THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XL MARCH 1962 MARS NO. 1

# AN INTRODUCTION TO ZONING ENABLING LEGISLATION

J. B. MILNER*
*Toronto*

The purpose of this article is to compare the zoning enabling legislation of the ten provinces of Canada all of which, to some extent, authorize local governments to enact by-laws to control the use of land and the erection and use of buildings and structures. In each province there is a general statute[1] and with a few

*J. B. Milner, of the Faculty of Law, University of Toronto.

[1] In British Columbia, the Municipal Act, R.S.B.C., 1960, c. 255, as am., esp. ss. 702-710, hereinafter referred to as the British Columbia Act. (Vancouver is governed by a special Act, the Vancouver Charter, S.B.C., 1953, c. 55. It is not included in this general survey); in Alberta, the Town and Rural Planning Act, R.S.A., 1955, c. 337, as am., hereinafter referred to as the Alberta Act; in Saskatchewan, the Community Planning Act, 1957, S.S., 1957, c. 48, as am., hereinafter referred to as the Saskatchewan Act; in Manitoba, the Town Planning Act, R.S.M., 1954, c. 267, as am., hereinafter referred to as the Manitoba Act; and the Municipal Act, R.S.M., 1954, c. 173, as am., esp. ss. 893-899. (Metropolitan Winnipeg is also governed by a special Act, S.M., 1960, c. 40. It is not included in this general survey); in Ontario, the Planning Act, R.S.O., 1960, c. 296 as am., hereinafter referred to as the Ontario Act; and the Municipal Act, R.S.O., 1960, c. 249; in Quebec, the Cities and Towns Act, R.S.Q., 1941, c. 233, as am., esp. s. 426, as revised and consolidated by S.Q., 1960, c. 76, s. 17, hereinafter referred to as the Quebec Act; in Prince Edward Island, the Town Planning Act, R.S.P.E.I., 1951, c. 163, as am., hereinafter referred to as the P.E.I. Act; in New Brunswick, the Community Planning Act, S.N.B., 1960-61, c. 6, hereinafter referred to as the New Brunswick Act; in Nova Scotia, the Town Planning Act, R.S.N.S., 1954, c. 292, as am., hereinafter referred to as the Nova Scotia Act; and in Newfoundland, the Urban and Rural Planning Act, 1953, S.N., 1953, No. 27, as am., hereinafter referred to as the Newfoundland Act. The amendments, so far as they are relevant are cited where necessary in the footnotes.

exceptions[2] reference is made only to the general law. Nevertheless there are literally hundreds of particular provisions in the statute law of every province whereby such control may be exercised either locally, by by-law, or provincially. And besides these provisions there is, of course, the whole range of statutory powers enacted by the Parliament of Canada including the very vital power to zone airports. None of these particular powers is dealt with here, except incidentally. Although the general laws are, in large part, peculiar to each province, an understanding of their common points and their differences will help in the understanding of each law, and because planning legislation in Canada is still experimental,[3] an understanding of the national picture will help in understanding the inevitable development of the law in each province. Where judicial interpretation has been given to the legislation the reports are noted and analysed but such is the character of the people and the problem that there has been little litigation in Canada.[4] Consequently the lawyers and administrators have to be guided largely by the bare words of their provincial Act.

For convenience the article has been divided into three parts: Part I. The Zoning Power; Part II. Zoning Procedures; and Part III. Three Approaches to Zoning.

## I. THE ZONING POWER.

### *The purposes of zoning*

The label "zoning by-law" is now so widely used on this continent that it is doubtful whether anyone is either misled by the label or can claim not to know what the by-law will be about. A zoning by-law does two things, usually: it classifies and segregates into particular districts or areas or *zones* the various uses of land and buildings that are permitted by the by-law, all other uses being prohibited; and it regulates the permitted uses in varying degrees depending upon attendant circumstances.

To find the reasons why a state should want to restrict the use of land it is necessary to go back in history to the time when no organized law authorized such restrictions. At that stage, that is, prior to the first world war, land use was controlled, first of all, by the law of nuisance, and, in many cases, by the use of restrictive covenants and building schemes in conveyances. From the terms

[2] The Municipal Act in Manitoba and in Ontario, *ibid.*

[3] *E.g.*, the Alberta Act has been amended every year since 1948, except 1956.

[4] Most of the reported cases have been cited except the numerous cases dealing with non-conforming uses that add nothing in principle.

of these schemes, it is clear that many landowners have sought to protect their own land far beyond the protection of the law of nuisance. When they sold part of their land, they restricted the purchasers' use to something they regarded as compatible with their enjoyment of the part they retained. There is a surprising similarity of objectives in the old cases. Apparently rich men thought it undesirable to have other than residential uses around their homes. Very often, too, they wanted to have comparatively rich neighbours, people of their own class, or, if that was impossible, people of the next highest class. In the supposedly democratic classless society of North America the choice usually rested on income. No one seems to have been eager to have either shops or industries nearby. In striking contrast to our farming communities, where the fashion seems to have been just the opposite, and a farmer built his house close by his working buildings, people seemed not to want to be reminded of unpleasant things like work while they were resting at home. The common exception is the medical doctor with whom the tradition of working in his residence dies hard. But the general attitude, which is traditional today, rarely gets much critical investigation and probably takes for granted the questionable value of segregating large areas of our towns and cities for the exclusive use of selected income groups.[5] It is observable that in villages, uses of land are more mixed than in towns and cities, but the difference may be the accidental result of size and number. If two or three rich men in a village live near each other, and also near the poorer men, and all of them near their work places and shops, there may in fact be just as much segregation, but in the towns and cities the larger numbers of rich and poor men mean larger areas of land reserved for their use. If this analysis is correct, it still remains to say whether the accidental result of mixed uses in the village is not a richer and better life (whatever that is) for the inhabitants. To some extent town planners try to reproduce the mixture of the village by stressing mixed uses in neighbourhood design in cities and towns.

*The definition of zones*

Zoning by-laws customarily set up areas, districts or zones, in which a use may be prohibited or permitted. Only in Ontario is

[5] For some views on the purposes of zoning, see Webster, Urban Planning and Municipal Public Policy (1958), pp. 362-435; Bassett, Zoning (1940); and, for a well known, but not very convincing judicial statement of the purposes of zoning, *Village of Euclid* v. *Ambler Realty Co.* (1926), 272 U.S. 365, esp. at p. 394.

it made explicit that a use may be excluded entirely from a municipality.[6] The thinking that distinguishes regulation from prohibition may be analogous to the thinking that a power to exclude a use entirely should not be inferred from a power to prohibit a use in an area or zone. On this basis, a municipality might exclude, say, an open air cinema, but some municipality must accept it, or else the business will disappear. The density of building in the municipality may be relevant. Perhaps a compactly built-up town or city should be allowed to exclude a use, but a wide open, undeveloped township should not. Since most by-laws prohibit all uses except those that are expressly permitted, in fact, most by-laws must exclude entirely many uses of land and buildings. Permitted uses are usually listed by the dozens, yet experience has shown that even acceptable uses are often forgotten.

Zones may be described by metes and bounds, or, where a Torrens land titles system is used, by reference to the plans, but most provinces expressly authorize the use of maps, as part of the by-law, to define the zone,[7] although with the exception of Newfoundland no province makes the use of a map compulsory. Even in Newfoundland it may be permissible to define an area by metes and bounds provided the definition is related to the map. Both planners and lawyers must by now thoroughly disapprove of zone descriptions such as that contained in City of Toronto By-Law 17,544 (passed in 1949, approved by the Ontario Municipal Board and still in effect) which occupies more than seven printed pages, although the operative parts of the by-law are three or four short sections. The surprising thing is that no provincial supervisory body has demanded that maps be used, although even in the richest provinces the prospects are slight that the remoter municipalities could afford maps.

A primary purpose of zoning is to separate incompatible uses but it does not follow that the purpose is achieved because the main uses permitted in a zone are themselves compatible. Most people would probably agree that a glue factory is incompatible

[6] Ontario Act, s. 30(1), paras. 1, 2, 4 and 6. The words "within the municipality" were added by S.O., 1955, c. 48, s. 40(1) and (2). Presumably the Ontario Municipal Board could still withhold approval of a zoning by-law because it excludes a use if it thought the policy, in a particular case, was undesirable. For a discussion of the constitutional implications of total exclusion under the U.S. Federal and state constitutions, see *Duffcon Concrete Products, Inc.* v. *Borough of Cresskill* (1949), 64 A. 2d 347 (N.J.).

[7] British Columbia Act, s. 702(1) (a) (as am. by S.B.C., 1961, c. 43, s. 41); Alberta Act, s. 80(2) (as am. by S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 41(1); Ontario Act, s. 30(5); Nova Scotia Act, s. 12(a); Newfoundland Act, s. 31(a).

with houses, but the exclusion of glue factories from a residential zone does not mean that the houses may not surround a glue factory if the centre of the residential zone is separately zoned for industry. To take a more probable illustration, it is not uncommon to find an automobile service station zoned by itself near a residential zone, on the theory that its convenience overweighs its "incompatibility". Another illustration may be found in the tendency to exclude churches from commercial zones, where there is often parking available, and include them in residential zones, where the accommodation of large numbers of cars is usually had only at the expense of unsightliness. Since parking is usually made a requirement of the use for a church, the use is not only segregated, in a negative sense, but an incidental and possibly incompatible use is compelled, sometimes at considerable cost.

*Regulation of use: performance standards*

The zoning power is thus used not only to prohibit some uses and permit others but also to regulate the permitted use, and the regulation is as important as the segregation. The usual controls regulate the set back of buildings, the size of the yards, the area of the lot, the height of the building, the floor space and sometimes, although rarely now, the cost and type of construction. Quite obviously, however, it is possible to set economically impossible standards, particularly of lot area, thus effectively prohibiting residential use by a by-law that expressly permits it.[8]

The regulation of a use frequently acts as a kind of modification of its incompatible character, which may enable an otherwise incompatible use to be tolerated in or near a zone where the unregulated use would be objectionable. It is common, for example, to permit an industry operated wholly within an enclosed building, and set back one hundred feet from the lot line, to be established next to a residential zone, where a so-called "dirty industry" would be prohibited. This kind of regulation is a crude form of what is sometimes called zoning by "performance standards,"[9]

[8] If there is no express power to prohibit, the power to regulate may be exceeded if the result is to prohibit in fact. *Toronto* v. *Virgo*, [1896] A.C. 88 (power to "regulate and govern" hawkers held not sufficient to prohibit hawkers in an important part of the city). See also *Re McCormick and Toronto Township*, [1948] 3 D.L.R. 70 (power to "license, regulate and govern" held not to authorize a license fee so high as to be "confiscatory and prohibitive").

[9] For a discussion of this technique, see "Trends—Performance Standards in Zoning" (1955), 2 Ontario Planning (No. 1) 6; Redman, Horack, Waring and Via, Clinic: Performance Standards in Zoning,

where supposedly incompatible uses are tolerated together if the "lower" use is operated so as not to display its offensive characteristic. It is said that engineers can now detect and measure nuisance such as noise, dust, odours, and the like, in so precise a fashion that it would be possible to permit any activity on land anywhere as long as the nuisance did not rise above a defined limit, the methods of curbing the nuisance being left to the engineering ingenuity of the landowner. If these methods of detection do indeed prove workable the whole character of zoning could change, and use segregation could become much less common. Those who decry the monotony of most zoning will doubtless support this advance in possible variety of uses. On the other hand those who want to isolate themselves from the very thought of work may still prefer the notion of islands of "pure" residential use. In any event, if zoning by performance standards becomes popular, it is unlikely that it will entirely supplant segregation of uses. The two can obviously be used to complement each other, as they are now, in their crude way.

While most provinces of Canada authorize a zoning by-law in a more or less similar form, on paper at least zoning is accomplished in a less familiar document in both Prince Edward Island and in Manitoba, where it may take the form of a land use control provision in a master plan. In both cases, however, the actual provisions look very much like a zoning by-law.[10]

*Control of the use of land*

It is usual in zoning enabling legislation to distinguish between the control of land use and the control of the erection or use of buildings or structures.[11] The distinction is of importance only

Planning 1952, pp. 150-166; American Society of Planning Officials, Industrial Zoning Standards, Planning Advisory Service Information Bulletin No. 78 (1955); and Performance Standards in Industrial Zoning, in Bulletin No. 32 (1951).

[10] In the P.E.I. Act, s. 2: the official plan includes a "comprehensive zone system", and see s. 25(1) (b) and the regulations applicable to Suburban Charlottetown, Trans-Canada Highway Area and Incorporated Villages (Office Consolidation published by the Department of Industry and Natural Resources, October 29th, 1959); and in Manitoba, the Manitoba Act, ss. 5 and 10, Schedule A. But compare the Municipal Act, R.S.M., 1954, c. 173, ss. 893-895. The Newfoundland Act, s. 31 (as am. by Act No. 19, 1955, s. 4) speaks of a "scheme for the control of the use of land" and the Ontario Act, s. 30, does not use the word "zoning" at all, it refers to "restricted area" by-laws, and then only in a section heading or marginal note. Otherwise the by-laws in Ontario have no particular name, but they are almost always called the "Zoning By-law" in the short title provision.

[11] The P.E.I. Act, s. 2 and s. 25(1) (b), speaks only of "a comprehensive zone system designed to secure the economic use of land" but "land" in that context doubtless includes buildings or structures. The

insofar as the enabling Act in other sections confers some power in respect of a use of land or of a use of a building, but not both.[12]

The almost universal use of the expression "use of land" as the subject of control would suggest that the broadest possible coverage of subject matter was included, but in the *Township of Pickering* v. *Godfrey* the Ontario Court of Appeal held that "the making of pits and quarries is not a 'use of land'"[13] within the meaning of the Ontario Act. The decision is oddly reasoned and one might have disregarded it as turning on its peculiar facts and not likely to be followed, but the Ontario legislature at the next session revised its legislation relating to pits and quarries. The whole revision is not relevant here, but what is important is the addition of paragraph 6 to subsection (1) of section 30 of the Ontario Act, expressly authorizing municipalities to pass by-laws for prohibiting the making or establishment of pits and quarries within the municipality or within any defined area or areas thereof.[14] By itself the amendment is innocuous enough, but when it is read with paragraph 1 of the same subsection, it casts doubt on the meaning of the general expression "use of land", which that paragraph authorizes municipalities to prohibit. If the *Pickering* case is rightly decided, then the legislature may have been justified in enacting a separate heading of control, but by so doing the legislature has, by inference, confirmed the judicial view and suggested that "use of land" in paragraph 1 does not include gravel pits. How far the expression "use of land" may be further restricted remains to be seen. Operation of a sand and gravel pit is not the only activity of the sort that a municipality may want to prohibit. Very often it may want to keep an existing contour for aesthetic reasons. Developers, contrariwise, usually want to level the land before building.

Whether the *Pickering* case, with or without the legislative support of the 1959 amendment to the Ontario Act, would be followed in other provinces is doubtful, but those provinces that

---

Quebec Act, s. 426 is rather ambiguous, but it would appear to authorize control over the use of buildings only! The Manitoba Act, Schedule A, is also ambiguous, but the Municipal Act, R.S.M., 1954, c. 173, s. 895, clearly distinguishes between control of land use and the erection of buildings, and authorizes both controls.

[12] See, *e.g.*, *infra*, the significance of the distinction for a committee of adjustment in Ontario, footnote 189.

[13] (1958), 14 D.L.R. (2d) 520, at p. 525 (Morden J.A.).

[14] S.O., 1959, c. 71, s. 5, transferred the zoning powers to the Planning Act and added para. 6 to s. 27a (1), which is now s. 30(1). See also the Municipal Act, R.S.O., 1960, c. 249, s. 379(1), para. 118 (requiring Municipal Board approval) and 119 (not requiring approval).

have no special powers for controlling gravel pits may wonder whether a definition of the word "use" might not be necessary.[15]

The rationale of the *Pickering* case involves a comparison with the sale of land and with mining operations. One is tempted to ask, irreverently, whether, if taking land away is not a use, what happens where something is added to the land? Is a cemetery, for example, a use of land (assuming, of course, no grave stones, which might be buildings or structures)? More seriously, is a municipality entitled to restrict the dumping of what is euphemistically known as "clean fill" in an area where it wishes to retain the existing elevation of land?

Closely related to the power to control land form, or contour, which must remain in doubt after the *Pickering* case, is the power to preserve existing vegetation and trees, especially on the steep banks of rivers, where careless and unscientific cutting of trees or removing of vegetation may drastically increase the danger of erosion. Only the New Brunswick Act authorizes the regulation of "the preservation and planting of trees"[16] and this power hardly goes far enough to compel good conservation techniques. In the other provinces the authority must be found under the general power to prohibit or regulate the use of land or in special conservation Acts which usually do not contain land use control powers.

The establishment of "open space" zones is another common restriction of land use. Open space may, of course, be acquired in many ways, the most appropriate being by purchase, but purchase is also one of the least attractive to a municipal council that has to find the money to buy the land. This economic pressure sometimes leads a council to try the zoning power as an inexpensive alternative. In some cases this can be done fairly legitimately, by restricting open land to agricultural uses, which usually involve very little building. But some municipalities are not content with this, they want to limit uses in a river valley to what are sometimes called "park" uses, recreational and perhaps nothing more. The result of such a by-law, which is undoubtedly prohibiting the use of land as authorized, is to reduce the market value of the land to

[15] In addition to Ontario, the following provinces have express powers: Alberta Act, s. 80(9) (as am. by S.A., 1957, c. 98, s. 13; 1959, c. 89, s. 10), referring to "the excavation of land, or the removal of top soil from land". Query whether this power is limited to excavation for building purposes and removal of top soil only for sale. New Brunswick Act, s. 19(a) (xii), authorizing the *regulation* of "the excavation or quarrying of land", but *cf.* s. 19(b) (iii), authorizing the *prohibition* of "the excavation of land" without a permit.

[16] S. 19(a) (xv).

almost nothing. Since title doesn't pass there may be no "taking" of land, and hence no claim for compensation, but the impropriety of such a by-law, unless special circumstances are present, is obvious.

Only the Alberta Act expressly deals with this problem. Section 80(5) provides that:

> No zoning by-law shall establish a district in which only parks, playgrounds, schools, public recreation grounds or public buildings are permitted unless at the time the district is established the lands are owned by the municipality or a public authority.

In most provinces a provincial agency of some sort supervises the exercise of the zoning power, and it may be that the agency would not approve a by-law that constituted a taking under the guise of zoning. In Ontario the Municipal Board is believed to resist such by-laws, or at best, approve them for one year, until the municipality can get around to purchasing the land.

In Saskatchewan the question has come before the courts. In *Regina Auto Court* v. *Regina*[17] the plaintiff complained that the city by rezoning his land from a second density residential zone, (R2) to a park zone (P), wrongfully deprived him of the "equitable ownership" of his property. He contended that the city should have bought or expropriated the property from him. Graham J. could find no ground for holding the by-law *ultra vires*.[18] The real point of the problem is raised by Graham J.'s observation:

> It is true, of course, that should the city any time in the future decide to take over the property for public-park purposes it would be necessary then for it to reach an agreement with the owner for the purchase or exchange of the property or failing this to expropriate the property under the appropriate Act.[19]

The question is, when the city expropriates, does it pay compensation on the assumption that the land has virtually no market value because of its zone classification? Regulation then will have amounted to a taking. This injustice is avoided in Newfoundland by a general provision that enables the owner to compel the authorized administrator to buy land "that has become incapable of reasonably beneficial use in its existing state" because of a scheme under a master plan.[20]

---

[17] (1958), 25 W.W.R. (N.S.) 167.

[18] The by-law was authorized by what is now s. 39 of the Saskatchewan Act.

[19] *Supra*, footnote 17, at p. 169.

[20] Newfoundland Act, s. 62, (as am. by 1954, No. 66). The provision is very similar to s. 19 of the Town and Country Planning Act, 1947 (U.K.) 1947, 10 & 11 Geo. 6, c. 51, and some of the difficulties in

Parking is one of the major problems in modern city planning and no city seems to conquer it. As more parking spaces are provided more cars appear claiming the spaces. While the number of cars per person may reach the saturation point the number of persons seems capable of indefinite increase. Consequently it is not surprising that several provinces[21] have specially authorized councils to require off street parking and loading space in connection with permitted uses of land, or the erection and use of buildings, or both. The Ontario provision, section 30(1) 5 is typical: "The owners or occupants of buildings or structures to be erected or used for a purpose named in the by-law may be required to provide and maintain loading or parking facilities on land that is not part of the highway." The real purpose of the power is clearly to reduce the amount of street parking and the by-laws frequently permit the off street parking to be on adjacent lots. A typical by-law provision under such a power will specify a parking space of defined area (usually 200 square feet) to be provided in some ratio to the building floor area, or seating capacity or some suitable formula. Many by-laws provide further that the parking area shall be maintained with a "stable surface that is treated so as to prevent the raising of dust or loose particles"[22] and may even go further to provide that "no charge shall be made for parking in a parking area" required by the by-law.[23] The consequences of such a "no-charging" provision, which is supposedly authorized under the section quoted and section 30(2) which authorizes the council in the by-law to "regulate all or any of the matters mentioned in subsection (1)", is to force the cost of parking directly on to merchants and manufacturers, but indirectly on to their customers, whether they use the parking space or not. It may be doubted whether the general authority to regulate can be used to oblige the customers who travel by public transit to subsidize parking space for those customers who prefer to drive their own cars. Many cities are now operating their own parking lots, and charging for the service, in which case presumably the parking requirements can in time be repealed, thus restoring some equity in the cost.[24] Meanwhile the location of parking facilities will

administering that section are set out in Heap, An Outline of Planning (3rd ed., 1960), pp. 70-73.

[21] All provinces except Manitoba, Prince Edward Island, Nova Scotia and Newfoundland. But Prince Edward Island regards the general authority as sufficient. See Reg. 13(f), *supra*, footnote 10.

[22] For instance, Township of Toronto Zoning By-Law 2813, s. 20(c). (A crude example of performance standards).

[23] *Ibid.*, s. 20(b).

[24] Alberta Act, s. 80(6a) (as am. by S.A., 1961, c. 79, s. 6), may defeat

present expense to individual developers and may result in an ungainly spacing of buildings.

Many Ontario by-laws respecting loading spaces passed under section 30(1) paragraph 5 limit the requirement to building uses "involving the frequent shipping, loading or unloading of persons, animals, or goods".[25] In Saskatchewan the authority itself is limited to requiring the provision and maintenance of any *necessary* loading or parking facilities.[26] In only two provinces[27] the loading and parking requirements may be applied to uses of land where no building is involved, as, for example, at a sports field where there are no seats. In the other provinces the existence of special powers in connection with buildings tends to cast doubt on the breadth of the general power to regulate, which otherwise might be thought to authorize parking requirements in connection with land uses.

How far off street parking controls can be applied positively, as a regulatory power, to buildings in existence at the time the by-law was passed is doubtful, and only the British Columbia Act expressly states that the by-law "*may* exempt any class of building or any building existing at the time" the by-law was adopted, thereby implying that the by-law could be applied to existing buildings if they are not expressly exempted.[28]

*Control of the erection and use of buildings and structures*

While some provinces are less explicit than others in granting authority to control land use, the authority to control the erection and use of buildings and structures is generally stated and substantially similar in each province although the supplementary details vary somewhat.[29] In Ontario the authority is to prohibit the erection or use "for or except for such purposes as may be set

the restoration of equity by permitting the owner to buy from the municipality a release from the parking requirement. The municipality must use any money so acquired for the development of off street parking areas, and the owner may still pass the cost on to customers using public transit.

[25] For instance, Township of Toronto Zoning By-Law 2813, s. 46(1).

[26] Saskatchewan Act, s. 39(2) (j).

[27] Alberta Act, s. 80(6) (iv) (as am. by S.A., 1957, c. 98, s. 13); New Brunswick Act, s. 19(a) (x). The New Brunswick provision is an unlimited general authority.

[28] British Columbia Act, s. 702(1) (d).

[29] The Manitoba Act, Schedule A, speaks only of buildings, but the Municipal Act, R.S.M., 1954, c. 173, s. 895, uses the word "structure" as well. The Nova Scotia Act seems to refer only to "buildings" (s. 12), while all other provinces include the word "structures" (excepting the Prince Edward Island Act, where reference is made to the "economic use of land" *and* "restrictions as to the size, height, placing and design of buildings" and on "the size of building lots" in the definition of an official plan (s. 2(a) (iii) ).

out in the by-law",[30] and in *Regina* v. *Gibson*[31] Schatz J. held that the section did not "authorize by-laws absolutely prohibiting the erection or use of buildings but such by-laws may be passed only to limit the type of buildings".[32] How this conclusion was reached is not too clear from the judgment reported, but the inference is that there must always be some "purposes" set out in the by-law. There would seem to be nothing to prevent a council by by-law limiting the use of land to the growing of crops, and if so, by implication no buildings could be erected. In the *Gibson* case, however, the Township of Etobicoke was trying to prohibit building on a proposed road shown on its official plan, and had it limited the permitted uses in its by-law to agricultural uses other than building it might have succeeded. But the by-law as passed seems as unworthy as the by-law in the *Regina Auto Court* case.[33]

The generality of the statutory language is supplemented in three provinces by a special provision authorizing the council to prohibit the erection of buildings on land that is subject to flooding, or that is low lying, marshy land that would be expensive to drain.[34] In Ontario all the conditions precedent, that is, the characteristics of the land, are jurisdictional facts, ultimately to be determined by the courts. In Saskatchewan the liability of the land to flooding is clearly a fact for the courts, and so, probably, is the existence of "bad natural drainage, steep slopes, rock formations or similar features", but whether the cost of drainage is prohibitive is to be determined by the opinion of the council. In New Brunswick all questions are left to the opinion of the local planning commission.

In Saskatchewan the special provision seems superfluous since the general authority in section 39(2) (c) probably authorizes prohibition of buildings anywhere, but in New Brunswick there is no clear authority to prohibit the erection of buildings, and the special provision may be necessary. In Ontario the provision does nothing but confound confusion. The Ontario Act limits the special authority to the prohibition of buildings for residential or commercial purposes. Since authority already exists in section 30(1) paragraph 2 for the prohibition of buildings for residential, commercial *or industrial* purposes, there is the obvious doubt whether the generality of paragraph 2 is cut down by paragraph 3, and whether authority exists to prohibit industrial buildings in the prescribed areas. Most industrial buildings require more drain-

[30] Ontario Act, s. 30(1), para. 2.
[31] [1959] O.W.N. 254.
[32] *Ibid.*, at p. 255.
[33] *Supra*, footnote 17.
[34] Saskatchewan Act, s. 39(2) (g); Ontario Act, s. 30(1), para. 3 and New Brunswick Act, s. 19(g).

age than either residential or commercial buildings and the exclusion of industrial buildings from the special provision is most mysterious. The existence of this special provision in three provinces invites the possible inference in the other provinces that they have no such authority, but the inference is an unworthy one.

In addition to the special provision for flood land and rocky or marshy land is the special provision in four provinces[35] that building permits may be withheld unless satisfactory arrangements for the supply of services to the lot have been made. In Alberta, New Brunswick and Nova Scotia the satisfaction is in the opinion of the council, and in Alberta the council may delegate the judgment to an agent or servant of the council. In Quebec "public waterworks and sewer services" must be installed. In British Columbia, as in Ontario, these matters are usually caught by subdivision controls.[36] In Ontario when no services are provided and for any reason subdivision control is inadequate some attempt is made to control unwanted building by setting minimum lot areas so large it is uneconomic to develop the land.

*Design control*

The most controversial of zoning controls is architectural, or esthetic, control. In the United States, where zoning by-laws can, in effect, be tested for "reasonableness" under federal and state constitutions, the litigation in this area has been extensive.[37] The greatest storm seems to have been raised over billboards and the advertising industry, billboard division, has been active in protecting its interests. Oddly enough, in Canada, in terms of legislative authority, little dispute can arise. In five provinces there is express authority to control the public display of advertisements.[38] In Alberta, Saskatchewan, Manitoba and Ontario there is authority to prohibit, in New Brunswick only to regulate. In Manitoba there is a special power to regulate "the advertising of any business con-

[35] Alberta Act, s. 80(7) (as am. by S.A., 1957, c. 98, s. 13); Quebec Act, s. 426(1a) (b) (as am. by 1956-57, c. 36, s. 9, 1960, c. 76, s. 18); New Brunswick Act, s. 19(d); Nova Scotia Act, s. 12 (h).

[36] In British Columbia the council had no right to require sanitary sewers for the general use of the corporation in a new subdivision, *Re Surrey* (1959), 20 D.L.R. (2d) 174, but see S.B.C., 1960, c. 37, s. 31.

[37] For a review of the cases, see Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal (1955), 20 Law and Contemporary Problems 218; Toll, Zoning for Amenities, *ibid.*, at p. 266.

[38] Alberta Act, s. 80(6) (*e*) (as am. by S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 39(2) (*k*); Manitoba Act, Schedule A (7), and the Municipal Act, R.S.M., 1954, c. 173, ss. 895(e), 899(a) and 900(1) (a); the Municipal Act, R.S.O., 1960, c. 249, s. 379 (1), para. 122 (Ontario Municipal Board approval is not required); New Brunswick Act, s. 19(a) (xiv) and s. 66(1) (d).

ducted in any zone or district" and permitted advertising may be subjected to the approval of an appointed official.[39] Within the sense of this provision billboard advertising is usually off site. There is little doubt that advertising is a structure if not a building, and presumably in the provinces that have no special provision the general provision is sufficient to control most undesirable (unsightly) advertisings unless the courts read the Acts restrictively because of the express authority in other provinces.

On the broader level of general architectural control, or design control, five provinces specifically authorize control of the "design, character and appearance" of buildings[40] although in Quebec the language is slightly different: there, authority is to "prescribe the architecture, dimensions, symmetry, alignment and destination" of the buildings. In all cases the control must be by general by-law; there is no special power to control individual buildings. The authority has not been widely used in Ontario, where the architectural profession is thought not to favour regulation of esthetic matters. The most common provision in a by-law is an attempt to discourage monotonous or repetitious design in suburban building. A typical provision states that in a housing project not more than twenty per cent of the dwellings shall be alike in external design with respect to size and location of doors, windows, projecting balconies and type of surface materials, and not more than three alike shall be built on adjoining lots fronting on the same street.[41] The provisions are usually easily open to evasion and often they do as much harm as good. On a proper layout a scheme with only three designs can be made more attractive than a layout of the same number of houses, all different in external design, but poorly arranged. The length of the street, the straightness of the street, and the monotony of the set back can be more significant than the design. Moreover, good design can be repeated safely more frequently than bad.

The city of Toronto has recently attempted to get special legislation passed to enable its council or the council's officers, to exercise control of design of specific buildings.[42] While there is a

[39] Municipal Act, R.S.M., 1954, c. 173, s. 895(1) (e).

[40] Alberta Act, s. 80(6) (*a*) (v) (as am. by 1957, c. 98, s. 13); Ontario Act, s. 30(1) para. 4; Quebec Act, s. 426 para. 1; New Brunswick Act, s. 19(a) (v) and Nova Scotia Act, s. 12(g).

[41] Township of Toronto Zoning By-Law 2813, s. 29.

[42] See Bill No. Pr. 30 (1960-61) 2nd Session, 26th Legislature, Ontario, Clause 6 (not passed). See also City of Toronto By-Law 21,295, requiring plans for buildings in R.1F zones to be designed by an architect. Not yet approved by the Municipal Board. And see Town of Oakville By-Law 1453, attempting to prohibit building in a residential zone before the

growing interest in the city's physical or architectural appearance the opposition does not spring from anti "bureaucratic" legal and lay opinions alone, but from the architects themselves. There is concern amongst architects that some of them will be called to sit in judgment over their fellows, which at the best of times is difficult, but in the subjective area of taste, can be quite embarrassing.[43]

While proposals for direct architectural control are unpopular and rarely carried out, zoning by-laws disclose a wide range of controls commonly imposed that have far greater effect on the "design, character and appearance" of our cities and towns than any control over even individual buildings would likely have. In every province there is express or implicit authority to regulate what in Ontario is described as "the cost or type of construction, the height, bulk, location, size, floor area, spacing, external design, character and use of buildings and structures" and "the minimum frontage and depth of the parcel of land and the proportion of area thereof that any building or structure may occupy".[44] A single example of the application of these controls will illustrate their present "bad" effects on city architecture as well as indicate their potential "good" effects. Given the usual but questionable limitation that streets must be sixty-six feet wide, the usual zoning by-law requirement that all houses be set back twenty-five feet and that no house exceed thirty-five feet in height, and the usual style of so-called ranch type houses, about eighteen feet high, the result is a wide uninteresting street, with each side unrelated to the other, and, because of the usual restrictions of lot width to a minimum of

---

external design has been approved in writing by the building inspector. Without special legislation the delegation is clearly bad. (*Infra*, footnote 157). Compare the recommendation of such a proposal, but requiring "commendation . . . by qualified persons", in Royal Architectural Institute of Canada, Report of the Committee of Inquiry into the Design of the Residential Environment (1960), para. 153.

[43] See, for example, two editorials by Professor J. A. Murray, in October, 1960, The Canadian Architect, p. 116, commenting on the Royal Architectural Institute of Canada Report, *ibid.*, para. 153, and in November, 1960, p. 126, commenting on the Oakville By-Law, *ibid.*, partially reprinted in (1961), 8 Ontario Planning (No. 1) 2.

[44] Ontario Act, s. 30(1) 4; *cf.* British Columbia Act, s. 702(1) (c) (the "size, shape and siting of buildings"); Alberta Act, s. 80(6) (*a*) to (*e*) (as am. by S.A., 1957, c. 98, s. 13). The Alberta Act is the most specific, and the British Columbia the most general. Saskatchewan Act, s. 39(2), also very complete; Manitoba Act, Schedule A (6) ("the height, use or general character") and the Municipal Act, R.S.M., 1954, c. 127, ss. 894(1) (*a*) (set back of buildings), 895(1) (*d*); Quebec Act, s. 426, para. 1; Prince Edward Island Act, s. 2(a) (iii) ("size, height, placing and design of buildings . . . size of building lots"); New Brunswick Act, s. 19(a); Nova Scotia Act, s. 12(d), (e).

fifty feet, and side yards of, probably, four feet on each side of each house, with each house unrelated to the other.[45]

Each of these controls has a purpose other than to effect the appearance of the street, and the usual rationale of their use today is expressed in terms of some legitimate and objective function. The wide streets are thought to be necessary to enable all the services to be installed, and to provide more convenient snow removal from the travelled portion of the road.[46] The services do not require such width and many could be put in the rear. Snow removal is just as convenient on a fifty foot road as on a sixty-six, particularly if the houses are set back twenty-five feet. The twenty-five feet is harder to account for as anything but fashion, but it is sometimes frankly justified on the ground that the street may some day have to be widened to accommodate increased traffic. This justification is surely too pessimistic a view of planning, which should be able to distinguish between reasonably permanent residential back streets and the busier thoroughfares. The height limitation has something to do with fire protection: the cost of equipment to pump water and to raise ladders to a greater height than thirty-five feet. Since the equipment ultimately becomes necessary for "high rise" buildings anyway it seems a shame that a community centre such as Don Mills has developed outside Toronto could not have the variety of sky-line that a high rise building would give it. The width of side yards is perhaps the most indefensible provision, except for what is believed to be public taste and preference for the isolated detached one family dwelling. How justified is this belief is uncertain, since very few good examples of rows or groups of attached houses are being offered for sale or rent, but there are no vacancies in the few good examples around Metropolitan Toronto! Height and yard limitations are also justified as means of ensuring a clear view of traffic at corners and adequate air and sunlight for all dwellings, but few layouts are con-

[45] The subdivision control laws in Canada show a striking common insistence that streets be sixty-six feet wide. There are exceptions: Alberta regulations expressly provide for half width streets of thirty-three feet. For comment on the waste of land involved, see Thomas Adams, Rural Planning and Development (1917), an early Canadian classic, pp. 88-90. See also Clarence Stein, Toward New Towns for America (rev. ed., 1957), pp. 41-48, for a description of the "superblock" which is characterised by wide peripheral streets and narrow internal streets. See also Irving Grossman, In Search of the Lost Street (1960), 17 Canadian Art 330, for an architect's view of the design of streets.

[46] Middleton J.A. recognized the real purpose of the set back control in *Re Masonic Temple Co. and Toronto* (1915), 22 D.L.R. 458, where he spoke of "the uniform and architectural symmetry which the statute endeavours to secure" (at p. 461).

sciously designed to take the best advantage of sun and shadow. If they were, one might expect the front yard of the house on the north side of a street to be deep, so that it would not shade its own yard space, while the front yard on the south side would be shallow, for the same reason. Very often the twenty-five feet of front yard, which is too small to be useful, especially if hedges are necessary to ensure privacy, results in the house taking up so much of the rest of the lot that the rear yard is less useful than it would be if the house were situated at the very front.

The notion that each lot owner must sacrifice twenty-five feet of his land on the off chance that some day the street will be widened at less cost to the municipality is hard to reconcile with the common provision for "deferred widening" by-laws dealing specifically with this problem[47] and usually providing for limited compensation, building rights, and sometimes compulsory purchase by the municipality at the request of the owner of undeveloped land. The special provisions invite the suggestion that general zoning set back provisions should not be used as a simpler substitute.

*Density control*

In four provinces there is an express power to prescribe "the maximum density of population"[48] and this rather obscure power is only explained in the Alberta Act, which states that the density "may be expressed in the by-law as a ratio of habitable rooms per acre or as a permissible number of dwelling units per minimum site area or in a similar way". In the other provinces the general powers can probably produce an equally effective control. The power to prescribe the coverage of a lot by buildings, coupled with the power to regulate the size, bulk and floor area of buildings, enables a council to control the density of buildings and if "floor area" means the floor area of individual rooms, rather than the total floor area of the whole building,[49] adequate control is possible. Some by-laws attempt to increase flexibility by expressing

[47] For instance, Saskatchewan Act, ss. 111-125a (as am. by S.S., 1960, c. 52, s. 8). The Municipal Act, R.S.O., 1960, c. 249, ss. 338-339; New Brunswick Act, ss. 39-42.

[48] Alberta Act, s. 80(6) (*b*) (iii) (as am. by S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 39(2) (*f*); New Brunswick Act, s. 19(a) (ix); Nova Scotia Act, s. 12(e); Newfoundland Act, s. 61(1) (r), (as am. by S.N., 1958, No. 4, s. 10(2), only as to provincial regulations. The Manitoba Act, Schedule A (5) refers to the "density of building".

[49] The Alberta Act speaks of both "ground area" and "floor area"; the New Brunswick Act, s. 19(a) (xi) and the Nova Scotia Act, s. 12(e), speak, of "size of rooms".

height and coverage limitations in terms of the ratio of floor area to the area of the lot. Thus if the ratio is three, the whole lot could be covered with a three storey building, half the lot with a six storey building, a third of the lot with a nine storey building.[50] In order to minimize the shadow effects higher storeys are sometimes required to be set back, producing a wedding cake effect typical of New York City. This formula of set back reaches its peak in Toronto, where, combined with a floor space index, there is a requirement, much too intricate to be repeated here, or perhaps anywhere, that establishes aerial building lines, generally sixty degree angles projected from the lot boundaries, within which the building must be built. In special circumstances the building is permitted to pierce the zoning envelope of projected angles.[51] The object of population density control is to avoid overcrowding and no by-law controlling the number of rooms or dwelling units can achieve this result unless it is accompanied by a law that limits the number of persons who may sleep in a room of a given size. Such a power is to be found in public health laws[52] but the enforcement may be rather difficult.

Since all provinces can, by some authority, special or general, regulate the bulk or size of buildings, it is not surprising that not only have by-laws preferred one family detached dwelling zones, but they have prescribed minimum house sizes, usually in terms of floor area. A typical by-law in a suburban municipality that is converting from agricultural to urban uses of land may provide a minimum ground floor area of, say, 720 square feet for a one storey house, 550 square feet for a storey and a half, and 500 square feet for a two storey house.[53] A provision of this sort is clearly authorized but when the provincial supervising authority[54] is asked to approve it, consideration may be given to the appropriateness of excluding from a municipality the lower income groups who

[50] For a discussion of the use of the formula to encourage variety in design, see Fountain, Zoning Administration in Vancouver (1961), 2 Plan 115, esp. at pp. 119-120.

[51] City of Toronto Zoning By-Law No. 20,623 (1959), s. 4(4) and (5). See s. 4(12) for the complementary provisions limiting the total floor area permitted as a ratio of the gross floor area to the area of the lot. See also the pamphlet, A Guide to the Revised Residential Zoning Standards of By-Law No. 18,642 (1958), which is indispensable to an understanding of the provisions. There are diagrams.

[52] For instance, The Public Health Act, R.S.M., 1954, c. 211, s. 15, and regulation 6/54 filed January 28th, 1954, s. 185(1): "All rooms in dwellings or other buildings used for sleeping purposes shall have a gross floor area of at least 60 square feet and shall provide at least 40 square feet of floor area for each occupant."

[53] For instance, Township of Toronto Zoning By-Law 2813, s. 37(7).

[54] See, *Infra*, Part II Zoning Procedures.

cannot afford even that small a house. One distinguished American planner once complained that the poor were being zoned into the Atlantic Ocean.[55] It is unlikely that the question would ever be decided, in Canada, by a court, although it is always possible, under the guise of "interpretation" to limit the authority of the council to a reasonable use unless more explicit authority is expressed in the Act.

*Non-conforming uses*

Perhaps the most troublesome of all zoning problems is the effect of the zoning by-law on already existing buildings, or on plans for buildings on which time and money have been spent before a by-law is passed, prohibiting the proposed building, or its use. Whatever the need or justification for retroactive legislative action, all Canadian zoning legislation except the Manitoba Act, the Prince Edward Island Act and the Newfoundland Act contain explicit provisions limiting retroactivity. The principles of the remaining provicial Acts, except in Ontario and Quebec, are substantially similar to the British Columbia Act. That Act[56] provides that a lawful use[57] of a building existing or under lawful construction at the time of the adoption of a zoning by-law may be continued. The material time in Alberta is the date of the first publication of the official notice of a proposal to pass a zoning by-law.[58] A similar notice is required in British Columbia, but a developer may not take advantage of the period between publication of the notice and the adoption of the by-law because the council may withhold a building permit for up to ninety days before the passing of the by-law, although if it does not pass the by-law it may be liable for damages arising during the last sixty days.[59] The Saskatchewan Act[60] also refers to the date of the first notice, but it also exempts a building for which a permit was in full force and

[55] The question is a constitutional one in the United States, and has provoked some comment. See *Lionshead Lake, Inc.* v. *Wayne Township* (1952), 10 N.J. 165, 89 A. 2d 693; and Haar, Zoning for Minimum Standards: The Wayne Township Case (1953), 66 Harv. L. Rev. 1051; Nolan and Horack, How Small a House? — Zoning for Minimum Space Requirements (1954), 67 Harv. L. Rev. 967; and Haar, Wayne Township: Zoning for Whom — In Brief Reply, *ibid.*, at p. 986.

[56] S. 705.

[57] Presumably "lawful" under relevant zoning by-laws and other municipal, or perhaps provincial or federal Acts or regulations. A violation of a private restrictive covenant would hardly constitute an "unlawful" use. *Cf. Teed* v. *Charbonneau* (1961), 26 D.L.R. (2d) 517 (H.C.). (Squatter "lawfully" uses land for purposes of Ontario Act.)

[58] Alberta Act, s. 2(m) and (n), and s. 82 (as am. by S.A., 1959, c. 89, s. 12).

[59] British Columbia Act, s. 707. [60] S. 49.

effect if construction is started within a year from the issue of the permit and is completed within two years after the passing of the by-law.[61] A building permit may be withheld *after* publication of the first notice for a period not exceeding three months during which time presumably the by-law will be passed or discarded.[62] The New Brunswick Act protects only existing buildings and buildings lawfully under construction, and the council may by by-law prohibit, for two months, after the first notice is published, any building that does not conform with the proposed by-law. The Nova Scotia Act[63] also refers to the publication of the first notice. Council may withhold a permit for two months prior to the passage of the by-law, or issue the permit subject to conditions.[64]

In Ontario[65] the protection is limited so that the by-law does not apply to prevent the *use* of land and buildings and probably any merely regulatory by-law, that does not prohibit use, is applicable retroactively, unless the courts decide generally that the zoning regulatory power is not retroactive. As in Saskatchewan the protection applies, not only to existing buildings, but to buildings the plans for which have been approved by the appropriate municipal officer, if the building is commenced within two years after the by-law is passed and completed within a reasonable time.[66]

Although Ontario is somewhat more generous to the owner whose plans for building have not matured to the stage of construction there is no provision for withholding a permit pending consideration of a by-law. In *Cridland* v. *Toronto*[67] an attempt was made by the city council to have the building inspector refuse a permit while he asked the council to consider whether it should declare the street to be a residential street. The attempt was held to be *ultra vires* and no effort seems to have been made to remedy this rebuff by amending the legislation. Nevertheless there is still the borderline case, as indeed there must be in the provinces with power to delay, where the plans are tendered for approval just before the by-law is introduced or proceedings initiated. This type of situation has been frequently litigated in Ontario but it is possible now to state a fairly settled rule. In *Hammond* v. *Hamilton*

[61] S. 49(1) (as am. by S.S., 1960, c. 52, s. 2).

[62] S. 48. [63] S. 18. [64] S. 19.

[65] Ontario Act, s. 30(7).

[66] The reference is to approved plans, not to a permit, as in Saskatchewan. While a permit may expire the plan approval is only limited by the two year provision. See *Re Imperial Oil Limited and Etobicoke*, [1951] O.W.N. 726.

[67] (1920), 55 D.L.R. 384 (H.C.).

the Court of Appeal reviewed a long line of cases and concluded that the public interest was not to be thwarted by the fact that preparing a zoning by-law took time and could otherwise be defeated by the deposit of plans. If the council in good faith, and without "taking sides", proceeds promptly to prepare and pass a zoning by-law the court will postpone consideration of a mandamus application until the by-law has been passed and dealt with by the Ontario Municipal Board.[68] The plans, therefore, are ineffective although deposited the day the by-law is first introduced,[69] and in *Re Ucci*[70] it was recognized that in a busy city the over-worked municipal staff cannot be forced to take a set of plans out of the order of arrival and deal specially with it. The consideration of plans is not likely to happen in less than three weeks in most large cities.

The Manitoba, Quebec, Prince Edward Island and Newfoundland Acts appear to give no express general protection but the Supreme Court of Canada, in *Canadian Petrofina Ltd.* v. *Martin and St. Lambert*,[71] seems to indicate that the by-law will not apply to either an existing building or one for which a permit has been issued. Fauteux J., speaking for the court, said:

> The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a landowner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of landowner cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a landowner are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power, may impose.
>
> From this it follows that, while the right to erect includes the right to receive the necessary permit for the erection of the building proposed to be erected in conformity with the law in force for the time being, the latter right is not any more secure than the former to which it is incidental. And if the insecurity attending this incidental right has not yet been removed by the granting of the permit, by the municipal authority acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted

---

[68] [1954] 2 D.L.R. 604. See also *Re Bondi and Scarborough* (1959), 19 D.L.R. (2d) 90, where a by-law declared invalid by the Supreme Court of Canada was re-enacted by a valid procedure and the court adjourned the mandamus application brought while the re-enacting by-law was pending before the Municipal Board.

[69] For instance, as in *Toronto* v. *Roman Catholic Separate School Board*, [1926] A.C. 81.

[70] [1955] 4 D.L.R. 700.

[71] (1959), 18 D.L.R. (2d) 761.

zoning by-law prohibiting the erection of the proposed building in the area affected.[72]

Although the enabling act is silent, which is the case in many American statutes as well, the by-law itself may limit the retroactivity, as in *Manitoba Vinegar Co.* v. *Winnipeg and Hurst*,[73] where the by-law protected "the lawful use of a building existing at the effective date of the By-law . . . although use does not conform to the foregoing provisions of the By-law". Dysart J. held that a vinegar factory which was being renovated for such use at the date of the petition for the by-law, and had been for several months before, was a building in existing use as a vinegar factory although no vinegar had ever been made there.

Where there is statutory protection there is usually express provision that a lawful non-conforming use may be extended throughout the building, if no structural alteration is involved.[74] The Ontario Act gives no such protection but the decision in *Central Jewish Institute* v. *Toronto*[75] seems to assure the right, but how this right applies to land is still obscure.

No Act defines what is meant by "use," or "existing use" beyond the details just discussed, but the word is quite ambiguous and in the contest between the private rights of a landowner and the dubious rights of a municipal government the private citizen is likely to win out, especially in the lowest courts. The attitude of the Supreme Court of Canada in the *Petrofina* case[76] is hardly typical. In *Shaul* v. *Jasper Place*[77] the excavation of a "dug out" for a building was held to be a "building under construction" although little money had been invested at that stage. Little more had been invested, probably, if as much, as in *Toronto* v. *Roman Catholic Separate School Board*[78] which held, in effect, that mere intention to use was not use, even if plans have been prepared,

[72] *Ibid.*, at p. 765.

[73] [1946] 3 D.L.R. 243 (K.B.).

[74] British Columbia Act, s. 705(3) (structural alterations may be allowed by the Zoning Appeal Board); Alberta Act, s. 82(4); by ss. (4*a*) (as am. by S.A., 1959, c. 89, s. 12) a non-conforming use of land may not be extended to any other part of the parcel and no additional building may be erected while the non-conforming use continues; Saskatchewan Act, s. 49(3); the use may be changed to a "similar or higher" use, ss. (4); New Brunswick Act, s. 20(5) and (7), the use may be changed to a "similar" use with the consent of the planning commission, ss. (6); Nova Scotia Act, s. 18(3), "similar use" may be permitted by the council.

[75] [1948] 2 D.L.R. 1. See also *O'Sullivan* v. *Sault Ste. Marie* (1961), 28 D.L.R. (2d) 1 (Ont. H.C.), where the court allowed a residence from which funerals had been conducted to be converted throughout to a funeral home.

[76] *Supra*, footnote 71.

[77] (1953), 10 W.W.R. (N.S.) 268 (Alta. D.C.).

[78] *Supra*, footnote 69.

but not deposited, although they must have been prepared at a material expense and may have been useful only for the particular site. Intended use, on the other hand, seems to have carried some weight with the majority of the Ontario Court of Appeal in *Regina* v. *Cappy and Smith*[79] where the letters patent of a company were looked at to ascertain what use it could properly make of a sports field and a use for motor cycle racing ten years before the by-law was passed was regarded as one of the uses on the day the by-law was passed in order to justify prohibited stock car racing in a residential zone. The Ontario Act may be susceptible of a broader interpretation than the other Acts since it speaks of "use for a purpose prohibited" and the purpose could be the particular purpose or a class of purposes, of which the particular use is but a specimen. When the *Cappy* case was in the County Court, Judge Factor was evidently willing to divide all uses into two classes, those prohibited by the by-law and those permitted. On this interpretation the non-conforming user could use his land for any purpose, since he was protected as to the prohibited class, and of course could change to the permitted class. This interpretation did not endear itself even to the majority in the Court of Appeal who thought the general purpose of spectator sports was wide enough. The dissenting judgment of Henderson J. is much more sympathetic to the purpose of the Act.

The privilege of changing the existing use to another non-conforming use is granted in some provinces[80] and the fact that a change is authorized suggests that Judge Factor's theory would not apply in those provinces. The same inference could be drawn in Ontario from the authority of a committee of adjustment in suitable cases to permit a similar use or one more compatible.[81] An attempted change to another non-conforming use led to later litigation in the *Manitoba Vinegar* case, when the company tried to take advantage of a similar provision in the by-law itself to change from vinegar manufacture to wine manufacture.[82] The Court of Appeal found the words of the by-law rather hard to understand, which is not surprising:

> Any such non-conforming use of a building may be changed to another non-conforming use permitted in the same Use District in which the said non-conforming use existing at the said time of passing of the By-law is classified or in a more restricted Use District.

[79] [1953] 1 D.L.R. 28.
[80] Saskatchewan Act, s. 49(4); New Brunswick Act, s. 20(6); Nova Scotia Act, s. 18(3), *supra*, footnote 74.
[81] Ontario Act, s. 18(2) (a) (ii).
[82] [1948] 4 D.L.R. 730; and see, *supra*, footnote 73.

But there is little justification for the court's conclusion that "the same Use District" referred to the R3 residential district in which the vinegar factory was located, when it could equally refer to the industrial zone where vinegar factories are permitted, and the owner could be allowed to convert his vinegar factory to any use permitted in that industrial zone. The reason the court did not follow the usual bias in favour of the landowner here may be that the vinegar company had recently settled the earlier litigation releasing the city from all claims for $27,500.00 and agreeing not to engage in vinegar manufacture, although the company had already bought the wine making equipment but had not disclosed this fact to the city.

Difficult though the Winnipeg by-law is to understand, it suggests an approach to this problem that may prove more workable than any to be found in the existing Canadian legislation. If, instead of protecting "existing use", the Acts set up classes of uses that were sufficiently similar, a change from one to another within the class would be unobjectionable in the community; the Acts could then permit the carrying on of any use within the class. This is the essential principle of the United Kingdom legislation[83] which freezes all land use and then sets up a "Use Classes Order",[84] and permits free movement within the classes. This kind of approach would go as far to avoid the kind of question raised in the *Cappy* case as words can go to avoid semantic quibbles. Such an approach might be supplemented by a system of preappointed evidence, in which a non-conforming user would be required to register his existing use within a period of, say, two months after the by-law was passed. Failing such registration he would be deemed to be a conforming user and would be denied the protection offered to non-conforming land and buildings. If the zoning administrator did not accept the evidence of the existing use, an appeal could be allowed to the zoning adjustment agency. If the system were complemented by the use of certificates of occupancy, whereby changes of use were recorded, the municipality would have a complete record of use. At present very little use is made of certificates of occupancy anywhere in Canada, although by-laws provide for them.[85]

[83] The Town and Country Planning Act, 1947 (U.K.), *supra*, footnote 20.

[84] U.K., S. I., 1948, No. 955, replaced by S.I., 1950, No. 1131.

[85] Certificates of occupancy are authorized under the Ontario Act, s. 30(4), and may be required on a change in the *type* of use. They are not commonly used. In other provinces the control is covered by more general language: Alberta Act, s. 80(8) (as am. by S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 39(2) (*l*); Quebec Act, s. 425(2), (as am. by S.Q., 1960,

When has a use been discontinued or changed, so that the protection has ended? If a shop in a proposed residential zone is closed for renovation when the by-law is passed the shop would probably be treated as being used on that day as a shop. Similarly, if after the by-law is passed the shop is closed for the same reason, the use would not be regarded as discontinued.[86] But if the shop is closed indefinitely, where will the line be drawn? No Act attempts to define discontinuance, but several Acts provide that if the use is discontinued (whatever the word may mean) for a definite period of time, the new use must conform.[87] In the second *Manitoba Vinegar Co.* case[88] the vinegar making use, which the owner had agreed to discontinue, was treated as "dead," that is, no right to convert to another non-conforming use under the by-law could arise. The case can be justified only on its very special facts.

Several provinces deal expressly with the effect of destruction of a building by fire, or other perils. If the damage has reached a specified percentage of the value above ground, usually fifty per cent, either as determined by a court if necessary, or by a specified agency, the building cannot be rebuilt except in conformity.[89]

The Ontario Act has no such provision about discontinuance or destruction but this has not stopped local draftsmen from putting in clauses in similar terms, usually with a one year period and fifty per cent damage. The clauses have probably been copied from an American by-law, made under very different legislation! If destruction by fire either to fifty or seventy-five per cent or, completely, is not a discontinuance of use, then the protection under the Ontario Act is still available.

---

c. 76, s. 16; New Brunswick Act, s. 19(c); Newfoundland Act, s. 31(b) (ii) (as am. by S.N., 1955, No. 19, s. 4).

[86] *Cf. Manitoba Vinegar* case, *supra*, footnote 73, and the *O'Sullivan* case, *supra*, footnote 75, where although no funeral was held for eleven months "the exemption was [not] lost for lack of continuous user" (p. 5).

[87] British Columbia Act, s. 705(2) (period of thirty days); Saskatchewan Act, s. 49(2) (*a*) (period of six months); New Brunswick Act, s. 20(4) (a) (period of four months, extendable by the planning commission). No time is specified in the Alberta Act, s. 82(3), the Nova Scotia Act, s. 18(2), the Ontario Act, s. 30(7). But see *Gayford* v. *Kolodziej et al.* (1959), 19 D.L.R.(2d) 777, where the Ontario Court of Appeal held that use of a summer lodge for one season as a private residence was discontinuance of the use as a summer lodge and was "tantamount to discontinuance for the whole year" (p. 780). No explanation of the reference to the "whole year" is given.

[88] *Supra*, footnote 82.

[89] British Columbia Act, s. 705(4) (seventy-five per cent as determined by the building inspector); Alberta Act, s. 82(2) (seventy-five per cent, no agency specified); Saskatchewan Act, s. 49(5) (fifty per cent, no agency specified); Quebec Act, s. 426, para. 27 (as am. by 1959-60, c. 76, s. 21) (fifty per cent, no agency specified; only applicable to "reconstruction or restoration", not to use); New Brunswick Act, s. 20(4) (b) (fifty per cent

The difficulty in interpretation of the non-conforming use provisions arises from the lack of any clear and apparent purpose behind the sections. If it is intended that non-conforming uses should wither away then it should follow that uses that are not really expected to wither away should not be prohibited. The effect of prohibiting the use, however, is often to make the use monopolistic in the zone, and thus increase its value. In these circumstances the owner may want to expand the use, even beyond the limits of the existing building and in Ontario clear legislative and administrative machinery[90] exists for this purpose, but its existence is rather inconsistent with the notion of the use withering away.

Ultimate disappearance as an end in view might be achieved by purchase, freely or by expropriation, and Ontario has an express power to purchase any non-conforming building[91] but the authority is rarely used. Most councils seem to think that if one property is bought, all the non-conforming property owners who feel their property has depreciated will demand that they be bought up too. And if the use is regarded as a nuisance the neighbours may press for purchase.

No province authorizes a scheme for elimination of non-conforming uses by setting a period of years at the end of which the building must be demolished. If the period is calculated with some regard for the probable economic life of the building, so that in theory at least the owner could have claimed full depreciation, there may be some justice in such a scheme. It has been tried in the United States[92] although it has not proved, yet, excessively popular.[93] In England a similar theory was recommended in the Uthwatt Report.[94]

*Compensation and betterment*

In *Re Dinnick and McCallum* Meredith J.A. said in 1913,

in the opinion of the planning commission); Nova Scotia Act, s. 18(6) (fifty per cent, no agency specified; applicable (only?) to buildings deemed to be existing, that is, lawfully under construction).

[90] Ontario Act, s. 18(2) (a) (i) (committee of adjustment extension of building only); s. 30(18) (council with approval of the Municipal Board; "extension of land" permitted as well as of building).

[91] S. 30(6).

[92] See, for instance, Los Angeles Municipal Code, s. 12.23 B. & C., and see *City of Los Angeles* v. *Gage* (1954), 127 Cal. App. 2d 442; 274 P. 2d 34, holding the provision constitutional.

[93] New York City is reported to have considered and rejected an amortization scheme.

[94] Final Report, Expert Committee on Compensation and Betterment, Cmd. 6386 (1942), ss. 240-251. On the whole subject, see Norton, Elimination of Incompatible Uses and Structures (1955), 20 Law and Contemporary Problems 305.

speaking of the rather primitive zoning by-law of the pre-war period: "The legislation is confiscatory in its character, though, of course, intended to be put in force for the general benefit. . . ."[95] This sentiment has not since been challenged, but in several provinces express provisions confirm the notion. Substantially the language states that property shall not be deemed to be injuriously affected by a zoning by-law.[96] This view appears to predominate in North America.[97]

In the provinces where no express provision is made Meredith J.A.'s assumption in the *Dinnick* case is probably acceptable as a working principle, but the question of the inequity of zoning limitations on land use is rarely faced in North American legislation. Even the Manitoba Act, which expressly confers on the responsible local government the right to collect from the owner a part of the increase in value of land resulting from a town planning scheme[98] and imposes a duty to pay compensation for injurious affection,[99] denies the owner compensation if the control could have been exercised in a zoning by-law.[100] Advocates of compensation and betterment schemes usually hail from England, where the idea received considerable support and publicity from the Uthwatt Report[101] and was actually enacted in the Town and Country Planning Act, 1947,[102] but the elaborate provisions proved unworkable for a variety of reasons and were effectively repealed in 1954.[103]

## II. Zoning Procedures.

Because the issues of zoning, especially the kinds of controls, and the uncertainties of compensation and betterment, are so variable

[95] (1913), 11 D.L.R. 509 (Ont. C.A.), at p. 514.

[96] British Columbia Act, s. 706 (not deemed to be taken or injuriously affected); Alberta Act, s. 85 (and no compensation for general plan development scheme or order, if provision could have been contained in zoning by-law); Saskatchewan Act, s. 47; Manitoba Act, s. 20 (special definition in subsection (2) ); Nova Scotia Act, s. 23(1). As to Newfoundland, see *supra*, footnote 20.

[97] The merits are debated in terms of United States constitutional theory in *Pennsylvania Coal Company* v. *Mahon* (1922), 260 U.S. 393. The case dealt with the regulation of coal mining but Holmes J. spoke in general terms. Brandeis J. dissented.

[98] Manitoba Act, s. 19(5) and (6) (not more than half the increase may be collected).

[99] *Ibid.*, s. 19(1) and (2).

[100] *Ibid.*, s. 20. This provision could place quite a strain on Manitoba zoning powers, which are less generally stated than in most provinces.

[101] *Supra*, footnote 94.

[102] *Supra*, footnote 83. For a short account from an American standpoint, see Haar, Land Planning Law in a Free Society (1951).

[103] U.K., (1954), 3 Eliz. 2, c. 72. For an account of the breakdown of compensation and betterment, see Heap, An Outline of Planning Law (3rd ed., 1960), pp. 110-149.

and unpredictable, the judgments made often so inexplicable, the one hope for the landowner and the community alike is to secure a satisfactory procedure whereby the public decisions affecting private land are made in circumstances guaranteeing adequate consultation. In this part the procedures of the ten provinces are compared and assessed.

*Compulsory compliance with a master plan*

Some guarantee that zoning is as rational as possible may be found in its origins in good planning. Whatever good planning may be, it probably first requires a survey (which is also relevant to zoning) of the conditions of a municipality followed by an analysis and a series of proposals. If this sort of planning takes place, and if the zoning is required to be consistent with it, there is some earlier indication of the direction land use controls will take, and the landowner can sometimes predict the results of public control in advance of zoning. Since a master plan is itself capable of amendment the protection it offers may be rather limited, but where the zoning by-law must conform, there is at least a guarantee that the council will think twice before changing it.[104] Four provincial Acts expressly require zoning by-laws to conform with the master plan.[105] The Alberta Act provides in addition that if a general plan is adopted the council "*shall* proceed" to enact a zoning by-law "in the manner prescribed" in the plan. The adoption of a plan is voluntary and since land use controls can be exercised under interim development control there is little pressure to adopt a plan.[106] Similarly Newfoundland directs that the council "*shall* develop fully" a scheme for the control of land use in strict conformity with the plan.[107] Otherwise zoning is not compulsory in Canada. The result is that the zoning by-law may vary from the plan even where the Act requires it to conform, because the plan has been amended but the by-law has not.[108]

[104] For a discussion of the master plan legislation in Canada, see Milner, An Introduction to Master Plan Legislation (1957), 35 Can. Bar Rev. 1125.

[105] British Columbia Act, s. 698(1) (as am. by S.B.C., 1961, c. 43, s. 39); Ontario Act, s. 15(1); Prince Edward Island Act, s. 18 (referring to "the by-laws of the municipality" but the plan itself contains "a comprehensive zone system"); Newfoundland Act, s. 31 (scheme must be "in strict conformity" with the plan).

[106] S. 66(a) (as am. by S.A., 1960, c. 107, s. 15; italics added). See s. 109(2) requiring conformity with a district general plan. Interim development control, before the plan is adopted, is discussed in Part III. Three Approaches to Zoning, *infra*.

[107] S. 31 (Italics added).

[108] The Metropolitan Toronto Planning Area (draft) Official Plan, pp. 265-266, suggests that non-conforming by-laws "should be compulsorily amended when the plan is approved".

*Extension of zoning beyond municipal boundaries*

Although regional planning is becoming more fashionable the problem of carrying out a regional plan, which necessarily covers more than one municipality, has not yet been satisfactorily solved. In Saskatchewan where a council has in operation a community planning scheme and has passed a zoning by-law but there is no by-law in the contiguous area in adjoining municipalities affected by the plan, the council, after consultation with the neighbouring municipalities, may apply to the Minister of Municipal Affairs, who may extend the operation of the zoning by-law to such area outside the municipality as he deems advisable.[109] In Manitoba the town planning scheme may apply to more than one local authority.[110] Since the scheme may in effect contain the zoning by-law, the by-law presumably can be made applicable to the whole territory of the scheme regardless of how many municipalities may be involved. In much the same way a regional plan in Prince Edward Island may contain a comprehensive zone system for the region.[111] In Newfoundland an "authorized council" may develop a zoning scheme in direct conformity with a municipal plan for a municipal area that embraces "any land outside of the Municipality concerned which in the opinion of the Minister" of Municipal Affairs and Supply is necessary to control related development beyond the municipal boundaries.[112] In Ontario there is a limited authority to extend the effects of a zoning by-law along both sides of a highway that is a boundary between two municipalities.[113] The most elaborate schemes for regional implementation of plans are to be found in Alberta and Saskatchewan, both of which provide for district planning commissions with power to prepare a district zoning by-law. In Alberta when a district general plan comes into effect every council *shall forthwith enact* and maintain a conforming by-law.[114] In Saskatchewan the adoption and passing of the district zoning by-law *shall* be effected by by-laws, declared to be complementary to one another, passed by the council of each

[109] Saskatchewan Act, s. 50. [110] Manitoba Act, s. 4.
[111] Prince Edward Island Act, s. 2(a) and (b) and ss. 14 and 15.
[112] Newfoundland Act, ss. 10(2) and 31.
[113] Ontario Act, s. 30(8). See also the rarely used power of a county to zone within 150 feet of a county road, which probably will pass through several municipalities: The Highway Improvement Act, R.S.O., 1960, c. 171, s. 64; and the similar power in Metropolitan Toronto: The Municipality of Metropolitan Toronto Act, R.S.O., 1960, c. 260, s. 97. In the event of conflict the county or metropolitan zoning prevails over the local zoning and if the powers were used it would be a major factor in the local land use control programme.
[114] Alberta Act, s. 109(2).

municipality affected.[115] If a council fails to pass a complementary by-law, the by-law passed by the other councils, if approved by the Minister, applies to the whole district.[116] Alberta does not provide any sanction for its compulsory by-law provision, nor is it clear what happens in Saskatchewan if every council fails to pass adopting by-laws.

*Zoning surveys and the power to inspect premises*

One of the basic studies for a master plan is an account of the building stock, and before zoning residential areas already built up, it is a good idea to know, for example, whether what is apparently a street of one family houses is really a street of rooming houses and duplex or triplex apartments. Planners are notorious for making what they call "windshield surveys" in which this kind of information cannot be obtained. If proper surveys are to be encouraged, adequate legal powers to gather facts must be provided. Yet Ontario does not authorize the planning staff to enter and inspect premises in any circumstances and in some other provinces the authority is to be exercised only under provincial supervision. Many lawyers would doubtless regard as undesirable an unfettered power to inspect (or, as they might call it, to search) premises. Obviously "inspection" to find facts on which to base legislative action ought not to be confused with "searching" in criminal investigation, but the current legislation treats inspection almost as if it were the same as searching, although no province requires a warrant, or, expressly, that a case of need be made out before a judicial officer. Inspection is, of course, quite a familiar process in relation to building by-laws, and doubtless some of these inspection powers may be adapted to planning surveys. In addition the need for inspection in relation to zoning is increasingly recognized. Alberta openly authorizes inspection[117] and directs that the by-law be based on a "survey of the existing uses and conditions of land and buildings and an analysis of future needs in the development of the municipality".[118] Moreover the Provincial Planning Board must be satisfied with the survey before the by-law is passed.[119] In Saskatchewan the power to inspect "any land, buildings or other property" is given to the Provincial Planning Appeals

[115] Saskatchewan Act, s. 58. [116] *Ibid.*, s. 59.
[117] Alberta Act, s. 89(1).
[118] *Ibid.*, s. 80(1a) (as am. by S.A., 1959, c. 89, s. 10).
[119] *Ibid.* No standard is set. For a recent analysis of the legal aspects of surveys, see Zeisel, The Uniqueness of Survey Evidence (1960), 45 Cornell L.Q. 322.

Board, who can authorize any person to act on its behalf.[120] There appears to be no local authority. In Manitoba a power of entry and inspection may be included in general provisions prescribed by the Minister to take effect as part of a town planning scheme.[121] In New Brunswick the council or planning commission may authorize any person to enter and inspect any land or building at reasonable times in the preparation of a by-law.[122] There is a similar power in Nova Scotia exercisable by the council.[123] In Newfoundland the power is available to an authorized administrator or his agent only when in the opinion of the Minister it is necessary or desirable.[124]

*Procedure for passing a zoning by-law*

Zoning by-laws are more far reaching in their effect than most by-laws and the procedure of their passing is usually more circumscribed. This circumscription takes the form of requiring a public hearing, provincial approval, with or without another hearing, and that regard be had for certain, or uncertain, statutory standards and objectives. In no provincial Act are all of these requirements present, but some combination is to be found in every Act.

Only in Ontario and Newfoundland is there no requirement of a hearing locally, and in Newfoundland the scheme for land use control is so closely related to the municipal plan, for which a hearing must be held,[125] that the purpose of the requirement may be partially met at least. In Quebec the requirement is restricted to amendments.[126] In the other provinces a hearing must be held, but the kind of inquiry varies. In British Columbia the hearing follows published notice and "all persons who deem their interest in property affected by the proposed by-law" must be heard.[127] In Alberta any person may object and may state his opinion of the objections and of the by-law. The council may require the submission of written objections before the hearing if warning is given in the required notice.[128] In Saskatchewan only written objections need be heard and determined.[129] In Prince Edward Island the planning board must hold hearings before recommending a

[120] Saskatchewan Act, s. 130(a).
[121] Manitoba Act, Schedule B (11).
[122] New Brunswick Act, s. 69(2) (b).
[123] Nova Scotia Act, s. 25(1).
[124] Newfoundland Act, s. 53(1). [125] *Ibid.*, s. 16.
[126] Quebec Act, s. 426, para. 1.
[127] British Columbia Act, s. 703 (as am. by S.B.C., 1961, c. 43, s. 42).
[128] Alberta Act, s. 83(2), (2*a*) and (2*b*) (as am. by S.A., 1957, c. 98, s. 14; 1959, c. 89, s. 13; 1960, c. 107, s. 22).
[129] Saskatchewan Act, s. 43.

proposed official plan or amendment.[130] In New Brunswick the council must consider written objections and hear any person who wishes to speak for or against them.[131] The Nova Scotia Act is substantially the same.[132]

With occasional exceptions Canadian Acts have, from their inception, required provincial approval of the zoning by-law. This centralized control is quite unknown in the United States and undoubtedly represents an English influence in what is substantially an American system of land use control. While there are advantages in having by-laws from small understaffed municipalities supervised by some provincial authority, the need is not so apparent in the larger centres. In those provinces where the first occasion for a public hearing is at the time of provincial approval there may be justification for retaining the approval so as to secure the hearing, but a requirement of a local hearing might be an adequate substitute, or, a provincial hearing only if some landowner appealed. Approval is not required at present in British Columbia, Manitoba (as to zoning by-laws), Quebec or New Brunswick, but in New Brunswick a copy of the by-law is to be sent to the director of the provincial planning branch for his comments.[133] In the other provinces approval is required, either of the Minister or of a provincial administrative tribunal.[134] Where approval of a zoning by-law is necessary and a particular power is also available in the general municipal legislation, more often than not the particular power may be resorted to without either a hearing or approval, as in the case of advertisement regulation in Ontario. There usually results a saving of time, which the council may think crucial in trying to prevent supposedly undesirable private action.

Only two provinces offer any guide to the approving authority,

[130] Prince Edward Island Act, s. 11 (see also s. 10(d)).

[131] New Brunswick Act, s. 48(4), (5). [132] S. 13.

[133] S. 50. Failure to comply with the section does not invalidate the by-law, ss. (5).

[134] Alberta Act, s. 83(5) and (7) (Provincial Planning Advisory Board) (as am. by S.A., 1960, c. 107, s. 22). S.A., 1959, c. 89, s. 13, re-introduced the requirement of approval after an experimental two years without approval, which had been abandoned in S.A., 1957, c. 98, s. 14. Before that the Minister's approval was required, R.S.A., 1955, c. 337, s. 83(5); Saskatchewan Act, s. 44 (Minister); Manitoba Act, s. 6(1) (Minister, but objections may be referred to the Municipal Board whose decision is binding on the Minister and he may not approve the scheme unless it conforms with the Board's decision; s. 6A (as am. by S.M., 1960, c. 76, s.3.)); Ontario Act, s. 30(9) (Ontario Municipal Board, which must hold a hearing unless there are no notices of objection, or if there are, the Board deems the objections insufficient to require a public hearing; ss. (11a), (11b), and (11c), S.O., 1960-61, c. 76, s. 3.); Prince Edward Island Act, s. 13(2) (Provincial Board); Nova Scotia Act, s. 14 (Minister); Newfoundland Act, s. 32 (as am. by S.N., 1961, No. 9, s. 4) (Minister).

or where there is none, to the council itself, and in neither case is it likely that the guide has much effect, although it may have some educational value. In most provinces the educational aspect is handled administratively, probably to much greater effect. The British Columbia Act lists six factors, all rather obvious,[135] directed to the council. In Saskatchewan a similar guide is offered to the council[136] and to the Minister, who is authorized to refuse to approve an amending by-law where in his opinion certain (or uncertain) conditions are not met.[137]

*Amendment*

A zoning by-law may give a landowner exactly what he wants and when it does his resistance to amendment can be high. To him the by-law represents the rule of law, and any change a derogation from the rule. A dissatisfied landowner is very likely to take whatever political action may be open to him to secure an amendment even in circumstances such that his neighbours may be as upset by the amendment as he will be pleased with it. Of course zoning by-laws can be amended, and it is a fortunate thing that they can, otherwise the mistakes of councils and approving authorities would be perpetuated. In the period between 1952 and 1958 the zoning by-law of the city of Toronto was amended about one hundred times. The view stated by the Supreme Court of Canada in the *Petrofina* case[138] that proprietary rights are insecure is clearly illustrated in the power to amend. The rule of law, if there is one, is to be found in the procedure established for amendment. The important element is the opportunity for affected persons to be heard. All the Acts provide for amendment and repeal and with minor exceptions the procedure to be followed is the same as in passing the original by-law, and in every case an opportunity to be heard is provided either locally or at the time of provincial approval.

In British Columbia, where approval is not required, there must be an affirmative vote for amendment of two-thirds of all the members of the council.[139] Although the higher vote is probably not much of a stumbling block, it lends weight to the popular misconception that zoning by-laws should not be amended, and may serve to make the council more thorough in considering the first by-law. In Alberta the requirement of a public hearing is relaxed where the amendment does not involve change in classifica-

[135] S. 702(2).
[136] Saskatchewan Act, s. 40.
[137] *Ibid.*, s. 46(3).
[138] *Supra*, footnote 71.
[139] British Columbia Act, s. 704 (as am. by S.B.C., 1961, c. 43, s. 43).

tion, number, shape or area of the districts, if its provisions apply to all districts, or where the Provincial Director has certified that it is being made only to clarify the existing by-law.[140] The Minister's authority to refuse approval of an amendment in Saskatchewan is subject to limitations expressed in rather general language relating to "good community planning practices" and "the character of the municipality". If the Minister thinks that the amendments are getting unwieldly and he considers that a consolidation is in order he may refuse his approval.[141]

The Ontario Act formerly required the approval of the Municipal Board to be given *before* the amendment had been passed, although the approval of the first by-law could be given after it was passed. This unusual provision was not understood by most municipal lawyers and by the time it was pointed out to them by the Supreme Court of Canada in *Township of Scarborough* v. *Bondi*[142] hundreds of amendments, approved by the Municipal Board *after* they had been passed, were open to challenge. The legislature had already corrected the situation[143] when the *Bondi* case was decided, but it was not made retroactive until the next year.[144] The City of Toronto frequently polls the local neighbours before considering an amendment, but there is no statutory authority for this practice and its basic political weakness was recognized in one of the earliest cases on "zoning" or land use control in Canada. In *Re Kiely*[145] the Toronto city council had passed a by-law regulating the location of livery stables and requiring the written consent of a majority of the owners or lessees within 500 feet before a stable could be erected. Wilson C.J., said:

> The by-law, if not *ultra vires*, is objectionable, because it requires . . . the consent of a number of persons in the neighbourhood, thus constituting these persons the judges of the right he asks, and divesting the commissioners of the power which they are required personally to exercise.[146]

The Quebec Act authorizes the procedure used in some Ontario cities without authority. In Quebec a zoning by-law may only be

[140] Alberta Act, s. 84 (as am. by S.A., 1957, c. 98, s. 15; 1959, c. 89, s. 14).

[141] Saskatchewan Act, s. 46.

[142] (1959), 18 D.L.R. (2d) 161.

[143] S.O., 1958, c. 64, s. 31(2). An amendment under s. 30(18) extending or enlarging non-conforming land, building or structure still requires approval before final passage.

[144] S.O., 1959, c. 71, s. 5, transferring the zoning powers from the Municipal Act, then R.S.O., 1950, c. 243, s. 390, to the Planning Act, 1955, S.O., 1955, c. 61. S. 390(9), (as am. in 1958), *supra*, footnote 143, became s. 27*a* (10) and referred to by-laws passed under a "predecessor" of this section.

[145] (1887), 13 O.R. 451 (Q.B.D.).

[146] *Ibid.*, at p. 457.

amended by a by-law of which notice has been given, a public meeting held between seven and ten o'clock in the evening, at which the by-law has been read and, if within the hour following the reading six qualified electors (or a majority if fewer than twelve are present) have demanded a poll, a poll has been taken. If no demand is made the amending by-law is deemed to have been approved by the electors. The zoning by-law may, for these purposes, divide the zones into sectors, and only those qualified electors in a sector, and in certain cases, in an adjoining sector, may vote.[147] The Quebec provision gets over at least one objection to the unauthorized Ontario practice: it establishes by proper authority the constituency whose view is relevant. It also establishes, by fiat if not by reason, that the counting of heads is an appropriate basis upon which to determine land uses.

In New Brunswick, the notice of intention to amend a zoning by-law must give the reasons for or an explanation of the amendment[148] and if written objection is presented not less than two days before the hearing, signed by the assessed owners of at least one-third of the area of the property within 300 feet of the property involved in the amendment, there must be an affirmative vote of three quarters of the whole council.[149] Once a council has voted on and defeated an amending by-law "such by-law" cannot be voted on again for a year.[150] How much of a change would be necessary to make it a new by-law is not indicated. The council may ask a fee not exceeding fifty dollars for considering an amendment, and may return part or the whole.[151] A zoning by-law may prescribe the times at which the council will consider an application to amend.[152] Presumably this does not preclude consideration at other times if the council chooses.

In Nova Scotia a similar effect is given to a protest signed by the assessed owners of at least twenty per cent of the properties affected by the amendment or repeal and an affirmative vote of two-thirds of the whole council is required.[153]

Not only is zoning amendment a commonly desired political objective but in two provinces the council must make a general review of the by-law every five years.[154] While no review is com-

---

[147] Quebec Act, s. 426, para. 1.
[148] New Brunswick Act, s. 48(3) (d).
[149] *Ibid.*, s. 49.
[150] *Ibid.*, s. 51.
[151] *Ibid.*, s. 52(1).
[152] *Ibid.*, s. 52(2).
[153] Nova Scotia Act, s. 16(4).
[154] Saskatchewan Act, s. 45 (an earlier review is not precluded); New Brunswick Act, s. 53. In Newfoundland the municipal plan must be reviewed every five years (s. 35), but there is no express duty to revise a

pulsory in Ontario, in that province there is the unique provision that if a person has applied to a council for an amendment to a zoning by-law and has been refused, or if the council refuses or neglects to make a decision within one month, he may appeal to the Ontario Municipal Board, who, after a hearing, may direct that the by-law be amended as the Board orders.[155] The Board has occasionally stated its position in these applications in these words:

> . . . the Board should decline to interfere with the exercise by elected representatives of a discretion given to them by Parliament except where it is shown that their action is clearly not for the greatest common good, that it creates an undue hardship, or that they have acted arbitrarily, on incorrect information or advice, or otherwise improperly.[156]

While the language may be rather general and allow the Board a good deal of freedom in future cases, it does indicate pretty clearly that the applicant carries a serious "burden of proof".

*Power to delegate*

One of the reasons for the frequency of amendment of zoning by-laws is the absence of authority to delegate the judgment of the council, in suitable cases, and with suitable safeguards, to administrative officials of the municipality who could make particular decisions in a context of knowledge. In Canada generally there is a traditional faith in the "rule of law" (in this case a by-law that is freely amendable) and a fear of "bureaucracy" (in this case usually a small, directly supervised staff with no security of tenure) both of which may account for the rare appearance of any individual discretionary powers.[157] In Alberta, however, there has been a sharp break with this tradition. In that province not only may uses of land and buildings be permitted in some cases only in the discretion of council,[158] an uncommon provision in itself, but the

---

scheme for land use control accordingly, although the scheme must be in strict conformity with the plan.

[155] Ontario Act, s. 30(19).

[156] For instance, J. A. Kennedy, Q.C., Vice Chairman and Milburn, Member, in *Re Levinter and Toronto*, O.M.B. file P.F.M. 6260-57.

[157] An example of discretion in a municipal civil servant is to be found in the Ontario Act, s. 31(1), para. 3, authorizing the building inspector to permit "such deviation as he may deem proper" from building by-laws, *except* zoning by-laws. The building inspector, to qualify for the authority, must be either an architect or an engineer. This technique could hardly be applied to a planner, since a professionally qualified planner is not so easily identified as the architect or engineer. For an example of general judicial attitude, see *Re Imperial Oil and Kingston*, [1955] O.W.N. 767.

[158] Alberta Act, s. 80(4) (*a*) (as am. by S.A., 1957, c. 98, s. 13). Few other provinces have provisions for "exceptions" or "conditional uses", a common American device: see Advisory Committee on Zoning, Depart-

discretion may be exercised by a "agent or servant" of the municipality appointed in the by-law. The servant or agent may also be authorized to decide whether a proposed use that is not named in the by-law is "sufficiently similar" to a named use to be considered a permitted use.[159] So intent is the Alberta Act in "securing flexibility" in zoning by-laws that the servant or agent may also in his discretion "in the particular circumstances set out in the by-law", determine the restrictive regulations of the by-law that shall apply to a proposed use of specific land or a particular building.[160] A similar power to delegate, in the case of specific uses of land and buildings permitted only in the discretion of council, has recently been introduced in Saskatchewan as well.[161] A very limited delegation is permitted in New Brunswick but the delegation is to the planning commission and the subject matter is similar to matters in other provinces dealt with by zoning appeal agencies.[162]

*Administrative adjustment of zoning*

The frequency of amendment of zoning by-laws is itself an indication that the local legislators, even when buttressed by master plans, special surveys and provincial supervision, are often wrong in their guesses. Amendments, however, usually take a considerable time, especially where, as in Ontario, the provincial supervision through Municipal Board approval is taken seriously. If a hearing is required the time involved in approving an amendment could vary from two to six months. In any event the kind of hardship created by a zoning by-law is often a hardship peculiar to a single piece of property, for which an amending by-law may be open to the objection that it is discriminatory.[163] It could even be argued, though not very sensibly, that a special concession in, say, the minimum depth of a front yard, unless it is framed in language capable of general application, does not come within the enabling power of *regulation*.[164] If the authority to regulate is regarded as

ment of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (rev. ed., 1926). The model Act is set out in an appendix to The Text of a Model Zoning Ordinance (2d. ed., 1960), published by the American Society of Planning Officials.

[159] *Ibid.*, s. 80(10) (as am. by S.A., 1959, c. 89, s. 10(d)).

[160] *Ibid.*, s. 80(11) (as am. by S.A., 1957, c. 98, s. 13).

[161] Saskatchewan Act, s. 39(3) and (4) (as am. by S.S., 1959, c. 107, s. 9).

[162] New Brunswick Act, s. 19(f). *Cf.*, Nova Scotia Act, s. 12(f) and 20(1)(b); and the Newfoundland Act, s. 61(1)(t).

[163] See Part III. Three Approaches to Zoning, *infra*, for a discussion of spot zoning.

[164] *Cf.* the Municipal Act, R.S.M., 1954, c. 173, s. 894(1), authorizing regulation of the set back of houses. Subsection (2) expressly provides that it is not necessary that the distance "be the same on all parts of the street". A similar provision existed in Ontario from 1904 (S.O., 1904, c.

limited to making completely general rules and not to dealing with special cases, then it may be necessary to look for a special enabling power that permits control of individual cases. Such a view is hardly tenable when one considers the immense complexity and scope of a modern land use control programme that is intended to be authorized. Individual pieces of property will frequently require special provisions that would be inapt for general application. The *Oxford Dictionary* gives as a meaning of regulate "to adapt to circumstances or surroundings" since 1630 and our legislatures might be supposed to have meant this by now. Nevertheless, whether it is because the general power to regulate is thought to be inadequate for special cases, or whether for some other reason, perhaps because the peculiar facts of special cases are not always known to a council when a by-law is drafted, despite notice and hearings, or perhaps because a more summary process is wanted, every province except Quebec and Prince Edward Island has provision for administrative adjustment, that is, for variance of the by-law terms.

In British Columbia the agency is called a zoning board of appeal, consisting of three members, one appointed by the council, one by the Lieutenant-Governor in Council, and a chairman appointed by the other two. Each member holds office for three years but is subject to removal by the authority that appointed him and the chairman by the Lieutenant-Governor in Council on the recommendation of the council. Members may not hold municipal office or employment, including membership on the advisory planning commission. An appeal lies to a judge of the County Court where questions of interpretation or valuation of damaged non-conforming buildings are involved.[165] In Alberta the appeal board membership may include members of the council, but they may not be the majority and all members (at least three) are appointed by the council. There is no further right of appeal.[166] In Saskatchewan membership on the board of zoning appeals, of three to nine members holding office for three year staggered terms, is unrestricted. Members are appointed by the council. An appeal lies to the Provincial Planning Appeals Board which the council may desig-

22, s. 19) where it was provided that the "distance may be varied upon different streets or in different parts of the same street", until it was repealed in 1941 (S.O., 1941, c. 35). Query whether even this power authorizes arbitrary discrimination in set backs.

[165] British Columbia Act, s. 708.

[166] Alberta Act, s. 81(1) and (5*a*) (as am. by S.A., 1957, c. 98, s. 13; 1960, c. 107, s. 21(b)). In some circumstances the Provincial Planning Advisory Board is the appeal board. As to *certiorari*, see *Re Herron* (1959), 19 D.L.R. (2d) 584.

nate in the by-law as the appeal tribunal instead of a local board if it chooses.[167] The Manitoba Act provides for no special body, but when a zoning by-law is passed under the authority of the Municipal Act it may provide a right of appeal from a decision of the building inspector respecting land use or the location or construction of a building.[168]

In Ontario the committee of adjustment is appointed by council for three year staggered terms, subject to the approval of the Minister of Municipal Affairs, and may not include a municipal councillor or employee except a school teacher. A committee is not available to a municipality that does not have an official plan, and its jurisdiction is limited to by-laws that implement the plan.[169] The committee is a post World War Two phenomenon and is still regarded by conservative municipal government experts with suspicion and distrust. An appeal lies to the Ontario Municipal Board which conducts a trial *de novo* of the application.[170] The appeal may be taken by any interested person, or by the Minister, who is thus able to supervise the local committee. On questions of jurisdiction and law there is a further appeal to the Court of Appeal.[171]

[167] Saskatchewan Act, s. 51 and s. 52(3), rule 17.

[168] The Municipal Act, R.S.M., 1954, c. 173, s. 895(1) (f). Apparently no variance is authorized, the jurisdiction is interpretive only, but since the appeal may be to the council, it could amount to an application for amendment to the by-law for which, in Manitoba, no Ministerial approval is needed. If the appeal is to a committee of council, with or without additional non-council members, there would clearly be no jurisdiction to amend, although the committee could recommend amendment. *Cf.* the Newfoundland Act, s. 31(b) (iii), *infra,* footnote 174, where the appeal is from *any* decision of the authorized *council* and presumably the Advisory Board may vary the scheme. It is understood that an "advisory commission" appointed under s. 13 of the Manitoba Act is usually authorized to vary the town planning scheme where there is unnecessary hardship or practical difficulty. The commission is given no such express authority by the Act. See also the Municipal Board Act, S.M., 1959, c. 41, s. 108, under which the Board may vary "*any* building restriction affecting lands . . . *howsoever* created". (Italics added). Perhaps this authority could include a scheme and a zoning by-law. Metropolitan Winnipeg has a board of adjustment: S.M., 1960, c. 40, s. 92 (as am. by 1961, c. 77, s. 27).

[169] Ontario Act, ss. 17 and 18(1).

[170] *Ibid.*, s. 18(12). A committee decision may also be attacked by *certiorari*, *R.* v. *London Committee of Adjustment ex parte Weinstein* (1960), 23 D.L.R. (2d) 175 (decision quashed on ground of uncertainty in terms in which it permitted variance. The question whether a variance is minor was said not to be open on *certiorari*—but query? It was not necessary to take advantage of the right of appeal to the Municipal Board first although in this case the court admitted the applicants' triumph might well be temporary. If an appeal had been taken first, the Board's order might have been certain in form and the entire time and expense of the *certiorari* application in two courts might have been avoided. Costs were awarded to the applicants.)

[171] The Ontario Municipal Board Act, R.S.O., 1960, c. 274, s. 95. The Board may also state a case for the Court of Appeal (s. 93) and the Lieu-

The zoning appeal board in New Brunswick consists of a chairman and four other members, not councillors or members of the planning commission, whose terms of office and removal are left to the council who appoints them. Unless the council is of the opinion that it is impractical the chairman must be a barrister of five years' standing.[172] There is no further appeal. In Nova Scotia application for zoning relief is to the council and there is no appeal from its decision.[173] Despite the fact that Nova Scotia is the only province to prefer the council, and in all other provinces the council members are either disqualified or allowed to sit only as a minority, the jurisdiction of the council in Nova Scotia is quite similar to the jurisdiction in the other provinces. The Newfoundland Act merely directs that the scheme for land use control shall provide for appeal to the Provincial Planning Advisory Board or such other appeal board as the Lieutenant-Governor in Council may appoint "against any decision of the authorized council relating to the use of land".[174]

The common core of jurisdiction is the power to relieve an applicant of "unnecessary hardship" in the application of the by-law by exempting him from its terms, or by varying the terms as they apply to him.[175] The expression "unnecessary hardship" is nowhere defined, and it is not used in Ontario, where the Act enables the committee to authorize a "minor variance from the provisions of the by-law, in respect of the land, building or structure, or *the use* thereof", where it is of the opinion that it is "desirable for the appropriate development or use of the land, building or structure" and that the "general intent and purpose of the by-law and of the official plan is maintained".[176] Probably the two different formulae work much the same result in practice, since, although it is rarely admitted, financial hardship is the basis of most variances in Ontario. Of course anyone could plead financial

tenant-Governor in Council may, on petition, vary or rescind any order of the Board (s. 94).

[172] New Brunswick Act, s. 22.

[173] Nova Scotia Act, s. 20. Although this procedure may be equivalent to an application for an amendment to the by-law, no Ministerial approval is necessary.

[174] Newfoundland Act, s. 31(b)(iii) (as am. by, S. N., 1959, No. 47, s. 6).

[175] British Columbia Act, s. 709(1)(c) (undue hardship) (as am. by, S.B.C., 1961, c. 43, s. 44); Alberta Act, s. 81(3)(*a*) (as am. by, S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 52(1)(b); New Brunswick Act, s. 24(1); Nova Scotia Act, s. 20(1)(c).

[176] Section 18(1) (Italics added). The New Brunswick Act, s. 19(h)(ii) gives a power of "reasonable variance" in otherwise much the same language, to the planning commission, but s. 24(2) makes the zoning appeal board a second appeal body, or, at the appellant's choice, the exclusive body.

hardship and it is usually considered to be an insufficient ground, but the acceptable grounds, of "peculiar circumstances" can usually be remedied by the expenditure of money, although probably the applicant cannot afford the money necessary. The successful applicant is likely to have established that, in the language of the Saskatchewan Act, there are unusual conditions, such as the size, shape or topographical features of his lot, not of his own making, and that a relaxation of the provisions of the by-law would not be contrary to its purposes and intent and would not injuriously affect the neighbouring properties.[177] Curiously, a Saskatchewan board may not grant any adjustment in respect of the use of property,[178] a power expressly conferred in Ontario and to be assumed in the other provinces. In practice in Ontario a variance of use is rarely regarded as minor, but the authority is there and although used sparingly, it can be very helpful.

Draftsmen in Ontario sometimes rely on a committee of adjustment, not merely to relieve against hardship through their lack of foresight, but they deliberately leave a by-law consciously inadequate intending that the inadequacy can be specially dealt with when the owner wants to build or otherwise develop his land. The committee can attach conditions to its approval, as can most appeal bodies.[179] These conditions may be of a special sort inappropriate in a general by-law and the draftsman can thus take care of special cases that in Alberta would be more conveniently dealt with by the wide powers of delegation to a servant or agent of the council. The power to attach a condition in a committee decision ought not to be abused: the condition ought to have some rational connection with the concession sought. If it does not, it is not improbable that the condition could be quashed on *certiorari*, although resort to the courts might not be very practical, since the committee may find other reasons for an outright refusal if the decision, rather than just the condition, is quashed.

The next most common jurisdiction is to grant relief to any person who is dissatisfied with the decision of an official adminis-

---

[177] Saskatchewan Act, s. 52(1)(b) and (2). *Cf.* Middleton J.A. in *Toronto* v. *Williams* (No. 2) (1912), 8 D.L.R. 299, at p. 302, "... there is another side to the question of hardship. The statute is remedial, and is for the protection of those who, in residential districts, have built houses and laid out gardens which would be much depreciated by the erection of large and often unsightly buildings completely overshadowing them."

[178] Saskatchewan Act, s. 52(3), rule 11.

[179] Ontario Act, s. 18(9); Alberta Act, s. 81(4)(*b*) (as am. by S.A., 1957, c. 98, s. 13; 1959, c. 89, s. 11; 1960, c. 107, s. 21); Saskatchewan Act, s. 52(3), rule 12; New Brunswick Act, s. 24(1).

tering the zoning by-law.[180] Whether this power includes a power to interpret the by-law is not clear, but an express power to interpret is given in British Columbia[181] and a curious power in Ontario[182] authorizes the committee, where the by-law uses general language to describe a use, to permit a particular use that "conforms" with the uses permitted in the by-law. If the Ontario provision allows the committee to expand the scope of permitted uses it is a valuable power, but if it merely allows it to "interpret", the value is merely that of an inexpensive but probably slower alternative to a mandamus application to a court. Mandamus must be equally available wherever any zoning appeal body is merely asked to interpret the by-law. It is unthinkable that the local authority excludes high court jurisdiction.

The Alberta Act[183] and the Nova Scotia Act[184] provide as a ground for appeal "when the by-law provides for an appeal", and the Nova Scotia Act provides a further ground when a person desires to "obtain the benefit of any exception contained in a zoning by-law".[185] The provisions are anomalous, since in Alberta most cases are likely to be dealt with under section 80(11) by the council or its servant or agent, and no express provision is made in section 80 for appeals to the appeal board; and the Nova Scotia Act likewise contains no express provision for appeals, or for exceptions, and if the intent of the Nova Scotia Act is to give a power of delegation in the by-law the section dealing with appeal jurisdiction seems an odd place to put it.

Three provinces authorize the appeal agency to handle some aspects of non-conforming uses. The British Columbia Act makes the zoning board of appeal the arbiter of the degree of damage that determines whether a non-conforming building may be rebuilt and of the occasions when structural alterations may be made.[186] In Ontario the committee of adjustment may permit the "enlargement or extension" of a non-conforming building or structure, but not of non-conforming land, and the conversion of a non-conforming use of land or buildings or structures to similar

[180] Alberta Act, s. 81(3) (*b*) (as am. by S.A., 1957, c. 98, s. 13) (decision in the exercise of discretionary authority: not "interpretative"); Saskatchewan Act, s. 52(1) (a) (misapplied the by-law); New Brunswick Act, s. 23(1) and (2) (misapplication); Nova Scotia Act, s. 20(1) (a) (dissatisfaction with official decision).

[181] S. 709(1) (a) (as am. by S.B.C., 1961, c. 43, s. 44).

[182] S. 18(2) (c).

[183] S. 81(3) (c) (as am. by S.A., 1957, c. 98, s. 13).

[184] S. 20(1) (d).

[185] *Ibid.*, s. 20(1) (b).

[186] British Columbia Act, s. 709(1) (b) and (c) (as am. by S.B.C., 1961, c. 43, s. 44).

or more compatible uses.[187] In New Brunswick the zoning by-law may provide that the planning commission, not the zoning appeal board, may permit a proposed use that is not otherwise permitted in the zone, if it is sufficiently similar to or compatible with a permitted use or to an existing use on an adjacent site.[188] This power in the New Brunswick Act goes farther to authorize the commencement of a non-conforming use, or its extension on to a new site, than any other Act, and throws more doubt on the underlying philosophy, often mistakenly thought to be valid in every province, that a non-conforming use is intended to wither away.

Ontario committees of adjustment have an express authority not found elsewhere, to "extend land" or a building or structure in permitted use, into an adjoining zone where the use is prohibited.[189] This is sometimes described as an extension of zone boundaries, but the Act seems to be much more limited. It merely permits the existing use, whether of land or existing buildings, into the adjoining zone. No other use permitted in the first zone can be commenced (as a non-conforming use) in the adjoining zone. Nor can a detached building, separate from the existing building, be erected in the adjoining zone: the Act authorizes only extension or enlargements.

The Ontario Act is unique in permitting only "the *owner* of any land, building or structure" affected by the by-law to apply to the committee.[190] Elsewhere the right is given, in effect, to interested persons, as is the right of appeal from the committee in Ontario to the Municipal Board,[191] which means that someone who ignored his right to object before the committee can interfere later. In Ontario a person who thinks a permit has been wrongly issued to a neighbour can only attack it in court. In other provinces he can use the cheaper remedy of the zoning appeal agency. In New Brunswick his right is expressly set out.[192]

Saskatchewan and Ontario require reasons to be given in the decision of the board of zoning appeals[193] and of the committee of adjustment,[194] but there is no sanction provided. Probably a decision could be quashed on the application of an aggrieved neighbour if no reasons are given, but he might first have to appeal to the

---

[187] Ontario Act, s. 18(2) (a)(i) and (ii).
[188] New Brunswick Act, s. 19(h) (i).
[189] Ontario Act, s. 18(2) (b).
[190] *Ibid.*, s. 18(1). (Italics added). Long term lessees are sometimes inconvenienced by this limitation.
[191] *Ibid.*, s. 18(12).
[192] New Brunswick Act, s. 23(2).
[193] Saskatchewan Act, s. 52(3), rule 14.
[194] Ontario Act, s. 18(8).

Provincial Planning Appeals Board or to the Municipal Board, which is under no duty to give reasons. In practice, in Ontario, very few committees give elaborate, or any but nominal reasons, and no effective action seems to be available to change their practice. The City of Toronto Committee of Adjustment is notorious for merely reciting as a reason the language of the Act respecting its jurisdiction and adding that the application is "reasonable".[195]

What is intended by the Acts is, to say the least, ambiguous. If the Acts intend that the committee must rationalize every application, then they serve no very desirable purpose and probably no pressure will be brought to change the present practice. If the Acts intend decisions to be precedents, then the objective is hopeless, since the cases are rarely sufficiently alike, and in any case, an amateur tribunal surely should not be the victim of its own mistakes through some nineteenth century fetish for precedent and supposed predictability. There are, however, two grounds for reasons that may justify some attempt to encourage boards and committees to give them. First, giving reasons may oblige the decider to clarify his own thinking. Second, and, perhaps, more important, the *publishing* of reasons will indicate to others, unfamiliar with adjustment work, how the problems can be handled, and ideas for ways out of difficult situations can be shared. This is no argument for writing reasons in all cases but only in those likely to be instructive to other boards and committees. If reasons were written in all cases the selection for publication might properly be left to a state or private publisher who has the benefit of scholarly advice.

Notice of appeal must be given in every province except Nova Scotia and except in British Columbia interested persons are assured an opportunity to be heard, to present evidence and to hear the evidence of others.[196] No Act indicates what weight, if any, is to be attached to the mere objection (or approval) stated without "reasons" by neighbours. The fact that a neighbour has a right to be heard does not justify the conclusion that his objection, if not rationally connected with the application, must be taken into account. There is no proper constituency in the case whose majority

[195] See *Duncan* v. *Ontario Teachers Federation* (1958), 15 D.L.R. (2d) 358, at p. 360 for an illustration.

[196] British Columbia Act, s. 709 (2) (as am. by S.B.C., 1961, c. 43, s. 44); Alberta Act, s. 81(6) (as am. by S.A., 1957, c. 98, s. 13); Saskatchewan Act, s. 52(3), rule 8 (opportunity to be heard only); Ontario Act, s. 18(6) (opportunity to be heard only); New Brunswick Act, s. 25(3). No doubt a duty to give notice would be implied in the Nova Scotia Act.

vote can solve anything. Purely personal objections are as temporal as the person making them.

*Appraisal*

A comparative survey of this sort should conclude with an account of how the various provincial Acts work out in fact: what kinds of by-laws are passed, how satisfactory they are, how much better, if at all, our cities and towns are as a result. The sad truth is that the facts for such an appraisal—facts in theory dear to the sociological jurisprude although actually he rarely goes out to look for them, usually being content with his own special brand of *a priori* "facts"—these social facts are simply not available.

It is not even possible to say why the Alberta Act, the most experimental and the most functional, from the planner's point of view, at least, permits so readily delegation of authority to the local civil service. Although the rate of development in Alberta has been high, it has not been nearly as extensive as it has in Ontario, where the resistance to delegation is as strong as ever, despite the great convenience delegation would bring to Ontario developers. One factor influencing Alberta may be the high percentage of English trained planners, who, while not so numerous as English trained planners in Ontario, may have been more willingly listened to. Certainly there are traces of both current and older English legislation in the Alberta Act. Yet most Canadian trained planners have been trained by English trained teachers. American planners have had surprisingly little influence in Canada despite the fact that Canadian local government owes a good deal to American models. Generally speaking the Ontario Act borrows much more from the United States than it does from the United Kingdom. Yet both Alberta and Ontario, whose Acts are probably most looked up to by the other provinces, have not slavishly followed any other jurisdiction, and Alberta especially has been active in adapting to local needs. The Alberta Act has been read sympathetically in Saskatchewan and Newfoundland, yet no province seems to follow Ontario's much slower experiments in planning legislation.

The New Brunswick Act, which is the most recently revised, appears to be rather eclectic with few distinctive provisions peculiar to itself, and with apparent influence from both Alberta and Ontario. To the extent that the civil service influences legislative policy, the fact that there are annual conferences of senior provincial planning officials might have been expected to produce an

even greater uniformity than now appears. Only specialized studies can disclose whether the existing differences in fact serve real differences in need, or merely reflect the accidental interests and influences of history, resistance to change and the ease with which the Acts of another jurisdiction can be copied. The question remains, why has the Alberta legislature been so experimental—and so sympathetic to bureaucracy?

## III. Three Approaches to Zoning.

*The piecemeal approach*

Before any zoning enabling legislation was passed, anywhere in Canada, land development was controlled at common law under the rubrics of nuisance and restrictive covenants. Neither of these controls was entirely satisfactory, chiefly because they both depended upon private initiative for their operation. Understandably the first planning legislation removed this limitation by putting the initiative in the hands of a local council. Under early zoning legislation controls were more limited than they are today, and the early by-laws tended to establish some of the benefits already familiar in building schemes with a bit more constructive control of the location of uses than the law of nuisance offered. But for some time the zoning was thought of, particularly in Ontario and Quebec, as a kind of state substitute for a building scheme and the initiation, instead of being exercised by the council for the whole municipality, was left to the residents of local neighbourhoods, or even streets, to decide whether they wanted zoning protection. The by-law in the *Separate School Board* case[197] was a fairly typical example. It applied only to Prince Arthur Street in Toronto, a street some 1600 feet long. It limited use to a "detached private residence". It said nothing about set back, yards, height, bulk, location, size, floor area, spacing, external design or character of the buildings. The next street, in all probability, would be unrestricted, although, scattered over the city, by the time the general by-law was passed in 1952, there were something like 400 zoning by-laws.

These piecemeal by-laws involved two dangers. One danger, a legal one, imperilled the validity of the by-law itself, and the other, a planning one, imperilled the validity of the city concept, a more important, if rather more vague, result.

The legal danger was that the by-law might be held to be discriminatory, or constituted what is sometimes called *spot zoning*.

[197] *Supra*, footnote 78. (The by-law is set out on p. 83).

It goes without saying that a municipal council must act in good faith in the public interest, and that it ought not to sacrifice the interests of the municipality at large for the benefit of a single individual. When this generalization is applied to zoning by-laws it immediately encounters difficulties because it is in the nature of zoning that it treats different pieces of land and different buildings differently, and its incidence falls unevenly on individual citizens. Consequently a council should be careful to act in good faith and to keep the public interest in mind, but it cannot avoid some discrimination. In short, not all spot zoning is illegal: some is simply unavoidable, and some is avoidable but desirable in the public interest. Although these views have frequently been expressed by Canadian courts, there is a surprising resistance to spot zoning of a desirable kind, not only by councils, who may have a rather imperfect awareness of the case for and against spot zoning, but also by municipal solicitors, who frequently discourage their councils from passing quite legal and desirable spot zoning by-laws on the very uncertain legal view that all spot zoning is bad.

The most recent case from the Supreme Court of Canada is *Township of Scarborough* v. *Bondi.*[198] In that case a by-law permitted a residential use of land described in a registered plan of subdivision, but by regulation permitted the erection of only one dwelling per 100 feet of frontage on a public street. Bondi owned a triangular lot with over 200 feet frontage on each of two streets. He could thus erect at least four dwellings on the lot. On the insistence of his neighbours the council passed an amendment that limited Bondi to only two houses. In fact the by-law did not impose on Bondi a higher standard than existed on the other properties that had been built up, but it did impose a different legal standard peculiar to his property. Judson J., with whom the whole court agreed, concluded that the council "was acting in good faith and in the interest generally of the area covered by the by-law and that it was not legislating with a view to promoting some private interest".[199]

One of the earliest cases is *Wood* v. *Winnipeg*,[200] in which the zoning by-law first established a uniform set back on a certain street, and the amendment under attack exempted one owner from the full set back on condition that he give a strip of land to the city. Although the owner was undoubtedly getting a special privilege not shared by his neighbours, the court found the amend-

[198] (1959), 18 D.L.R. (2d) 161. See also *Kuchma* v. *Tache*, [1945] S.C.R. 234.

[199] *Ibid.*, at p. 167.

[200] (1911), 21 Man. R. 426 (C.A.).

ment to be *intra vires* and passed in good faith in the public interest.

The most recent case in Ontario, *Re North York By-Law 14,067*,[201] dealt with a by-law permitting the owner of approximately an acre of land in a zone permitting five storey apartments, to erect a six storey apartment building provided he carried out certain landscaping around the building. The Ontario Municipal Board refused to approve, on the ground, among others, that the by-law was discriminatory. The Court of Appeal referred the by-law back with the instruction that it was not discriminatory and that it was within the council's jurisdiction. It is unnecessary here to recite more cases. The conclusion is easily justified that each case of spot zoning must be looked at on its own merits, it is not always bad on principle.

The planning danger in piecemeal zoning, though more important, may be described more briefly, as the encouragement of undesirable leapfrogging of incompatible uses over controlled uses. If one street, or one small area, is controlled, and no one prevents uncontrolled development all around it, the end may be a disorderly and inefficient development of the whole city. Inefficient organization of a city often inconveniences its citizens and increases cost through rapid deterioration of buildings with consequent lowering of assessment, not to mention concomitant inconveniences of inefficient transit facilities and the like.

*The comprehensive zoning by-law*

A realization of the planning dangers just mentioned, as well as many others, led many municipalities, after the second world war, to prepare and pass what are commonly called comprehensive zoning by-laws. There were other reasons, not the least of which was the tremendous increase of interest in town planning after the second world war, when whole cities had to be rebuilt in the theatres of war, and Canadian economic expansion led to a tremendous increase of population in our cities, which had to expand in the suburbs to accommodate the newcomers.

The comprehensive zoning by-law claims to be comprehensive only in a geographical sense. It is a direct reaction to the piecemeal zoning. It attempts to zone all the land in the entire municipality. Such comprehensive zoning is not entirely a post-war phenomenon, Vancouver had a comprehensive zoning by-law in 1928 and other cities, affected by American influences, had them as well, but the

[201] (1960), 24 D.L.R. (2d) 12 (Ont. C.A.). See also *Re Central Burnaby Citizens' and Ratepayers' Association* (1956), 6 D.L.R. (2d) 511 (B.C.).

early by-laws were the exception. The American influence stems from the preparation of a model zoning enabling Act by the Federal Department of Commerce in 1926.[202] Section 3 of the model Act requires that "Such regulations shall be made in accordance with a comprehensive plan" and the reference to a "comprehensive plan" probably gave birth to the expression "comprehensive zoning" in accordance with the plan. Oddly enough, the "comprehensive plan" referred to in the model Act is a bit obscure, no one seems to know for sure what plan is meant.[203] Today every province can boast of several comprehensive zoning by-laws.

The change from spot zoning and piecemeal zoning to comprehensive zoning probably pleases the after dinner speakers in the legal profession who praise the rule of law. The sufficiency of comprehensive zoning, however, is not to be tested by after dinner eulogy. Rather the test should be the frequency of requests for amendment and the merits of the requests; the frequency of applications for variances to the zoning appeal body and the merits of the applications; and the granting of exceptions where exceptions are provided for. Unfortunately there are no facts and figures to support any conclusion, but if the experience in Ontario is any indication of experience in other provinces, the comprehensive by-law is far from successful. Amendments and variances are frequent and point, often, to the inadequacy of preparation, usually because no proper survey or consultation was made before the zoning decisions were reached by the council. No particular criticism is implied in the incidence of amendments and variances, rather, the surprising thing is that they are not more frequent, since the task of the draftsman is almost impossible. It is one thing to prepare a "model" by-law that applies nowhere, and quite another, as every conscientious draftsman knows, to prepare an actual comprehensive zoning by-law.

In Ontario the difficulty of guessing accurately about every square inch of an area of several square miles is encouraging councils to pass by-laws they do not expect to be acceptable when development takes place. Their hope is that when a developer decides to build, and he finds the by-law is an obstacle, he will approach his council with a specific proposal about which he and the council can both talk more realistically because they have something definite to talk about. Nevertheless many landowners, possibly rather unsophisticated ones, take the by-law at its face

[202] *Supra*, footnote 158.

[203] For a discussion of the American cases, see Haar, In Accordance With A Comprehensive Plan (1955), 68 Harv. L. Rev. 1154.

value and are sometimes bitterly opposed to its amendment. This technique of building up false hopes and postponing real decisions on land use flaunts the rule of law unless the rule of law is taken to mean a fair and prompt procedure for exercising the state's power to control land use. That kind of rule of law is to be found better developed, for a quite different purpose, in Alberta, Saskatchewan and Newfoundland. In those provinces interim development control is provided for in the enabling Acts. Interim development control authorizes expressly what is done in Ontario in a back-handed way and much less efficiently.

*Development control*

The third approach to zoning is best illustrated by the United Kingdom legislation, the Town and Country Planning Act, 1947.[204] Section 12 of that Act effectively freezes the existing land uses and requires anyone intending to develop his land to apply for permission from the local planning authority, the county, or county borough, council. In dealing with the application, the local planning authority must have regard for the master plan and discretion is thus not entirely arbitrary or haphazard as it was in the heyday of piecemeal zoning in Ontario. "Develop" means the carrying out of building, engineering, mining or other operations in, on, over, or under land, or the making of any material change in the use of any building or other land. Exceptions were made for maintenance, and other minor matters and for classes of use that the Minister might prescribe. He did prescribe the Town and Country Planning (Use Classes) Order, 1950,[205] which sets up eighteen classes of use, rather like zone classifications in North America, and a person whose land is used for a purpose mentioned in a class, may convert to any other use in that class without permission. For example, Class I is: "Use as a shop for any purpose except as: (i) a fried fish shop; (ii) a tripe shop; (iii) a shop for the sale of pet animals or birds; (iv) a cat's meat shop." Under this Order an owner of a ladies' hat shop, sandwiched between two dress shops, could presumably convert to a *fresh* fish shop, a kind of English shop that North Americans generally find rather revolting when they first see one and might think undesirable between the dress shops.

Despite the thawing of the freeze by the Use Classes Order and by a somewhat similar relaxation in the Town and Country Plan-

[204] *Supra*, footnote 83.
[205] U.K., S. I., 1950, No. 1131, revoking S. I., 1948, No. 954.

ning General Development Order,[206] the requirement for development permission, popularly and perversely called "planning permission", remains a very tight control. For the year ending March 31st, 1958, in England and Wales with a population of 44,425,000, there were an estimated 400,000 applications for planning permission, of which 360,000 were approved, with or without conditions; 40,000 were refused, of which 9,068 were appealed and about a third of them allowed.[207] While this seems like vast bureaucracy it is to be remembered that in the City of Toronto with a population of 658,420 in 1958 there were 5,878 building permits issued,[208] 386 applications to the Committee of Adjustment,[209] and eighteen appeals to the Ontario Municipal Board from Committee decisions.[210] The Zoning By-law was amended forty-two times.[211] The volume of business in Toronto is not far off that of the United Kingdom on a population basis, and it now takes anywhere from three weeks to many months to get a building permit in Toronto. If a zoning decision had to be made at the same time, it would probably take very little longer. Committee of Adjustment cases take eight to ten weeks, zoning amendments about as long, and appeals to the Municipal Board at least two or three months for an appointment.

In Canada the English model can be found only in Alberta, Saskatchewan and Newfoundland, where what is called *interim* development control is authorized. In principle this control is complete but limited to the time required for the preparation of a master plan and a zoning by-law. In Alberta and Saskatchewan this time is defined generically as "prior to the completion and adoption of the general plan",[212] and "during a period deemed sufficient for the preparation and adoption of the community planning scheme"[213] but in Saskatchewan the Minister's order setting up the development control must prescribe a period not exceeding three years, from the date of his approval of the by-law adopting the order, or from "such later date" as the Minister may specify.[214] In Newfoundland the period must not exceed two years.[215] The result of the wholly generic description in Alberta has

[206] U.K., S. I., 1950, No. 728.
[207] Minister of Housing and Local Government, Annual Report(1959), pp. 98-99 (Cmd. 1027).
[208] City of Toronto Municipal Handbook (1960).
[209] Figure supplied by the Community Planning Branch, Ontario Department of Municipal Affairs.
[210] *Ibid.* [211] *Ibid.*
[212] Alberta Act, s. 68(1) (as am. by S.A., 1960, c. 107, s. 16).
[213] Saskatchewan Act, s. 31. [214] *Ibid.*, s. 35(c).
[215] Newfoundland Act, s. 11(1).

been that no municipality that is satisfied with its interim development control powers is in any hurry to prepare a plan and the local planners and lawyers are inclined to speak gladly or sadly, as the case may be, of "interimity".[216]

The effect of a provincial order[217] setting up interim control is, shortly, to pass control over development to the local council, or, in Alberta and Saskatchewan to the local council and an interim development board or an interim development officer or a servant of the council. Development is defined in Alberta as "the carrying out of any construction or excavation or other operations in, on, over, or under land, or, the making of any change in the use of any land, buildings or premises"[218] and in Newfoundland in much the same language, but with qualifications similar to those in the United Kingdom Act.[219] There is no statutory definition in Saskatchewan, but the Minister must state in his order "the matters to be subject to such control".[220] Existing zoning by-laws are suspended[221] and in Newfoundland development of land without approval is expressly prohibited.[222] Developers are not, however, without any guide as development permission must accord with the proposals for the master plan and the zoning by-law as they are worked out.[223] Moreover, the rule of law is further protected by establishing a system of appeals from the rulings of the interim development authority, be it the council, its servant or agent, or an interim development board or officer. In Alberta a person affected by a decision may appeal to an appeal board, if there is one, who shall recommend a decision to the council, with reasons, and

[216] For a detailed analysis of the special powers in Edmonton, alleged to have been "abused", see Mr. Justice M. M. Porter, Report on Inquiry into Edmonton Civic Affairs, printed in full, The Edmonton Journal, September 9th, 1959, pp. 12-15. In an unpublished comparison of Planning in Ontario and Alberta, delivered at the annual meeting of the Town Planning Institute of Canada in 1958, H. N. Lash said that "interim control is operating in Edmonton in its 8th year, in Calgary in the 6th".

[217] In Alberta, a ministerial order, s. 70; in Saskatchewan a ministerial order, s. 35; in Newfoundland an order in council, s. 11.

[218] Alberta Act, s. 2(d) (as am. by S.A., 1960, c. 107, s. 2, after *Calgary* v. *Reid* (1958), 17 D.L.R. (2d) 198 (C.A.)). *Cf.* the U.K. Act, *supra*, footnote 83.

[219] Newfoundland Act, s. 2(ff) (as am. by S.N., 1955, No. 19, s. 2(b) and 1961, No. 9, s. 2). The Newfoundland Act makes no provision for use classes.

[220] Saskatchewan Act, s. 35(d) (as am. by S.S., 1959, c. 107, s. 5(2)).

[221] Alberta Act, s. 70; Saskatchewan Act, s. 38*b* (as am. by 1959, c. 107, s. 8).

[222] Newfoundland Act, s. 11(2) (a).

[223] Alberta Act, s. 68(2); Saskatchewan Act, s. 38*e* (as am. by S.S., 1959, c. 107, s. 8) (the council must adopt a "zoning guide" following the procedures set out for regular zoning by-laws and the zoning guide is deemed part of the interim development by-law adopting the Minister's order); Newfoundland Act, s. 11(2)(b).

the council, after considering the recommendation shall decide the appeal. If there is no board the appeal may be taken directly to the council. A further appeal may be taken to the Provincial Planning Advisory Board. The Board shall have regard to the general plan that is being prepared but it is not bound by it.[224] In Saskatchewan an interim development appeals board may be set up in the same way as the board of zoning appeals, and an owner of land may appeal to the board and if there is no board, he may appeal to the council. The board or council, as the case may be, must give reasons in writing, and any person who feels that any interest he may have in property is adversely affected by the decision may appeal to the Provincial Planning Appeals Board.[225] In the Newfoundland Act there is no detail about appeal procedures, but the order setting up interim development control may make provision for an appeal from the decision of the authorized council to the Provincial Planning Advisory Board.[226]

This short account of interim development control can only suggest the possibilities of a system of permanent, or regular, development control such as has been in operation in the United Kingdom since 1948. What is of chief interest to this review of Canadian zoning enabling legislation is the comparison of the existing law in Alberta with the existing practice in Ontario. The Ontario practice already described briefly above, consists of passing a by-law prohibiting the most likely uses and permitting less likely ones. In at least one instance a by-law simply limited the permitted uses to those in existence on a particular lot on the day the by-law was passed.[227] In effect the by-law left the landowner with only the rights guaranteed to him anyway by section 30(7) of The Planning Act relating to non-conforming use. On a legalistic view the by-law could be regarded as making the area affected a single zone in which each individual landowner was given different privileges, depending on his use of his land on the day the by-law was passed. Except for the operation of section 30(7) such a by-law could be considered discriminatory. On the other hand, if the by-law had made the area a zone in which *all* uses of land and *all* erections and uses of buildings or structures were prohibited, there would clearly have been no discrimination and section 30(7) would still have permitted existing uses to continue.[228] The

[224] Alberta Act, s. 71*a* (3) to (9) (as am. by S.A., 1959, c. 89, s. 8; 1960, c. 107, s. 17).
[225] Saskatchewan Act, s. 38*c* and 38*d* (as am. by S.S., 1959, c. 107, s. 8).
[226] Newfoundland Act, s. 11(2) (h).
[227] East York Township, By-Law 6438 (1957).
[228] Whether the Ontario Act authorizes the prohibition of all uses is

owner who wished to develop would then have to ask for an amendment affecting at least his own land, and perhaps that of his neighbours. Such an amendment runs the risk of attack as discriminatory but is otherwise not likely to offend the law. Recently, however, in a rather striking judgment, the Court of Appeal held that an amending by-law that affected only one owner's land, comprising about an acre, and giving that owner a very material advantage over his neighbours, was not invalid on grounds of discrimination.[229] In any case it is difficult to see how a by-law that implements an official plan could not be in the public interest, apart from an exceptional case. Development control without master planning would have all the weaknesses of piecemeal zoning.

Another criticism of this technique has been that such a zoning by-law does not conform with the official plan. The short answer is that the official plan may easily be drafted to provide for precisely this method of implementation. In the Township of Scarborough, in Ontario, the Official Plan expressly provides for implementation in much this manner, but no general prohibitory by-law is necessary because the undeveloped land is held in large parcels and virtually all development involves subdivision. During the time required for ministerial approval of a plan of subdivision, a by-law applicable to that plan can be prepared and passed.[230] In practice the Minister may require the developer to agree not to oppose a by-law, the terms of which are stated in principle, as a condition to his approval of the plan of subdivision.[231]

One practical difficulty with this technique is the time loss through having to obtain Municipal Board approval. The recent amendment[232] allowing the Board to dispense with a hearing in some cases may help speed up many amendments. One practical advantage the Ontario developer has is his privilege of demanding

now open to doubt because Schatz J. held in the *Gibson* case that a by-law could not prohibit all buildings and structures, *supra*, footnote 31. As pointed out above, the decision is open to serious criticism.

[229] *Re North York By-Law 14,067*, *supra*, footnote 201.

[230] Township of Scarborough, Official Plan, approved 1957: "The plan is to be implemented . . . . A comprehensive zoning by-law covering the whole Township is not contemplated, since the degree of precision in defining land use zones required by such a by-law is not attainable in undeveloped areas. . . . A restricted area by-law is to be placed on each new subdivision when registered . . . ."

[231] Community Planning Branch, Department of Planning and Development, (now Department of Municipal Affairs) Subdivision Approval Manual (1958), p. 18: ". . . it is normal practice to require the owner to consent in writing to the passing of a by-law . . . restricting the use of land and buildings in a manner appropriate to such a subdivision."

[232] S.O., 1960-61, c. 76, s. 3, *supra*, footnote 134.

a hearing before the Municipal Board where the Board may direct the council to amend the by-law as required.[233] Another practical advantage, in Ontario or elsewhere, lies in the certainty the developer has that he is working within the law. Some lawyers in Ontario, because of the uncertainty and difficulty involved in finding the true by-law position, have turned to the local municipal officials for some assurance. Unfortunately under the present Ontario law the official's assurance, even his permit, is of no validity if he himself is mistaken about the by-law.[234]

It is not the purpose of this article to make a case for or against any particular system of land use control, but it is difficult to resist the temptation at least to comment on a situation where the Ontario system is being strained, some critics would say abused, to accomplish what is expressly authorized in three other provinces. In all four provinces the long range objective is a comprehensive zoning by-law. In Ontario the strained use of the Act has almost always been applied in the relatively undeveloped parts of the municipality where it is intended to pass a comprehensive by-law later.[235] In the other three provinces the by-law is the express objective. A zoning by-law has tradition at least to justify its position as the end of interim development control, but "interim" control might just as well be permanent as it is in the United Kingdom. The conditions zoning has to meet are not static: in an established part of a city it is not particularly helpful to a landowner that the by-law permits existing uses and a few "compatible" uses. Very often by accident or design of the by-law when the owner wants to change from the existing use he requires an amendment. In an undeveloped area the zoning is often inapt and intended really to freeze the existing agricultural and mixed uses until something more definite is known about probable development. The comprehensive zoning by-law often creates a mere illusion of the rule of law. When a change of use is desired, an amendment is frequently necessary. Meanwhile many an unsophisticated landowner may be cruelly misled by what appears to be a settled policy of land use. He might, of course, look at the master plan, if there is one. It would be hard to justify permanent development control unless a master plan, and continuous planning, were made compulsory, as they are in the United Kingdom, as a rational guide to the planner and the planned.

---

[233] *Supra*, footnote 155.

[234] *Belleville* v. *Moxam*, [1953] 4 D.L.R. 151, esp. at p. 153.

[235] This was so in both East York Township (*supra*, footnote 227) and in Scarborough Township (*supra*, footnote 230).

There is also much to be said philosophically for development control. Because it permits decisions to be made, as one writer puts it, "in context", the real purposes, both of the developer and of the state, are better known and understood by each other.[236] While the Ontario method of strain is the traditional way in which law reform takes place, there may be some advantage in having a consciously designed general law that takes account of the needs of the system really in use, rather than the one that exists only in the statute. In short, there may be some advantage in calling a spade a spade.

---

[236] Fuller, Freedom, A Suggested Analysis (1955), 68 Harv. L. Rev. 1305, esp. at pp. 1323-1325, "The Value of Choice in Context". Of course no decision is ever made in a state of complete understanding, but a legal system may attempt to create procedures postponing decisions as long as possible until the greatest practical degree of understanding is enjoyed by the deciders.