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THE NEW YORK CITY NOISE CONTROL CODE: NOT WITH A BANG, BUT A WHISPER

On October 4, 1972, a major comprehensive attack on the ever-increasing level of noise in New York City[1] was initiated as Mayor John V. Lindsay signed into law the New York City Noise Control Code,[2] the result of over five years of research and planning.[3] The statute is composed of eight articles which set forth specific decibel limits for certain equipment,[4] mandate studies leading to noise controls on rapid transit systems[5] and airplanes,[6] bar absolutely some sound sources and permit others to operate during certain specified times.[7] Provision is made to tie the level of noise to the character of local communities by creating ambient noise zones throughout the city.[8] The most dramatic change is the grant of jurisdiction to the Environmental Control Board, established under the Environmental Protection Act,[9] to conduct hearings and levy civil sanctions on violators.[10]

This comment will first review the history of noise control legislation in New York City, then examine the statute itself, and finally evaluate the Code's possibility of success.[11]

The History

The problem of excessive noise in New York City, as with many of our urban areas, dates back to revolutionary times.[12] The first ordinance

1. For an extensive bibliography on the subject of noise pollution and control, see "Quiet Please," 27 Record of N.Y.C.B.A. 118 (1972).

2. New York City, N.Y., Admin. Code ch. 57, §§ 1403.3-1.01 et seq. (Oct. 4, 1972) [hereinafter cited as Noise Control Code, with internal numbering only].

3. The Mayor's Task Force on Noise Control was created in late 1966, and made its first report in March of 1967. See N.Y. Times, Mar. 15, 1967, at 49, col. 2. See also notes 33-40 infra and accompanying text.

4. See notes 110-22 infra and accompanying text.

5. See notes 123-24 infra and accompanying text.

6. See notes 126-31 infra and accompanying text.

7. See notes 88-98 infra and accompanying text.

8. See notes 132-42 infra and accompanying text.

9. New York City, N.Y., City Charter § 1403 (Supp. 1972).

10. See notes 166-75 infra and accompanying text.

11. The need for a more quiet urban environment has been extensively discussed. For a concise treatment of the subject, see Hildebrand, Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, 70 Colum. L. Rev. 652 (1970).

12. "Carriages were driving past, and such a noise . . . . Signs were made to

in the United States to control excessive noise was passed by the City of Philadelphia in 1830;[13] New York City, however, did not enact its first anti-noise law until 1936.[14] The 1936 ordinance contained a general prohibition against "the creation of any unreasonably loud, disturbing and unnecessary noise."[15] While the purpose was commendable, the lack of objective standards of measurement made it virtually unenforceable.[16]

Over the next thirty years, this deficiency was amended by successive additions to the ordinance, which listed specific, enumerated acts to be unnecessary noises in violation of the general prohibition.[17] They included the sounding of motor vehicle horns in non-emergency situations,[18] the use of sound instruments for advertising,[19] and all construction activities before seven A.M. and after six P.M. (except by permit).[20] The city had the power to seek injunctions against violations of the anti-noise ordinances,[21] but local residents attempting to enjoin noise prohibited under the ordinance met with only partial success.[22] For the most part, enforcement rested solely with the New York City Police

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the doorkeeper to shut the sashes . . . . Mr. Morris rose. Said the noise of carriages had been so great that he really could not say that he had heard the body of the paper which had been read, and prayed that it might be read again. It was so [read]." Journal of U.S. Senator William Maclay, Aug. 22, 1789 at 125-28 (1890 ed.) regarding noise at Federal Hall. Congress requested and city officials closed adjacent streets. (Copy on file in Federal Hall Nat'l Memorial, New York City).

13. See Statute, A Model Ordinance to Control Urban Noise Through Zoning Performance Standards, 8 Harv. J. Legis. 608, 614 (1971) [hereinafter cited as Model Ordinance].

14. New York City, N.Y., Admin. Code ch. 18, § 435-5.0 (1963) (repealed by L.L. 1972, No. 57, Oct. 4, 1972) [hereinafter cited as Admin. Code]. The law was the result of the report, "City Noise," prepared by the Noise Abatement Commission under the sponsorship of the New York City Department of Health. Mayor's Task Force on Noise Control, Toward a Quieter City 17, 26 (1970) [hereinafter cited as Task Force Report].

15. Admin. Code, supra note 14, § 435-5.0(a) (repealed 1972).

16. As of 1969, most municipal ordinances relating to noise abatement were of this type. 115 Cong. Rec. 32178, 32179 (1969) (reprint of J. Kaufman, The Legal Aspects of Noise Control) [hereinafter cited as Kaufman].

17. Admin. Code, supra note 14, § 435-5.0(b) (repealed 1972).

18. Id. § 435-5.0(b)(1).

19. Id. § 435-5.0(b)(11).

20. Id. § 435-5.0(b)(7).

21. N.Y. Gen. City Law § 20(22) (McKinney 1968).

22. Modugno v. Merritt-Chapman Scott Corp., 17 Misc. 2d 679, 187 N.Y.S.2d 30 (Sup. Ct. 1959).

Department.[23] However, in this highly subjective area,[24] the lack of measurable standards, coupled with the low priority of such violations, resulted in a noise level at times capable of causing permanent hearing loss when sustained over extended periods of time.[25]

The New York state legislature moved beyond subjective standards in noise abatement when it passed section 386 of the New York Vehicle and Traffic Law.[26] This statute, enacted in 1965, prohibits a motor vehicle, emitting a sound of 88 decibels[27] or more as measured on the "A" scale,[28] from operating on a public highway. It also specifies the type of evaluating apparatus to be used,[29] as well as the speed of the vehicle[30]—in short, an apparently model piece of legislation. Unfortunately, the statute has been difficult to enforce. When monitoring stations were set up on the New England Thruway, background noise distorted readings.[31] In New York City, where open areas are minimal, the echo effect of a corridor of buildings, in addition to the density of traffic, made the statute meaningless as a control device.[32]

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23. For a survey of police enforcement of noise ordinances in New York City for the years 1950-1965, see Comment, Urban Noise Control, 4 Colum. J. Law & Social Prob. 109 (1968), reprinted in Noise Pollution and the Law 60 (J. Hildebrand ed. 1970).

24. It has been stated that "One man's music is another man's noise." Kaufman, supra note 16, at 32,181 n.1.

25. N.Y. Times, Nov. 29, 1970, § 7, at 3, col. 1.

26. N.Y. Veh. & Traf. Law § 386 (McKinney 1970).

27. This limit has been criticized as too high, since lower levels are feasible within the framework of existing technology. Anthrop, The Noise Crisis, 20 Univ. of Toronto L.J. 1 (1970) [hereinafter cited as Noise Crisis] reprinted in Noise Pollution and the Law 1 (J. Hildebrand ed. 1970).

28. The "A" scale [written dB(A)] of measurement closely parallels the hearing propensities of the human ear by discriminating against the high and low frequencies, which generally are not audible. Noise Crisis, supra note 27, at 4; Model Ordinance, supra note 13, at 612.

29. The sound meter is a portable device which is relatively simple to operate, and must meet the specifications of the American Standards Association. N.Y. Veh. & Traf. Law § 386(2)(a) (McKinney 1970); see also Model Ordinance, supra note 13, at 612. The microphone is to be placed fifty feet (plus or minus two feet) from the center of the lane in which the vehicle is traveling. N.Y. Veh. & Traf. Law § 386(2)(a) (McKinney 1970).

30. The vehicle must be traveling at less than 35 m.p.h. N.Y. Veh. & Traf. Law § 386(2)(b) (McKinney 1970).

31. Urban Noise Control, supra note 23, at 68-69.

32. Allen, Legal Aspects of Noise in New York City, 166 N.Y.L.J. 1, col. 4, June 12, 1970.

Against this background, Mayor Lindsay appointed a Task Force on Noise Control, a seventeen-person panel composed of laypersons, physicians and acoustical engineers[33] which, after three years of study, produced a fifty-five page report entitled "Towards a Quieter City."[34] The group found that noise in New York City had reached "a level intense, continuous, and persistent enough to threaten basic community life"[35] and suggested that "[a] creative partnership . . . be established between public agencies and private enterprise."[36] It proposed several long-range plans for future noise control[37] but was criticized for failure to recommend action on more pressing and controversial issues.[38] The report did result in the introduction of a bill in the New York City Council, granting the newly-formed Environmental Protection Administration (EPA) "jurisdiction to regulate and control the emission of sound waves or acoustical vibrations into the ambient air"[39] and giving the Environmental Control Board (ECB) power to regulate or prohibit noise pollution.[40]

The EPA had been created in January, 1968 to combine the operating and regulatory functions of the former Departments of Sanitation and Air Pollution Control, and some of the functions of the former Department of Water Supply, Gas and Electricity.[41] The "superagency" was headed by an administrator and included the ECB, with powers to adopt and amend rules relating to air and water pollution.[42] In the area of noise pollution, however, the functions of the EPA were listed as the enforcement of existing laws and regulations and the power to conduct investigations "to develop permissible sound levels."[43] The City Council bill was intended to grant the EPA and the ECB broader powers in the area of noise abatement "to write and enforce noise control regula-

33. N.Y. Times, Jan. 13, 1970, at 47, col. 5.

34. Task Force Report, supra note 14.

35. Id. at 5.

36. Id. at 6.

37. Id. at 43-53.

38. N.Y. Times, Jan. 13, 1970, at 47, col. 5.

39. The Council, The City of New York, Int. No. 107, § 1 (Feb. 17, 1970) (emphasis omitted).

40. Id. § 2.

41. New York City, N.Y., City Charter § 1403 (Supp. 1972).

42. Id. § 1404.

43. Id. § 1403(3).

tions."[44] This action had been strongly recommended by the Mayor's Task Force.[45]

In April 1971, a more comprehensive code was circulated among the various city agencies for review.[46] Rather than grant all rule-making power to the EPA, the new code delineated the various methods of attack to be used on the different sources of noise pollution and, where feasible, set specific decibel limits.[47] On July 7, 1971, the Mayor presented this noise control code to the City Council, as proposed by the City's Bureau of Noise Abatement and the EPA.[48] Jerome Kretchmer, the Environmental Protection Administrator, declared that:

> [The Code] was designed to replace current piecemeal legislation with a body of regulations that will not only apply specific decibel limits wherever feasible, but will also define and maintain general noise standards for geographical areas of the city so that noise pollution can be systematically prevented and abated.[49]

The Chairman of the City Council's Committee on Environmental Protection, Councilman Theodore Weiss, saw the proposed code as falling "far short of the needs of a city that is drowning in noise pollution."[50] The range of fines which could be assessed was thought to be too low,[51] and a curious provision in the section dealing with rapid transit appeared to doom any hopes of quieting subway clamor.[52] Overall, Mr. Weiss felt

44. N.Y. Times, Apr. 30, 1970, at 29, col. 1.

45. Task Force Report, supra note 14, at 7, 9.

46. N.Y. Times, Apr. 13, 1971, at 35, col. 3.

47. The Council, The City of New York, Int. No. 661 (July 13, 1971) [hereinafter cited as Int. 661].

48. N.Y. Times, July 8, 1971, at 1, col. 4.

49. Id.

50. N.Y. Times, Oct. 6, 1971, at 93, col. 6.

51. This criticism is most important since violators of noise control laws, such as construction contractors, may find it less troublesome to pay whatever low fines are assessed rather than jeopardize the completion date of a contract. This problem is occurring to some extent under the Noise Control Code. N.Y. Times, Jan. 1, 1973, at 17, col. 1.

52. Int. 661, supra note 47, § 1403.3-5.05 stated: "With respect to existing rapid transit railroads, allowable sound levels and acoustical performance standards shall be limited to those which are reasonably attainable without additional expenditures." This section was criticized as effectively barring improvement on one of the most objectionable sound sources in the city. N.Y. Times, Oct. 22, 1971, at 40, col. 1. It was deleted by the City Council's Committee on Environmental Protection. Report of the Committee, contained in the Minutes of the City Council Meeting 894 (July 6, 1972) [hereinafter cited as Committee Report].

that the code did not deal with "the noises of extreme concern to the rank and file citizens."[53]

The bill was referred for further study to the Council's Committee on Environmental Protection, which held public hearings, executive sessions and open meetings over the following year.[54] Changes were adopted by the Committee at its final executive session and the amended code, with the Committee's report, was submitted to the City Council on July 6, 1972, with a recommendation for adoption.[55] The bill was passed on September 12, 1972,[56] but a delay of several weeks ensued before the Mayor signed it, with construction interests fighting for an easing of the night-time ban on construction.[57] Indeed, as he signed the bill, Mayor Lindsay announced his intention to seek amendments to "permit emergency night construction work,"[58] but to date, no such amendments have been proposed.[59]

The Noise Control Code

The ordinance, entitled the "New York City Noise Control Code,"[60] [hereinafter the Code] begins with a statement which declares it to be the public policy of the city "to reduce the ambient noise level in the city" and "to set the unnecessary noise standards and decibel levels contained herein."[61]

The Code grants to the Police Department what amounts to concurrent jurisdiction with the ECB in the enforcement of the Code's pro-

53. N.Y. Times, Sept. 10, 1971, at 69, col. 1.

54. Committee Report, supra note 52, at 891.

55. The Committee found: "No one questions the absolute fact that a continued exposure to noise beyond certain measurable levels will create partial or total deafness; nor the fact that far too many New Yorkers are subjected to these deafening noise levels. . . . At the same time, noise prevention and noise abatement efforts by government and big industry have been sparse and sporadic at best." Id. at 890.

56. A motion to recommit the bill to committee was defeated and the bill passed, 31-5. Minutes of the City Council Meeting 1107 (Sept. 12, 1972).

57. N.Y. Times Editorial, Sept. 28, 1972, at 46, col. 1.

58. N.Y. Times, Oct. 5, 1972, at 51, col. 1.

59. Interview with Mr. Blaise Parascondola, Counsel to the City Council's Committee on Environmental Protection, Nov. 8, 1972 (copy on file in the offices of the Fordham Urban L.J.).

60. Noise Control Code -1.01.

61. Id. -1.03.

visions.[62] The first article concludes with a list of fifty-three definitions, including the various types of sound sources,[63] scientific standards of the units and apparatus of measurement[64] and the general definition of unnecessary noise.[65]

Administration

Article II of the Code grants the major administrative power in the area of noise pollution to the Environmental Protection Administrator[66] [hereinafter the Administrator] to take such action as is required to abate a sound source creating unnecessary noise, including investigations, studies, hearings and tests.[67] An order for testing, however, is conditioned upon a finding that the Administrator has reasonable cause to believe that the device in question is in violation of the Code.[68] Where tests by the EPA are required, the expense of providing facilities and a power source are to be borne by the owner.[69] The matter would then be referred to the ECB for appropriate action.[70]

62. EPA expects that the Police Department will be concerned primarily with enforcement of the unnecessary noise provisions of the Code, while EPA inspectors will enforce both decibel and unnecessary noise provisions. EPA, An Administrative Handbook for the New York City Noise Control Code 11 [hereinafter cited as the Admin. Handbook] (copy on file in the offices of the Fordham Urban L.J.).

63. The sound sources are generally defined functionally, as in the case of an air compressor, "a device which draws in air or gas, compresses it, and delivers it at a higher pressure." Noise Control Code -1.05(e).

64. The meter apparatus must comply with the specifications of the American National Standards Institute. Noise Control Code -1.05(rr). This is an up-dated version of the requirements of the state statute. N.Y. Veh. & Traf. Law § 386(2)(a) (McKinney 1970). See note 29 supra.

65. "Unnecessary noise means any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person, or which causes injury to plant or animal life, or damage to property or business." Noise Control Code -1.05(zz).

66. Id. -1.05(c), -2.01. The latter also grants the Administrator the power to delegate any authority vested in him by the Code. Within EPA, the authority to direct the implementation and enforcement of the Noise Control Code will be exercised by the Air Resources Commissioner, assisted by the Bureau of Noise Abatement and the Inspection and Enforcement Division. EPA, EPA Fact Sheet on Noise Code Enforcement 2 (Oct. 4, 1972).

67. Noise Control Code -2.03.

68. Id. -2.05(a).

69. Id. -2.05(d).

70. Id.

Registration of certain devices may be required by the Administrator.[71] As originally proposed, the registration requirements could have been imposed on any commercially-owned, power-driven device which would emit a sound in excess of 40dB(A) at ten feet.[72] The provision provoked some criticism,[73] and was restricted by the Committee to devices which are to be regulated by the Code.[74] The Department of Air Resources published the first set of proposed regulations pursuant to this section on November 14, 1972, requiring the registration of all air compressors and paving breakers used or operated in New York City.[75]

The Committee also sought to put the considerable purchasing power of the City of New York behind the Code by including a requirement of noise abatement contract compliance.[76] Generally, the section requires that any contract funded out of the City's capital budget include clauses ensuring compliance with the Noise Code and it gives the Administrator power to promulgate such regulations as he deems necessary for compliance.[77]

General Prohibition

The Code has continued the common law nuisance standard of the former ordinance in article III with the simple, one-line statement: "No person shall make, continue or cause or permit to be made or continued any unnecessary noise."[78] The term "unnecessary noise" has been defined in article I,[79] and such a standard has been held constitutional in New York State.[80] It has been included for two main purposes: (1) to pre-

71. The devices are limited to air compressors, paving breakers, refuse compacting vehicles and rapid transit railroads. Id. -2.09(a).

72. Int. 661, supra note 47, -2.09(a).

73. It had been suggested that this standard was quite stringent when compared with other sections of the Code. Letter and memorandum from Profs. Cyril M. Harris and Albert J. Rosenthal to John V. Lindsay, Mayor, and the Members of the City Council of the City of New York 6 (Mar. 13, 1972) [hereinafter cited as Harris] (copy on file in the offices of the Fordham Urban L.J.).

74. Committee Report, supra note 52, at 892.

75. New York City Record, No. n.14, d1 (Nov. 14, 1972).

76. Committee Report, supra note 52, at 892. This proposal originated as a recommendation of the Mayor's Task Force. Task Force Report, supra note 14, at 6, 8.

77. Noise Control Code -2.25.

78. Id. -3.01.

79. Id. -1.05(zz). See also note 65 supra.

80. People v. Byron, 17 N.Y.2d 64, 215 N.E.2d 345, 268 N.Y.S.2d 24 (1966).

serve the existing, common law standards developed under the former code,[81] and (2) to cover situations not specified elsewhere in the Code which may develop after enactment.[82]

Substantive Limitations

The Code applies two standards to determine whether specific sound sources are emitting offensive noise. The first is an unnecessary noise standard,[83] carried over from the former ordinance,[84] but significantly expanded.[85] The second standard sets specific decibel limits which certain devices are not permitted to exceed.[86] In certain areas where technology is evolving, the Council has called upon the Administrator to conduct studies over a one year period and submit the results, with recommended decibel limits, to the Council for enactment.[87]

Article IV contains a list of specific sound sources for which decibel limits are not a feasible means of control. The outright ban against all construction activities during certain hours[88] has been carried over from the prior ordinance,[89] but the extent of the ban and the test controlling the issuance of variances has had a checkered history. The Code proposal, as originally introduced, changed the prior law by keying the permissible periods of construction work into the zoning character of the neighborhood.[90] Variances could be issued only where "no harm to the public health and comfort would result and benefit to the public interest will result . . . ."[91] Such variances would be issued by the appropriate agency,[92] but could be rescinded by the ECB.[93]

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81. Committee Report, supra note 52, at 892.

82. EPA, A Guide to the 1972 New York City Noise Control Code 4 (1972) [hereinafter cited as EPA Guide] (copy on file in the office of the Fordham Urban L.J.).

83. Noise Control Code art. IV.

84. Several of these provisions were formerly found in Admin. Code, supra note 14, § 435-5.0(b) (repealed 1972).

85. See text accompanying notes 99-102, 105-09 infra.

86. Noise Control Code art. V.

87. See text accompanying notes 123-31 infra.

88. Noise Control Code -4.11.

89. Admin. Code, supra note 14, § 435-5.0(b)(7) (repealed 1972).

90. Permissible hours in residential and commercial zones would have been 7 A.M. to 6 P.M.; in industrial zones 6:30 A.M. to 6 P.M. Int. No. 661, supra note 47; Noise Control Code -4.09(a).

91. Noise Control Code -4.09(b).

92. Id.

93. Id. -8.01(b)(3).

The prior standard for the issuance of a variance called for a finding of "urgent necessity in the interests of public safety . . . ."[94] The Department of Buildings, an issuing agency, requested that the prior standard be maintained for all construction activities except tunneling, along with a reinstatement of the three day, renewable limit on variances.[95] In the final Committee Report, the prior standard was maintained, and the prior time limitation was continued.[96] A provision was inserted permitting emergency construction activities without a variance for a twelve hour period.[97] The power of review granted to the ECB in the original proposal remained.[98]

The section dealing with limitations on sound signal devices[99] starts with the carryover provision prohibiting the use of claxons and air horns (except in cases of imminent danger or emergencies),[100] and then goes on to deal with a relatively new, but nonetheless common problem in New York City—burglar alarms and the difficulty of silencing them once activated. As of October 4, 1973, all building alarms must automatically terminate after fifteen minutes, with motor vehicle alarms shutting down ten minutes after activation.[101] The ordinance also grants the Police Department the authority to disconnect a car alarm, and requires owners of cars so equipped to post prominently in the car the telephone number at which they can be reached.[102]

Other provisions ban the playing of radios, phonographs or tape recorders on public transportation,[103] or their use for public advertising purposes.[104] Streets adjacent to schools, courts or hospitals are areas

94. Admin. Code, supra note 14, § 435-5.0(b)(7) (repealed 1972).

95. Memorandum, Amendments to Int. 661, Proposed New York City Noise Control Code, Kretchmer, Environmental Protection Administrator 2-3, Apr. 10, 1972 [hereinafter cited as Kretchmer Memorandum] (copy on file in the offices of the Fordham Urban L.J.).

96. Committee Report, supra note 52, at 893. "Warming-up" of machines and early arrival of trucks and equipment fall into the category of construction activity prohibited before 7 A.M. Admin. Handbook, supra note 62, at 32.

97. Noise Control Code -4.11(b).

98. Id. -8.01(f)(2).

99. Id. -4.05.

100. Admin. Code, supra note 14, § 435-5.0(b)(1) (repealed 1972), now Noise Control Code -4.05(1), (2).

101. Noise Control Code -4.05(4).

102. Id.

103. Id. -4.03(c). They may be played when the sound is inaudible to another person, presumably with individual earphones. Id.

104. Id. -4.03(b).

where the creation of unnecessary noise is prohibited.[105] A joint order of the Administrator and the Board of Health can designate any geographical area in the city a "noise sensitive zone."[106] The purpose of such a zone would be to extend to the area the more stringent standards of unnecessary noise applied to areas surrounding schools, hospitals and courts.[107] A renewable order, effective for sixty day periods, would list those activities which, if undertaken in such a zone, would constitute unnecessary noise.[108] Those "suffering undue hardship" from such an order may demand a hearing.[109]

The second method of control in the ordinance is the establishment of specific decibel limits for certain devices.[110] Maximum ceilings for noise emissions are legislated for motor vehicles,[111] air compressors,[112] circulation devices, [113] garbage trucks,[114] car horns, [115] emergency signal devices[116] and paving breakers.[117] In most instances, maximum decibel levels are set to take effect immediately, with provision for a lower maximum emission a few years hence.[118] This "step-down" provision is utilized to avoid the effect of legalizing noise at current levels and to

105. Id. -4.19.

106. Id. -4.21(a).

107. Admin. Handbook, supra note 62, at 34.

108. Noise Control Code -4.21(a).

109. Id. -4.21(b).

110. Id. art. V, Prohibited Noise, Sound Level Standard.

111. Id. -5.03.

112. Id. -5.11. Ingersoll-Rand has already produced an air compressor that generates a dB(A) noise emission at three feet in compliance with the Noise Control Code. C.R. Bragdon, Noise Pollution: The Unquiet Crisis 204-05 (1971) [hereinafter cited as Bragdon]. However, the Chairman of the Board of Ingersoll-Rand has pointed out that this compressor is 30 per cent more expensive than the noisier version. N.Y. Times, Jan. 13, 1970, at 47, col. 5.

113. Noise Control Code -5.13. Measurement is to be made from the window nearest the exterior of the offending device, with the microphone placed three feet from the window inside the room. Committee Report, supra note 52, at 894.

114. Noise Control Code -5.15. See text accompanying note 121 infra.

115. This limitation (75dB(A) at twenty-five feet) will become effective for 1974 car models, but approved city-country horns will be permitted. Id. -5.17.

116. Id. -5.19. New York City's Police Department has included this requirement in specifications for bids on 1,000 new police cars. A spokesman for the N.Y.P.D. stated: "[T]he Department of Purchase is requiring compliance with its [Noise Control Code] provisions on all vehicle procurment [sic] . . . ." N.Y. Times, Dec. 14, 1972, at 49, col. 1.

117. Noise Control Code -5.21.

118. See text accompanying note 120 infra.

encourage research and expenditures in noise abatement technology.[119] Motor vehicles (other than motorcycles and vehicles over 8,000 lbs. net), operating at speeds of more than thirty-five miles per hour, are given a maximum noise emission standard of 82dB(A) until January 1, 1978, at which time the ceiling falls to 79dB(A).[120] Garbage trucks will have a maximum level of 70dB(A) effective December 31, 1974,[121] while emergency signal devices will be limited as of June 30, 1973 to sounds of 90dB(A).[122]

The most infamous noise source in the New York urban setting, the subway system,[123] does not yet have specific standards set by the Code. Rather, the Council has mandated that the Administrator, within one year, define and submit to the City Council for enactment into the Code "allowable sound levels and acoustical performance standards" for rapid transit systems.[124] A parallel section calls for similar studies and standards for railroads.[125]

The provisions as to aircraft[126] require an evaluation of the effects of the noise generated by airports on the public health, welfare and comfort,[127] and suggest a methodology[128] to be considered in formulating allowable emission standards for aircraft using New York City airports.[129] However, the City's power to regulate aircraft is circumscribed

119. Greenwald, Law of Noise Pollution, BNA Envir. Rep., Mono. No. 2 at 6 (1970).

120. For motor vehicles other than on a public highway the standards are enumerated in Noise Control Code -5.03.

121. Noise Control Code -5.15. The City and General Motors Corp. experimented in the development of a quieter garbage truck which the city now uses; as of 1970, however, no commercial carting companies had purchased it. N.Y. Times, Jan. 13, 1970, at 47, col. 5.

122. Noise Control Code -5.19.

123. "It is estimated that apart from the noise peaks of 109-114 dB(A) caused by wheel screams, an express train traveling at average speed through a local station generates noise levels of 90 dB(A) or more on the platform." EPA Guide, supra note 82, at 3.

124. Noise Control Code -5.07.

125. Id. -5.09.

126. Id. -5.05.

127. A study of the well-being of a community adjoining a major airport in Philadelphia is reported in The Metropolitan Philadelphia Noise Survey: Analysis of Sound and Its Sources, Bragdon, supra note 112, at 113-50.

128. Six techniques are suggested in the statute to lessen airport noise, including shielding, revised scheduling plans, and encouraging the use of quieter planes. Noise Control Code -5.05.

129. The Port Authority of New York and New Jersey, the owner of New

by recent federal legislation,[130] and the application of the preemption doctrine.[131]

Ambient Noise Quality Zones

Article VI contains an ambitious attempt to regulate the totality of sound in a given environment, rather than concentrating on the control of individual sound sources as a means of quieting the roar, by the creation of "ambient noise quality zones."[132] The Administrator has been directed to define and submit to the City Council within two years standards and criteria for such zones, which will encompass the entire city.[133] Zoning regulations, population density and the intensity of sound in the community will be considered in establishing the criteria.[134] The current scientific research on the effects of noise on public health and welfare, and the latest noise abatement technology for sound sources within a given zone must also be factors.[135] After passage of the legislation by the City Council, the Administrator will set allowable sound levels as to devices and activities in each zone, consistent with the enacted criteria and the other provisions of the Code.[136]

This section has been criticized as being so complex as to be unenforceable.[137] Certainly there is little current information on the interrelationship of the factors listed in the production of noise, and much study will be needed before a framework can be suggested. But it is just this totality of noise which has eluded the control of lawmakers under current theories of regulation. To lower significantly the concatenation of sound in our urban areas one must go beyond the noise emissions of single nuisances and limit the "all encompassing noise

York City's major airports, has imposed a maximum allowable sound level for jets, at 99dB(A), since 1951. Bragdon, supra note 112, at 42. The airlines have devised a system to circumvent the monitoring devices. N.Y. Times, Oct. 20, 1967, at 49, col. 7.

130. Noise Control Act of 1972, Pub. L. No. 92-574 (1972), U.S. Code Cong. & Ad. News, 92nd Cong., 2nd Sess., 6053 (1972) (codified in 42 U.S.C.A. §§ 4901 et seq. (Supp. 1973)) [hereinafter cited as Noise Control Act].

131. Comment, The Constitutionality of Local Anti-Pollution Ordinances, 1 Fordham Urban L.J. 208 (1972). For a recent listing of articles on aircraft noise emissions, see Model Ordinance, supra note 13, at 609 n.4.

132. Noise Control Code -6.01.

133. Id.

134. Id. -6.01(1).

135. Id. -6.01(c). This phraseology occurs repeatedly in the Code. See text accompanying notes 139, 148 infra.

136. Noise Control Code -6.03.

137. Harris, supra note 73, at 10.

associated with a given environment."[138] The full realization of the difficulty of the undertaking is indicated by the caveat in section 6.01:

> The provisions of this section . . . shall at all times be subject to the technical feasibility of defining such ambient noise quality zones, criteria and standards.[139]

The proposals of the article parallel closely those of the Federal Clean Air Act,[140] which directs the federal government to define regional air quality controls and criteria, and encourages municipalities to set consistent emission standards for maintenance of regional air quality.[141] Similarly, the ambient noise criteria will set a departure point in the planning and coordination of specific sound controls. It has also been suggested that studies conducted under this mandate would provide a detailed "noise profile" of the city itself, which would be highly useful in the administration of the proposal.[142]

Operating Certificates and Tunneling Permits

The same group of sound sources which may be subject to the registration requirements of section 2.09[143] may also be placed, at the discretion of the Administrator, on an operating certificate list.[144] Such action would require the owner to procure an operating certificate from the Administrator before using the device.[145] Certain information pertaining to the operation of the machine will be required,[146] and the signature of the applicant will be construed as an agreement of compliance with the Code.[147]

138. Noise Control Code -1.05(i) defines ambient noise as: "the all-encompassing noise associated with a given environment, being usually a composite of sounds from many sources near and far."

139. Id. -6.01(2).

140. 42 U.S.C. §§ 1857 et seq. (1970).

141. Id. § 1857(c).

142. Comments on the New York City Noise Control Code, Envir. Defense Fund Memorandum 16 (Apr. 25, 1972) (copy on file in the offices of the Fordham Urban L.J.).

143. See note 71 supra and accompanying text.

144. Noise Control Code -7.01.This is a crucial regulatory section, but it is not clear how these regulations will relate to those promulgated under -2.09.

145. Id. -7.03(a).

146. Id. -7.05. The owner must list (1) the model number and operating characteristics of the device in question, (2) a laboratory test report or a manufacturer's warranty as to sound emissions of the device under normal operating conditions, and (3) proposed means, if necessary, to control unnecessary noise. Id.

147. Id. -7.03(c).

Standards for granting the operating certificate call for a showing, to the Administrator's satisfaction, that the device: (1) will not violate the Code and (2) will incorporate advances in the noise control technology relating to the particular machine in question.[148] Tests, where necessary, are to be conducted pursuant to section 2.05(b),[149] again at the expense of the owner.[150] The Administrator must act on the application within a "reasonable time not to exceed sixty days"[151] and any disapproval will be reviewed upon receipt of the applicant's written request.[152]

Amendments to this section added requirements and conditions governing the granting of tunneling permits.[153] The definition of tunneling was expanded to include the sinking of shafts and related surface activities.[154] A tunneling permit from the Administrator is required for each shaft of the tunnel,[155] and the application for such a permit must include a detailed description of the proposed tunneling, the devices to be employed, and proposals for control of unnecessary noise.[156] Testing at the applicant's expense, as well as the characteristics of the blasting device, may also be required.[157] Blasting activities are only permitted between the hours of seven A.M. and seven P.M. on weekdays, except where, in the case of urgent necessity in the interest of public safety, a special permit has been procured from the fire department.[158]

Agencies advertising for bids for tunneling work will also be covered by this article. These agencies must procure from the Administrator a statement of requirements relating to tunneling, and such information is to be included in the contract specifications for the proposed tunnel.[159]

148. Id. -7.07.

149. See text accompanying notes 68-70 infra.

150. Noise Control Code -7.09(a).

151. Id. -7.11(a).

152. Such a request must be received within sixty days of service of the notice of disapproval. Id. -7.11(c).

153. Kretchmer Memorandum, supra note 95, at 4.

154. The original definition of tunneling, "any activity incidental to the fabrication of any underground tunnel" Int. 661, supra note 47 (-1.05(wwl)), was expanded to the "construction of any tunnel, including the sinking of shafts to tunnel or to an intermediate level and the surface activities required to sink the shafts and construct the tunnel." Noise Control Code -1.05(yy).

155. Noise Control Code -7.01(c).

156. Id. -7.05(b).

157. Id. -7.05(a).

158. Id. -7.01(e).

159. Id. -7.01(d).

This is another instance of a positive city government mandate for action in the area of noise abatement.[160]

Enforcement

The general enforcement powers of the Code have been entrusted to the ECB,[161] which was created with the passage of the New York City Air Pollution Control Code.[162] Originally, the Board was composed of the Administrator as Chairman, two Commissioners within EPA and two laypersons, one having experience in air pollution and one knowledgeable in water pollution control.[163] Amendments passed with the Noise Control Code added a third layperson having experience and background in the noise pollution control field.[164]

The procedural framework of this article parallels the enforcement provisions of the Air Pollution Control Code.[165] The ECB may conduct hearings, subpoena witnesses and papers,[166] take some actions after a notice and hearing,[167] and other actions only after notice.[168] The hearings may be conducted by a hearing officer or a member of the Board.[169] Such hearings are to be open to the public and will be recorded, and parties may be represented by counsel and cross-examine witnesses.[170]

160. Id. See also text accompanying notes 76-77 supra.

161. Noise Control Code -8.01. See also text accompanying note 42 supra.

162. New York City, N.Y. City Charter § 1404 (Supp. 1971).

163. Id. § 1404(1). The Mayor placed nominations for the positions on the Board before the City Council in October of 1971. N.Y. Times, Oct. 6, 1971, at 93, col. 6.

164. New York City, N.Y., L.L. 57, Oct. 4, 1972, § 3 (amending N.Y. City Charter § 1404).

165. New York, N.Y., Admin. Code ch. 57, §§ 1403.2-15.01 et seq. (Supp. 1971). Thus New York City will have "uniform administrative enforcement procedures with regard to environmental offenses." EPA, Introduction to the New York City Noise Control Code 2 (July 7, 1971) (copy on file in the offices of the Fordham Urban L.J.).

166. Noise Control Code -8.01(a).

167. Board actions after a notice and a hearing may include sealing of devices in violation of the Code, revocation or suspension of certificates or tunneling permits, and ordering the installation of muffling apparatus. Id. -8.01(b).

168. Id. -8.01(c). This section primarily deals with persons operating devices without required permits. The notice of violation, covered in -8.05, must be issued and served upon the person in violation or upon the owner.

169. Id. -8.13.

170. Id.

At the conclusion, a decision will be filed with the Board,[171] which will then hear any exceptions raised by the parties and render a decision, which shall include findings of fact, conclusions of law and rationale for the holdings as to each material fact raised.[172]

The Board may levy a civil penalty,[173] the amount determined in accordance with a table which relates the amount of the fine to the section of the Code violated, ranging from fifty dollars for the unnecessary use of a claxon, to one thousand dollars for unauthorized construction activities.[174] For every day the violation continues, an additional violation can be charged.[175] In addition, certain actions, mainly involving fraudulent completion of the various filing requirements, will cause the imposition of criminal sanctions.[176]

This article provides for citizens' suits, one of the more controversial innovations of the Code. Citizens may file complaints under the Code and prosecute such complaints before the Board, if the Administrator fails to do so within thirty days.[177] This power is limited to certain enumerated situations, such as the use of sound reproduction devices for advertising, after-hours construction work, and noise from machines otherwise regulated by the Code.[178] Such situations generally encompass the "large-scale" violations of the Code. To encourage diligence, provision is made to award a prosecuting complainant a maximum of twenty-five per cent of the proceeds of any civil fine levied in a proceeding brought by the Administrator,[179] and fifty per cent of such fine where the proceedings are brought by the complainant himself.[180] The purpose of the section is twofold:

> This section is intended to give the private citizen a tool by which he can do something palpable to abate noise and a means for insuring that City agencies

171. Id. -8.17(b). Exceptions must be filed within twenty days of service of the decision.

172. Id. -8.19.

173. Id. -8.01(b)(5). The imposition of a civil fine requires a notice and a hearing. See text accompanying notes 169-72 supra.

174. Noise Control Code -8.01(b)(5). This range of penalties was increased from the first proposal. See text accompanying note 51 supra.

175. Noise Control Code -8.01(b)(5).

176. The highest criminal penalty which can be imposed under the Code is a misdemeanor, with a penalty of five months imprisonment and a $1,000 fine. Id. -8.25(a).

177. Id. -8.09.

178. Id. -8.09(a).

179. Id. -8.09(d).

180. Id. -8.09(e).

must be responsive to his initiative. It is believed that, because of the time, expense and expertise involved in successfully pursuing the complaint procedure, it will be primarily organized environmental groups that initiate action under this section. The potential financial awards to the complainant are not considered large enough to stimulate any significant amount of "bounty hunting."[181]

Critique

The Noise Control Code has moved New York into the forefront of municipalities with sophisticated noise abatement programs.[182] The use of different techniques to regulate different sound sources, with the use of specific, quantitative limitations wherever possible, has been strongly recommended by most commentators in the field.[183] One particular device, noise regulation based on zoning considerations and property lines, was not utilized in the Code,[184] but would seem to be suggested by the criteria listed for the development of ambient noise zones.[185]

Another important advance is the grants of jurisdiction to the EPA and the ECB, covering the administrative and regulatory powers under the Code.[186] The police and the courts could give only cursory treatment to violators of the old ordinance in the heavily overloaded criminal justice system[187] and, even then, the vague standard of unnecessary noise made proof very difficult.[188] Now violators will be processed before a quasi-judicial board solely concerned with environmental matters,[189] and evidence will be collected and presented by noise experts, under a quantitative standard.[190] Fines, too, have been increased to the point where

181. Admin. Handbook, supra note 62, at 43.

182. Under Kaufman's rating system of municipal noise ordinances, New York City would now rank in the "Class A" group. Kaufman, supra note 16, at 32, 197-98. Noise control requirements have recently been written into New York City's Building Code. New York City, N.Y., Admin. Code ch. 26 §§ C26-1208.1 et seq. (1969).

183. See Bragdon, supra note 112, at 16.

184. It is utilized in the city zoning resolutions regulating noise in manufacturing districts. New York City, N.Y., Zoning Resolutions §§ 42-20, -21 (1972).

185. See text accompanying note 134 supra. This technique has been adopted in the new Chicago Envir. Control Ordinance, Chicago, Ill., Municipal Code ch. 17 (Supp. 1971), and has been recommended by the Task Force on Noise for the State of Illinois to control noise from stationary sources. Institute for Envir. Quality, Control of Noise from Stationary Sources 3 (1972).

186. See text accompanying notes 66-77, 165-81 supra.

187. Bragdon, supra note 112, at 15.

188. Id. at 16.

189. See notes 161-64 supra and accompanying text.

190. See notes 110-22 supra and accompanying text.

they should have some deterrent effect.[191] The question remains, will the Code quell the clamor?

The EPA has begun to move under several provisions. The agency has trained a group of monitoring engineers in the use of the sound level meters,[192] and they have already begun to issue summonses.[193] Contract compliance by city agencies has begun,[194] and proposed regulations covering air compressors and paving breakers have been published.[195]

It is interesting to note that three weeks after the passage of the New York City Noise Control Code, President Nixon signed into law the Noise Control Act of 1972.[196] The theme of this Act is summed up in the statement of congressional findings, "that, while primary responsibility for control of noise rests with state and local governments, federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment."[197] Thus, Congress directed the Federal Environmental Protection Administrator to publish reports, set performance standards and prescribe regulations for construction, electrical and transportation equipment, motors or engines, or any other major sound source for which, in the judgment of the Administrator, noise controls are feasible.[198] Such noise emission standards shall incorporate testing procedures where necessary.[199]

After the effective date of any noise emission regulation, manufacturers of regulated products must warrant to the ultimate purchaser conformity to the federal noise emission standard at the time of sale.[200]

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191. See text accompanying note 174 supra.

192. N.Y. Times, Oct. 19, 1972, at 37, col. 1.

193. N.Y. Times, Nov. 10, 1972, at 30, col. 1. Unfortunately, the Board cannot yet act on these summonses because the City Council has not yet acted on the Mayor's outside nominees. N.Y. Times, Jan. 1, 1973, at 17, col. 1.

194. See note 116 supra.

195. These regulations have been published pursuant to Noise Control Code -2.09; see text accompanying note 75 supra. It is unclear how these registration requirements will relate to the operating certificates required under -7.01. See also text accompanying notes 143-45 supra; Citizens Union of the City of New York, Endorsement of Proposed City Noise Code 3 (July 30, 1972).

196. Noise Control Act 42 U.S.C.A. § 4901 et seq. (Supp. 1973).

197. Noise Control Act § 2(a)(3).

198. Id. § 6(a). In deciding whether to set standards for specific products, the Administrator must consider such factors as the extent of use of the product, the amount of noise reduction possible through the use of the most current technology, and the cost of compliance. Id. § 6(c)(1).

199. Id. § 6(c)(1).

200. Id. § 6(d)(1).

While the act bars any state or local government from setting a different noise emission limit on new products,[201] it does specifically reserve to these governments the power to regulate noise emission through the "licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products."[202] New York City's Noise Control Code, where it sets specific performance standards, speaks specifically to the use and operation of devices which emit sound, and does not attempt to regulate manufacturing activities at all. It would thus appear that the enforcement provisions of the performance standards of art. V, in addition to the licensing requirements and operating list certificates of the Code, will be in accord with the directive of the Federal Noise Control Act.

Railroads and motor carriers engaged in interstate commerce, and aircraft will also have standards set by federal administrative action under the Noise Control Act. In the case of railroads and motor carriers, local governments may set noise emission standards, identical to any promulgated federal regulations, with the permission of the Federal Environmental Protection Administrator.[203] However, in the realm of aircraft noise emission control, the Administrator has been called upon to study various facets of the problem, considering among other factors, "additional measures available to airport operators and local governments to control aircraft noise."[204] This study would be the basis for measures to abate aircraft noise.[205] The scope of regulation left open to states and local governments is at present open to question.[206]

201. Id. § 6(e)(1).

202. Id. § 6(e)(2). The Senate Report explained this dual control scheme: "It is the intention of the Committee to distinguish between burdens which fall on the manufacturers of products in interstate commerce and burdens which may be imposed on the users of such products. In the judgment of the Committee, noise emission standards for products which must be met by manufacturers . . . should be uniform. On the other hand, States and local governments have the primary responsibility under the bill for setting and enforcing limits on environmental noise which in their view are necessary to protect public health and welfare." U.S. Code Cong. & Ad. News, 92 Cong., 2nd Sess., 4660 (1972).

203. Noise Control Act §§ 17(c), 18(c). For the local government to promulgate such regulations, the Administrator, in consultation with the Secretary of Transportation, must determine that the local ordinance is in response to special local conditions. Id.

204. Id. § 7(a)(4).

205. Id. § 7(b), which amends the Federal Aviation Act of 1958, 49 U.S.C. 1431 (1970).

206. The Port Authority of New York and New Jersey as operator of New

It thus appears that the City of New York has been given a considerable grant of power to tackle the problem at hand. But more important to the effectiveness of this ordinance is an alert citizenry. Too often, the intrusion of noise on an individual's working or sleeping patterns is shrugged off as a temporary and inescapable annoyance—part of the price of urban living. But it is just these petty intrusions which can cause serious physical impairment over a period of time.[207] The small corps of EPA inspectors cannot go it alone; citizens must be educated as to their right to a quiet environment and be willing to accept the consequent responsibilities.

"Quiet is an idea whose time has almost come."[208] Only strong public support for vigorous enforcement of this comprehensive Code can eliminate the "almost" for New York City residents.

York City's airports has imposed noise limitations on airplanes using the airports, N.Y. Times, Oct. 20, 1967, at 47, col. 7. But noise controls by municipalities, where they have conflicted with FAA regulations, have been held invalid under the doctrine of preemption. American Airlines Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir.), cert. denied 393 U.S. 1017 (1968). It would appear that this specific directive in the Noise Control Act to the FAA by Congress would preclude all attempts by municipalities to control noise emissions of aircraft. But see, City of Burbank v. Lockheed Air Terminal Inc., 457 F.2d 667 (9th Cir.), review granted, 409 U.S. 840 (1972), where the court of appeals held that the Federal Aviation Act of 1958 preempted a city ordinance regulating aircraft takeoffs between certain hours, despite the language of the Environmental Quality Improvement Act, which places primary responsibility for implementation of environmental policy on state and local governments. This case takes on added significance in the area of federal preemption, in that it was decided shortly before and without reference to the enactment to the Noise Control Act of 1972, whereas the brief submitted and in the oral argument before the United States Supreme Court in February, 1973, the city of Burbank specifically refers to the Noise Control Act of 1972 as requiring federal agencies to comply with state and local noise ordinances unless exempted from compliance by the President. The Federal Government, in an amicus curiae brief, supported the Burbank ordinance in that it "reflects the exercise of traditional police power to abate a nuisance," and further, that such a statute is superseded by federal legislation only if it is the clear intent of Congress. 41 U.S.L.W. 3457 (U.S. Feb. 27, 1973). In sum, while the Noise Control Act of 1972 reflects a comprehensive federal policy to minimize noise pollution, the delineation of responsibilities for enforcement and the question of whether Congress has so preempted the field as to preclude enforcement of local ordinances awaits a final determination by the Supreme Court and further study of the problem. See Brief for the United States as Amicus Curiae at 44.

207. Report of the Medical Sub-committee, Task Force Report, supra note 14, at 18.

208. N.Y. Times, Nov. 29, 1970, § 7, at 3, col. 1.