Heal the environment?

Apply a compress of cold cash!

BY JOSEPH L. SAX

There is always a tendency to begin by asking oneself the question, ought this issue to be resolved by administrative discretion, or by marketplace considerations of private enterprise, or by a legislative code, or by litigation? My experience suggests that — contrary to this way of looking at the problem — we tend to do best when we maintain a flexible posture in which it is possible to use each of these tools within a given problem context. Moreover, and more importantly, I am increasingly convinced that the opportunity to bring various institutional decision-makers into a given problem itself increases the likelihood that better decisions will be made because of the pressure that each institu-
tion can bring upon the others to do their job better. I am suggesting that more checking and balancing than we have traditionally had is desirable.

As I have indicated in my book, Defending the Environment, I believe it is desirable in many circumstances for courts to remand issues to the legislature, where—as is often the case—no specific, informed and open consideration has been truly given to a significant environmental issue despite formal authorization. We should, in short, be more realistic about the legislative process than the traditional notion of deference suggests. Similarly, I think we need greater judicial oversight of administrative decision-making than is provided by the
conventional interpretation of the Administrative Procedure Act. This would help us keep the many mission-bound and unimaginative agencies on their toes.

Let me give you just a single example of the kind of experience that persuades me of the importance of this claim that greater interplay is important. The Detroit Metropolitan Wayne County Airport, the major airport serving the Detroit area, recently held a public hearing for a proposed new runway, pursuant to the Airport and Airway Development Act of 1970. The Commission that operates the airport, to my astonishment, asked me to be the hearing officer; and to their astonishment, I accepted the assignment. I did so because I wanted to enlarge my perspectives on the way an administrative agency responds to a legal requirement that they permit public participation in their decision-making; and I felt that this opportunity was as close as I was likely to get to the inside perspective on public participation.

Obviously I cannot at this point comment on the merits of their proposal, or upon the adequacy of the hearing. But I can tell you something about my impressions of the Commission's preparations for the public hearing. I think they tell a great deal both about the issues of institutional interplay that I have been discussing, and about the meaning of such public participation questions as the statutorily-required public hearing.

My first surprise in getting into the airport expansion project was to discover that impressive efforts were being made to produce a fully-detailed environmental impact statement. The airport was being scrupulous to assure that in every procedural sense the hearing would be in full compliance with the requirements of the statute. For example, far from trying to bury their public notices in the small print of classified advertisements (as other airports have done), they drafted an ad to appear as a full quarter page, to be printed each week for five or six weeks and to go in more than 20 newspapers. The ad was not conventional legalese either, but was plainly designed to notify the citizenry and to make the issues in the hearing understandable. Beyond this, they are urging local radio and TV stations to announce the hearing. And they are making the relevant documents easily available, rather than burying a single copy in some obscure government office.

Beyond this, the Commission has sent observers to other airport hearings for the express purpose of determining how the hearing should be run in order to give both the substance and the feeling of fairness to those who attend. They have paid particular attention, for example, to those situations where the proponents preempt all the “prime time” of the hearing with long presentations, so that local citizens are exhausted by the time they get a chance to speak.

My suggestions have been accepted readily and without argument. While I have preserved by contract the right to impose my suggestions as requirements, I have nonetheless been impressed by the good faith and genuine concern the Commission shows for the desire to have an impeccably correct hearing.

The question is, why is this happening? Are those who operate the Detroit airport a particularly kindly group who have an unusual respect for the local citizenry? The answer, insofar as I can now tell, is no. My impression is that those who operate the airport are a tough-minded group of people who very much want to build that new runway, who are heavily committed to the need for it and who are quite doubtful they will learn much from a public hearing.

But they are scared, scared that if they don’t run their hearing in a highly correct fashion, they will be subject to suit and to the substantial chance that a judge will enjoin them from going forward. And the reason they are scared is that they have seen just this happen with several other airports. Thus, as I analyze the situation, the fear that citizens can come to court and possibly tie the airport project up for months or years is having a powerful effect in prodding the Commission to submit to public hearings that will be, in the fullest sense, beyond reproach. And that is good, if one feels that the local public ought to have a right to express their views and have those views taken into account before an airport, or similar facility, is constructed.

I feel confident that no such process would be underway if the old system of great deference to the project sponsor, or the old reluctance to grant injunctions to citizen groups, were still in force. Nor, I must add, do I think that the administrative response would be what I have described if the limits of judicial intervention were perfectly regularized and circumscribed. The willingness of courts to look at reasonableness in the particular circumstances, to use something of the common law method, represents some loss of certainty and an increased opportunity to keep administrators and industry on their toes.

To be sure, every person with operative responsibility has a strong desire for certainty, and conventional legal analysis tends to give a very high premium to certainty and predictability. But the question we must ask is whether it is worthwhile to trade some of that sureness of result—with its tendency to produce mechanical compliance—for the opportunity to promote high levels of concern and innovativeness? My experience suggests that this tradeoff is worthwhile, and that one of the challenges before us is that we may have to learn to live with a little greater uncertainty than we have had traditionally.

It is important to ponder the fact that in some areas industry can and does adapt itself to high levels of uncertainty, as with markets, prices and interest rates; while in others it appears to demand something approaching an absolute. Our handling of matters like environmental protection requires us to ask honestly and without preconceptions how much uncertainty, and of what kinds, we can acceptably adapt to for the benefits of needful environmental protection. Considering the speed with which technological changes occur, with which scientific knowledge develops, and with which public opinion changes, we may have to learn some adaptive skills that were unknown in the past.

Adaptation can come in many forms. It may involve less reliance than in the past upon high capital cost one-time investments, and a move toward greater flexibility. It is a platitude to note that one can cope with problems like those in energy and transportation by moderating either demand or supply. Revisions of price
structures, rather than capital investment, may give greater flexibility. Rescheduling flights or improving air traffic control technology may be appropriate means of meeting fluctuations and uncertainties in future demand. The mobile classroom, or moving students to schools, may be a partial solution to uncertainties in school building, where future residential development patterns are uncertain. Small, low-cost, short-life, generators may be a better solution in some instances than vast 50 or 100 year hydro-power structures.

Let me return now to my airport example and to another aspect of the question of public participation. Having indicated the virtues of the process by which the Detroit airport managers have prepared for their public hearing, I want to call attention to an element of the problem for which they have not prepared, and for which I do not blame them. The problem is this: a very elaborate public hearing is planned; the airport spends probably hundreds of thousands of dollars obtaining expert studies on noise, land use, traffic projections, and the like. They then will hold a hearing and present all this information to the local public, asking for comments, criticisms, and suggestions. In all likelihood, they will receive, at most, vague and perhaps stridently emotional negative comment. The airport managers may be disappointed. They have stirred up negative community response, but they probably will not get any significant factual or detailed critical information. The results may be a further disenchantment with the idea of public participation.

Let us, however, look just slightly beneath the surface. If this is what happens — and the hearings thus far held in other cities suggest it generally is — what does it tell us? In my opinion it tells nothing about the value of the public hearing idea. Rather it says that when one party to a controversy has essentially unlimited funds to spend on experts, and the other has essentially none, there is not going to be a sophisticated explication of technical or policy issues. Moreover, the party without resources is highly likely to use the only tool he has at his command; that is, to lash out with high levels of emotional response. I can assure you that if local opponents of airports (or other similar facilities) had at their command the resources that the agency did, you would hear very little hysteria; you would hear detailed, dispassionate, technically-sophisticated responses to each of the sponsor's claims. We all work with the best tools we have available.

This brings me to my final point, the reiteration of a suggestion I made just a year ago at the Atomic Industrial Forum in talking about public opposition to nuclear plants. It is this: If we are to maintain the practice of the public hearing, if we are to operate on the assumption that public participation is legitimate, we must arm members of the public with the necessary tools to participate knowledgeably and intelligently. This means we must give the economic means to present technically-detailed information.

I suggest that we experiment in at least one such area by requiring the project sponsor to put up a sum equal to something like one-tenth of one percent of the capital cost of the project to be made available to potential public opponents of the project so that they can have conducted, for them, environmental studies and reports of essentially equal quality to those conducted for the sponsor.

If we began to adopt some such process, we would see a good deal less judicial or political intervention. For I am convinced that much of the true incentive for such intervention is a powerful uneasiness about the adequacy of present arrangements for public participation.

I don't see any insuperable obstacles to the implementation of such a proposal if we are willing to try some innovative approaches. I would suggest something along the following lines. For each such project (like a major airport expansion), we would have appointed a disinterested person with no other function than to allocate the "public participation" fund for studies and reports. Such a person might be the kind of individual appointed to be a master in certain lawsuits, or a well-known and disinterested scientist.

This appointee could then operate in the following ways: He could hire a few advisers to indicate to him the kind of work that is needed to prepare the local community adequately to participate at the coming hearing. At the same time, he might set up some meetings with local groups and interested organizations to discover the nature of their concern. He would then go forward to contract for those studies and reports he determines are needed within the budget available to him. His decision would not itself be subject to challenge, as in a judicial proceeding, but would represent his own best judgment. The information then obtained would be made available to interested citizen groups. They would lose something of control of the information to be gathered for them, but they would be vastly better off than they are now.

I do not suggest that such a situation would be perfect, but I am confident that it could be workable. And I am certain that the experiment is worth trying now in an area like power plant siting or airport location. I think it ought to be tried upon the initiative of government agencies and concerned industries as a self-interested effort to promote better decision-making, as a sign of an honest effort to make citizen participation meaningful, and as a genuine way of seeking an answer to the question whether there are some alternatives to confrontation.

Do not underestimate the depth of citizen discontent, of which litigation over environmental issues is merely a single sign. Do not underestimate the ability of citizens to penetrate phony accommodations in the direction of participation. And do not underestimate the grave importance — all flamboyant rhetoric aside — of making environmentally sound decisions.

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