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AN INTRODUCTION TO MASTER PLAN LEGISLATION

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This article is intended to be an introductory critical examination of the legal and administrative problems of a master plan. It is not about zoning. Indeed, one of its main purposes is to stress the importance of the master plan as a planning document of material legal significance in addition to the more familiar zoning by-law and control of subdivision plans. Yet this very aim increases the burden on an author, for there are only a half dozen judicial decisions in all of Canada affecting master plans, and the analysis of the law must therefore be based largely on the planning legislation, which legislation offers the added difficulty of necessarily being drafted in rather vague and general language. Nevertheless the function of the master plan is sufficiently important to the lawyer that some attempt must be made to measure its significance for private interests as well as municipal governments, its status, and the part it plays in the planning of our communities. The expression master plan[1] is used to denote the planning document authorized under various names in provincial statutes and in the plan-

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[1] Although it is not used in any provincial statute, "master plan" seems to be the most widely accepted of the words in common use to describe a plan for community development. "Official (town) plan" seems to be favoured in Canada. See part III *infra*.

ning legislation of the United Kingdom and the United States. The article is divided into four parts: I. An Illustrative Planning Problem; II. The Planning Area; III. The Planning Agency; and IV. The Content and Legal Effect of a Master Plan. The comparative analysis is based on the legislation current at the beginning of 1957.[2]

I. *An Illustrative Planning Problem*

While it is obviously impossible, or at least beyond the author's competence, to discuss here at any length the principles of town planning[3] some insight into the planning problems of a community may be had by considering a commonplace enough choice that may confront any community: how wide should it make a street? One factor that may determine its choice may be the encouragement given by a senior government to make all streets at least sixty-six feet wide,[4] as happens in Ontario. But the problem does not always stop there, because more and more frequently communities are having to build streets eighty-six feet, or one hundred, or even 120 feet wide. Obviously the cost of the land required will increase greatly if greater width is needed, and it will increase even more if there are buildings in the way, a common event where an existing street has to be widened.

To satisfy itself that its street will be wide enough the community will have to examine a variety of factors, no one of which will be controlling, and all of which, appropriately considered together in their proper perspective, may well leave the street planner with rather uncertain guides.

One major factor is the probable volume of traffic. Basically the planner must know how many people will use the proposed street. If the street is already in existence, and is to be widened, a traffic count can be taken, but since the main concern is with the future use, the traffic count is only a start. There must be an

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[2] When the article was ready for the press copies of the radical revisions contained in the 1957 legislation in Saskatchewan and British Columbia were received and have been accounted for in the footnotes. Other 1957 legislation was not available. (After the galley proofs were returned to the author the 1957 amendments to the Alberta legislation, as well as the R.S.A. 1955, were received and the extensive changes have been noted briefly).

[3] Short accounts of planning concepts may be found in Patrick Abercrombie, Town and Country Planning (2nd ed., 1943), and Thomas Sharp, Town Planning (1940). The latter, a Penguin book, is unfortunately out of print, but it is a most valuable short account. See also Lewis Mumford, The Culture of Cities (1938), a much longer work, almost a course in planning itself. See pp. 508-532 for a bibliography.

[4] See, for example, The Municipal Act, R.S.O., 1950, c. 243, s. 476(2).

analysis of the count, which, when coupled with field inquiry about where travellers are going, may yield helpful data for guessing about the future, and the data may also be useful in planning entirely new streets. This process of guessing, or predicting, to give it a prettier name, involves a study of the total road pattern in the light of the surrounding uses of land from terminal to terminal, and along the route, or proposed route, and, depending on how the proposed street fits into the total pattern or system, the land uses in any area to be served by the street. In short, it is necessary to know where the traveller will be coming from, where he will be going, and what he will be going to do.[5] At one end of a street there may be dwelling houses; at the other, factories and offices. This simple pattern would suggest peak periods of use, and depending on the density of the residential area and the number of persons employed in the industry and commerce, the number of persons likely to be using the street during those periods could be accurately predicted. But a modern community is not likely to be quite so simple. Along the same street there may be shops to which the housewife will go in the off-peak periods. There may also be schools, churches, and theatres, or other places of recreation. Some of the uses of land may be what are sometimes called "traffic generating"; other uses may be lured there because the traffic is known to be there; others may involve very little traffic. If the existing uses happen to be agricultural,[6] and the proposed street is being laid out through a farmer's field, then some guessing will have to be attempted about the probable uses and, more important, the intensity of those uses, in the years to come.

A second factor to be considered is the purpose the street is intended to serve. The obvious purpose is, of course, for transport, but the kinds of transport can vary so greatly as to be serious factors bearing on the necessary width of the street. Streets vary from the extreme of the six or eight lane controlled access highway limited to private passenger vehicles, or more rarely, to commercial vehicles, to the extreme of the most local of roads, the cul-de-sac street perhaps only forty or fifty feet wide and serving only half a dozen houses.

Clearly the street need not serve either of these extremes.

[5] Such studies are sometimes given the title "origin-destination survey". See, for instance, Report on the study and analysis of Truck Travel, Metropolitan Toronto Planning Board (1956), especially chapter II on method.

[6] This is a crude example. A historical study of land use in any community will show that uses change over the years in almost all built up areas as well as the surrounding farm lands.

Among the variations within the extremes is the typical city street that serves both local and through traffic with general access from all property fronting on the street. In some newer, well designed towns, provision is now made for streets accommodating only relatively local traffic but having no private land with access to them. They serve only as transport routes for vehicles and pedestrians coming off intersecting local streets. Development of this sort may be seen, for example, in Don Mills, near Toronto, and in Kitimat in remote northern British Columbia. To most people the idea of a street to which no private land has access is rather sophisticated, and it is not surprising that few municipalities have yet regarded the obvious expense as worth the final result, since our present concept of municipal tax laws discourages streets without taxable frontage.

Apart from transport, however, the street may serve many purposes. Every vehicle moving on a street must come to rest somewhere, some time. Very often it comes to rest somewhere on the side of the street. Parking space may or may not be provided off the street. Here again, the uses of the adjoining land become significant. If the street serves a line of shops, almost certainly street parking space will be inadequate, if permitted at all, but if the street is residential, quite probably parking could be permitted, at least for visitors. But if the residential street is close to a shopping street, overflow parking from the commercial area could seriously disrupt the parking facilities needed for the residents.

Another use of a street, and one that most communities probably deplore, although they rarely do much about it, is as a playground for children. Fortunately this use is usually confined to the most local of streets, but where the land is densely developed in rather incompatible uses; where, for example, there are large apartments with no open space around, children may be found playing on very busy city streets.

A use for streets that no municipal engineer is likely to overlook is as a right of way along which water and sewer pipes, gutters and storm sewers, electricity and telephone lines are laid. If the street is too narrow, this right of way will have to be acquired after building along the street has commenced, and the expense is thereby greatly increased. Again, unless the existing uses of land are expected to be more or less permanent, or the future uses can be accurately predicted, the kinds and extent of services to be provided cannot themselves be predicted.

Some part of most streets will sooner or later be used for pe-

destrian traffic, either on the same surface with vehicular traffic, or on sidewalks separated by a bit of curbing. Again, unless the density of vehicular traffic is accurately predicted, the curbing may have to be taken up and replaced later, because the street has had to be widened. The accurate prediction of the purposes the street is to serve will be essential to enable the community to build the street at the most economic cost in the long run.

A third factor to be considered is the availability of other means of transport: rapid transit by bus or rail, railways, seaways, airways, to mention only those we are familiar with today. Not only, then, must a study be made of the total road pattern of the area, but also of other transport services now or likely to become available. The right of way for a city rapid transit system might well be acquired when the right of way for a street is purchased, which would materially affect the amount of land involved. A subsidiary factor of some significance becomes more apparent here, that the alternative means of transport are almost exclusively long distance transport which necessarily increases the area whose intensity of use has to be studied and predicted.

A fourth factor is that of growth. Growth and change are characteristic of the history of communities and the planner must dip into the future, far as human eye can see. But it is a human eye, limited by the capacity of the human mind to sort out and weigh all the factors likely to affect land use in the future, and the intensity of that use. Complementary to the growth of the community is the growth of its financial ability to pay for a road of the width ultimately required. It may be therefore, if the law permits it, that the small but growing community will buy sufficient land for a sixty-six foot road, and restrict building on the adjoining twenty-seven feet on each side, so that the cost of acquiring the land for widening the street to 120 feet may be postponed until the community has grown able to meet it, and meet it less expensively than if there had been unplanned growth. Contrast, for example, the cost of widening Dorchester Street in Montreal, where buildings had to be purchased and removed despite the fact that a planning control had been imposed some years before, but not soon enough.

A fifth factor, of varying importance to communities, is what might be called civic beauty. Lovers of beauty, unfortunately, tend to forget about essential services like sewers. The municipal engineer, who may be, if nothing else, a sewer expert, has, as a result, become a dominating influence in planning the modern city and has perhaps tended to stress more material factors. Never-

theless it may well be questioned whether man can long survive in the best of engineered worlds, if his environment is not *also* a source of beauty. It is a sad fact, however, that beauty in a city has to be paid for, and failing a generous benefactor, it has to be paid for out of public money, and to increase the width of a street to provide for an avenue of trees down the middle, while it may increase not only the beauty but also in some cases[7] the safety of movement on the street, may well add just the amount the taxpayers finally refuse to pay.

In passing, some mention might be made here of a sixth factor relevant to the planning of the street. That is the private planning of the adjacent landowners. In these modern days one is inclined to think of planning as an exclusively state function, but historically many of the best planned areas were the product of farsighted private landowners, and developments like Don Mills[8] and Kitimat[9] are contemporary examples. It is also remarkable that so many of the enduring examples of town planning are individual streets and squares. This is possibly explicable on the ground that the man in the street sees that street, and if he likes it he will be reluctant to let it go, but the man in the street can only see a total road pattern from the air, or on a paper plan, and is therefore less concerned about its achievement or retention. The total road pattern, in its ability to accommodate the movement of the residents of the community, is perhaps the most basic of planning considerations, and the design of the street system will necessarily be completely interrelated with the ultimate land uses and the number of people who will use the land and the streets.

Perhaps the most vital question to the planner of the community's streets is whether the bases of these various factors can be predicted with any degree of accuracy. Even more, can these factors be controlled? Control, if possible, would immensely increase the accuracy of prediction. Under a socialist state, of course,

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[7] Night driving is endangered by trees that cast confusing shadows. A solid barrier of vegetation would be more effective at night.

[8] To the extent that Don Mills was intended to be a self-contained community the experiment must be considered a partial failure, since relatively few (about 20%) of the working residents work in Don Mills industry or commerce. To the extent that it was intended as a suburb of Toronto's industry and commerce, it is even more of a failure although the fault was hardly that of the private developers, since the streets leading into Toronto are simply not wide enough to handle existing traffic. Nevertheless the Don Mills "experiment" has many advantages and its study will be rewarding to planners and their lawyers.

[9] Kitimat is an isolated town, but even it has environs that may be spoiled unless the planning and the complementary controls are extended to cover the whole inhabitable area.

control could be achieved by ownership; although some doubt exists whether Russia will succeed in curbing the growth of Moscow according to the city plan. So-called democratic capitalist economies are reluctant to go this far. As a substitute, modern legislatures have provided the planner with legal powers to control the use of land without depriving the owner of all of his rights and privileges. But every planner knows that to make such a legal power effective there must still be a sensible attempt made to predict the most likely land use and the most desirable, and as far as possible the two will be made one.

A simple example will demonstrate the pressures that will affect land use and often pull the planner into sympathy with the likely use. Suppose in a developing area there is found to be a large volume of sand and gravel in the soil, an essential building material in short supply. The planner who attempts to restrict this area to residential use, despite the pressures its owners will be under to quarry the sand and gravel, will probably fail. On the other hand, the planner who is ingenious enough to work out a way of making effective use of the area after the sand and gravel have been extracted, will be making a real contribution to the welfare, economically and aesthetically, of the community.

It should be clear that if the planner is to make the most of his community's future, he must know such things as whether there is sand and gravel under the surface of the land. It would be a mistake, most people would agree, to insist that the city hall be erected on land containing a rich vein of gold. Some uses of land seem to be almost inevitable, and it has been truly said that good planning is co-operation with the inevitable. But like most aphorisms, it is overly glib, and does not tell what is inevitable and what can be wilfully controlled. Dr. Reinhold Neibuhr's prayer, had it not been adopted by Alcoholics Anonymous, might be received as the planner's prayer:

> Give me the serenity to accept what cannot be changed
> Give me the courage to change what can be changed.
> The wisdom to know one from the other.

To get at the information needed to assess the various factors that are relevant in determining how wide a street should be made, the area involved must be thoroughly studied, to predict the population growth, the land uses, the natural resources to be exploited, the probable course of development and the possible control over that development that it is discreet to attempt.

If all this seems like no more than a penetrating glimpse of the

obvious, it is because community planning involves very obvious considerations—the common danger is to forget the obvious, to act, in short, without thinking first. And it is true, of course, that although the planning considerations are obvious, they are, in a community of any size, very complex,[10] and they are frequently very difficult to reduce to precise proportions. Population prediction, for example, is notoriously difficult, if not impossible, and the density of future population is at the very core of planning. Indeed the planner must cautiously heed the biblical proverb: "thou knowest not what a day may bring forth."

If, as a result of thinking about these and other problems[11] and the factors that have been discussed, decisions are made by a community, and these decisions, with or without the thinking that led up to them, are embodied in a written document, with or without maps and illustrations, that document may reasonably be called a master plan for that community.

II. *The Planning Area*

This discussion of planning problems having proceeded in terms of the building of a street, it might seem unnecessary to look beyond the community boundary as the area for which the community plans, but a moment's reflection on some of the factors involved in determining the width of the street will make it apparent that regardless of what area is *planned*, much more than the community itself will have to be *studied*. The word "community" has been used so far because it does not so precisely refer to the area within the jurisdiction of a local government of any recognised sort: it is not limited to a city, town, village, township, county, district, or what have you. The planning problems are usually the problems of at least a community, if not of a larger area, a community, for this purpose, being defined as an area compactly inhabited by people having many common interests regardless of the political boundaries that may exist. Thus planning problems common to the whole area are to be found in every metropolitan area in the world, and almost every metropolitan area is governed today by

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[10] As an antidote to the oversimplified treatment here see Wilfred Owen, The Metropolitan Transportation Problem (1956), a short but quite understandable account with analysis of general concepts. On the broader question of general land use planning, see F. Stuart Chapin, Jr., Urban Land Use Planning (1957).

[11] The other problems may include water, storm and sanitary sewer works, schools, parks, playgrounds, and private development of housing, industry and commerce.

several local governing units, be they cities, towns, villages or townships, separately, or in some combination.[12]

Because it has the greatest familiarity with the facts of its problem, perhaps the best planner is the body that will carry out the plan. In the case of building a street, that body is frequently the municipality, but while most streets are municipally built and maintained, they are always a part of a road pattern that involves so called arterial highways that are built and maintained by some other, usually senior, government such as a county or a province. Once the scope of planning is realized, doubt begins to appear whether the local government boundaries represent even a possible planning area. In determining the width of a street a basic consideration was the number of people who would use it. Prediction, and perhaps control, of the number of people in a community, that is, the density of population, can rarely be achieved except by planning the area in which development is likely to take place over a long period of years. Thus the planning of a metropolitan area cannot be achieved by looking at any single constituent municipality, or, indeed, at the whole metropolitan area, but only by looking at the area into which that metropolitan community is likely to expand in the future.

Thus we arrive at what is commonly called regional planning, that is, planning of an area larger than any municipality or group of adjacent municipalities, yet smaller than any of the provinces of Canada with the exception, perhaps, of Prince Edward Island. That province, with a population under 100,000 (less than each of a dozen Canadian cities and some Ontario townships) and an area of about 2000 square miles, less than three times the area of the Metropolitan Toronto Planning Area, might be regarded as the optimum planning area in the province. The Metropolitan Toronto Planning Area, although one of the largest, if not the largest in Canada, can hardly be considered either a maximum or an optimum size of planning area. In the opinion of many planning "experts" Metropolitan Toronto's planning problems arise out of what may likely become a continuous urban area from Oshawa to Niagara Falls within the next fifty years. Fifty years is a relatively long term to plan, twenty is more commonly attempted, but a few centuries ago churches were built to last forever.[13] A region need

[12] Metropolitan Toronto is the latest attempt to solve the problems arising from multiplicity of governing units in a single community, but it is only one in a line of experiments throughout the world. See, for an account of several important city governments, William A. Robson (ed.) Great Cities of The World (1954).

[13] Prime Minister MacMillan was recently complaining of the shoddy

not necessarily centre around a single city at the core, as does the present Metropolitan Toronto Planning Area. In British Columbia the Lower Mainland Planning Area is not as obviously centred around Vancouver.

Advocates of regional planning would not necessarily limit the region to something less than the area of the whole province, although planning, as distinct from studying, an area ranging into two or more provinces naturally will present added difficulties when the plan is carried out. Yet interprovincial study may well be essential, as in the case of Kingston, Ontario, whose future will probably be materially affected by developments in both Toronto and Montreal.

While there is no doubt that any municipality facing its own planning problems can to some extent study the whole area that will influence its development, the repetition of this study by all the other municipalities in the same area (and there could be literally hundreds[14] of them; the Metropolitan Toronto Planning Area even now includes twenty-six municipalities) would be expensive and wasteful. Moreover, one of the purposes of planning is to get co-operation and conformity in achieving community ends, and the duplicated efforts of many constituent units are not likely, because of the nature of the problems, the great scope for differences of opinion, and the possibility of human error, to produce anything like consistent results. Planning for the future will obviously be more effective if a commonly accepted goal is sought, even if, in the opinion of many, the goal is wrong. Just as lawyers know that it is frequently desirable that a legal point be settled, even if it is not settled right, so the builders of a community will achieve more if they strive harmoniously to build a community of two million people, even if in the predicted period it is apparent that two and a quarter million people have to be accommodated. The planner, after all, need only provide for orderly acceleration of development to handle that error.

Despite the obvious need for a functional planning area, what Robert Whitten said back in 1935 has remained substantially true, pessimistic as it may be. He said, speaking of regional planning:

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building practices of the builder of No. 10 Downing Street 293 years ago! Associated Press dispatch, London, Toronto, The Globe and Mail, July 12, p. 13, col. 1.

[14] Metropolitan Chicago is said to contain over 1600 government units (this figure includes school and other local boards with independent powers to levy taxes and borrow on debentures). See Robert A. Walker, The Planning Function in Urban Government (2nd ed., 1950), especially at p. 260, Table 13.

> In general, the areas that form the most appropriate municipal or regional governmental units are also the most appropriate units for planning purposes. There are many cases, however, in which existing political boundaries of cities, villages, counties, and states are far from being the most suitable for general governmental purposes and in like measure they are ill-adapted for planning purposes. Nevertheless, they exist, and until changed or supplemented must be used as planning units.
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> The large metropolitan area is a striking example of failure to provide a governmental authority coterminous with the community of interest to be served. . . .[15]

The professional planner tends to regard the whole community as a unit, and while this is a valid view for many purposes, it ignores the very real financial problems arising in a so-called metropolitan area because of the municipal tax structure. It is axiomatic that the residential assessment of a municipality cannot (or will not, politically speaking, because the residents would sooner spend their money on cars rather than schools) pay for schools and other municipal services. Consequently the municipality strives to have industry within its taxable borders, regardless of the fact that the built up area is quite continuous and few people know where the borders are. Industry makes few claims on the school facilities. In a rapidly expanding metropolitan area this lack of "balanced" assessment may cause acute difficulties. Some municipalities have, as a result, tried every legal device at their command to keep out new residents until industry is first established.

Against this very real problem of finance the planner poses the most pressing planning problem of the metropolitan area, the need for more housing. Obviously the crude system of municipal taxation needs overhauling, but until it is reformed planners will simply have to face the political and economic facts. They may find some comfort in Dr. Niebuhr's prayer.

With the exception of Quebec[16] the provinces of Canada have

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[15] Report by Robert Whitten in VII Harvard City Planning Studies, Edward M. Bassett, Frank B. Williams, Alfred Bettman and Robert Whitten, Model Laws for Planning Cities, Counties, and States (1935) p. 130.

[16] Quebec has no general planning legislation as distinct from enabling powers to carry out plans. But see Harold Spence-Sales, Planning Legislation in Canada (1949), especially pp. 40-47, for a short account of the planning powers. See also Parent, City Planning and The Law in the McGill Monograph Series, Housing and Community Planning (1944) pp. 178-195. And see the Cities and Towns Act, R.S.Q., 1941, ss. 430-432, as amended by 1945 (Que.), c. 52, s. 5,and 1953-54 (Que.), c. 32, ss. 15, 16, dealing with plans for streets, lanes and public places. These limited "plans" require the approval of the Superior Court and are "binding upon the municipality, the proprietors interested and all other persons." It is difficult to estimate the scope of this power to plan; it could be more

in theory at least provided in some measure for the planning of areas larger than a single municipality. In every province, however, planning seems to be regarded primarily as a local government function, and where provision is made for planning areas beyond the boundaries of a single municipality, care has been taken to protect the municipality's interests.

Newfoundland has provided for three kinds of planning area, outside of the area controlled by the City of St. John's, none of which is necessarily confined to the limits of an existing municipality. When a council has resolved to prepare a municipal plan it may apply to the Minister of Municipal Affairs and Supply for the definition of a "municipal area" which may include any land outside the municipality which in the Minister's opinion is necessary to enable the council to control development relating to the municipality that may occur beyond its boundaries and to control the amenities of the municipality.[17] Upon the application of one or more councils who have resolved to plan, the Minister may define the boundaries of a "joint planning area". A joint planning area may include the whole or part of a municipality and the land adjacent concerned with its probable extension and necessary for proper control of the surrounding countryside or whose development would affect the amenities existing or to be developed.[18] More recently provision has also been made for "local planning areas", under provincial control, outside of the municipalities otherwise provided for.[19] Only the joint planning area seems adaptable to regional planning and it is not clear that the Minister can include any part of a municipality that does not first resolve to plan and apply to the Minister. He may include the adjacent land without resolution or application but this added area would not necessarily extend to the limits of an appropriate region.

As recently as 1956 Nova Scotia[20] provided for the creation of a "metropolitan area" as a planning area, but even this is limited by the fact that it is the creature of two or more councils, who must agree and, unlike Newfoundland, apparently the whole

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vital than is generally thought if the reasons for the street widths indicated were based on a thorough survey and were set out at length.

[17] The Urban and Rural Planning Act, 1953 (Nfld.), No. 27, ss. 9 as amended by 1954 (Nfld.), No. 66, s. 2, and 10, hereinafter referred to as the Newfoundland Act.

[18] *Ibid.*, s. 36.

[19] *Ibid.*, s. 40A as amended by 1955 (Nfld.), No. 19, s. 5.

[20] 1956 (N.S.), c. 43, s. 2, adding Part V, Metropolitan Planning Commissions, to the enabling act, The Town Planning Act, R.S.N.S., 1954, c. 292, hereinafter referred to as the Nova Scotia Act.

of any participating municipality[21] must be included in the planning area. Upon the application of two or more councils the Minister of Municipal Affairs may by order establish a metropolitan planning commission and in his order he must specify the area with respect to which a commission shall exercise its power.[22] A similar area could be arranged by agreement of the councils concerned under the original Act, but the provision for a "joint" commission[23] is much looser and does not seem to contemplate a joint body in the sense that the 1956 amendment does.

The expression "metropolitan area" is not used in the New Brunswick legislation[24] but an official town plan may likewise be designed by any local authority, or authorities, when more than one is interested.[25]

Prince Edward Island recognises a "regional plan" that may be prepared by a joint planning board created by agreement of two or more municipalities approved by a two-thirds vote of the councils concerned.[26]

In Ontario, while a similar provision[27] enables two or more municipalities to apply to the Minister of Planning and Development to define and name a planning area, the Minister on his own initiative where in his opinion it is in the interest of any area, may define an area[28] and in any case may include parts as well as the whole of municipalities.[29] The Minister exercised this power in the case of the Metropolitan Toronto Planning Area,[30] mentioned above, which includes twenty-six municipalities who would have been most unlikely to have applied to be made one planning area. That is not to say that several municipalities would never agree

[21] The whole of a municipality, in the case of a large unit like a township or county (or a "municipality" in Nova Scotia) may be unnecessarily involved, since the reasonably predictable direction of growth may lie only in a small portion, and the residents in the rest of the municipality may have little interest in paying for planning development likely to be separated later from its control. We badly need municipalities with elastic boundaries.

[22] *Ante*, footnote 20.

[23] Nova Scotia Act, *ante*, footnote 20, s. 2. See also s. 10.

[24] Town Planning Act, R.S.N.B., 1952, c. 233, hereinafter referred to as the New Brunswick Act. The constitution of a board where more than one council or authority is interested is rather uncertain.

[25] *Ibid.*, s. 2. The language is similar to that of the Nova Scotia Act, s. 2. Each council is responsible for carrying out the plan in its jurisdiction (s. 12).

[26] The Town Planning Act, R.S.P.E.I., 1951, c. 163, s. 2(b) and s. 9(1), hereinafter referred to as the Prince Edward Island Act.

[27] The Planning Act, 1955 (Ont.), c. 61, s. 2(1), hereinafter referred to as the Ontario Act.

[28] *Ibid.*

[29] *Ibid.*, s. 2(2).

[30] The Minister was acting on an express statutory command: The Municipality of Metropolitan Toronto Act, 1953 (Ont.), c. 73, s. 179.

to plan together. Prior to the metropolitan planning area, York County together with the city of Toronto constituted a planning area established on application of the municipalities[31] by agreement. The metropolitan planning area, however, spreads into a very different area, including parts of three counties (but the parts of the counties consist of the whole of any municipality, any part of which it was felt it was desirable to include). Within the larger planning areas smaller planning areas may be retained for some purposes, the smaller area being known as a "subsidiary planning area".[32]

The Manitoba legislation[33] contemplates the possibility that a "town planning scheme" may be prepared by a local authority with reference to any land within *or in the neighbourhood of* the area over which it has municipal control.[34] How far the minister may extend the area under the expression "in the neighbourhood of the area" is difficult to anticipate but the difficulties may be more imaginary than real since provision is also made for a joint commission,[35] where more than one local authority is interested, to prepare the "town" planning scheme.

Saskatchewan has perhaps the most complicated provisions for the establishment of a "planning district"[36] for which a district planning committee may produce a plan, which, upon adoption and approval, may be called the "Official Plan". Not all municipalities are equally qualified to participate. Only those who have, by by-law approved by the Minister of Municipal Affairs, empowered their local "community planning committee" to act in a continuous advisory capacity to the council may "initiate an agreement" with one or more municipalities.[37] The agreement

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[31] The municipalities were apparently the City of Toronto and the County of York, a federation of all municipalities in the county except the City of Toronto. It does not appear that each constituent municipality was consulted individually.

[32] The Municipality of Metropolitan Toronto Act, *ante*, footnote 30, s. 179 and 1957 (Ont.), c. 92, s. 1. The Minister could also establish a subsidiary planning area within a planning area that included only one municipality. Ontario Act, s. 4.

[33] The Town Planning Act, R.S.M., 1954, c. 267, hereinafter referred to as the Manitoba Act. For a comprehensive study of the Manitoba Act, see Gerald A. P. Carrothers, Planning in Manitoba (1956).

[34] *Ibid.*, s. 4. [35] *Ibid.*, s. 9.

[36] The Community Planning Act, R.S.S., 1953, c. 157, s. 26, hereinafter referred to as the Saskatchewan Act. After this article was ready for the press the 1957 Saskatchewan Statutes were received. Chapter 48, The Community Planning Act, 1957, hereinafter referred to as the 1957 Act, repeals and re-enacts the Saskatchewan Act. References are made to the new provisions in the footnotes. Section 26 is now ss. 54 and 55. The new sections are simpler and contain more detail.

[37] *Ibid.* The 1957 Act permits any councils to enter into an agreement.

establishes the district, defines its area, and provides a constitution for the planning committee. The Minister must approve the agreement, and it must be adopted by "complementary by-laws".[38] If the participating municipalities refuse to pass by-laws adopting the agreement the initiating municipality may pass an adopting by-law that, if approved by the Minister, will have effect on the planning district.[39]

Alberta, like the other provinces, contemplates planning within the boundaries of the municipality,[40] and the "general plan" is usually for the development of a municipality, but on the application[41] of two or more municipalities the Lieutenant-Governor in Council on the recommendation of the Provincial Planning Advisory Board may in an order establishing a district planning commission define a "district planning area".[42]

British Columbia also provides principally for planning for the future physical development of the whole municipality or a particular area of the municipality,[43] but where it appears expedient to the Minister of Municipal Affairs he may declare *any* area a planning area and may define its boundaries.[44]

The relative emphasis on local, that is, municipal planning, apparent from this short survey of the provincial acts, may be less significant, in some provinces, at least, than appears from the text of legislation. Except in New Brunswick and British Colum-

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[38] *Ibid.* The 1957 Act does away with the need for complementary by-laws.

[39] *Ibid.*, s. 26(2) and (3).

[40] The Town and Rural Planning Act, 1953 (Alta.), c. 113, s. 64, hereinafter referred to as the Alberta Act. See now, R.S.A., 1955, c. 337 (published in 1957) and the extensive amendments contained in 1957 (Alta.), c. 98, especially s. 21, adding ss. 99-129, constituting Part IV, District Planning. Space does not permit an analysis of these provisions. S. 64 is now s. 63.

[41] *Ibid.*, s. 10. See now, 1957 (Alta.), c. 98, s. 5, revising ss. 10-13 of the Alberta Act. The change of principal interest is the power of the Board to recommend the establishment of a district planning area on its own motion.

[42] *Ibid.*, s. 11(b). Some six or seven district planning areas have been defined.

[43] Town Planning Act, R.S.B.C., 1948, c. 339, s. 4 as amended by 1954 (B.C.), c. 50, s. 2, hereinafter referred to as the British Columbia Act. After this article was ready for the press the 1957 British Columbia Statutes were received. The Municipal Act repeals the Town Planning Act and enacts planning measures as Part XXI Community Planning, ss. 691-720. There are radical changes, and the relevant ones have been noted in the footnotes below. Section 2 is substantially reproduced in ss. 692 and 693.

[44] *Ibid.*, s. 65. See now, s. 717(1) and (2) of the Muncipal Act (1957). The power to declare an area is transferred to the Lieutenant-Governor in Council, and he may act only on the petition of two or more municipal councils in a "region" (not defined).

bia[45] the master plan produced for a planning area, whether it be a single municipality or group of municipalities or a region, determined on functional principles, is required to be submitted to a minister of the crown or, optionally, in Ontario, to the Municipal Board. Depending on the extent to which the minister, or a provincial planning agency, may give leadership or direction in planning, many of the objectives of regional planning could be achieved through co-ordination at the provincial level. This possibility leads inevitably to the vital questions: who is to do the planning? And who controls the planners?

III. *The Planning Agency*

Planning is simply the thinking that precedes action. If the thinking is about the long term, the designation of planning is perhaps more apt, but in any case, it should be quite clear that there is nothing unusual about planning, it occurs every day in private enterprise as well as public. Problems only arise when the planning is formalized and even then little difficulty need be anticipated when the person who will carry out the planning is formally authorized to plan. Thus the planning of a street by a municipal engineer would not require special legislation. The obvious planner of a municipality is the municipal council, since next above the municipal engineer the council builds the streets. And to the extent that the planning area is limited to the municipality, the council is the planner in all provinces, although in no province is the council intended to stand entirely alone, except, perhaps, in Quebec.[46] Where the planning area exceeds the boundaries of the municipality it is obvious that some other body must be found to plan. Unless this body has some political and legal status in the community its plans may be ignored and it is necessary therefore to examine the planning agency with some care to appreciate the "legal" strength of a plan, just as the planning area had to be examined to appreciate the "legal" territorial scope of the plan.

But the matters that have to be taken into account in planning even the width of a street are not entirely matters that the municipality will carry out. In determining the number of people who may use a street it is necessary, as we have seen, to take account

[45] Under s. 694(2) of the Municipal Act (1957), provincial approval is now required in British Columbia too.

[46] Even Quebec has a degree of provincial assistance and operates a Provincial Planning Bureau. And in Newfoundland, where, unlike any other province except Quebec, no provision is made for a local advisory body, there is a high degree of provincial control.

of the alternative means of travel open to those people. The street may be a municipal street, in part at least, but it may be part of a provincial highway and it may run parallel with a railway line. Thus the people who somehow have to move through the area serviced by the street may go on foot (on a municipal sidewalk) or by car or bus (municipally operated or regulated) or by provincially or federally regulated bus, or by railway or air (federally operated or regulated). The agencies who will carry out plans, and therefore be under some pressure to make plans, are not by any means all municipal. They are not even all provincial and municipal. Some of the most vitally involved executive agencies (or the legislature that controls them) are federal. Transport, not only of people but also of goods, is one of the most basic factors in planning any community and with the exception of wholly intra-provincial transport, transport is federally controlled in Canada.[47] Railways, airlines, harbours, interprovincial bus lines, all of these agencies are federally regulated, as are the major agencies of commerce and communication; telegraph and telephone, radio and television, the post office and banks. Nevertheless because the British North America Act allocates legislation in relation to matters of municipal institutions[48] in the province to the provincial legislatures, the assumption is too generally made[49] that the legislative control over planning is provincial, and, by delegation, municipal. It is important to remember, in assessing the legal consequences of formalized plans, that the private and public agencies that may carry out the plans or desire to act inconsistently with them, may be subject to legislative regulation at any or all of three levels of government.

With this warning, however, we may return to the central problem of the master plan, and in examining the agencies involved in its creation, we have two objectives in mind. First, as a factor in determining the stability or strength of the plan, the representative and administrative character of the planning agency must be ascertained. Second, to know what protection exists for the rights of individuals, we must learn what opportunities there are for being heard somewhere in the planning process before any decision is taken that may immediately or in the long term adversely affect an individual's rights. Hearings may be of vital importance

[47] British North America Act, s. 92(10), and see *A.G. (Ont.)* v. *Winner*, [1954] A.C. 541.

[48] *Ibid.*, s. 92(8).

[49] See, for example, Alan Armstrong, Community Planning and Urban Decentralization in Proceedings, Seventh Annual Conference, Institute of Public Administration of Canada (1955) pp. 187-194.

to a landowner if the effect of the plan is materially to restrict his freedom to use his land as he pleases. On the other hand, public, and informal private, meetings, rather than hearings, will often be equally important so that the planner may learn what private interests want. Both hearings and informal meetings and consultations would seem to be essential for fair and effective planning.

Where the planning is formally directed to the whole or a part of a single municipality, the elected municipal council can accurately be called the primary planning agency in all provinces. But in all the provinces where there is general enabling planning legislation, except Newfoundland, the council is provided with a secondary appointed planning agency of varying importance in the different provinces.

In all cases secondary planning agencies make no final decisions on plans, they merely advise and recommend, but experience has shown, in Ontario at least, that the advisory function is quite imperfectly understood, and administrative and political misunderstandings have been sometimes substantial. Both private individuals and their legal advisers have tended to assume that the planning board is more than an advisory agent, and criticism that might otherwise have been directed at the representative and politically responsible local council (if it could not sensibly have been suppressed altogether) has been bitterly pointed at the citizen board. It is, however, also true that the political, as distinct from the legal, powers of the advisory body are very often of considerable significance, since municipal councils are loath to ignore advice that the public may regard as sound and well informed, coming as it sometimes does, from a planning board or commission assisted by an able staff of professionally trained persons. One might wonder whether the planning board ought not to deliver its advice privately so as to avoid popular acceptance before the politically responsible members of the local council have decided whether they can afford to act on the advice, or even adopt it as a long-range program. Were it not for the fact that community planning is almost everywhere recognised as requiring wide publicity and public understanding, which usually involves early disclosure to the public of tentative proposals, legislative schemes might be worked out that made the advisory function private, and in one or two instances this has already happened in Canada.[50]

The various provinces provide interesting contrasts in their

[50] See *infra*, the Alberta legislation and see, G. Sutton Brown, Planning Administration in (1954), 4 Community Planning Review 24.

planning agencies. Despite many common provisions there is no possibility of complete uniformity beyond the proposition that the council is the primary planning agency nothwithstanding the presence in eight provinces of secondary advisory bodies.

Newfoundland

In Newfoundland planning within the municipal area is commenced by a council resolution to adopt a proposal to prepare a *municipal plan.*[51] Before proceeding further with planning, as distinguished from carrying out plans, the Newfoundland Act requires the Lieutenant-Governor in Council to initiate development control by an "interim development order"[52] operative for a period not exceeding two years. The planning process thus operates to affect private legal rights *before* planning is commenced. When the interim development order is made the council is obliged to prepare a scheme of development (the municipal plan) within the period during which the interim development order is effective.[53] No provision is made for extending the period in the quite possible event that the plan is not ready within the outside limit of two years. The plan is limited to a ten year view[54] and when completed in accordance with the Act, may be adopted by the council by resolution.[55]

The council's plan requires the approval of the Minister[56] and before he considers it the council must allow opportunity for public inspection[57] and give notice of a public hearing[58] to be conducted by a commissioner appointed by the Minister[59] but paid by the council.[60] Objections must be lodged in writing with the council at least five days before the date set for the hearing.[61] The

[51] Newfoundland Act, s. 9(1), *ante*, footnote 17, as amended by 1954 (Nfld.) No. 66, s. 2.

[52] *Ibid.*, s. 11. An interim development order may suspend the operation of any act or by-law relating to the municipal area for up to two years and may authorize the council to control development within the area for the same period. In the order, or at any time thereafter, the Lieutenant-Governor in Council may make rules among other things prohibiting the development of land or the erection of any house or building in the area without the approval of the council. "Development" is defined by s. 2 (ff), as amended by 1955 (Nfld.), No. 19, s. 2, to include almost any activity, in, on, over or under land. The 1955 amendment is copied closely from s. 12(2) of the Town and Country Planning Act, 1947, 10 & 11 Geo. VI, c. 51.

[53] *Ibid.*, s. 12. Newfoundland is the only province that compels the completion (on paper at least) of planning once the local council has initiated it voluntarily. But cf. the power of other provinces to plan for the municipality. See, *post*, footnotes 85, 95, 127, 134 and 163A.

[54] *Ibid.*, s. 13. [55] *Ibid.*, s. 14. [56] *Ibid.*, s. 26.
[57] *Ibid.*, s. 15(3). [58] *Ibid.*, s. 15(2). [59] *Ibid.*, s. 17(1).
[60] *Ibid.*, s. 17(2). [61] *Ibid.*, s. 18.

commissioner must report to the Minister in writing and send him all the evidence taken at the hearing.[62] In his report he must set forth his recommendations respecting all the objections he considered and state the objections he did not consider and his reasons for not considering them.[63] On completion of the hearing the council may apply to the Minister for approval. No further hearing is required and the Minister may approve or disapprove or indicate his willingness to approve if specified amendments are made.[64] The council must publish notice of the Minister's approval[65] and the plan takes effect from the date of publication.[66]

When a joint planning area has been defined the Lieutenant-Governor in Council may constitute a body corporate to be known as a joint planning authority to administer the area. The joint planning authority may consist of not more than ten persons "who are members of one of the councils which made the application upon which the joint planning area was defined." Each member holds office while he is a member of his local council and until his successor is appointed, presumably by the Lieutenant-Governor in Council.[67] The provisions of the act applicable to municipal plans also apply to a joint plan.[68]

Newfoundland is notable as the only province with general planning legislation that makes no provision for a *local* advisory planning body. But at the provincial level provision is made for a Provincial Planning Advisory Board consisting of a director and three representatives from three provincial government departments concerned with some aspect of urban and rural development.[69] The advisory board is apparently intended to assist local planning[70] but it appears that subject to the approval of the Lieutenant-Governor in Council the board may make regulations[71] "for putting into operation any municipal plan or joint plan" and for controlling subdivision and regulating land uses, matters which, in the other provinces, are usually left to the initiation of a local council, although in most cases provincial approval is required. This combination of advisory and regulatory functions could create some conflict of interest to the detriment of local planning.

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[62] *Ibid.*, s. 21(1). Presumably the commissioner's report is not a public document, *Local Government Board* v. *Arlidge*, [1915] A.C. 120. See also Report of the Committee on Administrative Tribunals and Enquiries (1957) Cmnd. 218, *passim.*

[63] *Ibid.*, s. 21(2).

[64] *Ibid.*, s. 23.

[65] *Ibid.*, s. 24.

[66] *Ibid.*, s. 26.

[67] *Ibid.*, s. 37.

[68] *Ibid.*, s. 39.

[69] *Ibid.*, s. 4.

[70] *Ibid.*

[71] *Ibid.*, s. 61.

Nova Scotia

In Nova Scotia any council may prepare a plan[72] but before adopting, varying or revoking a plan, or taking any official acts in matters pertaining to town planning the council shall, *if* a town planning board has been established, "request the board to make a report".[73] There is no suggestion that the council need act on the report, or even wait until it is delivered, and a court has so held under similar legislation,[74] but common sense would suggest that consideration of the report would be a prudent course, particularly if the planning board is held in high regard. Where a council decides to invite the assistance of a *town planning board* the council may create a board[75] which must consist of the mayor or warden *ex officio* and six members of whom at least three must be councillors.[76] A majority of the members are therefore elected representatives of the municipality's voters. Members other than councillors apparently have no fixed term of office, but hold office until their successors are appointed.[77] It is not clear whether the board is larger when more than one council is interested, but if a metropolitan planning commission is established, its membership, part of which must be appointed by the participating municipalities and part by the Minister of Municipal Affairs, is determined by the Minister's order establishing the commission.[78]

Why a planning board should be any more suitable to plan than a council is not clear, and the usual defence, that the board member has a greater security of tenure than a councillor, does not apply here. But co-operation of the public, sometimes promoted by establishing a citizen board, is vital in planning matters,

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[72] Nova Scotia Act, *ante*, footnote 20, s. 4(1).

[73] *Ibid.*, s. 4(2).

[74] *Pringle* v. *Victoria*, [1951] 3 D.L.R. 334 (B.C.S.C.). The Council of the city of Victoria referred a zoning by-law amendment to the planning commission who replied in a letter written Dec. 19th, 1950, stating that they had tabled the matter until Feb. 1st, 1951, when further information might be available. Without waiting for a report, the Council passed the by-law. Macfarlane J. said in part at p. 336: "It is, I think, unquestionable that the Town Planning Commission is an advisory body only and I think it follows in the absence of some provision in the statute that the Council is free to act, that is, to pass its amending by-law without waiting for some time that the Commission may specify, at the conclusion of which the Commission will consider that it may have more information which it may desire to have before making a recommendation. Of the two, the Council is the sovereign body responsible to the electors and if not satisfied to wait for a specified time, other than sufficient for the Commission to say it approves or does not approve or is not in a position to do either, I see nothing in the statute that requires it to wait."

[75] Nova Scotia Act, *ante*, footnote 20, s. 2(1).

[76] *Ibid.*

[77] *Ibid.*, s. 2(2).

[78] *Ibid.*, s. 39, as amended by 1956 (N.S.), c. 43, s. 2.

and of course where the area being planned comprises more than one municipality, the board may be highly convenient. When a council plans, it presumably makes use of its permanent staff, possibly a group of technically competent persons. In Nova Scotia a planning board may also employ a staff[79] and in addition it may make use of the municipal staff, who are obliged to perform any task for the board that they would have had to do for the council, had planning remained a council task.[80]

Despite the elaborate provisions for an advisory planning board it is notable that in Nova Scotia the responsibility for considering written objections to the proposed plan is vested in the council which must provide opportunity for inspection of the plan in advance of the day when the written objections will be "considered and determined".[81]

Notwithstanding this protection of individual interests the proposed plan is not "official"—does not become effective—until it has been approved by the Minister of Municipal Affairs.[82] He must have a copy of all the written objections,[83] but he is evidently under no obligation to consider further objections, or to hold a hearing. At no stage in Nova Scotia is a hearing[84] necessary, although nothing would prohibit one by either the board or the council or for that matter, a delegate of the Minister.

The provincial control of planning does not stop at this power of approval. In a case where he thinks fit, the Minister may compel or enforce planning by the municipality, or plan for it himself.[85]

New Brunswick

New Brunswick follows the same general scheme of planning as Nova Scotia, but with important differences in detail. The council is still the primary planning agency,[86] and it, too, need only consult the *town planning commission* if the council has seen fit to create one.[87] The commission may have as few as three members, as many as fifteen,[88] holding office in rotation,[89] and no mention is made of the representation of council members. The term is three years[90] and the powers of the commission are the same as

[79] *Ibid.*, s. 3(2). [80] *Ibid.*, s. 3(4). [81] *Ibid.*, s. 6.
[82] *Ibid.*, s. 7. [83] *Ibid.*, s. 8(b).
[84] A hearing is usually something more than is implied by a duty to "consider and determine" written objections. Contrast the broad powers of the Newfoundland commissioner to compel attendance of witnesses: Newfoundland Act, *ante*, footnote 17, s. 20.
[85] Nova Scotia Act, *ante*, footnote 20, s. 21.
[86] New Brunswick Act, *ante*, footnote 24, s. 6(1)(a) and (b).
[87] *Ibid.*, s. 6(2). [88] *Ibid.*, s. 2(1). [89] *Ibid.*, s. 2(2).
[90] *Ibid.*

those of a Nova Scotia board, but in addition the commission may hold public meetings to help explain town planning matters and promote pride in the community.[91] There is still no requirement of a public *hearing* as distinct from a public *meeting* but the council has the same duty as in Nova Scotia to consider written objections.[92] The commission may employ technical assistance and utilize existing municipal staff.[93]

The provincial control of planning in New Brunswick is vested in the Provincial Planning Board,[94] but it does not have the privilege of approving plans and consequently has no occasion for a hearing. It has, however, the same powers as the Minister in Nova Scotia, but subject to the approval of the Lieutenant-Governor in Council, to compel or enforce planning by the municipality, or to plan for the municipality itself.[95] In this event a committee of five members of the Board acts as the local planning commission.

Prince Edward Island

The pattern, such as it is, apparent in Nova Scotia and New Brunswick legislation, is broken in the Prince Edward Island Act, which more closely coincides with the Ontario Act. The council is given no formal power to plan by itself, although there can be no doubt that any council is free to plan as it pleases, but its plan, when produced, will have no binding effect on subsequent councils, and will not qualify the council for any of the relatively uniform powers of expropriation in the process of carrying out the plan, which are contained in all nine provincial acts.

In Prince Edward Island, a *planning board* may be created by a council.[96] Its members must be ratepayers resident in the municipality and council members are limited to one council member for each three non-council members.[97] The mayor may be appointed from year to year as a member ex officio.[98] The non-council members hold office for six years in rotation.[99] There is, therefore a greater stability and continuity of membership than in Nova Scotia and New Brunswick, and independence from the council is more emphatic than in New Brunswick, which has no provision, or in Nova Scotia, where the council members must

[91] *Ibid.*, s. 3.
[92] *Ibid.*, s. 9(3).
[93] *Ibid.*, s. 4(1) and (3).
[94] *Ibid.*, s. 37.
[95] *Ibid.*, s. 40.
[96] Prince Edward Island Act, *ante*, footnote 26, s. 4.
[97] *Ibid.*, s. 5(1). There may be three, six, or nine members, plus the number of council members qualified.
[98] *Ibid.* The mayor may appoint a member of council to act for him with the approval of council, s. 5(2).
[99] *Ibid.*, s. 5(3).

be in the majority. A planning board may employ its own staff,[100] as in Nova Scotia and New Brunswick, if the council provides the funds, but Prince Edward Island planning boards may only use the staff of the council "subject to approval of council".[101] There is hidden in this provision a fairly substantial degree of control over the planning board by the council, which must agree to pay for the board's staff and may deprive it of the council staff if it pleases. No provincial planning legislation seriously contemplates the burdensome technical work of planning being done by spare-time citizen boards, and the degree of independence in selecting its staff is a measure of the independence of the planning agency from the council. If there is no independence the planning function of the agency would seem to be a pointless duplication of a job that may be just as well, if not better, done by the council itself.

A joint planning board may be established by agreement of two or more councils, approved by a two-thirds vote of the councils.[102] The joint planning board may prepare and recommend adoption of an *official plan* or a *regional plan*.[103] A single or joint planning board has substantially the same power to prepare a plan[104] as in Nova Scotia and New Brunswick. The board must, however, hold public *hearings*[105] in addition to optional public meetings,[106] and at the hearings representations may be made by interested persons.

A planning board does not produce a plan, it is merely to recommend what the Act is careful to call a "proposed plan" and even when adopted by the council or councils, by at least a two-thirds vote,[107] it does not become "official" until approved by the provincial board after that board has also heard all persons desiring to be heard.[108] There is thus a second hearing on the plan. When so approved the proposed plan becomes the official plan. While a two-thirds vote of the council would not seem a very serious protection against hasty adoption or amendment, even this slight requirement is not made in Nova Scotia or New Brunswick.

The provincial control is apparently limited to approving (and presumably advising); there is no power to compel planning.

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[100] *Ibid.*, s. 8(1).
[101] *Ibid.*, s. 8(2).
[102] *Ibid.*, s. 9(1).
[103] *Ibid.*, s. 9(3).
[104] *Ibid.*, s. 10(a) and (b).
[105] *Ibid.*, s. 11.
[106] *Ibid.*, s. 10(d).
[107] *Ibid.*, s. 12(2). A joint plan is evidently only capable of being adopted in part by each council.
[108] *Ibid.*, s. 13(2). Notice is required—such as the Municipal Board (sic) may deem advisable!

Ontario

The Ontario scheme fairly closely resembles the Prince Edward Island legislation, although again there are important differences and the Ontario Act is much more detailed. As in Prince Edward Island, a council has no formal power to plan, and an official plan can only be adopted by a council if it was originally approved by vote of a majority of all the members of a planning board.[109]

A planning board for a single municipality, or, more strictly speaking, for a single planning area, is appointed by the council.[110] There may be four, six or eight appointed members, plus the head of the council, who is ex officio a member.[111] The members must not be employees of the municipality or a local board[112] (except school teachers[113]) and the members who are members of council must not be in the majority.[114] Thus a higher proportion of council members is possible than in Prince Edward Island. Council members hold office for a year, others for three years in rotation.[115] Where a planning board serves a joint planning area, the Minister of Planning and Development must approve the appointment of its members.[116] A planning board similarly constituted may continue to function, or be established, in a subsidiary planning area within the joint planning area.[117] A board may employ technical assistance[118] within the limits of the budget determined by council, but there is now no provision, as in the maritime province acts, for use of the council's staff.[119] The absence of a provision in the Act, while it does not mean that the Board cannot use the council's staff, does mean it will be more difficult to persuade a busy staff to find time to serve an outside body.

The functions of the board are similar to those of New Brunswick and it is notable that an Ontario board, unlike a board in Prince Edward Island, is not obliged to hold hearings, although "it shall hold public meetings".[120] That its function is a continuing one is clear from its duty to "review the official plan from time to time and recommend amendments".[121]

[109] Ontario Act, *ante*, footnote 27, s. 10(2). [110] *Ibid.*, s. 3(1).
[111] *Ibid.*, s. 4(1). The head of the council, with approval of the council, may appoint a member of council as his substitute s. 4(3).
[112] *Ibid.*, s. 4(1).
[113] *Ibid.*, s. 4(1a), 1956 (Ont.), c. 64, s. 1.
[114] *Ibid.*, s. 4(2). [115] *Ibid.*, s. 4(4).
[116] *Ibid.*, s. 3(1). The appointment is made by the "designated council"; see *post* footnote 122.
[117] *Ibid.*, s. 2(4). [118] *Ibid.*, s. 4(9).
[119] But cf. The Planning and Development Act, R.S.O., 1937, c. 270 s. 13(8), now repealed.
[120] The Ontario Act, *ante*, footnote 27, s. 10(1)(b).
[121] *Ibid.*, s. 10(1)(f).

When the plan has been adopted by the council of the "designated municipality"[122] (by a vote of the majority of all the members[123]) the council must submit the plan to the Minister for approval.[124] No provision is made for a hearing by the Minister, but a curious provision is made for the Minister to refer[125] the plan to the Ontario Municipal Board which can exercise all the powers of the Minister, and "upon application therefor", evidently by anybody, the Minister must refer the plan to the Board.[126]

There would appear to be no power in Ontario comparable to that in Nova Scotia and New Brunswick, to compel a municipality to plan, but when it comes to the traditional means of carrying out plans, by zoning by-laws and subdivision control, the Minister may exercise by order the same powers as those enjoyed by the municipality but not exercised by it.[127]

Manitoba

Like Ontario, Manitoba requires local planning to be initiated by application to the Minister charged with the administration of the Act[128] who may authorize a local authority to prepare a *town planning scheme* if the local authority satisfies him that there is a prima facie case for making a scheme. [129]Thereafter the council becomes the primary planning agency, but for the purpose of preparing a town-planning scheme a local authority singly or jointly with other authorities where they are interested, may appoint a *commission* of five to ten members approved by the Minister.[130] Members appear to have no fixed term of office and the commission has no express powers to hire anyone nor to use as of right the council's staff. The commission is not obliged by the Act to hold hearings of any sort, but under ministerial regulation, written

[122] *Ibid.*, s. 1(b) and s. 2(5). Where there is a joint planning area, the Minister may designate one municipality whose adoption of the plan binds all constituent municipalities upon approval. If the designated municipality does not adopt the plan, another constituent municipality may, and upon approval by the Minister the plan will apply to the entire area. Where only one municipality is involved, that municipality is a "designated municipality" by definition without naming by the Minister.

[123] *Ibid.*, s. 11(2). This requirement is not likely to be as difficult to meet as the two-thirds vote in Prince Edward Island, but it is more difficult than a bare majority of a quorum, as in Nova Scotia and New Brunswick.

[124] *Ibid.*, s. 12(1). [125] *Ibid.*, s. 29(1).

[126] *Ibid.*, See Milner, Administrative Appeals under Planning Legislation, in Special Lectures of the Law Society of Upper Canada (1956) p. 117, for a detailed account of the opportunities for a lawyer to assist his client under the Ontario legislation.

[127] *Ibid.*, s. 25.

[128] At the present time it is the Provincial Treasurer.

[129] Manitoba Act, *ante*, footnote 33, s. 4.

[130] *Ibid.*, s. 9(1).

objections are considered at both the local and provincial levels.[131] A planning scheme is not effective until it has been approved by the Minister,[132] who may make such modifications or impose such conditions as he sees fit.[133] After holding an inquiry, the Minister may compel the local authority to plan, or enforce its plan, or plan for the authority.[134]

Saskatchewan

A Saskatchewan municipal council apparently may not plan formally on its own. It must first appoint a *community planning committee* of three to nine members.[135] There is no provision about qualifications of members.[136] The committee may prepare a *community planning scheme*, a zoning by-law, and, if the by-law is approved by the Minister of Municipal Affairs, may act in an advisory capacity to the council on all matters pertaining to community planning.[137] Where the committee is so authorized by ministerial approval, the members hold office for three years in rotation, without pay, but with actual expenses.[138] The committee may employ technical help within the limits of its budget furnished by the council.[139] No provision is made for the committee to use municipal staff. No provision is made for hearings or public meetings by the committee but after notice and opportunity for inspection the council must "hear and determine"[140] all written ob-

[131] The regulations are set out in Carrothers, *op. cit.*, *ante*, footnote 33, at p. 134. The provincial "hearings" are held by the Municipal Commissioner.

[132] Manitoba Act, *ante*, footnote 33, s. 6(1). [133] *Ibid.*

[134] *Ibid.*, s. 23. The power to plan for the authority is less clearly stated than in the Nova Scotia Act, *ante*, footnote 85, or in the New Brunswick Act, *ante*, footnote 95.

[135] Saskatchewan Act, *ante*, footnote 36, s. 7(1). See now The Community Planning Act, 1957, *ibid.*, s. 9(1). The body is now called a community planning commission, whose duties are expressly said to be to "advise and assist" and no express provision is made to authorize a commission to prepare a scheme.

[136] The 1957 Act, s. 9(2) makes the mayor, reeve, etc. a member *ex officio*, and guides the selection of members from specified groups. Council members and council employees may not constitute a majority (s. 9(4)). Cities may now establish technical planning boards, as in Alberta (*post*) (ss. 17-20).

[137] Saskatchewan Act, *ante*, footnote 36, s. 7(1).

[138] *Ibid.* s. 7(6) and 7(7) as amended by 1955 (Sask.), c. 40, s. 3. If the Committee is not authorized to act in an advisory capacity evidently its members have no set term of office. See now 1957 Act, s. 10(1); and s. 16, providing for payment. The concept of a committee not authorized to act in a continuing advisory capacity has been dropped.

[139] *Ibid.*, s. 7(2). See now, 1957 Act, s. 13. By s. 14 the commission may appoint advisory committees.

[140] *Ibid.*, ss. 10 and 11. This presumably involves a proper hearing. Cf. the duty to "consider and determine" in the Nova Scotia and New Brunswick Acts. See now 1957 Act, ss. 24 and 25.

jections before adopting the scheme by a majority vote of all members.[141]

The Minister of Municipal Affairs must approve the scheme before it has effect,[142] and although he need hold no hearing he must be provided with a copy of the written objections.[143] He may refuse to approve a scheme when in his opinion the provisions contained therein are not in conformity with "good community planning practice."[144] On approval the scheme may be termed the "Official Plan" of the community.[145]

Where a district planning area is established the agreement[146] must provide for a "district planning committee" of three to nine members, the method of selection and the term of office of the members to be agreed. The agreement must be approved by the Minister of Municipal Affairs.[147] Upon approval the agreement has to be translated into by-laws by each participating council, and each by-law requires the approval of the Minister,[148] who may require changes,[149] and he may also appoint representatives to the committee at the request of any participating council.[150] The district planning committee may be given the same powers as a community planning committee.[151] The district committee may also prepare a district planning scheme, to be adopted by the initiating council and the other participating councils[152] following the same procedures as in the case of a community planning scheme. Where the other councils affected fail to pass complementary by-laws the initiating council's by-law, if approved by the Minister, applies to the planning district.[153]

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[141] *Ibid.*, s. 9(1). This section authorizes a council to "adopt a scheme" and it presumably refers only to the scheme prepared by the committee. See now, 1957 Act, ss. 21 and 23.

[142] *Ibid.*, s. 12(1). See now, 1957 Act, s. 26(1).

[143] *Ibid.*, s. 12(2). See now, 1957 Act, s. 26(2).

[144] *Ibid.*, s. 12(3). See now, 1957 Act, s. 26(3). The expression is not defined.

[145] *Ibid.*, s. 12(4), and 1954 (Sask.), c. 40, s. 3. See now, 1957 Act, s. 22(4). The approved name is now "The Community Plan", but may be applied only where the scheme is "comprehensive in scope". Cf. s. 9(3) of the Saskatchewan Act before the 1954 amendment.

[146] *Supra* note (35).

[147] Saskatchewan Act, *ante*, footnote 36, s. 26(1). See now, 1957 Act, ss. 54 and 55, which provide somewhat more detail about the contents of the agreement. The district planning committee is now called a commission.

[148] *Ibid.*, s. 26(2). The 1957 Act has dropped the requirement of complementary by-laws. The approved agreement can stand on its own feet.

[149] *Ibid.*, s. 26(3).

[150] *Ibid.*, s. 26(4) as introduced by 1954 (Sask.), c. 40, s. 6.

[151] *Ibid.*, s. 27(1). See now, 1957 Act, s. 54(d).

[152] *Ibid.*, s., 28. See now, 1957 Act, s. 57.

[153] *Ibid.*, s. 30. See now, 1957 Act, s. 59. There is now no "initiating

Alberta

An Alberta municipal council may prepare a *general plan* for the development of the municipality,[154] to be adopted by a by-law.[155] Before the second reading the council is obliged to hold a public hearing (after notice and opportunity to inspect) to hear the objections written or oral that any person wishes to make, and to give any person an opportunity to state his opinion of the objections and of the by-law.[156]

Alberta, perhaps more obviously than any other province, emphasizes the purely advisory function of the *planning advisory commission*, to be created by by-law in which may be set out, at the council's discretion, the constitution of the commission. The members must, however, represent the council, the citizens at large, and any organisation concerned with planning, or all or any of them.[157] The council may, apparently, put the planning advisory commission virtually in the same position as an Ontario board, for the council may delegate such powers to the commission as it deems necessary, and the commission may hire technical assistance within the budget supplied by the council.[158]

In addition to the planning advisory commission, the council of a *city* may establish a *technical planning board* to advise and assist the council and to co-ordinate the activities of its various departments and agencies in planning and development.[159] The board must consist only of officials of the city but within their budget they may engage technical assistance and the council may delegate such powers as it deems necessary for planning.[160] The board, because of its make up, remains entirely subservient to the council, yet for the same reason, it may present the council with a united front by the "expert" staff on a planning issue.

At the provincial level there are two planning agencies. One, the Provincial Planning Advisory Board, is a body comprised of provincial officials, which, as its name implies, is primarily advisory and is obviously intended to promote planning at lower levels of

council" and the Minister may approve the by-law of any council concerned and it will apply to the district.

[154] Alberta Act, *ante*, footnote 40, s. 64(1). Literally the council "may authorize the preparation" of the plan, and since s. 65(2) requires the plan to be prepared by "qualified persons" perhaps it is felt that councillors are not qualified. See now, R.S.A., 1955, c. 337, s. 63(1) and s. 64(2).

[155] *Ibid.*, s. 68(1). See now, R.S.A., 1955, c. 337, s. 67(1).

[156] *Ibid.*, s. 84(2). As amended by 1954 (Alta.), c. 105, s. 5. See now, R.S.A., 1955, c. 337, s. 83(2), as amended by 1957 (Alta.), c. 98, s. 14.

[157] *Ibid.*, s. 89. See now, R.S.A., 1955, c. 337, s. 88.

[158] *Ibid.*

[159] *Ibid.*, s. 88. See now, R.S.A., 1955, c. 337, s. 87.

[160] *Ibid.*, s. 88(4). See now, R.S.A., 1955, c. 337, s. 87(4).

government.[161] The other is the Minister of Municipal Affairs, whose approval is required of by-laws adopting general plans. He may either approve the by-law, subject to any amendments or conditions he deems necessary, or refuse to approve it.[162] He is not required to hold any hearing, but the "proper officer" of the municipality must state the persons objecting to the by-law at the hearing held by the council, the nature of their objections, the manner in which the council dealt with them, and the way in which the by-law passed by the council differs from the by-law made available for public inspection.[163] If he is not satisfied with local planning, after making inquiries the Minister may compel or enforce planning by the council, or plan for it himself.[163A]

When planning is seen to involve more than one municipality the Lieutenent-Governor in Council on the recommendation of the Provincial Planning Advisory Board, upon receipt of an application made by the councils of two or more municipalities, may establish a *district planning commission*.[164] The constitution is determined by the Order in Council[165] and by regulations.[166] In the same manner the constitution may be amended to change the representation of the area, on application of a council or the commission itself.[167] The district planning commission may prepare and recommend to a participating municipality a general plan and it may study the area with a view to preparing a general plan for the area.[168] Participating councils may appoint members of council to be members of the district planning commission where the order determining its constitution provides for council members[169] and no statutory provision in any way otherwise limits the constitution of the commission. When the commission recommends jointly to two or more municipalities a by-law adopting

[161] See Part I of the Act: Provincial Planning.

[162] Alberta Act, *ante*, footnote 40, s. 84(5). See now, R.S.A., 1955, c. 337, s. 83(5). But see also, 1957 (Alta.), c. 98, s. 14, which repeals the requirement of provincial approval.

[163] *Ibid.*, s. 84(4). See now, R.S.A., 1955, c. 337, s. 83(4). The 1957 amendment, c. 98, s. 14, requires the material to be sent to the Director of Town and Rural Planning.

[163A] *Ibid.*, s. 96. See now, R.S.A., 1955, c. 337, s. 95.

[164] *Ibid.* s. 10. See now, R.S.A., 1955, c. 337, ss. 10 and 11, as enacted by 1957 (Alta.), c. 98, s. 5.

[165] *Ibid.*, s. 11. See now, R.S.A., 1955, c. 337, s. 11, *ante*, footnote 164.

[166] *Ibid.*, s. 12. See now, R.S.A., 1955, c. 337, s. 11, *ante*, footnote 164.

[167] *Ibid.*, s. 13. See now, R.S.A., 1955, c. 337, s. 11, *ante*, footnote 164.

[168] *Ibid.*, s. 14. See now, R.S.A., 1955, c. 337, s. 14.

[169] *Ibid.*, s. 87(2). See now, R.S.A., 1955, c. 337, s. 86(3) as enacted by 1957 (Alta.), c. 98, s. 16. It is now expressly provided that one member shall always be a member of the council and any other member need not be a member of the council but may be either a senior official of the municipality or a resident of the municipality.

a general plan each council may delegate to the commission the publication of notice and the holding of hearings in respect of the by-law.[170]

British Columbia

In British Columbia a council has power to prepare the *official town plan*[171] and the council must "approve" the plan by resolution,[172] and upon approval, after being sealed, dated and signed by the municipal clerk, the plan becomes the official town plan.[173] A resolution involves a single vote by the council. A by-law usually is given three readings. The adoption of the official town plan is thus even less formal than Nova Scotia, New Brunswick and Alberta, who require a by-law supported by at least a majority of a quorum.

The council may create a *town planning commission* to act in an advisory capacity[174] with at least four ex officio members: the mayor, a member of the council, the official in charge of parks and a representative from the school board, or representatives where there is more than one school district involved. Vancouver has two extra ex officio members representing the joint sewerage board and the port authority. In addition Vancouver and Victoria have nine appointed members, cities over five thousand have six appointed members and all other municipalities, three.[175] Appointed members are appointed by the council and hold office for three years in rotation.[176] No person holding any municipal office may be appointed.[177] Members receive no pay beyond actual expenses and they are limited by the budget set by the council.[178] No provision is made for the employment of technical assistance.

Where there are town planning commissions in contiguous

[170] *Ibid.*, s. 87(3). See now, R.S.A., 1955, c. 337, s. 86a as enacted by 1957 (Alta.), c. 98, s. 17.

[171] British Columbia Act, *ante*, footnote 43, s. 4 as amended by 1954 (B.C.), c. 50, s. 2. Under the Municipal Act (1957), the council may prepare "community plans" (s. 693).

[172] *Ibid.*, s. 5(1). Now if a community plan is to become "official" it must be so designated by a by-law passed by a two-thirds vote of all the members of the council. Municipal Act (1957), s. 694(1).

[173] *Ibid.*, s. 5(2). A by-law designating an "official community plan" must be approved by the Lieutenant-Governor in Council. Municipal Act, (1957), s. 694(2).

[174] *Ibid.*, s. 19. See *Pringle* v. *Victoria*, *ante*, footnote 74. The Municipal Act (1957), dispenses with the town planning commission with its elaborate statutory constitution, and provides, in s. 698, for an advisory planning commission whose establishment and constitution are in the discretion of the council, who must adopt the by-law by a two-thirds vote of all the members. The commission members must serve without pay (s. 698(1)).

[175] *Ibid.*, s. 20(1) as amended by 1954 (B.C.), c. 50, s. 13.

[176] *Ibid.*, s. 20(2). [177] *Ibid.*, s. 20(3). [178] *Ibid.*, s. 21.

municipalities, they may hold joint meetings and "any conclusion reached at any such joint session shall receive the careful consideration of each Commission affected but the liberty of action of each Commission and its individual responsibility shall not be restricted by the decisions of the joint body. . . ."[179] But when a commission reports to its council on any matter dealt with at a joint session it must report the recommendation of the joint session and indicate its reasons for differing if it does.[180]

Regional planning is not, however, limited to voluntary joint sessions. The Minister of Municipal Affairs may in his discretion declare an area to be a planning area, whereupon there is a *regional planning board.*[181] The minister appoints one member and each constituent municipality appoints one member. The members hold office for three years, without compensation beyond actual expenses from a budget supplied by the constituent municipalities. The engineer if there is one, and some other official if not, and the town planner, if there is one, of each constituent municipality are advisory members without a vote. The regional planning board may, within the limits of its budget, engage technical staff.[182] The board may prepare a plan for the area, which it must submit to the councils of each municipality affected for adoption.[183] The councils in turn must refer the plan to the town planning commission, if there is one, for report.[184] If the plan is satisfactory to the council it may adopt it by by-law.[185] If it is not satisfactory the council may, with the consent of the board, amend the plan and adopt the amended plan by by-law.[186] No provision is made for hearings by either the advisory agent or the council and since

[179] *Ibid.*, s. 23. The provisions for joint meetings are not re-enacted in the Municipal Act.

[180] *Ibid.*

[181] *Ibid.*, s. 66(1). Under the Municipal Act (1957), the board is created by the Lieutenant-Governor in Council (s. 717(3)).

[182] *Ibid.*, s. 66, which provides for the details set out in the text above. See 1954 (B.C.), c. 50, s. 14 as to the town planner as an advisory member. See now, ss. 717-720 of the Municipal Act (1957). The following changes are notable. The Lieutenant-Governor in Council appoints one member who holds office during pleasure. Council appointed members hold office for one year or until a successor is appointed. No provision is made for advisory members.

[183] *Ibid.*, s. 68 and s. 70(2). Under the Municipal Act (1957), it is the duty of the board to prepare community plans (s. 718(1)).

[184] *Ibid.*, s. 70(3), but see *Pringle* v. *Victoria, ante,* footnote 74.

[185] *Ibid.*, s. 70(4). A resolution apparently would be insufficient in the case of a plan recommended by a regional planning board.

[186] *Ibid.* These complicated provisions are now simplified by s. 720 of the Municipal Act (1957). The board may adopt the official community plan for the planning area by a two-thirds vote of all members, but the approval of two-thirds in number of the member municipalities and the Lieutenant-Governor in Council is required.

provincial approval is not required, there is no occasion for hearings by any provincial agency.[187]

Summary

To summarize, only two provinces leave municipal planning entirely to the local council, New Brunswick and British Columbia,[188] although in both provinces the councils may appoint advisory agencies to assist. In all other provinces (except Quebec) some form of provincial approval of a plan is mandatory. In five provinces, Newfoundland, Nova Scotia, New Brunswick, Alberta and British Columbia, the whole responsibility for preparing and adopting a plan may be on the council, but in the other four, Prince Edward Island, Ontario, Manitoba and Saskatchewan,[189] the council must adopt a plan prepared by a subsidiary planning agency. In some circles this division of the work is regarded as capable of causing more friction than benefit.[190] On paper at least, Alberta seems to have the best planning machinery, yet the satisfaction expressed about some aspects of the Alberta Act by the McNally Commission[191] may be somewhat misdirected. In reality the success of municipal planning depends upon the extent of public understanding and support. If there is not much support, regardless of the machinery for planning, delaying and obstructive tactics by lawyers, politicians and land developers will inevitably be effective.

IV. *The Content and Legal Effect of a Master Plan*

A meaningful discussion of the content of the master plan and its legal effect can only proceed upon an understanding that the content and the legal effect are inextricably interwoven with the purpose the plan is to serve and the technical skill of the planners. The purpose of planning, although capable of being stated in rather broad and vague terms, depends in actuality on the strength of the political desire to make even tentative decisions on long

[187] No provision for hearings or public meetings is made in the Municipal Act (1957).

[188] But see now, s. 694(2) and s. 720 of the Municipal Act requiring provincial approval.

[189] Under the 1957 legislation the council may plan independently. See, *ante*, footnotes 135 and 141.

[190] For a good critical study of planning agencies from an American viewpoint, see Walker, *op cit.*, *ante*, footnote 14. Walker clearly regards planning as a council responsibility. See especially Ch. 5, The Independent Planning Commission.

[191] Report of the Royal Commission on the Metropolitan Development of Calgary and Edmonton (1956), Chapter 5, Planning in the City, The Metropolitan Area and the Region.

range problems. The content and legal effect can thus be said to vary directly with the strength of the intention to plan and the skill in drafting the plan.

Perhaps as good a statement as any of the purpose or object of planning is to be found in the Ontario Act. It defines a plan as "a programme and policy, or any part thereof, covering a planning area or any part thereof, designed to secure the health, safety, convenience or welfare of the inhabitants of the area, and consisting of . . . texts and maps, describing such programme and policy. . . ."[192] It serves to stress the fact that planning is not concerned solely with the physical question of, say, the width of a street, but with all the multitude of community forces, which have to be measured and assessed, that will go into the determination of the question.

A meaningful discussion of the content and legal effect of a plan must also proceed on an understanding of the powers of government that commonly exist today for carrying out the plan. These powers, at the municipal level, involve, (i) power to zone, that is, to control the use of land by a private landowner,[193] (ii) power to regulate the division of land into smaller parcels, that is, so-called subdivision control,[194] and (iii) power to prosecute a program of public works and undertakings including, of course, building streets, parks, schools, utility systems, and, in some cases, the supply of electrical power.[195] Mention should also be made of a fourth power to prohibit or regulate development on an *ad hoc* basis pending completion of a comprehensive plan, so that long term decisions are not stultified by private building activity before the plan is made official and the first two powers are brought into operation. This power is usually spoken of as "interim development control".[196] The longer the delay in producing a plan, the less justified is the use of the word "interim".

[192] S. 1(h), *ante*, footnote 27. This language is of course very vague, and some of the other acts have somewhat narrower definitions, but the objects of community planning are so broad that narrow language frequently excludes desirable objectives.

[193] In Ontario these powers are set out in The Municipal Act, *ante*, footnote 4, s. 390. In most provinces that have formal planning legislation the general municipal power to zone is contained in the planning act.

[194] See the planning acts.

[195] These powers are, of course, set out in a variety of provincial acts.

[196] Only three provinces provide expressly for interim development control: Newfoundland, *ante*, footnote 52; Saskatchewan, in the 1957 revision, *ante*, footnote 36, ss. 31-38; and Alberta, in the Alberta Act, *ante*, footnote 40, ss. 69-73. See now, R.S.A., 1955, c. 337, ss. 68-72, as amended by 1957 (Alta.), c. 98, ss. 8, 9 and 10. The U.K. Town and Country Planning Act, 1947, *ante*, footnote 52, in a sense puts the whole of England and Wales under "interim" development control permanently.

The master plan is presumably intended to operate as a guide to the people who exercise these powers, and, as well, to that important person so vitally affected in the long run, the private landowner, who, once he starts building, or even subdividing his land, becomes known as a land developer, which is rapidly becoming a term of opprobrium.

Effect As A Constitution

In this context, then, we may examine the legal effect of the plan. If a municipality chooses to plan its future without invoking the applicable enabling act examined in the earlier parts of this article, there is nothing save a shortage of money to stop it, and that shortage will not be overcome by invoking the act. This is presumably the position in Quebec. But if a municipality proceeds on this basis, its plan will have no legal effect whatever[197]—it will not even have the same operative effect as an orthodox by-law passed to regulate some specific conduct. In looking for "legal effect" then, we are looking to see what consequence the plan has under the enabling act that an exactly similar statement made without reference to the act would not have. We may also look to see what protection the plan has under the enabling act that makes it more secure than an ordinary by-law.

One authority on planning law has suggested that an authorized master plan is a kind of "impermanent constitution".[198] The authority is American and he of course has in mind the American concept of a constitution, a document embodying limitations on the freedom of government activity, legislative, administrative and judicial, and subject to change only by a more restrictive procedure than is applied to ordinary laws. This same concept can be applied with some qualifications to the Canadian planning acts.

Seven of the nine planning acts in Canada contain substantially similar provisions preventing the municipality from undertaking any public works that do not conform with the plan or that are in any manner inconsistent with or at variance with it.[199] The New-

[197] This statement may be subject to some qualification. See the discussion of *Re Marckity and the Town of Fort Erie and Burger*, [1951] O.W.N. 836, *post*.

[198] Charles M. Haar, The Master Plan: An Impermanent Constitution (1955), 20 Law and Contemporary Problems, at p. 353. Numbers 2 and 3 of vol. 20 of Law and Contemporary Problems, published by the faculty of law at Duke University in Durham, North Carolina, contain valuable writing on American planning law and practice.

[199] Nova Scotia Act, *ante*, footnote 20, s. 5; New Brunswick, s. 7; Prince Edward Island, *ante*, footnote 26, s. 17, but a work may be undertaken with the approval of the Provincial Board; Ontario, *ante*, footnote 27, s. 15(1); Saskatchewan, *ante*, footnote 36, s. 13, (1957 Act, s. 27(1));

foundland Act merely speaks of the plan as "binding" on the council.[200] The Manitoba Act contains no direct statement of the effect of the plan on public works, but it does provide that it shall have effect as if enacted in the Act.[201] This constitutional aspect has only indirect effect on the private landowner, it operates primarily as a guide and co-ordinating influence among the various branches of local government. Depending, however, on the degree of detail in the plan, it might provide for the actual location of proposed schools, or, more properly, the principle upon which actual location should be determined, which would serve as a warning to land developers of the necessity for and probable location of schools in areas in which they are interested. Several acts require or suggest that the plan should indicate the time when municipal services will be made available[202] and this information would vitally affect a private developer waiting for sewers to be installed.

More significant to private interests is the provision to be found in Prince Edward Island,[203] Ontario[204] and British Columbia[205] that no by-law shall be passed that does not conform with the plan. If the plan decides such policy matters as future land use in the planning area, a zoning by-law could only be passed if it provided for the same land use, or if the plan were first amended. While none

Alberta, *ante*, footnote 40, s. 68(2). See now, R.S.A., 1955, c. 337, s. 67(2) as amended by 1957 (Alta.), c. 98, s. 7, which drops the requirement of approval by the Minister. British Columbia, *ante*, footnote 43, s. 5(2). A non-conforming project may be approved by a two-thirds vote of the council if the council has first submitted the plans to a town planning commission, if there is one. This amounts to an amendment of the plan, but is not so regarded in the act. An amendment requires only a resolution, presumably by a majority of a quorum. In the Municipal Act (1957), the proposition is stated more broadly, in s. 695(1): the council "shall not authorize, permit or undertake *anything*" contrary to the plan.

[200] *Ante*, footnote 17, s. 27.

[201] S. 7, *ante*, footnote 33. The effect of this provision may be far wider than the provisions in the other acts, depending on the text of the scheme. The distinction between planning and zoning is almost lost in the Manitoba Act and a scheme could amount to a zoning by-law, in which case it would be much more than a constitutional framework for subsequent legislation. The New Brunswick Act, *ante*, footnote 24, s. 8, also gives the official town plan the same effect as if enacted therein, but the plan, in New Brunswick, seems to be quite distinct (in theory) from the zoning by-law. See ss. 7 and 14.

[202] For instance, The Newfoundland Act requires the plan to show the order in which designated parts of the area are to be supplied with light, water and sewerage, streets, transits and other facilities (s. 13(d)). Cf. all the other acts, which merely suggest the contents of plans.

[203] Prince Edward Island Act, *ante*, footnote 25, s. 18.

[204] Ontario Act, *ante*, footnote 27, s. 15.

[205] British Columbia Act, *ante*, footnote 43, s. 10A (added by 1950 (B.C.), c. 73, s. 3) as to an official town plan, and s. 71 as to a plan recommended by a regional planning board. The Municipal Act (1957), does not expressly retain this provision, but s. 695(1) has the same effect: "The council shall not authorize anything contrary to . . . the plan. . . ."

of the expressions used in the other provinces would seem to be as restrictive as this limitation on passing by-laws, the power in Nova Scotia,[206] New Brunswick,[207] Manitoba[208] and Alberta[208A] at the provincial level to enforce conformity with the plan might produce much the same result with the added significance that a possibly interested person is authorized to act as enforcement officer. In Prince Edward Island and British Columbia no official enforcement agency is established, but indirect enforcement may result from the unwillingness of mortgagees[209] to lend money on the security of a house built in conformity with a by-law itself at variance from the master plan. In Ontario, in addition to this indirect means of enforcement, the planning board apparently may restrain the council in "any contravention of section 15".[210] The Newfoundland Act does not contemplate development control by a zoning by-law, but schemes for building lines and land use control subsequent to the adoption of a plan must be in strict conformity with it.[211]

The significance that attaches to this quasi constitutional status of a master plan varies considerably depending on the content of the plan. Most plans in Ontario, for example, say very little about public works programs beyond the laying out of some streets. Probably no school board in its attempt to locate a school where it pleases has yet been adversely affected or stopped by an official plan.[212] On the other hand, zoning by-laws sometimes fail to secure Municipal Board approval because the land use shown on the zoning map does not coincide with the plan.[213] But most plans are so brief in their text or map legends, that only the crudest classifications of land use are shown. If the plan allocates all land into,

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[206] *Ante*, footnote 85.
[207] *Ante*, footnote 95.
[208] *Ante*, footnote 134.
[208A] *Ante*, footnote 163A.

[209] In my experience in an Ontario township I have found mortgagees, both public and private, motivated by doubts of validity of title, to be very helpful as enforcement officers.

[210] Ontario Act, *ante*, footnote 27, s. 28. It is a bit difficult to imagine a planning board, with a budget provided by the council, taking legal action to restrain the council from passing a by-law or even proceeding with some non-conforming public works. The relations between the two bodies would be somewhat strained afterwards, to say the least! By this section a ratepayer has the same power to restrain the council.

[211] Ss. 28 and 31, *ante*, footnote 17. See also *post*, footnotes 221 and 222.

[212] But a zoning by-law, as distinct from an official plan, has stopped a school board. See *Toronto* v. *Roman Catholic Separate School Board*, [1926] A.C. 81. An official plan unquestionably could block school board action if it contained clear enough provisions.

[213] This inconsistency of maps is sometimes avoided by using the plan map as the zoning map. A well designed plan map would be so different from a well designed zoning map that the two could not be interchanged. The zoning by-law provides for immediate uses of land. The plan contemplates uses years in the future. Future uses may be very different.

say, some one of four classes, agricultural, residential, commercial or industrial, what sort of by-law will not conform? If the plan labels an area as "residential", will a by-law permitting a small shopping centre not conform? Where is a court to look for a meaning for the word "residential"? In Ontario, are cases on the older zoning by-laws relevant, when a council could declare a street to be a residential street, and hospitals,[214] churches[215] and funeral parlours[216] were permitted? What effect has the plan of the city of Toronto, which delineates the uses in somewhat more detail?[217]

As long as crude classifications are used, with no statement of principle or purpose to show the logic of the classification, endless questions can arise. Can banks be permitted in industrial zones? Greenhouses in commercial zones? In Ontario, two courses are open. The planners may continue as many are doing now, to draft documents with almost meaningless classes of land use, and depend on the convenient authority of the Ontario Municipal Board to declare that a by-law conforms,[218] thus perhaps depriving the courts of their jurisdiction to hold to the contrary, except, of course, the Court of Appeal on an appeal from the Board on a question of law or jurisdiction.[219] Since no administrative power to declare that a by-law conforms is provided in Prince Edward Island or British Columbia, presumably in those provinces a by-law is open to attack in the courts in all cases.

The other course of action is open in all provinces. The planners may draft master plans with some attention to the question of their legal purposes and effect—if, that is, the planners want their plans to have a legal effect.

There is a secondary legal effect of the master plan, in any province, probably including Quebec, although there may be doubt where plans are not "official". Since a plan is intended to be an "official" guide to the development of the community, if it states any rational principle of land use control, it may very well minimize the possibility of a by-law being declared invalid because of discrimination. What is sometimes called "spot zoning" could hardly be charged against a by-law that conforms with a compre-

[214] *Re The Religious Hospitallers of St. Joseph and The City of St. Catharines*, [1946] 4 D.L.R. 737.

[215] *Re Guest et al. and The Town of Weston*, [1954] O.W.N. 271.

[216] *The City of St. Catharines* v. *Hulse*, [1936] 2 D.L.R. 453.

[217] The City of Toronto Official Plan classifies land uses as residential, commercial, and industrial. Originally only "residential" was defined. Amendment No. 3 defined all three words. "Residential" includes such uses as "business administrative offices".

[218] Ontario Act, *ante*, footnote 27, s. 15(3).

[219] Ontario Municipal Board Act, R.S.O., 1950, c. 212, s. 96(1).

hensive plan. Of course, once again this sometimes vital legal consequence of a plan depends upon the thoroughness with which the plan has been prepared, but in the provinces requiring provincial approval, upsetting the plan as a statement of public as opposed to private interests will be difficult, regardless of its lack of thoroughness.

One statutory legal effect is found only in British Columbia. Where the recommendation of a regional planning board includes provision for a zoning by-law, if the council adopts the plan it must "forthwith pass" the by-law.[220] A somewhat similar provision in the Newfoundland Act requires a council, when a municipal plan comes into effect, to cause to be prepared plans of development lines[221] and to "develop fully" a scheme for the control of the use of land.[222] There would appear to be little difference between a plan of development lines and a scheme of land use control and the more familiar zoning by-law. If so, the Newfoundland provision is very similar in effect to the British Columbia section.

Subdivision Control

Apart from what might be called the positive law effect of the master plan it also has a formal persuasive effect in Ontario and British Columbia. Of the various methods of carrying out a master plan, zoning and subdivision control have the most direct effect on private interests, and in Ontario, where the Minister of Planning and Development must approve a plan of subdivision, in considering a plan "regard shall be had . . . to . . . whether the plan conforms to the official plan".[223] Similar language is used in British Columbia where "every approving officer shall give due regard to and take cognizance of any adopted plan when dealing with applications for the approval of any plan of subdivision".[224] It is difficult to believe that in the other provinces a similar concern would not be shown for a master plan when subdivision control

[220] British Columbia Act, *ante*, footnote 43, s. 76. The Municipal Act (1957), does not retain this compulsion on the councils to zone.

[221] S. 28, *ante*, footnote 17. Plans of development lines must show the land required for new and the widening of old streets, public open space, and public utilities.

[222] S. 31, *ibid.* A scheme is to all intents and purposes a zoning by-law.

[223] Ontario Act, *ante*, footnote 27, s. 26(4) (a).

[224] British Columbia Act, *ante*, footnote 43, s. 77. The words "any adopted plan" would suggest that this section applies equally to official town plans under Part I of the Act, although it appears in Part IV Regional Planning Areas and might be limited to regional plans. This ambiguity is removed in the Municipal Act (1957), s. 708(2), which applies only to "official community plans".

is being exercised.[224A] Depending, of course, on the content of the plan, it could have very considerable effect on a proposed subdivision of land. Road patterns might be indicated to which the subdivider would have to conform, schools, shopping areas, churches and density of population might be similarly provided for in a more or less flexible fashion depending on the skill of the plan's draftsmen. A well-drafted plan may be of major service to a land developer in giving him some idea in advance of the facilities needed, the road pattern to be met, and perhaps the time when his land would be regarded as ready for subdivision because the additional services of water, sewers, electricity, etc., could be economically provided.

Enabling Effect

Similarly master plans sometimes operate as a guide to redevelopment programs, and in this connection another common legal consequence of a plan becomes evident. That consequence might be called the enabling power of expropriation, or municipal land acquisition, a device, if properly handled, that may be of real help to private developers, who, where their interests and those of the municipality coincide, may be entitled to ask the municipality's help in assembling land for redevelopment.[225] There are instances where a private developer with good intentions has to some extent been foiled by unwilling landowners whose "holding out" has left a blighted spot in an otherwise healthy redevelopment.

Another enabling power peculiar to Ontario arises from the fact that a committee of adjustment can only deal with zoning[226] by-laws that "implement" an official plan. A committee of adjustment is competent to grant relief in certain cases where the by-law works a hardship.[227] No other province expressly limits the operation of its corresponding machinery to cases where there

[224A] The master plan may be made controlling on plans of subdivision by regulation where power to make regulations is given under the Act. See, *e.g.*, Alberta regulations made by the Provincial Planning Advisory Board under the general provision of s. 25. (See s. 6 of The Subdivision Regulations in The Alberta Gazette, July 15, 1953.) In 1954 the Board was given express power to pass such a regulation. See 1954 (Alta.), c. 105, s. 3. See now, R.S.A., 1955, c. 337, s. 25(2) (a) (ii). Whenever a plan takes effect as if enacted in the Act, presumably the master plan is controlling on subdivision approval.

[225] See, for example, the Ontario Act, *ante*, footnote 27, s. 20, especially the definition of redevelopment to include resubdivision.

[226] Ontario planning legislation does not use the expression "zoning by-law".

[227] Ontario Act, *ante*, footnote 27, ss. 17 and 18. See especially s. 18(1) and (2).

is a plan in effect. Since this power to "adjust" a by-law is usually much desired, and since, in Ontario, the power to zone long preceded the present concept of an "official" plan, councils have been suspected of adopting a plan solely to qualify for a committee of adjustment. If the legislature intended the "plum" to encourage planning, it has only half succeeded, for many of the plans are plans in name only, and yet the Minister can hardly refuse them since he does not want to discourage a "plan" that might, in the future, be amended and developed into a sophisticated piece of community planning.

Effect on Other Units of Government

The master plan clearly "binds" the council to the extent just described, but its effect on other units of municipal government is not so clearly defined in some provinces, although the fact that "public improvements" and "public works," must conform to the plan probably means that all local government building programs are controlled.[228] But at the more senior levels of government a master plan seems to be far less significant. While the Minister who is charged with the responsibility of approving plans might be expected to conform with a plan he has approved, he is usually not the Minister of Highways, for example, who has control of one of the major planning powers at the provincial level. And, of course, the activities of the major transport and communications systems, which are federally owned or regulated, are in no sense subject to the plan. But merely because a body is not bound by a plan does not mean that a planner cannot have regard to that body's future intentions, so far as they are known to the body and can be revealed. As the first part of this article was at some pains to point out, the planner has to co-operate with the inevitable. Inquiry of the national railways, for example, may disclose their plans for many years ahead, thus enabling the planner to take them into account, even if he cannot control them. In fact, planning often succeeds where the planner attempts to co-operate with the plans of private interests when even competent legal attempts at control would almost certainly have failed to change them. Moreover, private interests may be willing to make changes to accommodate to a planner's proposal when the planner is able to show the common sense superiority of his scheme.

[228] The Ontario Act defines "public works" to include an undertaking within the jurisdiction of a council or of a "local board". See s. 1(j) and 1(d). Other provincial acts are less clear about the definition of public works.

Amendment of Plans

Having examined in some detail a master plan's formal status, legal and persuasive effect, we may now consider its permanence. Three factors will contribute to the permanence of a plan: its intrinsic merit as a plan; the political stability of the planning agency; and the ease with which the planning legislation permits its change. In every province the master plan may be amended or repealed by the same procedure by which it was adopted.[229] This guarantees that the hearings or opportunity to submit written objections will be available, and except in New Brunswick and British Columbia[230] approval at the provincial level will have to be procured. There is little doubt that the requirements of hearings, considering written objections, submitting to an advisory planning agency where one exists, and obtaining provincial approval contribute to the permanence of a plan, even if it only means that a zoning by-law has to be "passed" twice, once as an amendment to the plan and once as an amendment to the principal by-law.

In Ontario it is possible for a council to initiate an amendment to an official plan, although it cannot prepare a plan in the first instance.[231] But where the council initiates the amendment the Minister may request a report from the planning board, and if the board does not concur, the Minister may only approve the amendment when it has been adopted by a two-thirds vote of all members of the council.[232]

Only in Ontario has a private citizen a "right" to initiate an amendment to the master plan, and even there he is limited to the "right" to request the Minister (after the council has failed to propose his amendment itself) to refer the request to the Ontario

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[229] Newfoundland Act, *ante*, footnote 17, s. 25; Nova Scotia Act, *ante*, footnote 20, ss. 4(2), 6, and 7; New Brunswick Act, *ante*, footnote 24, ss. 6(2), 8, 9, 10(1); Prince Edward Island Act, *ante*, footnote 26, ss. 14, 15. (By s 14, where the plan covers more than one municipality and one or more councils refuse to adopt a proposed alteration or addition, any council concerned may apply to the Provincial Board for its approval thereof and the Provincial Board may approve such alteration or addition); Ontario Act, *ante*, footnote 27, s. 14. Manitoba Act, *ante*, footnote 33, s. 6(2); Saskatchewan Act, *ante*, footnote 36, s. 14 (1957 Act, s. 29); Alberta Act, *ante*, footnote 40, ss. 84, 85, but see now, R.S.A., 1955, c. 337, ss. 83, 84, as amended by 1957 (Alta.), c. 98, ss. 14, 15; British Columbia Act, *ante*, footnote 43, s. 5(2). The Municipal Act (1957) provides for "revision" by the same procedure as adoption, s. 694(1) (b).

[230] The Municipal Act (1957), requires provincial approval: s. 694(2). Alberta has now dropped the requirement of provincial approval of plans, *ante*, footnote 162.

[231] Ontario Act, *ante*, footnote 27, s. 14(1).

[232] *Ibid.*, s. 14(2).

Municipal Board.[233] The Minister may refuse the request or refer it to the Board.[234]

It is most likely that, considering the relative ease with which amendments to master plans may be secured, plans will be frequently amended. Indeed, the Newfoundland Act compels a review, and revision if necessary, every five years.[235] This is not necessarily a bad thing, despite the caustic criticism sometimes advanced.[236] Plans are prepared for many reasons, not only because the community is overcome by an irresistible desire to do a thorough job. As its mistakes become apparent, or as it learns more about the actual conditions in the municipality or its planning environs, or as the plans and desires of private interests are revealed, it is inevitable that readjustment will be necessary. In fact it would be tragic if the readjustments could not be made. If plans were to remain static for some fixed number of years, formal planning would either stop altogether, or else the contents of the plans would be so diluted as to be useless as a guide or foundation for any wise control of land use or development. One prominent planner has referred to the "ghost plans" prepared by some Ontario planning boards but not made "official" because the board is afraid of the degree of rigidity already attached to plans! The recent history of planning in the United States indicates that this

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[233] *Ibid.*, s. 14(3). The "right" arises when the council refuses to propose the amendment or fails to propose it within thirty days of the receipt of the request.

[234] *Ibid.*, s. 14(4). This seems to be the only instance when the private citizen cannot compel the Minister to refer a matter to the Board under s. 29(1). See, *ante*, footnote 15. In this instance the "approval or consent" of the Minister is not being sought.

[235] S. 35, *ante*, footnote 17. The 1957 Saskatchewan Act, *ante*, footnote 36, c. 48, s. 28 contains a similar provision. This is new. Cf. the U.K. Town and Country Planning Act, 1947, *post*, footnote 238.

[236] See, for example, an editorial in the Globe and Mail, July 6, 1957 (p. 6, cols. 2 and 3). The final paragraph reads: "If there is to be wise and economical community development in Ontario, more stability will have to be given to official plans and zoning by-laws. If public confidence in municipal institutions is to be maintained, the people should be able to feel a measure of security in their plans and investments. Official plans in the minds of the ratepayers are a form of contract between the municipality and themselves. They should be given some of the sanctity of contracts." Earlier in the editorial the suggestion is made that "official plans, once approved, ought to remain fixed for a period of years — at least ten — before they are open for amendment." In fairness to the notion of contract status for a master plan, attention should be directed to s. 20 of the Prince Edward Island Act, *ante*, footnote 26, which provides that "where an agreement is made between a municipality having an official plan or regional plan and any authority or person with respect to a building project which conforms with the . . . plan, no alteration or addition shall be made to the . . . plan . . . which is contrary to the agreement unless the parties thereto approve of such alteration or addition, or unless the same is approved by the Provincial Board."

same conflict between the desire for certainty and the need for flexibility has bedevilled thinking about planning in that country as well.[237] When two somewhat antagonistic but beneficial forces are at work, it is adolescent to succumb to either force at the expense of the other. As maturity is reached a more or less successful attempt is made to harmonize the forces and adopt a course that minimizes the antagonism. In planning, this harmony will be produced by better planning, greater public understanding of the planning, and by increasing public pride in the community. It is doubtful whether any legislative scheme, no matter how ingenious, will improve the situation unless the better planning, greater understanding and increasing pride are concomitants.

Effect on Private Interests

So far this analysis has concerned itself with the effect of the plan on public bodies (and on private interests, but only indirectly), in keeping with the quasi-constitutional aspect of plans under all the Canadian acts. But for lawyers it is even more important to see how the plan may affect a private interest directly. Apart from the persuasive effect of the master plan on subdivision control, the general theory behind all the Canadian acts, with two exceptions, is that the plan, of itself, will have no binding effect on private interests.[238] Just as a municipality would hesitate to plan if the law made its plan binding on it for, say, ten years, in the same way it would hesitate to plan if the law made it binding on a private citizen's use of his land. If a plan were to bind the citizen, the

[237] C. M. Haar, *op. cit.*, *ante*, footnote 198 *passim*, and at p. 376 particularly.

[238] The two exceptions are Newfoundland and Saskatchewan, but compare Manitoba and New Brunswick, where, because the plan takes effect as if enacted in the act, its effect on private landowners depends on its contents. New Brunswick provides for "zoning" independently from the plan. Cf. Town and Country Planning Act, 1947, *ante*, footnote 52. The master plan is called a "development plan" (s. 5(1)) and is required to be prepared by every local planning authority within three years after July 1, 1948. (*Ibid.*) It requires approval of the Minister of Local Government and Housing (formerly of the Minister of Town and Country Planning) and must be reviewed "at least once in every five years" (s. 6(1)) but may be amended at any time subject to the approval of the Minister (s. 6(2) and (3)). Unless permitted by the Act or by regulation development can only take place with the permission of the planning authority (s. 12), who "shall have regard to the provisions of the development plan" (s. 14(1)). The Minister may, by a development order (a specially authorized ministerial regulation (see s. 13)) authorize a local planning authority to grant permission for development which does not accord with the provisions of the development plan (s. 14(3) (b)). In practice planning permission will be given when the proposal is in substantial accord with the plan. See generally, Desmond Heap, An Outline of Planning Law (2nd ed., 1955).

unfortunate confusion between planning and zoning would be worse confounded.

The exceptions are in Newfoundland, where a plan is binding upon all "persons, partnerships, associations or other organisations whatsoever"[239] and in Saskatchewan, where both a community and a district planning scheme, once adopted, prevent an owner from erecting any building or structure that is inconsistent or at variance with the scheme or would prejudice the carrying into effect of the scheme.[240] What effect this has had on the willingness to plan, or the thoroughness of any plan attempted, is impossible to measure, since the variables in planning are so great that no single factor in the success or failure of a plan can be charged with the whole credit or blame.

Apart from the positive law of Saskatchewan there is only one case, in Ontario, where a court has given more than the "constitutional" effect to a plan. In *Re Marckity and The Town of Fort Erie and Burger*,[241] Spence J. withheld mandamus to a building inspector who had refused a permit to erect a motel on what the proposed plan showed as "residential" land. The report does not make it clear whether the plan delineated any theory about the proposed uses of residential land, but a motel is not too unreasonable a use to permit on residential land and a by-law that permitted motels in some zones on residential land could hardly be said not to conform. The significant passage in Spence J.'s judgment is the suggestion that when the plan is approved, it will be binding on landowners. He said:

> . . . the proper course is for the Court to adjourn the motion *sine die*, so that it may be determined whether or not the municipal plan will become an official plan under the provisions of the said Planning Act, and will effectually prevent the erection of a "motel", and, therefore, would justify the municipality in refusing a building permit for such a building.[242]

With respect, it seems that Spence J. has confused the plan with the zoning by-law that might (or might not) be passed to implement it.[243] There is nothing in the Ontario Act to even sug-

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[239] Newfoundland Act, *ante*, footnote 17, s. 27.

[240] Saskatchewan Act, *ante*, footnote 36, s. 13(2). The 1957 revision introduces an enigmatic variation: "The *initial implementation* by the council of a community planning scheme shall prevent an owner . . . ." (s. 27(2)) (My italics; the italicized words are not defined and I find their meaning most obscure.).

[241] *Ante*, footnote 197. [242] *Ibid.*, at p. 837.

[243] The only two cases referred to by Spence J., *Re Bridgman and the City of Toronto*, [1951] O.W.N. 472; O.R. 489; 3 D.L.R. 814 and *Re Greene and the City of Ottawa*, [1951] O.W.N. 674, are cases dealing with

gest that when land use is determined in an "official plan" thereafter a private citizen cannot develop his land inconsistently. A building permit is certainly not a "public work" as defined in the Act. Under the Act no hearing is necessary and there is no suggestion in the report of the *Marckity* case that a hearing or even a public meeting was held. By contrast, no zoning by-law could be passed and take effect without a hearing before the Ontario Municipal Board. A zoning by-law, as the Municipal Act makes clear, is a static instrument intended to freeze land use as permitted and regulated in the by-law until the by-law is amended. The official plan, however, is contemplated as a dynamic instrument expressing the manner of growth of the municipality and indicating the limitations the council may be expected to impose, *in the future*, on land use. There was nothing in the *Marckity* case, under the Ontario Municipal Act, to prevent the town council from zoning out the motel by by-law, but it clearly did not elect to use that instrument. Instead it merely published what has since proven to be merely the first version of its *plans* for the future, not its *laws* for the present.[244]

The *Marckity* case has been given some support by the Court of Appeal, in *Hammond* v. *Hamilton*.[245] The precise wording of Roach J.A., speaking for the court, must be observed, although it is not clear whether he was using his language in the sense understood by the planning profession in Ontario. Without commenting on the facts of the *Marckity* case, he said:

> There may be rare cases in which the council has made the decision but has not actually enacted the by-law. The *Marckity* case, *supra*, is an illustration. A municipal council cannot act as swiftly as an individual. Formalities have to be complied with and instructions have to be given to the corporation solicitor who in turn must prepare the by-law. Unavoidable delays in enacting the by-law may occur. If the decision, though not expressed by by-law, is clear and if it appears that the council has proceeded or is proceeding to implement its decision by a by-law with reasonable promptitude having regard to all the circumstances the motion might well be adjourned.[246]

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pending zoning by-laws. In both *Re Bridgman* and *Re Greene* reference is made to an unreported case, *Re Howard Furnaces and the City of Toronto*, which dealt with an application for mandamus when the city had passed a by-law providing for a street widening. None of these cases is strictly relevant to Spence J.'s problem. Under the Ontario Act there is a clear distinction between a plan and an implementing by-law.

[244] The plan was approved by the Minister on December 15, 1952, as of June 20, 1952, and has been amended three times since, twice in 1953 and once in 1954. No comprehensive implementing by-law appears yet to have been passed.

[245] [1954] O.R. 209; 2 D.L.R. 604.

[246] *Ibid.*, at p. 221 (O.R.); p. 613 (D.L.R.).

It is to be noted that the *Hammond* case involved no official plan, but arose out of the city council's consideration of a zoning program. No decisions had been taken and probably would not be taken for some time when the applicant asked for permission to erect a service station. The Court of Appeal ordered the corporation to direct the building commissioner to issue the permit.

Two conditions were laid down by Roach J.A. in the quoted passage, and either would have been fatal in the *Marckity* case, which he cites as "an illustration". The first condition that must be satisfied before the court will accept a council's decision, although no by-law has been passed, is that the decision be clear. Nothing in Spence J.'s opinion would indicate that in the *Marckity* case the decision of council was clear enough finally to exclude a "motel" from the area. In fact most Ontario plans probably do not contemplate the exclusion of motels from all parts of residential areas. What a plan classes as a residential area may turn out to include five or six zones in the implementing by-law in which particular uses may vary considerably.

The second condition laid down by Roach J.A. requires that the council either has implemented or is about to implement its decision by by-law—with reasonable promptitude. In the subsequent history of the town of Fort Erie it is apparent that the council was in no hurry to implement its plan.[247]

Effect as An Educational Document

In addition to its rather limited legal effect the master plan performs what might be assessed as a much more important and much more complex role as an instrument for public enlightenment. I hesitate to debase the word education, but if modern usage of English prevails then "public education" would be an acceptable expression. This enlightenment or education affects a widespread group of people, in different ways and in different degrees.

Those who derive most enlightenment are those who prepare the plan, for they have to learn a great deal about their community's history, assets and future possibilities. Those who prepare the plan are, in some provinces, theoretically the council members. In other provinces, theoretically they are members of planning boards or commissions. In all provinces, in fact, the councillors and planning board members are usually supplemented by paid employees or consultants of the community. If a planning community is wise enough and rich enough to keep qualified

[247] *Ante*, footnote 244.

planners permanently on its staff, the community will benefit immensely, not only in planning, but in carrying out the plan, both of which involve continuous planning and review.

But the enlightenment does not necessarily stop with this relatively select group. If the planning agency takes advantage of its privilege or duty to hold public meetings during the preparation of the plan, or holds hearings on a more formal basis, those citizens who make representations or merely attend meetings may increase their understanding of their community and its problems. Finally the plan, the document itself, may be published and carry the understanding of the problems still further.[248]

The Content of The Plan

We may conclude this analysis of the status of the master plan with some tentative suggestions, respectfully submitted (for I am not a community planner) of the desirable content of a master plan. We have already seen that its content may be quite variable, and that its positive and persuasive legal effect will vary with the degree of detail in its content.

The planning profession has long since accepted the advice of Sir Patrick Geddes that a survey must precede analysis and that the plan or proposals are the product of both.[249] No planning act in Canada is inconsistent with this principle and Prince Edward Island, Ontario and Alberta direct the planners explicitly to investigate and survey what Ontario calls, generally, "the physical, social and economic conditions in relation to the development of the planning area".[250] The importance of the survey can hardly be overestimated since the planner who does not know the facts of his case is guilty of absentee planning, despite his physical presence. This survey may include a complete physical inventory, which will help solve drainage problems, avoid building homes on gravel pits, disclose information about the population—its make up in age groups: old people, young people, people who are inadequately housed—and so forth. To learn where we are going it is often helpful to know where we are and where we have been.

The survey is perhaps best left to the professional planner, but

[248] The U.K. Act, *ante*, footnote 52 by s. 10(2) (c) requires the Minister to make regulations securing that copies of the plan "shall be available on sale to the public at a reasonable cost." Some English plans have been published as trade books. See, for instance Thomas Sharp, Oxford Replanned (1948).

[249] Patrick Geddes, Cities in Evolution (1915, reprinted 1949), *passim*.

[250] Ontario Act, *ante*, footnote 27, s. 10(1).

the lawyer is directly concerned that the survey be made a part of the plan, either in the main text, or with only the findings and their analysis in the text and the detailed facts and figures supporting the findings in an appendix at the end. Planners themselves debate the desirability of including the survey in the text of the plan. There is one very practical reason for doing so—when a municipality hires a consultant to prepare a "packaged plan" and the survey is not included, that municipality may be faced with the cost of a second survey some day when a land developer has retained the consultant who is free to make use of the survey data languishing in his office. A municipality that hires a consultant would be wise to insist that the property in all survey data and maps and plans is vested in the municipality. Two uses of the master plan make it desirable to have the survey included. One is the educational use where the survey will present in accessible form a vast amount of the history and inventory of the community. The other use is, perhaps, peculiar to Ontario, where the Act requires the Ontario Municipal Board, in declaring that a by-law conforms with the official plan to be of opinion that the by-law conforms with the "general intent and purpose".[251] The plan is also conceived as a guide to the committee of adjustment, who must respect its "general intent and purpose".[252] The general intent and purpose of any document is frequently difficult to detect, but if the draftsman does not attempt a deliberate statement, a lawyer's experience in interpreting statutes should have taught him the value of the "legislative history", which, in the case of the plan, is embodied in the survey. The language of the first two clauses of the rule in *Heydon's* case[253] is peculiarly apt: "1st. What was the common law before the making of the act. 2nd. What was the mischief and defect for which the common law did not provide." If one substituted the expression "condition of life" for "common law" and "plan" for "act", the paraphrase would serve as a valid directive to plan draftsmen.

After the survey the plan should include an analysis of the

[251] *Ibid.*, s. 15(3).

[252] *Ibid.*, s. 18(1) and (2) (b). Committees of adjustment are frequently asked to vary side yard requirements in the zoning by-law. It would be most helpful to know why yard requirements are made: whether it is to facilitate fire fighting, to allow room to park a car, to secure adequate daylight, or just because the zoning by-law copied by the municipal solicitor or planning consultant contained a similar provision. A committee is sometimes asked to enlarge or extend a non-conforming building, but no official plan in Ontario deals in principle with the intended fate of those existing uses of lands and buildings that the planners consider undesirable.

[253] (1584), 3 Rep. 7a; 76 E.R. 637, at p. 638.

data in the framework of the principles of planning; or, to put it in other terms, the plan should show that existing conditions of the municipality have been studied to see how they will tend to change or should be changed as the community develops. An attempt must be made to select those conditions that can and should be changed and provision made for them. The plan draftsman would be wise to keep in mind the function of the plan in respect of zoning and subdivision control. An allocation of land use without definition may be too restrictive for the zoning by-law and an allocation without reference to time may result in premature subdivision. If the plan embraces an area that is currently in agricultural use and it is reasonably expected to develop for industrial and residential use in the next few years, allocation flatly, at once, to industrial and residential use would limit zoning to those uses and encourage developers to subdivide for residential use immediately although the cost of extending municipal services might be prohibitive. Some plans therefore "phase" or "programme" development by indicating the areas to be developed within the first five years, other areas in the second five years, and so forth. Other plans describe the conditions in which expansion will be undertaken more generically, in terms of density. Thus the plan might speak of developing the first area until population density approached the plan's ideal, say, thirty persons per acre, when expansion into the second area would be commenced.

Many master plans consist primarily of a map, but it is by no means the most important element. Land use allocation may of course be shown on a map, but the most important elements in plans appear to be intensity of land use in terms of people, that is, *densities* of population; the relationship of these land uses to each other; and a road pattern to accommodate the people in their use of the land. It is the delineation of this relationship, buttressed by the facts of existing and proposed uses, densities and road patterns, that lies at the heart of planning. This delineation of relationship is more easily understood if it is in text rather than map form. To take a trivial example, it may be better planning to state the principles that will govern the future location of service stations—traffic considerations, frequency, total number, relationship with other land uses, etc., rather than to provide on a map for a service station where it may well turn out that no oil company may want one. The temptation to locate the station on the map may lead to undesirable rigidity as well as the creation of a monopoly in the landowner whose land is selected for the location.

If the master plan is regarded as the source book and guide for the enactment and administration of zoning by-laws, subdivision control, and a public works program its drafting will be materially different from the style now regarded as standard, at least in Ontario. It is not unreasonable having regard to the purposes a plan is intended to serve to suggest that the master plan should be a statement of accepted principles of planning, illustrated by photographs, maps and diagrams, applied to the municipality being planned. Such a plan, it is submitted, may be politically more acceptable, legally and administratively more meaningful, and therefore more stable and useful, than a lesser plan with the superficial certainty, but barrenness and rigidity, of a typical town-planning map.

That was Then and This is Now

It may be presumptuous for anyone to recite another person's articles of faith. But the personal and judicial creed of Jerome Frank is plainly written in his opinions and books. He held it basic that a lawyer should be a good, in fact a superb, technician, but insisted that he should be the master, not the servant, of his bundle of techniques. To him the law was an instrument of justice which can work with only a degree of perfection. A capacity to read and to collate cases was to him a necessary legal skill. But he regarded the judicial habit of deciding cases on the basis of Points and Authorities as a mischief-making device. Its use was an attempt to stretch likeness further than it would go, and to base a judgment upon the stereotype of former decisions. To him even the leading cases were points in the development of a doctrine, and to him it was important to ask whence that doctrine came, the circumstances which had attended its origin, the mutations through which it had gone, and its current relevancy. In his opinions in admiralty, in contract and in public control he presented striking histories of the sweep of doctrine down the decades and of its imperfect expression in case law. I never heard him speak of 'eternal principles' or of 'values which are everlasting', but he did recognize that there are objectives which are enduring, and that they must, as change and rust get in their work, be newly adapted to the infinite variety of the changing circumstances of life. If law must not break with the past, it must not neglect its duty to the present. In a deft process of accommodation there must alike be continuity and novelty. For these and like reasons Jerome Frank is to be numbered among the common-law judges and is to be ranked high among modern jurists. For these reasons he stands in the great tradition. (Walton Hale Hamilton: The Great Tradition—Jerome Frank (1957), 66 Yale L.J. 821, at p. 823)