

Book Review: "Community Planning, A Casebook on Law and Administration", by J. B. Milner (ed)

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“COMMUNITY PLANNING, A Casebook on Law and Administration”, EDITED BY J. B. MILNER, TORONTO: UNIVERSITY OF TORONTO PRESS, 1963. Pp. xx, 794. (\$15.00).

Community planning as we know it to-day is a subject of quite recent origin basically dating from the enactment of *The Planning Act*, 1946,¹ which preceded the present statute. A few years earlier, The Municipal Act had been amended in respect of the powers of municipal councils to pass by-laws dealing with the use of land and buildings and the regulation of such matters as bulk, height, location and size of buildings along lines similar to those now provided for in section 30 of *The Planning Act*.²

In the case of *Toronto v. King*, Riddell J. remarked “The common law right of every man is to build upon his own land whatever kind of building he sees fit, so long as it is not a nuisance, public or private”.³ How drastically various legislative bodies have modified (or attempted to modify) the common law position and the way in which the Courts have reacted are subjects on which there is ample documentation in Professor Milner’s excellent casebook.

One is not intended to read such a volume from cover to cover during the course of a short series of sittings. As Professor Milner points out, “The book can only be used effectively by a reader who in Bacon’s words, will chew and digest it”. Indeed, it provides much which can usefully be put to such use.

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¹ (1946) 10 Geo. VI (Ont.) c. 71.

² R.S.O. 1960, c. 296.

³ (1923) 54 O.L.R. 100 at 102.

The work is far more than a compilation of cases, although needless to say it reproduces the leading ones. What renders the book particularly valuable is the diverse selection of materials from sources either inaccessible or nearly so. There are extensive extracts from decisions of the Ontario Municipal Board and committees of adjustment providing the student with an unusual opportunity to witness the administrative process at work. The editor has drawn extensively from articles and papers by persons who are or purport to be experts in their field. The book provides copious references to the Ontario statutes as well as to those of many other jurisdictions, particularly the Western Canadian provinces. As the editor indicates, the materials have a Canadian emphasis and it is our good fortune to have them collated particularly when one realizes that this branch of the law is of such recent origin.

Obviously a book of this sort finds its greatest utility as an adjunct to a course of lectures. There can be no doubt that it would serve this purpose well because it offers a varied and thought-provoking selection of material of such a type as should foster vigorous discussion. Without the benefit of the accompanying lectures the purpose of including some items is a trifle obscure. For example, a short explanation (such as appears in some sections) as to the arrangement of extracts in the chapter "Planning and Land Values" would have been useful.

In its broadest sense, planning might embrace every phase of man's being, what Mumford regards as "the provision of an environment suited to every phase of life and growth, from infancy to senescence."⁴ One of the means of achieving this is by regulating the individual's use of land. Until quite recently such regulation followed quite narrow lines. In the City of Toronto for example, there were literally hundreds of restrictive by-laws applying to land and buildings situated on named streets or within small areas. In most instances they seldom did more than to prohibit the use of land or the use and erection of buildings for a purpose other than that of a detached private dwelling house. In 1952, the City enacted its first comprehensive zoning by-law setting out in detail the uses to which land and buildings might be put throughout the whole municipality and providing an extensive series of provisions as to lot coverage, landscaped open space, location of buildings, parking requirements and so on. The result is the complex type of by-law referred to in Professor Milner's chapter on "Land Use and Bulk Controls".

As a further example, the editor sets out a New York City zoning resolution, noting that its provisions have been reproduced "as an illustration of the drafting devices used to make a complex 'by-law' more understandable". The extent to which the draughtsman has succeeded in clarifying the extent to which buildings are permitted to penetrate "the sky exposure plane" and the requirements

⁴ "Planning for the Phases of Life" quoted in casebook, p. 72.

as to providing for a minimum distance between buildings "in high bulk districts" is in this reviewer's opinion somewhat conjectural. In fact it might be useful to ponder the effect on the democratic process when such complicated enactments are required to be debated by elected representatives whose powers of comprehension in such matters can hardly be expected to match those of professional planners, architects or engineers.

As even a cursory examination will reveal, Professor Milner's book deals in a comprehensive manner with virtually every phase of the control of land use, both by public and private means and no attempt will be made to outline its contents here. Reference to one particular chapter, that on "Non-conforming Uses: Retroactivity", should be made for it is this matter which seriously weakens any effective zoning scheme.

The problem of course is not a new one although its nature is more readily appreciated when one has an opportunity of examining the concentration of decisions the editor has collected. The difficulty arises from such a well intentioned common sense provision as that set out in section 30(7) of The Planning Act providing that a zoning by-law does not apply

to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose.

The editor has set out a substantial portion of the judgment in the Oakwood Stadium case.⁵ This pertained to property used by the public for witnessing various kinds of sport such as soccer, rugby and track and field events. Prior to the passing of a by-law in 1948 restricting the use of land to various residential purposes, the then owners had concluded that the premises, for safety reasons, were not appropriate for various types of automotive vehicle racing. In 1951 new owners made what changes were required to render the property suitable for stock-car racing. The subsequent use of the stadium for this purpose was held by the Court of Appeal to be permissible. The Court concluded that the purpose may be construed as a general one. As Laidlaw J.A. stated ". . . it cannot be said that the purpose for which the property was used on the day of the passing of the by-law was for football games or for foot-races or for any other particular kind of public entertainment, exhibition or performance. It was for one and all of that kind of activity".⁶ Perhaps this lack of change was not so apparent to neighbours of the stadium who heard the loud exhaust noises, the screeching of wheels and the clanging and banging and who were the recipients of the extensive exhaust fumes referred to in the dissenting judgment of Henderson J.A. Statements in more recent decisions compiled by the editor to the effect that a change in the character of the user is not to be considered and that

⁵ *Regina v. Cappy and Smith*, [1953] 1 D.L.R. 28.

⁶ *Ibid.*, 35.

a use may be legally nonconforming even although only incidental at the relevant date compound the confusion.⁷

Insofar as their termination is concerned, the Ontario legislation provides a somewhat impractical power which may be exercised by municipal councils to acquire non-conforming land or buildings. As effective zoning requires the eventual elimination of such uses the extracts selected by Professor Milner respecting amortization of non-conforming buildings are particularly pertinent.

Regardless of how comprehensive a zoning by-law may be, its utility is destroyed if it is not effectively enforced. The editor refers to legislation providing for imposition of fines where by-laws have been breached. While experience indicates that the maximum fine is rarely imposed, even if it were such would not deter a substantial zoning violation. One might argue that a continuing offence might result in the accused being repeatedly charged although from a practical standpoint such a course is not feasible. The effective means of securing enforcement is therefore to restrain the contravention of the by-law by injunction.

While Professor Milner refers to certain pitfalls which this remedy entails there is an additional one in that such a course of action is lengthy and cumbersome. In the first place, the municipal corporation's right to an injunction before trial is doubtful.⁸ After all, what irreparable damage does it suffer? Furthermore, the prosecution of an injunction action involves the delays inherent in getting the case to trial and even if the plaintiff is initially successful the recalcitrant defendant may decide that the economic benefits of his illegal user of the property might justify his resorting to the appeal courts. In the meantime, the breach of the by-law continues, perhaps for years.

The more expeditious determination of what might well represent flagrant breaches of a zoning by-law is a matter worthy of consideration. In the meantime, both the teacher and student are indebted to Professor Milner for his having made available so exhaustive a selection of cases and materials pertaining to what is one of to-day's most vital breaches of the law.

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⁷ *Regina v. Rutherford's Dairy Ltd.*, [1961] O.W.N. 146; *O'Sullivan Funeral Homes v. City of Sault Ste. Marie et al.* (1961), 28 D.L.R. (2d) 1.

⁸ *Township of York v. Smith and Cappy*, [1951] O.W.N. 570.

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