World Telegram, July 1, 1960, at 15, col. 3; Huxtable, *They Call this 'Saving' a Landmark?*, N.Y. Times, Jan 5, 1975, at D29, col. 1.

44. Landmarks Preservation Commission of the City of New York, Certificate of Appropriateness No. 364, Henry Villard Houses.

45. N.Y. Times, June 6, 1975, at 35, col. 1.

46. Application for Variance on Behalf of the Archbishopric of New York, No. 693-74-BZ (Bd. of Standards and Appeals of the City of N.Y., filed Nov. 26, 1974).

Board of Standards and Appeals jurisdiction over lots containing areas equivalent to that proposed for the hotel.⁴⁷ The developer then withdrew its variance application and entered into negotiations with the Conservancy and the City Planning Commission to explore a compromise. To date, the City Planning Commission has not yet acted.

Thus, where the Landmarks Commission has failed to protect historic areas, as in the Fifth Avenue case, or has not protected the resource sufficiently, as was the case with the Gold Room of the Villard Houses, citizens have readily stepped in. While historic preservation legislation was not designed to encourage citizen participation, it permits contributions from the public either in the form of judicial challenge or through independent action.

III. Noise Abatement

The last five years have produced extensive new laws at the local, state and federal levels to regulate noise and create causes of action for noise related injury,⁴⁸ and even to impose criminal sanctions for excessive noise.⁴⁹ These recent statutes and ordinances were adopted against the background of long standing common law remedies which had ceased to be sufficiently effective.⁵⁰ They represent an attempt to combat a pervasive hazard more effectively than was possible under common law. In the wake of these trends a new area of urban environmental law has emerged.

47. New York, N.Y. Zoning Resolution § 74-72.

48. As of 1972, there were between 1,500 and 2,000 state and local noise control codes. 61 AM. JUR. 2d *Pollution Control* § 111 (1972). On the local level, see CHICAGO, ILL., MUNICIPAL CODE § 17-1.6 to -4.21 (1970), discussed in Grad & Hack, *Noise Control in the Urban Environment*, 1972 URBAN LAW ANNUAL 3, 14 (1972). That statute requires that manufacturers who sell specified vehicles and other equipment in Chicago to certify that their equipment meets prescribed noise emission standards. On the state level, see, e.g., FLA. STAT. ANN. § 403.061(13) (1973); N.D. CENT. CODE § 23-01-17 (Supp. 1975), which authorize the air and water pollution control agencies of their respective states to establish noise standards.

49. See, e.g., NEW YORK, N.Y. ADMIN. CODE §§ 1403.3-1.01 to -8.25 (1975).

50. See generally, Comment, *The New York City Noise Control Code: Not With a Bang But With A Whisper*, 1 FORDHAM URBAN L. J. 446, 447-51 (1973). Until the enactment of the New York City Noise Code in 1972, local citizens had only partial success in enforcing existing noise laws due in large part to the lack of established measureable standards to judge noise pollution. The police department has always had the right to enforce laws against noise polluters but such actions were a low priority problem for the department. Mayor Lindsay appointed a task force to study the problem of noise in New York City and the group's report helped spark passage of the 1972 Code. *Id.* at 449.

When the harmful effects of noise were little understood, the nuisance doctrine afforded uneven protection. Nuisance or trespass theories often result in a balancing of equities with a judgment not wholly satisfactory to either party. Damages may be awarded; and in cases where a governmental agency produces the noise, courts have held that there has been a confiscation of property rights.⁵¹ Yet, money awards alone do not remedy the problem. While nuisance actions can result in injunctive relief removing the noise, they can also result in money damages alone without the equitable relief primarily sought.⁵² Rather than leave the aggrieved citizen to common law remedies, statutes were enacted to provide private enforcement of the right to eliminate unwanted noise.

At the federal level, noise laws have vastly expanded both environmental rights and their enforcement. Federal noise laws regulate noise levels in places of employment. They also regulate aviation noise and noise levels in machinery sold in interstate commerce. While the occupational noise standards are promulgated under OSHA,⁵³ and the Federal Aviation Authority sets noise emission standards from aircraft,⁵⁴ it is in the regulation of machinery noise levels where the greatest latitude is provided for citizen enforcement. Indeed, it is the area of broadest prohibition and the relevant statute, the Noise Control Act of 1972,⁵⁵ specifically provides for citizen suits.

51. See *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, the Court said that the fifth amendment of the Constitution required the Federal Government to pay for air-space taken from a private citizen and rejected the landowner's common law argument that ownership of the land extended to the periphery. *Id.* at 260-61. See also *Griggs v. Allegheny Co.*, 369 U.S. 84 (1962). For a case involving a state statute, see *Aaron v. Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974).

52. This is particularly true in government air space confiscation cases. See *Town of East Haven v. Eastern Airlines, Inc.* 333 F. Supp. 338 (D. Conn. 1971).

53. 29 U.S.C. §§ 651-78 (1970). See also 29 C.F.R. § 1910.95, Table G-16 (1975). Sample permissible sound levels include 6 hours at 92 decibels, 4 hours at 95 decibels, 1 hour at 105 decibels, and ¼ hour or less at 115 decibels. *Id.*

54. The Noise Control Act of 1972, 42 U.S.C. § 4906 (Supp. IV, 1974), 49 U.S.C. § 1431 (Supp. IV, 1974). The Federal Aviation Administration (FAA) must consult with the Environmental Protection Administration (EPA) before prescribing and recommending standards. The EPA must then submit the proposed regulations to the FAA. The FAA may accept, modify or reject the EPA proposals. If it does modify or reject, the EPA may request a review. 49 U.S.C. §§ 1431 (c)(1),(2) (Supp. IV, 1974).

55. 42 U.S.C. §§ 4901-18 (Supp. IV, 1974), 49 U.S.C. § 1431 (Supp. IV, 1974).

A. The Noise Control Act of 1972

In 1970, the Noise Pollution and Abatement Act⁵⁶ was enacted to promote research into all aspects of noise. In addition, where the federal Environmental Protection Agency (EPA) Administrator determined that a federal agency's acts created unwanted noise, the Act required that agency to consult with the EPA concerning abatement.⁵⁷

In 1972, Congress concluded that noise problems created by vehicles, construction equipment and other machinery used in interstate commerce ought to be regulated uniformly. Pursuant to that decision it enacted the Noise Control Act of 1972,⁵⁸ which sets noise emission standards for such products in interstate commerce⁵⁹ other than aircraft and military items.⁶⁰ "Environmental Noise" is broadly defined as the "intensity, duration and the character of sounds from all sources."⁶¹ The Act requires the EPA Administrator to set criteria for identifying different noise qualities and quantities and their impact on public health.⁶² He must then set noise emission standards for major sources of noise, after considering the economic possibilities of noise reduction. The manufacturer must warrant that its product will conform to the federal emission standards at the time of sale.⁶³ Thus, warranty is for manufacturing defects only. The user is responsible for using the product in its normal way with normal maintenance.⁶⁴

The Act's thrust is toward manufacturers but users may be subject to more stringent local laws depending on the circumstances. Thus, the Act allows more specific local laws, such as New York City's Noise Code, to continue in force, except where they deal with

56. 42 U.S.C. § 1858 (1970).

57. *Id.* § 1858(c). When compiling their NEPA impact statements, see 42 U.S.C. § 4332 (1970), the heads of all federal agencies should ensure that all facilities under their jurisdiction are designed, constructed, managed, operated and maintained to conform to the Standard of the Noise Control Act of 1972. Exec. Order No. 11,752, 3 C.F.R. 380-85 (1974).

58. 42 U.S.C. §§ 4901-18 (Supp. IV, 1974), 49 U.S.C. § 1431 (Supp. IV, 1974).

59. 42 U.S.C. § 4905 (Supp. IV, 1974).

60. For aircraft regulations, see 42 U.S.C. § 4906 (Supp. IV, 1974); 49 U.S.C. § 1431 (Supp. IV, 1974).

61. 42 U.S.C. § 4902(11) (Supp. IV, 1974).

62. *Id.* § 4904(a).

63. *Id.* § 4905(d)(1).

64. S. REP. No. 1160, 92nd Cong., 2d Sess. 7 (1972).

the design-related noise emission of machinery.⁶⁵

The enforcement provisions of the Act are similar to those of the Clean Air Act⁶⁶ and include both fines and imprisonment as penalties. First offender violators may be fined up to \$25,000 or imprisoned for one year, and any violator may be subject to an injunction.⁶⁷ Most significantly, the Act creates a civil cause of action for "any person" to restrain any other person, including a governmental agency, from violating a federal noise standard or to require enforcement of such a standard. The Court may award the costs of litigation including reasonable attorney and witness fees;⁶⁸ such a provision substantially undercuts the discouraging cost factor of citizen suit litigation. Moreover nothing restricts the individual's right to sue under common law or any other statute.⁷⁰ Before a citizen sues a federal or state governmental agency to enforce noise rights, he must first give sixty days notice of intent to sue,⁷¹ and the notice must recite the nature of the alleged violation. Since these citizen suit and notice provisions have only recently become effective, there is not sufficient data for analysis.

B. New York City Noise Code

Illustrative of local legislation is the New York City Noise Code⁷² which provides for citizen enforcement of its provisions and actively relies on citizen protests and reports. New York's Noise Control Code of 1972 is a model of vigorous legislation intended to remedy the absence of noise regulation. The Code codifies the common law ban on "unnecessary noise"⁷³ and specifically defines "prohibitive noise"⁷⁴ from vehicle exhausts and other sources. The Code contemplates the setting of noise levels for aircraft, railroads, subways,

65. 42 U.S.C. §§ 4905(e)(1)(A),(B) (Supp. IV, 1974).

66. Compare *id.* § 4910 with Clean Air Act, *id.* § 1857(c-8)(c) (1970).

67. *Id.* § 4901 (Supp. IV, 1974).

68. The EPA may intervene in such actions. *Id.* § 4911(c).

69. *Id.* § 4911(d).

70. *Id.* § 4911(e). These provisions substantially duplicate the federal citizen suit authorizations of the Clean Air Act, *id.* § 1857(h-2) (1970) and the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1365 (Supp. IV, 1974).

71. 39 Fed. Reg. 36011 (1974).

72. NEW YORK, N.Y. ADMIN. CODE §§ 1403.3-1.01 to -8.25 (1975).

73. *Id.* § 1403.3-1.03 (1975).

74. *Id.* § 1403.3-3.01.

trucks, and various other noise producing systems.⁷⁵

Enforcement of the Code is through complaints to the New York City Environmental Control Board, and administrative court. The Board may issue subpoenas, order the installation of noise control equipment, issue cease and desist orders, impose civil penalties up to \$1,000 per day, and revoke permits or variances.⁷⁶

Any citizen may initiate enforcement proceedings and the City Department of Air Resources provides a kit with forms for filing a formal "Citizens Noise Complaint Affidavit" and offers a bounty of 25 percent of any fine assessed to the complainant. While citizen complaints give the aggrieved individual an outlet for prosecution of noise violators, the Environmental Control Board docket is so crowded and its follow-up so limited that real relief may not be immediately forthcoming. Still, the force of eventual fines has provided incentive for noise abatement, as well as the possibility of private suits alleging damages. Furthermore, the Code has created standards of illegality which may be treated as nuisances per se by plaintiffs.

C. Problems in Noise Control Litigation

While noise control has become an integral aspect of environmental quality, the battle toward reaching the various statutes' objectives will not be without problems. Noise laws, like other urban environmental laws, do not easily mesh with other older urban values and vested interests. The trade-off issues presented are an instructive example of conflicts along the way to a noise-free city.

The problem of harmonizing environmental laws with other policies is well illustrated by *New York Telephone Co. v. New York City Transportation Administration*.⁷⁷ In this suit against New York City, New York Telephone Empire City Subway Co., Ltd., Consolidated Edison Co. of New York, Inc., and the Brooklyn Union Gas Co. attacked amendments to the City Department of Highways Rules regulating street openings.⁷⁸ One of the amendments prohib-

75. *Id.* §§ 1403.3-4.01 to -4.23, -5.01 to -5.23.

76. The section of the Code dealing with the functioning of the Environmental Control Board is NEW YORK, N.Y. ADMIN. CODE § 1403.3-8.01 (1975). There is also a section in the Code dealing with citizen complaints. *Id.* § 1403.3-8.09.

77. 44 App. Div. 2d 784, 355 N.Y.S. 2d 6 (1st Dep't 1974).

78. NEW YORK, N.Y. ADMIN. CODE § 1403.3-4.11 (1975).

ited any work on subsurface installations in eighty-one named streets on weekdays between 7 a.m. and 7 p.m. (daylight), with exceptions provided for inspection and emergency work. The Commission of Highways may declare an emergency upon application if interruption of a public utility or sanitation service might result from having to postpone a street opening to a weekend. In "undue hardship" cases the Commissioner may waive or modify the regulations to accommodate specific cases.

The City adopted these rules pursuant to the transportation controls required by the Federal Clean Air Act and the New York State approved "New York City Metropolitan Area Air Quality Implementation Plan Transportation Controls,"⁷⁹ a plan approved by the United States Environmental Protection Agency.⁸⁰ The City, considering itself bound by the state and federal law requiring transportation controls, asserted that its discretion had been preempted and that such street opening rules were mandated. Plaintiffs argued that the Department of Highways rules were unrelated to the Plan, and, further, that the "daylight" rule is an abuse of the City's police power in that it conflicts with, and seriously impairs, the New York State mandate to utilities to provide certain public services without interruption.⁸¹ Moreover, plaintiffs alleged that the Rule conflicted with the City's Noise Control Code.⁸² That Code bans construction on weekends and on weekdays between 6 p.m. and 7 a.m. (night) under city permit.⁸³ Variances for "public safety" reasons may be granted by any City agency,⁸⁴ although, in emergencies, none are required for a twelve hour period.

The Supreme Court of New York County granted the utility plaintiffs a preliminary injunction against the Department of High-

79. This latter report was issued by the New York State Dept. of Environmental Conservation in April 1973. 44 App. Div. 2d at 785-86, 355 N.Y.S. 2d at 7-8.

80. See note 157 *infra*.

81. See, e.g., N.Y. PUB. SERV. LAW §§ 65, 91 (McKinney 1955); N.Y. TRANSP. CORP. LAW §§ 11, 27 (McKinney 1943). The Public Service Commission appeared as amicus curiae on behalf of the utilities initially and on appeal. *New York Tel. Co. v. New York City Transp. Admin.*, 44 App. Div. 2d 784, 355 N.Y.S.2d 6 (1st Dep't 1974).

82. NEW YORK, N.Y. ADMIN. CODE § 1403.3-4.11(a) (1975) which allows construction only on weekdays between the hours of 7 A.M. and 6 P.M.

83. *Id.* § 1403.3-4.11.

84. *Id.* § 1403.3-4.11(b).

ways Rules on street openings while denying a motion to dismiss. The utilities had successfully contended that they could not fulfill their normal maintenance work and abide by the amended rules.

The Appellate Division for the First Department affirmed⁸⁶ but declined to take judicial notice or (impliedly) to consider the federal preemption issues since the plan for transportation controls was not a part of the record below.⁸⁷

In a separate concurring opinion, Judge Kupferman observed that the utilities' attack was on the Highway Rules rather than on the Noise Code: "They are not generally desirous of having night time work due to union problems and overtime pay, muggings, [and] not finding nearby customers open"⁸⁸

Most significant for the purpose of this discussion, however, is the recognition which Judge Kupferman gave to the public policy trade-offs:⁸⁹

Obviously, the legislative and executive branches have an obligation to help prevent air pollution and noise pollution and yet also to allow the utilities promptly to perform their duties. Where there is a possible conflict in the achievement of these ends, the court should not intervene unless the resolution of the conflict is arbitrary and unreasonable Although yet to be demonstrated, it may be that the utilities involved will have additional expenses, but this is part of the social cost of having a more livable environment The danger inherent in having uninspected utility facilities, such as gas lines, is readily apparent, and the problem requires careful consideration, but in proper perspective.

What Judge Kupferman views as a "proper perspective" is both perspicacious and time-tested. As Chief Judge Breitel has written with respect to New York City's local law regulating emissions from fuel burners and refuse incinerators, resolution of thorny regulatory problems can proceed even by trial and error. The justification for such experimental efforts is the fact that "[u]nfortunately, the extent of the pollution problem, its life-threatening acceleration, and the high economic and social costs of control are exceeded in gravity by only one or two other domestic or even international issues."⁹⁰

85. 44 App. Div. 2d at 784, 355 N.Y.S.2d at 7.

86. *Id.*

87. *Id.* at 785, 355 N.Y.S.2d at 8.

88. *Id.*

89. *Id.* at 786, 355 N.Y.S.2d at 8-9.

90. *Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 219, 265 N.E.2d 72, 75, 316 N.Y.S.2d

While the curb on certain weekday street openings would reduce traffic congestion and thereby aid commerce as well as curb air pollution, it is true that some new costs would accrue to the utilities.⁹¹ These, in turn, are likely to be passed on to the rate-paying public. The real question is whether they should be allowed to so tax the public since, it is the "right of the public to the use of the streets which is 'absolute and paramount.'" Private abutters have no such right.⁹² A franchised utility's interest in streets is arguably no less subservient to the public's right of use.

Regretfully, a considered balancing of these issues was delayed when trial was postponed. The public was the loser in not having a prompt adjudication of these issues. The Highway Department contemplated permit-by-permit evaluation of trade-offs for street openings. Its rules were consistent with the Clean Air Act.⁹³ Moreover, a Noise Code variance could be given for the "urgent necessity" of reducing air pollution and traffic congestion.⁹⁴ Since a compatible statutory interpretation was possible, the utilities might have served the public better by working under the rules rather than seeking their invalidation *in limine*. Ultimately, the trade-off issue here is one for administrative action and legislative amelioration and refinement in light of practice. Courts can proceed only so far. "So long as there is reasonable basis in available information, and rationality in chosen courses of conduct to alleviate an accepted evil, there is no constitutional infirmity."⁹⁵

IV. NEPA and the City

The requirements for environmental impact statements have advanced the ability of a citizen to protect himself from unanticipated environmental harm at the hands of federal agencies. The urban

226, 230 (1970).

91. Such increased costs would accrue in the form of overtime pay for employees, union problems, and increased security for workers. App. Div. 2d at 785, 355 N.Y.S.2d at 8.

92. *Cities Service Oil Co. v. City of New York*, 5 N.Y.2d 110, 115, 154 N.E.2d 814, 816, 180 N.Y.S.2d 769, 772 (1958).

93. See *Exxon Corp. v. City of New York*, 356 F. Supp. 660 (S.D.N.Y. 1973) (N.Y.C. can control amount of lead in gasoline sold within city); *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y. 1972) (ordinance regulation exhaust emission controls for licensed cabs found not to be pre-empted).

94. *NEW YORK, N.Y. ADMIN. CODE* § 1403.3-4.11(b) (1975).

95. *Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 219, 265 N.E.2d 72, 75, 316 N.Y.S.2d 226, 230 (1970).

NEPA cases reached important new dimensions in recent years. A review of the cases in and around New York evidences how important and open-ended the analysis of environmental impact has become today. The vindication of rights for an urban community "beautiful as well as healthy"⁹⁶ has been made more realistic than ever before.

A. *Chelsea Case*

In *Chelsea Neighborhood Association v. United States Postal Service* the District Court for the Southern District of New York ruled that the U.S. Postal Service had not properly adhered to the National Environmental Protection Act (NEPA) in proposing construction of a Vehicle Maintenance Facility (VMF) in the Chelsea neighborhood of Manhattan.⁹⁷ Judge Ward's opinion was affirmed by the Second Circuit Court of Appeals.⁹⁸

Prior to the *Chelsea* case NEPA had been invoked in a series of challenges to the new Federal House of Detention being built behind the U.S. Courthouse in Foley Square.⁹⁹ In *Hanly v. Kleindienst*¹⁰⁰ the Second Circuit required strict adherence to NEPA's purposes and procedures, but on the facts, no serious environmental adverse impact was present in the proposed new detention center.¹⁰¹ The *Chelsea* case is a more sophisticated and meritorious instance of NEPA's utility.

The Postal Service's VMF clearly raised serious environmental health and safety issues. The Postal Service had prepared an Environmental Impact Statement (EIS); but when neighborhood residents challenged the sufficiency of the EIS, the Service contended that it was not required to comply with NEPA.¹⁰² The district court disagreed, and in a ruling of first impression held the Postal Service subject to NEPA.

96. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

97. 389 F. Supp. 1171 (S.D.N.Y.), *aff'd*, 516 F.2d 378 (2d Cir. 1975).

98. *Id.*

99. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972). Judge Mansfield decided *Kleindienst* and Judge Feinberg decided *Mitchell*.

100. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

101. *Id.* at 828-36.

102. 389 F. Supp. at 1175-76.

Although NEPA expressly applies to "all agencies of the Federal Government,"¹⁰³ many agencies have resisted embracing the Congressional mandate.¹⁰⁴ The Postal Service raised the unique objection that the Postal Reorganization Act¹⁰⁵ exempted the Service from the environmental mandate, but the court ruled that "[t]here is nothing in the language of § 410 on its face which prohibits or makes impossible application of such a broad expression of overriding national policy as NEPA."¹⁰⁶ In addition, the court noted the Service's failure to examine all alternatives to the VMF as NEPA requires. In addition, there was insufficient study of the VMF's impact on the neighborhood and on the proposed apartment complex to be built above the facility.¹⁰⁷

Finally, the court took a telling look at what may be viewed as a beginning of "urban sociological law."¹⁰⁸ In its final analysis of the procedural inadequacy of the EIS the court noted:¹⁰⁹

[N]owhere does the EIS give meaningful consideration to the problems posed by such high density dwellings, containing large open space, completely isolated from the surrounding environment. These are problems which will affect both the project residents and the Chelsea neighborhood in general. For example, crime and crime control are problems which have an environmental impact which must be considered in detail.

The procedural inadequacies of the Postal Service EIS were sufficient to justify a preliminary injunction barring construction contracts for the VMF. The circuit court's affirmance agreed that "the Service has failed to meet the requirements of NEPA in making 'a careful and informed decision.'"¹¹⁰ Among the deficiencies of the Postal Service EIS, the court of appeals cited and described the

103. National Environmental Protection Act, 42 U.S.C. § 4332(2) (1970).

104. See, e.g., *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). Some agencies still resist. See, e.g., Robinson, *Extraterritorial Environmental Protection Obligation of the Foreign Affairs Agencies: The Unfulfilled Mandate of NEPA*, 7 N.Y.U. J. INT. L. & POLITICAL SCI. 257 (1974).

105. According to the Postal Reorganization Act, 39 U.S.C. § 410(a) (1970), federal laws and regulations, with a few specific exceptions, do not apply to the Postal Service. NEPA is not one of the federal laws that specifically applies to the Postal Service. 39 U.S.C. § 410(b)(Supp. 1974).

106. 389 F. Supp. at 1179.

107. *Id.* at 1180-81.

108. Letter from Albert K. Butzel of Butzel & Kass (attorneys for the plaintiffs) to Nicholas A. Robinson, March 4, 1975.

109. 389 F. Supp. at 1184 (citations omitted).

110. 516 F.2d at 389.

sociological issue: "We do not know whether informed social scientists would conclude that the top of the VMF would likely become a human jungle, unsafe at night and unappealing during the day."¹¹¹

B. Westchester County Courthouse

Similar urban social issues came into play in the lengthy and considered opinion which enjoined destruction of the six-building complex constituting the Westchester County Courthouse.¹¹² The Courthouse was scheduled for demolition in the urban renewal of downtown White Plains, but subsequently was included in the National Register of Historic Places under the National Historic Preservation Act (NHPA).¹¹³ Before federal funds are used in a project which affects an historic site listed in the National Register, NHPA requires that the federal agency afford the Advisory Council on Historic Preservation opportunity "to comment."¹¹⁴ When read with NEPA, the duties of HUD were broadly construed. HUD's failure to review whether demolition of the courthouse was a major federal action significantly affecting the environment, was held to be "both substantively and procedurally defective under NEPA."¹¹⁵

The district court closely adhered both to NEPA's requirements and the *Hanly* decision, and left the scope of what remained to be examined broad. While the range of interdisciplinary factors HUD will explore cannot be predicted, it is certain that some evaluation will be required where none was proffered before.

C. Trinity Case

The broader scope of NEPA relief was further emphasized in recent rulings in Manhattan's urban renewal area. *Trinity Episcopal School Corp. v. Romney*¹¹⁶ has significance in the development of urban applications of environmental law, and as a probing of the reach of other duties under the National Environmental Protection Act. The plaintiffs in the *Trinity* case included a non-sectarian

111. *Id.* at 388.

112. *Save The Court House v. Lynn*, No. 75-6005 (2d Cir. April 30, 1975).

113. 16 U.S.C. § 470 (1970).

114. 16 U.S.C. § 470(f) (1970). Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971) requires adherence to these provisions.

115. No. 75-6005, at 50.

116. 523 F.2d 88 (2d Cir. 1975), *remanding* 387 F. Supp. 1044 (S.D.N.Y. 1974).

private school, a committee of neighborhood residents, and individuals from the upper west side of Manhattan. They claimed, inter alia, that the West Side Urban Renewal Plan was modified without compliance with NEPA. The Plan and its impact are extensively set forth in the district court opinion.¹¹⁷

Trinity School had agreed to sponsor a site next to its facilities (Site 30) on the understanding that the Plan would include at most some 2,500 low-income housing units and that in middle-income buildings the units would be allocated thirty percent to low-income tenants and seventy percent to middle-income tenants. The suit was precipitated by a redesignation of Site 30 from middle to low-income housing. Plaintiffs claimed that the redesignation would cause the area to deteriorate from the projected mixed middle-class neighborhood to a ghetto. Relying on *Otero v. New York City Housing Authority*,¹¹⁸ they contended that the change in Site 30 would mean that the area would "tip" from a middle to a low-income area, lose racial and economic integration, and produce an increase in crime, noise, and other anti-social activity.¹¹⁹

The district court concluded that the evidence as to tipping was too imprecise to permit a finding that the changes in the Plan would tip the neighborhood. It reviewed the evidence in terms of (1) gross numbers of minority or low-income families, (2) quality of community services, and (3) attitudes of majority group families as to whether they would leave the area.¹²⁰ Despite 25 trial days and extensive factual and expert testimony the district court concluded that "no meaningful proof exists in the trial record that the presence of that class [low income residents] is per se a cause of neighborhood deterioration."¹²¹ This finding was buttressed by two HUD studies showing that the change in Site 30 would not have a significant adverse impact on the environment.¹²²

The district court expressly found that "[C]ommunity attitudes and fears, or the propensity of certain economic or racial groups to commit anti-social behavior, do not lend themselves to . . . objec-

117. 387 F. Supp. at 1048-53.

118. 484 F.2d 1122 (2d Cir. 1973).

119. 387 F. Supp. at 1064-65.

120. *Id.* at 1065.

121. *Id.* at 1073.

122. *Id.* at 1073-75.

tive analysis and are not required in a NEPA study."¹²³ Moreover, it ruled that HUD's Special Environmental Clearance¹²⁴ which concluded that the project would not have a significant adverse impact on the environment had satisfied the mandate of NEPA as well as HUD's guidelines.¹²⁵

The Second Circuit refused to hold that the district court's conclusions of fact were clearly erroneous,¹²⁶ but the plaintiffs did successfully contend that, as a matter of law, HUD's conduct did not satisfy NEPA. The court of appeals held that NEPA (1) required HUD to make its own independent review of alternatives and not merely accept City Housing Authority conclusions, and (2) mandated a full review of alternatives irrespective of the obligation of filing an EIS.

In outlining the urban factors which must be examined with respect to a project such as the Site 30 apartments, the court included "site selection and design; density; displacement and relocation; impact of the environment on current residents and their activities; decay and blight; implications for the city growth policy; traffic and parking; noise; neighborhood stability; and the existence of services and commercial enterprises to service the new residents."¹²⁷

Against such factual review, the court stated that HUD must study:¹²⁸

alternative locations or sites; alternative of not building; alternative designs both in use of site and in size of individual units and number of total units; dispersal of the low income units or more sites in the project area; alternative measures for compensating or mitigating environmental impacts; and alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in the area as public housing projects.

Moreover, the court ruled that "[t]he statement of possible alternatives, the consequences thereof and the facts and reasons for and against is HUD's task."¹²⁹

123. *Id.* at 1078-79.

124. This is required for apartment projects with 100 or more units (Site 30 had 160 units) under HUD Circular 1385.1, 37 Fed. Reg. 22,673 (1972).

125. 387 F. Supp. at 1081-82.

126. 523 F.2d at 92.

127. *Id.* at 93.

128. *Id.* at 94.

129. *Id.*

The circuit court did not directly decide whether community attitudes and fears are a proper subject for a NEPA study. It did speculate, however, that testimony by area witnesses on crime, drugs, vandalism, and other evidence of anti-social behavior¹³⁰ "might well influence the appropriate housing agency to endeavor to minimize these dangers in its 'alternative' recommendations."¹³¹ Thus it appears that subjective factors relevant to "tipping" may also be considered in connection with the wide range of alternatives which must be studied.

What remains to be seen is how an interdisciplinary approach will be used to study alternatives. The circuit court remanded the case to the district court to require a study by the appropriate agencies of possible "alternatives" regarding the proposed change in Site 30.¹³² Critique of how such a study is to be accomplished necessarily will involve whether HUD has satisfied section 102(2)(a) (obliging it to utilize a systematic, interdisciplinary approach) as well as section 102(2)(D) (which mandates developing alternatives). As the foregoing suggests, this may be a far more sophisticated undertaking than the house of detention review in the *Hanly* cases presented.¹³³ Like the *Chelsea* case, consideration of subjective factors may require the expertise of sociologists, as well as anthropologists and psychologists.

It is this aspect of the ruling which gives it precedential importance. Moreover, as New York State moves to implement its State Environmental Quality Review Act (SEQRA),¹³⁴ and other states apply their "little NEPA's," this NEPA construction may well be carried over to SEQRA, and all city and state agencies may find themselves engaged in the urban sociological examinations presaged in the *Chelsea* case and the *Trinity* ruling.

V. Procedural Problems: Ripeness

Just as a court's narrow interpretation of "standing" recently barred citizens from contesting excessive subway noise,¹³⁵ so a nig-

130. 387 F. Supp. at 1069.

131. 523 F.2d at 95.

132. *Id.*

133. See text accompanying notes 103-104 *supra*.

134. Act of Aug. 1, 1975, N.Y. Sess. Laws ch. 612 (McKinney's 1975).

135. *Abrams v. New York City Transit Auth.*, 48 App. Div. 2d 69, 368 N.Y.S.2d 165 (1st Dep't 1975).

gantly view as to when an issue is ready for judicial review can stall vindication of public rights. The question of the point at which a party threatened with environmental injury may seek redress in the courts was highlighted in 1974 by two New York County Supreme Court rulings involving the proposed West Side Manhattan convention center of the New York City Convention and Exhibition Corporation (Corporation).

In *Gottfried v. New York City Convention and Exhibition Center Corporation*¹³⁶ Judge Greenfield denied petitions under Article 78 of New York's Civil Practice Law and Rules (CPLR) which alleged, *inter alia*, that the Corporation's Development Plan for the convention center failed to conform to New York City's "comprehensive" plan and failed to examine the adverse public health effects and other environmental impact generated by the center. The City Planning Commission and the Board of Estimate, in approving the Development Plan, had made specific findings that it was in conformity with the comprehensive plan for the municipality as a whole.¹³⁷ However, petitioners claimed that such a finding could not have been made because no environmental impact studies had been undertaken or completed prior to presenting the Plan to them for approval. Nevertheless the court decided that the future impact was difficult to anticipate, and that studies being done as the project was developed was sufficient to comply with the provisions in the law.¹³⁸

The *Gottfried* special proceeding was brought by a state Assemblyman for the Assembly District in which the proposed convention center site is located, by four residents of the neighborhood, and the New York Coliseum Exhibition Corporation, a potential competitor of the respondent corporation.

A separate Article 78 Proceeding was commenced by a citizens' organization, the Coalition for Clean Air by 1975. Justice Greenfield

136. *Gottfried v. New York City Convention and Exhibition Center Corp.*, Index No. 13,184/73 (N.Y. County, Sup. Ct. Aug. 29, 1974).

137. The corporation is created and governed by Act of July 2, 1971, ch. 1011, [1971] N.Y. Laws 1691, *as amended*, Act of July 2, 1971, ch. 1009-10, [1971] N.Y. Laws 1689; Act of June 8, 1972, ch. 926, [1972] N.Y. Laws 3753. Sections 6(1), 6(2), and 6(4) of this act require in relevant part that the Corporation's Development Plan must conform to "a comprehensive plan for the development of the municipality as a whole."

138. Index No. 13,184/73, at 23.

also denied this petition to enjoin the project.¹³⁹ Petitioners had urged that (1) the Corporation was proceeding to construction without a permit, (2) the New York State Commissioner of Environmental Conservation had failed to halt construction and, (3) increased traffic would pollute the air thus impairing public health.¹⁴⁰

The court ruled that the Coalition's petition was "premature and legally insufficient."¹⁴¹ No construction had begun. No permits were needed. No injury was present or immediately foreseeable. The court declined to enjoin any party on the basis of the charge of "anticipatory violation of the law."¹⁴²

Several important environmental quality issues were raised by these suits. The first was the air quality deterioration. The second was whether all aspects of neighborhood protection had been considered and whether the center conformed to the city's zoning and comprehensive planning.¹⁴³

Although the corporation was not required *in haec verba* to do an environmental impact analysis for the center, it was obliged by law to evaluate the "relationship between the [center's] development plan and a comprehensive plan for the development of the municipality as a whole."¹⁴⁴ In turn, the City Planning Commission was to "certify . . . whether the development plan . . . conforms to a comprehensive plan"¹⁴⁵ and then the Board of Estimate was by resolution to decide whether "the development plan conforms to a comprehensive plan."¹⁴⁶

The petitioners claimed that air pollution, traffic and neighborhood impact should have been reviewed as part of the required conformity with the comprehensive plan. The Corporation maintained that all these environmental evaluations could be done after its development plan was approved.¹⁴⁷

Judge Greenfield reconciled these positions as follows:¹⁴⁸

139. *Coalition for Clean Air by 1975 v. New York City Convention and Exhibition Center Corp.*, 172 N.Y.L.J. 17 (Sup. Ct. Sept. 6, 1974).

140. *Id.*

141. *Id.*

142. *Id.*

143. See note 137 *supra* and accompanying text.

144. Act of July 2, 1971, ch. 1011, [1971] N.Y. Laws 1691.

145. *Id.* § 6(2).

146. *Id.* § 6(4).

147. 172 N.Y.L.J. at 17.

148. *Id.*

It is difficult to comprehend how there can be definitive statements as to the total environmental impact of a future project when so many variables and contingencies can alter the outlook.

The court deferred to the expertise of the Planning Commission which found that the Corporation's development plan conformed to a comprehensive city plan. It did so apparently in the face of "conflicting factual claims," and a record revealing that the only environmental study was a twenty-two page statement entitled "Preliminary Statement of Environmental Effects."¹⁴⁹

Put bluntly, the court acknowledged that petitioners had shown that no serious environmental protection studies had been undertaken prior to asking city approval of a major convention center and plan which included a city capital budget authorization of fifty million dollars to begin construction of the center. Nonetheless, the court told the petitioners, that it was not yet timely to raise these environmental issues.¹⁵⁰

The ripeness issue is one which has been litigated in federal court environmental cases. These rulings can offer some guidance in the Convention Center context. Where a statute clearly evidences a legislative policy of "ecology preservation," a court is reluctant to find laches.¹⁵¹ In the "comprehensive plan" for the development of the municipality, environmental issues increasingly are held relevant.¹⁵² Nonetheless, as Judge Greenfield's ruling reveals, the mandate to include environmental protection in such a comprehensive plan is less than uniformly admitted. Thus, failure to seek judicial review at this juncture raises the possibility of a finding of laches at a later date.¹⁵³

149. *Id.*

150. *Id.*

151. See *Steubing v. Brinegar*, 511 F.2d 489 (2d Cir. 1975); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972).

152. See generally, *Nattin Realty, Inc. v. Ludewig*, 324 N.Y.S.2d 668 (Sup. Ct. 1971), *aff'd*, 40 App. Div. 2d 535, 334 N.Y.S.2d 483 (2d Dep't 1972), *aff'd mem.*, 32 N.Y.2d 681, 296 N.E.2d 256, 343 N.Y.S.2d 360 (1970) (local zoning ordinance was required to take into consideration ecological problems such as effect of change of zoning on local water supply and sewage disposal facilities). *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968), deals more with land use and not quite as clearly with environmental problems.

153. Respondents argued that by seeking a stay on September 5, 1973 when petitioners commenced the proceedings the passage of time alone subjected them to charges of laches. Memorandum for Respondents at 15-17, *Gottfried v. New York City Convention and Exhibition Corp.*, Index No. 13,184/73 (N.Y. County, Sup. Ct. Aug. 29, 1974).

In declining to stay the center operations, or to fashion sua sponte an intermediate remedy compelling environmental studies in connection with the comprehensive plan, the court ruled that the relief was sought too early, and dismissed the petitions. In a comparable NEPA case, *Silva v. Romney*,¹⁵⁴ the First Circuit Court of Appeals agreed that the district court had the power to enjoin HUD from approving a \$4 million mortgage guarantee and \$156,000 interest grant pending preparation of an environmental impact statement. In the case of federal highway construction, the mere acquisition by a state government of land for a federal highway route required environmental impact analysis under NEPA because it "would make proceeding with the proposed route increasingly easier and, therefore, a decision to alter or abandon the route increasingly undesirable."¹⁵⁵

In a close analysis of NEPA review, one commentator argues that "[t]he virtual inevitability of federal involvement, coupled with NEPA's clear command to include environmental considerations in the earliest planning of federally supported projects, especially before alternative sitings and possible palliative actions are foreclosed," suggests early review.¹⁵⁶ In the *Gottfried* case, where an Army Corps of Engineers' permit must be obtained, a federal suit to compel a NEPA review might have been timely under federal law even while Judge Greenfield was rejecting the claim of a state or city responsibility under state law. The reluctance of the *Gottfried* court to read strong environmental requirements into the City comprehensive plan illustrates the uncertainty for both conservationist and developer in dealing with environmental laws. Arguably, until the forthcoming NEPA review is completed for federal permits, no extensive or irreversible activity should be encouraged. The court's reading of the corporation's authorization laws is at odds with an integrated environmental approach to projects like the Center. As with the New York Telephone case, where state laws can be construed to facilitate a socially desirable end, they should be so construed.

154. 473 F.2d 287 (1st Cir. 1973).

155. *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329 (4th Cir.), cert. denied, 409 U.S. 1000 (1972). For a highway ruling in an urban context, see *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971).

156. R. ANDERSON, NEPA IN THE COURTS 69 (1969).

VI. Conclusion

The deterioration of our cities has engendered among the citizens a sense that they themselves must act to protect the aesthetics, health and safety of their habitat. New legislation affords comprehensive new rights to citizens when the appropriate administrative agencies fail to maintain or restore an urban environmental amenity.

The channel into which citizen enforcement action proceeds is the court system. Traditional administrative law challenges, such as in *Spatt*, will doubtless be given a careful and considered reception. Invocation of the newer environmental criteria may find tougher sledding. The courts are unfamiliar and unsure of relating these new rights to older and more traditional standards. The *New York Telephone* and *Gottfried* decisions are illustrative of such judicial reluctance and uncertainty.

Where specific newer standards may prove difficult for courts to apply, the more comprehensive instruction of NEPA is more easily grasped. A court can order a comprehensive analysis of urban environmental impact more easily than it can weigh the validity of ultimate decision. Citizens are in a good position to assail incomplete NEPA studies because of their own familiarity with local urban conditions. NEPA cases also serve to cut through the sectoral isolation of noise, water, air and preservation laws, and to integrate sympathetically the goals of different environmental statutes.

Environmental law has become an "urban" law field, both in terms of statutory development and case law. Citizen awareness of the right to enforce environmental law protections has grown substantially in recent years. "Citizen groups are not to be treated as nuisances or trouble makers but rather as welcomed participants in the vindication of environmental interests."¹⁵⁷ Through the evolution of such activism, urban centers in the United States may well be moving toward establishing the sound environment which has so often eluded us in the past.

157. *Friends of the Earth v. Carey*, No. 75-7497, at 3424 (2d Cir. April 26, 1976). In an appeal arising out of a denial of an action brought by a citizen's group to enforce implementation of the Transportation Control Plan for the Metropolitan New York City Area (the "Plan"), the Second Circuit reversed the district court and remanded the case, directing enforcement of the "Plan's" several strategies to abate air pollution. The court noted the validity of citizen suits in the environmental area, and said that the record before them "crie[d] out for prompt and effective relief if the congressional clean air mandate is to have any meaning and effect in New York City." *Id.* at 3440.

