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Zoning: Avenues of Reform

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"Planning is not simply a matter of allocating land for various kinds of development. It is also concerned with the form of development and redevelopment, and with the quality of the physical environment that is produced. 'In the end what matters is not simply where development takes place: its form is equally important and the planning system will be judged by the quality of the results it produces.'"

Although the above statement may be viewed by some to be a statement of the very obvious, and to be almost axiomatic in nature, such is not the case. A history of the early conceptions and development of planning will show that planners in early years did not adopt such an approach; furthermore an examination of the history of the operative sections of the Planning Acts of various Canadian Provinces will show that apparently the legislatures of the provinces have not until fairly recently seen fit to adopt this as a goal for planning. It would seem, therefore, that, although the goal of the Planning Advisory Group may be seen to be most obvious and desirable to the contemporary urban citizen, as an enunciation of planning requirements, this has not always been so.

It will be necessary, therefore, to go back in time to when zoning, as an instrument of planning, was first conceived in order to examine its goals. It will be found that the form which development took was not always important, but rather it was only the location of development which the system tried to control. It was this system of planning implementation that was the basis of all planning acts in Canada. An examination of the functioning of that system in general terms will be undertaken

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and the failure of that system even to achieve its limited goal of allocating land for various kinds of development in a meaningful way will be indicated. Moreover, since planning goals are presently seen to include substantial control of the form of development, the methods by which the zoning system has attempted to influence the form of development and become more flexible, will be discussed. In addition, the problems of administrative discretion, arbitrary decision making, inadequate powers, and inefficiency will be discussed with relation to attempts to achieve this new goal of planning through zoning.

Having examined the origins of the present system and the problems in adopting it to the goal set out by the Planning Advisory Group an indication of recent reforms in Canada and abroad, will be undertaken. Two streams of planning implementation have produced two possible ways of solving some of the problems in the traditional Canadian planning system. The American Law Institute has produced reforms which rise out of the traditional zoning system while the British have instituted a system of development control, first enacted in the English Town and Country Planning Act of 1947 which has since that time attempted to achieve tight control in order to insure quality development. Both these systems will be analyzed and examined for neither is without difficulties. Finally attention will be focused on reform that is indigenous to Canada, legislation from the provinces of Alberta, Nova Scotia and Manitoba. This legislation attempts to use concepts from both systems to produce a method of implementing planning that is much more suitable to present realities.

Ontario, is perhaps, the best province to examine initially as it is experiencing more development than other provinces, yet has few legislative zoning reforms. It thus shows the difficulties of traditional zoning methods most clearly. In that province recently, numerous new regional governments were

4. 10 & 11 Geo. 6, c. 51 (U.K.).
5. R.S.A. 1970, c. 276; S.N.S. 1969, c. 16; S.M. 1971, c. 105. There are also similar reforms in British Columbia, S.B.C. 1971, c. 38, amended 1972, c. 36 and in New Brunswick, S.N.B. 1972, c. 7, these latter statutes however, are not dealt with in this paper.
established or proposed. One of the reasons for the implementation of such systems of government, it was suggested, was to facilitate more adequate planning; yet none of these new municipalities were given the ability to achieve the obvious goal of positive control over the form of development.\(^6\) Virtually no changes were made in the zoning powers under the Planning Act or the acts incorporating these new municipalities. Thus, although the goal of controlling not only where development occurs but also how and in what form it occurs may seem obvious, it has not been legislatively recognized or dealt with in Ontario. Planning in that province is implemented by a static system not designed for development control; by a system which is being forced to adopt, and to be more flexible, through \textit{ad hoc} measures; by a system which is in need of reform.

I Zoning: General Concepts and the Ontario Example

Traditional zoning for the purpose of segregating uses comes to us from the United States as a result of two model acts developed by the Department of Commerce of the Federal Government. The first of these was the \textit{Standard State Zoning Enabling Act} of 1922, and 1926 and the second, \textit{The Standard City Planning Enabling Act} of 1928.\(^7\) The relationship between the \textit{Standard City Planning Enabling Act} and the Ontario Planning Act\(^8\) is considerable.

The American Act called for the preparation and adoption of a Master Plan, the contents of which were to provide for the physical development of the territory governed by the local government.\(^9\) The Ontario Act calls for an Official Plan for essentially the same purpose.\(^10\) In both cases the plan is to have a certain legal status, for under section 15 of the Ontario Planning Act.

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10. R.S.O. 1970, c. 349, s. 13. A legal status for plans is provided in Alberta, R.S.A. 1970, c. 276, s. 96; Nova Scotia, S.N.S. 1969, c. 16, s. 14; and in Manitoba, S.M. 1971, c. 105, s. 578.
Planning Act no by-law can be passed or public work undertaken that does not conform with the plan while section 9 of the Standard City Planning Enabling Act also goes to the quasi-legal status of its Master Plan.

It can be seen that the Ontario Act is not very original. Its sections on subdivision control\(^1\) differ little from those in the American statute\(^2\) but most importantly the method of general implementation in each statute is the same; that is through the use of the zoning by-law. As the earlier acts required the division of the municipality into 'districts',\(^3\) the Ontario Act refers to 'defined areas'\(^4\) where by-laws might regulate or restrict in a uniform way.

The basic premise with this method of implementation is that separation of uses is desirable and is the goal of the planning process. The pure zoning method emphasizes the distinctions between uses rather than any relationship that ties them together for, indeed, its advocates fifty years ago assumed that "land owners could be protected from injurious effects of other land uses by dividing up the city with houses here, business over there, and industry somewhere else."\(^5\) The local legislature was to establish rules to govern development into the distant future, perhaps twenty or thirty years. Their legislation was designed so that, development could occur without further state intervention either through legislation (by-laws), or through the administration of official discretion. Development was to occur automatically along the lines of the zoning by-laws. The concept then was that of static rather than dynamic land use control. The American Law Institute refers to this as a "static end state concept"\(^6\); the Master Plan was drawn, the by-laws passed and slowly but inevitably the city would fill out according to plan. One need only look at a

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11. R.S.O. 1970, c. 349, ss. 29-34.
14. R.S.O. 1970, c. 349, s. 35. Other planning acts in Canada follow the same procedure. R.S.A. 1970, c. 276, s. 119; S.N.S. 1969, c. 16, s. 33; S.M. 1971, c. 105, s. 598.
consolidation of the zoning by-laws for a large Ontario city to see that this ideal is far from dead. The zoning by-law covers the entire city mapping out districts according to use and density in order to achieve the ends of the legally adopted plan.

Traditionally zoning as a system of planning implementation is not intended to control the form or nature of development; it assumes that mixture of uses is undesirable and should be segregated and thus operates as an extension of the nuisance principle; it assumes that such segregation will lead to stability and desirable development without detailed regulation; and lastly it assumes, to a great extend, that it is possible to predetermine desired development. Because of these assumptions it operates in two basic ways; both of these can be found in section 30(1) of the Ontario Planning Act. Firstly zoning by-laws may separate incompatible uses (s. 30(1) and (2)) and secondly, by s. 30(4) and (5) certain general standards regarding the use of land or buildings may be set out for each zone or district. Other than these, no other control is possible on the face of the Ontario statute. There is, however, one further common control — that of density within zones and in Ontario this is found in sections 338-339 of the Municipal Act. Development is simply to occur and continue within the ambit of this regulatory system. It should be noted, however, that even this minimal amount of control may be, because of the traditional approach of the courts in narrowly construing legislative grants of power to municipalities, further limited. By the decision of the Ontario Court of Appeal in the case of Township of Pickering v Godfrey the digging of gravel pits was held to be not included in the meaning of a use of land under section 30(1) (1) of the Ontario Planning Act and, therefore, such enterprises were not subject to zoning control. The result of such a decision may be that a municipality in Ontario cannot through zoning by-law even control the using up of land, or the movement of land without specific legislative permission. For example, where a municipality may want to

19. The City of Winnipeg Act. S.M. 1971, c. 105, s. 598(1) provides for municipal regulation of the removal or moving of soil. The amendments, however, in Nova Scotia do not include such a provision.
keep an existing contour for aesthetic reasons while a developer finds it more economical to level the land before building, control of the developer may well be beyond the scope of zoning power. A further restriction arises in the case of Regina v Gibson\(^2\) where it was held that the zoning section of the Ontario Act did not "authorize by-laws absolutely prohibiting the erection or use of buildings but such by-laws may be passed only to limit the type of buildings."\(^2\) It would seem that, therefore, a municipality cannot freeze the use of any land completely without specific legislative provision and thus again the control exercised through the zoning process is further limited.

In summary then, it would seem that the traditional system of planning implementation still maintained in Ontario and some other provinces in concept and structure, revolves around the allocation of land for certain kinds of uses subject to certain general regulation. This system remains the basis of all planning acts regardless of more recent reforms. Furthermore this process, by judicial interpretation, has been limited so that certain activities may not be controlled and development may not be prohibited absolutely. Zoning powers, therefore, under such unamended acts as Ontario's are extremely limited, while the difficulty of amending to provide specifically for every type of needed control is obvious.

II The Failure of Zoning

The criticisms of such an approach for the implementation of modern planning are not difficult to enumerate. Perhaps the most obvious is that the system is not based on realistic assumptions; for the implementation of zoning by-laws does not lead to complete segregation of uses, nor to development which is of a quality that could be achieved with more complete control. The system, it would seem, is not flexible enough to deal with the form which development takes, as it is too concerned with land allocation. Its standards become minimum standards, it can impose no condition nor positive duties; it is unable to set temporary control or distribute the costs of

\(^{20}\) 1959 O.W.N. 254.

\(^{21}\) Id. at 255. No provincial legislation provides specific authority for absolute prohibitions.
development. Furthermore, it does not recognize that different parts of the city might need different types of control and implementation.

A fairly recent study of private redevelopment in the City of Toronto sheds some light on this problem. The study points out, that in the central city, redevelopment is a continuous and volatile source of urban growth and structural change and suggests that it can be seen in terms of a replacement process in the building stock of the city. The rationale for private redevelopment, it asserts, is economic. New development occurs not because of zoning but because of demands that cannot be met by the existing building stock; buildings may either become obsolete because of deterioration and thus create an economic demand or because even without deterioration a more profitable use can be found for the land.

Bourne's study shows that the operation of complex and variable market forces are very influential in the development of the centre of Toronto. He continues, however, that redevelopment is too highly localized and specialized in type, and variable through time to be neatly molded solely by market forces. Other forces are also important in redevelopment, he argues, so that redevelopment is also a function of the relative potential of each area to attract new investment. That potential is the result of many variables so that neighbourhood amenities, accessibility, and location, establish one potential for given types of redevelopment in neighbourhoods within broad areas of the city. Other factors are important, however, in the redevelopment of broader areas of the city; examples of those factors are the location and existing concentration of apartments, proximity to subway, distance from centres of population, and parks, with accessibility to the rest of the city seemingly being most important. On the choice of an actual location for development still other criteria were found to be relevant such

23. Id. at 173.
24. Id. at 174.
25. Id.
as site factors, property size, presence of vacant land, and physical attributes. Bourne concludes:

"The operation of these factors in the redevelopment process produces a distinct spatial pattern. Apartment redevelopment, for example, is concentrated in higher income sectors. Within these sectors are about a dozen points of maximum accessibility. Over time, these clusters have shifted as redevelopment migrates from one local area to another, but have remained in the high income sectors. This clustering effect in spatial patterns stems in part from zoning, but more important, from the external economies that result from proximity among related uses, and similar social groups and the catalytic reaction of major development projects attracting others."27

Bourne's study, it is suggested, is most important, for it indicates the various forces at work within the planning system. To divide a city into zones and expect development to occur solely on the basis of subdivisions is unrealistic in the extreme and, although the zoning system has been altered to be a more positive force,28 it is designed to function essentially in this way. Zoning it can be concluded is not the prime force in the allocation of land for development, which was its intended purpose. Yet Bourne's analysis indicates more than that market forces are the prime movers in where redevelopment occurs; it indicates, as well, that the market forces are also important influences on the form in which development occurs, and that the nature and design of apartment and office redevelopment is profoundly influenced by the market.29 His conclusions from these studies are that urban development needs more comprehensive treatment and control to bring under its ambit all

26. Id.
27. Id.
28. For example S.N.S. 1969, c. 16, s. 33 provides architectural control as does S.M. 1971, c. 105, s. 598. Furthermore where such amendments are not in force such powers are evolved through administrative procedures as will be seen later. The best example of this is in Ontario.
aspects of development, that is both locational (spatial) consideration and physical structure.\(^3^0\)

Accepting that the planning process needs the authority to control the spatial and structural relationship of development within its surroundings, a more detailed examination of the present zoning system shows its further inadequacies in this area. Certainly land allocation has a function, albeit a limited one, and if our present system were able to include other more specific methods of control, many problems would be at least partially alleviated. Unfortunately the Ontario zoning system has been drafted and interpreted so that it cannot include specific controls such as landscaping, individual design and location and even in jurisdictions where amendments have occurred to increase the control of zoning difficulties arise.

The Ontario \textit{Planning Act} provides authority for a certain amount of control over the height, bulk, location, size, floor area, spacing, external design, character and use of buildings through zoning, while under the Manitoba and Nova Scotia legislation architectural control is possible by zoning.\(^3^1\) But the result of such regulations are standards that are not drafted to apply to individual projects of development such as an office or apartment complex; but rather the results are standards meant to apply generally to all development within the zone. It should be noted that this control can be adopted to deal with a specific development; but this will be discussed later.

The results of this kind of regulation of development can be seen only too well by driving city streets where set backs, lot size, design and heights are identical throughout an area. Monotony and sterility can be the result, for the standards which are supposed to be minimums are in fact maximums and all variety is lost. In a report on the \textit{Problems of Zoning and Land-Use Regulations}\(^3^2\) prepared for the National Commission on Urban Problems this difficulty was pointed out. The report states that present zoning standards set by the municipality as a minimum guideline for development invariably became the maximum standard for the developers; so that if a by-law set a

\(^{30}\) Id. at 177.

\(^{31}\) See note 28 supra.

requirement of so many parking spaces per unit in apartments, pressure by the developers would be exerted to lower that ratio; if that did not succeed the developer certainly would not exceed the requirement. Similarly if the floor space index was the most the municipality thought desirable, pressure would again ensue from the developer to increase it. The report felt that one of the inherent weaknesses in the setting of standards was that they simply resulted in setting the lowest possible standard for community development and that furthermore they were quickly outmoded and constantly challenged. In short, zoning simply restricts to prevent the worst, and frequently inhibits the best or even better.

Judicial interpretations of the Planning Act in Ontario has reinforced this approach and these consequences; for the Ontario Court of Appeal in Re Mississauga Golf and Country Club Ltd. denied municipal councils the authority to set positive duties on developers. Kelly, J. A. disallowed certain conditions set out in a by-law as beyond the authority of the municipality. The case concerned the zoning of a lot for the purpose of a gas station upon, in part, the following conditions: (a) that the station be of "Van Horne" design and of Credit Valley Stone, (b) that parking be limited to two commercial vehicles both of which were to be owned and leased by the operator of the station for use in breakdown and emergency cases and (c) that the land be suitably landscaped at a cost of, but not exceeding, $1,000 and furthermore that it be fully maintained to original standards.

Condition (a) was disallowed on the grounds that in addition to limiting land use, it attempted to define the nature of the building, not its height, location, bulk, or use, by specifying the nature of material and the type i.e. Van Horne. Condition (b), it was suggested by the court, went perhaps too far, in that it defined the types of vehicles to be permitted to park; while the last condition, relating to landscaping, was simply held to be "not a valid provision for inclusion in a zoning or land use by-law".

33. Id. at 5.
35. Id. at 631.
36. Id. at 632.
The Mississauga Case, although an example of spot zoning, would indicate, therefore, that the zoning system as presently drafted in Ontario and even as amended elsewhere can do no more than set what is tantamount to minimum standards for the development of the community. Indeed it would appear that the system can encourage forms of development which are the antithesis to the goals of the Planning Advisory Group.

Closely related to the problem of attaching positive conditions to zoning by-laws, is the issue of whether under the Ontario Act municipal councils have the authority to attach, as a condition precedent to use of land, adequate municipal services. Once again the Courts have found fit to limit the authority of the municipality and in *Re O'Donnell and City of Belleville et al.*37 such authority was denied.38 Although much can be said of the Courts near sightedness in restricting municipal zoning powers, not only with respect to their opposition to conditions, but also with respect to their definition of "use"; as mentioned earlier, it would seem that such judicial decisions are well within the rationale of zoning law. The powers of zoning under traditional planning acts such as Ontario's were not intended to create positive obligations, as pointed out, but were to set out basic standards for the development within the city; the municipality was not to be involved and the system was to depend on the existence of the private developer (or public agency) subject only to certain restrictions. No positive duties were intended to be placed on the developer; development power was to rest with him subject only to certain restriction; development decisions were assumed to be independent of planning laws.39 In view of the original policy behind the implementation of planning, then, judicial decision-making can be seen to be well within the confines of the legislative purpose of the statute.

But to look at legislation and judicial review is to look at only one aspect of the implementation of planning. The actual administration of that process must also be examined. In doing

37. 2 D.L.R. (3d) 460.
38. S.N.S. 1969, c. 16, s. 33 (2) (a) (iv) attempts to remedy this prohibition, but does so only where costs for municipal servicing are prohibitive.
so it is evident that although one of the main values originally thought to be found in zoning was certainty the process as presently administered does not reflect that value. Although zoning purports to allocate uses in a definite and visible way so that all might simply look at the by-laws and be certain as to what use will be allocated to what place, such is not the case.

As mentioned earlier many factors affect the distribution of uses besides zoning; but the zoning system itself no longer facilitates certainty. A City of Toronto Planning Board report, dated May 14, 1968, to the Building and Development Committee of the City of Toronto\textsuperscript{40} states that "the principle advantage of (general zoning) is that it provides absolute certainty. The owner of any property knows what uses he may make of it and the conditions under which it may be developed."\textsuperscript{41} A study done in the summer of 1968 casts great doubt on the existence of this absolute certainty.

"In the study of 41 Ontario municipalities, including all the larger cities and their fringe municipalities, 415 by-laws were examined. Of these 316 or 76\% related to a single piece of land, usually a block or less. The remaining 99 or less than 25\%, introduced general changes. Three quarters of the rezoning was spot zoning and 95 of the by-laws contained site-plans. With amendments this frequent and of this particular character, the argument that general zoning gives absolute certainty hardly holds water . . . In Toronto it was estimated that 80\% of the apartment suites built during 1966 required a zoning by-law amendment. In North York it was estimated that 95\% of the multiple family dwellings and virtually all the single family dwellings in the year ending July, 1968 required amendments. In Etobicoke 80\% of the multiple dwellings required amendments\textsuperscript{42}

\textsuperscript{41} Id.
\textsuperscript{42} Id. at 13-14.
The present system in Ontario, and indeed elsewhere gives the form of certainty and protection without its substance, and this perhaps helps to explain why the forces outlined by Bourne are so potent.

This is not to say, however, that zoning can never be useful. But it must be realized that in considering planning controls, the type of control needed may vary between different areas. Suburban raw land may need both subdivision control and zoning while the developed areas of the city which are stable, particularly areas of new and middle aged housing, perhaps can be adequately protected by negative zoning controls and housing codes. Even here, however, problems arise in defining the areas and flexibility may still be needed to allow certain uses. On the opposite end are areas that are degenerate and suitable for large scale redevelopment; here, urban renewal may be used so that public ownership results in close control over development. There are, however, the large and important areas, to which Bourne refers, which are undergoing continual private redevelopment. It is these areas in particular where the form of development must be subject to a control more flexible and efficient than that of zoning by-law and amendment.

III Response to Inadequacies

Thus far, this paper has dealt with zoning in the abstract to some extent, for pure zoning as envisaged by the early American acts and copied in Canada certainly does not exist. The goal of controlling the form and nature of development is a goal which has been sought for quite some time in most developed areas. It would be hard to believe that planners knowing the weaknesses of the zoning system would continue to use it regardless of its effect.

The result of its ineffectiveness in Ontario has been, to a large extent the rise of extra-legislative methods to achieve tighter control.\textsuperscript{43} Thus far the legislature’s and judiciary’s contribution to the zoning process have been examined; the input of the “administrators”, those who implement and enforce the system created by the legislature must now be evaluated. In general, it can be said that the results of their work have been to

\textsuperscript{43} The phenomenon has not been restricted to Ontario alone.
produce closer control over the form and structure of development in spite of the system, but this has not been done without certain costs.

One such administrator, Donald Guard, Planning Director of the City of London, pointed out the problem and his solution to it.

"Zoning has failed as a satisfactory instrument to ensure the proper implementation of a land use master plan. Even if it permits good development, which many by-laws do not, a zoning by-law cannot prohibit bad development. Try as you will, you cannot really do much more than keep the soap factory out of the single family area and ensure a reasonable intensity of land use. Surely we have a right to expect more than that from all the effort we put into planning and zoning. There is a vast difference between permitting and "ensuring". Surely implementation is more than just permitting and hoping for the best.

But under Ontario law zoning is the only legal means we have to control land development. In London we have developed methods and procedures under zoning law to achieve development control. Our methods are cumbersome because our law was never intended to be used in this way but they are effective."

The methods and procedures referred to in the above passage are really the freezing of land use by zoning. Land is restricted to its existing uses and buildings so that when a development or redevelopment is contemplated the developer must approach the municipality with a proposal. Amendment of the freezing by-law is not authorized until a proposal suits the plans of the municipality, and when the amendment is passed it applies only to the specific land covered by the proposal. This method of spot-zoning is then reinforced either by a site-plan (describing in detail the form of development appended by the by-law), or the signing of an agreement

covering the development as a prerequisite to the passing of the amendment, or both of these techniques as in the case of London.

Although this system has the obvious advantages of flexibility and control, problems still arise from it. The site-plan by-law has the difficulties mentioned above as a result of the Mississauga Case. Its provisions legally are severely limited, while the validity of the agreement may be challenged, for under the Ontario Planning Act only subdivision agreements are authorized. Furthermore, the imposition by agreement of controls which cannot be imposed under the Ontario planning legislation seems highly dubious, and although the agreement usually states that it is binding on the heirs of the owner, serious legal problems arise with the technicalities of restrictive covenants and the ability of the agreement to bind future owners or developers. It should also be noted, that any by-law which technically freezes the land use must be in keeping with the Official Plan, as must be the amendment allowing the development, unless the Official Plan is to be amended as well. One further problem affects the agreement and amendment procedure; this is that it precludes any changes once the by-law has been passed and therefore is not suitable for dealing with problems arising after the development is approved.

While the above methods have been the most popular in Canada until recently, American administrators have formulated other devices to add flexibility in order to control the actual form of development. Such devices as the ‘floating zone’, ‘special exemption permits’ and variance committees have performed this function. In addition there is one other device common to both countries, the bonus. The bonus provision is intended to encourage individual developers to incorporate into their development features such as pedestrian ways, courts, plazas and set backs. For example the Downtown Plan for Toronto calls for an 8% increase in density in return for making 10% of the surface area of the development into a public pedestrian area.45 Bonuses, however, work best if they can be negotiated for the specific needs of each development rather than being set out in by-laws where they again may function to

encourage uniformity and are not able to create much flexibility or control. Such difficulties were found in the City of Toronto's attempt to develop criteria for the awarding of bonuses. The City of Toronto Planning Board reported on January 4, 1966 that a residential floor space bonus system for the City of Toronto could only be effective if it were flexible and had different standards for different developments. Furthermore it adopted a schedule appended to the report that suggested the criteria and bonuses for different developments. This did not receive the approval of the Minister of Municipal Affairs, and thus the bonus cannot be applied in a discriminating and flexible way to suit a particular development. The result is a provision in the Official Plan to increase density for the mere adherence to general standards.46

All these methods are really foreign to Euclidian zoning, and are grafted to it, as stated, in order to bring that zoning system into line with modern planning implementation. In doing so, however, serious difficulties arise, much more serious than those mentioned above regarding site-plan by-laws and agreements. The difficulties involve something much more basic to a system based on the rule of law. By-laws are amended by municipal legislative bodies after a developer's plans are considered by such municipal departments as planning, engineering, utilities and education. Their criticisms may often result in changes in the proposal, and once the plan conforms with the desires of the various departments municipal approval is recommended.47

The problem here is not so much that development may cause a disregard of neighbouring uses, nor that the method is cumbersome and inefficient, but, more importantly, that the method can lead to much discrimination and misuse of administrative discretion. The real objection would seem to be that much development control is carried on at a hidden level by municipal departments when the public should be involved. Furthermore, although Ontario Municipal Board approval is required for all by-laws passed under section 30 of the Ontario Planning Act and there is thus some possibility for control and

46. City of Toronto Planning Board file number 02.16.33 and City of Toronto Official Plan, 2.9 (c) (i).
47. Supra, note 44 at 3.
publicity; that Board was directed by the Ontario Court of Appeal in *Re North York By-law 14,067*\(^4\)\(^8\) not to consider the agreements outside the by-law entered into between the municipality and the developer in its own approval of the by-law. Nor is this situation restricted to Ontario. In Nova Scotia rezoning appeals are made to the Planning Appeal Board; when hearing rezoning appeals, that Board does not consider the particular development that is the subject of the rezoning, nor agreements worked out between the municipality and the developer; only the rezoning in the abstract is considered.\(^4\)\(^9\)

The problem of discrimination and the control of discretion also arises in the simple use of spot-zoning. The Supreme Court of Canada has stated that spot-zoning is not a problem, because any zoning can be discriminatory.\(^5\)\(^6\) But the very general nature that a Master Plan may take may afford little protection to individuals in controlling the passage and amendment of by-laws. Again appeal bodies such as the Ontario Municipal Board, although supposedly the protector of individual interests against such rezonings may not be very effective, for often in defining their own authority and discretion over appeals they seem more preoccupied with protecting amenities, than planning processes. And indeed in Nova Scotia appeals are often heard without any plans for a basis of evaluating the rezoning. As well since such Boards do not see themselves as planning agencies, and since they have neither staff nor expertise, their input into protecting individual interests through enforcing plans is even more limited.\(^5\)\(^1\)

The result of all this is that the zoning system which was designed to allocate land for certain uses has undergone a metamorphosis and has been used to control the form of development. The goal cannot be disputed but the method may


49. *Planning Appeal Decisions* Department of Municipal Affairs, Halifax, March, 1972. No reported decisions regarding rezonings are concerned with the merits of the particular development but only the rezoning.


be dangerous. Since zoning was developed only to control uses in a general way, the Euclidian system contemplated the making of most, if not all, policy decisions when initial zoning was done. Administration was, therefore, only a minor problem; the committee of adjustment was, perhaps, the only administrative structure required. If the system worked in the conventional way — exercise of administrative discretion was to be peripheral to zoning. But because of the desire to make zoning more flexible and to achieve more positive control, increasingly more policy decisions are being made by the administrators rather than by the councillors in by-laws. Mandelker points out the dangers of this in his *Controlling Planned Residential Development*.

"If the need for discretion is explicitly recognized through the adoption of planned development regulations a method must be found which will sufficiently guide the exercise of that discretion and prevent so much of a shift of initiative to the developer that public controls are frustrated. Such a shift occurs much too often under *ad hoc* techniques which are used to make conventional controls less rigid."

The need for reform of the zoning system then can be made on many grounds. As pointed out there are still legal and technical difficulties in adapting the present system to development control. Furthermore such adaptation that has occurred is cumbersome to say the least. Spot-zoning has much potential for discrimination, especially since the Supreme Court of Canada does not view a legally enforceable right as existing as a result of discrimination. Lastly and most importantly there is a real danger that results from the use of a system for purposes for which it was not intended: the danger that important policy decisions are being made unknown to the public and by persons not chosen to make them.

54. Id. at 4 and 5.
55. The most obvious example of this can be found in the decision of the O.M.B. Re *City of Toronto* By-Law, 162-69, R. 698-69, R. 698-69, R. 715-69, where six years passed between the time a developer approached the Planning Department and the by-law was passed.
IV Reforms

The system of development control presently in force in England is perhaps the best place to begin a discussion of reform, for it goes to the heart of the problem and unabashedly controls the form of development in every way from siting, to design, to colour.

This system of planning control depends on the definition of development, found in the 1962 Town and Country Planning Act\(^5\), section 12(1) which defines development "as any operation in, on, over, or under land, or the making of any material change in the use of any building or other land." The legislation, therefore, has a compound definition of development with two distinct aspects; operations and uses. Telling in his Planning Law and Procedure\(^5\) suggests that operation means any change in the physical characteristics of land, or what is on, in or above it; while use refers to the purpose to which land or buildings are devoted. The Act, therefore, goes much further than Euclidian zoning by controlling the form of development under the broad net of "operation".

Yet the Act specifically excludes from the definition of operation "the carrying out of works for the maintenance, improvements or other alterations of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building."\(^5\)\(^8\) And thus the effect of the statute is not to prohibit needed maintenance and repair; and yet demolition of a building which may profoundly affect a community's environment is within the ambit of the Act.\(^5\)\(^9\)

The interpretation of 'change of use' in the act is also indicative of an attempt to balance the need to control, against the need for a certain amount of freedom and therefore, it should be noted that the change must be material; that is "of such a character that it matters having regard to the objects of

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58. Town and Country Planning Act 1962, 10 & 11 Eliz. 2, c. 45 s. 12 2(a), (U.K.).
planning control." The Act furthermore, under section 12, attempts to make the general rules a little more clear by listing certain activities such as the conversion of a dwelling house to two or more separate units, or the deposit of refuse, or the displaying of advertisement as material changes, while simultaneously excluding other uses from the definition such as the use of buildings on the same lot as a home where the use is incidental to the home, the use of land for agriculture or forestry purposes, and the changes of uses within certain classes. This definition of development then is the base upon which the act is built. Its all encompassing scope, with the few exceptions listed above, is indicative of its ability to bring within the planning system the form of development. The operative section is 13(1) of the 1962 Town and Country Planning Act, which states that: "subject to the provisions of the section, planning permission is required for the carrying out of any development of land." As a result of this section, but for a few exceptions listed in the act, all those activities encompassed by the broad definition of development are subject to control through the requirement of planning permission which can be obtained in three basic ways, by a development order from the Minister, by a deemed grant of permission in special cases, and, thirdly, by the decision of a local planning authority.

The permission deemed granted is mainly to deal with transitional problems and is not of great concern. The development order of the Minister, however, is an important device, for again it loosens up the system so that all activity included under the definition of development is not necessarily controlled. The development order is further subdivided for administrative purposes into; specific development orders which apply to certain specified lands (this is used a great deal in the development of new towns), and the general development order which applies to all lands. The 1963 General Development Order granted planning permission for twenty classes of development set out in the Schedule to the Order, so that for a fairly wide variety of minor development no application need

61. 10 & 11 Eliz. 2.
be made to the local planning authority for permission. It should be noted, however, that even in these less important areas of development such as minor changes to homes, minor operations including building fences, gates and painting, and the changing of certain uses to other classified uses, control is exercised under the General Order. This is in fact permission granted subject to certain limitations and conditions which can be enforced by the local planning authority. Furthermore, nothing in the General Development Order can permit development contrary to conditions imposed under any other grant of permission. The statute then requires all other development to receive the approval of the local planning authority.

Since the methods of loosening development control have been emphasized, it should be noted that the English system is one of basically tight control. The definition of development includes far more than the regulation of 'uses' under the Ontario Act, for everywhere development is permitted without local approval, conditions are imposed. Furthermore, in England most development of any consequence must receive local planning authority approval and it is there that the possibility for tight control is really present. In dealing with an application, the local planning authority is given wide latitude to decide whether to approve an application, and although it must have regard to the development plan, it is not confined solely to it. It may have regard to any other material consideration. The application can then be disposed of in one of three ways. The authority may: (a) grant permission unconditionally; (b) grant permission subject to conditions as they see fit; (c) refuse permission.

It is through the requirement for permission and the subsequent imposition of conditions for approval which can deal with the time as well as the form of development, that development is controlled. Moreover, as long as the condition is reasonably certain, and intelligently and sensibly related to the

64. See ss. 17(1) Town and Country Planning Act 1962.
65. Id.
planning scheme and proposals for the area it is valid.\textsuperscript{66} The result is that control is so wide that social structure can be actively controlled so that in a green belt area for example planning permission for a home may be allowed for an agricultural worker and yet refused for a suburbanite.\textsuperscript{67} This procedure, however, is further enforced by the power of local planning authorities to enter into agreements with landowners restricting or regulating the development of their land either permanently or temporarily. Furthermore such an agreement is enforceable against person deriving title under the person with whom the agreement was originally made.\textsuperscript{68} These methods thus circumvent many of the problems found in adapting zoning to development control. The system is fairly efficient for approximately 400,000 applications are processed yearly.\textsuperscript{69} Applications are speeded up by approval in principle through outline planning permissions which leave detailed negotiations to a later date. The system is not only fairly quick and efficient but it removes many of the difficulties of our method. Unlike a site-plan by-law, conditions of any kind may be imposed through the development permission. All difficulties with the validity of any agreement are removed; the agreement is legal and runs with the land which is dubious under the Ontario system. The British, in short have a system designed to suit the goal of total development control and thus it functions well in doing just that.

Yet perhaps the most serious flaw in the \textit{Town and Country Planning Act} method is similar to the serious problem in the adaption of the zoning system to development control: that is the problem of the unbrideled and hidden administrative discretion. As noted above, the granting of planning permission is virtually unchecked — considerations must only be materially relevant to planning in both the consideration of the application generally and the imposition of particular conditions. No further criteria are set out in the Act.

\textsuperscript{67} Mandelker, \textit{Green Belts and Urban Growth}, University of Wisconsin Press, Madison (1962), at 47-8.
\textsuperscript{68} \textit{Town and Country Planning Act}, 1968 c. 72, s. 37 (U.K.).
\textsuperscript{69} Mandelker, \textit{Green Belts and Urban Growth}, at 59-60.
Coupled with this is the problem of planning on a more general level. Until 1968 the only requirement was a development plan which was a generalized written statement prepared by the local authority and accompanied by a one inch to the mile scale map. The plan, furthermore, was to be revised every five years and thus was seldom ever finalized. Although planning directives were sent out by the Minister these had little impact on the development plans. The result of this system was that planning administrators were really making policy on the local level without any guidelines; and hence much of the control was based on interim planning, on sketch plans approved in principle or on individual merits without regard to overall development. It would seem possible to conclude that, in practice, the English system was focussing too much on form and not enough on development in the broad scope and thus was experiencing, to some extent, the same difficulties that may result from constant by-law amending through spot-zoning.

The local administration of the system is equally troublesome. There is no obligation in the Act for public notification or for allowing third parties to be heard when an application for planning permission is considered. This has been changed slightly by Ministerial Directive which requires that the application be advertised in a local newspaper and that a period of not less than twenty-one days be allowed for written objections. But the beneficial effect of such limited reform is highly doubtful. The result of this entire procedure is that the decision on an individual application is the most important decision and yet it is the least open to public scrutiny or challenge. The application is important, as mentioned, because consideration is focussed on its merits rather than the development plan in general and yet in 95% of the cases studied by Mandelker the local committees in closed session simply followed the advice of the technical staff.

Furthermore, the appeal procedures, which are used in only 3½% of the applications, are not effective in the limiting

70. Id.
72. Mandelker, Green Belts and Urban Growth, at 69.
73. The Future of Development Plans, at 3.
or controlling of the exercise of the land planning authority's discretion. Written reasons for local decisions must be given but these invariably echo the general language of ministerial circulars, or the development plan, and they tend to express the conclusions of the authority without indicating why the decision is reached. Appeals are, therefore, difficult because of the burden of challenging the reasoning of the local body whose real reasons are unknown. This approach, tends to restrict the development of local case law on planning permission which might narrow discretion. Contributing further to this problem is the fact that committee meetings are in private with no record kept of the minutes; therefore no information is disclosed to third parties. Often permission is simply given by consent which is not appealable, so that the only possible limitation on the local planning authorities is the general circular sent by the Minister of Local Housing and Government.

The Pugh Committee examining the functioning of the system arrived at basically the same conclusions as Mandelker in his analysis. The system, it felt, was basically sound and could work effectively but the problem lies in the administrative aspect of it for the Committee discovered wide variations in the dealing with applications. The Committee, however, did not refer to the specific problems that Mandelker raises such as the fact that too much reliance is placed on the local planning officer, and that, although the local council is supposedly the planning authority, the planning departments and officers are replacing them in that capacity. The Planning Advisory Group did nevertheless suggest two solutions to the administrative problems. Firstly, management studies and meetings were suggested for local authorities, so they might better exercise their functions. Secondly, in order to limit their discretion, secondary (detailed planning for specific areas) planning was recommended. This was implemented under The Town and Country Planning Act of 1968. Certainly this latter proposal for what was termed ‘structure plans’ will encourage the imposition of controls with broader community considerations

74. Mandelker, Green Belts and Urban Growth, at 72.
76. Mandelker, Green Belts and Urban Growth, at 87.
77. Supra note 68.
rather than just the merits of a particular development, and thus can be termed an improvement in the system. Although such planning will tend to limit the discretion of local planning authorities, more than this is needed, for the system suffers from the same problems as Ontario; namely, that many of the major decisions effecting the community are being made beyond the public's view. This was not examined by the committee.

Mandelker, more cognisant of this problem, goes one step further in suggesting needs for reform: he advocates more formal and open hearings and proceedings for the implementation of more detailed planning. The reason for this, he argues, is that in any system where planning is dealt with on a case by case basis each decision is necessarily arbitrary to some extent, even if made within the confines of a more detailed plan, and thus greater precautions for openness and fairness must be taken.\(^7\)\(^8\)

The English experience, therefore, offers new approaches for use in Canada to achieve more flexible planning implementation and control on a case by basis, but alerts us to the dangers involved in that method. Certainly the problem of detailed planning on a local level is serious for official or master plans can be full of only pious vagaries. Likewise the more detailed control of the form and nature of development harbours increasing dangers because it relies more on the technocrats and experts, and because the more important decisions are being made by experts in consultation with developers without public scrutiny or consideration. The values of flexibility, efficiency and tighter control would certainly have to be weighted against such changes. In the view of one writer the risk should not be taken,\(^7\)\(^9\) and rather than seeing the English system as the saviour of planning he states:

"...my consideration is that possibly with some exceptions... local administration simply could not handle any such responsibility and that genuine planning sacrifices would also be involved. What we would probably get is \textit{ad hocery} triumphant-

\(^{78}\) Mandelker, \textit{Green Belts and Urban Growth}, at 140.

reactionary and incompetent. Moreover on principle I do not like any further steps away from the rule of law - by vesting major land-use power in non-elected administration officials.”

Canadians may, therefore, look to the British system for a practical resolution of some of their problems and indeed a system of which it has been said that is “basically sound and can work efficiently”. But its problems cannot be over looked and must be resolved before it is adapted, because:

“In practice, however, the product has not lived up to its promise. Part of the problem lies in the planning process. Policy remains fuzzy and unclassified. Planning administrations muddle through. Public disenchanted is all too obvious . . . The health of the planning mechanism would benefit greatly from public stock taking, increasing policy clarification, and a tightening improvement in the administrative machinery.”

As mentioned, the Town and Country Act of 1968 may have solved some of the difficulties with its requirement of structure, urban, local and action area plans — each plan becoming more specific and detailed. Policy decisions will be much more circumscribed by this planning on a much smaller scale, and these plans can give clear indications of where, how, and when more positive controls on development should be enforced. But given that the plans are not binding, given that general development plans will encourage wide flexibility, and given the nature of the decision making process, further changes are surely required.

The American Law Institute’s Model Development Code is an attempt to meet the problems of Euclidian zoning by giving positive control powers and flexibility to the general zoning system. Its major difference from the English model is that general zoning is possible under the system along with the development control of the English Town and Country Planning Acts. As with the English system the Model Code’s foundation

80. Id. at 107.
82. Mandelker, Green Belts and Urban Growth, at 156.
is the definition of development. It too is very wide and all encompassing in order to give a broad grant of power to the local authority while not allowing it to regulate all human activity. The essence of the definition is "development means the dividing of land into two or more parcels, the carrying out of any building or mining operation, or the making of any material change in the use or the appearance of any structure on land." While the definition is further refined as to exclusions and inclusions, it is basically similar in purpose to that of the English Act in controlling changes of any consequence.

Whereas the English system relies on planning permission to cover all development and then loosens this control, the Model Development Code stipulates that by-laws or ordinances must be passed before control comes into being. Upon the passing of an ordinance, development can only occur in accordance with the terms of the ordinance and furthermore the ordinance may require that development be undertaken only upon the granting of a development permit. The code thus empowers municipalities to control development if they wish without imposing an obligation upon them to do so. Furthermore, the type of control is flexible since the by-law may divide development into one of four categories: development which is permitted as of right (general development), development which may be permitted at the discretion of the local planning authority, development which needs no permit, but must simply comply with general regulations, and development excepted from the regulations of the ordinance. This more flexible approach is perhaps the greatest difference from the English Act with respect to implementation technique, and is, perhaps, more suitable to cities with different areas requiring different methods of control. Essentially, the two systems, in redefining development and permitting controls over it, do not differ.

The greatest difference arises in the administration of the system and this is perhaps where much might be borrowed from the American system, for much is done in it to control

85. Id. s. 2-101.
86. Id. at 28-29.
87. Supra, note 80.
discretion and make the implementation process open to the public. The American Law Institute proposes the setting up of a Land Development Agency to serve a function similar to the local planning authority under the English legislation. Although under both systems the internal working and rules governing the agency are almost non-existent, the American model has one vital difference. By section 2-102(1) of the *Model Land Development Code*, it is the Land Development Agency which must grant any development permit. Furthermore a grant or denial of a development permit is an 'order' of the Agency, and, by subsection (2), a hearing is required, where the issuance of an order involves the exercise of discretion, or where anyone entitled to notice under the hearing provisions requests the hearing.

The difference, therefore, is the requirement of a hearing but even more important are the rules governing that hearing found under section 2-304. They are as follows:

2. At least two weeks in advance of a hearing the Land Development Agency shall publish notice of hearing in a newspaper of general circulation, and shall give notice individually to the following;
   (a) the developer;
   (b) owners of any land within (500) feet of the parcel on which development is proposed;
   (c) any neighbourhood organization qualified under section 2-307 by the Land Development Agency if the boundaries of the organization include any part of the parcel on which development is proposed, or any land within (500) feet thereof;
   (d) any other person, agency or organization that has filed with the Land Development Agency a request to receive notices of hearings and has paid a reasonable fee therefore;
   (e) any other person, agency, or organization that may be designated by the development ordinance;
   (f) any person, agency, or organization that may be designated under a rule of the State Land Planning Agency.

3. The notice shall
   (a) give the time and place of the hearing;
   (b) contain a statement describing the subject matter of the hearing; and
(c) specify the officer or employee of the Land Development Agency from whom additional information can be obtained.

4. The Land Development Agency shall designate itself, or a committee, panel, or member of the Agency, or a hearing officer, to conduct the hearing, and shall designate one of the persons conducting the hearing as the presiding officer.

5. A written statement giving the name and address of the person making the appearance, signed by him or his attorney, and filed with the presiding officer constitutes appearance of record. The parties to a hearing shall be any of the following persons who has entered an appearance of record either prior to commencement of the hearing or when permitted by the presiding officer
   (a) a person entitled to notice under paragraphs (a), (b) and (c) of subsection (2);
   (b) a person specifically entitled to be a party under the development ordinance rule of the State Land Planning Agency;
   (c) a person who satisfied the presiding officer that he has a significant interest in the subject matter of the hearing.

6. All testimony at the hearing shall be under oath. The presiding officer may administer oaths and may issue subpoenas to compel the attendance of witnesses and the production of relevant papers, including witnesses and documents requested by any party.

7. A party shall be afforded an opportunity to present evidence and argument and examine and cross-examine witnesses on all relevant issues, but the presiding officer may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony and cross-examination.

8. The Land Development Agency shall make a full record of the hearing, by any appropriate means which shall be transcribed if a request is filed under ss. 9 — or may be transcribed on order of the presiding officer or the Land Development Agency. If a sound recording is made any person shall also have the opportunity to listen to the recording at any reasonable time.

9. A person who has been assigned to conduct a hearing or make a decision shall neither
   (a) communicate, directly or indirectly, with any party or his representatives in connection with
any issue involved except upon notice and opportunity for all parties to participate; nor
(b) take notice of any communication, reports, staff memoranda, or other materials prepared in connection with the particular case unless the parties are afforded an opportunity to contest the material so noticed; nor
(c) inspect the site with any party or his representative unless all parties are given an opportunity to be present.

10. If the hearing is not conducted by the full Land Development Agency, the person or persons conducting the hearing shall prepare a recommended decision, transmit it to the Land Development Agency, and give notice of the right to obtain a copy thereof to all parties.

11. The Land Development Agency shall make its decision based on the record of the hearing and may accept, modify or reject any recommended decision. The parties may, with the consent of the Land Development Agency, waive decision by the Land Development Agency and accept a recommended decision as final.

12. The Land Development Agency shall issue its decision in writing and shall include written findings of fact and conclusions, together with the reasons therefore. Each material finding shall be supported by substantial evidence or, if it is noted on the record, by the personal knowledge of or inspection by one or more of the persons who conducted the hearing. To the extent practicable, conclusions based on any provision of this Code or of any ordinance or rule shall contain a reference to the provision relied on.

The thrust of the above section is to publicize the discretion of the Agency by exposing its process to the public. Davis in his *Discretionary Justice* sees openness as "one valuable weapon in the fight against the arbitrary exercise of discretion". Although such a procedure may not confine the discretion of the Board, it in fact gives structure to it. This is further aided by the need for written reasons. The public and parties will no longer be unaware of what is being done and

their presence surely will improve the quality and the fairness of the proceedings.9

This approach is totally unlike that in England where decisions are made behind closed doors. But the section goes further than opening doors, for it allows for the operation of another part of the Code for the registration of neighbourhood organizations who then have a right to notice regarding developments affecting them. Furthermore this notice and hearing is important, for it takes place early in the process before momentum on the part of the developer has built to such an extent that opposition might be futile. It thus encourages involvement at a level where citizens might contribute and have an effect on the decision and conditions made; rather than at an appellant level when much has already been done.

Yet this approach is not without its difficulties; Milner in his Development Control: Some Less Tentative Proposals states "The obvious advantage of a permit system is the avoidance of delay. The fewer people in a decision the quicker the decision will be reached."90 It is certainly true that judicializing the process will mean certain delays but this cost must be weighed against the benefit achieved. Delays could be avoided by severely restricting appellant jurisdiction in order to ensure the efficiency of the system. Milner was concerned about delay in obtaining development approval and continued "This last criticism of delay, is perhaps particularly applicable to Toronto, where a developer can expect 'natural justice' to the fifth power! It is not impossible that a developer will be given five hearings on what is essentially one development proposal. While 'participating democracy' is the currently fashionable cant, in what passes in some circles for political 'science', it is unlikely that the most stalwart advocate of participating democracy would have much sympathy for the above example of democracy in the Toronto procedure as it is sometimes applied."91

91. Id. at 33-34.
Milner's criticism is most certainly valid regarding the present system in Ontario; but emphasis must be placed on the quality of natural justice rather than its quantity. Proposals put forward in the draft code most likely would end delays of this type for issues would be flushed out, all the people heard, and decisions made with a better understanding in the initial hearing, thus mitigating the need for rehearings. Jeffrey Jowell, moreover, in his *The Limits of the Public Hearing as a Tool of Urban Planning* points out that although there is great difficulty in adjudicating urban planning problems because many such issues are polycentric and thus not amenable to a "judicial" decision, such processes as proposed by the American Law Institute help to clarify issues, alternatives and preferences. Indeed, it can be added, that the written decision required by the Code will expose priorities and values utilized in solving complex problems. Other criticisms may be made against this judicialization process. Firstly, the system encourages collusion between planning staffs and developers before the hearing; but this is the case now without any public involvement. At least the Draft Code presents some opportunity for control; much more than is present under Euclidian methods or in England.

The second criticism is that it would be virtually impossible to gain the approval of development necessary to the community as a whole but undesired by any neighbourhood. Examples of such development could be public housing projects or children's homes. The Draft Code suggests, that an agency involved in regional projects which may be locally unpopular but socially desirable, be formed and that it have a limited exemption from the hearing provisions in order, to circumvent this problem. This is perhaps the only solution; but it should be pointed out that the same situation occurs under present zoning techniques, and therefore cannot be a reason for rejecting the Code's methods. Certainly, if partial immunity to a higher agency is chosen, that agency must be obliged to engage in careful studies and plans for best locations. Furthermore, such a technique would fit well within the framework not only of more detailed secondary planning but also within the concepts

of development control so that the impact of the development might be lessened, somewhat.

V Canadian Reform

Attempts to tinker with the difficulties of traditional Euclidian zoning have been made in various Canadian Provinces. Manitoba, Alberta and Nova Scotia all provide for conditional zoning. In addition, those acts remedy difficulties such as the lack of power to control the using up or moving of land, and architectural design. None of these amendments, however, solves completely the basic difficulties of Euclidian zoning; for although increased flexibility and wider control are provided, the fact remains that the Euclidian zone is designed for use over a wide area and it become a minimum standard when it is used as such. Furthermore as pointed out it is designed to operate with minimal interference; conditional zoning and zoning agreements frustrate this and are cumbersome to operate. Any certainty and protection that a static zoning system attempts to ensure are lost by such adaptations.

This is not to state, however, that such amendments are totally undesirable. Certainly they provide for flexibility and enable tighter control, but they do so at the expense of the "protective" and "non-interference" goals of zoning and only by requiring rezonings and thus cumbersome procedures.

The legislation in these three provinces, however, goes much further than minor amendments in Euclidian zoning, for it grafts onto that traditional zoning system the English idea of development control. It thus produces a sophisticated system where Euclidian zoning can be used for the preservation or protection of developed areas and where development control can be used in areas that are undergoing development that the city wishes to control. Such districts may be designated as development control areas.

These three pieces of legislation thus try to overcome the difficulties of Euclidian zoning by two methods; by the reform

93. City of Winnipeg Act, S.M. 1971, c. 105, s. 600(1) Planning Act, R.S.A. 1970, c. 276, s. 123(c) Town Planning Act, S.N.S. 1969, c. 16, s. 33(5).
94. City of Winnipeg Act. s. 598(1) (d) and (e).
95. Town Planning Act (N.S.) s. 33 2(a) (ix).
of zoning itself, and by the introduction of development control, a concept which is, as stated earlier, essentially alien to zoning. In introducing this new factor, a land use control system that is much more responsive to community needs has obviously been established; but the reform must still be examined against the criteria of detailed planning and public access in the development control process. It is these issues as indicated above, that are areas of concern in Great Britain and the United States.

With respect to the need for detailed planning, the Manitoba legislation has dealt with the problem fully in its *City of Winnipeg Act*. It calls for a plan containing a statement of general policies for the city’s development, The Greater Winnipeg Development Plan;\(^9\) "district plans",\(^9\) detailed plans with respect to proposals for development and land use for districts within the city; and finally "action area plans for areas to be treated comprehensively by development, redevelopment or improvement...".\(^8\) The City of Winnipeg legislation is closely modelled on the amendments of the English *Town and Country Planning Act Amendments, 1968*,\(^9\) and thus narrowly defines discretion by requiring detailed planning at the district level for the City of Winnipeg. Furthermore, the planning process under that legislation stipulates that development control areas may be designated, but only within districts where there is an approved district plan.\(^9\)

The Planning legislation in Alberta and Nova Scotia is similar to that of Winnipeg although the legislation in those two provinces is province-wide and attempts to coordinate local (rural and urban), regional, and provincial needs and outlooks whereas the Manitoba legislation is tailored to meet requirements of the City of Winnipeg alone.\(^1\) It is, however, only in the urban areas of Alberta and Nova Scotia that development pressures would be great enough to require development control measures, and thus the planning requirements of those acts must be examined in their urban rather than rural context. It

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96. *City of Winnipeg Act* s. 569 (f).
97. *Id.* s. 569 (d).
98. *Id.* s. 509(b).
99. *S.* 1(3) (Development Plan); s. 2(1) (Structure Plan); s. 2(5) (Action Area Plan).
100. *City of Winnipeg Act* s. 4(1).
can be said, therefore, that on the basis of the statutes the detailed planning required in Winnipeg is not mandatory in the urban areas of Alberta or Nova Scotia, as both provinces require regional plans of a more general nature and municipal plans which, would not require the detail of the district or action area plans of Winnipeg.

The detail of municipal planning in the three provinces, however, obviously does not depend solely on the number of legislative subdivisions in the planning process. Alberta’s municipal development plan (or general plan as it is called) could include specific and detailed principles or standards for various areas of a city. Indeed the legislation sets out a number of minimal requirements for the content of a plan including “proposals as to the content of a development control by-law”. No very specific proposals are found, however, in the City of Edmonton Plan which seems to envisage detailed work coming later in the development scheme by-law.

By comparison, the Nova Scotia legislation does not set out any specific requirements for a municipal development plan; the statute in that province requires only that such a plan “include statements of policies”. The proposed Halifax Municipal Development Plan makes note of this provision and then continues: “The operative word in the quotation above is policy. The act is explicit in that a municipal development plan for the City of Halifax shall include statements of policy. The plan presented herewith provides the City of Halifax with a much-needed general policies plan, which has been prepared under the guidance provided in the Planning Act.

The proposed Halifax plan, therefore, contains little but platitudes respecting future development of that city and, with reference to development control suggests only that any site in

101. Planning Act (Alta.) s. 67 (Regional Plan) and s. 94 (General Plan); Town Planning Act (Nova Scotia) s. 4 (Regional Plan) and s. 12 (Municipal Plan).
102. Planning Act (Alta.) s. 95(c.) Moreover in Alberta there can be development control without a general plan being in existence under s. 100.
104. Planning Act (N.S.), s. 13(3).
excess of five acres is suitable for comprehensive development with approval.\textsuperscript{106} The Nova Scotia legislation thus appears to be even less helpful in limiting discretion than the legislation of Alberta. It would seem, therefore, that in providing protection to individuals in a development control situation that the Winnipeg legislation is most attractive with its three levels of planning. It is obvious, of course, that provincial legislation alone is not enough and that even specific legislative requirements with respect to planning may be avoided by municipalities. Nevertheless, in attempting to bring the British system of land development control to Canada it would seem necessary to import its planning process as well. It is only Manitoba which has attempted to do this.

The importance of detailed planning, of course, can only be seen in examining the process of development control in these three provinces and its relationship to planning. For this purpose then, the legislation will now be briefly reviewed in order to examine how a municipality must evaluate specifically proposed developments in development control areas, what limitations are placed on municipalities in that examination, and what procedures and safeguards are present in the legislation. With respect to the considerations in approving a development application the Manitoba legislation requires that council have regard to any material consideration, the provisions of the development plan, the district plan, and relevant provisions of an action area plan.\textsuperscript{107} It does, therefore, differ somewhat from the Alberta legislation for the City of Winnipeg Act attempts to balance the merits of a project in conjunction with those objective criteria as stated in its plans. In Alberta, it would seem the merits of a proposal are more important. Indeed, in that province a plan does not have to exist for development control to take place.\textsuperscript{108}

The Nova Scotia legislation is not nearly as clear for it provides for the establishment of districts by zoning by-laws which describe the purpose for which development shall take

\textsuperscript{106} ibid.
\textsuperscript{107} City of Winnipeg Act, s. 633(1).
\textsuperscript{108} Planning Act (Alta.), see also F. Laux, The Zoning Game – Alberta Style: Part II Development Control (1972), 1 Alberta Law Review 1 at p. 18.
place and which prohibits development for other purposes. This by-law may only be for the purpose of carrying out the intent of the municipal plan.\textsuperscript{109} Council is under no statutory obligation to examine any specific consideration or any specific plans in granting permission to develop under the by-law. Any objective evaluation comes only through comparing the purpose of proposed development and the intent of the municipal development plan.

In all three jurisdictions development approval involves agreements or conditions with respect to that development in order to facilitate the kind of control mentioned earlier. Once again it is only the Manitoba legislation which appears to have built into it any limitations on the discretion of the municipality in imposing conditions. Nova Scotia allows council to impose such conditions as council may direct\textsuperscript{110} while Alberta as well has no clear statutory limitation on conditions that may be imposed.\textsuperscript{111}

The \textit{City of Winnipeg Act} not only restricts conditions to those concerning use, time, siting and design, traffic control and parking, and landscaping and open space; but also specifically excludes conditions imposed on the developer for the provision of or contribution to electricity, water or sewage facilities.\textsuperscript{112} It is beyond the scope of this paper to argue the merits of the specific exclusion in the Manitoba legislation but it should be noted that this is an important attempt to prevent abuses within the development control system. The private interest must be protected along with the public interest in the imposition of conditions; the provisions of the Manitoba legislation accomplish that in part by setting a definite limit on the kinds of conditions to be permitted. Moreover, it relieves the courts to some extent of the difficulty of trying to ascertain the planning relevance of conditions that might be imposed by municipalities when those conditions viewed from the perspective of planning

\footnotesize{109. \textit{Town Planning Act} (N.S.) s. 33 (1).}
\footnotesize{110. \textit{Id.} s. 34(1).}
\footnotesize{111. \textit{Planning Act} (Alta.) s. 123(c). See also Laux, \textit{supra} note 109 at 26-35.}
\footnotesize{112. \textit{City of Winnipeg Act} s. 632(3).}
relevance may be valid, but when viewed from the aspect of fairness, desirability or need may be improper.\footnote{113. For example a court cannot consider the social implications of charging the cost of services to a developer, nor whether those costs are defined adequately.}

It has been argued thus far, that the Manitoba legislation is superior to the legislation in Nova Scotia and Alberta from the point of view of certainty and limitations on municipal power because that legislation confines and orders the exercise of discretion in the controlling of development through detailed planning, relating planning to decision making, and imposing restrictions on conditions to be imposed. The "due process" provisions of the \textit{American Law Institute Model Act}, however, were also seen to contribute to the goal of limiting discretion. Moreover, while the matters of planning and related conditions it can be argued, mainly protect the developer, the open hearing and reasoned judgement can be seen to give more protection to the public interest.

With respect to the procedure of granting approval for development it is once again the Manitoba legislation which is superior. That legislation includes an elaborate structure for the participation and representation of the public with respect to the approval of proposed developments and thus the public is involved in and aware of all the conditions, requirements, and details that control any such development. That structure begins with a hearing by the community committee in which the development is to occur. Public notice of the application for development permission and notice of the hearing through newspaper publication and the posting of a notice on the property involved is required. The legislation also encourages the mailing of notices to the applicants, owners and tenants within 500 feet of the development and any organization or person who has registered with the municipality within the year prior to the submission of the proposal. These provisions closely resemble those of the \textit{Model Development Code}. Moreover, also in keeping with the Code, a record (which is available to the public) is kept of the hearing, and as a result of this initial hearing, the community committee must summarize all representations and submissions to it and give its reasons for its suggestions as to the success or failure of the application. This
report is the basis of further reports and recommendations in an administrative hierarchy. In all those further reports and recommendations reasons must be given and sent to those of the public who are interested. Ultimately council approves or rejects the application and the conditions imposed. The public is once again informed and the possibility of a further hearing by the Municipal Board is decided upon by the Minister of Municipal Affairs.\textsuperscript{114}

The openness and citizen involvement, the requirement for reasons and records, the very early participation of all those concerned with the development — private citizens, neighbourhood organizations, local politicians, municipal staff, and developers is obvious in this legislation and stands in stark contrast to that of Nova Scotia and Alberta. The Nova Scotia legislation requires council to either conduct a hearing or delegate the authority to conduct such a hearing to an officer before passing any zoning by-law.\textsuperscript{115} Council must hear and determine all written objects that come from such a hearing which must only be advertised in the newspaper. There is no on-going consultative process under the Nova Scotia legislation. Reports and views from municipal staff are not considered or evaluated against the public's views; politicians do not have to be involved with the process except in making the final decision. Most importantly, the involvement and procedures focus on a rezoning by-law to designate development control areas. This, in itself may tend to affect the procedures, and results in the approving of districts for development control and thus forestalls an examination of the development itself by the public and affected citizens, for the actual development is approved by council resolution without any public input at a time after the development control district is designated by by-law. Finally, the \textit{Town Planning Act} permits an appeal to the Planning Appeal Board from councils resolution on the actual development; but that Board "shall not interfere with that decision [of council] unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the Municipal Development Plan".\textsuperscript{116} This would

\textsuperscript{114} \textit{City of Winnipeg Act} ss. 610-618.
\textsuperscript{115} \textit{Town Planning Act} (N.S.), s. 36.
\textsuperscript{116} \textit{Id.} s. 52(2).
seem to be a vague standard to apply to a specific development especially given the generality of the Municipal Development Plan. In Nova Scotia, therefore, because of weak planning, limited citizen involvement, uncertainty with respect to the development proposed, and an ambiguous standard for decision-making at the Planning Appeal Board level the numerous problems and indeed dangers involved in a development control system are left untouched. The province has moved to a sophisticated method of land use control without the needed procedural and planning safeguards to accompany it.

In Alberta this situation is not quite so serious, although even there development control can occur without any plans, or plans of great detail, and citizens are not involved in the initial stages of granting development permission. Indeed when initial permission is given no hearing is held and no reasons are given so that proceedings by way of appeal are de novo; however, natural justice is eventually introduced, but only after time has passed and citizens have been ignored in the early decision-making process.

VI Conclusion

There is no doubt that all Canadian provinces will have to amend planning legislation that was developed half a century ago. But this must be done with care for many subtle problems are involved besides that of introducing flexibility into planning implementation. Ontario, whose system perhaps best typifies the Euclidian method of zoning, may be the next province to move into this new area of control. The Ontario Law Reform Commission has already submitted one report on development control and has seen the complexities in reform. In its Report on Development Control it has stated: “The Commission recommends that: a thorough review and study of the entire process of planning in Ontario, including a review of the functions of the official plans and zoning by-laws, should be

117. Planning Act (Alta.) s. 123(c) gives a development officer alone the initial authority to grant or deny development permission.
118. For an explanation of the mechanics of this see Laux, supra note 109 at 21-25.
undertaken by the Province of Ontario with the assistance of professional planners, architects, economists, sociologists, and persons engaged in municipal affairs, as well as lawyers.”

This advice it seems was followed in Manitoba for the drafting for the City of Winnipeg Act. That legislation recognizes not only the deficiencies of zoning but the difficulties in moving to development control. It recognizes that in dealing with the problems in the administration of zoning by-laws, development control legislation alone (without the safeguards which the British experience has shown are needed and which the American Law Institute suggested were desirable) is not enough.

Perhaps because Alberta almost stumbled into development control by accident\(^{120}\) and because Nova Scotia is not a highly urbanized jurisdiction, those two provinces do not deal with the less obvious components of a meaningful reform in land use planning legislation. They do not approach the standards of the Manitoba legislation nor do they seem to recognize an important balancing factor which the Ontario Law Reform Commission mentions — the need to find the “acceptable middle ground between the legitimate right of the private developer and the broader concerns of the public benefit through the process of government.” The City of Winnipeg Act subtly balances these interests and contains provisions that at least in part deal with important issues of planning and procedure raised in England and the United States. The Alberta and Nova Scotia legislation, although creating a more flexible planning implementation process as advocated elsewhere fails to recognize that zoning reform is not enough — planning and procedure for the protection of public and private interest is also important.

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120. See Laux supra note 109 at 6-9 on the introduction of development control into Alberta.
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