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Community Planning: A Casebook on Law and Administration

By

J. B. MILNER

Toronto: University of Toronto Press. 1963.

Pp. xx, 794, \$20.00

This is a casebook designed for teaching land planning students and law students in Canadian universities. Its author is a noted member of the Faculty of Law at the University of Toronto. I am not positive that the book will prove to be a successful teaching vehicle. But for an American it provides a comprehensive and valuable source of comparative Canadian materials.

Professor Milner's objective is

to bring together materials that may help the lawyer and the planner talk together with a greater understanding of each other's problems and points of view. The materials are presented in an attempt to show the law student what the professional planner hopes to do; and to show the planner how the law (and the lawyer) expects him to do it.¹

I feel confident that a planning student will have a better appreciation of the legal process after finishing the book; I am not as confident, however, that the law student will understand the planning process in the same dimension or will have been forced to grapple intensively with some of the more difficult legal issues involved with governmental control of the use of land.

The book opens with a chapter on nuisance principles in which the author presents a number of cases involving private and public nuisances and more extensive materials (both cases and statutes) relating to pollution of natural resources. The placement of this chapter serves a two-fold purpose: (1) to introduce readers to the legal process, and (2) to indicate the efficacy of judicial land planning. The second purpose is well served, but the materials are too skimpy to illustrate adequately the process of the law. Professor Milner's cases on private nuisance give some flavor of the appellate

1. P. vii.

process, but do not come close to providing the data needed to answer his provocative opening questions, *i.e.*, "is the adjudicative process (and the judicial process) better adapted to the settlement of disputes arising out of past events, the legislative process (private, or contractual, and public) better for the settlement of conflicts about future arrangements?"² Obviously, the questions are not to be answered definitively. But merely to understand what the questions mean, the student needs more than a number of appellate responses to disparate nuisance situations. He needs some materials on pretrial and trial process, as well as some text on the administrative and legislative processes.³ This is a tall order, but more attention to the way the processes work rather than to the substantive rules generated by the processes offers the opportunity to explore meaningfully the important questions posed by the author.

The next five chapters are largely devoted to planning. Chapter 2, "The Meaning of Planning," consists of excerpts from reports, books, and articles, designed to explore basic growth patterns of modern municipalities, the impacts of physical forms on social, economic, and political events (Winston Churchill's speech on the rebuilding of Commons is especially good), and underlying philosophical problems of freedom and order. The major offering is Lewis Mumford's, "Planning for the Phases of Life," an interesting brief exploration into the physical forms which should be available for different generations in an Anglo-American city.

Many books on planning include "big picture" chapters. Professor Milner's is better than most. But I find such material nearly unteachable—especially when they are divorced from the context of concrete proposals and presented in excerpted fashion. Rather than include such materials in a teaching book, it would seem more profitable to end one's course with an intensive reading of a series of articles or a single book which presents an entire thesis which can be discussed and criticized meaningfully.

Chapter 3, "Planning and Land Value," includes some materials on valuation in eminent domain (interestingly, the basic formulas seem to differ in the United States and Canada), but concerns itself in large part with the "right to compensation." Professor Milner uses excerpts from the Uthwatt Report, Von Hayek, and Dunham,

2. P. 5.

3. See, *e.g.*, *Note on the Structure of a Law Suit*, in Louisell & Hazard, *Cases and Materials on Pleading and Procedure* 1 (1962).

as well as some cases and statutes to raise basic problems. In my view, whether the government must pay or not is the central substantive issue in land regulation. In the United States, we pose the issue doctrinally as whether regulation amounts to a "taking" and is thereby constitutionally prohibited in the absence of payment. In Canada, many statutes provide for compensation if property is "injuriously affected," a test, I expect, not very dissimilar to the constitutional one in the United States. The Milner material is inadequate to raise many of the basic issues. The Uthwatt excerpts relate primarily to concepts of "floating" and "shifting" values, the Von Hayek excerpt criticizes these economic theories, and the Dunham passage comments critically on Von Hayek. This is all quite interesting, but it does not go far enough in land economic theory; for instance, no competing economic analysis is presented. And more importantly, the materials do not raise what I think is the central issue: the shifting of costs on the basis of location resulting from regulations designed to benefit the public. In American terms, the question is posed as one of equal protection of the laws. In Canadian terms, it is one of discrimination. I am by no means confident that cost-shifting by land regulation is condemnable;⁴ whether it is or not, however, seems to me central but ill-explored in this chapter.

Chapters 4 and 5, "The Legal Effect of Master Plans" and "The Machinery of Planning," concern themselves with what a plan is and how it is administered. These are the central planning chapters of the book. Professor Milner chooses to present excerpts from various "master plans" at the end, rather than at the beginning, of Chapter 4. This seems a mistake, for his materials on the legal effects of plans, how they are reviewed and amended, and the legislative guides for their creation, are difficult to understand without having seen the end products to which these subsections relate. Another problem is Professor Milner's constant quotation of statutory excerpts without textual interconnections or summaries. Additional text (which Professor Milner writes extremely well), or at least pertinent questions would be helpful to guide the reader and keep his interest from flagging.

Chapter 5, concerned with the administration of planning, first is addressed to planning agencies and then to the decision making process, with special emphasis on hearings, notice, and public re-

4. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1126-30; 1134, 1141-46 (1964).

ports. Some text should be added: we need an informal description of the typical relationship between local planning agencies and town councils as well as a systematic description of how the typical planning case proceeds. Nevertheless, Professor Milner's concern with procedural regularity, especially the opportunity to address the ultimate decision-maker directly, is excellent and I only wish that he had devoted more space to this section. The materials presented raise the fundamental questions: are hearings to be open, what are proper notice requirements, should affected landowners have access to reports of hearing examiners, and what items should be included in the written decision of the planning agency. As substantive limitations on land regulation are loosened, it becomes increasingly important to regularize the administrative process through which the regulations are created and applied. The Milner section is provocative.

Less attractive, at least for American readers, are the sections on provincial supervision of planning, regional planning, and the larger region. While Professor Milner is obviously aware of the importance of the inter-governmental questions involved, he does not devote enough space to local governmental organization in Canada. Constant reference is made, for instance, to the Ontario Municipal Board, a provincial entity which, together with the Provincial Minister, has substantial supervisory power over municipalities. Apparently, it may approve or disapprove local planning bylaws, subdivision proposals, master plans, and annexations. We have few analogues in the United States, and attention in depth devoted to this agency would be most helpful for American planners. Of course, from the Canadian viewpoint, this criticism is probably wide of the mark and it should not be taken as necessarily lessening the value of the book as a training tool for Canadian students.

Chapter 6 explores subdivision control. The legal materials are thin, except for the section on the equitable distribution of servicing costs. The chapter opens with some excerpts illustrating the growth patterns in urban areas which are interesting, but exceedingly short. It moves then to techniques of control (largely statutory excerpts) and then to principles of physical design. This latter section contains interesting data, but there is no attempt to relate the data to any legal problems—especially those involving the wide administrative discretion necessary to permit ingenuity in design. The short section on municipal services introduces the problem of distribution of costs

and the concluding section on proposals to shift cost burdens includes a fascinating scheme of ground rents.

The balance of the book is conventionally set out and covers, in order, private land use control, constitutional authority to regulate land use, nonconforming uses, bulk controls, zoning, administrative adjustment (largely variances), and development controls. The chapters are carefully done. Especially noteworthy are Milner's treatments of boards of adjustment, retroactive application of regulations, and enforcement problems. Somewhat disappointing is the section on development controls which is largely a discussion of interim zoning without reference to much of the present day thinking relating to timing controls and open space acquisition.

I am somewhat troubled by Professor Milner's choice of treatment of planning and then of regulation, rather than to organize the materials in another fashion. This choice leads both to repetition and to the separation of topical matter which is highly related. For instance, the materials on the machinery of planning (Chapter 5) and the administrative adjustment of zoning (Chapter 12) could be combined to the advantage of both chapters. Similarly, the materials on the constitutional authority to regulate land use (Chapter 8) could be interspersed with the materials on planning and land value (Chapter 3) and the legal effect of master plans (Chapter 4), to the advantage of the overall presentation.

While the number of criticisms in the foregoing paragraphs might seem to indicate that Professor Milner's casebook is seriously wanting in value, this is far from true. The book represents one of the first serious undertakings to present materials for both planning and law students. Its coverage is wide and generally well done. The book is valuable for the American planner and lawyer as a fertile source for comparative Canadian materials, and it is very probable that it will prove to be a useful teaching vehicle in Canadian universities. When Professor Milner does his second edition, I hope that he will find it possible to add extensive text or at least more extensive excerpts from the books and articles of others. I believe that added depth is possible without adding too many additional pages if reorganization is undertaken so as to coordinate the planning and regulation materials.

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