SOME FEATURES OF FINNISH ENVIRONMENT LAW

A STUDY IN CONFLICTING INTERESTS

BY

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> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.
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> (UN Conference on the Human Environment, Stockholm 1972)

1. INTRODUCTION

In developed countries environmental problems present a structure differing from that existing in developing countries. Only when a society has reached the standard of a welfare state is it possible, especially from a moral point of view, to reach a balance between exploitation and preservation of the natural resources of a country where man's use of the environment is increasingly diversified. In the Nordic countries there are in force or under preparation statutes for the protection of the environment which aim to control and to combat the deleterious effects of human actions. Other norms set standards on the environment in housing, industry, etc. These interacting norms contribute to shaping the factual, though not always lawful environment in which man has to live whether he wants to or not. Necessarily, the right to the environment will be determined by the contents of these norms. Considering the matter from the aspect of basic human rights, one should compare the result of those norms with the ideal environment to which man is supposed to be entitled. In this paper, however, I propose to study the problem with regard to the actions which individuals and authorities can take for environmental purposes, particularly on the basis of Finnish law.

One could put forward the idea of an environmental interest, the concept being used in the same sense as the interest of an owner. This concept would be the interest of a meaningful use and protection of land. However, it would not be appropriate to use the concept in this sense because the different elements entering into it would often be opposed to one another, depending mainly on whether we look at the need for change or the need for conservation of a landscape or of an environment. Moreover, it seems that different subjects and authorities have different ideas of the

value of a particular environment. So it is necessary to strike a compromise between the conflicting values and to try to discover which effect of an environmental measure will be optimal from the general point of view. In most cases, we are able to state which solution would be best from the ecological or ethical or cultural point of view, but difficulties arise when these protective environmental interests are in conflict with economic or political needs. It would be possible to estimate the impact of these aspects if we thought in terms of growth and economic prosperity. Nowadays we are painfully aware that although growth is a dominant factor it should not be allowed to lead to environmental destruction. Since this is not an article on environmental economics or politics, the problem to be faced here is that of the laws relating to the environment and their construction.

First of all a question must be put: Is there a concept of environmental harm or nuisance? The more we realize the value of a particular environment, the more we might accept such a concept: the concept of nuisance depends on what is commonly practised. The Continental law books indicate that an environmentally negative influence is to be regarded as a (private) nuisance by applying a literal interpretation of originally strict rules concerning the use of land. Supposing that there exists a right concerning a certain quality of environment, it seems reasonable to guarantee that actions could be brought under this right. It is, in a way, contradictory to speak at the same time of a relatively unlimited use of land and of the possibility of regulating this use in terms of environmental and other common needs. It is necessary to find practicable means of implementing environmental interests as a whole. In this paper I shall try to elucidate these interests.

2. THE CONCEPT OF ENVIRONMENTAL HARM

If we accept the idea that environmental harm constitutes a nuisance, the legislator has to be given the competence to regulate harmful forms of land use. Though it is not possible on the basis of Nordic laws to forbid or to control every kind of use of individual property, we do have, as a matter of fact, a legal principle which enables the authorities to control the use of land by different measures. This control might precede use or it might be performed to survey the compliance with stipulated conditions. Environmental interest is of course an undivided whole, but the legal measures are of varying nature. So there are means for a social valuation system, like planning and land development, including the issuing of

general standards to prevent harmful emissions. On the other hand, inhabitants of the site should have the right to take action against nuisances in the environment, independently of the existence of common interests. However, the distinction between physical and non-physical forms of environmental harm makes it almost impossible to enumerate situations where a legal norm is supposed to have a regulative function.

One might state that ownership of land implies the right to expect a rational and environmentally harmless use of land by neighbouring owners and entrepreneurs. As far as private relations are concerned, actions in cases of improper use are based on the concept of nuisance (cf. the German term "Immission"). We can face the problem in two ways. It is, of course, possible to concentrate on the concept of nuisance and distinguish three categories, generally called (1) tolerable nuisance, (2) excessive nuisance—i.e. in the meaning that only private interests are concerned—and (3) "public action" nuisance where public welfare might be offended or put at risk.[1] In fact we can see that such a classification is based on the gravity or the nature of the harm caused by neighbours. In legislation this kind of nuisance is always supposed to be of a certain duration. Therefore other harmful effects, induced by accident or fraud, are usually subject to a different conceptualization and hence a different norm system.

Another way to face this problem is to look upon it from the aspect of whether the right to action exists or not. It is not only the substantive issue, e.g. pollution, that constitutes the basis of regulation but also the means of enforcement at the disposal of persons and interest groups as well as of authorities. Hence the relation between "nuisance" and the right to take action depends on the gravity of the harm or detriment caused in the neighbourhood. This interdependence seems rather unpractical, partly because the concept of nuisance is difficult to define and the degree of tolerance which might be accepted is difficult to estimate and partly because people may not be aware of the environmental values involved. The present author therefore envisages the possibility of developing the present permit systems into a system of rights of parties to bring actions. There should be an *actio popularis* and during the subsequent examination the authorities should have the power to investigate both private and public interests on their own motion. We already meet this approach in the Finnish Water Act, which has a licensing system of its own. A survey of Nordic environment law recently made by Mr. Justice Bertil Bengtsson (*NU* 1976: 25) indicates clearly that the central material norms in all five countries are, for the most part, comparable, although—owing to different

[1] Cf., for this terminology, von Eyben, *Fast ejendoms regulering*, 1971, p. 555.

conditions—some rules bear on national features. On the other hand, the rules of jurisdiction and administration differ very much from one another, so that a comparison in this respect does not prove the superiority of one system over other systems. Moreover, there has been no Nordic legislative cooperation within this field apart from a number of important conventions (see *NU* 1976: 25, pp. 40 f.).

3. PRIVATE AND PUBLIC INTERESTS AS ARGUMENTS AGAINST NUISANCE

In so far as legislation is based on a system of prior control (planning, permission, notification, etc.), private and public interests are treated equally from a procedural aspect. However, this does not immediately lead to a sufficient degree of protection of private rights but only to a right to be heard in the matter, provided the interest is well-founded. That is why the forms of public hearing as well as the status of private claims relating to these forms are of great importance both from a Finnish and from a more general point of view.

There is a close connection between planning and environmental protection and we should need a system to decide whether a rule is to be looked upon in one way or the other. In my opinion *Hans Ulrich Müller-Stahel* has developed an interesting system of environment law.[2] It is based on the following three main features:

- Legal measures of space and economic planning to avert abstract threats to the quality of the environment;
- An executive and controlling organ of environmental protection with competence to take action, to avert concrete dangers;
- Repressive measures of penal law, administrative coercive law and private law to reinforce and guarantee the preventive measures mentioned above.

In fact, one cannot expect environment law to be effective without a comprehensive system of preventive and repressive means.

The question whether damages for environmental nuisances should be paid is complex and depends on chance circumstances and scattered regulations. Compensation only to a large group of interested inhabitants or other subjects does not, of course, restore the earlier status, so from the

[2] Müller-Stahel (ed.), *Schweizerisches Umweltschutzrecht*, 1973, p. 557.

environmental point of view physical reparative measures taken by the user, i.e. the polluter, are of primary importance. A pollution-control fee laid upon the polluter according to the principle that the polluter is responsible for caused damage has a positive effect only if it does not increase the detrimental effects and if it leads to preventive measures.[3] If we consider a certain use of land or a certain establishment to be a risk to the environment, partially or as a whole, the most reasonable course would be to minimize the possibility of harm in advance. This is possible by means of a licensing system. This, of course, would involve a restriction of private (and public) decision-making. There is a difficulty in determining how far such restrictions might legally reach. One might probably say that in so far as the nuisances reach beyond the boundaries of the land of the user, even vertically, the legality of any form of public control is beyond suspicion. Because of this difficulty we are confronted in Nordic laws with different types of prohibitions against environmental hazards. These legal norms, which for the most part have an old Roman and Continental tradition to rely upon, are based on certain criteria, viz. the vicinity of two or more properties, the degree to which the nuisance is unreasonable and whether or not it is of a lasting nature.

The need to distinguish between private and public interests in Finnish law is due to the fact that authorities, as a rule, do not make their decisions with regard to all interests concerned but only to those determined by law. I should like here to refer to a decision made by the Finnish Supreme Administrative Court (hereinafter: FSAC) (Yearbook 1975 A II 68):

> In this case a town council had authorized its technical committee to lease a certain area of land (17 000 m²) to a private company for industrial purposes, in particular for an asphalt station enterprise (hereinafter called *Matter I*). Over a hundred persons representing a local house-owners' association sent a letter to the town council suggesting that the site be moved 200 metres to reduce the impact of noise and fumes on the settled area. The association was informed by municipal decision that it was for the building authority, first to make a decision in the event of building permission being applied for and, secondly, to decide whether environmentally harmful effects would preclude the granting of such permission.
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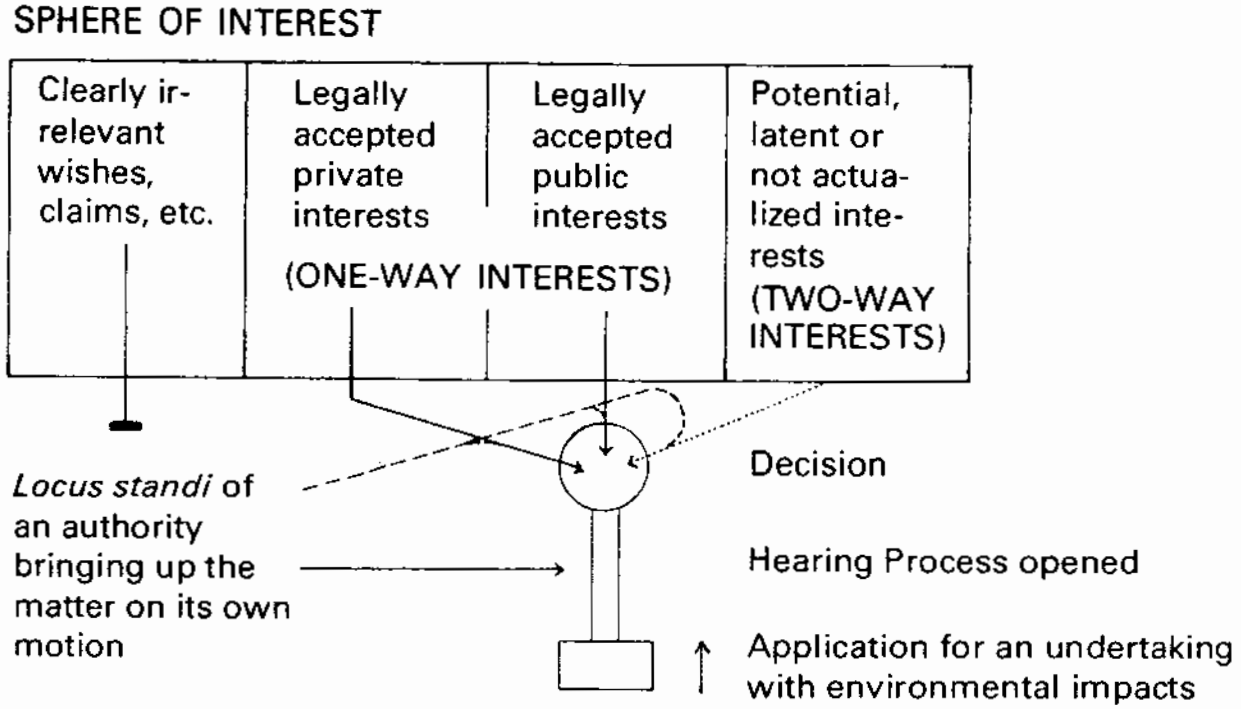
> In conformity with health legislation the Health Board issued a siting permit containing the condition that only light fuel oil should be used and that the amount of dust should not exceed 150 mg/Nm³ (*Matter II*). An inhabitant of the town appealed to the county administrative board against the decisions made in both matters and claimed that they should be revoked because the

[3] The Finnish water conservation fee has to some extent this function, see Hollo, *Pilaamisellon sisältö vesilain mukaan* ("The Content of the Prohibition of Pollution according to the Water Act", with a German summary), 1976, pp. 324 ff. and 353 ff.

asphalt enterprise would cause sanitary and environmental harm. The county administrative court considered that the decision in Matter I was not appealable and therefore did not review it. As far as the other decision was concerned the court arrived at the same result on the ground that *the appellant's right was not affected* in such a way that he could appeal (under the Health Act and the Act on Neighbour Relations). The FSAC unanimously upheld the opinion of the district court in the first matter but concerning the Health Board's decision is stated (by 5 votes to 3) that the siting permit had affected the appellant's right in such a way that he had become entitled to appeal under the Health Act. But instead of returning the case the Court examined the matter and stated that the enterprise could not cause any sanitary or environmental harm as referred to in sec. 18 of the Health Act. The permit issued by the Health Board did not have any effect on a future building permission or on the provisions of the Neighbour Relations Act in so far as these protect *private interests.*

We may note that, while the appellant's action was dismissed on the ground of *absence of interest,* the Court did not deny that he might have an interest but refused to examine it in the context of that particular proceeding. Further, we should bear in mind that the licensing authorities on their own motion *are to take private interests into consideration to a certain degree* irrespective of whether the parties themselves have brought them up or not, though the public information of an application is supposed to reach all persons involved. Another question, then, is how far private subjects (and sometimes even certain specialized authorities) should have the right to be heard in cases where the interest is obviously of a public character. It is typical of the Finnish system that rules concerning what interest constitutes a right to be heard depend on the type of permit or claim. The possibilities of action, on the other hand, depend mainly on the type of nuisance.

The framework of interests is complicated. It seems that one should distinguish between two patterns of environmental decisions, viz. the decision as such (based on application, zoning, etc.) and the decision in terms of alternatives. I propose to use the terms *one-way decisions* and *two-way decisions*. The cases which I call one-way decisions often hold an interest to be contrary to the projects at issue, but since rules relating to the conditions of permission do not cover potential future interests, the decision is based strictly on a comparison of immediate material benefit and harm. This interest is latent, though evident in similar situations. Let us take the following example. A highways administration intends to build a road through a previously quiet part of a village or region. Probably objections against such a "necessary" or "socially useful" project would not be heard and demands that the road should be built elsewhere would be classified as



unreasonable. Later on, perhaps, nature conservation authorities realize the value of, let us say, a land and forest area around the road. But by then the building of the road has enlarged the village and given rise to new investments in the area. However, the plans to preserve the area are welcomed by most of the local inhabitants and by scientists but opposed by municipal and commercial interests. We see that the interests involved in the road-building case were the same all the time, but *the environmental value had changed*—or rather it had not changed, but had been perceived in another way. Should not this argument lead to the conclusion that environmental interests must be anticipated, which means that a right to be heard should be granted in the first stage of decision-making? It is highly questionable, as already mentioned, whether it is possible to maintain at this stage a distinction between public and private interests.

In a *two-way decision* alternatives are dealt with in such a way that a permit can be refused on the basis of planned or feasible values. On this level interests require an alternative analysis of land-use solutions and perspectives. There are two possibilities: an application might be rejected as inappropriate; alternatively, the solution might be, in the case of a useful establishment, to alter the application as well as its plan during the licensing process or to make the permission conditional. In any case a basic rule for the evaluation system has to be found. That rule consists of the significance that *parties and/or authorities* might give to their objections. *As a rule a party* (*on the basis of interest*) *has* locus standi *in the matter, including a*

right to appeal.[4] A person for whom a decision means an obligation or whose rights are curtailed ought to be heard in the process of administration. The hearing is not always bound by formal criteria as to whether the subject is a party or not. Sometimes it is necessary to distinguish between "parties" and other related subjects. A municipal water board, for example, is not a party but it is entitled to give its opinion in water cases.

Two-way interests have a chance only when legal rules make it possible to take other than clearly recognizable legal rights into account. Under a provision where only parties with property rights have the possibility of objecting to the effects of an establishment, or in rare cases to its siting as such, the decision-making authority cannot reject an application on other grounds, let us say for the benefit of future environmental needs. According to certain rules an application can be examined in a wider context than in relation to individual property rights. Here, as a matter of fact, it seems as if "parties" and authorities could speak for the public.[5] In so far as planning serves as a foundation for future or present environmental needs, it is logical to bind establishments and constructions to detailed plans. However, this system is not perfect. When—as is usually the case in Finland—a plan does not lay down rules on the siting of detrimental establishments or forms of land use, members of the community should have the right to make their objections when public interests are included in the framework of the permit rule. Actually this question arises especially where the main environmental acts (the Act on Neighbour Relations, the Health Act, the Building Act, the Water Act) are involved (see section 7 *infra*).

Another problem is that permits should not be unchangeable but subject to amendment in cases where the circumstances are likely to change; I call this the *permutation clause.* According to such clauses, which are common in other legal systems as well, either a permit is granted only for a fixed period of time or a temporally more or less unlimited permit can be revoked or its contents made more strict. The last-mentioned model prevails in the Finnish system, though in other respects a permit should as a rule be irrevocable. It should be mentioned that under special circumstances, in conformity with the Water Act, private subjects may claim that a permit should be reexamined or, in cases of excessive pollution, even revoked. This right belongs to an authority or to anyone suffering harm,

[4] See, for the Finnish system, Merikoski, *Hallinto-oikeuden oikeussuojajärjestelmä,* 1968, p. 132.

[5] According to the Act on Private Roads, sec. 7 (as amended 1975), a road cannot be built when it is not appropriate for common needs. Moreover, the interest of natural preservation as well as cultural aspects can prevent the construction of roads.

i.e. private subjects showing an interest of their own. The nuisance does not necessarily have to exceed the tolerance level. Since the legislator here speaks of the "control authority in question", not only the general control authority (the National Water Board) but also authorities representing specific public interests such as fishing, nature conservation, etc., have the right in question. Under the Act on Neighbour Relations of 1920, after a permit has been granted private subjects can only claim damages or measures to reduce harm exceeding the tolerance level. We see that a permit granted in conformity with both of the acts mentioned cannot be altered on the ground that later environmental needs call for this.

As a basis for a more detailed analysis of the party-interest system it seems desirable first to present a survey of Finnish planning legislation.

4. PRIVATE ENVIRONMENTAL INTERESTS IN THE PLANNING PROCESS

If we look at the Finnish planning system, it is obvious that reservations for land use have both a positive and a negative impact. On the one hand, a plan can lead to housing, industry, roads, etc., which have or may have a stimulating effect on business activity, albeit with varying side-effects for the environment. On the other hand, the plan can forbid most kinds of lucrative land use and in that way preserve environmental features, but with the side-effect of lowering the commercial value of land. The main general principles for land-use planning are international, the tendency being to coordinate land use and pollution control. In federal states, however, it seems that land-use control has only recently become a target of federal authorities, at least in so far as land use might have pollutant effects. In Finland, where the central administration and local autonomy confer on certain local authorities the right to regulate land use and to control pollution, legal rules and the control power of the state should guarantee equality and justice.[6] According to the Finnish Constitution of 1919 the state has a right to control and direct municipal functions by means of legislation, but not by means of administrative measures as such.[7] The independence of the municipalities has been as extensive as has been

[6] The developmental trend seems to be that local authorities are more bound by means of state prescriptions, e.g. financial planning. The opposite seems in part to hold good for Denmark, where the possibilities of appeal have been restricted of late as far as municipal permits are concerned. This is due to the partial decentralization principle, see Andersen, *Kommuneplanloven*, 1976, p. 314.

[7] Holopainen, *Kunnan asema valtiossa*, 1969, pp. 288 ff.

necessary to fulfil basic municipal functions.[8] Nowadays ministries and central boards in Finland as a rule issue directives. The normative effect of these is sometimes perhaps more extensive than it ought to be. In fact we still need a legal study concerning the powers of the state to bind the municipalities in the field of environment law.

In Finland there is a kind of *actio popularis* in the sense that every member of a municipality has the right of appeal in most municipal affairs. This is important with regard to environmental issues, particularly as far as planning is concerned. According to the Municipality Act of 1976, sec. 139, every member of the municipality has the right of appeal on the ground that a municipal authority's decision encroaches upon his rights. Moreover, all members are given the right of appeal in cases of faulty or illegal decisions. Generally, however, the legislation relating to planning, building and a few other kinds of land regulation is based on a more strict administrative procedure where a personal or subjective interest has to be proved in case of an appeal. But in some—not always definable—cases, the right of appeal against decisions made in this field is based on the Municipality Act, sec. 139. It is therefore necessary to distinguish between the member's right and the party's interest. Both might materialize in some kinds of procedures where environmentally effective measures are taken. Where the member's right of appeal is not provided, a party's private interest may serve as a ground for appeal.

Regional plans represent a continuous planning process where different areas of a certain region are reserved for different purposes.[9] This kind of plan covers two or more municipalities and consequently the municipalities have to set up a regional planning body. The legal criteria for the planning measures are sparse, the whole procedure being somewhat centralized in the Ministry of the Interior. With a few exceptions the legal effects come into force when the plan has been ratified by the Ministry. The Ministry issues directives for each planning area. The regional plan is superseded by the ratification of a more detailed plan, but subsequent amendments of that plan still have to be in accordance with the regional plan. Since the regional plan has legal effects on private land use, the members of the participating municipalities have a right to make their objections. But as the plan does not automatically lead to the establishment

[8] Cf. *op. cit.*, p. 323.

[9] The plan is based on research and inquiries which should cover all relevant needs, see the Finnish Building Act (1958), sec. 22(2) and the Building Decree (1959), sec. 18. The so-called regional plan regulations are aimed at directing a more detailed planning of the land use. Therefore authorities should—owing to the relatively binding force of this plan—wherever possible adapt permits and other decisions to the plan regulations; cf. the Building Act, secs. 26–27, and Hyvönen, *Kaavoitus- ja rakentamisoikeus*, 1974, p. 90.

of pollutant plants, a land reservation for this purpose as such should not be appealed by neighbouring inhabitants. An appeal is, however, allowed whenever someone's interest or right is or might be involved. Hence grounds for appeal are constituted by, first, substantive legal errors in planning measures and, secondly, formal errors such as an error in the hearing or in the realization of the principle of equality of members of the municipality, etc.

The general plan covers the area of one municipality. Substantially and from the environmental point of view we can consider the general plans equal to the regional plans (see the Building Act, secs. 28–32 a). Both plans have to be based on three legal criteria (Building Act, sec. 22(2)), namely local conditions, future development in the municipality, and planning measures relating to areas in the municipalities of the neighbourhood. Moreover, due regard must be paid to the economy of planned use of land and, in particular, care must be taken that landowners will not suffer substantial disadvantages.[1]

If we presuppose that planning measures should lead to an environmentally balanced solution, where private interests in environmental quality are included, private subjects can claim either that more preservative reservations should be made or that a measure should be discarded on the ground that it is too one-sided. During the planning process, before the plan is accepted by the municipal council, the right to make objections belongs to *interested* subjects (Building Act, sec. 125).[2]

National planning has no legally binding force in Finland but it does influence regional and municipal planning. The need for a physical plan, which would cover the whole country, is obvious in Finland, too. Compare the Danish and Swedish systems of state planning.[3]

If we consider the most extensive form of general physical planning on the state level as a part of administration,[4] this need not have a direct legal

[1] The so-called master plans, which are a kind of draft, can be approved by the regional planning council as well as the plans themselves; as far as the master plans are concerned they are not subject to appeal.

[2] Preparatory municipal planning decisions are not subject to appeal.

[3] The Finnish *Commission Report 1974:44* recommends that state planning should be used to preserve and to develop areas and resources of national importance. The Swedish National Planning System has for several years had as its aim to coordinate ecological needs and economic possibilities. One of the leading principles has been that plans concerning environmentally negative measures should be preceded by early, general and uniform considerations.

[4] By administration I mean here a process where rules for more detailed decisions are given to bind authorities but where the legal effects arise on a lower concrete level. That process is, of course, based on legal norms, the validity of which has to be shown separately. In so far as the process produces illegal measures on a lower level, the objections have to be allowed on the basis of interest or as a municipal appeal.

effect on private interests and therefore participation of citizens[5] does not seem to be necessary.

The Finnish planning system is, however, rather far-reaching with regard to a party's right to be heard. The rule that even during the drawing up of a plan landowners should be informed is legally binding regardless of the type of plan (the Building Decree, sec. 154).[6] The question of publicity and secrecy in administration has a close connection with the possibility of making effective use of the party's right. One aspect is the principle that in the context of a close-knit democracy the population should participate in the planning process *before the plan is adopted.* The Finnish rule mentioned, however, only implies that landowners who might be affected by the future plan should be heard *in so far as this seems necessary.*[7] Though the rule is binding whenever it is a question of a landowner's right or interest, the planner can, of course, hear other interested subjects as well; it is therefore possible to give wide publicity to a plan under preparation. The fact that planning activity without adoption of a final plan may have substantial effects on private interests—for example, a building permit will not be granted or the formation of an estate will not be allowed—has proved that the legislation has certain defects.[8] A hearing and the giving of information about alternatives could give rise to a debate with more favourable effects to the *interested parties* in the planning area. This is important where a plan has a guiding influence on environmental activities.[9] As far as sites for polluting activities are concerned, it might be possible to restrict the right to be heard to those who have interests situated only within a certain distance of the polluting activities—provided that the harmful effects have been limited. Here we have to distinguish between the formal criteria and the existence of an

[5] "Participation of citizens" does not exist in Finland in the Anglo-American sense but the term is used here to indicate that people have a right to be heard by virtue of their membership of a municipality. However, planning as a process certainly implies a suitable degree of cooperation and information even before a draft is published, cf. the Finnish Building Decree, sec. 19.

[6] This effect has been dealt with in the Danish Municipal Plan Act (1975), sec. 6.

[7] Considering the *ratio* of this rule, in the present author's opinion the question whether or not a hearing is necessary depends on the value of interest and not on the planner's opinion. Similarly Pietilä, *Tonttirekisteriküinteistön muodostaminen Suomen voimassa olevan oikeuden mukaan,* 1969, p. 122, and Hyvönen, *op. cit.*, p. 95.

[8] Cf. Pietilä, "Rättsskydd vid markplanering", a report presented at The Twenty-seventh Meeting of Scandinavian Lawyers in Reykjavik 1975, p. 12.

[9] There is in continental Europe within the framework of the "Raumplanung" a recent trend to allow a large group of citizens to be heard during the preparation of a detailed plan not only on the basis of use of land but also on environmental grounds, see. e.g., Kimminich, *Das Recht des Umweltschutzes,* 1972, p. 65, Rosenstock, *Schweizerisches Umweltschutzrecht* (ed. by Müller-Stahel), 1973, p. 187.

interest, since the *actio popularis* does not presuppose the existence of a (legally protected) right.

It is obvious that popular activity depends on social conditions, basically on education and information. From an environmental point of view a planning measure can affect a subject as to his legal "rights", or it might be wrong on the ground of unsuitability. This distinction is clear if we base a party's *locus standi* on the right of property only: though the private right is, in this case, partially based on the possibility of an injunction, it is questionable whether the absence of such possibilities would prove that a planning measure or a permission is lawful. I would suggest that the preventive suits are based on arguments according to which private rights chiefly indicate the need for consent from the owner—in those cases public need may necessitate rules to the contrary—but in other respects the distinction between private and public interests and needs is from the point of view of principle irrelevant. Anyway we have to realize that the prevailing legal rules do not allow a wide interpretation of the party's *locus standi* owing to the conceptualization based on ownership and subjective rights.

Environmental interests have subsequent legal grounds in the Finnish system. Since it is our concern to analyse the possibility of rendering an evident interest, we may disregard the lack of an overall environmental legislation.

5. THE SITING OF AN ESTABLISHMENT

According to the Swedish Environmental Protection Act, sec. 4, a site for environmentally harmful activities should be chosen in such a way that the goal can be achieved with a minimum of damage and harm whenever this is possible at reasonable cost. This norm, as well as valid legal principles in the other Nordic countries, generally regulates the siting only in a more or less limited area. Consequently private and local public interests are dependent on which of the alternative sites provided will be chosen. On a nationwide level there are no rules having a special environmental value. But one has to admit that there are financial and other means of regulating the siting problems of polluting establishments on a nationwide level. The free market system does not allow of far-reaching restrictions in the field of enterprise, but it seems obvious that whenever the state gives support to

an establishment, the state can issue conditions concerning the site even on environmental grounds.[1]

Though in Finland planning is the primary means of regulating the siting of establishments, i.e. by issuing area reservations, objections cannot be made with regard to nationwide alternatives in general, but only in so far as an alternative is likely to diminish nuisances. In the Danish system the authorities are obliged to consider the environmental effects during the planning process (see the Act on Country and Regional Planning of 1973). The Finnish building legislation has been interpreted as implying that the planner is not supposed to consider the effects of a reservation; on the other hand, a plan does not create the right to use the area for all reserved purposes. But there are grounds for not accepting this construction. In the opinion of the present author, the legality of a reservation cannot be proved without considering all environmental consequences wherever a plan has legal effects relating to the use of detailed areas. The principles of equality and justice would appear to indicate that not only the questions of ownership and boundaries but also the change of use as well as the *legal conditions for this change* should be subject to planning decisions.

In so far as regional and general planning only control the administration's decisions but do not enable individual subjects to create certain establishments, e.g. to expropriate areas or rights, it seems reasonable to restrict the right to be heard on the matter of the legality of a plan. To take an example, the question whether or not a municipality should admit an airport within its boundaries should be decided on the political level, taking into account the reports submitted by the authorities involved.[2] The decision on the siting of the airport might—though not in itself—lead to intolerable disturbances. But, as is the case in Denmark, an establishment projected in a regional plan does not, in principle, induce environmental harm, since there are regulations concerning distances and other characteristics of airports, roads, etc., in relation to settled areas. In some parts of the Finnish legislation on building, practice has adopted the opinion that administration has to consider not only public needs but also private interests.[3] In so far as distance norms are practicable for danger-

[1] In the German Democratic Republic all state enterprises are established by means of investments. In conformity with the principles of the Decree of August 30, 1972 (*Gesetzblatt* II, p. 573) first the macro-site, then the micro-site is determined following a general investigation of economic, political, social, environmental and other grounds.

[2] In Sweden the National Planning Board is represented when the Licensing Committee (the authority for environmental permits) has its meetings, though without the right to vote in the matter.

[3] In its decision of June 19, 1972, reg. 2471, the FSAC stated, after considering the regulations in respect of the establishment of a rifle range, that the range was—owing to its closeness—likely to cause continuous and unreasonable nuisance to the appellants' residences.

ously polluting plants, these norms should in my opinion be used whenever detailed plans[4] are given legal effects through the act of ratification by the Ministry.

6. THE PRIVATE INTEREST GROUP

On the level of private ownership the existence of private interests is maintained by the primary rule that use of a property depends upon the owner's decisions. Therefore all kinds of harmful effects outside the property used create a substantive interest in cases of reduction of value or losses. Independently of this interest, an owner may have the formal right to be heard whenever his property is subject to administrative decisions. The substantive interest is, however, excluded as the basis of claims by rules concerning the obligation to tolerate effects from outside. As has been declared in conformity with sec. 903 of the German Civil Code (*BGB*), it is not possible to define the owner's right on the basis of the concept of freedom, for in fact neighbourhood rules are *the* criteria which define the limits of the right of property in relation to the effects of use outside the confines of the estate.[5] The general prohibition against causing harmful effects on a neighbour's property has been declared in legal terms, e.g. in the Swiss Civil Code (*ZGB*, art. 684). From the Finnish point of view the Neighbour Relations Act, sec. 17, regulates by enumeration all forms of air pollution, including noise and tremor, wherever the nuisance is caused by sources (activities) beyond the household level.[6] It seems to me that this section contains an enumeration of examples; its object is to ensure that a neighbour should not suffer from *continuous unreasonable* nuisances. Hence an extension of the forms of nuisances is possible (e.g. nuisances induced by radioactive emissions, light disturbances, etc.). The question of the point at which the tolerance level will be reached has been so widely discussed that I will not go into it here. In the Finnish system a person or an establishment[7] needs a permit whenever the tolerance level will be

[4] I.e. town planning, building planning and shore planning. In cases of a qualified general plan ("plan of third degree": this is ratified by the state authority and contains detailed provisions on land use) the plan might include restrictions to build or to use the soil. These restrictions can prevent landowners from a profitable exploitation of property or make them suffer from nuisance due to planned activities which have caused the restrictions.

[5] See Kleindienst, *Der privatrechtliche Immissionsschutz nach § 906 BGB*, 1964, p. 13.

[6] *Commission Report 1914: 3*, p. 59.

[7] A permit is required for an establishment or a store, for other activities permission cannot be granted: this means that a neighbour is supposed to give his consent. Moreover, other permissions might be necessary.

exceeded and whenever a priority rule (sec. 17.2) is not applicable. Hence private interests lie behind the need of a permit. Where a permit that is needed is not applied for, the neighbour can institute a court action with a view to having the activity discontinued; here the court can examine whether the tolerance level has been exceeded or not. In other cases the need of a permit is to be examined by the licensing authority (municipal building committee). At court the case will be treated as if a necessary permit had been granted if the activity has been tolerated for a period of not less than three years. The difficulty arises as to which interests are to be considered when a permit application has been made, because private interests are presumed to be at risk. It is useful to distinguish between the licensing case in which interests are taken into consideration and the sanction system, because sanctions can be applied on the basis of the fact that private or certain public interests are violated.[8]

It is the effects of nuisance that constitute the private interests in the permit system. Because it is the aim of a legal system to protect private rights, the system ought to define the level of protection to be guaranteed. Private ownership is protected in Finland by the Constitution, but this cannot imply that any owner has the right to oppose industrialization or housing development in the neighbourhood and it does not even mean that development in a certain area could be stopped on account of the landowner's interests. The real problem is to define the level of nuisances which the landowner has to tolerate. According to the Finnish system *locus standi* is not dependent solely on the right to claim damages. Private interest can be realized by the possibility of proving that the establishment is not lawful or that preventive measures have not all been taken or have not been prescribed. In the opinion of the present author correct procedural treatment of a subject suffering from a nuisance should not prevent him from making objections to the establishment as such. In the light of the Water Act it seems pertinent to state that in the licensing procedure only interested subjects (including authorities) can claim that their legal status be respected. However, owing to the duty of the authority to bring in relevant matters on its own motion (Water Act, ch. 16, sec. 21.1) all preconditions for a permit have to be examined, which means that if it becomes evident that environmental harm not in accordance with the plan

[8] The Neighbour Relations Act, sec. 24, gives a possibility for authorities to stop *on public grounds* nuisances which have a private nature but in this special case it need not have any influence on private rights. This rule, which does not conform to modern needs, indicates that private relations might implicitly affect public interests qualitatively and quantitatively. It is not necessary to use the fiction that the authority replaces a private subject who has failed to react in his own interest.

will occur, a party does not—as in other cases—lose his right to make objections or to appeal.

There is a group of legal rules which concerns the examination of environmentally harmful effects of an establishment which has been applied for. The licensing authority is bound to these rules, which means that the common interest of minimizing negative effects is provided for to a certain degree. The rules constitute part of the *public interest* of controlling compliance of legal rules. In Finland the National Water Board, in its capacity of general controlling authority, has the right to be heard as well as to appeal against decisions under the Water Act which it does not consider lawful. This interest is independent of the substantive (public) interests which this authority has to represent according to the Water Administration Act: e.g. the Board cannot on substantive grounds have a voice in matters of fishing interests, as these relate to the Ministry of Agriculture and Forestry.

The situation is, on the other hand, different where unlawful acts have been committed: private parties and specialized authorities (i.e. authorities which represent only one area of environmental interests) can notify the Board or bring a suit before the Water Court with the plea that the illegal effects of an establishment or a form of use (not the establishment as such) should be stopped or, in certain cases, damages be paid. Wherever public interest is concerned the Board has the duty to take measures. If we compare this rule with the Neighbour Relations Act, sec. 24, a tightening of the authorities' duty can be noticed. On the other hand, it seems that the common interest does not encompass an interest relating only to the competence of special authorities but also means that the nuisance tolerated by private subjects has a more general effect. In Finland, however, the Board does not have a sanction system of its own at its disposal (cf. the Swedish Environmental Protection Act, sec. 40).

Health legislation in general is part of public law, though individual subjects in all licensing systems certainly have the right to make objections to measures which could endanger the health of the population. This principle is becoming a rule even in housing and labour law as a form of protection of the *social environment,* too. According to the Water Act no form of use can be permitted which would endanger public health (ch. 2, sec. 5). Apart from this self-evident rule the Health Act (1965) contains a provision with a general environmental impact. An establishment (see the list in the Health Decree, sec. 17) which might endanger health in the environment requires a siting consent issued by the municipal health board, unless the area is reserved for that purpose in a detailed plan. As a rule the building authority cannot give building permission or permission

according to the Neighbour Relations Act against the Health Board's decision.[9] The right of appeal is formally the same here as in respect of other administrative acts, but the Health Act does not contain provisions for evaluation or protection of private interests. Since the right of appeal is subject to the precondition that the siting will cause a health risk in the environment (i.e. to the appellant), the Board should not, in my opinion, issue a permit if another site with lesser risks can be found and/or the risk could be technically averted by reasonable means.[1] Because of the division of competence a siting permit does not eliminate the need of other permits or consents.

7. THE BURDEN OF TOLERATING NUISANCES

Actions are, as a rule, not allowed in cases where a certain use of land has to be tolerated by the neighbours. In private relationships between landowners it seems as if the legal rule would not indicate how far the user might proceed but only what others have to tolerate. This relationship of concepts is interesting because the content of the burden of tolerating nuisances depends on the existence of nuisances in general and on the added effects caused by different sources of nuisance. The fact that a certain nuisance is common and is tolerated up to a point makes it possible to present a list of typical kinds of nuisances which do not give rise to any legal claims. If, for instance, an establishment is allowed on the basis of a permit system, this can lead to the exclusion of the private interests concerned, i.e. in so far as they are supposed to be dealt with and to be considered as lacking legal significance.

In the Finnish system we are confronted with a dual system for the protection of private interests. In general a citizen's right to have his interests considered is rather far-reaching in licensing systems—though the systems vary in this respect—because the system of requiring a permit has, to some extent, the function of replacing private consents. For this reason we should, at least theoretically, make a distinction between the cases where consent is not required[2] and those where a permit has the nature of an expropriation of individual rights. I propose to use the term expropriation in two senses: first, as referring to those cases where a right

[9] Certain installations which might induce water pollution have to obtain a permit from the water administration: it contains the conditions of both siting and use.

[1] See, e.g., *BGB*, sec. 906.

[2] This is the case when the user is not going to take the property or rights of someone in possession or when the nuisance has to be tolerated.

will be extinguished or an easement created in a compulsory way; secondly, in the more unusual sense of indicating that a certain person will have to tolerate harmful effects even though his consent might seem essential. Planning measures do not, as we have seen, as a rule create reductions of use in the form of expropriations in either of the senses mentioned here, but when a plan reservation has an unreasonable or excessive effect on some part of the area, individual landowners might have the right to claim expropriation[3] or compensation for damage caused by the realization of general and detailed plans (see the Building Act, ch. 8). Hence the realization of those plans is based on the possibility of expropriation for certain forms of common use; in other cases a landowner has the right (and in cases of building even the duty) to carry out the plan. If we look at an individual's right to property and bear in mind the protection rule of the Constitution, sec. 6, it is obvious that differences of opinion may occur regarding the interpretation of the word "expropriation". It seems to me that the legislator had the intention to protect mainly the title, indirectly the substance of property. Consequently the value of property depends—or should depend—on factual and present criteria and on the personal interest invested.

According to the Neighbour Relations Act, permission can be issued causing a certain degree of nuisance which is in excess of the tolerance level (secs. 18–19, amended by Act no. 581/77).[4] The purpose of this rule is to regulate in particular air and soil pollution as well as noise, but rules relating to a general licensing system for different kinds of pollution on both private and public grounds are under preparation. The question whether the licensing system should be based on the definition of the protected interest or on the qualities of the establishment is to some degree politically controversial, but it seems that both solutions are feasible in Finland. Both models exist in neighbouring countries: the former in, e.g., Sweden and Denmark, the latter in, e.g., Norway and the Federal Republic of Germany.[5] Hence there is a tendency to summarize private interests and to adapt the construction of public interests when, for example, the consent of all parties cannot be obtained. But, of course, public interest is not just the sum of private needs. In environment law the two concepts are

[3] E.g. when a general "third degree" plan or a detailed plan contains reductions of use or reservation measures which are not reasonable in relation to other owners, cf. the Finnish Building Act, sec. 135.

[4] Parties in a licensing case in conformity with this act are not only the owners of estates next or opposite to the establishment but also subjects whose tolerance level has to be examined.

[5] Cf. the Norwegian Act on Neighbour Relations 1961, sec. 19, according to which a permit is needed for industrial and other establishments whenever *detriments can arise for many people or a large area.*

interrelated: there is a very limited private area where authorities have no interest in interfering and, on the other hand, private subjects involved have often no interest in the use of certain policy rules; but in other respects it is difficult to say whether the interest or nuisance involved is of a private or a public nature. Of course it is possible to create a system where the conditions for an establishment are based on both private and public interests but where nevertheless the suffering party is entitled to claim that the tolerance level should be respected. Under Finnish law the licensing system is still formally based on the idea that only private interests ought to be considered, because the need for a permit is linked to an exceeding of the tolerance level: this means that the licensing authority (after April 1, 1978, the municipal building committee) can reject the application only if the neighbourhood will not tolerate the nuisances. The term "exceeding of the tolerance level", however, has not been defined and therefore it seems that an application would always be granted, subject of course to the condition that reasonable measures be taken. As a matter of fact the system is not merely based on private rights. The authorities already have the possibility of considering other than private nuisances because permission presupposes that the *site*, owing to circumstances of nature and other aspects, is *especially suitable* for the establishment. Moreover, the former existence of other establishments has to be examined. The "suitability" is a concept which ought to cover other than strictly private interests:

> In a decision of October 20, 1971 (Yearbook 1971 A II 80) the FSAC held that the establishment of a quarry would constitute a continuous and unreasonable encroachment on private interests and therefore needed a permit. All instances explicitly stated that it was impossible to site the establishment on the property involved in such a way that the detrimental effect could be reduced, eliminated or compensated for sufficiently. The application was rejected.

In such cases not only landowners whose tolerance level is endangered but also other groups and subjects might claim the right to be heard on the ground of non-existence of permit preconditions (public interest): this, however, has nothing to do with the party's status unless an authority has to stand for a specific public interest (health, etc.).

8. THE INTEREST OF VALUE AND THE INTEREST OF LEGALITY

Since the environmental instrument which is based on the Neighbour Relations Act will probably be renewed in the near future, I will not discuss

here the possibilities of innovations in and through practice, though doubtless there may be many. Since hitherto the licensing system provided by the Water Act has served as a model for such new legislation, I should like to make some remarks about the interest system created by the Water Act.[6]

In Finland private subjects and public subjects in a comparable position have a right to own and to use water areas. Even where owners do use waters personally there are restrictions which guarantee the realization of public interests in private areas (*usus publicus*). It seems necessary to make a distinction between the public interest in having unpolluted waters and the private right to claim damages, since there is no right relating to a certain quality of nature as such but only a right to make use of the legal means to prevent other subjects from reducing the value of an environment. Owners are not entitled to use waters in such a way that other private or public interests may be jeopardized, unless a permit has been issued or—in some cases—the consent of an owner has been obtained. Consequently, a permit has different functions. As a rule the complex of private and public interests relating to the value of an environment is indivisible. But while *private interests mainly consist of substantive values including the qualities of an environment, the public interests are substantive or formal.* Here different subjects normally represent in a certain sense a private or public interest, but this does not mean that both groups of subjects could not speak for the same interest. Let us take, for instance, fishing in a privately-owned area where the owner has the right and the authority the duty to see to it that substantial measures be taken in the matter. As I have already mentioned, this and the duty of the authority to consider interests on its own motion make it possible that interests will be considered in a licensing procedure even without any explicit claim. An authority can be given *locus standi* and the right to take action even if that authority has no substantive interest of its own in the case.[7] In the licensing procedure there is a certain group of

[6] Actually there are plans to reform the provisions concerning water pollution in particular. The plans deal with the party's position, too. In my opinion it is questionable whether it is possible or reasonable to extend the right of compensation in favour of subjects who are actually accustomed to use a water area without having any special right to that use, especially if we realize how small an impact damages have in preventing pollution. Another matter is that it is difficult for the subjects involved to bring a suit for the purpose of claiming compensation for deleterious changes of a watercourse for the time before a permit has been granted or for a later period when the detrimental effects were not known during the permit procedure. Of course, a subject has the right to receive damages, but I see a need to make it possible to have the costs of the procedure paid by the party that has caused pollution or loss unless, of course, the claim is void of any legal grounds.

[7] In case of repressive measures it seems that private subjects could not as parties speak for public interests. If an establishment has been started without permission but in such a way that the private interest will not be harmed, a subject can only notify the authorities but not bring an action against the establishment.

state authorities which have the status of a party[8] and another group which have *locus standi* only on substantive grounds.[9] So far this distinction has not been observed, but I have understood that the fact that only some authorities have been explicitly informed cannot prevent others from representing their legal interest. This means that planning, health and building authorities can act as parties in the same way as floating companies, transport companies and other right-holders.

Formal or substantive interest which might have an impact on the contents of a permit differs from the use of repressive measures. The National Water Board, which is a party in the licensing procedure on formal grounds (and in relation to public water areas, see Act of April 1, 1966/204, even on substantive grounds), has general competence in cases of unlawful activities on the part of the user. According to the Water Act the Board has to take measures wherever the public interest so requires. This interest can be both formal and substantive. Moreover, it has been interpreted by some to mean that the Board can decide whether the public interest is concerned or not. If we accept this view, the Board could refuse to take action even if another authority states that the interest represented by it is concerned. Despite the wording of the text I consider this interpretation incorrect, even though, of course, the Board is bound to act when it is more or less evident that a form of use is unlawful. Here a difficulty arises, since the provisions are partly linked to the substantive value of an interest (as in the general prohibitions against changing and polluting watercourses), but I would respect the ability of the parties concerned to value their own interest until the final decision of the Water Court on the value of interest as well as on the unlawfulness is made.

9. FINAL REMARKS

Within the framework of private and public interests the Finnish licensing systems are chiefly based on the concept of change in the environment resulting in a harmful effect on someone's right or interest. Therefore the concepts of pollution, changing of the natural environment, etc., can be made subject to scientific and sociological interpretation as well as planning as a process of evaluation. Since the legislator does not accept those

[8] These authorities are informed about the application in conformity with the Water Act, ch. 16, sec. 8(1).

[9] Other authorities, provided they are capable of representing an interest on its own behalf.

concepts as exclusively eterminative but presupposes that changes have a detrimental effect on *private* and at times also on *public interests*—for which there exists a list of examples in the Water Act—the provisions tend to acquire a wider application. This means that there might, e.g., be local or general interest in restricting polluting activities on the basis of recreational or purely socio-environmental grounds or combining general legislation with international agreements on preservation, vessel pollution, mining, and so on. A planning system with binding force for the use of a watercourse is in preparation. The overall public interest of controlling and guiding any form of land use makes it necessary to analyse that interest in its various functions in depth and to define its limits in connection with new legislation. Otherwise authorities will be charged with this mainly theoretical task and environmental interests will be dependent on vague interpretations.