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THE SECOND BATTLE OF GETTYSBURG: CONFLICT OF PUBLIC AND PRIVATE INTERESTS IN LAND USE POLICIES

*By Charles E. Roe**

Gettysburg, in 1863 a cross-roads village of Pennsylvania Germans, was the scene of a climactic battle of the American Civil War. For three July days the armies of Robert E. Lee and George G. Meade engaged in the bloodiest battle ever fought on the North American continent. When the cannonade ceased and the remnants of Pickett's Charge streamed back over the mile of open field from defeat, the first Battle of Gettysburg was finished. Lee's last invasion of the North was repulsed, and the Confederacy's last real hope for independence was denied . . . at a terrible cost of 51,000 casualties. President Abraham Lincoln came to Gettysburg that November to dedicate the "hallowed ground" toward "a new birth of freedom" so "that government of the people, by the people, for the people, shall not perish from the earth."

Five score and eight years after the military clash, Gettysburg became the scene of a second great battle. This time the conflict was over commercialization—private development of property surrounding the Gettysburg National Military Park. This article will examine the overall land use problems at Gettysburg, the conflict of public and private interests, the observation tower controversy and legal contest, misrepresentation of the public interest by the Department of the Interior, and the lessons offered concerning protection of the public trust.

"This blatant exploitation has earned Gettysburg the nickname among its (perhaps envious) neighbors, 'the town where the dead support the living.'"—The Philadelphia Inquirer, Gerald McKelvey, August 9, 1971.

Gettysburg National Military Park has become the crown jewel in the Department of the Interior's collection of historical parks,

monuments, and battlefields. The National Park comprises 3,700 acres of rolling fields and wooded hills on Pennsylvania's piedmont beneath the low Blue Ridge Mountains. The park includes the largest portion of the battle site, the 6,000 grave National Military Cemetery and site of the Gettysburg Address, and the new Eisenhower National Historic Site. The National Park Service here protects the positions of the two armies, 450 cannon, 125 historic buildings, and over 1,400 markers and monuments. During the peak summer months rangers offer continuous daily programs in the Visitor Center-Cyclorama, evening amphitheatre programs, and hourly talks at six battlefield locations. Located within 75 miles of Washington, 50 miles of Baltimore, 115 miles of Philadelphia, and 375 miles of seventy-five percent of the nation's population, Gettysburg attracts one of the largest visitations among the 270 National Parks and Monuments. In 1970 Gettysburg park visitation had climbed to 4,327,612.¹ Park officials project over 10 million annual visitors by the 1976 bicentennial year and 50 million in the 1970 decade.²

The national shrine is also a tourist attraction. Some would say a tourist "trap." Bordering the Gettysburg National Military Park are strips of motels, restaurants and snack bars, filling stations, commercial museums, and souvenir shops. Some 2,000 people are employed in the tourist industry in the town of 8,000. Gettysburg itself is virtually surrounded by the federally-owned, tax-exempt land of the park which is the source of animosity among city officials who are foremost concerned with borough progress. The local coffers are heavily dependent upon revenues from property and tourist taxes. The community provides the essential services of lodging and food. In return tourists leave profits, estimated by the local Travel Council at \$20 to \$25 million annually.³ Within the past decade Gettysburg commercial attractions have grown rapidly. From the modernistic park Visitor Center, built in 1962 near the "High Water Mark of the Confederacy," can be seen the gaudy neon strips of motels, restaurants, wax museums, electrified maps, battle theatres, filling stations, Hardee's Hamburger, Colonel Saunder's Kentucky Fried Chicken, even a Fantasyland and frontier fort.

Critics label these areas in unzoned Adams County an affront to the "historyscape" and "the shame of Gettysburg." This opposition was brought to a head by the proposed construction of a 307-foot, triple-decked observation tower beside the battlefield. News of the

plan of Thomas R. Ottenstein—wealthy Maryland news dealer, lawyer, bank director, and real estate developer—launched what has popularly become known as “the second battle of Gettysburg.”

“Rising from the ground and capped by an illuminated American Flag, the National Gettysburg Battlefield Tower will be dedicated to the unity of this country and a monument to our glorious history . . . a fitting symbol of liberation.”—Tower for One Nation: National Gettysburg Battlefield Tower, Inc., corporation brochure, December 1970, p. 6.

Thomas Ottenstein in September of 1970 publicly announced his plans for a Tower for One Nation. He had obtained building permits from the Gettysburg Borough Council, the Adams County commissioners, and the Commonwealth of Pennsylvania in July. Ottenstein’s proposed one-million-dollar tower—a hyperbolic basketweave design—would be topped by a “classroom in the sky” capable of holding 700 people. Three circular observation levels would stand atop the 300-foot shaft of pipe and steel columns. Elevators would wisk an estimated 700,000 visitors (at \$1 admission price) to the top the first year, and by 1976 over five million might be expected to pay for the panoramic view over the battlefield. The tower’s height would match the elevation of Big Round Top on the southern extreme of the park and would be over a hundred feet higher than the overlook on Little Round Top. It would far out-soar the Visitor Center observation deck and the three, tree-top-sized park observation towers of 1896 vintage. But Ottenstein intended his tower to afford an “educational experience” supplementary, but superior to, that provided by the National Park Service programs. He promised that the tower would be staffed by interpreters and that it would offer audiovisual presentations to instruct the sightseers. The format would employ professional consultants to produce “a unique educational aid.”⁴

Ottenstein became increasingly resentful of government efforts to thwart what he contended to be a legal enterprise. Highly critical of the Interior Department, he claimed, “there would be no commercialism at Gettysburg if the Government had the facilities to provide what people demand. The Park Service can’t handle the people.”⁵ By absenting itself from the “obligation” of participating in the task of caring for the personal needs of tourists, the Park Service had forced the “herculean” task upon the community. Since it paid no local taxes, the National Park Service made no contribu-

tion to the required services and facilities. The tower, on the other hand, would substantially support the community funds with its revenues and taxes.⁶

The forty-one-year-old builder bristled at the immediate barrage of criticism directed at his tower plan. He did not take easily to those who branded his project a "monstrosity" and "environmental insult." He charged that the Park Service did not offer proper interpretation of the battle and could not provide the visitor with a comprehensive "picture" of the field. Therefore his tower would be a public service, for it would present the best education and interpretation of the battle.

As opposition mounted the developer came to see the erection of the tower as his "duty." Ottenstein professed a "near obsession" to bring the American citizen what he "deserves"—a valid interpretation of the battle and a sobering educational experience. His project to him seemed both necessary and supremely right. He steadfastly avowed, "I am certainly not in this for the money, although that is the American way. . . . Sure, I'm going to make a profit. But let me tell you, I don't need this tower to live on. I believe in it."

The tower first was proposed for a site on Baltimore Street overlooking the National Cemetery. The location was part of a commercial site known as the Streets of 1863, owned by LeRoy E. Smith, proprietor of many tourist enterprises and a tour busline and a candidate for a park concessionaire in the future. Smith conferred with National Park officials in August of 1970 and withdrew Ottenstein's land option. Ottenstein then acquired options on three lots in the middle-income residential area of Colt Park. He completed the purchase of the unzoned property from the Colt Park Development Company by March and in early May drilled borings for foundations.

Although in proximity to the commercial complex along U.S. Rt. 15 (Steinwehr Avenue), the tower would rise from the center of a residential subdivision. That fact gained the enmity of neighborhood home-owners. The Colt Park site was within 1000 yards of the park Visitor Center and a half block off the left flank of the famous Confederate infantry charge led by Major General George Pickett. The tower would sit behind the Home Sweet Home Motel, closest commercial enterprise to the High Water Mark of the Confederacy.

Ottenstein contended that his tower would be less vulgar than much of the existing commercial clutter in the area. The tower

would be designed to be aesthetically pleasing with "an almost ethereal sense of lightness."⁸ Its blue-colored observation decks would blend with the sky. Its landscaped base would be a "garden spot." Ottenstein offered to furnish a free tourist bus transit system in the borough and to aid in landscaping Steinwehr Avenue. No concessions would be sold at the tower. Nor would its location near the commercial complex be out of place. Rather, "The tower will speak for itself. I'm going to create a total environmental atmosphere, and I'm going to do it right," Ottenstein asserted.⁹

"The benefits of the tower to Adams County and to the millions of tourists that come here each year could be tremendous to both, a substantial tax base to the county and township. To the tourist, an education like this cannot be obtained in any other manner."—Harry F. Biesecker, Vice Pres. Adams County Commissioners, September 3, 1971.

Thomas Ottenstein, described as "a credit to America's free enterprise system,"¹⁰ also promised that the tower would be an economic boon for the area. It would generate increased employment, contribute to local business, and stimulate an economic multiplying effect on the Gettysburg tourist and retail business. Moreover, it would furnish a greater tax base for the community. As Mayor William G. Weaver and other local officials affirmed, the Gettysburg ten percent borough admissions tax eventually would reap millions of dollars in municipal revenue from the tower.

The Gettysburg Borough Council, county commissioners, and many local businessmen enthusiastically supported the project. Ottenstein quickly aligned himself with the Chamber of Commerce and Travel Council and determined to proceed with his plans. As he observed, "You don't hear the businessmen complaining. The only ones you hear are the federal park people and the college people. They aren't the ones who must make their money off the land to live."¹¹

Within a decade the tower could be the largest single tax-payer in the township. The prospect of as much as \$70,000 in increased admission taxes within the first year of the tower's operation was convincingly attractive for the borough and business leaders. Mayor Weaver endorsed the tower: "It will bring in a lot of tax money. . . . I'm very bitter about them [National Park Service] for taking all our land off the tax rolls. So is Harry Biesecker. The land they

are taking now doesn't do a thing to bring more people into this town."¹²

Local officials were indeed upset by National Park Service purchase of 350 acres of \$505,000 assessed value within Cumberland Township during the year. County commissioner Harry F. Biesecker led local opposition to federal acquisition of taxable properties for park usage. Although saying he was not at all opposed to the park, Biesecker criticized park administrators for "a lack of communication over the years"¹³ and for its methods in "taking away valuable taxable lands."¹⁴

County commissioners and township supervisors opposed further land acquisitions for the park. They were especially concerned by reports that the federal government held interest in the purchase of 110 more properties in the battlefield area, including valuable commercial enterprises on the park fringes. In that event the county might expect to lose another \$926,210 in real estate taxes, while the borough and township could lose \$75,000 in amusement tax revenue.¹⁵ Despite growing market values of county property and Park Service denials that it contemplated purchases of such magnitude, the fears of local officials grew with the Park Service purchase of the largest Gettysburg commercial attraction, The National Museum and Electric Map. The \$2,350,000 purchase of the enterprise with plans for future relocation in a second park visitor center meant the ultimate loss of \$25,000 in annual local tax revenues.¹⁶ Until the new facilities were constructed, the National Museum would likely be leased to a taxable private concessionaire. The acquisition further undercut Thomas Ottenstein's criticisms of Park Service educational programs, but it strengthened local official endorsement of the tower to bolster the dwindling tax base.

"To achieve the purpose of a historical area, i.e., preservation and appropriate public use, planning and management should be related to the total environment in which the area is located. Such planning and management recognizes the need for transportation arteries, utility and communication corridors, consumptive resource uses, and residential, commercial, and recreation land uses in the environs of the park as parts of a systematic plan assuring viability and good health of the park and the surrounding region.

The Service should be alert to peripheral use and development proposals that impinge on the environment of a historical area.

Moreover, it should cooperate with and encourage joint and regional planning among public agencies, organizations, and individuals having responsibility for maintaining the quality and aesthetics of the environment surrounding historical areas.—Administrative Policies: For the Historic Areas of the National Park System, *George B. Hartzog, Jr., Director, National Park Service, U.S. Dept. of the Interior, September 1968.*

In line with this administrative policy the National Park Service has been in the process of developing a master plan for the management, development, and use of the Gettysburg historical area. The alleged secrecy of the plan during its formulation was a source of irritation for community leaders. However, the Park Service plan was designed along guidelines set by the Department of Housing and Urban Development in a program for community planning. The federally-financed study for the Gettysburg vicinity was HUD's pilot project in an attempt to develop better planning in communities adjacent to national park facilities. Efforts were to be made to coordinate the two plans.

The joint comprehensive plan for the Gettysburg Borough and Cumberland Township was designed by the noted Wallace, McHarg, Roberts, and Todd, architects and planning firm of Philadelphia. Preliminary plans in the David Wallace-Ian McHarg study were announced in the spring of 1971. Publication of the park's master plan has been delayed due to revisions being made to coordinate it with the Gettysburg-Cumberland regional plan. Thomas Harrison, director of resources for the Gettysburg National Park, called the park master plan a living document to be used to develop the park for the future, specifically in the period from 1980 to the year 2000.

The park master plan would provide for a new transportation system to handle the 8 to 10 million annual visitors by 1980. A network of outlying parking areas and bus lines would combine with the regional plan for a Rt. 30 bypass north of town and possible parkway to the west. Certain "intrusions" would be removed from the battlefield, including the park's 80-foot observation towers, utility poles, some roadways, modern dwellings and commercial enterprises. An expanded visitor center would be located on the western periphery of the park with two satellite centers east and south of town. Scenic easements on the park perimeters would be another key point in the park's future development. Large areas of the field would be returned to the condition during the battle.

The Wallace-McHarg-Associates regional plan prepared options for development in water supply and waste removal systems, traffic and circulation, expansion of commercial activities, accommodation of residential growth, and patterns of park development. A long overdue zoning plan would be necessary. The study urged the reluctant Commonwealth of Pennsylvania to proceed at full speed to construct a Rt. 30 bypass. It suggested that the National Park Service purchase the four block strip of commercial establishments along Steinwehr Avenue and remove the concerns to new locations around the new tourist centers by using sales or special leasing arrangements of federal property at no tax loss to the borough.¹⁷

David Hamme, field consultant of the Philadelphia planning firm, warned local officials that failure to cooperate with the Park Service would force it to "protect itself" by purchasing large parcels of land and making Gettysburg a virtual island surrounded by federal non-taxable land.¹⁸ But a form of Armageddon seemed to be avoided when in April of 1971 borough and township officials tentatively approved the regional plan.

Hamme reported to the Gettysburg Borough Planning Commission and County Planning Director John I. Callenbach on December 30, 1970, that the Ottenstein tower on the Colt Park site could have negative effects on the town. It would generate a serious traffic and parking problem since the residential area could not handle adequate parking facilities. The effect of the tower would be not so much to attract more visitors into town as to increase the concentration of tourists into an already congested area. The Wallace-McHarg firm warned that the tower would draw visitors away from other segments of the Gettysburg tourist industry and thereby cause redistribution of tourist expenditures and some loss in tax revenues and employment. At worst the tourists would spend less time and money in the town and perhaps the uncontrolled development of the area would tend to destroy Gettysburg as a tourist attraction. Location of the tower in the Colt Park neighborhood would be an invasion of privacy and would reduce the property value in the prime residential area. The result would be a tax loss and lower property market values. The tower would also "decrease the sense of an historic environment within the boro."¹⁹

"The tower will wholly dominate this historic scene and may well constitute the most damaging single intrusion ever visited upon a comparable site of American history,"—George B. Hartzog, Jr.,

Director NPS, to Rogers C. B. Morton, Secretary Dept. of the Interior, undated.

The opening shot in opposition to the Ottenstein tower was fired by Frank E. Masland, Jr., a retired industrialist of Carlisle, Pennsylvania. The Chairman of the Governor's Citizens Committee on the Commonwealth's Natural Resources first broke the news of the tower project in a September 19, 1970, letter to *The Gettysburg Times*. Masland termed the tower "most monstrous" and reported that the Director of the National Park Service George B. Hartzog, Jr., considered the venture an "environmental insult." Masland was in a position to know. The personal friend of Hartzog, Masland had served as Chairman of the Advisory Board for National Parks under Secretary of the Interior Stewart L. Udall and now was a consultant to Secretary Rogers C. B. Morton.

Masland denied that he was speaking on behalf of Interior officials. But although his public statements against the tower were his personal opinions, they were in harmony with those of Park Service administrators. He was not only writing letters to build public opposition. Masland was in close contact with Interior officials, he was futilely attempting to enlist Commonwealth action, and he was writing to the White House.

A public outcry against the tower plan immediately arose from within the Gettysburg community. The vocal opposition aired their complaints in *The Gettysburg Times*. Dr. Neil W. Beach, biology professor at Gettysburg College and president of the school board, was among the first assailants of the tower. These critics formed a group called Concerned Citizens of Adams County for a Quality Environment and claimed the support of the silent majority of the divided community. Early public opposition was based primarily on aesthetic grounds. Beach claimed his objections went deeper than the so-called "space needle." For him, "It is what is happening to this country. It's not just air and water pollution anymore, but visual pollution. We have an obligation here to the landscape. . . . We must develop the area with good taste."²⁰ The tower seemed only the symbol of the growing problem of commercialism. "Everything is getting higher, bigger and gaudier. Somewhere there has to be a stop—and this tower is it."²¹

Beach's opinion reflected much of the public antagonism toward the tower and growing commercialism in Gettysburg. The letter columns of the local newspaper became a new ground of conflict

in the "second battle" as tower adversaries hurled volleys of condemnation: "the rape of Gettysburg . . . country Coney Island . . . monument to a quick dollar . . . an act of vandalism . . . desecration of holy ground . . . monster with Disney features . . . for 30 pieces of silver my heritage is sold. . . ."

"In the interest of the thousands of veterans buried at the Gettysburg National Cemetery, we oppose the commercialization of their hallowed ground."—The American Legion, Department of Pennsylvania, February 3, 1971.

As the local skirmishes grew into regional and then national proportions, the ranks of tower critics swelled. The Pennsylvania American Legion's executive committee resolved its opposition. So did the Adams County Historical Society, the Lincoln Fellowship of Pennsylvania, the Gettysburg Civil War Round Table, the Gettysburg Battlefield Preservation Association, and the Pennsylvania Historical Association.

The executive director of the State Historical Commission, S. K. Stevens, expressed the body's "strong opposition to such a plan . . . contributing to the destruction of the historical integrity and environment of one of our nation's most hallowed historical shrines."²² But though the commission pledged to lead a fight against the tower, it admitted the impotence of the tower foes. A commission spokesman conceded its opposition would be mostly vocal "since the proposed tower would be built on private land and we have no legal recourse."²³ This would be at the heart of the opposition's inability to act—it had no conventional legal recourse.

"Mine eyes have seen a really go-go deal. . . . Get that governor and those historians and conservationists out of the way, and this thing can go, man."—KMOX Radio editorial, St. Louis, Mo., August 20, 1971.

"It would be a pity to mar that historic landscape with a giant tower—in the name of free enterprise, education, or anything else."—WTOP-TV editorial, Washington, D.C., May 24–25, 1971.

Thomas Ottenstein justly felt embattled; he was coming under nation-wide fire. The attacks on his tower plan came from the press and news media from as near as Philadelphia, Baltimore, Wilmington and Washington and as far as Atlanta, Louisville, St. Louis, Los Angeles and even Biloxi, Mississippi.

Ottenstein felt misunderstood. He was angry and stubbornly de-

terminated to build his tower for the American people. It was his "duty." He charged that *The Gettysburg Times* refused to print particulars of his point of view or of his supporters. Biased editors and news commentators failed to consult him. Ottenstein became wary of all but a few reporters whom he considered objective.²⁴

"We must knock at the door of courthouses throughout the nation and seek equitable protection for our environment. Let each man and every corporation so use his own property as not to injure that of another, particularly so as not to injure that which is the common property of all the people and let no wrong be without a remedy!"—Victor J. Yannacone, Jr., Address to National Wildlife Federation Sixteenth Annual Conservation Conference.

Not all critics of the tower were without legal recourse, although the lack of zoning regulations seemed to leave the Interior Department, Pennsylvania Historical Commission, and preservation groups powerless to stop Ottenstein. None appeared to have any grounds—conventional grounds—for legal action.

Then five residents of Colt Park, representing over 150 neighboring homeowners, on May 8, 1971, filed a class action against Ottenstein to prevent construction of the tower on the site purchased in November. Work on its foundations had begun the preceding week. The complaint alleged the tower "will become a public nuisance, seriously damaging the peace, quiet, dignity and good order prevailing now" in the residential area. The suit further charged the tower would create "mental discomfort" for the residents, would "cause repeated trespasses on private property," that Ottenstein "has made no provisions for parking in the area of the site." The tower and its customers would endanger the children of the neighborhood, depress property values, threaten the "peace, security, welfare" of the residents, and constitute an invasion of their privacy. The action in equity for injunctive relief sought to permanently enjoin construction of the tower in Colt Park.²⁵

For a month Ottenstein could not be reached for service of the public nuisance complaint. Not until June 10 was the deputized sheriff of Philadelphia able to locate the developer and serve the class action. Then through Attorney Jerome H. Gerber, Ottenstein issued a denial that the tower would create a public nuisance and claimed his property was in a commercial area. Construction on the Colt Park site halted. Money can afford to wait, but Ottenstein was

in trouble. The Colt Park residents apparently had the active though unofficial support of big guns—the Department of the Interior. Ottenstein finally was ready to make a deal. Subsequent events would make the public nuisance suit unnecessary.

“Since I became Secretary of the Interior, I have reviewed the history of this project and feel that all resources should be brought to bear to prevent this intrusion on the historic Gettysburg scene, including any help you may be able to bring to block its construction.”—Rogers Morton to Milton J. Shapp, Governor of Pennsylvania, June 14, 1971.

Primary opposition to the Ottenstein plan had come from the National Park Service of the Department of the Interior. Director George Hartzog was quick to denounce the proposal as a potential “environmental insult” which would become “the most monstrous” commercial project in Gettysburg, perhaps “the most damaging single intrusion ever visited upon a comparable site of American history.”²⁶ Senator Hugh Scott of Pennsylvania, Republican floor leader, called the tower plan “very ill-advised.”²⁷ Former Secretary of the Interior Stewart Udall, as a consultant to the new Pennsylvania Department of Environmental Resources, asserted the tower would “dominate” the battlefield: “There is enough desecration in the commercial part of Gettysburg without this new intrusion.”²⁸ Interior officials seemed solidly and vehemently opposed to the tower.

Gettysburg National Military Park administrators are responsible for prevention of intrusions on the park landscape. Local park officials were therefore in the front lines of the battle. Acting Superintendent William C. Birdsell on December 20, 1970, issued a clarification of the National Park Service stance against the tower. His statement to the press denied that the Park Service “mildly scoffed at the tower idea” as *The Sunday Patriot-News* of Harrisburg had reported. Rather, the NPS “is in total opposition to such a tower.” The opposition was based on the tower’s affront to the entire park and an intrusion on the landscape and community. As custodians of the battlefield, cemetery, and Eisenhower farm it was the NPS’s “responsibility to protect and preserve Gettysburg’s historic integrity.” Headlines blazoned “NPS ‘Totally’ Opposed . . .”²⁹

Park Service criticism was reiterated on January 17, 1971, by Ben Butterfield, assistant director of the NPS, in a letter to *The Sunday*

Patriot-News. He repeated that the tower “would be an intolerable scenic intrusion on the integrity of an exceptionally fine historic and natural treasure.” But he cautioned that the Department of the Interior had little legal authority to prevent or delay tower construction. It could only support the protests of concerned individuals and groups.

Jerry L. Schober, Superintendent of the Gettysburg National Park, was placed in a position to do all he could to see that the tower was not built. He too asserted, “Construction of the tower or any other such business facility that intrudes upon the historic site and scene of the great events in American history should not be encouraged or tolerated.”³⁰ Thus to the public the National Park Service exhibited a united front in its total opposition to Ottenstein’s plan, but in fact the Department of the Interior also was a divided community.

The Park Service quietly garnered influential and financial support for the loyal opposition groups. It might be unable to directly defeat the tower but could provide the ammunition. A prime beneficiary was the newly organized Defenders of the Gettysburg National Military Park, Inc. The war chest of the rank and file opposition grew through the spring toward a sum approaching \$50,000. The Pittsburgh Melons contributed substantially, as did others from outside the community.

But the Park Service believed itself to be helpless to block the tower project on legal grounds—conventional grounds. Ottenstein’s location on private property was immune from the controls the Park Service exercises over the federal lands. The tower came under no municipal curbs on land use. It complied with borough and state building codes. Throughout the spring NPS officials informed inquiring Senators and Congressmen in a similar manner: “The National Park Service has announced its opposition to this proposed structure. However, since it would be a commercial undertaking located on nonpark lands, we are without authority to prevent this venture.”³¹

“Personally, I feel that Gettysburg, as it has been developed so far commercially, is an unmitigated ecological atrocity bordering, from an aesthetic sense, on a national disgrace. . . . I believe, from my discussions with Mr. Harrison, Mr. Schober, and experts I have called from around the country that we can probably make this case as far as the Gettysburg situation is concerned.”—Attorney

Victor J. Yannacone, Jr., memorandum to Interior Department, May 1971.

In this time of growing environmental awareness a portion of the legal profession has come to advocate unconventional means of litigation to defend the public trusts and rights of citizens for environmental quality. One of the more unorthodox of these lawyers has been Victor J. Yannacone, Jr., who proved to be an enigma in the Gettysburg case.

The New York Times on May 16, 1971, reported that the Defenders of the Gettysburg National Military Park, Inc., was negotiating with Yannacone to bring suit against the tower and the commercial intrusions. But on what grounds would the suit be based? On unconventional grounds. Victor Yannacone seemed the man to do it. The outspoken attorney from Patchogue, New York, had built a reputation as a pioneer in environmental litigation. As a fiery attorney for the militant Environmental Defense Fund, Yannacone introduced class action to conservation litigation. The EDF class actions did not seek money damages but injunctive relief and a declaration of the public's rights. The popular tactic of letter-to-the-editor efforts of conservationists are, in Yannacone's opinion, useless. Litigation is instead the answer; EDF's motto: "Sue the Bastards."³²

Yannacone professes boundless faith in the judicial process and the law. "Law is the framework of civilization and litigation is the civilized answer to trial by combat Lawyers are champions and their client's interests . . . are at stake," he says.³³ The time has come for defenders of the environment to protect their cause of the public trust in the courthouse. "But if the door to the courthouse is closed—the door to the street may be opened."³⁴ Law should be the weapon of conservationists. "At this time the environmental interests of civilization can only be protected by direct attack upon those actions which can cause serious, permanent and irreparable damage to our natural resources."³⁵ Yannacone was willing to lead the attack. He had built his environmental reputation from a landmark lawsuit in *Yannacone v. Suffolk County Mosquito Control Commission*, which was a seminal action against environmental degradation in that it did not allege personal damages. He then proceeded to argue other class action suits to protect the Florissant Colorado Fossil Beds, to enjoin against DDT and dieldrin use in Wisconsin and Michigan, and to restrain the Secre-

tary of Transportation and Dade County Port Authority from further construction on a jetport in the Florida Everglades.

The Yannacone strategy was class action, not for personal damages but for declaratory judgments and injunctive relief. He would base his arguments on the unconventional grounds that the public right to a quality environment is an unenumerated right guaranteed by the Ninth Amendment to the United States Constitution³⁶ and protected by the "due process" and "equal protection" clauses of the Fifth and Fourteenth Amendments.

Yannacone lambasts the powerful corporations who manipulate the law and use their property to injure the common property of all the people. But the far-ranging lawyer reserves his greatest antipathy for the government bureaucracy as "the worst offenders in this process of environmental degradation."³⁷ "Yannacone's Law—Civilization declines in relation to the increase in bureaucracy."³⁸ Yet on May 4, 1971, part of that bureaucracy, the Department of the Interior, asked Yannacone's counsel; subsequently, however, it was to reject it.

After studying local park records, inspecting the tower site, and conferring in early May with Park Service officials and attorneys of the Defenders of Gettysburg, Yannacone prepared what he termed a "cosmic" lawsuit which would extend beyond the tower issue in its scope. He told a *New York Times* reporter, "This will be a test case for the entire National Park System. The case will raise the single fundamental issue of whether the National Parks, as unique historical resource treasures, can dictate the use of property outside their boundaries. We will attempt to show the tower will cause serious permanent and irreparable damage to the Park vistas."³⁹

Yannacone proposed that the plaintiffs, whether the Park Service or a private public benefit organization, should file a complaint that the tower would cause "serious, permanent, and irreparable damage to the unique, national, historic resource treasure that is Gettysburg National Military Park-Gettysburg National Cemetery-Eisenhower National Historic Site." Following steps would be to apply for a temporary restraining order and an expedited hearing. Yannacone would assert federal jurisdiction in the class action on the basis of the United States Constitution, Ninth Amendment; the privileges or immunities, due process, and equal protection clause of the Fourteenth Amendment and equal protection and due process clause of the Fifth Amendment; 28 U.S.C. §§1343(3),

1333(4); 42 U.S.C. §1983; 5 U.S.C. §702; and 42 U.S.C. §4321 et seq.⁴⁰ A public nuisance suit would be inadvisable in Yannacone's opinion:

As far as I am concerned, there is no possibility of establishing within the bonds of conventional legal practice and regular limitations on evidence that this tower is in fact a public nuisance. . . . I feel that the nuisance action is at best an harassment or delaying action. I also feel that the loss of the nuisance case might seriously jeopardize our right to proceed in a more fundamental action involving the same subject matter. There is both the defense of "election of remedies" and "laches" to contend with. I also feel that substantial scientific testimony could be presented favorably in the context of a nuisance cause of action.⁴¹

Yannacone believed that on his proposals "we can probably make this case as far as the Gettysburg situation is concerned." The value to the Park Service in establishing the integrity of national historic treasures as a public right would be "in excess of many hundreds of millions of dollars. If the Supreme Court should ultimately decide that the public trust doctrine is not applicable to private property, then the Park Service is in no worse position than its already sorry state."⁴² Yannacone asked a flat preparation charge of \$5000 and a guarantee of \$50,000 for a first class litigation.

Neither the Department of the Interior nor Defenders of Gettysburg continued with Yannacone. He heard nothing from them after his May conferences.

"Sic utere tuo ut alienum non laedas." Use your own property in such a manner as not to injure that of another.—Roman legal maxim.

Other environmental lawyers suggest various means to protect public rights to environmental quality.⁴³ Those means may utilize both statutes and common law. Where a citizen has no specific statutory right to protection of land, air, and water, the common law may provide a means of protection. Court decisions and interpretations create that body of precedents known as the common law. Its particular genius is that it can expand to meet the changing needs of a changing world. Joseph L. Sax believes there is no good reason why a theory of public rights to environmental quality should not be adopted. The concept of public rights and trust is as old as Roman law and English common law. Common property

resources, like any private interest, should be entitled to legal protection.

The development of environmental statutes would provide new bases for increased litigation; citizen suit statutes would enable private citizens to litigate for public rights.⁴⁴ Congress or the states may establish such laws. In the absence of existing federal or state statutes regulating land use practices on private property at Gettysburg, the Department of the Interior might have pursued delaying tactics or sought a restraining order (moratorium). It might have encouraged passage of federal and state laws to recognize the public trust doctrine or to specifically regulate land use around national parks.⁴⁵ Limits must be placed on the rights of the entrepreneur when his actions impinge upon the rights of the public. No commercial enterprise should enjoy the privilege of benefitting economically from the presence of a national treasure when it thereby demeans that treasure. When state and local governments are unwilling to prevent degradation of national parks, most notably in the cases of Gatlinburg, Tennessee, and Gettysburg, Congressional action seems to be required.

Fundamental protection of natural and historic resources might be found in the bills of rights of the United States and state constitutions. Yannacone, for one, would regard such interpretations as altogether reasonable.⁴⁶ Other scholars advise the addition of an Environmental Bill of Rights through constitutional amendment.⁴⁷

Did the Commonwealth possess such a constitutional guarantee of environmental quality? Until May 18, 1971, it did not; at that time, however, Pennsylvanians overwhelmingly ratified by a four to one vote a constitutional amendment which provided just that:

The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. (Article 1, Section 27).

"I am grieved and at a loss to understand the apparent lack of recognition on the part of the current administration of the responsibility we, as a state, have for the preservation of one of our two most outstanding historic treasures, Gettysburg."—Frank Masland to Pa. Attorney General J. Shane Creamer, May 10, 1971.

The Commonwealth of Pennsylvania inexplicably remained aloof from the tower controversy through the spring of 1971. The state was content to stay uninvolved in the battle and leave the opposition role to the Department of the Interior and private organizations. State officials perhaps felt it politically safer to remain ostensibly neutral when they could see how bitterly divided were the citizens of Gettysburg. Despite the objections by the Pennsylvania Historical and Museum Commission and the impassioned pleas of the Governor's Citizens Advisory Committee on Natural Resources, chaired by Frank Masland, the Democratic State Administration continued its silence.

The silence was broken briefly on March 2, 1971 when the Department of Labor and Industry announced that the state building permit held by Ottenstein was invalid. The permit issued for the Baltimore Street site did not authorize construction on the Colt Park location. It was unlikely that the new permit would be a barrier for Ottenstein for the Department of Labor and Industry was "concerned primarily with the safety" of the tower.⁴⁸ Appeals to Attorney General Shane Creamer to delay or prohibit a new permit were in vain. Upon reapplication for the new location, the department granted a new permit to Ottenstein. The Federal Aviation Agency, which must regulate the Eisenhower helicopter pad, similarly issued a new permit.

The Secretary of the Interior added a moderate plea to Governor Milton J. Shapp that the Commonwealth join the struggle to block tower construction. Rogers Morton wrote Shapp on June 14, 1971:

Since I became Secretary of the Interior, I have reviewed the history of this project and feel that all resources should be brought to bear to prevent this intrusion on the historic Gettysburg scene, including any help you may be able to bring to block its construction. Construction of the tower is now underway. This Department intends to use whatever authority exists to prevent completion of the project. We hope you will agree that the vast majority of Pennsylvanians would want the integrity of this site in your State preserved for their and other Americans' descendants.⁴⁹

The Shapp Administration eventually would agree, but for the time it remained publicly silent. Governor Shapp replied, "I have been opposed to this tower from the beginning, and we have been trying to develop a way to prevent the construction." The Commonwealth "has been working on this matter ever since it was

brought to my attention several months ago," and the case was still under investigation.⁵⁰ It would appear that Shapp's opposition was yet weak and that actually he had only recently become aware of the controversy. Shapp suggested to Morton that the tower might interfere with the Eisenhower Farm helicopter pad, but the Eisenhower Farm is three miles from the Colt Park site. Governor Shapp did not appear well-versed in the Gettysburg situation.

Public pressure, aroused by the news media, was having its effect on the Pennsylvania legislature, however. Ried L. Bennett, Chairman of the Recreation and Tourism Sub-Committee of the House Committee on Business and Commerce, after touring the battlefield with park officials wrote to Governor Shapp on June 23, 1971:

I left the Battlefield convinced that we *must* do something to stop this monstrous intrusion. It is not proper to call it a tourist "attraction," but rather a tourist "trap". . . . I ask you to use every possible means to stop this construction. There are several citizen law suits against the construction, but I strongly believe that your influence can be particularly effective. . . . I ask again that you exert every possible influence to stop this insult to "what they did here."

Mercer County Assemblyman Bennett proceeded to introduce a bill to urge "the Governor of Pennsylvania, the President of the United States, and the Congress of the United States to immediately undertake such action as is necessary to halt the construction of this tower . . ."⁵¹ The House and Senate by voice votes adopted the resolution by July 8.

"The agreement between the National Park Service and businessman Thomas R. Ottenstein, Silver Spring, Md., will change the construction site to one preferred by the Interior Department."
—Department of the Interior, NPS, News Release for Sunday, July 11, 1971.

By July the National Park Service and Department of the Interior seemed publicly committed to total opposition to tower construction. But in a news release on July 11, Washington officials announced an agreement with Ottenstein to move the tower site to one "preferred" by the Interior Department. The tide of battle had turned. Public tower foes were astounded by the Park Service consent. Had the Department of the Interior indeed switched sides in the middle of battle with possible victory in sight? If this was a second battle of Gettysburg, had the Department of the Interior

betrayed the public trust? There was consternation in the ranks. The front-line soldiers of the NPS—the local Gettysburg park officials—were taken by complete surprise. They reacted, like their counterparts in battle, under the mistaken impression that they were fighting the good fight, to the bitter end, win or lose. They had been fighting up to the moment when their generals surprisingly announced an agreement with the “enemy”: It seemed more like the Russian Front than the second battle of Gettysburg.

The press release by George Hartzog announced the agreement was reached through negotiations between Ottenstein and Interior Department special assistant, J. C. Herbert Bryant, Jr. The terms provided that Ottenstein would stop building at the Colt Park site and convey those three acres to the Park Service. In return, the NPS provided written clearance for a new site—to become known as the Stonehenge site—on the east boundary of the battlefield. This location on the Baltimore Pike Rt. 140 would be 1000-yards east of the park Visitor Center, 750-feet from the National Military Cemetery, and adjoining the Gettysburg Evergreen Cemetery. Trees would hide the base of the tower and its parking lot from the main battlefield area. The NPS would permit a 300-foot-long, 22-foot-wide right-of-way across federal property for a limited access road to the tower. Under the agreement Ottenstein would contribute five percent of the taxable income from the tower operation to a non-profit foundation that would make purchases and conduct restoration in the park area.

If the announcement of the settlement came as a complete surprise to the public and local officials, the counter-reaction may have shocked Interior officials in Washington. Negative editorial response came from *The New York Times* to the *Los Angeles Times*. The *St. Louis Post-Dispatch* and *Los Angeles Times* intimated that the Park Service “deal” with Ottenstein was improper by interspersing portions of the Gettysburg Address through accounts of the “secret agreement.” *The Philadelphia Inquirer* proclaimed, “Conceived in poor taste, and dedicated to the desecration . . .” (Aug. 9); “are we not to ask of those who propose this tower and those who support its erection, ‘How dare you?’ ” (Aug. 9); “Gettysburg Belongs to Us All” (July 22); “But a real estate operator, local commercial groups . . . and local government officials . . . have their own ideas on how and for what that ground is to be consecrated. Apparently the National Park Service, which is supposed

to protect historical landmarks, finds it fitting and proper to agree. We do not" (July 13).

The Park Service, however, did not totally agree on any part of the negotiated settlement. Local park officials had not been consulted. They learned the news from the banner headlines in *The Gettysburg Times* of July 10. As late as July 13, Superintendent Jerry Schober told reporters he had "not yet received any official information on the agreement" from his superiors and knew "only what was in the news release which the department had embargoed for release last Sunday."⁵² Schober reiterated his lack of knowledge in a Wednesday press conference. Although he admitted he could "learn to live with it" if he had to, Schober still felt the tower "is incompatible with the historical integrity of the battlefield." However, he interpreted the Interior news release to mean he should "exercise no more opposition" to the construction of the tower.⁵³ The personal sentiments of disapproval for the Interior action seemed apparent to a Baltimore reporter who quoted Schober, "I am not able to discuss the Park Service's change. I'm in the service because I thought I was performing a service."⁵⁴

Nor had members of the Gettysburg master plan team been consulted by Washington officials. One planner wrote privately and angrily:

There is one great advantage to all this in that I believe the tower now will totally negate the need for a master or resource management plan. Direct everyone to the tower and fence off the entire park. Then let nature take its course and see who would come to Gettysburg just for viewing a wilderness area. . . . I feel the tower could be treated sculpturally to have more personal symbolism to me like redesigning it into a huge screw or at least paint it purple.⁵⁵

Community opposition leaders were equally unhappy. Attorney Donald Swope charged the Park Service "pulled the rug out from under us." Neil Beach lamented the new location "is just as bad as the old one," and the Park Service "sold the community down the river."⁵⁶

"Stay and fight it out."—Maj. Gen. Henry W. Slocum's accepted advice, minutes Union Army of the Potomac Council of War, July 2, 1863, First Battle of Gettysburg.

There is no validity to the popular allegations against the Interior Department of a sell-out or political dealings. Instead, the

agreement with the tower builder was the result of a conflict within the National Park Service between advocates of restraint and advocates of intervention. Those urging restraint prevailed and the agreement with Ottenstein concluded.

The legal profession in general hates to lose. Lawyers, like many athletes, are trained to win or, next best, to avoid defeat. Most consider it an important part of their professional obligation to avoid litigation and encourage settlement whenever possible. And when successful litigation is unlikely, a compromise settlement is supremely advisable. This philosophy can be seen in the Interior decision to seek an agreement with Ottenstein. Yet there comes a time not to settle. There is a time not to compromise. There is a time to bring a case. So thought many opponents of the tower who, like the more militant conservationists, believed in fighting an uncompromising legal battle to the bitter end, win or lose. What was the worst that could happen? The foes of construction could lose, but even in defeat the cause of the Park Service could win public support. A loss would clarify the position of national parks as a public trust in the eyes of the courts, and thus clarify the need for further legislative protection. At best Gettysburg could become a landmark decision should the courts rule that the public trust and historic integrity of Gettysburg National Military Park was not to be violated by use of private property on the fringes. At worst, if the courts should decide the public trust doctrine was not applicable to private property, the Park Service would be in no worse predicament than it already was.

It would not have been the first landmark decision involving the battlefield. On January 27, 1896, the United States Supreme Court ruled that the government had the right of eminent domain to condemn land for the protection of the Gettysburg battlefield.⁵⁷ The Supreme Court reversed the decision of the Circuit Court of Eastern Pennsylvania, which had denied the right of the War Department to condemn property of the Gettysburg Electric Railway Company for the purpose of marking battle lines as authorized by act of Congress in 1895 establishing the Gettysburg Military Park. Justice Rufus W. Peckham, expressing the unanimous opinion of the court, said:

The Battle of Gettysburg was one of the great battles of the world. . . . The importance of the issue involved in the contest of which this battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended

upon the result. . . . Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not . . . even take possession of the field of battle in the name of and for the benefit of all the citizens of the country for the present and for the future? . . . The determination is arrived at without hesitation that the use intended . . . is that of public nature which comes within the constitutional power of Congress to provide for by the condemnation of land.⁵⁸

The National Park Service, as a matter of policy, seldom employs condemnation as a means of acquiring land. It is a messy process. In this case, the Ottenstein property in Colt Park did not adjoin federal property. Federal purchase of the site would not have prevented construction of the tower elsewhere; even a successful nuisance suit by the Colt Park residents would not have prevented this.

The strenuous objections of the NPS to the plans for the tower were insufficient. Every conventional means to block construction seemed impossible. There was no zoning regulation in the borough or township. There was doubt that the citizens' nuisance suit could be successful. A state suit might also have had a reasonable chance for success, but Governor Shapp discouraged the hope. On May 21 Secretary Rogers Morton requested the solicitor of the Interior Department "to take all appropriate action necessary to enjoin the construction of a 320-foot observation tower which will be located adjacent to federally owned lands of the Gettysburg National Military Park. Because construction of the tower is now underway, it is essential that immediate action be taken."⁵⁹ The word came back that the Interior Department had no effective legal means to prevent construction. By early June the Interior's legal decision had been made.

The doubters at the Interior Department prevailed. Their lawyers did not wish to fight a litigation on unconventional grounds. They dismissed Yannacone's proposal to argue a precedent-setting case based on the public trust doctrine. Rather than await the outcome of the Colt Park nuisance suit or possible state action, the Interior Department officials decided to bargain with Thomas Ottenstein. The decision by early June was made without consulting local park administrators, master plan team members, or Pennsylvania officials. The secrecy and the decision itself are points of major question. The more restrained element had reached its conclusion—litigation might not be won and rather than risk defeat it would seek an acceptable settlement. Exact details of the infight-

ing and debate within the Interior Department cannot be known without official investigation. The Colt Park site was wholly unacceptable for the NPS; a less damaging location would be preferred.

By early June special assistant J. C. Herbert Bryant, Jr., an aid to Asst. Secretary of the Interior, Nathaniel P. Reed, had begun bargaining with Ottenstein. In fact, Ottenstein and aides of NPS Director Hartzog had already been holding periodic meetings, at least three conferences before May. The first had been at the Interior's request. Ottenstein then had refused to budge; declining to consider alternate tower sites away from the center of the battlefield, he had begun drilling his tower foundations. But by June the situation had changed and Ottenstein was willing to negotiate. He had serious parking problems and a class lawsuit facing him at his Colt Park site. The residents' suit was prepared and their action was funded by "interested citizens." Now the developer was most willing to reach an agreement which would give him a strategic location, parking space, and written clearance from the Interior Department. He was pleased to give generously in return. His proposal to create a foundation and to fund it with a percentage of his income from the tower was an offer the Park Service found attractive. It would provide money to purchase much fringe land around the battlefield for which the Interior Department had been loath to seek appropriations. Concealment of the negotiations from local park officials—a gross injustice—perhaps forestalled a public outcry in Gettysburg until it was too late. Hartzog signed the settlement on July 2 and delayed announcement until July 11.

Interior officials reacted with some embarrassment to the negative public reaction to the agreement. "Nobody wants the tower," asserted special assistant Bryant. "The agreement doesn't give Mr. Ottenstein permission to build the tower. It merely says we prefer the site over the other one." If the Interior had chosen to stand and fight "we would have been in bad shape. The only thing we could do was polarize the people." Bryant noted, "We looked at several sites. The one settled on was the . . . least objectionable. It is a Mickey Mouse area as far as commercialism goes. It's over by U.S. 140—the Baltimore approach road—and has all the roaches—Fort Defiance, Fantasyland, things like that."⁶⁰ In fact, Bryant was mistaken; Fort Defiance and Fantasyland are on the Taneytown Road, much closer to the center of the battlefield. His familiarity with Gettysburg may have been somewhat lacking—a fact

of some importance as the chief government negotiator in the agreement.

National Park Service officials in Washington stuck to the formal explanation of their action and for the most part assumed silence as the Commonwealth of Pennsylvania entered the battle. The excessive delay in providing local Gettysburg park officials details of the agreement, after excluding them from consultation during negotiations with Ottenstein, was inexcusable. More inexcusable was Interior intimidation of local park administrators for expressing their personal opinions in continued opposition to tower construction. Director Hartzog's interposition relieved the unwarranted pressure coming from Washington. The Gettysburg National Military Park officials could hardly be expected to swallow the turn of events readily and reverse their personal convictions.

"The Commonwealth of Pennsylvania joins a second battle of Gettysburg today to prevent the environmental desecration of this historic battle site."—Governor Milton J. Shapp, televised statement, July 20, 1971.

Even as federal officials were granting clearance for a tower solution, Ottenstein was running into more difficulty. He had no option or lease to build on the latest site owned by the Apple County Lodge, Inc. The lessor had no authority to sublease the land. Ottenstein began clearing the area for his tower without contacting the property owners. When he moved bulldozers onto the wooded acreage around the Stonehenge restaurant on July 13, the president of the owning corporation, John E. Maitland, ordered him off the property and threatened to sue for trespassing and damages in the destruction of one hundred trees. Maitland informed Interior officials of his "disapproval of the erection of a tower" and reminded them of his legal "rights as a property owner."⁶¹ Again Ottenstein was stalled.

More important was Governor Shapp's move for an injunction against Ottenstein. After months of equivocal responses to Interior queries, the Democratic Governor entered the fracas "with gongs and trumpets . . . a splendid, cannonball dive into the pool" as one source recounted. Shapp's decision, although doubtless based on sincere opposition to the tower construction, was also motivated by a partisan desire to embarrass the Nixon Administration. The Governor, his attorney general and aides sortied to Gettysburg to

express their disapproval of the Interior agreement and champion the cause of the people of Pennsylvania.

Speaking before television cameras in the Gettysburg National Cemetery, Shapp declared on July 20, "Five score and eight years ago, our forefathers battled at Gettysburg to prevent the destruction of this nation. The Commonwealth of Pennsylvania joins the second battle of Gettysburg today to prevent the environmental desecration of this historic site."⁶² Shapp came armed with affidavits. Bruce Catton warned, "It is my opinion that the construction of a 300-ft. tower near or in the Gettysburg National Military Park is a long step in the process of cheapening and commercializing the battlefield area."⁶³ Stewart L. Udall affirmed, "the construction must be prevented. The Gettysburg site must continue to be a natural sanctuary where commercialism is barred and where all forms of economic use are completely and permanently prohibited We today are stewards for future generations and as such we owe it to them, to conserve this beautiful and historic site unimpaired."⁶⁴ Other statements came from professors, state officers, the Gettysburg Battlefield Preservation Association.

The Governor directed pot shots at the Interior Department, telling the press that although the Interior Department dropped all opposition to the tower for reasons "certainly not germane to environmental protection," the Commonwealth had not dropped its opposition.⁶⁵ In intimating that the Interior had reneged on a promise to help prevent completion of the project, Shapp released the letter of June 14 from Secretary Rogers Morton.

Shapp personally appeared before a judge especially summoned to the Adams County Courthouse to hear his petition and obtained a temporary restraining order against tower construction. The Governor contended that the newly amended State Constitution empowered the Commonwealth to block the tower. This would be the first test of the new environmental quality amendment which declared the public right to the preservation of the natural, scenic, historic and aesthetic values of the environment. Judge John A. MacPhail, after listening to jurisdictional questions raised by Ottenstein's attorneys, ruled that the court had jurisdiction and set hearings for August 3.

While an opinion poll by *The Philadelphia Inquirer* showed 82.9 percent of its respondents opposed to the planned tower,⁶⁶ a segment of the Gettysburg community was most unhappy with the

Governor's action. Obviously they were those who had been anxious to benefit from the economic gains expected from the tower. Gettysburg Chamber of Commerce, Retail Merchants, and Travel Council directors on July 28 formally resolved their disapproval of Shapp's move "to enjoin free enterprise activity."⁶⁷ County commissioner Biesecker turned his ire from the Park Service land acquisition policies toward the Governor. He asked Shapp if he was "in favor of the free enterprise system," or aware that "tourism is one of our largest industries."⁶⁸ Complaining of tax losses, Biesecker blasted the NPS and called the tower "a goldmine bringing in tourists who will spend money here."⁶⁹ Biesecker wrote that Shapp should stay out of Adams County issues and that "perhaps it would be wiser if our Governor would concern himself with the enactment of a suitable budget for the entire Commonwealth, rather than becoming involved in local issues."⁷⁰ To prove his point the Republican commissioner gathered 2,200 signatures of county residents in support of the tower. To them the tower was primarily a local issue; to others it seemed of wider importance.

"I have also been advised that accusations of conflict of interest on my part will first be broadcast to the media and then an attempt will be made to take disciplinary action by some law group. . . . While I have no doubt that any such accusations will not stand careful scrutiny, the intimation of such to the National news services, as has been threatened, will cause me serious, permanent and irreparable personal damage which could scarcely be remedied."—Victor J. Yannacone, Jr., to Judge John A. MacPhail, October 13, 1971.

If tower foes were not yet inured to surprises, there was another jolt for them. Victor J. Yannacone, Jr., joined Jerome H. Gerber as the second attorney for Thomas Ottenstein. Two months previously Yannacone had advised the Interior Department and Defenders of Gettysburg how to defeat the tower; the Shapp Administration recently had approached him to be their counsel; now Yannacone would defend the erection of the tower on its new site!

Pennsylvania officials on July 19, 1971 asked Yannacone to represent the Commonwealth in its suit against the tower. He warned them that they were risking Pennsylvania's new amendment in an uncertain fight with Ottenstein that would expose the amendment to a fatal court interpretation. Yannacone argued that

the suit be brought on the basis of the public trust doctrine, as he had outlined for the Department of the Interior. The Pennsylvania Justice Department held firm to test its new environmental amendment. Negotiations with Yannacone broke off.

When Ottenstein asked Yannacone within a few days to represent him, Yannacone accepted. No explanation of his motive was forthcoming, although cynical speculation abounded. The attorney announced that he had been retained at \$4,000, in fees—more like \$7,000, huffed Ottenstein.⁷¹

Whether Yannacone erred in accepting the case remains to be seen. He had exposed his ethics and convictions to critics. By bringing into the trial record documents borrowed from the Park Service two months before, when planning a federal suit for the Defendants of Gettysburg, Yannacone opened himself to charges of conflict of interest. Judge MacPhail, however, for the record, accepted Yannacone's explanation as well as his later appeal that his interests were not in conflict. He was allowed by the court to continue representation of the defendants. Yet Yannacone remained an enigma. He had generated much of the misunderstanding that surrounded him; moreover, his aide, Marty Murda, maintained uneven relations with the press. Considering Yannacone's reputation as an environmental defender, observers questioned his basic motives and intentions—to prove the State did not have proper jurisdiction, to somehow bring his public trust theory into play, or to vindicate his final conviction of the tower's value?

The counsel for the defense asserted to the press that he had never opposed the tower concept and that his concern had been previously to have the site changed. In Adams County Court of Common Pleas Yannacone maintained that his position advanced the wishes, desires, and needs of the Park Service and that the tower on its new site would be a substantial educational contribution. His preliminary statement of July 25, inserted into the court record, delineated his involvement with the case from his earlier contacts with the Interior Department. Yannacone would effectively argue his client's defense.

“. . . substantial, even overwhelming, authority views the tower as a desecration and despoliation of the battlefield area and its surroundings. Construction of the tower and the attendant use of the site proposed for this purpose, therefore, is in clear violation of the rights of the people of this Commonwealth. This proscribed use of the site is clearly within the power of the Commonwealth

as set forth in the Amendment.—*State Argument, from Plaintiff's Application for a Preliminary Injunction, p. 7.*

For three days, August 3 to 5, Judge John MacPhail heard the testimony of thirteen witnesses as the State Attorney General, J. Shane Creamer, sought to prove the unconstitutionality of the observation tower. The Attorney General argued that construction of the tower would violate the constitutional right of Pennsylvanians to a "natural, historic and aesthetic environment of their Commonwealth." The State, as trustee of the public, had the standing to bring suit to maintain and preserve the environment on the basis of the self-executing amendment. To prove his case that the tower would cause irreparable damage, Creamer called ten witnesses to the stand.

Witnesses for the Commonwealth included an impressive medley of architects, state officers, historians, and theologians. Their testimony emphasized the probable damage of the tower on the aesthetic and mood values of the park. In instances the Commonwealth's questioning of its witnesses seemed incomplete, and there were signs of difficulty in execution of argument. Under fierce cross-examination from Yannacone, the State witnesses sometimes more fully revealed their opinions. Creamer did not call to the stand members of the park or regional planning teams, local planning commission, high federal officials, or authorities who may have cast doubt on the economic or educational values of the tower. Nor did the Attorney General call Yannacone himself to the witness stand. The outcome of the hearings would show the Commonwealth should have impugned the rationale of the Interior agreement with Ottenstein and the presupposed benefits of the tower.

State witnesses contended the tower would intrude upon the integrity of the battlefield and would cause irreparable damage to the historic, scenic, and aesthetic environment.⁷² Historian Bruce Catton warned that the tower would "break the spell" of history for the visitor, and would not be as educational to him as his actually "scrambling" over the terrain. Dr. Louis R. Kahn, University of Pennsylvania professor of architecture of world fame, explained that the project would disturb the natural balance of the local environment and be out of natural sympathy with the surroundings. Although other commercialism constituted intrusions, the "constantly out of scale" tower would "dominate" the area. The visitor would be "constantly aware" of its presence. Pressed

by Yannacone's disparagement, Kahn responded with a description stricken from the record, "this tall, out-of-scale, money-making, supposedly educational thing . . . this scribbling in the sky . . ." Another eminent architect, Vincent Kling, echoed these sentiments saying the tower "will shock the sky. . . . It will stand out" at all times on the skyline, "an ungainly . . . spool of corrugated metal and strips of windows," the tower "will top all the tabloid commercialism" already present in the area. The structure "without grace" and without "the vital conditions for beauty and aesthetic qualities" is out of scale; "this tower is too big." Others testifying were Thomas A. Oravec, engineer for the Pennsylvania Bureau of Industrial Standards; Dr. S. K. Stevens, director of the State Historical Museum Commission; Dr. Charles H. Glatfelter, chairman of the Gettysburg College history department; Dr. Robert Jenson, professor of philosophy at the Gettysburg Lutheran Seminary; the Rev. Dr. Robert A. MacAskill, pastor of the local Presbyterian Church; Conrad L. Lickel, director of Pennsylvania State Parks; and Thomas J. Harrison, director of resources and management at Gettysburg National Park. Harrison, the only subpoenaed witness, said "as a private citizen" he felt "the tower would be an intrusion on the history-scape and on the ecological values of the area."

Yannacone capably defended the proposed tower as a "classroom in the sky" which would enhance the battlefield as an educational facility. Its architectural design would be in sharp contrast to the bulk of commercialism in the vicinity. In defense of the tower, Yannacone called three witnesses. Joel H. Rosenblatt described in detail the advanced methods he used to design the "educational tower." The structure was designed to provide an overview of the battlefield and to be "as unobstructive as possible." The "classroom in the sky" would provide "an abstraction of history" and "would get the message across as quickly as possible without a lot of little details gathered from here and there." Harry F. Biesecker, county commissioner, explained the tower's expected value for tax revenues and in drawing "tourists' dollars" and presented a petition of 2,200 persons in favor of the tower. Dr. Mario Mensini, California educator and consultant to the National Park Service, asserted he "cannot understand people who want serenity in this ugly scene" of war. This battlefield, now a pastoral and peaceful scene, "no longer reflects the battle as it was," no longer reminds the tourist of the horrors of war. And noting all the commercial clutter already

encroaching, he said "there will be no damage" if the tower is built. The educational value of the tower would lie in the use of modern educational techniques and the use of the Gestalt approach of "total involvement."⁷³

The defense attempted to discredit the Commonwealth's presentation by questioning the authority of its witnesses on aesthetic criteria and contrasting their expertise with the needs of the general tourist. Defense questioning and briefs characterized testimony as personal, inexperienced observations. Ottenstein's attorneys emphasized the witnesses in evaluating the impact of the tower on the regional environment, relied on "*personal* feeling" without substantiation by any objective criteria. The spirit of Gettysburg "varies from individual to individual" for "the spirit is very private." And while the architect-poet or a historian might prefer to absorb the message of the battle by walking through pastoral fields, the average citizens coming to Gettysburg would benefit from other educational processes. Even some of the Commonwealth's witnesses admitted, however grudgingly, that the tower would contribute to educational opportunities available at Gettysburg. Their objections were couched in spiritual values not in issue, undefinable aesthetic values, romantic conception of history, and differences of opinion over architectural design.

Following preparation of court transcripts and written briefs, Judge MacPhail again heard oral arguments from the counsels on September 22. Jerome Gerber for the defense claimed the Pennsylvania environmental amendment was not self-executing and lacked proper legislative implementation, that the suit violated the Fourteenth Amendment in depriving the defendant of due process and right to a jury trial, and that the Commonwealth was discriminating against his client by singling out one of many alleged environmental insults in the area. The State was tampering with the rights of an individual to do with his property what he wishes, and was competing with the United States government which had agreed to the construction of the tower. Attorney General Creamer countered by refuting Gerber's charges and denying that the proposed "classroom in the sky" would be more than a "cash register in the sky" and "a predator preying on human values." He cited the Constitution as the fundamental fabric which "must be enforced by the courts."⁷⁴

While the judge formulated his decision over the next month, the Shapp Administration determined to offer Gettysburg state

aid to eliminate its "commercial blight" and finance historic restoration. Creamer asked cooperation of local business leaders in removing large signs and pledged to influence the balking State Department of Transportation to construct the new Rt. 30 by-pass as the community and NPS had requested for 1976. "We have the governor's ear," Creamer advised, and the Gettysburg project would receive "top priority."⁷⁵ Despite the battling, the controversy seemed to have some benefits. Community leaders now recognized the need for zoning regulations and cleanup of the cluttered commercial areas. At last there was a growing community willingness to accept local planning and land use regulation. That fundamental acceptance would surmount a major obstacle, but the questions remained—when would land use policies be accepted and how stringent would the regulations be? Weak and flexible zoning laws would have little value.

"This Court cannot be convinced by such testimony that irreparable harm will result in the light of the agreement between the Federal government and the defendants. If, in fact, the American people have been misled by the Federal government's two-sided approach to the 'tower problem,' then other remedies must be pursued."—Opinion of the Court, Adams County Branch of the Court of Common Pleas of the 51st Judicial District in the Commonwealth of Pa., October 26, 1971.

Adams County Judge John MacPhail on October 26 rejected the State's request for a permanent injunction against the tower. "The Commonwealth has failed to show by clear and convincing proof that the natural, historic, scenic, and aesthetic values of the Gettysburg area will be irreparably harmed by the erection of the proposed tower at the proposed site." Yet, in other respects, the ruling suggested a lower court landmark decision.

The State won court approval of the new environmental rights amendment to the Constitution. MacPhail concluded that the amendment was self-executing. It did not require enabling legislation to execute the intent and while:

It is true that there are no definitions of "natural, scenic, historic, and aesthetic values" in the amendment and specific procedures are not spelled out as how the Commonwealth shall conserve the natural resources of the Commonwealth, but we think by going the route of constitutional amendment the legislature may very well have determined that such matters were for the interpretation of the courts.⁷⁶

Furthermore, the Attorney General has the right to institute such a suit as trustee for the people of Pennsylvania.

MacPhail decided the federal legislation with respect to national parks did not pre-empt Commonwealth jurisdiction over areas beyond the park boundaries. The Commonwealth is not prevented from bringing suit by reason of previous issuance of construction permits by the State Department of Labor and Industry. The granting of relief to the Commonwealth would not be an infringement on the constitutional rights of the defendant, for an injunction would not be an action of eminent domain. Nor did the action violate the equal protection clause of the Fourteenth Amendment since the absence of an environmental protection amendment previously precluded Pennsylvania suits against other commercial ventures in the area. Thus the new environmental amendment was upheld in its first test case.

However, the appellate court ruled the Justice Department had not proved its contention that the tower in its proposed site would "*irreparably harm*" (judge's emphasis) the environment. Although "natural, historical, scenic and aesthetic values . . . are subjective matters where reasonable men may differ," the court could assume the burden in determining what these values are for a particular area. MacPhail concluded first in considering scenic and aesthetic values "that while the proposed tower may not be architecturally inspiring, we are unable to say that it will irreparably damage those values in this area." Because the project might have redeeming educational, social or economic values, "we are unable to say that the proposed tower will irreparably damage the natural values of the present-day Gettysburg area." The court must view the situation as it now exists. "The evidence in this case clearly shows that the historical Gettysburg has already been raped." The court criticized the local governments for not remedying the excesses of commercialism and advised those opposed to this commercialism to insist that local officials enact appropriate ordinances and adopt comprehensive plans for the area. MacPhail found it "encouraging" that at last there is a comprehensive plan for the park and that, since the case was instituted, efforts had begun on the state and local level to plan for the future development of this historic area. "In the meantime, however, the courts cannot be used as a substitute for the legitimate exercise of police power by the local governments and unless there is a clear showing of irreparable damage,

the extraordinary remedy of injunctive relief cannot be, and will not be, invoked.”

Central to the court's dismissal of the suit was the agreement between the National Park Service and Ottenstein. The hasty decision of Interior officials to reach a settlement with the developer now proved to defeat the very cause the NPS was mandated to protect. In choosing to make the best of a bad situation, Interior officials in effect had imposed their will on public and state opposition forces. The court interpreted the NPS decision as disproving the argument of the Commonwealth. To Judge MacPhail's mind, the higher authority of NPS officials, who had been mandated by law to protect the national parks for all the people, overrode the authority of state or private opinion. To best understand the court's reasoning, that portion of the opinion is presented verbatim:

Of utmost importance to the Gettysburg area are the historical values. Here again we need not be concerned with precise definitions of what such values consist. In Gettysburg they are unique, but they are equally unique at Valley Forge and Williamsburg. Here, in this action, we have the trustee for the Commonwealth coming into direct conflict with the trustee for the nation's peoples. The National Park system is charged with preserving and managing "for the benefit of all the people of the United States." In this case, as we have previously noted, there is an agreement between the National Park Service and the defendants. For whatever reason, the National Park system has implied by this agreement that the historical values of Gettysburg will not be damaged by the erection of this tower at this site. They have even agreed to provide access to the tower site over government land. Thus, while it may appear to a great historical writer or to the minister of a local church who has a sincere interest in his community that the proposed tower at the proposed site will damage the historical values of this area, this Court cannot be convinced by such testimony that irreparable harm will result in the light of the agreement between the Federal government and the defendants. If, in fact, the American people have been misled by the Federal government's two-sided approach to the "tower problem," then other remedies must be pursued. What the Court does have before it at the present time is an agreement which purports to speak for all of the people of this country concerning the impact of the proposed tower at the proposed site on the historical values of this area. Since that agreement speaks approvingly, we cannot say that there is clear evidence to the contrary.

Thus, we conclude that the Commonwealth has failed to meet its burden of proof.⁷⁷

The opinion seemed to be a lower court landmark decision in clearing the way for the Pennsylvania Justice and Environmental Departments to protect public rights for environmental quality on the basis of the Commonwealth's Constitution. The narrow interpretation of "irreparable damage" may be subject to reversal or expansion in appeals or in other cases. It is unfortunate that the court was reluctant to question the administrative decisions in the Department of the Interior dealing with the public trust. Too often courts quickly take refuge behind statutes that purport to limit judicial review,⁷⁸ or too often courts minimize the scope of statutes that purport to allow judicial review of "final" agency action.⁷⁹ Far too frequently the courts would have us believe that it is inappropriate for citizens or courts to second guess the official vindicators of public interests. Yet it is clearly evident that no federal agency has a monopoly on wisdom or superior authority. The administrative decisions of the NPS should be open to question and reversal. The appeal route may reveal that the federal decision to approve the tower site was one more of expediency than of protection of the public trust. It is difficult to conjecture what would have been the court opinion if the Interior Department had not reached settlement with Ottenstein. Perhaps the weight of National Park Service opposition would have proven the irreparable harm of the tower on the historic values of the Gettysburg area. Perhaps not. More important for the concern of this study are the reasons for the Interior agreement with Ottenstein and the consequences of that imposed decision.

When Thomas Ottenstein heard of the Adams County Court ruling, he exulted, "Now I'm going to build my goddamn tower."⁸⁰ His decision may also have been premature, for Ottenstein still had not acquired the Stonehenge land, and its owner adamantly proclaimed "there is no way" he would sell the site.⁸¹ Furthermore, another wedge of land, 180 feet wide, between the government and Stonehenge properties proved to be owned by A. R. LeVan, who had spent 35 years developing his acreage as a wildlife preserve and had never been contacted by Ottenstein or the NPS over possible purchase.⁸² Although the MacPhail decision was limited specifically to that Stonehenge site, Ottenstein might be forced again to another location. Commonwealth attorneys immediately

announced they would appeal the decision to the Pennsylvania Supreme Court. At the same time local Defenders of the Gettysburg National Military Park, Inc., proclaimed plans for "the pursuit of other legal and equitable remedies" with the backing of a "resurgence of opposition" and growing financial support.⁸³ The second battle of Gettysburg appeared far from over.

"Congress directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations."
—National Park Service Act, 16 U.S.C.A. §20.

The National Park Service has been the greatest loser of the second battle of Gettysburg. Interior officials had the opportunity to draw the line in protection of national treasures, to set precedent on behalf of the public trust, to help shape a national land use policy, to gain public support. Instead the NPS received a black eye and alienated a portion of its former public allies.

Important lessons are offered by the conflict between and within private and public interests. The battle demonstrated:

- (1) the need for local-regional-state-federal (park) cooperation and communication;
- (2) the need for strong zoning and land use regulations in the area of a national treasure;
- (3) the need for comprehensive community, park, and regional planning;
- (4) the need for reform of the misplaced economic incentives which may encourage environmental degradation;
- (5) the need for control of excesses of commercialism and gains of private enterprise at the expense of public interests;
- (6) but perhaps most importantly, the duty of the highest trustee of the public to fully perform its mandated purpose to protect the public trust.

The opinion of the Adams County Court posed the question if the National Park Service had properly upheld its mandated purpose to protect the national treasures and public trust in the Gettysburg controversy. The agreement with the tower developer, by providing NPS written consent and a right-of-way over federal property after secret negotiations, may have violated the Historic

Preservation Act of 1966⁸⁴ and the spirit and intent of the National Environmental Policy Act of 1969.⁸⁵

The Historic Preservation Act provides that prior to any proposed federal action potentially damaging to property of historic significance as recorded on the National Register of Historic Places, the federal agency concerned must refer the matter to the Advisory Council on Historic Preservation, a body composed of government representatives and private citizens appointed by the President. The Advisory Council renders opinions on the desirability of such proposals and recommends modifications to federal actions to protect historic sites. Although Gettysburg National Military Park is on the National Register, Interior officials did not consult the Advisory Council for comment on the tower agreement—this in spite of NPS condemnation of the tower at its Colt Park site as an “environmental insult” and perhaps “the most damaging single intrusion ever visited upon a comparable site of American history;”⁸⁶ this in spite of Executive Order 11593 in which the President on May 13, 1971, directed agency heads to “provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation.”⁸⁷

Decision of NPS officials to reach a settlement with Ottenstein was not in accord with general objectives set forth in the National Environmental Policy Act of 1969. The landmark Act declared, in part, that:

it is the *continuing* responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to end that the Nation may—

- (1) fulfill the responsibilities of each generation as *trustee of the environment* for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and *esthetically and culturally pleasing surroundings*;
- (3) attain the widest range of beneficial uses of the environment *without degradation*, risk to health or safety, or other undesirable and unintended consequences;
- (4) *preserve important historic, cultural, and natural aspects of our national heritage*, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice. . . .⁸⁸ (Emphasis added.)

Nor did the Interior Department prepare an environmental impact statement as required by the Act.⁸⁹ The Act requires that

the responsible federal agency proposing legislation or planning action "significantly affecting the quality of the human environment" file an impact statement with the President's Council on Environmental Quality. The agency must describe the action and alternatives, obtain comments from other environmentally expert federal, state, and local agencies, and make its impact analysis and comments of other agencies available to the President, Council, and the public for review processes.⁹⁰

However, the National Park Service did not file the required impact statement, its negotiations with the tower developer were secret, and no review processes were allowed before the agreement was signed. The Interior's written consent and grant of federal property for the observation tower were within the purview of NEPA. Throughout the legislative history of the Act the phrase "to the fullest extent possible," which modifies all section 102 duties, clearly was intended to make the duties mandatory—not discretionary—unless precluded by statute.⁹¹ NEPA's requirements are particularly important in informal agency decisions, where the Administrative Procedures Act does not specify procedures but merely provides for court review.⁹² Council on Environmental Quality guidelines require agencies to prepare impact statements for projects involving a federal lease, permit, license or other entitlement, which would include clearance for the tower siting. The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be interpreted by agencies with view to the cumulative impact of the proposed action. When there is potential that the environment may be significantly affected, the statement is to be prepared. "Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases."⁹³ Certainly in the Gettysburg controversy an impact statement was necessary. Even when statements are not required, the policies of NEPA sections 2 and 101, and the duty imposed by section 102(1), demand that adverse environmental impact be considered. Otherwise agencies could not attain the Act's objectives.⁹⁴

The environment within the purview of the Act embraces both the natural and the manmade.⁹⁵ The erection of cooling towers for atomic energy plants is as much within the purview of the statute⁹⁶ as activities that threaten marine life due to thermal pollution. Environmental policy "broadly construed, is concerned with the maintenance and management of those life-support systems—natural

and manmade—upon which the health, happiness, economic welfare, and physical survival of human beings depend. . . . The quality of the environment, in the full and complex meaning of this term, is therefore the subject matter of environmental policy.”⁹⁷ Senator Henry M. Jackson, who guided the Act to passage, viewed manmade degradations such as “poor architectural design and ugliness in public and private structures” to be as serious as “nature related” degradation.⁹⁸ Among the specific “examples of the rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation” were not only the Everglades jetport controversy and the Santa Barbara disaster, but “federally sponsored or aided construction activities such as highways, airports, and other public works projects which proceed without reference to the desires and aspirations of local people.”⁹⁹ Certainly the federally approved Gettysburg observation tower would be erected against the desires of many Americans.

The National Environmental Policy Act directs the federal government “to protect and improve the quality of each citizen’s surrounding both in regard to the preservation of the natural environment as well as in the planning, design, and construction of manmade structures.”¹⁰⁰ Since the Act therefore requires, for example, that the Atomic Energy Commission consider in its licensing of nuclear plants such environmental effects as thermal and visual pollution, it may then be argued that the Act requires the National Park Service to be able to justify any grant of right-of-way for a private observation tower that is an environmental insult to a national park. An “increasingly ugly landscape cluttered with billboards, powerlines, and junkyards”¹⁰¹ (or observation towers) was one of the many environmental outrages scored by Jackson and the Senate Report on the Act.¹⁰² Certainly the historic and aesthetic integrity of Gettysburg National Military Park is within the scope of the National Environmental Policy Act.

The National Environmental Policy Act recognizes the importance of public access as a force for corrective action. Citizens have a ground on which to challenge federal agency actions in court when agencies fail to consider the environment in their actions.¹⁰³ And despite earlier uncertainty, the courts have concluded that the Administrative Procedures Act permits “aggrieved” persons to seek review of agency actions in almost every case in which a specific review provision is lacking.¹⁰⁴ Public foes of the Gettysburg tower

might ask the federal courts to overturn the Interior Department agreement with Ottenstein by alleging violation of both NEPA and the Historic Preservation Act. Relocation of the tower could make the Interior settlement worthless. Yet, most important is the principle involved. The Department of the Interior may have violated the public trust and disregarded statutory requirements.

"The evidence in this case clearly shows that the historical Gettysburg has already been raped."—Opinion, Adams County Court, Judge John A. MacPhail, October 26, 1971.

From the inside perspective of the Interior Department hard choices had been made. A decision was reached that seemed best to those Park Service officials in Washington who had power to decide when all the pressures, constraints, and influences in operation were taken into account. Commercialism at Gettysburg was already a serious problem. Mistakes had been made in the past. Surely this observation tower only intensified the problem. Yet without conventional legal means to effectively prevent the encroachment, Interior officials felt it best to negotiate for the removal of the tower to a site with a less adverse impact on the battlefield. This seemed the best course in an unfortunate situation. So it appeared to the Interior officials in Washington, but not to local park administrators and public foes of the tower.

It is so easy for administrators to adopt the position that this is the last intrusion to be permitted, that no bad precedent is being set, and that the line will be drawn at the next case. The tower joined a succession of museums, amusement parks, junk yards, neon lights, and snack bars, and quite likely it would offer greater educational benefits than the other commercial enterprises. This was presumably not the time to draw the line. But that line should have been drawn by the NPS long ago. Will it not also seem quite rational to approve the next small intrusion, with the same reservations about its successor? When the pressure was on, the Interior doubters prevailed. The master plan and future land purchases may prevent future incursions; the line might be drawn then. However, as one development after another is allowed, the cumulative effect is to gradually erode resource values, in this case of a national shrine. The danger is that the result is exactly opposite the overall policy that the administrators presumably want to achieve, and are mandated to achieve.

The New York Times expressed similar views in its July 31, 1971, editorial:

Gettysburg could survive this tower. . . . But in a country that at last is becoming aware of the need to safeguard both its environment and its heritage, the principle is more important than the tower. If the National Park Service succumbs to deals and pressures, as it seems to be doing at Gettysburg, the integrity of a number of other historyscapes will surely be challenged in the future.

Interior Department officials apparently did not feel it wise to attempt to prevent construction of the tower with unconventional legal theories; they instead chose to reach a compromise settlement. Their decision was forced on the public, in spite of public opposition to the tower. It is in such ways that the administrative process tends to reflect not the will of the people, but the will of the bureaucrat—the administrative perspective posing as the public interest. The citizen—viewed as an outsider by bureaucrat and sometimes by court—is thought to possess no authority with respect to the public interest. In the Gettysburg battle, the bureaucratic middlemen had their way. They pulled the foundations from under the legal efforts of the Colt Park residents and Defenders of Gettysburg, despite private assurances of assistance. They provided the most effective defense for the tower in the Commonwealth's suit for injunction. They violated the National Environmental Policy Act. . . . They violated Gettysburg.



FOOTNOTES

* Manpower Development Officer, United States Environmental Protection Agency. The opinions expressed herein are the author's; they have not been endorsed by the Agency.

¹ Gettysburg National Military Park records.

² *The Gettysburg Times* (Jan. 7, 1971).

³ *New Era*, Lancaster, Pa. (Jan. 18, 1971).

⁴ Tower for One Nation, corporation brochure (Dec. 1970); *New York Times*, Ben Franklin (Dec. 20, 1970).

⁵ *The New York Times*, Ben Franklin (Dec. 20, 1970).

⁶ Ottenstein letter to *The Gettysburg Times* (Sept. 24, 1970).

⁷ *The New York Times* (Dec. 20, 1970).

⁸ Tower for One Nation, corporation brochure.

⁹ *The Gettysburg Times* (Jan. 28, 1971).

¹⁰ Tower for One Nation, corporation brochure (Dec. 1970).

- ¹¹ New Era, Lancaster, Pa. (Jan. 18, 1971).
- ¹² *Id.*
- ¹³ Biesecker, letter (Sept. 3, 1971).
- ¹⁴ WRC-TV NBC interview (Dec. 22, 1970).
- ¹⁵ The Gettysburg Times (Oct. 27, 1970).
- ¹⁶ The Gettysburg Times (May 21 and Aug. 19, 1971).
- ¹⁷ Memo to the Planning Commissions of Gettysburg Borough and Cumberland Township, from Wallace, McHarg, Roberts & Todd (Feb. 22, 1971).
- ¹⁸ The Gettysburg Times (Oct. 31, 1970).
- ¹⁹ Memo to Gettysburg Borough Planning Commission from David C. Hamme (Dec. 30, 1970).
- ²⁰ New Era, Lancaster, Pa. (Jan. 18, 1971).
- ²¹ US NEWS & WORLD REPORT, p. 67 (Oct. 18, 1971).
- ²² The Gettysburg Times (Oct. 1, 1970).
- ²³ The Gettysburg Times (Dec. 17, 1970).
- ²⁴ Communications with Ottenstein (Sept. 23 and Oct. 11, 1971).
- ²⁵ Complaint filed in Adams County Court of Common Pleas, No. 1, July Term 1971.
- ²⁶ Memorandum George Hartzog, Jr., to Secretary Rogers Morton, date unknown.
- ²⁷ The Philadelphia Inquirer (July 18, 1971).
- ²⁸ The Gettysburg Times (Mar. 17, 1971).
- ²⁹ Draft news release and The Sunday Patriot-News, Harrisburg, Pa. (Dec. 20, 1970).
- ³⁰ Statement (June 2, 1971).
- ³¹ Herthon L. Bill, Acting Director NPS, to Senator Clifford P. Case (Apr. 2, 1971).
- ³² J. B. Craig, editorial in AMERICAN FORESTS 77, p. 11 (July 1971).
- ³³ Address to National Wildlife Federation 16th Annual Conservation Conference.
- ³⁴ SPORTS ILLUSTRATED 30, p. 29 (Feb. 3, 1969).
- ³⁵ Address, *supra* note 33.
- ³⁶ "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," such as the right to a quality environment says Yannacone. Whereas Yannacone bases his strategy on the Ninth Amendment, Joseph L. Sax, University of Michigan authority in environmental litigation, discounts its use. Sax claims the Ninth Amendment is a vessel into which one can pour almost anything and probably was a way of the Founding Fathers to express hope that they had forgotten nothing important in the Bill of Rights. See J. L. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION at 238 (New York: Alfred A. Knopf, 1971). At least one court, however, has disagreed; *see* Environmental

Defense Fund Inc. v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971).

³⁷ Address, *supra* note 33.

³⁸ SPORTS ILLUSTRATED, *supra* note 34 at 25.

³⁹ R. J. Dunphy, "New Fighting Reported at Gettysburg and Antietam—A dispatch from the Field," The New York Times, Travel and Resorts Section (May 30, 1971).

⁴⁰ Memorandum, V. Yannacone, Jr., to the Dept. of the Interior, p. 2 (May 1971).

⁴¹ *Id.* at 7-8.

⁴² *Id.* no. 2 at 3.

⁴³ B. Cohen, "The Constitution, Public Trust Doctrine, and the Environment," UTAH LAW REVIEW (June 1970); J. Sax, DEFENDING THE ENVIRONMENT, *supra*, note 36 at 160-73, 248; "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICHIGAN LAW REVIEW 471-516 (1970); V. J. Yannacone, Jr., ENVIRONMENTAL RIGHTS & REMEDIES (Rochester, N.Y.: Lawyers Cooperative Publishing Co., 1971).

⁴⁴ See, e.g., G. I. McGregor, "Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute," 1 ENVIRONMENTAL AFFAIRS 606 (1971) and statutes cited therein.

⁴⁵ The Administration's National Land Use Policy Bill, S. 992, introduced to the United States Senate on February 25, 1971, would encourage states to regulate land use for protection of "important ecological, cultural, historic, and aesthetic values," Section 101(a)(1).

Senator Henry M. Jackson's proposal, National Land Use Policy S. 632 as introduced on February 5, 1971, would require states to develop "buffer zones, scenic easements, prohibitions against non-conforming uses, and other means of assuring the preservation of aesthetic qualities" for protection of federal areas, including national parks, from "inconsistent or incompatible land use patterns in the same immediate geographical region," p. 34, subdivision 7, line 12.

The judicial moratorium is discussed in J. L. Sax, DEFENDING THE ENVIRONMENT, *supra* note 36 at 210-11: Evidence might show that the balance between the risk of harm, though uncertain, and the benefits to be derived from immediate action favor delay. Yet a program might be continuing, or might have been authorized, in the absence of full knowledge or under circumstances where the facts seem to have been buried under political exigency. In such circumstances, the interposition of a judicially declared moratorium may be needed. It can be used either to liberate a legislature from an unwise program it finds difficult to squelch or to provide the incentive for a needed sober second look. Such cases have not yet been developed. For the reasons indicated earlier in this book, it is hard to obtain judicial

action unless the plaintiff is prepared to point to some specific statutory provision which has been violated. The adoption of the public trust theory and the development of a common-law approach to environmental cases, emphasizing the right to reasonable protection of common resources against serious threats of infringement in the absence of compensating benefits, can set the stage for cases of the kind just described. Too often we act in ignorance; an enforceable public right to delay action when more knowledge is needed is central to the development of the emerging law of environmental rights. As the concept of the public trust develops, the judicial moratorium will be available to meet this need.

⁴⁶ See, e.g., V. J. Yannacone, Jr., ENVIRONMENTAL RIGHTS AND REMEDIES, *supra* note 43.

⁴⁷ See, e.g., M. Baldwin, "Toward a Constitutionally Protected Environment," 56 VIRGINIA LAW REVIEW 458-86 (1970).

⁴⁸ Department spokesman, The Gettysburg Times (Mar. 2, 1971).

⁴⁹ Morton's June 14 letter released to press by Governor Shapp on July 23.

⁵⁰ Shapp's June 22 reply released to press on July 23.

⁵¹ The Gettysburg Times (July 6, 1971).

⁵² The Gettysburg Times (July 13, 1971).

⁵³ The Gettysburg Times (July 15, 1971).

⁵⁴ Baltimore Evening Sun (July 22, 1971).

⁵⁵ In some sections citation of sources and occasional specifics must be omitted to protect both the author and professional stature of participants in the "battle." Basis for this and other sections came primarily from the author's own observations. Local Park officials were hesitant to provide their personal opinions.

⁵⁶ The Philadelphia Inquirer (July 18, 1971).

⁵⁷ U.S. v. Gettysburg Electric Railway Co., 160 U.S. 668, 168 S. Ct. 427, 40 L. Ed. 576 (1896), where the Court concluded:

1. The United States may condemn land whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution.
2. In examining an act of Congress every intentment will be made by the courts in favor of its constitutionality.
3. The preservation of the battlefield of Gettysburg, with the leading tactical positions properly marked with tablets, is a use which comes within the constitutional powers of Congress to provide for by condemnation of land.
4. That Congress limited the amount to be appropriated for such a purpose, and provided that no liability on the part of the government should be incurred, nor any expenditure made beyond the appropriations then made or to be made during the session, does

not prevent the condemnation of lands for such use, when it does not appear that the appropriation has been exhausted.

5. Congress has power to take land devoted to one public use for another and different public use, upon making just compensation; the intention to take land of a railway company, in this case, appears from the recital in the joint resolution of June 6, 1894.
6. The quantity of land to be taken for a public use is a legislative and not a judicial question; the effect of taking a part upon the rest of the land remaining is a mere question of compensation.

⁵⁸ U.S. v. Gettysburg Electric Railway Co., 160 U.S. 668, 168 S. Ct. 427, 40 L. Ed. 576 (1896).

⁵⁹ Memorandum, Rogers Morton to U.S. Solicitor (May 21, 1971).

⁶⁰ Baltimore Evening Sun (July 22, 1971).

⁶¹ The Gettysburg Times (July 28, 1971).

⁶² The New York Times (July 21, 1971).

⁶³ Affidavit, State of Michigan (July 15, 1971).

⁶⁴ Affidavit, Commonwealth of Pennsylvania (July 16, 1971).

⁶⁵ The New York Times (July 21, 1971).

⁶⁶ The Philadelphia Inquirer (August 9, 1971).

⁶⁷ The Gettysburg Times (July 28, 1971).

⁶⁸ The Philadelphia Inquirer (July 21, 1971).

⁶⁹ Evening Sun, Hanover, Pa. (July 17, 1971).

⁷⁰ The Gettysburg Times (July 19, 1971).

⁷¹ See *supra* note 55.

⁷² All hearing quotes in this section gathered from briefs, mass media, and personal notes.

⁷³ In his visits that week to the battlefield, Mensini said he had not visited the park Visitor Center-Cyclorama, nor walked over much of the field, nor had he listened to the six park interpretive programs usually delivered hourly but cancelled because of the week of rain. Nowhere, he complained, had he seen "particularly inspired" visitors.

⁷⁴ The Gettysburg Times (Sept. 23, 1971).

⁷⁵ The Gettysburg Times (Sept. 23, 1971).

⁷⁶ Quotations in this section come from Opinion of the Court, Adams County Branch of the Court of Common Pleas of the 51st Judicial District in the Commonwealth of Pennsylvania (Oct. 26, 1971).

⁷⁷ *Id.* at 13-15, citing to 16 U.S.C. §§1, 3 (1970), Aug. 25, 1916, C.408, 39 Stat. 535 and to letter in evidence dated June 14, 1971, from Honorable Rogers Morton, Secretary, United States Department of Interior to Governor Shapp urging the Governor to help "block" construction of the tower.

⁷⁸ See Administrative Procedure Act, 5 U.S.C. §701(a)(2) (1970). Traditional public trust law embraces parklands and requires that

such lands not be used for nonpark purposes. But except for a few cases like *Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1966), in which a public park would have been converted to a little needed ski area with such potential profit accruing to a private developer, it is uncommon to find judicial decisions that constrain public authorities in the specific uses to which they may put parklands.

Although many legislatures and courts have recognized an obligation to safeguard the public trust, numerous courts still profess that courts are not an appropriate forum in which to examine issues concerning administrative actions dealing with public trust lands. These courts follow the approach that the exercise of discretion by a governmental agency can not be reviewed in the absence of corruption, bad faith, abuse of discretion, or unfair dealing tantamount to fraud. *E.g.* *Rogers v. City of Mobile*, 277 Ala. 261, 169 S.2d 282 (1964). It is unheard of for a court to rule directly that a policy is illegal because it is unwise.

See J. L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *supra* note 43 at 492-496, 556.

⁷⁹ See Administrative Procedure Act, 5 U.S.C. §704 (1970), and J. L. Sax, *id.* at 498.

⁸⁰ The New York Times (Oct. 27, 1971).

⁸¹ The Gettysburg Times (Oct. 26, 1971).

⁸² The Gettysburg Times (Nov. 15, 1971).

⁸³ The Gettysburg Times (Oct. 28, 1971).

⁸⁴ 16 U.S.C. §470 et seq. (1970).

⁸⁵ 42 U.S.C. §4321 et seq. (1970).

⁸⁶ Memorandum, George B. Hartzog, Jr., to Rogers C. B. Morton, date unknown.

⁸⁷ Memorandum Order 11593. "Protection and Enhancement of the Cultural Environment," May 13, 1971, as reprinted in the Second Annual Report of the Council on Environmental Quality (GPO: August 1971) pp. 327-29. Section 1. Policy: The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation. Agencies of the executive branch of the Government (hereinafter referred to as "Federal agencies") shall (1) administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations, (2) initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures, and objects of historical, architectural, or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3) in consultation with the Advisory Council on Historical Preservation (16 U.S.C. §4701), institute procedures to assure

that Federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures, and objects of historical architectural or archaeological significance.

⁸⁸ NEPA, 42 U.S.C. §4322(C) (1970).

⁸⁹ NEPA, 42 U.S.C. §4332(2)(C) (1970).

⁹⁰ Environmental Quality, Second Annual Report of the Council on Environmental Quality, pp. 156-518 (GPO Aug. 1971).

⁹¹ P. A. Donovan, "The Federal Government and Environmental Control," 1 ENVIRONMENTAL AFFAIRS 304-05 (1971).

⁹² Administrative Procedure Act, 5 U.S.C. §701 et seq. (1970).

§702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§706. Scope of Review

The reviewing court may set aside agency action found not in accordance with the law, contrary to constitutional right, or short of statutory right without observance of procedure required by law.

⁹³ "Statements on Proposed Federal Actions Affecting the Environment: Council on Environmental Quality Guidelines," 36 Federal Register, 7724-7729, April 23, 1971.

⁹⁴ P. A. Donovan, *supra* note 91 at 310.

⁹⁵ E. H. and J. L. Hanks, "An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969," 24 RUTGERS LAW REVIEW 230-72 (1970).

⁹⁶ In form the Environmental Policy Act is a statute; in spirit a constitution. It serves a constitutional function.

⁹⁷ L. K. Caldwell, consultant to Senator H. M. Jackson, Hearings on S. 1075, S. 1752 Before Senate Committee on Interior and Insular Affairs, 91st Congress, 1st Sess. 40 (1969).

⁹⁸ Senator H. M. Jackson, 115 Cong. Record S12125 (Oct. 8, 1969); S. Rep. No. 91-296, 91st Cong., 1st Sess. 8 (1969).

⁹⁹ *Id.* at 8.

¹⁰⁰ S. Rep. No. 91-296, 18 (1969).

¹⁰¹ All present on the boundaries of GNMP.

¹⁰² 115 Cong. Rec. S12125 (Oct. 8, 1969).

¹⁰³ See P. A. Donovan, *supra* note 91 at 317-19, discussing standing, and E. H. Hanks and J. L. Hanks *supra* note 95.

¹⁰⁴ G. Newstadter, "The Role of the Judiciary in the Confrontation with the problems of Environmental Quality," 17 UCLA LAW REVIEW 1070-1100 (1970). Newstadter maintains that the role of the judiciary in confronting problems of environmental quality must be to assure that other decision-making bodies of government make the best possible decisions about environmental quality. With the courts having

reached an expanded concept of standing to seek judicial review under the "person aggrieved" language of statutes creating specific administrative agencies, the logical step was to extend that concept of standing to the identical language of the Administrative Procedure Act which governs judicial review of all administrative bodies. See *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967); *Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969); *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970); and more recently *Mineral King*, in all of which the necessary strategy was to question not so much the propriety of an environmental decision as the efficacy of the decision-making process. NEPA has simplified this strategy. More recent cases in which courts recognized the standing of organized conservation groups to challenge by way of the Administrative Procedure Act include *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971); *Citizen Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970); and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).