AN INTRODUCTION TO SUBDIVISION CONTROL LEGISLATION

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When a piece of land described in a deed or other evidence of title is divided into two or more pieces of land separately described in one or more deeds the large piece is said to have been subdivided. The prefix adds little to the verb but the longer form probably came into use because in the nineteenth century the colonial governments or the new Canadian government set about dividing the colonies and territories into surveyed divisions of land sometimes called "township lots" shown on maps. Any subsequent division, out of respect for this division has been called a subdivision.

Subdivision is a continuous process in the administration of a system of private land ownership, and it is accelerated with each economic boom. The process is most in evidence around urban centres, where large farms are changed into urban streets and small housing lots. This scale of operation is perhaps the one that the word conjures up in most minds. "Subdivision", however, is properly used to describe the division of one lot into two or two hundred, or, indeed, two thousand, as may be the case where a large land development corporation assembles perhaps thousands of acres, and sets about to subdivide the land into a "new town", such as Don Mills near Toronto, or Kitimat in northern British Columbia.

For many years now this process has been seized upon by governments as the appropriate point to impose a system of control, not so much over the subdivision as over the accompanying development of the land by the layout and construction of streets and parks, the installation of water and sewer services, power and telephone lines, the location and construction of schools, as well as provision for the various other services usually privately supplied, such as shops and churches. It is the purpose of this

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article to examine the nature of the control in the various provinces of Canada. For convenience the article has been divided into four parts: Part I. The Need for Control; Part II. Provincial and Municipal Controls; Part III. The Role of the Central Mortgage and Housing Corporation; and Part IV. The Sanction of Control.

I. *The Need for Control.*

Historical problems.

Since the subdivision of land has been proceeding continuously on this continent since the seventeenth century, and controls have only been thought necessary in the relatively recent years of the twentieth century, some explanation of the unsatisfactory state of subdivision will be necessary if the current complex controls are to be appreciated. Three problems from the past will demonstrate what is generally accepted as the justification for control.

If we may assume that land developers tend to follow past practices despite changes in current fashion, we may conclude that, without external pressure by the state, developers would continue to subdivide land on the fringes of our growing towns and cities into rather small lots, of perhaps thirty-three feet or even less, notwithstanding a changing local government fashion that now prefers a wider lot of perhaps fifty feet. Couple with this change in fashion a belief based on principles of public health that unless a modern sewer system is available, lots should be large enough to accommodate a properly designed septic tank and weeping field, and the result is dissatisfaction with the excessively small lots of the past.

A second unpopular feature of past subdivision practice is the grid pattern of streets that was so favoured by our grandfathers, who may have got these fashions from as respectable a source as Hippodamus, said by Aristotle to be the inventor of town planning and a man known to favour the grid layout in new areas. Characteristic of the older grid layout was the equality of street sizes, regardless of the job the street had to do. Every intersection was a four way intersection and every street might carry the same quantity and quality of traffic despite the fact that some streets inevitably faced heavier demands and should have been made wider so as to be capable of carrying the load. The street pattern was such, too, that many of the streets came to a dead end at the edge of the subdivision and no one seemed to care that when the adjoining area was developed the streets on that subdivision should jibe with the existing streets.

Perhaps the greatest dissatisfaction with uncontrolled subdivision had to do with the sometimes unbearable burden of cost left with a municipality in which unrestricted residential subdivision had taken place with the concurrent installation of municipal services but without the expected sales of land to future residents. Since the tax system was such that the municipality expected to be able to pay for the services from the increased taxes paid by the householders after houses had been built on the lots, if the sales did not go through the revenue would not be forthcoming. This phenomenon was especially evident during the economic depression of the nineteen thirties, when it was possible to see newly laid out paved sidewalks, curbs and tarred streets, with fire hydrants betraying the existence of a water pipe, and catch basin grills betraying the existence of a storm sewer system, below the ground, without a house in sight. It is true that many municipalities acquired some desirable building lots through tax default, but this was little comfort to a municipal treasurer with construction bills to pay and a deepseated superstition that it was morally indecent for a municipality to be in the real estate business.

The tendency to exploit the land beyond the existing market was probably encouraged by the fashion of the day to have municipal services installed by the municipality, but when the owner of a farm could gamble on the market at relatively little risk to himself, he would stand by while roads were graded, pipes laid, sidewalks constructed, all at public cost, hoping that prosperity would continue and he could sell his lots, fully serviced, to a largely unsuspecting taxpayer. Today we speak of land that is "ripe" for subdivision, that is, land for which there is an existing demand, as building lots. And we speak of "premature" subdivision, that is, land put on the market when buyers are withdrawing. Perhaps more than any other condition, it was this economic concern over premature subdivision that inspired the postwar legislative attack on the free market in urbanizing land.

Modern objectives.

Two objectives could be said to compete for greater attention in modern subdivision. The more pervasive is the economic objective of getting municipal services at as modest a cost as possible, regardless of who pays for them. The other objective is rather more difficult to define, but it has to do generally with the design of the proposed layout of streets and lots, and may be described as the creation of a pleasant and convenient environment. The

two objectives are not discrete and the choice of the environment is constantly modified by a concern for its cost and how the cost is met.

The design of the street system in modern subdivisions shows an increasing rejection of the simple grid layout of past years.[1] The rectangles of streets and lots have given way to curved streets and in many instances irregularly shaped lots. Three major characteristics may be mentioned. First, there is a preference for T shaped intersections, which have two advantages. Visually, the T intersection means that one street terminates. A grid layout may make all streets endless corridors. For many people the terminated street acquires a certain charm, a slight sense of enclosure. But more important, in many minds, is the traffic convenience of the T intersection since it means that the driver has to watch only two directions of traffic instead of three. It is commonly asserted that fewer accidents occur at T intersections than at grid intersections.

Once the grid pattern is rejected it becomes even more urgent that the designer keep in mind the probable location of connecting roads in future adjoining subdivisions, and, of course, the existing minor roads that he thinks should be linked up. Where there is comprehensive planning in the area the designer can usually learn the general road arrangement well in advance of development. This attempt to link up is the first to be mentioned of many "off site" considerations in subdivision design.

The second major characteristic is the distinction between major and minor roads.[2] It is now recognised that not all streets carry the same amount of traffic and that all streets should not, therefore, be the same width. Those that will carry heavier traffic should be wider, those that serve only a small number of houses, may be much narrower. How narrow a street may be is a matter of considerable debate. In Canada road allowances have rarely been narrower than sixty-six feet, by coincidence the length of a surveyor's chain, and conceivably chosen as the width for no other reason. Some engineers today claim that if the buried services (water, sewers and perhaps power and telephone lines) are to be put under sod rather than hard surfacing sixty-six feet will be required. Others claim that the accessibility of buried pipes is not important if streets and services are well planned and the

[1] Thomas Adams in his report for the Conservation Commission, Rural Planning and Development, in 1917, was an early opponent of the grid system in Canada. See esp. pp. 67-71.

[2] Adams, *op. cit.*, *ibid.*, pp. 88-90.

services can accordingly be buried under the hard surface despite the increased interference with traffic and the greater cost in digging them up infrequently when repairs are necessary.

A third characteristic is the occasional departure from the familiar layout of streets in favour of the so-called "Radburn idea".[3] Clarence Stein is credited with the invention of the superblock, a combination of the first two characteristics described, in which a major road encircles a large "block" served by smaller roads of limited purposes consisting often of loops or crescents and sometimes *culs-de-sac*. In the *cul-de-sac* the houses are sometimes turned around, so that the rear of the house faces the roadway or circle, and the front looks inward to the garden area. Where two or more such *culs-de-sac* are placed side by side, the garden area may be quite extensive and be laid out with foot paths, so that different kinds of traffic are so separated that children may walk all the way to school without having to cross a street. The town of Kitimat, in northern British Columbia, contains a number of the Stein superblock features. The "house turned around" has not been entirely successful. Habit dies hard and people who would ordinarily not put their washing in their "front" yard sometimes hang laundry on the street side (the modernists) and sometimes on the garden side (the traditionalists, for whom "front" is always determined by the location of the street). Separation of traffic is a major principle in the superblock. The design is such that through traffic follows the wider peripheral road, and goes around the residential area, local traffic takes the narrower roads, and footpaths combined with underpasses under the narrow roads, effectively keep the pedestrian traffic off the highway most of the time.

Whether the modern subdivision goes the whole way of the superblock the street layout will probably be done with the location of the houses to be built clearly in mind. Thus the T intersection may be designed with a lot at the head of the street but with a house sited so that lights from cars coming up the street will not be irritating. *Cul-de-sac* layouts will be designed with the style and location of the house in mind, so that there may be an architectural unity suitable to the short street and circle. Under our most common combination of land use controls—zoning and subdivision control, the location of particular buildings is thought to be the concern of the zoning by-law rather than sub-division

[3] Clarence S. Stein, Toward New Towns for America (1957 rev. ed.). See esp. pp. 41-48.

control, but in some cases the two controls are merged. The separation is, of course, quite artificial, and Scarborough Township in Metropolitan Toronto for example, has for many years timed its zoning by-law to coincide with the approval of a plan of subdivision. In any case, in many well designed projects the developer himself will have retained an architectural control through restrictive covenants in the purchase deeds.

Similarly, while the superblock may not be achieved, more use is being made today of parks and footpaths where the pedestrian is free of vehicular traffic. There are, however, still grumblings to be heard from some municipalities that share Jane Jacobs' fear of bad men who are believed to lie in wait in parks and lanes to seize their prey.[4] A less romantic objection is sometimes taken to the maintenance problem—footpaths rarely can be cared for with standard snow removal and street cleaning equipment.

Where subdivisions include rivers or lakes within them, or on a border, the street layout including footpaths will nowadays try to bring some part of the shoreline within reach of the general public, either by paths or small parks on the waterfront, or by streets that separate the water's edge from the house lots. In such cases, of course, the grid pattern must be rejected and despite its illusory simplicity more and more designers are looking for interesting alternatives.

Parks and open spaces are not, of course, confined to river and lake districts. In most modern plans of subdivision considerable thought is given to the amount and location of open space to be provided. Sometimes the open space is of only visual importance. It is pleasant to look at. The current tendency is to put this space into front yards, thus thrusting the maintenance back on the private landowners. Very occasionally, a designer will lay out a small square with houses around it with quite shallow front yards. Here again the location of the house is important in the architectural effects sought, and the all too common separation of zoning from subdivision control largely results in this sort of thing happening at the instance of the developer rather than through the public controls.

When parks are intended to serve the needs of more active recreation than mere strolling in the garden, their location and size becomes a complicated social problem. It is being argued today that we have too many large and largely unused parks and

[4] Jane Jacobs, The Death and Life of Great American Cities (1961), pp. 74-79 and *passim*.

playgrounds, too few small playlots. These are debatable problems but specific solutions have to be given when land is laid out for subdivision if the cost of acquiring land for "totlots" is to exclude the added cost of a house that has to be torn down to make way for the play area. Small and numerous playgrounds are opposed by municipalities who think of the cost of attendants. If a very small playlot could safely be administered without an attendant, more plans would be compelled to show them. Whatever the size of the playground the area available for it will have to be included in some plan in any case.

Especially in the subdivision of larger acreage will designs have to take into account the location of other municipal services, as well as some services traditionally supplied by private enterprise. Not only will a zoning by-law have to indicate where land uses such as churches, schools, shops, and work places are permitted, the plan of subdivision will have to take such uses into account in its road pattern. Churches are not best located by selecting three or four housing lots, nor are schools or local shops, to say nothing of service stations and larger shopping centres. These "non-residential" uses in a substantially residential area should be served by an efficient layout of streets and should be located so as to minimise their nuisance effect on surrounding houses. Kindergarten and lower grade schools, for example, should be located in the centre of the area they serve.

Economic servicing of land that is about to be developed for urban uses can be considered regardless of the identity of the person who pays, or, as is increasingly the case, on the assumption that the cost will be borne for the most part by the developer and through him by the purchasers of lots in the subdivision.

It is likely that the least expensive way of servicing land is to install all the capital works before houses are built and the inhabitants have settled in. Apart from the economy of free movement, especially of heavy road machinery, there is an unmeasurable saving of discomfort and inconvenience caused to the inhabitants. At this stage not only water and sewer pipes can be buried, but power and telephone cables as well. It is true that the economy is not immediately apparent, but almost immediately the cost of maintenance will be lower. It takes only the damage done to electricity lines above the ground by a few icing storms to account for the short terms savings of putting the lines up instead of under. If any of the services is to be buried later, the cost in disruption will be higher. Ten years ago the idea of buried power

cables was thought radical—today it is becoming an acceptable consideration.[5]

Still a question of debate is the burying of storm sewers. Ten or fifteen years ago quite respectable developers were laying out streets with no sidewalks and open surface drainage, or ditches. It is, of course, much less expensive to grade a shallow ditch on each side of a roadway, sod it, and leave it. In the course of time, however, a major inconvenience reveals itself. The driveway to each private lot may have to be built over a culvert and during the winter the culvert contrives to fill itself with leaves and ice which, being protected from spring sun, melts more slowly than the surrounding open sodded ditch. The result is flooding and damage that can only be avoided by expensive public maintenance by steaming out the ice and dirt and starting a clear channel for the spring run off.

The use of open drainage involves an important limitation on the pattern of streets. If the ditches are to work, the contours of the land must be a guiding factor in the layout. Water runs downhill and the layout must be such that gulleys are avoided and the water is given an unimpeded channel from one end of the subdivision to the other. Drainage problems can be acute, since the effect of hardsurfacing roads and building houses is to decrease the opportunity for natural absorption in the earth. If the sewers are put underground the surface contour is of somewhat less critical significance since catch-basins can be established where needed.

Sanitary sewers used to be considered almost as luxurious as the storm sewer. It was thought adequate to insist as a public health measure, that private septic tanks and drainage fields be installed. If this is permitted today, there is almost certain to be a minimum lot size, adequate to permit proper drainage and evaporation without danger of contamination—sometimes to a well on the same lot! Both the well and the private sewer are rapidly disappearing in favour of a piped water and sanitary sewer system, with consequent advantages to the householder, who can be less concerned about ground water levels and the vast lawns he has to mow.

As services are added to a lot originally made oversized to accommodate a private water supply and sewer system some space becomes superfluous, but subdivision is usually inconvenient because the house was not located with future subdivision in mind

[5] For an American view, see George C. Bestor, Buried Cables: A Survey of Buried Distribution for Residential Land Development. Technical Bulletin 48 of the Urban Land Institute (1964).

and current standards may make building illegal on any vacant part. While large lots can be designed and developed for further subdivision, it is usually more economical to service land for its "ultimate" density if possible before building begins.

The cost of municipal services varies from eight to twelve million dollars a square mile. For most suburban development, that means about three to five thousand dollars a lot. Put another way, it means about eighty dollars a running foot for the various services, plus schools and other "off site" expenses. The impact of these costs on design is nowhere better illustrated than in the Ontario Community Planning Branch's exhibit at the Canadian National Exhibition in 1958.[6] Various layouts were shown for the same 330 acres of land. The grid-iron pattern had 60,760 feet of streets and 1,110 lots. The so-called "planned neighbourhood" had only 38,270 feet of streets and 1,140 lots *and* 160 "lots" represented by multiple dwelling areas.

The "planned neighbourhood" would probably not be built overnight. Residential development very often starts with single family detached or semi-detached houses. The multiple housing areas may be developed much later. If the subdivision layout does not provide space for this later development, land costs for the development may be enhanced by the cost of the houses that have to be removed. It is a question of market prices, rents, and convenience, whether the land should remain vacant for the waiting period or not. Clearly developers with short term interests will press for development to meet the immediate demand since someone else will bear the cost of the higher density development when it is due. Nevertheless the well laid out urban area has its multiple housing in the appropriate places, and these places can often be most effectively selected before building begins. The places will be determined by the relative location of schools, parks, shops and major roads.

II. *Provincial and Municipal Controls.*

With this rather sketchy account[7] of the objectives sought in mod-

[6] Reproduced in (1958), 5 Ontario Planning No. 8, p. 1 under the title, "Subdivision Design, Good, Grid and Gimmicky" and in Milner, Community Planning: A Casebook on Law and Administration (1963), pp. 312-317 in slightly revised form.

[7] Useful text material on either the objectives or the techniques of subdivision design is not easy to find. In Canada three slim volumes are out of print: Harold Spence-Sales, How to Subdivide (1950) and V. J. Kostka, Planning Residential Subdivisions (1954) and Neighbourhood Planning (1957). Mary Rawson and Agnes Norville, Subdivision Casebook (1963), is available free from The Community Planning Association of Canada, Ottawa. It reviews fifteen subdivision designs.

ern subdivisions the techniques of control in use across Canada can be explored on a comparative basis.[8] From a "legal" standpoint rather more is published about controls in Ontario than in the other provinces but enough is available to anticipate the likely disposition of the contentious questions.

The agency.

Control over subdivision could be exclusively local, local subject to provincial supervision or entirely provincial. Traditionally in North America it has been considered to be a local matter and in many provinces of Canada one might have thought that provincial control of master planning would be sufficient to protect provincial interests. Most provinces regard the function as local and in Ontario where control of plans of subdivision is exclusively provincial there is an express suggestion to the Minister that he refer to local officials. There is usually some provision for appeal from the local decision.

In British Columbia all subdivisions require the approval of an approving officer[9] who is defined as the Municipal Engineer unless some other officer has been duly authorized by the council of the municipality, and, in unorganized territory, the Deputy

[8] In each province there is a general statute to which reference will be frequently made: British Columbia, Municipal Act, R.S.B.C., 1960, c. 255, esp. ss. 711-713 (hereinafter referred to as the British Columbia Act) and Land Registry Act, R.S.B.C., 1960, c. 208, esp. ss. 83-98; in Alberta, The Planning Act, S.A., 1963, c. 43, esp. Part 2, Subdivision of Land, ss. 16-26 (hereinafter referred to as the Alberta Act) and The Subdivision and Transfer Regulation, Order in Council No. 1194/63 (hereinafter referred to as the Alberta Regulation); in Saskatchewan, The Community Planning Act, 1957, S.S., 1957, c. 48, esp. ss. 65-74 (hereinafter referred to as the Saskatchewan Act); in Manitoba, The Municipal Board Act, S.M., 1959, c. 41, esp. ss. 93-107 (hereinafter referred to as the Manitoba Act), The Real Property Act, R.S.M., 1954, c. 220, and The Metropolitan Winnipeg Act, S.M., 1960, c. 40; in Ontario, The Planning Act, R.S.O., 1960, c. 296, esp. ss. 26 and 28 (hereinafter referred to as the Ontario Act); in Quebec, The Cities and Towns Act, R.S.Q., 1941, c. 233, esp. s. 429, paragraph 8 as reenacted by S.Q., 1959-60, c. 76, s. 26 (hereinafter referred to as the Quebec Act) and the Municipal Code, s. 392*f* enacted by S.Q., 1963, c. 65, s. 5 (hereinafter referred to as the Municipal Code); in New Brunswick, Community Planning Act, S.N.B., 1960-61, c. 6, esp. ss. 27-38, as am. by S.N.B., 1963, c. 13, and 1964, c. 18 (hereinafter referred to as the New Brunswick Act); in Nova Scotia, Town Planning Act, R.S.N.S., 1954, c. 292, esp. s. 27, as am. by S.N.S., 1964, c. 45 (hereinafter referred to as the Nova Scotia Act); in Prince Edward Island, The Town Planning Act, R.S.P.E.I., 1951, c. 163, esp. s. 24 (hereinafter called the Prince Edward Island Act); and in Newfoundland, The Urban and Rural Planning Act, 1953, S.N., 1953, No. 27, esp. s. 31, as am. by S.N., 1955, No. 19 and s. 61(1) (b)-(h), as am. by S.N., 1955, No. 19 and 1959, No. 47 (hereinafter referred to as the Newfoundland Act).

[9] Land Registry Act, *ibid.*, s. 88. Approval is required before a plan may be received on deposit in the Land Registry Office (unless a judge orders the deposit under s. 98).

Minister of Highways, the Chief Engineer or Assistant Chief Engineer of the Department of Highways, or a person authorized by the Lieutenant-Governor in Council.[10] Plans must be approved or rejected by the approving officer within a time fixed by the Lieutenant-Governor in Council.[11] In municipalities of whatever size the authority is local. Even a village of 500 with no engineer in its employ may name another official, perhaps the clerk, as the approving officer.

In the event of rejection by the approving officer, or his failure to approve or reject within the required time, the owner may appeal to a Judge of the Supreme Court in Chambers in a summary way by petition.[12] The judge may make "such order in the premises as the circumstances of the case require, and may order that the plan be deposited [in the Land Registry Office] if it is otherwise in order".[13]

In Alberta the approving authority is the municipal planning commission in the case of the cities of Edmonton and Calgary, the regional planning commission when so authorized by the Provincial Planning Board and the Director of the Board in all other cases.[14] The applicant may appeal to the Board, which is not bound by the Subdivision and Transfer Regulation, and it may waive or modify any requirement or condition of approval.[15]

In Saskatchewan the approval of the local council is required where the council has made regulations not inconsistent with the Act for controlling subdivisions. The regulations must be approved by the Minister of Municipal Affairs and when no regulations have been made the approval of the Minister himself is required.[16] In a sense a council's jurisdiction extends beyond the limits of its boundaries. When a subdivision is located within three miles of a city, one and a half of a town, and within one mile of a village, if the urban council has adopted a by-law and there is in effect a community planning scheme that includes provision for a system of highways, the jurisdiction is held jointly with the municipality in which the land to be subdivided is situated.[17] The Minister has an overriding power to approve any plan of subdivision after requiring changes if he deems them expedient and to dispense with approval; and he may, by order or regulation delegate this power to the provincial Director of Community Planning.[18] He may also

[10] *Ibid.*, s. 91(2). [11] *Ibid.*, s. 91(1). [12] *Ibid.*, s. 98(1).
[13] *Ibid.*, s. 98(4). [14] Alberta Act, s. 19(2).
[15] *Ibid.*, s. 20. If a decision is not given within ten weeks the applicant may appeal, s. 20(3).
[16] Saskatchewan Act, s. 65(1). [17] *Ibid.*, s. 65(2).
[18] *Ibid.*, s. 70.

declare that a local council has responsibility for plan approval.[19] An owner may appeal to the Provincial Planning Appeals Board if he is dissatisfied with the decision of the council. The Board's decision is final.[20]

Jurisdiction to control subdivision in Manitoba is divided between the Metropolitan Corporation of Greater Winnipeg, which has jurisdiction over land in the Metropolitan Corporation and the additional zone,[21] and the Municipal Board, which has jurisdiction over all other land. In addition in both cases the approval of the registrar general is also required.[23] Approval is a prerequisite to registration and the privilege of registration expires after sixty days from the date of approval by the registrar general.[24] Local control is assured and appears to be paramount, since the Municipal Board may not "approve registration of a plan of subdivision . . . that has not first been approved by resolution of the municipal council concerned".[25] Otherwise the Board is free to consider all representations before approving the plan. There is an appeal from the Municipal Board to the Court of Appeal with leave of a judge of that court, on questions of law and of the jurisdiction of the Board.[26] The Metropolitan Corporation, once the Metropolitan Development Plan has been established, may enact subdivision control by-laws setting out the requirements with which developers must comply.[27] This local jurisdiction is final, but the provisions for the Board of Adjustment, although couched in language more applicable to zoning adjustment, clearly apply to by-laws respecting plans of subdivision.[28] There is no appeal from the Board save to the Council.[29]

The jurisdiction over subdivisions in Ontario is considerably more complicated than in most of the other provinces. A distinction has first to be made between a subdivision of a parcel where the new parcels are described by metes and bounds and where they are described by a registered plan of subdivision.

If the description is by plan, before registration it must have

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[19] *Ibid.*, s. 71. [20] *Ibid.*, s. 65(3).

[21] Metropolitan Winnipeg comprises about 235 square miles and the "additional zone" around the periphery about 425 square miles. For a summary of the system see the Report and Recommendations of The Metropolitan Corporation of Greater Winnipeg Review Commission.

[22] Manitoba Act, s. 102, as am. by The Metropolitan Winnipeg Act, *supra*, footnote 8, s. 213.

[23] The Real Property Act, *supra* footnote 8, s. 117(1), as am. by The Metropolitan Winnipeg Act, *ibid.*, s. 215.

[24] *Ibid.*, s. 117(5). [25] Manitoba Act, s. 106. [26] *Ibid.*, s. 58.

[27] The Metropolitan Winnipeg Act, *supra*, footnote 8, s. 83(1)(*d*).

[28] *Ibid.*, s. 84(1). [29] *Ibid.*, s. 84(7) and (8).

the approval of the Minister of Municipal Affairs.[30] Although the Minister may consult local councils and boards, indeed he almost invariably does, it is his decision that controls.[31] But the owner, or any interested person, perhaps any person, may require the Minister to refer the plan to the Ontario Municipal Board, in which case the Board has the same powers as the Minister to approve.[32] The Board may state a case on a question of law for the Court of Appeal[33] and there is an appeal from the Board to the Court of Appeal with leave of the court on questions of law and jurisdiction[34] and from the Board to the Lieutenant-Governor in Council on any question.[35]

If the description is by metes and bounds then the Minister's approval is not required and no control is involved unless the local council has passed a subdivision control by-law. Such a by-law need only designate an area within the municipality as an area of subdivision control. The area may be as small as the land in a single subdivision, or it may be the whole of the municipality. Once designated, the area is affected by the provisions of The Planning Act and presumably is affected by changes to those provisions when the Act is amended, whether the by-law is amended or not.[36] Despite the now declining practice of repeating in the by-law the language currently in the Act, the by-law as such would appear to have no consequence beyond the designation. Once an area is designated, an owner of land in the area cannot convey or mortgage it or enter into an agreement to lease it beyond twenty-one years unless the local planning board consents, or, where there is no planning board, the Minister of Municipal Affairs.[37] The jurisdiction of the planning board or the Minister is limited by an exemption from the control: consent is not required if the land is described in accordance with and is within a registered plan of subdivision. [38]The effect of the subdivision control by-law is, therefore, to force the owner to apply for the Minister's approval of a registered plan. He is likely to receive a local consent only if his subdivision creates a very small number of lots. Further exemptions are provided. First, if the owner does not retain the fee or the

[30] The Registry Act, R.S.O., 1960, c. 348, s. 86(20); The Land Titles Act, R.S.O., 1960, c. 204, s. 161.

[31] Ontario Act, s. 28(3). [32] *Ibid.*, s. 34(1).

[33] The Ontario Municipal Board Act, R.S.O., 1960, c. 274, s. 93.

[34] *Ibid.*, s. 95. [35] *Ibid.*, s. 94.

[36] S. 26(1). But see S.O., 1960-61, c. 76, s. 1(3) as to the effect of the amendment that year. Also *Re Avola and Hallett*, [1963] 1 O.R. 167.

[37] Ontario Act, s. 26(1) (*e*). The consent lapses after six months unless the permitted transaction takes place, s. 26(3*a*).

[38] *Ibid.*, s. 26(1) (*a*).

equity of redemption in any land abutting the land conveyed or mortgaged, consent is not required.[39] Thus if the owner is selling for example, a five acre block to a purchaser and he owns and retains no abutting land, he needs no consent. But if he is dividing a ten acre parcel, or if he owns a separately described parcel, of another five acres, that abuts on the five acres he is selling, he needs consent. Second, if the parcel being sold is ten acres or more in area, and any abutting land retained is also ten acres or more, no consent is required.[40] Apparently a ten acre parcel is thought to be large enough to be controlled adequately when the purchaser subdivides. In fact, a ten acre parcel with only 150 feet of frontage is not unknown even today and obviously creates serious problems. Finally, where the land is being acquired or disposed of by her Majesty in right of Canada or of Ontario or by any municipality, metropolitan municipality or county, no consent is necessary.[41]

The 1964 amendments[42] to The Planning Act provide for a transfer of the consenting authority of the planning boards to committees of adjustment whose jurisdiction hitherto in practice has been confined to zoning by-laws. It was evidently thought that the planning boards devoted too much of their time to dealing with consent applications and correspondingly too little on larger planning problems. In some planning areas consent applications had some political significance and a planning board's reputation as an advisory body might be coloured by its reputation as a deciding body. When, indeed *if*, the 1964 amendment comes into effect (on a date to be proclaimed) the planning boards will become exclusively advisory agencies with no deciding powers.

The limited control established by the Act may be extended in the by-law, at the choice of the local council, to bring within control a plan of subdivision that has been registered for eight years or more[43] and to limit the privilege of further subdivision of a lot in a plan already registered.[44] The first control is popularly spoken of as "deregistration" of a plan, but it is somewhat less, since it merely limits the privilege of subdivision—the privilege of a lot owner to dispose of it without consent, if he owns and retains no abutting land, is unaffected. The second control is sometimes called "part-lot control" and is a necessary control when the demand for housing lots is high and developers might be tempted to subdivide still further, below a desired minimum area or width of lot.

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[39] *Ibid.*, s. 26(1) (*b*). [40] *Ibid.*, s. 26(1) (*c*). [41] *Ibid.*, s. 26(1) (*d*).
[42] S.O., 1964, c. 90, ss. 1 and 6. [43] Ontario Act, s. 26(2).
[44] *Ibid.*, s. 26(3).

The planning Board's decision is subject to appeal to the Municipal Board[45] and thereafter the three kinds of appeal are available. The first passing of a subdivision control by-law is a wholly local choice but once an area has been designated, the council may not alter or dissolve it without the approval of the Minister or, on application, the Municipal Board in lieu of the Minister.[46] Just what constitutes an alteration or dissolution *of an area* is not clear, but it seems unlikely that the mere changing of the incidence of the law within a previously established set of area boundaries that remain unchanged would constitute an alteration. Thus a council might amend its by-law to add part-lot control or "deregister" an old plan without ministerial approval. An "old" plan in Ontario could mean a plan registered back in the nineteenth century but not developed. It could also mean a plan registered prior to modern controls. In some cases it might be thought desirable to "deregister" a recent plan that hindsight suggests was hastily approved. The eight year period is intended to give the developer some security from local council whimsy.

In Quebec the jurisdiction is wholly local and there would appear to be no appeal provision.[47]

The New Brunswick legislation puts the jurisdiction to *approve* subdivision in the planning commission,[48] a body consisting of five up to fifteen members established by the local council. Control is also vested in the council,[49] which, although it may set standards in a "subdivision by-law", may vest most of the discretion in the commission save for the requirement that in the opinion of the council, the services needed will be within its ability to pay and the owner has made arrangements satisfactory to it for his share of the installation of the services.[50] The commission has power to vary the requirements of the by-law when it is of the opinion that the variance is desirable for the development of any piece of land and accords with the general intention of the by-law and, if there is one, the Community Plan.[51]

Where a commission approves a subdivision of land that is not situated in a city, town or village, the approval is not effective until the Minister of Public Works has assented to it if the plan provides for new streets or if it may in the commission's opinion

[45] *Ibid.*, s. 26(14). Only the applicant may appeal and the Board can only vary the conditions, it cannot vary the basic consent.
[46] *Ibid.*, ss. 26(12) and 34(1).
[47] Quebec Act, s. 429, para. 8, unnumbered subparagraph five, Municipal Code s. 392*f*, para. *e*.
[48] New Brunswick Act, s. 30(1).
[49] *Ibid.*, s. 29(1).
[50] *Ibid.*, s. 29(1) (j) (i) and (ii)
[51] *Ibid.*, s. 29(4).

affect the future location of streets.[52] The Minister may not assent until the Provincial Planning Board has approved the location of the streets and the streets have been constructed under the supervision of and to standards approved by the Minister.[53] The Board's approval and the street construction may be dispensed with on the recommendation of the commission and the Board if the Minister is satisfied that a substantial part of the land has been laid out generally as shown on the plan and a substantial part of the streets had been used as streets before June 1st, 1961.[54]

As in Ontario, the New Brunswick subdivision control procedures need not apply to the whole municipality, let alone the whole province, but the discretion in new Brunswick to exempt land is vested in the planning commission which has an express power of delegation of this authority.[55] The commission or its delegate may exempt from the Act or from the council's subdivision by-law (1) any subdivision into lots that have an area of at least five acres and frontages of at least five hundred feet; (2) a parcel of land that is the subject matter of a separate deed or is separately described in a deed of two or more parcels if the deed was registered before the commission was established or a subdivision by-law was passed; (3) a part of a piece of land that is distinct from other parts by reason of separate possession, occupation or use and was so distinct before a subdivision by-law was passed; (4) a part of a piece of land that is separated from the other part by a street, railway or river; (5) any transaction that amounts to a lease for a period not exceeding ten years; (6) any easement; (7) a sale pursuant to a mortgage made before a subdivision by-law was passed; and (8) any further exemption added by the Provincial Planning Board and approved by the Lieutenant-Governor in Council.[56]

In Nova Scotia the primary jurisdiction to control subdivision is vested in the Minister of Municipal Affairs who may "prescribe regulations", but approval is required from the council of cities, towns or municipalities,[57] and where a council has appointed a town planning board the powers and duties of the council respecting subdivisions *shall* be delegated to the board.[58] The jurisdiction of a *board* in a town or city extends into a municipality two or three miles respectively unless the municipality has appointed a board and no subdivision may be made in this belt unless the board of the nearest town or city approves. Even when there is a

[52] *Ibid.*, s. 35(1). [53] *Ibid.*, s. 35(2). [54] *Ibid.*, s. 35(8).
[55] *Ibid.*, s. 28. [56] *Ibid.*, s. 28(1) (a)-(h).
[57] Nova Scotia Act, s. 27(1). [58] *Ibid.*, s. 27(4).

planning board in the municipality the decision on such a subdivision, although approved by the municipality board, is subject to appeal within thirty days by the town or city (presumably the council) to the Minister of Municipal Affairs.[59] The Minister may adopt, vary or revoke the plan and his decision is final.[60] Neither the council nor the planning board may approve a plan of subdivision in a "municipality other than a city or town" until the Minister of Highways or his delegate in his department has approved the street system.[61]

The "prescribing" of regulations by the Minister evidently means the proclamation of regulations requested by the local council or town planning board at the suggestion of the Minister. Only sixteen of the sixty-six municipalities had had subdivision regulations prescribed by the Minister at the end of June, 1964. In February, 1964 a model form of subdivision regulations for towns in Nova Scotia was prepared by the Community Planning Division of the Department of Municipal Affairs for "recommendation" to the towns.[62] A board, but not, apparently, a council, may, with the approval of the council and of the Minister, "prescribe" additional regulations respecting subdivisions.[63]

In Prince Edward Island a local council may approve and file in the clerk's office, with the Provincial Board and in the appropriate registry office a map showing areas in which subdivision control is operative.[64] Land in such areas may only be sold or conveyed if it is subdivided according to a plan of subdivision registered in accordance with The Registry Act, or unless the sale or conveyance is approved by the council.[65] The Registry Act is not a control statute—the Registrar must register any plan properly proved for registry.[66] The only real sanction to control by the Council is thus the cost of registering a plan. Any party to a proposed sale or conveyance may appeal to the Provincial Board and the Board's decision is final.[67]

Newfoundland divides the jurisdiction between the City of St. John's and areas held or administered by the St. John's Municipal Council under the Newfoundland Act or any other Act and

[59] *Ibid.*, s. 27(5), as am. S.N.S., 1956, c. 43, s. 1. In Nova Scotia a "municipality" resembles an Ontario "county".
[60] *Ibid.*, s. 27(8).
[61] *Ibid.*, s. 27(12), as enacted by S.N.S., 1964, c. 45, s. 2.
[62] Available in mimeographed form.
[63] Nova Scotia Act, s. 27(9), as am. by S.N.S., 1964, c. 45, s. 1.
[64] Prince Edward Island Act, s. 24(1).
[65] *Ibid.*, s. 24(2).
[66] The Registry Act, R.S.P.E.I., 1951, c. 143, s. 28.
[67] Prince Edward Island Act, s. 24(3).

all the rest of the province. Outside of the St. John's areas the Provincial Planning Advisory Board, subject to the approval of the Lieutenant-Governor in Council, may make regulations prohibiting the subdivision of land except with the approval of the Director of the Board.[68] The Board's regulations may also prescribe standards and procedure.[69] Notwithstanding this power in the Board and Director, when a municipal plan comes into effect the authorized council must prepare regulations "prescribing the subdivision of land" and "provisions for appeal to the Advisory Board" against any decision of the council relating to "the use of land".[70] The appeal provisions could easily be said to apply to a decision to refuse the privilege of subdivision—unless the sale of land is not the *use* of land. Authorized councils do in fact prescribe regulations for land use zoning and subdivision in which the council is the approving agency and an appeal to the Board is provided.

General guides to the exercise of discretion.

Unlike zoning enabling legislation, which in only a few provinces contemplates explicitly a system of "spot zoning", subdivision control is in all provinces an *ad hoc* control. There are, however, in each province, by law or practice, or both, fairly clear guides to the exercise of discretion by the approving agency. In most cases there is provision for a subdivision control by-law in which standards may be set forth generally, but there is still room for discretion on many matters. There are also a number of other guides available.

The master plan

Since the subdivision of land involves a number of questions that might reasonably be called "planning" questions, one might expect to find some formal link, in theory at least, between the master plan and the approved subdivision. Not always is conformity with the plan a statutory requirement.

Under the British Columbia Act the approving officer must "give due regard to and take cognizance of any official community plan".[71] Similarly under the Ontario Act, the Minister, in considering a plan, shall "have regard to whether the plan conforms to the

[68] Newfoundland Act, s. 61(1)(b), as am. by S.N., 1955, No. 19, s. 6 and 1959, No. 47, s. 12.
[69] *Ibid.*, paras. (c)-(g).
[70] *Ibid.*, s. 31(b) (ii) and (iii), as am. by S.N., 1955, No. 19, s. 4 and 1959, No. 47, s. 6.
[71] S. 711(3).

official plan".[72] Since in Ontario the Minister must have approved the plan unless the Municipal Board did, it is unlikely that he would disregard the plan altogether, but the legislative device is a useful one to give a senior official discretion, at the same time drawing his attention to an important factor to be taken into account. Where the plan of subdivision is submitted to the Municipal Board and the Board's jurisdiction was not invoked to approve the official plan for that planning area, the Board may be less concerned than the Minister. Since the approving officer in British Columbia may have had nothing to do with the plan his concern may be somewhat less conscientious than the Ontario Minister's.

In Alberta, Saskatchewan, Manitoba, Quebec and New Brunswick conformity with the plan is to some extent statutory. In Alberta land may be subdivided only in conformity with a plan or proposed plan or a logical extension of the plan.[73] In Saskatchewan a community planning scheme may provide for the manner in which land should be subdivided and a plan may be refused that is inconsistent with a scheme adopted under the Act.[74] In Quebec the council may by by-law prohibit subdivisions that do not coincide with the master plan.[75] In New Brunswick the council may provide that a plan of subdivision must in the opinion of the planning commission "conform to" the community plan, or proposed plan or a logical extension of it.[76] In Manitoba where a town planning scheme has been prepared for the area affected by a proposed plan of subdivision the plan must be prepared as, or as part of, a town planning scheme under The Planning Act.[77] The Municipal Board, before approving a plan of subdivision shall ascertain whether it should, or need not, be included in a town planning scheme and the applicant may be required to get a report from the "comptroller of town planning" as to the applicability of The Town Planning Act to the plan.[78]

In the remaining provinces the connection with the master plan is somewhat more tenuous and less explicit. Under the Prince Edward Island Act, where the council has the power to approve,

[72] S. 28(4).

[73] Alberta Act, s. 16(*b*). See also Alberta Regulation, s. 15. Conformity is required with planning measures generally, and to the extent the approving authority thinks is "reasonable and logical". The subdivided land may be only "adjacent" to the land covered by the planning measure.

[74] Saskatchewan Act, s. 74(*a*), as am. by S.S., 1959, c. 107, s. 11.

[75] Quebec Act, s. 429 unnumbered para. 3; Municipal Code, s. 392*f*, para. *c*.

[76] New Brunswick Act, s. 29(1) (i) (ii).

[77] Manitoba Act, s. 104(1) and (2). Plans for new townsites or summer resorts must also be prepared as part of a scheme.

[78] *Ibid.*, s. 105.

if this power is, or must be, exercised by by-law, the by-law must conform to the official plan.[79] Since the Act does not say explicitly that approval may be by resolution the general rule that a council should act by by-law in important matters would probably apply. In Newfoundland when a municipal plan has been adopted for a municipal area the authorized council must develop fully a scheme for control of the use of land in strict conformity with the plan and prepare regulations dealing with subdivision.[80] That the regulations must be in strict conformity is likely but not explicit. The regulations made by the Board and the judgment of the Director would probably conform but there is no statutory requirement. The Nova Scotia Act does not relate subdivision control to the official town plan, but since no public improvements inconsistent with the plan may be undertaken by the council,[81] it could not implement that aspect of a plan of subdivision to which it had given its approval unless the necessary public improvements conformed.

Concern about the relation of the plan of subdivision to the master plan is rather academic unless the master plan includes features relevant to the subdivision and development of private land. Such features could include the land use policy and a programme of public works, such as extensions of water mains, installation of sewers, the layout of major and even minor roads, and the phasing of development over a period of years in terms of selected areas or of budget needs. Comparatively few master plans have been adopted in Canadian municipalities and fewer still have all of these features. Nevertheless the master plan, or plan of municipal development, still holds the key to rational regulation of subdivisions.

The subdivision control by-law

A more likely guide to subdivision development is the subdivision control by-law. In the provinces where the council or some provincial agency is authorized to pass by-laws setting subdivision standards these standards presumably prevail although the enabling legislation is not always explicit in defining failure to comply with a subdivision control by-law as a ground for refusal. In British Columbia the power to refuse when the subdivision plan does not conform to the by-law is explicit.[82] In Alberta an applica-

[79] S. 18.
[80] Newfoundland Act, s. 31 esp. para. (h) (ii), as am. by S.N., 1955, No. 19, s. 4.
[81] S. 5.
[82] Land Registry Act, *supra*, footnote 8, s. 94.

tion may be approved only if the proposed subdivision conforms with the Act and the provincial regulations,[83] but if the approving officer is of opinion that the compliance with the regulations is impracticable or undesirable because of circumstances peculiar to a proposed subdivision he may refer the matter to the Provincial Planning Board who may grant relief.[84] In Saskatchewan the provision is explicit.[85] Neither Manitoba nor Ontario uses the by-law system. The Ontario Act does provide for a number of factors to which the Minister and the planning board shall have regard and most of these are matters similarly delineated in subdivision control by-laws in other provinces. In Quebec some regulation may be by by-law but council approval is required and while a council would presumably follow its own by-law it is not explicit that it should and practical considerations doubtless dictate some deviation from time to time. The absence of express power to vary leaves a variance open to challenge as discriminatory. In New Brunswick the planning commission must be of the opinion that the proposed subdivision meets the requirements of the by-law but it may permit variances.[86] Neither the Nova Scotia Act nor the Newfoundland Act is explicit.

The content of a subdivision control by-law is too extensive to be set out here and specific matters of subdivision control policy are discussed at length below. The kinds of matters dealt with, some of which are more important than others and more commonly found, can be seen from an examination of The Subdivision and Transfer Regulation in Alberta, which contains sixty-nine sections many of which contain several subsections. In addition to the technical requirements of an application—the kinds of diagrams, plans, and the like that are to be filed—and the procedural provisions, the owner is warned that the suitability of land for subdivision and sale must be established having regard to topography, soil characteristics, surface drainage, potential flooding, subsidence and erosion, accessibility, availability and adequacy of services, the existing and prospective uses of land in the vicinity as well as its marketability and the likelihood of economic and orderly provision of necessary services.[87] These general considerations bear a strong similarity to the factors that the Minister of Municipal Affairs in Ontario shall have regard to in settling a draft plan.[88] Their statement in regulation form is no more nor

[83] Alberta Act, s. 19(3). [84] *Ibid.*, s. 21.
[85] Saskatchewan Act, s. 74(*a*), as am. by S.S., 1959, c. 107, s. 11.
[86] New Brunswick Act, s. 29(1) (i) (iii) and (4).
[87] Alberta Regulation, s. 13. [88] Ontario Act, s. 28(4).

less binding than is the Ontario Act. But the Regulation in Alberta goes on to provide for general factors governing subdivision design, accessibility of parcels, construction of public roadways, utilities, provision of reserves (that is, land to be used for schools, parks and recreation areas), street systems, street widths and lengths, design, intersections, layout and dimensions of lots, with special provisions for subdivision for residential, commercial and industrial uses, country residences, small holdings, resort purposes and highway commercial use.[89] Some of the more controversial of these matters are discussed below.

Other sources of guidance

In addition to the formal documents embodying subdivision policy, developers in Ontario had access to the *Subdivision Approval Manual* (now out of print), which deals primarily with procedure, and to the publication *Ontario Planning*, in which, from time to time, major notes on subdivision control have appeared. Nothing in *Ontario Planning* is more than an indication of the Minister's likely way of looking at a proposed plan but since it is a production of the Minister's staff, its value as an indicator is fairly high.

Particular policy questions: design

The conflict of interest in the matter of design between the private developer and the agency supposedly representing the public interest is usually most apparent in the developer's attempt to get the greatest number of lots out of his property. For various reasons the control agency frequently wants fewer lots. It is a truism that the more lots there are the greater the financial return. When the number of lots is increased by improvement of the street layout, and without reducing their size, the truism is rather obvious. It is less obvious that smaller lots can be sold for almost as much as larger lots and that there is usually a net gain even if the greater number of lots have to be sold for slightly less. The question then arises: on what grounds can the state properly insist on minimum lot sizes?

[89] The Alberta Regulation relates subdivisions to proposed land use, which must be shown for each parcel (s. 5(2)) and where the proposed uses involve two or more "classes of use" the approving authority may require that the subdivision be designed by a planner (s. 5(10)) *i.e.*, a member or associate member of a recognised town planning institute or a person who is otherwise formally recognised as having a professional planning qualification (s. 2(21)). Under the Ontario Act, s. 28(2) (*d*) the applicant must disclose the proposed use of the lots, but generally subdivision control is kept separate from land use control.

Minimum lot sizes are, of course, commonly settled in Canada by zoning by-laws and the issue has been frequently met in that context. Quite independently of zoning standards, however, subdivision control in most provinces attempts to limit the lot size. One reason commonly given for requiring large lots is that space for private water supply and sewage systems is necessary. Hence in British Columbia the subdivision control by-law may provide that where both municipal water and sewers are available, a minimum of 5,000 square feet will be required. Where only municipal water is available, 7,500 square feet will be required. Where neither municipal service is available, 15,000 square feet will be required.[90] These standards are not seriously different from those prevailing in other provinces. The Alberta Regulation sets figures of 5,000 and 10,000, the latter where neither water nor sewer is available. Where a duplex dwelling is erected, 3,500 square feet are required for each unit. Where a rowhouse is erected, 3,500 square feet are required for the end units, but only 2,500 square feet are required for interior units. The standards for higher densities are not comparable, since the British Columbia standard cited does not deal with higher densities but the difference between 15,000 square feet and 10,000 square feet is such that an Alberta developer could expect to get three lots to every two approved for the British Columbia developer. As the pressure for serviced lots increases, of course, the demand will drop, and the developers in both provinces will be concerned largely with the need for 5,000 square feet for a city lot. Given the fashion of the moment for so-called "ranch type" bungalows, a fifty foot lot is almost a necessity. Construction of three storey detached houses on thirty-three foot lots or even narrower ones was common in the city of Toronto half a century ago and many of these houses still exist and are in reasonable demand for single family dwellings. A fifty foot frontage is today a common minimum, as many zoning by-laws testify, and the provision in the Alberta Regulation[91] for "a mean width of not less than 40 feet for internal parcels and not less than 50 feet for corner parcels, provided that the average width of any group of adjoining internal parcels shall be not less than 45 feet and provided that the parcel widths are reasonably varied" is fairly generous. The express insistence on varying widths is quite

[90] These figures are from a departmental suggested by-law. The Act itself, s. 712, establishes a minimum frontage of one-tenth of the perimeter of a lot but the council may exempt a subdivider from the minimum by a two-thirds vote of all members.

[91] S. 34(1) (a) (i).

uncommon. Whether a "group" consists of two or at least three is not defined, but with two to a group, one could be thirty feet wide and one sixty, and with three, there could be two twenty-five foot lots side by side next to an eighty-five foot lot. However, as long as the area must be at least 5,000 square feet,[92] the narrow lots would have to be inordinately deep and a complementary control limits their depth to an average of not less than 110 feet,[93] which seriously limits the variety possible. The idea of requiring only an average area instead of width and depth seems to be unattractive. There is no particular virtue in these examples, and an approving authority might not accept such variety if it were offered. But the possibility of variations are greater than in most provinces that have only minimum widths. There is no legislative guide at all in some provinces, for example Ontario, but by its very absence the Minister or the Ontario Municipal Board may be open to persuasion that even greater variety than that almost required in Alberta should be encouraged. If it is assumed that a purpose of subdivision control is to encourage better design, freedom to experiment with lot shapes and sizes is undoubtedly important, but if there is no corresponding freedom and encouragement of suitable housing design and location the purpose may be frustrated. In short, a liberal subdivision policy can be thwarted by a rigid zoning control over size and location.[94] Even if both subdivision and zoning or development controls are liberal, the end product will still depend on the taste of the developer.

Not only is the unnecessarily, or uniformly, large lot an expense to the developer, but the current insistence on at least a sixty-six foot right of way for all streets as well, in the view of some planners means that a good deal of land that might be used for housing is used for unneeded street space. The Alberta Regulation permits a fifty foot street allowance for "minor" streets,[95] which is a land saving of nearly twenty-four per cent. Such a concession is increasingly common. In Newfoundland the subdivision regulations for the Town of Baie Verte permit a forty-four foot reservation on minor residential roads and *cul-de-sac* roads.[96] Service roads designed to limit the number of direct accesses to a highway may be thirty-three feet. Again, in Ontario no subdivision control standard is provided in the Act, but the Min-

[92] *Ibid.*, s. 34(1) (a) (iii). [93] *Ibid.*, s. 34(1) (a) (ii).

[94] See Milner, An Introduction to Zoning Enabling Legislation (1962), 40 Can. Bar Rev. 1, esp. at pp. 13-17.

[95] S. 25(1).

[96] Schedule A(2). Mimeographed copy kindly supplied by Provincial Director.

ister is not bound by section 466(2) of The Municipal Act[97] which requires Municipal Board approval for streets narrower than sixty-six feet. It is commonly thought, however, that the provincial grants for highways will be refused for narrow road allowances.

There are no positive provisions in the legislation to guide the subdivision designer on questions such as the location of non-residential uses in residential subdivisions—churches, schools, local shopping centres, and service stations. These matters could have some direction from the master plan and indeed that is probably the proper place to look, but there are, of course, comparatively few master plans in Canada, and still fewer that deal with such questions.

The control of street layout and lot size raises a difficult question of degree. How far should the state carry its own idea of design when it is in conflict with the design proffered by the owner and investor? Has the state any "right" to insist on a "Radburn plan"[98] when the developer wants a grid pattern? Even if the state tries to convince the developer that better design would save him money, should it force the better design on the developer if he does not want to be convinced? Critics have suggested that the developer or his purchasers are "sovereign consumers" whose choice ought to have priority unless the state can show from its choice of design benefits to neighbouring land, or, better, unless it can show from the developer's choice detriment to neighbouring land.[99] Other, somewhat socialistic, views are possible. If the present generation considers its duty to be to pass on to the next generation the best urban development it can, the choice of the "sovereign consumer" has no particular claim to sympathy. He is in fact the developer, a producer, not a consumer, in this situation. The difficult question is whether the developer's idea of what is good is better or worse than the state's idea.

Servicing costs

Much more controversial than design is the allocation of the cost of servicing new subdivisions. The traditional method, if any method can be so described, was for the developer to put in few services at his (or his purchasers') expense, but for the local government to install most of the services under local improvement

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[97] R.S.O., 1960, c. 249, s. 466(3).

[98] *Supra*, footnote 3.

[99] See, for example, Dunham, City Planning: An Analysis of the Content of the Master Plan (1958), 1 J. of L. and Eco. 170, esp. at pp. 177 and 180.

legislation.[100] The principle of such legislation is that some of the cost is borne by the community as a whole and some, usually about seventy per cent, is borne by the landowners who most directly benefit. In that event the timing of the service becomes crucial. If, for example, streets, water pipes, sewers and paved sidewalks are constructed and installed at the expense of the local government before houses are built, the risk that the houses will not be built will fall heavily on the local government. It expects to recoup the cost of the services in large part from the owners of lots with houses, who pay higher taxes than owners of lots without houses. During the depression years many municipalities were caught in just this plight, that after the land was serviced, the market for houses dropped and vacant lots lined paved streets.

Most provinces now in effect require the developer to carry the whole risk of a falling market, as if he had the whole benefit of the sale of serviced lots and houses. Whether this view is justified is an open question. If the factors involved were capable of precise enough identification, the question would be one for "cost benefit" analysis and would yield to standard cost accounting procedures.[101] If the developer guesses correctly he will pass the whole of the cost (but not the risk) on to his purchasers. In that case he will pay nothing in the long run. But the purchasers are clearly not the sole beneficiaries of streets, not to mention schools, if the developer is asked to pay for them. Other inhabitants will use them. At the same time the purchasers will use municipal services paid for by the other inhabitants. In some cases there may be services installed at the request of the other inhabitants that are still being paid for and if the debt service can be identified, perhaps the purchasers should be excused from paying any part of the amounts unpaid. Any particular development will require close analysis in its particular municipal context. It is likely that

[100] See, for example, The Local Improvement Act, R.S.O., 1960, c. 223. And see, Crawford, Canadian Municipal Government (1954), pp. 211-213.

[101] The questions discussed briefly here as problems of legislative policy are, in the United States, constitutional problems as well. The question is whether there is a taking of property or a mere regulation not involving discrimination. Hence the courts have had a large hand in their development. Two recent analyses may be of interest: Reps and Smith, Control of Urban Land Subdivision (1963), 14 Syracuse L. Rev. 405 and Heyman and Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions (1964), 73 Yale L. J. 1119. Footnote 102 on p. 1143, contains a typical calculation of the cost per lot of additional school facilities made necessary by a subdivision development. See also One Hundred New Families (1955), 2 Ontario Planning No. 9 (November) where the additional municipal costs of all kinds are analysed.

the factors are too vague and uncertain to yield very satisfactory results from the relatively fine tools of cost accounting.

Indirectly, in addition to the other inhabitants who use streets and schools, local merchants may profit from the increased local market in most cases; not, perhaps, where development is on such a scale that new shopping facilities are necessary. Presumably, too, the employment and the investment "climate" is usually improved by an increase in the number and variety of employable persons. Because most of the community benefits are difficult if not impossible to measure, they seem to be discounted, especially in the face of an attractively simple, if *possibly* unfair, method of financing land services. One result, among others, is that services are paid for by second or third mortgage loans, at extremely high interest rates, where municipal loans would probably have cost less than half. Such a price rise may be a significant inflationary pressure.

Streets and street services

The British Columbia Act authorizes the Council in its subdivision control by-law to require that streets *within* the subdivision be cleared, drained and surfaced to a prescribed standard, but sidewalks and boulevards may not be included.[102] Land may be requested without compensation for streets within the subdivision to a width of sixty-six feet including land for widening existing streets within or bordering on the subdivision up to an additional thirty-three feet.[103] The council may also require the developer to install a "sewage collection system" and connect it to the existing municipal sewage disposal system. The lands included in the subdivision may then be exempted from the charges imposed in the municipality for work of a like nature for a period of time calculated to be sufficient to amortize the actual cost of the collection systems computed at an interest rate not exceeding four per cent. If the municipality requires a main to be of a diameter greater than is needed to service the subsivision, the municipality must assume the cost of the extra capacity.[104] The Council may also require the developer to install water mains and sanitary sewers in the subdivision and to the subdivision from established trunk mains and sewers where the established mains and sewers are at least 2,000 feet from the subdivision, or such greater distance as may be specified in the by-law.[105] The same by-law may

[102] S. 711(1) (*d*).
[103] *Ibid.*, subsection (2) and s. 713.
[104] *Ibid.*, subsection (1) (*e*).
[105] *Ibid.*, subsection (5).

also provide for the sharing of the cost between the developer and the municipality.[106] Where the subdivision is of land zoned for agricultural, rural or industrial use, the enforcement of the trunk main and trunk sewer by-law provision is subject to appeal to the Zoning Board of Appeal.[107]

The Alberta Regulation authorizes the approving authority at the written request of the local council to impose a condition on approval that all or any streets, curbs, storm sewers, drainage ditches, bridges, culverts, dikes, land fill and "other necessary services" be provided or constructed.[108] The approving officer may also require the applicant to enter into an agreement in writing with the council stating the respective obligations to be assumed by him and by the council respecting construction, installation, operation, repair and maintenance of specified works and services, the standard to be met, the method of payment and the timing of construction and installation in relation to the development of the subdivision.[109] The approving authority may require the Director to place a caveat relating to the agreement upon the land to be registered.[110] If a subdivision that is subject to such an agreement is somehow later included within the limits of another municipality "the respective obligations set forth in the agreement shall remain in effect as between the applicant and the council of that municipality".[111] Nothing is said of the effect if the applicant conveyed the land to another developer but the agreement is "deemed to be a covenant running with the land".[112] This question is discussed below when the Ontario provisions are reviewed.

Regulations made by the Minister in Saskatchewan may prescribe "reasonable" conditions to ensure the construction of graded, gravelled or paved streets and lanes, the construction of curbs, sidewalks and drainage ditches and the installation of culverts.[113] No mention is made of storm sewers, or water supply or sanitary sewer systems. Every council can enter into agreements not inconsistent with the Act or by-law and the agreements "shall bind the land".[114]

[106] *Ibid.*, subsection (6).

[107] *Ibid.*, subsection (7) and s. 709(1) (c).

[108] S. 18(1). See also Alberta Act, s. 24(1), as am. by S.A., 1964, c. 68, s. 6.

[109] *Ibid.*, s. 18(2).

[110] *Ibid.*, s. 18(3).

[111] *Ibid.*, s. 18(4).

[112] Alberta Act, s. 143.

[113] Saskatchewan Act, s. 69(*a*). Regulations controlling the subdivision of land were published in 1959, 55 Sask. Gaz. 27-30. Regulation 12(10) "vesting—(referred to by some as dedication)—All land reserved for streets and lanes when adjoining land to be subdivided shall be properly vested in the Crown".

[114] *Ibid.*, s. 131(2).

In Manitoba, the Municipal Board may approve registration of a plan of subdivision upon terms requiring that, before any lots are sold, "adequate waterworks, sewers, streets, lanes and other improvements" are constructed or installed.[115] The Metropolitan Council may enact a by-law with respect to "requirements with which persons establishing and developing, or proposing to establish and develop, a subdivision of an area of land shall comply". No further particulars are specified.[116]

The pace of suburban development in Ontario since 1945 especially around Metropolitan Toronto has been perhaps the fastest and on the widest scale of any province in Canada. The struggle there to find an equitable solution to the allocation of the cost of services has been more openly carried on and the efforts of municipalities to press the cost on the developer and his purchasers have been resisted in the courts and before the Ontario Municipal Board. For some years the Act did no more than direct the Minister, in settling a draft plan of subdivision, to have regard to "the adequacy" of highways, utilities and municipal services and the adequacy of school *sites*.[117] He was, however, free to impose such conditions to his approval as in his opinion were advisable.[118] Specifically, he was authorized to impose, among others, the condition that such highways as he deemed necessary be dedicated[119] and sufficient land, other than land occupied by building or structures, be dedicated for widening existing highways.[120] With no more statutory authority but with an excellent subdivision market, municipalities managed to insist that roads be built, first with gravelled surfaces, later with hard surfaces, still later with curbs and paved sidewalks; first with water mains and open ditch drains, later with water mains and storm and sanitary sewers. The method by which these services were obtained was straightforward if not explicitly authorized—the municipality would tell the developer that when the Minister asked its opinion of the proposed plan of subdivision the municipality would refuse to recommend it unless he, the developer, would agree to supply specified services, constructed to a specified standard, and provide a performance bond to guarantee them. Although the Ontario Act has no provision similar to that of section 106 of the Manitoba Act, the Minister almost invariably refused to approve a plan on failure of the municipality to recommend it and the agreements were

[115] Manitoba Act, s. 107.
[116] The Metropolitan Winnipeg Act, *supra*, footnote 8, s. 83(1) (e).
[117] The Ontario Act, s. 28(4).
[118] *Ibid.*, s. 28(5). [119] *Ibid.*, para (*b*). [120] *Ibid.*, para. (*c*).

usually forthcoming. As long ago as 1958 the Minister indicated in his *Subdivision Approval Manual* that "it will usually be required that the subdivider agree to satisfy all the normal requirements of the municipality with respect to the construction of roads or streets and the installation of services".[121]

One early objection to this practice orally made before the Ontario Municipal Board, to whom a subdivision approval application had been referred, was that the Minister had no power to refuse a plan. It was argued that the Act expressly instructed him to settle a draft plan that, in his opinion, would meet all requirements.[122] The argument was not accepted and it is difficult to avoid the conclusion that the Minister must have the power to refuse. He had to have regard to whether the proposed plan was "premature",[123] and he could hardly meet that requirement if indeed the plan was premature and that uncertain word referred to economic conditions over which the Minister had no control.

Ontario municipalities soon discovered that it was not enough to have the developer construct and install municipal services only on the land included in his plan. Too frequently the land was some distance from the nearest water main or sewer main and the cost of connecting the water and sewer pipes in the subdivided land to the existing services was not inconsiderable. In some cases it might even be necessary to add to the capacity of the pumping station, or install a booster at some key point, or to extend a sewage treatment plant, or even construct a new one. These "off site" expenses were at least shared by asking the developer to pay perhaps $500.00, or even, in one case to come to my attention, $750.00 for each lot before a building permit would be issued.

These agreements were made with the full knowledge of the Minister and were accepted by most developers and municipalities because the alternatives were even less satisfactory. One alternative was refusal of the plan. The Minister was forced by economic and political facts to accept the municipality's argument, in most cases, that it was not able to finance the services that a new subdivision would add to the municipal tax bill. As long as municipalities are forced to draw most of the locally raised revenue from land taxes it is unlikely that they can afford to let the residential development greatly exceed in value the commercial and industrial development. This relationship arises from the "political fact" that the amount of taxes a municipality can collect from householders is less than the cost of the services the householders demand. The

[121] Page 19, para. (d). [122] Ontario Act, s. 28(3). [123] *Ibid.*, s. 28(4) (*b*)

extra revenue necessary comes from provincial government grants and from commercial and industrial landholders who pay a higher amount (based, of course, on "market value") more willingly since they treat it as a cost of doing business and pass it on to their purchasers, the rarely remembered consumers who ultimately pay for everything. It is commonly believed that the ideal ratio of residential assessment to commercial and industrial assessment is fifty-fifty and most municipalities seem to feel that a drop to sixty-forty is as far as they can safely go. The feeling that a sixty-forty ratio is the limit may in fact indicate far more serious social, political and economic problems pointing to inappropriate land uses and municipal boundaries. This pressure to increase the industrial assessment has led to quite irrational zoning of industrial land. The province encourages urban planning in The Planning Act and makes it next to impossible in The Assessment and Municipal Acts. No wonder the Minister accepted philosophically the scramble for cash and services from the developers.

In some municipalities the crippling service was thought to be sewers, depending on the density of development. In other municipalities the crippling service was thought to be schools. Usually over half of a municipal tax bill today in Ontario is for schools, which are a mandatory expense and many people feel it might properly be paid by the provincial government which sets the standard in education anyway. Moreover, as long as the municipal source of revenue is land, it is argued, the services the municipality supplies should be limited to services to land. The construction and operation of schools is only very indirectly a service to land. The cost to the school board of educating a child is frequently more than a low income householder can (or is politically willing to) pay for all services and there is certainly some justification for the political view that residential land is paying as much as it can now afford. Studies in Ontario to assess this justification are now under way. It is too early yet to say what these studies will reveal, but experience with residential land development has suggested that the present system is under considerable strain.

Some lawyers had some doubts about the adequacy of the legislative basis for what were commonly called "subdividers' agreements".[124] To remove these doubts the Legislature amended The Planning Act in 1959 to provide that the Minister could make

[124] A specimen "subdivider's agreement" is reproduced as a schedule to Tucker, The Lawyer's Role in the Development of a Subdivision, Special Lectures of The Law Society of Upper Canada (1960), "Contracts for the Sale of Land", p. 147, at pp. 164-179.

the agreement a condition of his approval.[125] Although some lawyers objected to the change, and especially to the additional provision retroactively validating the existing agreements,[126] some developers appeared before the legislative committee considering the amendment and assured the committee that they had entered into the existing agreements with their eyes open and that they had no objection to their validation. It would appear that some business men's ideas about the morality of retroactive legislation are more generous than some lawyers'!

The struggle over such agreements did not end with the 1959 amendment. In December 1959 King J. dismissed an application for a mandatory order directing the Township of York to issue a building permit to the applicant who had purchased subdivided land that was subject to an agreement by which the owner agreed not to build on certain lots (those purchased by the applicant) until arrangements had been made with the adjoining owners (off the plan) to grade the lots to a more suitable building grade. King J. also refused an order declaring that the clause was not binding on subsequent purchases. On appeal, Morden J.A., taking a rather literal view of The Planning Act, and refusing to review the basis of *Tulk* v. *Moxhay*[127] at this late date, allowed the appeal and the mandatory order was issued.[128] Morden J.A. considered the covenant to be one *in gross*. He did not see how the township could have taken a restrictive covenant for the benefit of lands it did not own. This weakness might be overcome in a later situation, as Morden J.A. suggested, if the municipality complied with "the present operation of the doctrine in *Tulk* v. *Moxhay*", perhaps by

[125] S.O., 1959, c. 71, s. 4(1). See now Ontario Act, s. 28(5) (*d*). The municipality is expressly authorized to enter into such agreements, s. 28(6). The argument that a cash contribution is an unconstitutional provincial indirect tax was rejected by the Ontario Court of Appeal in *Beaver Valley Developments Ltd.* v. *Township of North York* (1960), 23 D.L.R. (2d) 341, and affirmed by the Supreme Court of Canada (1961), 28 D.L.R. (2d) 76. Section 28(7) permits a developer or the municipality to "appeal" to the Ontario Municipal Board any unsatisfactory condition. This privilege had always existed independently under s. 34(1), where the Minister may refer a plan to the Board as well. The Minister's power is not abridged by s. 28(7). *Re McIntosh Investments Ltd.* (1961), 28 D.L.R. (2d) 322 (Ont. C.A.). Two attempts to collect cash contributions for consents to transfer under s. 26(1) (*e*) have failed. A council's by-law requiring payment of a "severance fee of $400.00 per lot" was quashed as *ultra vires* in *Noble* v. *Township of Brantford* (1963), 39 D.L.R. (2d) 610 (H.C.). A more complicated attempt to require a fee of $300.00 for the required signature of the Township Clerk as "witness to the application to the Planning Board" failed in *Downey* v. *East Flamborough Township*, [1963] O.R. 659 (Co. C.). Money paid under protest was recovered.

[126] S.O., 1959, c. 71, s. 4(3). [127] (1848), 2 Ph. 774, 41 E.R. 1143.

[128] *One Twenty-Five Varsity Road Ltd.* v. *Township of York* (1960), 23 D.L.R. (2d) 465.

taking title to the street on which the lots abutted and describing the covenant as one for the benefit of the municipality's street binding on the owner, his heirs and assigns.[129] Morden J.A. also held that section 28(5) (d) was ineffective to render building restrictions binding on subsequent purchasers. It is true that the section speaks of the condition that the owner "enter" into an agreement. It does not require even the owner to perform the agreement to discharge the condition, let alone a subsequent purchaser. On the other hand, this is a statute dealing with "planning", with long term effects, and it involves no real strain on the meaning of the language of the Act to hold that it requires the agreement to be carried out before the condition is discharged. The Minister does not impose the condition to burden the owner capriciously, he imposes it to benefit the land, and he is really not concerned at all with the identity of the owner. But he wants a condition that is self-executing, so that he is not himself burdened with added administrative chores. To import into a twentieth century statute some largely irrelevant philosophical biases of the nineteenth century is, of course, possible, but it is not neccesary. If, as the Ontario legislature has said, remedial statutes are to be construed liberally so as to achieve their true intent and meaning,[130] Morden J.A. might have been forgiven had he attempted to make the statute work.

In *Seabee Homes Ltd.* v. *Town of Georgetown*[131] Gale J., accepting "without reservation and indeed willingly" the *York Township* case, found that the relationship proved between the developer who entered the agreement and the applicant who purchased from him was so close that the court ought not to aid the applicant. The circumstances of the transaction were examined closely and a number of "suspicious" elements were exposed. Gale J. denied, however, that he was acting on a "mere aura of suspicion". He was convinced that the applicant was not a *bona fide* purchaser but was assisting the developer in the next step in avoiding the effect of his agreement. The result may be that the *York Township* case will prove to be a fairly easy one to circumvent. Perhaps one ought to be satisfied if dishonest developers are stopped from frustrating the object of the agreement but it does remain difficult to

[129] In *Re McKillop and City of Vancouver*, [1954] 3 D.L.R. 63, Whittaker J. held a covenant valid as touching and concerning the street, and permitted the City to enforce it. The purpose of the covenant was to assure "pleasure of prospect" from the street by keeping it clear of buildings for forty feet. *Cf. Re Daly and City of Vancouver* (1956), 5 D.L.R. (2d) 474 to the same effect where the restriction was to aid in acquiring land cheaply for road widening.

[130] The Interpretation Act, R.S.O., 1960, c. 191, s. 10.

[131] (1961), 31 D.L.R. (2d) 705.

see why, in a public law context, any person purchasing land with full knowledge of the agreement, made with the Minister's approval and registered, should be regarded as *bona fide* and entitled to disregard the agreement with the blessing of a court of law.[132]

The Quebec Act and the Municipal Code contain no reference to the construction or installation of services by the developer at his expense but there is no reason to think that a Quebec municipal council could not use indirect pressures before granting approval.

In New Brunswick a council may not give approval to a plan of subdivision unless, in its opinion, the owner has made satisfactory arrangements to install at his own expense, or to assist to the extent required by the by-law in installing streets, curbing, sidewalks, culverts, drainage ditches, water and sewage lines and "other facilities deemed necessary by the council", or unless the owner "delivers a performance bond acceptable to the council in an amount sufficient to cover such expenses", or pays such a sum as may be provided in the by-law for such facilities. Nor may a council approve a plan unless in its opinion it will be able in the foreseeable future to provide the proposed subdivision with light, water, streets, schools, recreational areas, transit, sewage lines or other facilities, or the person proposing the subdivision makes satisfactory arrangements for providing such facilities.[133]

Only in 1964 did the Nova Scotia legislature amend the Town Planning Act to authorize a town planning board, with the approval of the council and of the Minister, to prescribe a regulation requiring a subdivider to the extent provided by the regulation and according to specifications in the regulation, to install water and sewer services, to construct, lay out, grade and pave any proposed street in a subdivision, and to enter into a suitable performance bond.[134] Before that the board's power to prescribe additional regulations in this respect was limited to "the construction of new streets, widening or modifying existing streets and provision of sewers and other utilities".[135] Evidently the earlier language was thought inadequate to authorize a regulation imposing a require-

[132] A simple amendment could avoid future doubts. Section 28(5) could be amended by adding paragraph (*e*) to the effect that an agreement made pursuant to a condition imposed under paragraph (*d*) is binding on the owner, his heirs and assigns and on the municipality in which the land is or may become situate. Or similar words could be added to section 28(6). To speak of "binding the land", or "running with the land" is to court the shades of *Tulk* v. *Moxhay* with perhaps quite unexpected results.

[133] New Brunswick Act, s. 29(1) (j) (ii).

[134] S.N.S., 1964, c. 45, s. 1, adding paragraph (d) to s. 27(9).

[135] Nova Scotia Act, s. 27(9).

ment of this sort on a subdivider. The earlier language was not repealed. The recommended model regulations for adoption by the town planning boards provide, among other things, that the amount of the performance bond, if considered excessive by the owner, is subject to arbitration at his request.

The Prince Edward Island Act has no provisions relating particularly to services and any power to control would have to be implied from the requirement of council approval. The matter could therefore be reviewed on appeal to the Provincial Board.

The Newfoundland Act likewise has no express provision, but the subdivision regulations made under section 31 by the Town of Baie Verte are believed to be typical. No subdivision permit will be issued unless provisions satisfactory to the Council have been made for "both a piped supply of drinking water, and a properly designed permanent sewage disposal system". In exceptional circumstances and in certain areas, after consultation with the Chief Medical Officer and the Director of Urban and Rural Planning, the standards may be relaxed if no injury to public health or safety is foreseeable.[136] There are elaborate provisions dealing with standards of construction.[137]

Public land

The third substantial and controversial policy question that has received legislative attention is the appropriate contribution by the developer of land for public purposes other than highways. Such land might be made available for many different municipal purposes. The most common purpose is for public parks and playgrounds. Another possible purpose is for school sites. Another is for sites for public buildings and for garbage dumps. Whatever the purpose, if a developer is asked to convey to the municipal corporation some part of his land without compensation he will expect to get the compensation from his purchasers. The taking of this land is, therefore, something of an inflationary pressure that may be more justified for parks and playgrounds if they are designed to serve the future inhabitants of the developed subdivision. Schools and other possible local land uses are less obviously a proper expense only of those inhabitants. Traditionally the more general expenses are borne by the whole municipality, at least in part.

Nevertheless most provinces have provision of some sort usually expressed as a percentage of the land being subdivided that may

[136] S. 3.3.5.

[137] Schedule 'A', clause (3).

be required for public purposes without compensation. The provisions are reviewed below but no information about their use is readily available to permit an assessment of their effectiveness. It will be seen that no province has set any precise standards of design that would guarantee any particular use of the land in an appropriate place. Both quantity and location are crucial problems that are left substantially to the judgment of the approving officer subject sometimes to fairly general provisions in the Acts.

The problem is not dealt with in the British Columbia Act.

The Alberta Regulation requires "reserves" to be provided in accordance with the standards set out in the Regulation when land over two acres in area is being subdivided.[138] "Reserve" means a parcel of land reserved for use as a park, recreational area or a school site.[139] The area may not be less than ten per cent of the whole area to be subdivided.[140] If the reserves and the streets total more than forty per cent the area of reserves may be reduced by the Board.[141] Where an owner subdivides in stages he can count the reserves over the whole area in computing the ten per cent. On the recommendation of the approving authority that the reserve would serve no useful purpose or would be unnecessary or undesirable, the Board may order that the reserve be deferred until a further subdivision is made, or be waived.[142] Where the reserve is waived the applicant may be required to pay to the municipality a sum equal to the value of the land before the subdivision that would otherwise have been reserved.[143] The value is to be determined as two and a half times the assessed value calculated according to the 1959 *Assessment Manual*.[144] If the reserve is not used by the municipality it may be leased or sold by tender or public auction.[145] Moneys received may be invested but may be used ultimately only for purposes of schools, public parks and recreation areas.[146]

A regulation of this sort sometimes tempts a developer to suggest to the approving authority that land of a swampy character or unsuitable for building purposes be counted as the ten per cent. This temptation is avoided by a direction that the land contained in each reserve shall be suitable for the use for which it is intended and shall on the average be of the same character and quality as

[138] Alberta Regulation, s. 19(2), as am. by Alberta Regulation 433/63, September 25th, 1963. Subdivisions under two acres are exempt, s. 19(1).
[139] *Ibid.*, s. 2(26) and Alberta Act, s. 2(*r*).
[140] Alberta Act, s. 24(2). [141] Alberta Regulation, s. 20(3).
[142] Alberta Act, s. 25(1). Where a reserve is deferred the Director may file a caveat against the title, s. 25(3) as amended by S.A., 1964, c. 68, s. 7.
[143] *Ibid.*
[144] *Ibid.*, s. 25(2), as am. by S.A., 1964, c. 68, s. 7.
[145] *Ibid.*, s. 26(1). [146] *Ibid.*, s. 26(2).

the remainder of the land in the subdivision.[147] Where land that is virtually wasteland is included in the proposed plan the Board on the recommendation of the approving authority may require the wasteland to be provided as a reserve in addition to the ten per cent.[148]

The Saskatchewan Act relates the amount of land to be dedicated to "the public use, other than for streets and lanes" to the density of development. Where there are to be four or more families to the acre, ten per cent of the land is to be dedicated, in all other cases, five per cent.[149] Where the land to be subdivided is a townsite or is the first subdivision within a quarter section, the minimum area is two acres.[150] There are minor exceptions for public or private utilities and the like.[151]

Neither the Manitoba Act, The Planning Act, nor The Metropolitan Winnipeg Act contains express powers to require dedication or conveyance without compensation to the municipality of land for public purposes, although in Metropolitan Winnipeg the power to enact by-laws with respect to plans of subdivision and establishing "the amount of land that shall be used for parks" may be broad enough.[152] The presence of the express power in other provincial acts might suggest a rather different interpretation.

In Ontario *The Planning Act* has long authorized the Minister to include as a condition to his approval of a plan that land not exceeding five per cent in area without regard for the density of the proposed development be conveyed to the municipality for "public purposes other than highways".[153] "Public purposes" probably does not include school purposes, since municipal corporation land is rarely used for school sites.[154] The school authority by whatever name is usually a separate corporation that owns its own land.

The Minister may authorize instead of the conveyance the payment of a sum not exceeding the value of five per cent "of the land included in the subdivision".[155] Until 1963 this authority was re-

[147] Alberta Regulation, s. 21(2).

[148] *Ibid.*, s. 21(3). Wasteland could increase the reserves and streets over the 40% limit set out in s. 20.

[149] Saskatchewan Act, s. 68(*d*) authorizing regulations which have been made: (1959), 55 Sask. Gaz., No. 3, pp. 27-30. See clause 10(1). Subdivision into lots of ten acres or more is not affected.

[150] *Ibid.*

[151] *Ibid.*

[152] The Metropolitan Winnipeg Act, *supra*, footnote 8, s. 83(1) (*d*) (*i*).

[153] Ontario Act, s. 28(5) (*a*).

[154] An attempt to hold up a subdivision until a school site was sold at "raw land" prices failed in *Board of Education of Etobicoke Township* v. *Highbury Developments Ltd.* (1958), 12 D.L.R. (2d) 145 (S.C.C.).

[155] Ontario Act, s. 28(8) as enacted by S.O., 1962-63, c. 105, s. 8(1).

stricted to cases where the official plan indicated the amount and location of the land to be ultimately provided for public purposes, but there is now no limitation on the Minister's discretion. The land so acquired may be sold with the approval of the Minister.[156] The money received from a sale and the cash received in lieu of land are to be paid into a special account to be used only for the purchase of other public lands with the approval of the Minister.[157] If some part of the payment for the lands acquired came out of general funds, that part may be returned to the general funds on the sale of the land.[158]

A study of the evolution of the present Ontario provisions discloses an interesting practice. Originally only land could be taken for public purposes. There was no express authority to take cash in lieu of land, but since in small subdivisions a park might be unnecessary, or in larger ones sufficient park space might exist, the municipality would bargain with the subdivider to take cash from him in exchange for withholding the municipality's recommendation to the Minister that park land be required. In other cases the municipality might falsely assure the Minister that his conditions had been met when the cash was received. This cash, which many developers felt was extorted from them improperly, went into the general funds. When cash payments were legitimated the special fund provisions were introduced to allow some external control over the use of the money so received. But it was soon discovered that the five per cent in value was calculated on the basis of "raw land" values, since the Act did not refer expressly to serviced land within the subdivision. To get more money some municipalities turned to another device—that of recommending to the Minister that the choicest lots in the plan be required for park space (that is, for public purposes) and the Minister seems to have accepted this recommendation whether the space was appropriate for a park or not. There was, perhaps, no convenient way in which the Minister could test the *bona fides* of the municipality. When the land had been fully serviced at the expense of the subdivider, the municipality would then ask the Minister's approval of the sale of the lots for residential purposes but at serviced land values. To the extent that the 1963 amendment[159] disposing of the require-

[156] *Ibid.*, s. 28(9).

[157] *Ibid.*, s. 28(10), as am. by S.O., 1961-62, c. 104, s. 5(2), 1962-63, c. 105, s. 8(2).

[158] *Ibid.* By s. 28 (9*a*), enacted by S.O., 1961-62, c. 104, s. 5(1) the council may contribute to the fund from its general levy and may receive gifts.

[159] *Supra*, footnote 155.

ment of an official plan provision relating to public lands indicates a shift of policy, to that extent it could be argued that the Minister is free to approve the requested sales with a clearer conscience. It may be queried, however, whether the approval of the Minister is valid and the title to the lands good, since the land dedicated was never in fact received as land "for public purposes" but only as land for resale. The resale of public lands required only for that purpose is not necessarily a "public purpose". Unlike the Alberta Regulation the Ontario Act does not attempt to guide the Minister in the exercise of his discretion.

The Quebec Act[160] authorizes the council to pass a by-law requiring as a condition precedent to the approval of a subdivision plan that the owner convey to the municipal corporation an area of land not exceeding five per cent of the land in the plan, situated at a place that, in the opinion of the council, is suitable for parks or playgrounds. Alternatively, the owner may be required to pay a sum not exceeding five per cent of the "value mentioned in the valuation roll" of the land comprised in the plan. Such payments must be kept in a special fund for the purchase of lands "intended for the establishing or equipping of parks and playgrounds". Land conveyed to the corporation under the by-law may be used only for parks and playgrounds.

In New Brunswick the subdivision by-law may require that up to ten per cent of the area of the subdivision, at a location to be approved by the commission, be conveyed to the council for public purposes.[161] The council shall "set aside" such lands for "public purposes" but the council may, with the concurrence of the planning commission, sell them.[162] Money, not exceeding one-twelfth of the market value of the land exclusive of streets, received in lieu of such lands likewise must be paid into a special account and spent only for acquiring *or developing* land for public purposes, or be invested and the proceeds of such investment are also to be paid into the same account.[163]

In Nova Scotia, although the Minister may prescribe general provisions relative to "areas to be reserved for public purposes",[164] no minimum or maximum area is provided for in the Act and the 1964 model form of subdivision regulation does not deal with land for public purposes.

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[160] S. 429 unnumbered paragraph 7. And see Municipal Code, s. 392*f*, para. *g*.

[161] New Brunswick Act, s. 29(1) (e).

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

[163] *Ibid.*, s. 29(3).

[164] Nova Scotia Act, s. 27(1) (e) (i).

The Prince Edward Island Act makes no mention of land reservation or dedication for public purposes.

The Newfoundland Act authorizes the Advisory Board to prescribe as a condition to approval of a plan of subdivision that the owner shall surrender without compensation an unspecified quantity of land such as in the opinion of the Board is necessary for "streets, parks, playgrounds or other public purposes".[165] No further guidance is given by the Act. The subdivision regulations for the Town of Baie Verte made under section 31 of the Act require the dedication for public use other than streets of not more than ten per cent of the total area to be subdivided.[166] The council must approve the location and suitability of the public reservations and in any case they shall not be land that is incapable of development.[167] The council may also, and probably in addition to the land dedicated for public use, require any existing natural feature, or a part of it, to be retained.[168] Reserves along the banks of every river, brook, or pond are required by the Crown Lands Act.[169] At the discretion of the council this reservation may be treated as the land dedicated for public use.[170]

III. *The Role of the Central Mortgage and Housing Corporation.*

Notwithstanding that the regulation of subdivision, land use and building is a matter of provincial concern under the British North America Act, the Federal Government has had an important influence on the quality of subdivisions since 1945 when, generally speaking, Canadian provinces began to take subdivision control more seriously. Federal control has not been exercised directly, of course, but indirectly through its lending policies under the National Housing Act, 1954[171] and its predecessors administered by the Central Mortgage and Housing Corporation, a Crown corporation commonly referred to as C.M.H.C., established in 1945[172] to be the Government's housing agency.

It was commonly thought in 1945 that the national housing policy was to encourage the construction of housing for that part of the population that could not afford housing on its own. To what extent that policy, if it was the policy, has been successful is not a concern here, but it may be reported that subsequent practice has established C.M.H.C. as a major factor in most of the housing

[165] Newfoundland Act, s. 61(1) (d).
[166] S. 3.3.19.
[167] *Ibid.*
[168] *Ibid.*, s. 3.3.22.
[169] R.S.N., 1952, c. 174, s. 121.
[170] *Ibid.*, s. 3.3.24.
[171] S.C., 1953-54, c. 23, as am. See Woodard, Canadian Mortgages (1959), for a full account of the federal role in housing mortgages.
[172] See now, R.S.C., 1952, c. 46, as am.

constructed for the middle and some of the upper income groups. At first the assistance was given by sharing part of the loan along with the "approved lender", a commercial lending institution approved by the Governor in Council. Currently, assistance is given by insuring[173] the approved loans of approved lenders. When one or two approved lenders have refused a loan, or in special circumstances, C.M.H.C. will make loans directly. A loan to assist in the construction of a house is insurable if, among other things, when made to a builder who intends to sell the house to a "home purchaser", it was for the aggregate of the loan insurance fee and ninety-five per cent of the first $13,000.00 of its lending value and seventy per cent of the amount by which the lending value exceeds $13,000.00.[174] "Lending value" means the value of the proposed house for lending purposes as determined by C.M.H.C.[175] Like any other lender or insurer, C.M.H.C. can set its own conditions and if by offering loans at an attractive rate it can secure an important part of the building loan business, its conditions will have a correspondingly important influence on building standards and subdivision design. Its influence has been even wider, for so great has been the public reaction to its standards that privately financed houses are sometimes advertised as built to "N.H.A. standards" although the mortgage financing is entirely private and at a higher rate.

The housing standards are not relevant here, but the C.M.H.C. subdivision design standards are more important than the provincial or local standards in all cases where there are lower standards locally. In some cases there may be no local standards. Where the local standards are higher, as was fairly frequently the case, and more frequently with the passing years, the higher standards must be met. Conformity is also required with a master plan if one is in force, a zoning by-law, restrictive covenants in relevant title deeds, easements, and municipal requirements for services, open space and the like. C.M.H.C. supervision of plans is of practical importance whatever the standard being applied because it makes the C.M.H.C. officials unofficial enforcement officers of the local standards when they are higher. Indeed, any lender's solicitor tends to become an "enforcement officer", often more assiduous than the municipality itself.

From its experience with many thousands of building lots C.M.H.C. prepared, in 1956, what it described as "a few rules of

[173] National Housing Act, *supra*, footnote 171, s. 6.
[174] *Ibid.*, s. 7(*d*) as am. by S.C., 1957-58, c. 18, s. 1(1), 1960-61, c. 1, s. 2(2) and 1964, Bill C-102, clause 2(1).
[175] *Ibid.*, s. 2(22).

thumb" on subdivision planning.[176] It is conceded that no set of rules can be made to produce the best design for every site, but common errors can be avoided. The policy guides for insurance or loan applications deal with much the same subject matter as the local standards that have been commented on in Part II. The minimum lot area for a single family detached house is 4,000 square feet for an internal lot, 5,000 square feet for a corner lot. The depth of the lot is affected by a requirement of a set back from "arterial roads" of at least forty feet and a rear yard of 1,000 square feet for each house. A depth of ninety feet is acceptable in ordinary circumstances and variation is permitted and encouraged. There is no standard set for the width of streets but fifty to sixty-six feet is referred to as "normal". Footpaths are required at the mid-point of a street with over 1,200 feet of private frontage and where municipalities refuse to accept such footpaths long frontages are not acceptable to C.M.H.C. Public open space is demanded if the layout is capable of containing more than fifty houses. At least five per cent of the "total area that could be offered as mortgage security" under the National Housing Act may be required. This total presumably would not include streets, which ultimately will belong to the Crown or the municipal corporation and are not mortgageable by the developer. Hence the five per cent is a considerably lesser area than the five and sometimes ten per cent of the land included in the subdivision plan that may be required by most provinces. The open space requirement of C.M.H.C. will be waived where the developer demonstrates the existence of "*improved* public open space adequate to the needs of his development and to those of all other housing (existing or potential) with equal claims on the same space", or where adequate provisions for open space appears in the official plan and C.M.H.C. is satisfied that the municipality has made financial arrangements for the "sure implementation" of its plan. Where there is no assurance of adequate open space by one of these means the properties in the development may be "down-graded" in appraisal for lending values.

The adequacy of municipal services and schools and school sites will be assessed by C.M.H.C. and in recent years loans have been made available to municipal corporations or municipal sewerage corporations to assist in the construction or expansion of sewage treatment plant or trunk collector sewers or both.

[176] [1956] C.M.H.C. Builders' Bulletin 79. The appendix contains "notes for the guidance of those seeking acceptance of housing layouts". A more elaborate bulletin on "Site planning requirements" is under preparation.

The C.M.H.C. "approving officers" also take into account proximity of churches, shops, railway services, trunk highways, trees, in short "other surrounding features affecting value of site". The Corporation has at least the viewpoint of an astute lender of money, but it is a viewpoint consciously supplemented by its statutory responsibility to "promote the improvement of housing and living conditions".[177] In recent years, especially in the fringe areas of our larger metropolitan centres, local standards have been much higher and the quality of subdivision design much improved. Doubtless these improvements are due in part to the educational process of subdivision approval of C.M.H.C. as well as the efforts of the provincial planning agencies.

IV. *The Sanction of Control.*

The power of refusal.

Subdivision control is essentially a licensing system. That is, subdivision is wholly prohibited until a specified approval (or license) has been obtained. The authority of the approving officer to refuse his approval is, therefore, vital to the effectiveness of the control. Only in three provinces, British Columbia, Saskatchewan and Manitoba does the Act expressly confer the power to refuse a tendered plan.

In British Columbia the approving officer is expressly authorized to refuse approval if he is of the opinion that the cost to the municipality of providing services would be excessive[178] and under the Land Registry Act he may refuse approval if the subdivision does not conform to the subdivision control by-law[179] and if in his opinion, the anticipated development of the subdivision would injuriously affect the established amenities of adjacent properties or would be against the public interest.[180] The last ground would seem to be broad enough to justify the view that approval can be withheld in all appropriate cases.

The Saskatchewan Act, although expressly authorizing the Minister to refuse, does so on fairly broad grounds, but considerably narrower than in the British Columbia Act. Substantially the occasions for refusal are limited to failure of the plan to meet some prescribed standard, whether in the Minister's regula-

[177] From the long title of the National Housing Act, 1954, *supra*, footnote 171.

[178] British Columbia Act, s. 711(4).

[179] Land Registry Act, *supra*, footnote 8, s. 94.

[180] *Ibid.*, s. 96. The public interest is stated in s. 91(4) and (5) where the approving officer is instructed not to approve certain plans affected by the Controlled Access Highways Act, R.S.B.C., 1960, c. 76.

tions, the council's subdivision control by-law, the master plans or the Act itself, or if the location of the land is unsuitable for building purposes.[181] There is no general power to refuse because the proposed plan is not in conformity with good community planning practice, although the Minister may refuse to approve a subdivision control by-law on this ground.[182] Nothing so generous as the "public interest" ground is provided.

In Manitoba the Municipal Board is expressly instructed not to approve a plan unless it has first been approved by the local council[183] and in certain cases unless it is made part of a town planning scheme,[184] but there is also an express power to "make or refuse to give its approval" in its discretion.[185]

The debate over the Ontario provision has already been discussed.[186] Neither Ontario nor the other provinces confers a specific power on the approving authority to refuse. Since all subdivision control statutes are essentially licensing statutes, it would seem reasonable to infer a power to refuse when the plan is, in the approving officer's opinion, not in conformity with the statutory or by-law standards. One could wonder how some courts might apply the maxim *expressio unius est exclusio alterius.*

The effect of control on title.

If the enabling legislation merely requires approval, or prohibits subdivision—that is, conveyance—without approval, what is the effect of a conveyance in defiance of the statute? Textbook law on the question, based on general pronouncements in the cases, is clear enough.[187] You look to see whether there is a clear prohibition of the agreement to convey or the conveyance, or both, whether there is a penalty provided for violation, and finally, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law. We have the authority of Lord Esher M.R. that this intent may be ascertained from the context of the whole Act and the subject matter.[188] The subject matter in the subdivision

[181] Saskatchewan Act, s. 74, as am. by S.S., 1959, c. 107, s. 11. The Minister's regulations made under s. 67 may include a thirty day limit within which a plan must be "approved, modified or rejected" by the council or councils concerned, s. 68(a). The Minister may revoke his approval of a plan, s. 70(3).

[182] *Ibid.*, s. 72(6). [183] Manitoba Act, s. 106.

[184] *Ibid.*, s. 104. [185] *Ibid.*, s. 107. [186] *Supra*, page 60.

[187] See, for a short comment, Milner, Case and Comment (1959), 37 Can. Bar Rev. 636.

[188] *Melliss* v. *Shirley and Freemantle Local Board of Health* (1885), 16 Q.B.D. 446, at pp. 451-452.

situation being the conveyance of land, the certainty of which is desirable, it would seem reasonable to hold that a conveyance was effective without approval unless it was expressly declared ineffective. No provincial Act has been interpreted on this point but the Ontario Act has been interpreted on the related question of the enforceability of an agreement to convey and the Supreme Court of Canada was unanimous in its view that as long as the parties intended to comply with the public control their agreement was enforceable on production of the Planning Board's consent or the Minister's approval of a plan of subdivision.[189] As Judson J. remarked, "The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent and this is all that the parties have done in this case".[190] At the time when the contract involved was entered into the Ontario Act prohibited the making of such a contract without consent and provided a penalty of $500.00.[191] While the case was in the courts the Ontario Act was amended and section 26(4) now provides:

> An agreement, conveyance, mortgage or charge made in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into, subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

At the same time any doubt was removed about the effect of previous contraventions of the subdivision control area by-law. The contravention did not have and shall be deemed never to have had the effect of preventing the conveyance or creation of any interest in land.[192] Matters in litigation commenced on or before March 29th, 1961, were not affected.[193]

The new subsection seems to be clear enough except, perhaps, for its reference to the express condition that the agreement is to be effective only if the provisions of section 26 are complied with. Section 26 does not deal with subdivision that is approved by the Minister under section 28. In practice vendors and purchasers have intended, as the cases illustrate, sometimes to get plan approval, sometimes to get planning board consent to a sale by metes and bounds. It is not clear that the new subsection validates an agree-

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[189] *Queensway Construction Ltd. and Truman* v. *Trusteel Corporation (Canada) Ltd.* (1961), 28 D.L.R. (2d) 480. See Milner, Comments (1961), 39 Can. Bar Rev. 461.

[190] *Ibid.*, p. 483.

[191] The Planning Act, 1955, S.O., 1955, c. 61, s. 24(1) and (8).

[192] The Planning Amendment Act, 1960-61, S.O., 1960-61, c. 76, s. 1(2).

[193] *Ibid.*

ment made conditional upon compliance with section 28. It could be argued that compliance with section 26 involves compliance with section 28, since section 26 contemplates a procedure for subdividing by registered plan as well. Unfortunately the exemption from section 26 contained in subsection (1)(*a*) only applies where the land that is conveyed or is agreed to be conveyed is described in accordance with and *is* within a *registered* plan. If a farmer offers his farm for sale save for a block reserved for himself that contains his house, and he says he will put on a registered plan, acceptance of the offer, although clearly contemplating compliance with section 28, does not bring the transaction within section 26, which deals only with sales by metes and bounds. If the farmer and his purchaser have the advantage of legal advice before entering into the contract for sale, they might include a clause reciting that the agreement is conditional upon compliance with section 26 of The Planning Act and approval of a plan by the Minister under section 28. The first part of the clause would be pointless except that such a formula would presumably invoke the protection of section 26(4)! There seems to be no substantial ground for not treating as valid an agreement to convey that is conditional upon compliance with section 28. In view of Judson J.'s remark[194] it is reasonably predictable that he would regard compliance with section 28 as sufficient. In the *Trusteel* case, where Judson J. made the remark, the sale was of ninety-five out of ninety-six lots on a proposed plan of subdivision, and no mention was made of planning board consent anywhere in the reported facts. But in that case Judson J. was not concerned with the niceties of section 26(4) which had just been passed and was not applicable to the pending litigation. The "niceties" should not be allowed to frustrate the amendment.

Another difficulty with section 26(4) is that it requires the express condition to be "contained therein"—that is, contained in the agreement. It is likely that the draftsman had in mind that the agreements would always be in writing and intended to refer, by "therein", to a written agreement. In fact, however, these agreements may be partly in writing and partly oral, and, barring the Statute of Frauds the oral provision for compliance with section 26 might be thought sufficient. If the Statute of Frauds was pleaded successfully the contract would not be enforced. If it was not pleaded the oral condition would effectively require submission

[194] *Supra*, footnote 190. Judson J. also observed there that the contract in that case was "entered into in contemplation of *compliance with the statute*" (my italics).

to the public control. Despite my conjecture about what the draftsman probably had in mind I should think that a well proved oral agreement that section 26 was to be complied with would lead to an enforceable agreement for sale.

Prior to the passing of section 26(4) there was a penalty for contravention. With the passing of the subsection the penalty was abolished.

In British Columbia no instrument executed by any person in contravention of section 83 of the Land Registry Act[195] confers upon the party claiming under it any right to registration. Since conveyancing in British Columbia is under the land titles system the denial of the right to registration would be tantamount to failure of title to pass. There is no applicable penalty for contravention.

The Alberta Act also directs the Registrar not to accept an instrument granting a lease for more than three years of only part of a parcel, or charging, mortgaging or otherwise encumbering only part of a parcel, or providing for the sale of part of a parcel, unless it is approved. There is no applicable penalty for contravention.[196]

The Saskatchewan Act contains no specific provisions relating to title. General provisions for penalties include fines of not less than ten dollars nor more than $100.00 and in case of a continuing offence for each day a further fine not exceeding twenty-five dollars.[197] There is a limitation period of two years.[198]

The Manitoba Act contains no specific provisions relating to title.

Three of the western provinces have a more or less common provision dealing with the sale of a lot by reference to a plan of subdivision that is not in fact registered. The purchaser without knowledge of the non-registration may at his option rescind the contract of sale and get back all money paid, plus interest, or hold the vendor to the contract, deed or conveyance.[199] In Alberta and Ontario sale by an unregistered plan is an offence.[200] There is no provision for the option of rescission or specific performance subject to approval.

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[195] *Supra*, footnote 8, s. 83(3).

[196] Alberta Act, s. 23. See also s. 23*a*, as enacted by S.A., 1964, c. 68, s. 5.

[197] Saskatchewan Act, s. 134. [198] *Ibid.*, s. 135.

[199] In British Columbia, the Land Registry Act, *supra*, footnote 8, s. 115; in Saskatchewan, The Land Titles Act, 1960, S.S., 1960, c. 65, s. 98; and in Manitoba, The Real Property Act, *supra*, footnote 8, s. 119.

[200] In Alberta, The Land Titles Act, R.S.A., 1955, c. 170, s. 88; In Ontario, the Ontario Act, s. 29.

There is no provision respecting title in the Quebec Act.

The New Brunswick Act provides simply that where a planning commission has been established and a subdivision by-law passed a transaction does not create or transfer an interest in a parcel of land if it would divide a piece of land into two or more parcels until a plan of subdivision has been approved by the commission and filed in the registry office.[201]

The Nova Scotia Act has a rather curious history. It now provides that every person who makes or purports to make any subdivision without complying with the Act is liable to a penalty not exceeding twenty dollars for every day during which such default continues.[202] The Minister's consent is required for a prosecution.[203] Originally, when the Act was passed in 1939, it provided that title would not pass unless the plan were filed in the registry office.[204] The Act was not proclaimed until 1943 and apparently its proclamation in the middle of the War went more or less unnoticed. In 1948 it became necessary to rectify the situation because so many deeds had been executed that did not pass title. Chapter 56 of the statutes of that year repealed the 1939 provision and provided that it should be regarded as having never been passed!

The Prince Edward Island Act contains no specific provisions relating to title but an agreement for sale or a conveyance contrary to section 24 is prohibited and in addition to any other remedy provided by law the relevant planning board or the municipal corporation "may restrain any transaction of sale or conveyance in contravention".[205] Presumably if the transaction is not restrained its validity depends upon the interpretation placed on the section prohibiting the agreement or conveyance. Although there is no applicable provision for a penalty in the Act it would seem likely that title would pass since otherwise there would be no need to institute a restraining action. The Act is not explicit on the procedure for restraining.

In Newfoundland the Advisory Board may, subject to the approval of the Lieutenant-Governor in Council make a regulation providing that no conveyance, transfer or agreement to convey or transfer an interest in land situated in any municipal area or joint planning area that did not hitherto pass as a separate parcel by conveyance, transfer, assignment, gift or operation of law is effectual

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[201] New Brunswick Act, s. 27(2), as am. by S.N.B., 1963 (2nd sess.), c. 13, s. 8. Subsection (3) exempts the sale of a remnant of a piece of land.
[202] Nova Scotia Act, s. 27(10). [203] *Ibid.*, s. 27(11).
[204] S.N.S., 1939, c. 8, s. 28.
[205] Prince Edward Island Act, s. 24(4).

to pass any interest in the land either at law or in equity until approval is given by the Minister or by some person designated by him.[206] The regulation may also prescribe that the Registrar of Deeds shall not register any such document unless approval is obtained.[207] There is a general provision for penalties of $200.00.[208]

Conclusion

In most provinces the legal sanctions are severe—not only fines but in many cases the loss of ability to buy and sell real estate—and it is reasonable enough to ask whether the sanctions are effective. Are we getting better designed subdivisions at lower costs more equitably distributed with less economic waste through frustrated development? The optimistic answer to all parts of the question is "Yes", but there remains a disturbing discontent with our "urban sprawl".

We sometimes assume that people want single family detached houses running endlessly into the countryside because they buy them. But we have had little experience in this generation with modern design in higher densities—row houses, maisonettes and apartments—and the assumption that detached houses are preferred is not necessarily valid.[209] The preference is that of the developer, not the inhabitants, and he could be wrong. Unless there are equally attractive offerings of detached houses and higher density housing in about the same areas of the community there is hardly a fair choice presented to the consumer.

High density development almost always involves higher initial capital cost for services and whether a municipality or a developer can meet that cost depends largely on its or his credit rating and the credit facilities available. Only recently has C.M.H.C. extended its assistance to sewerage systems for municipalities. Historically its most attractive assistance has been to the building of detached houses. How far the former federal policy has helped to determine the shape of our present day suburbs would

[206] Newfoundland Act, s. 61(1) (h).

[207] *Ibid.*

[208] *Ibid.*, s. 63(1).

[209] The Swedish government conducted a survey of a sample of 1179 householders living in "private houses" and 1356 living in multi-family houses, in a country where detached dwellings are quite rare. See Michanek, Housing Standard and Housing Construction in Sweden (1962), pp. 26-27, a pamphlet published by The Swedish Institute. (English translation by George Scott.) The survey concluded that "if all who wanted to, could move immediately to the type of dwelling they desired, then the distribution of households would result in 52% living in private houses and 48% in multi-family houses". There is believed to be a very low vacancy rate in the well-designed combinations of housing types around Toronto, a traditionally detached house community.

be difficult to measure, but it has undoubtedly played a part. When the capital costs are initially thrust on the developer, which is almost universal development policy in Canada, he is likely to choose the kind of development that keeps those costs at a minimum, another policy that favours detached houses.

The equity, or lack of it, in the allocation of capital costs still bothers many critics of current planning. A comparison of the careful, almost reluctant, imposition of some costs (or the initial risk of them) on the developer in British Columbia with the much broader imposition in, for example, Alberta, where school sites may be asked for, and Ontario, where they may not, but where cash grants are quite common, suggests that the answers are not obvious. The growth of the Ontario Water Resources Commission could reach the radical position where the financing of water and sewer services is accepted as a provincial responsibility in Ontario. With increasing provincial and federal credit more municipal services might be installed at the choice, as to time and place, of the municipal council rather than the developer, but the repayment of that credit by the taxpayer will still involve as yet unsettled questions of equity in its allocation to various parts of the community.

Behind all these unsettled questions in our subdivision control policy—questions of urban design, appropriate land use and the allocation of cost—there stands *the* question of our time: what to do about the private motor car, the machine that is at least as likely to control our lives as any computer yet conceived.

Some of the answers can only come when we clarify in our own minds, and especially when councils, planning agencies and developers, clarify in their minds, the kind of community we want to build. Despite the proliferation of controls, current development shows more of general indecision and the fortuitous choice of private developers than of bureaucratic dictation.