

THE UNIVERSITY OF MANITOBA

URBAN SPRAWL AND THE SOLUTION OF GROWTH PLANNING:
LEGAL PROBLEMS WITH ITS IMPLEMENTATION IN CANADA
AND THE UNITED STATES OF AMERICA

By

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the University of Manitoba in partial fulfillment of the requirements
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ADDENDUM

Research for this thesis was concluded on February 1, 1976; on February 23, 1976, the Supreme Court of the United States issued the following order in the case of Construction Industry Association of Sonoma County v. City of Petaluma:

Motion of Pacific Legal Foundation to file brief, as amicus curiae, is granted. The petition for a writ of certiorari is denied.

Thus, the ruling of the Ninth Circuit Court of Appeals [at 522 F.2d 897 (1975)] is final.

ABSTRACT

A legal analysis of some of the solutions to the problem of urban sprawl focusing on phased-timing development as implemented by the City of Ramapo, New York, and the urban growth limit solutions variously termed No, Non, or Limited Growth Planning. An analysis of the United States Constitutional Right to Travel as it applies to these solutions with emphasis on the case of Construction Industry of Sonoma County v. The City of Petaluma, California.

Secondly, a projection of the United States planning solutions onto the Canadian legal infrastructure and a discussion of development control legislation.

Thirdly, a discussion of the misinterpretation of the decision in Kruse v. Johnson and its codification into Canadian Municipal law, specifically the use of, or preclusion of the use of, the ground of "unreasonableness" in challenging zoning by-laws with the resultant possibility of using United States solutions without any practical means of judicial review of their implementation.

A NOTE ON CITATIONS

In consultation with my advisor the system of citation used was devised as a synthesis of a number of different style manuals. The general object and purpose is to provide intelligible citations which enable the ready location of the material in the University of Manitoba Law Library where the bulk of the research was carried out and which library is a standard teaching library.

Footnotes: Citations are to the West Publishing Company National Reporter System for the United States of America case law. This was done since the Law Library does not have the Official Reports if they are covered by the National Reporter System.

Canadian and English material is cited to one reporter only and the choice of the reporter was dictated by the availability of that reporter on the day the research was undertaken.

Bibliography: I have used a modified system instead of the Harvard Citator system because I feel that fuller citations are preferable. Therefore, I have given, as best as possible, the following information for texts: namely, author, title, city of publication, publisher, and date of publication. In some cases this has been expanded.

For periodicals I have used the above method in that I have given the author, title, and citation. Abbreviations are those used in The Index to Legal Periodicals. A date preceding the citation indicates Commonwealth origin; a date following indicates United States of America origin.

Full parallel citations are given where possible and multiple reports are given for the sake of completeness. No order was used in the listing of reports except that they generally indicate the report actually used. At least one of the reports can be found in the Law Library collection.

I trust that this method is clear and that it makes the reference material readily available to those who use the Law Library of the University of Manitoba. The planning reports listed in the Bibliography are in the Law Library collection and recourse to the Architecture and Fine Arts Library at the University of Manitoba should not be necessary except for urban planning material in general.

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CHAPTER ONE

INTRODUCTION

In response to rapid urbanization and suburbanization of the United States in the past five years a phenomenon has developed--namely the attempt in various small(er) municipalities located in the path of growing urban centers to try to prevent or evade the problems of urbanization. Municipalities are searching for ways to prevent their growth beyond a maximum "desirable size;" their attempts have been met by challenge even where the legislation is lacking in bias, racial or otherwise. These challenges have resulted in the development of a new zoning premise: the requirement that the general welfare of the community includes the general welfare of the region as a whole.

In general, the United States and Canada derive their basic zoning power from common law powers inherent in sovereignty. Even though it may be said that the zoning power is granted by the legislature, the legislature has merely delegated a portion of its sovereign power. While a municipality is a creature of statute (except where there is home rule), it necessarily follows that if a municipality is not specifically prohibited from exercising police powers (when given a grant of powers) it has the

power to effect zoning by way of the common law doctrine of nuisance.¹ However, in the United States the Federal and State Constitutions place limits on what may be done under the banner of the police power. The I, the V, the XIV, and now the IX Amendments to the Federal Constitution prevent certain types of planning from being implemented even though they may be effective in stopping urban sprawl or being maintained if enacted by a municipality. The Canadian situation diverges in that since 1898² no local government has had to worry about having any by-law quashed or declared invalid on the basis that the by-law is unreasonable, the basic test of the United States Vth Amendment, and this principle appears to be firmly enshrined in the provincial legislation in Canada. Since 1959³ spot zoning has been legal in Canada; the Supreme Court of Canada ruled in that year that all zoning was inherently discriminatory⁴ to some extent and that a municipal council was free to draw zoning boundaries

¹See Siegan, Bernard H., Land Use Without Zoning, Lexington: Lexington Books, 1972.

²Kruse v. Johnson, [1898] 2 Q.B. 91.

³Scarborough v. Bondi, [1959] S.C.R. 444.

⁴In some cases discrimination has been shown but these cases closely intertwine the issues of bad faith and fraud. See Re Dillabough, (1967) 62 D.L.R.(2d) 653, Re Rosling, (1967) 64 D.L.R.(2d) 82, County View v. Dartmouth, (1974) 8 N.S.R.(2d) 1, Standard Oil v. Kamloops, [1972] 5 W.W.R. 660.

wherever it saw fit. These two principles make Canadian zoning practically unquestionable.⁵

With the problems of urban sprawl⁶ facing Canada more acutely in the future than at present, it is only natural that Canadian legislators and city planners might look to the south and view the solutions offered in the United States. They might also look across the ocean to the United Kingdom and see what was done under the statutory title of Town and Country Planning. The Canadian planner has a more liberal climate within the legal structure of the municipal government to propose solutions than his American counterpart and the legal ability of the land owner or affected person in Canada to challenge the planners is not as great. As long as good faith is shown by the legislators, the planners' ideas can

⁵Grounds that are possible, but generally not available, are the absence of enabling legislation, uncertainty, procedural error, improper delegation, and sub-delegation.

⁶The trend toward urbanization is projected by Federal Urban Affairs Minister Bernie Danson: Ontario, Alberta, and British Columbia would increase in population; Prince Edward Island, Newfoundland, Yukon Territory, and the Northwest Territories would retain their current population percentages; and, the rest of the Provinces would lose population.

Population as Percentage of National			1971	2000
Ontario.....		36.0		43.0
Quebec.....		28.0		21.5
British Columbia.....		10.0		14.0
Alberta.....		7.5		9.0
Saskatchewan.....		4.5		1.5
Manitoba.....		4.5		3.5
New Brunswick.....		3.0		2.5

generally be implemented. The private citizen's (subject's) recourse is to object to the city council, object to the municipal board, or to elect more sympathetic legislators.

This thesis shall outline some of the new solutions to the urban problems developing in the United States and an analysis of them in terms of the Canadian legal infrastructure.

As to format, the research material is current to February 1, 1976. The organization is chosen because of a statement made in one of my undergraduate law classes, "Just give me the facts, I can draw my own conclusions." Therefore, Chapter Two sets out the ideas employed by Ramapo, New York, Phased Timing Zoning; Chapter Three views the issue of housing limits and the United States Constitutional Right to Travel; Chapter Four outlines the new developments of No Growth City Planning; Chapter Five reviews the land use control mechanisms in Canada and the United Kingdom. In Chapter Six the historical development of the Canadian codification of the Rule in *Kruse v. Johnson*⁷ is traced. The final chapter, Chapter Eight, draws tentative conclusions for future analysis and consideration by the reader.

⁷Supra, note 2.

CHAPTER TWO

THE NEED TO STOP URBAN SPRAWL

Only five per cent of the land comprising the Province of British Columbia is available for production of food crops; ten per cent is available for all agricultural pursuits.¹ By 1972, fifteen thousand acres per year were being converted from agriculture to urban uses.² To prevent a similar problem in Dade County, Florida, the county government [City of Miami] adopted a housing permit moratorium on May 15, 1973, with the following pre-ample:

WHEREAS, the zoning ordinances of Dade County are predicated on a comprehensive plan, and are designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to promote adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate transportation, water, sewage treatment, schools, parks and other public requirements; and

WHEREAS, the continual process of growth and change within Dade County requires the continuing analysis of living, working and production conditions; and

¹British Columbia Land Commission, Keeping the Options Open, Burnaby: British Columbia Land Commission, 1974, page 5. The total land area of British Columbia is 250,000,000 acres. Ten thousand acres comprise the principal agricultural area of the province.

²Ibid.

WHEREAS, the continual flux of social patterns in the urban community often requires intensive restudy of areas of the community; and

WHEREAS, the changing social patterns often cause existing zoning districts to become outdated, inequitable, unbalanced and inappropriate as applied; and

WHEREAS, it is in the public interest to make a comprehensive determination as to whether existing zoning districts are appropriate, where it appears that changing social patterns have cast doubt on their propriety; and

WHEREAS, it is unreasonable to allow the issuance of building permits in areas where environment considerations and changing social patterns have cast doubt on the propriety of existing zoning districts as applied thereto; and

WHEREAS, the health, safety, welfare and morals of the people of Dade County cannot be fully protected without the establishment of a procedure for the unhindered review of the propriety of zoning classifications as applied.³

Urbanization is a concern of the commonweal.

The northeastern seaboard of the United States "is the site of a remarkable development--an almost continuous stretch of urban and suburban areas from southern New Hampshire to northern Virginia, and from the Atlantic shore to the Appalachian foothills."⁴ So wrote Jean Gottmann in 1961. The problem of urbanization is upon us; urban sprawl

³Metropolitan Dade County, Florida, Ordinance 7218, May 15, 1973.

⁴Gottmann, Jean, Megalopolis, Cambridge: M.I.T. Press, 1961, page 3.

is devouring the countryside.⁵ As Norman Marcus of the New York City Planning Commission has said:

Unless the remaining vacant land in the state is allocated to a set of sound regional priorities, it may become impossible to undo the mistakes which have been made in the central cities and prevent their redevelopment. Similarly, areas that are now rural and suburban are apt to slide into unplanned growth willy-nilly at the behest of courts and developers who apply subjective stands to remedy clear violations of equal protection constitutional requirements.⁶

This is not a typically North American problem. The geographers project megalopolis in the following areas:

1. The London - Paris - Ruhr Triangle
2. The Yangtze Delta
3. East America (slightly south of Gottman's megalopolis)
4. West America (California)
5. La Plata Delta
6. The extreme south tip of Africa
7. Southeast Australia⁷

What is the cause of the sprawl? One factor is the "underassessment of land which allows speculators to hold desirable land off the market thus forcing premature subdivisions and housing tracts farther out. This 'leap-frogging' in turn further increases the value of vacant

⁵Urban sprawl can be defined as, metropolitanization "through the process of scattered development of miscellaneous types of land use in isolated locations on the [urban] fringe followed by the gradual filling in of the intervening space with similar uses." Whyte, Jr., William in Bell, Christopher J., Controlling Residential Development in the Urban Fringe: St. Louis County, Missouri, 48 J. Urban Law 409 (1971).

⁶Marcus, Norman, Exclusionary Zoning: The Need for a Regional Planning Context, 16 N.Y.U.L.F. 732, 740 (1970).

⁷Papioannon, John G., Future Urbanization Patterns: A Long Range World-Wide View, 39 Ekistics 368, 370 (1970).

land held close in, yet the tax assessment policy characteristically takes no notion of this."⁸

Unless decisions are made about the personal automobile as a means of transportation, the trend seems to be towards more urban sprawl because the automobile offers an:

escape from the town centre but then makes return to the centre so congested and complicated that commerce and industry follow it outwards, creating a tide of shops and factories which swamp all intervening open space while the city centre, such as it is has to be torn up to accommodate returning cars or cars in transit.

In most old towns the first main streets were built to accommodate a small community and modest traffic flows. As the town grew to a city, the outlying streets were built with considerable width. As collectors of traffic the suburban arteries seem to be oversized compared with traffic they carry and compared to downtown streets which carry great volumes of traffic at metropolitan crossroads.¹⁰

However, the motor car cannot be solely blamed:

[Urban sprawl seems] to be associated one way or another with economic growth. Commerce and industry require markets. The city provides the means and the markets. Then the growth itself provides more markets and more labour and more enterprises are drawn in to profit by them. Proximity cheapens services and costs. Pressures

⁸Yearwood, Richard M., Subdivision Law: Timing and Location Control, 44 J. Urban Land 585, 607 (1967).

⁹Ward, Barbara, The Process of World Urbanization, New York: United Nations, 1969, page 12.

¹⁰Havlick, Spencer W., The Urban Organism, The Cities Natural Resource from an Environmental Perspective, New York: Macmillan Pub. Co., 1974, page 89.

on local government produce urban utilities. They attract further migrants with yet more money to invest or labour to sell.¹¹

In 1971 a Wisconsin public opinion poll obtained responses of people asked where they wanted to live:

<u>DESCRIPTION OF AREA</u>	<u>WHERE DO YOU LIVE NOW</u>	<u>WHERE DO YOU WANT TO LIVE</u>
Open country	12%	34%
Small town or city	33	30
Medium size city or suburb	28	22
Large city or suburb	27	14
Total	100	100 ¹²

In Chicago, Illinois, people were asked if they would be afraid to walk alone at night in different size cities; the response by community size:

<u>COMMUNITY SIZE OF RESPONDENT</u>	<u>1968</u>	<u>1972</u>
500,000+	40%	49%
50,000 - 500,000	38	49
2,500 - 50,000	22	41
Less than 2,500	21	21 ¹³

People want to live in non-urban areas and are afraid to walk alone outside in urban areas. That seems to be tautological in its analysis.

Population increases appear to bring problems. What do people perceive as the problem? Tom McCall, Governor of the State of Oregon, announced on national United States

¹¹Ward, Supra, note 9.

¹²Finkler, Earl, Nongrowth as a Planning Alternative: A Preliminary Examination of an Emerging Issue, A.S.P.O. - P.A.S. No. 283, Chicago: American Society of Planning Officials, 1972, page 22.

¹³Ibid., quoting the Sun Times, April 23, 1972.

television in the early 1970's, "Please come visit us in Oregon again and again. But for heaven's sake don't come here to live."¹⁴ Hawaii's state legislature passed a bill establishing a control commission to set limits on the number of importable automobiles and the number of ships and planes bringing in passengers.¹⁵

Livermore, California, had an initiative petition drive in 1972 to limit the number of building permits if any of the following took place: (1) double sessions in the schools, (2) sewage disposal became substandard, or (3) rationing water for human, agricultural, or fire safety consumption was necessary.¹⁶

Brookhaven, in Suffolk County on New York's Long Island, initiated its planning process in late 1974. As stated in their draft plan, "One theme runs throughout the plan, a single question that was asked time and time again...how many people should ultimately live in

¹⁴Lawrence Halperin and Associates and the State of Oregon, Willamette Valley--Choices for the Future, San Francisco: Lawrence Halperin and Associates, 1972, page 94.

¹⁵Ibid.

¹⁶Cranston, Mary, Garth, Bryant, Plattner, Robert and Varon, Fay, A Handbook for Controlling Local Growth, Palo Alto: Stanford Law School, Environmental Law Society, 1973 page 90-96. The ordinance proposed was declared invalid (now on appeal) and void on December 29, 1972, by Judge Lyle E. Cook. The grounds were overbroad, no perceptible standards, and, an invalid attempt, procedurally, to zone.

Brookhaven?"¹⁷

What function does land regulation perform? Does zoning further the four sisters of police power (health, safety, morals, and general welfare) or does it further someone's private economic needs? Zoning is a cause of urban sprawl; it makes land scarce because less land is available for different uses.¹⁸ Siegan believes that, "land and property are being regulated almost merely for the sake of regulation under an apparent assumption that no matter how unreasonable, inequitable, and irrational the process is, its absence would only make things worse."¹⁹

¹⁷Raymond Parish & Pine, Inc., Brookhaven Master Plan, draft copy, Brookhaven: City Planning Board, 1974, page 2. Brookhaven has 245,260 people as of 1972, an increase of 121.6 percent over ten years with a projected holding capacity of 1,000,000 persons based on water supply; 750,000 to 700,000 persons based on sewer capacity.

¹⁸Siegan, Bernard H., Land Use Without Zoning, Lexington: Lexington Books, 1972, page 13:

It is always intriguing to inspect zoning maps of large cities and contemplate the reasons why one or more individual parcels happened to be given particular zoning classifications...

Was it to promote the public health, safety, and welfare? Was it to enhance property values--and whose? Perhaps it was bought and paid for. Was it upon advice or recommendation of a planner, political committee man, or the 'right' lawyer? Would many or any other planners have given similar advice? Was it pressure from the homeowner's association? Was it because two, twenty, or two hundred people appeared at a hearing to express opposition? Or again, a court may have ordered it contrary to the wishes of the city council.

¹⁹Ibid., 21.

Canada is suffering from its problems of urbanization. Canadian urbanization has supposedly brought the following with it, poverty, housing cost inflation, transportation congestion, environmental decay, social unrest, and fiscal squeezes.²⁰ But urban sprawl is a problem of its own.²¹

Urbanization in Canada is ongoing; one-fifth of the population lives in two urban areas, Montreal and Toronto.²² By 1980, 80 percent of Canada's population, projected at 26,650,000 will be urbanized. One-third of the population, 8,500,000 will live in Ontario; 4,103,000 will live in what is termed the Mississauga Conurbation.²³

It is generally conceded that people want to live in pleasant surroundings and, in general, urbanized areas are not found to be pleasant. Daniel Boone once said, "I had not been two years at the licks, before a damn Yankee came, and settled down within a hundred miles of

²⁰Lithwick, N.H., Urban Canada, Problems and Prospects, Ottawa: Central Mortgage and Housing Authority, 1970, page 19.

²¹Ibid., 30.

²²Ibid., 54.

²³Ibid. The Mississauga Conurbation is the area of urban sprawl around the western end of Lake Ontario from Oshawa in the east to Dunnville in the west (on Lake Erie) to Barrie in the north and Kitchner-Waterloo in the north-west.

me!"²⁴ Growth has become a dirty word in some areas; the era of big for bigness sake is over.²⁵ But one major reason exists for controlling urban sprawl, other than the desire to maintain country side as countryside for its own sake or use as parks, and that is the financial cost of urban sprawl.

The major increased financial cost of urban sprawl over denser planned communities is the high cost of services. The Real Estate Research Corporation conducted a study of the "costs of sprawl"²⁶ for a number of United

²⁴Niles Weekley Registrar, May 17, 1823, quoting an 1801 statement cited in Hersey, John, My Petition for More Space, New York: Alfred A. Knopf, 1974.

²⁵Garden Grove Urban Development Department, Growth Policy Element, City of Garden Grove General Plan, Garden Grove, California: Urban Development Department, 1973, page 1:

For the first time on any significant scale there is a national [U.S.A.] questioning of the future direction of this country in terms of the amount and quality of growth...The proposal for a growth policy [policy for the American people who must decide just what sort of country they want this to be] does not presume that the City of Garden Grove [or any other city] can, by itself, determine the level or rate of population growth. It does, however, suggest that the exercise of coordinated local public policy can very substantially influence growth.

²⁶Real Estate Research Corporation, The Costs of Sprawl, Environmental and Economic Costs of Alternative Residential Development Patterns at the Urban Fringe, Washington, D.C.: Government Printing Office, 1974.

States government organizations²⁷ in 1974. Three types of community development patterns were compared: low density sprawl,²⁸ a combination mix,²⁹ and high density planned.³⁰ The developments were analyzed in terms of the following variables: economic costs, land use, environmental effects, and personal effects.³¹

Land use for the three types generated the expected results in that the high density planned community has

²⁷Council on Environmental Quality; Office of Policy Development and Research; Department of Housing and Urban Development; Office of Planning and Management, Environmental Planning Agency.

²⁸Supra note 26, Executive Summary, page 2.

Low density sprawl is defined as, "entire community is made up of single family homes, 75 percent sited in a traditional grid pattern and the rest cluttered. Neighborhoods are situated in a 'leap-frog' pattern with little continuity.

²⁹Ibid. Combination mix is defined as, "the community consists of a housing mix of 20 percent of each of the five types of dwellings, single family homes, conventionally located; single family homes, clustered; townhouses; walkup apartments (two stories); highrise apartments (six stories), half located in planned unit developments, half located in traditional subdivisions."

³⁰Ibid. High density planned is defined as: in this community housing is composed of 40 percent high rise apartments, 30 percent walkup apartments, 20 percent townhouses, 10 percent clustered holes. All of the dwelling units are clustered together into contiguous neighborhoods, much in the pattern of a high density 'new community.'

³¹Ibid., 1. The purpose of the study was to inform local officials of some of the basic material and provide an information source.

over fifty percent of its available land as open space; however, if back yards in the low density urban sprawl community are added to public open space and private land dedicated to open space, then the low density community has twice as much open space as the high density community unimproved.³² Only half as much land is allotted for transportation uses in the high density community as the low density urban sprawl freeing more land from the omnipresent automobile.³³

Economic costs in terms of total capital improvement costs range from a high of \$48,000 per dwelling unit for low density urban sprawl to a low of \$27,000 for high density planned.³⁴ The high density planned community costs 21 per cent less than the combination mix and 44 per cent below the cost of the low density urban sprawl.³⁵ The largest cost saving is in the area of residential construction costs, with concomitant savings in the cost of installing utilities and roads.³⁶ Figure I shows the differences in cost for the developer and the city local community. The high density community has a lower private

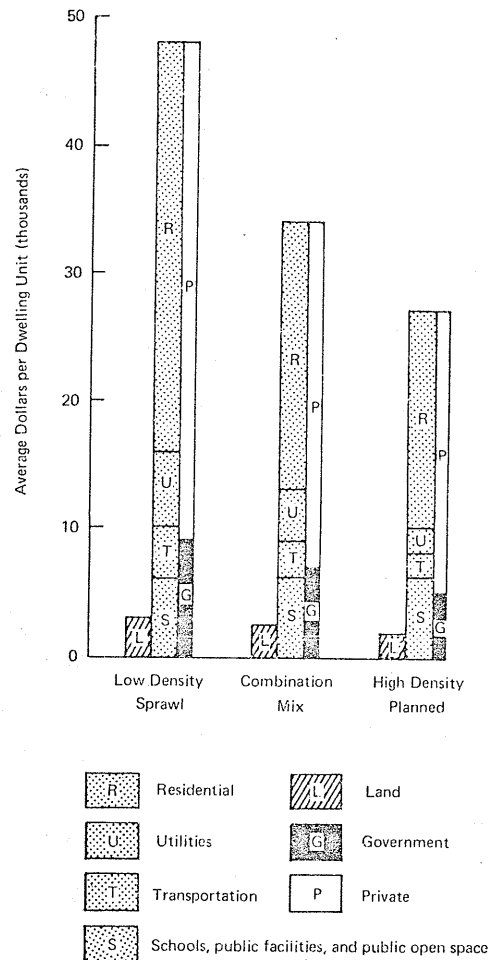
³²Ibid., 2.

³³Ibid.

³⁴Ibid., Figure II, page 3.

³⁵Ibid., page 3.

³⁶Ibid.

FIGURE I³⁷COMMUNITY COST ANALYSIS
CAPITAL COSTS

and public cost than the other two types of development. Maintenance and operating costs are not significantly different because they are more dependent on population size than development patterns. The largest difference is in the cost of operating and maintaining utilities which

is what could be expected; it is expected that it will be necessary to install more utility lines in areas of urban sprawl than in higher density communities.³⁸

In terms of environmental costs, air pollution is caused by automobile and residential heating (not counting industrial or commercial uses which are regulated by specific environmental acts).³⁹ Forty-five percent less air pollution is generated in the high density community because of less automobile traffic and greater heating savings as compared to the low density urban sprawl model.⁴⁰ Water pollution is differentiated in run off figures; the less paved area, the less run off; however, as is the case of air pollution, pollution per square area is greater and the dispersal effect of urban sprawl is lost in considering noise pollution. But wild life and ecological concerns are enhanced by high density planning.⁴¹

In areas where water is in limited supply, 35 percent less water would be needed in high density areas over low

³⁸Ibid., Figure III, page 4.

³⁹Two excellent texts on U.S. environmental laws are (1) Grad, Frank P., Environmental Law, New York: Matthew Bender, 1974, (2) Anderson, Frederick A., NEPA in the Courts, A Legal Analysis of the National Environmental Policy Act, Baltimore: Johns Hopkins University Press, 1973

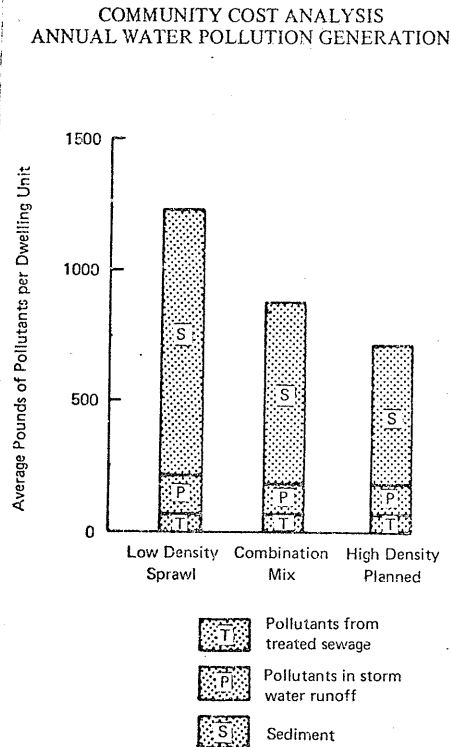
⁴⁰Supra note 26, page 4.

⁴¹Ibid.

density urban sprawl for lawn sprinkling.⁴² Six percent less would be saved by clustering.⁴³

Energy consumption is diagrammed in Figure II:

FIGURE II⁴⁴



The energy saved by planning can be fourteen percent,⁴⁵ combined with high density decreased energy can be 44 percent.⁴⁶

Personal costs are basically non-quantitative.

⁴²Ibid., 6.

⁴³Ibid.

⁴⁴Ibid.

⁴⁵Ibid.

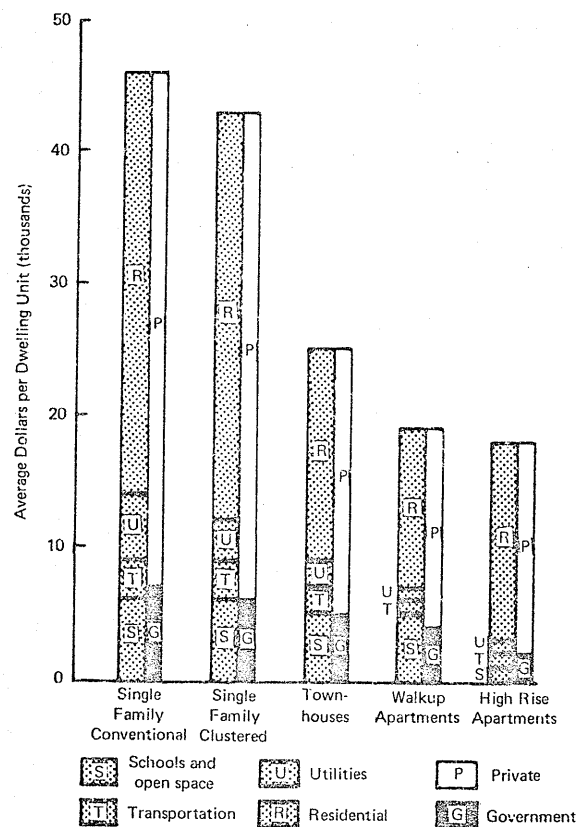
⁴⁶Ibid.

Qualitative measures could be commuting time and maintenance time needed to care for the home.

On the basis of the total neighborhood, what costs could be expected for a community of 33,000 persons? For the five types of developments the capital costs are given by Figure III:

FIGURE III⁴⁷

NEIGHBORHOOD COST ANALYSIS
CAPITAL COSTS



⁴⁷Ibid., Figure VIII, page 7.

Increased density costs less, as in community cost, walk-up apartments are the least costly to construct; but, for streets, roads, utilities, and schools, high rises are the least expensive.⁴⁸

The study concludes: "planning, to some extent, but higher densities to a much greater extent, result in lower economic costs, environmental costs, natural resources consumption, and some personal costs for a given number of dwelling units."⁴⁹ Urban sprawl costs the taxpayer more than planned higher density communities along with cost personal amenities not easily quantitatively measured--the quality of life. Leapfrogging developments should be prevented from a purely economic reason; it costs the person as taxpayer more to allow the country side to be "developed" than it costs the local community to exercise some restraint in building. Growth may still be good, but uncontrolled growth cannot be good.

⁴⁸One assumption implied in the study is that the population will be slightly smaller in the higher density living pattern than the lower density living patterns.

⁴⁹Supra note 26, page 6.

CHAPTER THREE

RAMAPO, NEW YORK: TIMED PHASED ZONING AND THE CONCEPT OF REGIONALISM IN THE DEFINITION OF THE GENERAL WELFARE

The extent that a municipality could limit migration to its confines has been debated in the United States for over two hundred years. Initially, communities attempted to limit their religious, ethnic, or racial composition. Within the past decade the focus has changed from that of group discrimination to the limitation of the actual number of people that would be permitted entry based on demographics. Recently, two cases have shed some light on the issue, *Golden v. Planning Board of Ramapo, New York*,¹ and *Construction Industry Association of Sonoma County v. City of Petaluma, California*.² Both of these cases involve attempts to limit the municipalities' population and control the ultimate municipal size by employing the police powers.

In 1955, Henry Fagin proposed that urban development be regulated by a timing mechanism which would control

¹285 N.E.2d 291 (C.A. N.Y., 1972).

²375 F. Supp 574 (D.C., E.D. Cal., 1972), rev'd (9th Cir., 8-14-75).

the tempo of urban expansion accomplished by an element of the municipalities' master plan.³ This mechanism could accomplish five objectives:

1. Control the economic cost of municipal services,
2. Retain municipal control over eventual character of development,
3. Create a balance between uses,
4. Achieve greater detail and specificity in development regulations, and
5. Allow for a higher quality of community services and facilities.

A number of cases of the issue of phased zoning, or as it is better known, development timing, have been decided, of which the City of Ramapo zoning by-law was the first to receive court approval.

Albrecht Realty Company v. Town of New Castle,⁴ a Supreme Court of New York decision, concerned a zoning by-law which created a Special Residence District. Only 112 building permits were to be granted within the Special Residence District in quarterly percentages of 25% for those quarters beginning June 1st and September 1st; and 15% from December 15th and 35% from March 1st. Practically all the land outside the incorporated village was placed in this district. The Albrecht Realty Company claimed

³Fagin, Henry, Regulating the Timing of Urban Development, 20 Law and Contemporary Problems 298 (1955).

⁴167 N.Y.S.2d 843 (1957).

that this was a taking of its property without compensation, violating constitutional provisions, and was ultra vires the enabling act. The court held that "there is nothing in the Town Law, G261 [the enabling act in question] that gives the defendant town power to regulate the rate of its growth and the Zoning Ordinance Article under attack here is a direct regulation of the rate of growth and nothing more."⁵ The evidence was held to have shown that this was an attempt to relieve pressure for new facilities in a school district. The Court also held that this was a taking and that the by-law left the plaintiff realty company without any beneficial use of the land and made it impossible for them to receive a reasonable rate of return on the investment. This was a primitive way to control development; far from outlawed, its use will appear later in the Petaluma, California, situation.

Preceding the passage of the Ramapo by-law, a number of other cases were decided on the legality of development timing--usually against its validity.⁶

⁵Ibid., 844.

⁶Beach v. Planning and Zoning Commission of Town of Milford, 103 A.2d 815 (Conn., 1951); Josephs v. Town Board of Clarkstown, 198 N.Y.S.2d 695 (1960); Levitt v. Sands Point, 148 N.Y.S.2d 798 (1956) modified 152 N.Y.S.2d 711 (1956) and 154 N.Y.S.2d 846 (1956); Rockaway Estates v. Rockaway, 119 A.2d 461 (N.J., 1955).

In 1961 Frank S. So proposed capital improvement programming.⁷ Capital improvement programming is outlined as:

the scheduling of public physical improvements for a community over a period of time. The scheduling is based on a series of priorities, according to the need, desire or importance of such improvements, and the communities' present and anticipated financial standing...whereas the zoning ordinance and subdivision regulations guide certain aspects of private development, the capital improvement program can have a proportionately greater impact on urban development since decisions whether certain improvements are built at all are made...⁸ [It] includes new or expanded physical improvements for the community that are of relatively large size, are relatively expensive and relatively permanent.⁹

The improvement plan would include schools, streets, sewers, playgrounds, police stations, libraries, etc. and would by its nature have a time duration for construction of these improvements. By deciding when the improvement will be constructed by the municipality, influence over the location of present and future growth could be maximized. Priorities would be developed on the basis of anticipated revenue projections, anticipated expenditures, debt service costs, and community desires. It was a method of this nature that was employed in Ramapo, New York.

⁷So, Frank S., Capital Improvement Programming, A.S.P.O. - P.A.S. No. 151, 1961

⁸Ibid., 1.

⁹Ibid., 4.

There are three major legal questions as to the validity of development timing in the United States:

1) Is there a state enabling act? 2) Is this an exclusionary device to keep out unwanted migrants? 3) Is this a "freeze" on land that amounts to a taking?¹⁰

Ramapo's by-law did not violate any of these, but these issues are what must be resolved for all new zoning techniques. As to issue (2), it is beyond the scope of this thesis to analyze the ordinances in terms of racial group exclusion. A violation of the Constitutional prohibition against racial discrimination will invalidate an otherwise valid zoning by-law and includes issues that are not germane to this thesis.¹¹

Before discussing Ramapo's by-law, one more question must be answered, "Is there a right to municipal utility service?" If there is no such right, a requirement that such utilities be installed by the municipality before a building permit will be issued under a development timing ordinance using a capital improvement program would frustrate the ability of the property owner to develop his land.

¹⁰Elias, Ervin A., Significant Developments and Trends in Zoning Litigation, 1973 Planning & Eminent Dom. Inst. (S.W. Legal Fdn.) 1, 25 (1973).

¹¹Some other exclusionary devices that have been used in attempts at racial discrimination are large lot zoning, minimum size requirements for houses, maximum numbers of bedrooms, and exclusion of mobile homes. Referendums on zoning changes have also been employed.

In California, Marin County voters voted down a water facilities bond issue so as to prevent the attraction of future new residents even though the voters were in need of new water facilities.¹² In *Wilson v. Hidden Valley Municipal Water District*,¹³ residents of an agricultural area near Ventura County, California, petitioned to leave a regional water district so as to prevent the importation of water into the area. The residents wanted to retain the agricultural character of the district by preventing adequate water service for urbanization since there was insufficient water for maximum agricultural use and no surplus for urban development. In both these cases, local residents refused to supply to themselves utility services and implicit is the denial of services to future residents because of the lack of development potential caused by the lack of utility services.

However, once a municipality furnishes utility services, it must furnish them without discrimination. In *Hawkins v. Town of Shaw, Mississippi*,¹⁴ it was shown that municipal services were denied on the basis of race. In one of the few municipalities where general revenue funds

¹²Agelasto, III, Michael A., No Growth and the Poor, Equity Considerations in Controlled Growth Policies, 9 Planning Comment 2 (1973), Date of referendum unknown.

¹³63 Cal. Rptr. 889 (C.A., 1967).

¹⁴437 F.2d 1286 (5th Cir., 1971).

and special assessments are not used to pay for municipal utilities, the Town of Shaw supplied streets, paving, sanitary sewers, water mains, fire hydrants, and surface water drainage to the white area of the town. Unpaved streets without street lights (of a newer kind which had been installed in the white section) and no sewers were provided in the black areas; water was supplied to the black area but pressure was inadequate. The Fifth District Court of Appeals ruled that the Equal Protection clause of the 14th Amendment to the Constitution applied to municipal services and ordered corrections. In this case there was an "arbitrary quality of thoughtfulness."¹⁵ The issue as to whether or not there is a right to municipal utility services is not decided; however, it is generally now accepted that in the United States if a municipality has furnished utility services, it may not discriminate among its customers without reasonable classification or it will be a violation of the Equal Protection clause.¹⁶

¹⁵Norwalk CORE v. Norwalk Development Agency, 395 F.2d 920, 931 (2nd Cir., 1968).

¹⁶"The action taken by the local authority was arbitrary and unreasonable. The water facility is a municipally-owned public utility established under legislative authority....The provision of water for the public and private uses of the municipality and its inhabitants is the exclusive province of the local agency; and it is elementary that the exercise of the power must be in all respects fair and reasonable and free from oppression. There can be no invidious discrimination in the extension of the service thus undertaken by the municipality as a public responsibility. Equal justice is of the very essence of the power. Impartial administration is the controlling principle. The rule of

Ramapo, New York, is a rapidly expanding suburban area (population 76,702 in 1970 census, double its 1960 population, with a projected figure of 120,000 in 1985) in Rockland County within commuting distance of New York City. The Ramapo by-law provided for special areas called "Residential Development Use" areas where it was necessary to obtain a special permit before development would be allowed. Residential development use was defined as "the erection or construction of dwellings on any vacant plots, lots, or parcels of land."¹⁷

The by-law provided for certain standards to be met before a special permit would be granted to a developer for a proposed development in addition to having to meet the other zoning regulations. All requirements were framed in terms of the availability of the following:

1. Public sanitary sewers or approved substitutes
2. Drainage facilities
3. Improved public parks or recreation facilities including public schools
4. State, county, or town roads - major, secondary or collector

action must apply equally to all persons similarly circumstanced. There is a denial of the equal protection of the laws unless the water service be available to all in like circumstances upon the same terms and conditions, although the rule of equality may have a pragmatic application. Persons situated alike shall be treated alike."

¹⁷Ramapo, New York, Selected Sections from the Zoning By-Law, 24 Zoning Digest 99, See Appendix A.

5. Firehouses.¹⁸

A point system was established with a sliding scale for each of the above elements depending on the proposed development's location. A total of 15 points was needed for permission; the maximum was 23. "Subdivision is thus a function of immediate availability to the proposed plot of certain municipal improvements; the avowed purpose of the amendment [to the zoning by-law now under attack in a proceeding functionally equivalent to mandamus for a building permit] being to phase residential development to the town's ability to provide the above facilities or services."¹⁹ The town undertook to see that the required facilities would be built within an 18-year period as outlined in a Master Plan and the Capital Improvement Plan. The Master Plan was adopted in 1966 and was to have a duration of 6 years. The Capital Improvement Plan was to last an additional 12 years. The act provided that a permit could be issued if the development met the minimum point value or, in no case, later than the final year of the 18-year Capital Improvement Plan. The permit was fully assignable; and if improvements are scheduled for the next year hence from date of application, the improvements are deemed to exist; a prospective subdivision could have the date of subdivision advanced by the developer

¹⁸ 285 N.E.2d 291, 295 (C.A. N.Y., 1972).

¹⁹ Ibid.

agreeing to provide those services or improvements which will bring the point total to 15; and, variances were provided for.

The program sought to establish orderly growth through sequential development policies commensurate with public facility capacity. The area of effect of this by-law was not to reclassify any existing use zones, but to add a new classification. It was the intent of the local officials to create public housing in the area and to have bi-racial low-income family housing available. Thus the issue of racial exclusion was not a factor in this case.²⁰

On the question of whether or not there was an applicable state enabling act for the by-law, the Court of Appeals for New York State held that "phased growth" is well within the enabling legislation.²¹

In New York State, municipalities lack inherent power to zone; such power must be delegated by the State

²⁰Ibid., note 2. Lauber, Daniel, Recent Cases in Exclusionary Zoning, A.S.P.O. - P.A.S. No. 292 (1973) p. 19,

Timed development received its judicial blessing in Ramapo,--a blessing whose final effects are still unknown. It does appear, however, that if a timed development ordinance is clearly found to be part of an exclusionary scheme, it will be declared invalid by the New York Courts.

Had this case been decided before a Pennsylvania or New Jersey Court, both of which are much more well-versed in the dynamics of exclusionary land use practices, a much different decision may have resulted. [Certiorari was denied by the United States Supreme Court for lack of a substantial Federal question].

²¹Ibid., 300.

Legislature. It was argued by the plaintiff that timing controls are not within the enabling legislation because they place a prohibition on the subdivision absent precedent or concurrent action of the town.²² The Planning Board does not have absolute power to prohibit the grant of subdivision permission; it has the right to refuse approval in the absence of improvements specified in the state enabling act. Here the opposite of what normally is the case where the Town makes the improvements; it does not put any absolute prohibition on the subdivision "any more than would the developer's refusal."²³ However, the Town may not be held to the program because of fiscal needs from year to year.²⁴ The effect is a conditional prohibition on subdivision approval--a requirement for facilities, either municipally or developer installed, with the same objective. The result of either instance is subdivision rights conditioned on the availability of facilities and not totally denied.

The Court of Appeals went on to discuss the issue of regionalism in land use controls and the effect of *National Land and Investment Company v. Easttown Twp. Board of Adjustment*,²⁵ its progenitors, and progeny.

²²Ibid., 298.

²³Ibid.

²⁴Ibid., note 7.

²⁵215 A.2d 597 (Pa. S.C., 1968).

Is the Ramapo by-law a taking (expropriation by use of the zoning power) of property and thus requiring compensation? The 14th Amendment to the U.S. Constitution selectively incorporates the 5th Amendment provision that no "private property be taken for public use, without just compensation" by the phrase "nor shall any state deprive any person of life, liberty, or property, without due process of law." This constitutional safeguard compels payment to a property owner when a zoning regulation effectively prevents the reasonable economic enjoyment of the property of the owner-developer.

A by-law which permanently restricts reasonable use is a taking; the pragmatic difference between a taking and restriction is the requirement of paying taxes if it is a restriction and condemnation if it is a taking. But a temporary restriction which in the short run may be a burden, may be valid if within a reasonable time the alternate benefit will give a substantial increase in benefit, or it is to promote the public good.²⁶

Under the Ramapo by-law, the plaintiff claimed that the restriction is for an entire generation and is not a temporary expedient. The Town contended that the use of the land is not serialized and there are other available uses. The Court held that there was some restriction on the use of the property in question, but unless the

²⁶Arverne Bay Construction Company v. Thatcher, 15 N.E.2d 587, (C.A. N.Y., 1972).

regulation is an unreasonable restriction in terms of necessity or diminution of value of the use so as to be a confiscation, a regulation would be valid. The Court concluded:

In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitution.²⁷

However, all phased growth plans are not necessarily valid; the reasonableness of the plan must be considered. Three later cases in the Appellate Division of the Supreme Court of New York deal with the reason for the plan. In *Charles v. Diamond*²⁸ a sanitary sewer was unavailable; it had been unavailable for seven years; and, the municipality had not established a time table. A Ramapo-type defense was held to be invalid and the required permit ordered to be issued. In *Lake Illyria Corp. v. Town of Gardiner*,²⁹ the Court held that moratoriums on issuance of permits were valid if adopted pending the approval of a master plan; but, four successive one-year moratoriums without adoption of the master plan was not phased zoning but "stop-gap zoning." A reasonable measure to protect

²⁷285 N.E.2d 291, 305 (C.A. N.Y., 1972).

²⁸345 N.Y.S.2d 764 (A.D., 1973).

²⁹352 N.Y.S.2d 53 (A.D., 1974).

the public interest pending passage of a master plan and zoning ordinance was not authorized by the decision in *Golden v. Planning Board of Town of Ramapo, New York*. And in a case where all permit requirements were met except sanitary sewer facilities which had no relationship to any community plan, or plan for improvement of the sewer system, a proprietary home for adults could not be denied a building permit. It was unreasonable and discriminatory to "punish" a single landowner for the fault of the municipality which did not provide the sewer. However, a short moratorium would be allowed to remedy the problem. If the municipality failed to provide the sewers within the allotted time, the landowner would be entitled to damages.³⁰ These cases can act as limitations in the scope of *Golden v. Planning Board of Town of Ramapo, New York*, by confining the case to planning criteria and not subsequent developments.

But it is not always possible to burden a developer with the cost of all improvements if benefits caused by the improvements are bestowed on other property owners.³¹

³⁰*Belle Harbor Realty Corp. v. Kerr*, 350 N.Y.S.2d 698 (A.D., 1973).

³¹*Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills*, 28 N.J. 423, 147 A.2d (1958), imposed cost of water-mains extensions on developer following *Reid Development Corporation v. Parsippany Troy Hills*, 89 A.2d 667 (1952). Here no standard or regulation was adopted for applications for service and administration decision making when acting on the applications.

In *Deerfield Estates, Inc. v. Township of East Brunswick*³² the lack of standards in the ordinance requiring municipal water and sewers had this effect and the ordinance was ruled invalid. While the municipality could have discretion in whether or not it wanted to extend water mains, it was governed by a test of practicability of equality of treatment of applicants for water service.³³ Judge Breitel dissented in *Ramapo*. Taking a regional approach to the problem of land use controls in urban areas, the Judge stated that the by-law was ultra vires the enabling act in that this by-law was not within the power to control the "density of population." He also cited *National Land and Investment Co. v. Easttown Board of Adjustment* in which the Supreme Court of Pennsylvania said, "Zoning is a means by which a government body can plan for the future..."³⁴ Communities must deal with the problem of population growth. They may not adopt zoning regulations that effectively restrict population to near present levels."³⁵ Judge Breitel did not reach the constitutional issue following judicial reluctance to rule on a constitutional issue if the case can be decided on another ground.

³²286 A.2d 498 (S.C. N.J., 1972).

³³See generally, 45 A.L.R.829, 48 A.L.R.2d 1222, 56 Am. JUR., Waterworks, section 61.

³⁴285 N.E.2d 291, 308 (N.Y. C.A., 1972).

³⁵*Ibid.*, quoting *Concord Township Appeal* (aka *Appeal of Kit-Mar Builders, Inc.*), 268 A.2d 765 (Pa. 1970).

This is the exact opposite of Judge Seilleppi's majority opinion in the case where he said, "Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well ordered and thriving communities into blighted ghettos with attendant hazards to health, safety, and social stability..."³⁶

In 1972 the Columbia Gas Co. of Ohio was granted permission to deny natural gas service to all new premises regardless of use. The Public Utility Commission of Ohio found that there was a shortage of natural gas and that a distribution system was needed.³⁷ In 1974 the East Ohio Gas Company requested permission to cut back on natural gas distribution for commercial use and to establish a priority system within the class of commercial use.

Should a municipality operate a public utility to supply natural gas, the same situation would most probably entail. Could the availability of municipally supplied natural gas be also added to the type of by-law developed by Ramapo and create a requirement that could not be met. The obvious solution is an all electric unit; but, electric

³⁶Ibid., 302.

³⁷In the Matter of the Investigation of Supply of Natural Gas within the State of Ohio, Public Utilities Commission of Ohio, Case No. 71-757-G, Programs proposed by Columbia Gas of Ohio, Inc., 1972.

power is becoming expensive or scarce. Private utilities cannot purposefully control growth, but state-wide influence can be exercised by the public utility commissions. In *Jackson v. Metropolitan Edison Company*,³⁸ the Supreme Court of the United States refused to extend the Doctrine of State Action (so as to have federal jurisdiction) to utility service users. The dissent would make electrical service by a public regulated monopoly subject to the requirements of Procedural Due Process. Thus, the choice of whether or not there will be service and how it will be granted, barring some form of overt racial, religious, ethnic, or sexual discrimination, will be left to the States and their regulatory bodies.

A major issue of zoning technique was raised in *Golden v. Planning Board of Ramapo* and the municipality prevailed; the argument is for regional consideration in zoning. In the decision, the Court specifically states that any zoning technique that restricts the free mobility of people will be considered inherently suspect³⁹ and there will be no countenance, under any guise, of

³⁸95 S.Ct. 449 (1974).

³⁹Under the XIV Amendment, a State may make reasonable classifications but certain classifications are prima facie invalid unless the State can show a compelling state interest to support the classification. Abridgement of fundamental Constitutional Right will be inherently suspect, i.e. The Right to Travel was declared to be a fundamental right in *Shapiro v. Thompson* 394 U.S. (1969).

community efforts at exclusion or immunization of people.⁴⁰ The major problem is local community autonomy, as seen by legal commentators, and movement is afoot for regional solutions to urban land use problems. "The evolution of more sophisticated efforts to contend with the increasing complexities of urban and suburban growth has been met by a corresponding reluctance upon the part of the judiciary to substitute its judgment as to the plan's over all effectiveness for the considered deliberations of its progenitors."⁴¹ But, this presupposed "considered deliberation" by rational men. The presumption of validity allows for this type of judicial reluctance, but there remain other checks on the acts of the legislature. As the Court said:

It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth...Where those restrictions upon the beneficial use and enjoyment of land are secondary to promote the ultimate good of the community are within the bounds of reason they have been sustained. Zoning [however] is a means by which a governmental body can plan for the future--it may not be used as a means to deny the future. National Land & Inv. Co. v. Easttown Twp.⁴² Bd. of Adj. 419 Pa. 504, 528, 215 A.2d 597, 610.

It must be "necessary to promote the ultimate good of the community" and be "within the bounds of reason;"

⁴⁰Ibid., 300.

⁴¹Ibid., 301.

⁴²Ibid., 301-2.

that is a critical twosome. A by-law can both be within the benefit of an isolated community and it can be within reason, but it does not follow that it will be both if one is present. It is only "required [by the New York Court Court of Appeals] that communities confront the challenge of population growth with open doors."⁴³ The community may impose a temporary prohibition on development to provide municipal services.

The power to zone being derived from the police power⁴⁴ must advance the general welfare. But the general welfare of whom? It has always been tacitly assumed that it is the general welfare of the community in whose jurisdiction the zoning by-law was passed. But in 1924 the Ambler Realty Company in its reply brief in the Supreme Court of the United States said the districting ordinance of the Village of Euclid, Ohio, "did not take into account the rest of the city [Cleveland, Ohio, of which Euclid is a suburb] and therefore could not be rationally regarded as taking a comprehensive view of the public welfare..."⁴⁵ By classifying the land residential, the city of Euclid "imposes upon the general welfare the burden of having the business and industry of the Village of Euclid and of the

⁴³ Ibid., 302.

⁴⁴ Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

⁴⁵ Village of Euclid, Ohio v. Ambler Realty Co., Reply Brief of the Appellee, February 16, 1926, page 40.

City of Cleveland diverted to less favorable and less available lands in order to maintain a rural character for certain residence property."⁴⁶ Thus the issue of what boundaries the "community" encompasses was clearly raised in the first case ever decided in the United States Supreme Court on the validity of zoning. The Supreme Court did not rule on the issue and it has not been decided by the Supreme Court yet. This issue is now being raised in the Petaluma, California case.

In the State Supreme Courts the issue of what region the general welfare concerns has been raised and considered.⁴⁷ In a number of early cases, the courts were asked to consider regionalism in the context of inter-municipal border disputes, i.e. different zoning classification in either side of a common border.⁴⁸

⁴⁶Ibid., Brief and Argument for Appellee, February 22, 1926, page 41.

⁴⁷The lead case is *National Land and Investment Company v. Kohn* (aka Easttown Twp. Bd. of Adjustment), 215 A.2d 597 (Pa., 1965) followed in Pennsylvania by *In re Appeal of Girsh*, 263 A.2d 395 (1970) and *Concord Township Appeal*, supra note 35. In New Jersey the lead cases are *Kunzler v. Hoffman*, 225 A.2d 321 (1966) and *Quinton v. Edison Park Development Corporation*, 285 A.2d 5 (1971). Among the many law review articles on the topic, Robert E. Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs*, 3 Conn. L. Rev. 244 (1971) has the best summary of the problem at pages 247-250.

⁴⁸*Forbes v. Hubbard*, 180 N.D. 767 (Ill., 1932); *Hannifin Corporation v. City of Berwyn*, 115 N.E.2d 315 (Ill., 1953); *Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182 (N.J., 1953) *aff'd* 104 A.2d, 441 (N.J., 1954).

In Borough of Cresskill v. Borough of Dumont,⁴⁹ the New Jersey Superior Court stated that property outside the established zoning classifications use and even if in an adjoining municipality along with the common jurisdictional boundary would be affected by a zoning by-law. The Court stated:

Zoning regulations must be in accordance with a comprehensive plan, and they must be made with reasonable consideration to the peculiar suitability of the land for a particular use, and with a view of conserving the value of property and encouraging the most appropriate use thereof... Cassinari v. Union City, 1 N.J. Super. 219, 63 A.2d 891 (App.Div.1949); Collins v. Board of Adjustment of Margate City, 3 N.J. 200, 69 A.2d 708 (1949). Hence, it becomes a legal requirement that the restrictions and regulations in a zoning ordinance must be made with reasonable consideration to the character of the land and also to the character of the neighborhood lying along the border of the municipality adopting the ordinance. In the case of Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347, 349, 9 A.L.R.2d 678 (1949), the court said: "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."⁵⁰

The Supreme Court of New Jersey went on, in affirming the Superior Court decision and quoting from Duffcon Concrete Products, Inc., v. Borough of Cresskill,⁵¹ to

⁴⁹Borough of Cresskill v. Borough of Dumont, 100 A.2d 182 (1953).

⁵⁰Ibid., 191-2.

⁵¹64 A.2d 347, (N.J., 1949).

deny the contention that zoning halts at the municipalities' boundary (except possibly if there are large areas of undeveloped land in question:

What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality, improved highways and new transportation facilities have made possible the concentration of industry at places best suited to its development to a degree not contemplated in the earlier stages of zoning. The same forces make practicable the presently existing and currently developing suburban and rural sections given over solely to residential purposes and local retail business services coextensive with the needs of the community. The resulting advantages enure alike to industry and residential properties and, at the same time, advance the general welfare of the entire region.⁵²

The Borough of Dumont owes a duty to the residents of the Borough of Cresskill to hear any residents and taxpayers who may be adversely affected by the proposed zoning changes and consider their rights as they would those

⁵²104 A.2d 441, 446 (N.J., 1954).

of the residents of their own municipality. "To do less would be to make a fetish out of municipal boundary lines and a mockery of the principles of zoning."⁵³

In 1966 the Supreme Court of Pennsylvania decided the case of National Land and Investment Company v. Kohn (aka, Appeal of Board of Easttown Township, etc.).⁵⁴

This case has become the major precedent for requiring regional considerations in zoning. The case involved the requirement of a minimum lot size of four acres. The Court found that:

1. Easttown is in the path of expansion from Philadelphia, Pennsylvania, and from King of Prussia-Valley Forge.⁵⁵
2. Sixty percent of the township population lives in twenty percent of the land area.⁵⁶
3. Private deed restrictions impose four, five, and ten acre minimum lot size area in ten percent of the area.⁵⁷
4. Of the total 5,157 acres in the township, some 898, or about 17%, have been restricted by the new zoning ordinance to minimum lots of two acres. Approximately 1,565 acres composing about 30% of the township are restricted by the zoning ordinance to lots of four acres minimum area. About 5% of the population live in the areas zoned for two and four acre sites which together constitute about 47% of the township. Some 1,835 acres, representing about

⁵³Ibid., accord supra note 47.

⁵⁴215 A.2d 597 (1966).

⁵⁵Ibid., 605.

⁵⁶Ibid.

⁵⁷Ibid., 605-6.

35% of the township, remain unaffected by the new zoning and continue, under the township's original zoning classification, to be zoned for building sites with a minimum area of one acre.⁵⁸

5. Census figures show:

1920 2,307 persons
1960 6,907 persons
1963 8,400 persons

School enrollment at sixth grade:

1955-56 ... 498 children
1963-64 ... 1052 children
1969-70 ... 1680 children (estimated)⁵⁹

6. Large areas are still held in large parcels. Plaintiff's property is held in such an area.⁶⁰
7. There is still a dispute as to the character of the township as rural or urban. But area is best described as "semi-rural" or "estate-rural."⁶¹

The Court stated its position in the matter as one of being "a judicial overseer, drawing the limits beyond which local regulations may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies."⁶² Zoning may be used to control the density of the population;⁶³ it is impossible to declare

⁵⁸Ibid., 606.

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹Ibid.

⁶²Ibid., 607.

⁶³Bilbar Construction Company v. Easttown Township Board of Adjustment, 141 A.2d 851 (Pa., 1958).

a minimum acreage requirement unconstitutional per se.

Each case must be tested on its own merits.⁶⁴ However,

[the] relative advantages of a one acre lot over a one-half acre lot are easy to comprehend. Similarly, a two acre lot has advantages over a one acre lot and three acres may be preferred over two acres or ten acres over three. The greater the amount of land, the more room for children, the less congestion, the easier to handle water supply and sewage, and the fewer municipal services which must be provided. At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference. The point at which legitimate public interest ceases is not a constant one, but one which varies with the land involved and the circumstances of each case.⁶⁵

The usual claims were made to defend the by-law on the basis of drainage, sewage disposal, pollution problems, road and highway needs, but these were not decisive; as the Court said as to the contention of needed roads:

Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future--it may not be used as a means to deny the future. The evidence on the record indicates that for the present and the immediate future the road system of Easttown Township is adequate to handle the traffic load. It is also quite convincing that the roads will become increasingly inadequate as time goes by and that improvements and additions will eventually have to be made. Zoning provisions may not be used, however, to

⁶⁴Nectow v. Cambridge, 277 U.S. 453 (1928).

⁶⁵215 A.2d 597, 608 (1966).

avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.⁶⁶

The Township also claimed that four areas created "greenbelts" to preserve the character of the area, but the Court did not think that by law this would establish such "greenbelts." And if preservation of open space were the objective of the by-law, cluster zoning could be employed. Four acre zoning is not a reasonable means to achieve this end.⁶⁷

The major impact of the case is contained in the next two paragraphs:

There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate.⁶⁸

The township's brief raises (but, unfortunately, does not attempt to answer) the interesting issue of the township's responsibility to those who do not yet live in the township but who are part, or may become part, of the population expansion of the suburbs. Four acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We

⁶⁶Ibid., 610.

⁶⁷Ibid., 611.

⁶⁸Ibid.

have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid. Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner.⁶⁹

An owner of a home may seek to make his property as secluded as possible to the extent that he can afford it. He may, singly or with his neighbors, purchase sufficient neighboring land and protect himself by covenants and deed restrictions as long as it does not deprive someone else of his constitutional rights.

This case was followed by the Supreme Court of Pennsylvania in *In Re Appeal of Girsh*,⁷⁰ and *Appeal of Kit-Mar Builders, Inc.*⁷¹ But these cases take National Land as requiring municipalities to deal with population problems. "They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels."⁷²

The Pennsylvania cases were decided on the basis of an expanded definition of what is the general welfare. This line of precedent, while of persuasive reasoning by

⁶⁹Ibid., 612.

⁷⁰263 A.2d 395 (1970).

⁷¹268 A.2d 765 (1970).

⁷²Ibid., 768.

a respected State Supreme Court, is not binding outside of Pennsylvania and no other State is required to adopt this definition of "General Welfare." In Pennsylvania it is not for the township to decide who may or may not live in the township.

New Jersey case law has paralleled the Pennsylvania case law and there has been developed the "balanced community"⁷³ test for zoning decisions. A balanced community may be defined in many forms but in *Oakwood at Madison, Inc. v. Township of Madison*,⁷⁴ it was designed by the town to preclude. The by-law's effect was to prohibit more than 500-700 additional multi-family units; three or more bedroom apartments are not permitted, and two bedroom units could not account for more than twenty percent of total apartments developed. A maximum of 200 units per year were permitted.

The township conceded the invalidity of the 200 maximum, but the Court found that

The underlying objective of the ordinance under attack was fiscal zoning, zoning as a device to avoid school construction and other governmental costs incident to population expansion. Housing needs of the region were not taken into consideration in its enactment, according to several members of the township council and planning board.⁷⁵

⁷³283 A.2d 353 (N.J., 1971).

⁷⁴Ibid.

⁷⁵Ibid., 357.

But the test was "balance" and well ordered plan for the entire municipality.⁷⁶ Zoning out apartments was not possible as an answer to increased growth.

Because no flood or drainage problems were discussed at the hearings on the master plan and the record was not supportive of the need, the Court held that the zoning ordinance was invalid because it did not create a "balanced community." The Court concluded:

In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside. *Vickers v. Tp. Com., Gloucester Tp.*, 37 N.J. 232, 181 A.2d 129 (1962), upholding a prohibition against trailer camps anywhere within a municipality, is not to the contrary.

The ordinance under attack must be held invalid because it fails to promote reasonably a balanced community in accordance with the general welfare unless it is defensible on some other ground.⁷⁷

Oakwood at Madison, Inc. has subsequently been seen to impose an affirmative duty to provide housing when the municipality is confronted with the need to establish a

⁷⁶Ibid.

⁷⁷Ibid., 358.

definition of the "General Welfare;"⁷⁸ but there is conflicting case law on the problem.

In a recent case, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,⁷⁹ the Supreme Court of New Jersey declared that it was the duty of developing municipalities to:

make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of low and moderate income persons for housing and it must affirmatively afford that opportunity at least to the extent of the municipality's fair share of the present and prospective needs therefor in its community. These obligations must be met unless the particular municipality can sustain the burden of demonstrating peculiar circumstances that dictate that it should not be required to do so.⁸⁰

As said, to be valid, a zoning by-law must be for the general welfare of the community; the Supreme Court of New Jersey put meaning into that catch-all phrase:

But whose welfare is implicated? When zoning regulations have substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded. Adequate housing for all categories of people is an absolute essential in promotion of the general welfare required in all local land use regulations. Further, the universal and constant need for such housing is so important that the general welfare that developing municipalities must consider extends beyond their boundaries and cannot be confined

⁷⁸General Welfare as a Zoning Purpose Held to Encompass Local and Regional Housing Needs, 26 Rutgers L. Rev. 401, 411-15 (1973). On the issue of what is balanced, Jerome C. Rose, *The Courts and the Balanced Community: Recent Trends in New Jersey Law*, 38 A.I.P.J. 265 (1973).

⁷⁹43 L.W. 1152 (N.J., Sup. Ct., 1975).

⁸⁰Ibid.

to the good of the particular municipality. It follows that the presumptive obligation arises for each developing municipality to affirmatively plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including low and moderate cost housing. Conversely, it may not adopt policies that thwart or preclude that opportunity.⁸¹

[A prima facie case having been established by the plaintiffs, the municipality has the burden of defending its zoning by-law.]

...[The] position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise...

The court has no hesitancy in now saying, and does so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of people, no municipality may exclude or limit categories of housing for that reason or purpose.

The municipality also seems to argue that the zoning limits are justifiable for ecological and environmental reasons. It argues that much land still available for residential development is without sewer or water utilities and that the soil is such that a plot size of at least one-half acre is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the municipality could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. The present environmental situation of the area is, therefore, not a sufficient excuse for limiting housing therein to single-family dwellings on large lots.⁸²

The Supreme Court of New Jersey concludes that zoning

⁸¹Ibid.

⁸²Ibid.

in New Jersey must meet the following criteria:

a developing municipality, by its land use regulations, must permit multi-family housing, without restrictions on the number of bedrooms in each unit, as well as small dwellings on very small lots, low cost housing of other types, and, in general, high density zoning without unjustifiable minimum requirements as to lot size, building size, and the like. The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, developing municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.

A developing municipality's obligation to afford the opportunity for decent low and moderate income housing extends at least to that municipality's fair share of the present and prospective regional need therefor. The composition of the applicable region will necessarily vary from situation to situation....

[A] developing municipality can [not] ignore a demand for housing within its boundaries of the part of people who commute to work in another state.⁸³

⁸³Ibid. To effect a statutory basis for the requirement of government-subsidized housing, a bill was proposed in 1972 in the New Jersey legislature, (Assembly No. 1421), under which the state Department of Community Affairs would assess the total need for low- and moderate-cost housing in the state and each county, taking into account (without sanctions being available):

- a. The existence of housing for low- and moderate-income families by area, condition, vacancy rates and cost;
- b. The availability and location of low- and moderate-income jobs by area and wage levels;
- c. Population and employment projections by occupation and industry;
- d. A projection of housing trends by area based on current land use, construction regulations and market performance;

Dismissing for want of jurisdiction, the United States Supreme Court allowed to stand the New Jersey Supreme Court's decision.⁸⁴ This, in effect, says that the definition of the General Welfare is not a Federal Question.⁸⁵ A court may compel a local municipality to include

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- e. Open space, water supply and waste disposal affected by such housing and provisions for them;
 - f. Present and projected financing available for housing for low- and moderate-income families from public and private sources;
 - g. Effect on the State and the various communities and effect on existing land use development regulations.

After six months the counties would allocate needed housing to particular municipalities using the following criteria:

- (1) Availability of sites for construction of low- and moderate-income housing;
- (2) Proximity to existing and projected locations of low- and moderate-income employment;
- (3) Conformity with the State development plan and county and municipal master plans;
- (4) Availability of land and open space areas and their intended use;
- (5) Existence of, and feasibility and estimated costs of providing local and regional public services and facilities to support the proposed housing;
- (6) Substandard housing in the municipality;
- (7) The number of low- and moderate-income households as a percentage of households in the municipality;
- (8) The relative impact of real property taxation upon the residents of the municipality; and
- (9) Effect on the community and impact on existing land use development regulations.

⁸⁴Supreme Court, October 6, 1975. Township of Mount Laurel v. South Burlington County N.A.A.C.P.

⁸⁵A Federal Question is an issue "arising under this Constitution [U.S.], the Laws of the United States, and Treaties made, or which shall be made, under their authority." cf. Wright, Charles A., Handbook of the Law of Federal Courts, 2nd edition, St. Paul, MN: West Publishing Co., 1970, page 54.

considerations of extra-territorial matters when passing a zoning by-law; failure to take into consideration these matters will render the by-law invalid on the grounds of unreasonableness since it is unreasonable, per se, to ignore consideration of such facts.

In cases where the Right to Travel is concerned, it can be argued that a person who is excluded from one town and forced to migrate to a second town is being adversely affected and the general welfare of the community as a whole may be violated since one community will force its neighbors to accept its problems.

Community wide zoning, at the municipal level, may be required. In areas of megalopolistic growth the communities may be forced to adopt centralized planning methods.

A concomitant problem, and worthy of some consideration, is the single use zoning of the entire municipality. In *Cadoux v. Planning and Zoning Commission of the Town of Weston*⁸⁶ the municipality determined that there was no need for additional commercial or industrial uses within the municipality and claimed that no existing zoning district was suitable for industrial or commercial uses with certain exceptions. The issue was phrased as follows:

[T]here is no question as to the right of a municipality to establish a residence district from which all business and commerce may be excluded. The question arises as to the extent of that district. May

⁸⁶ 294 A.2d 582 (Conn., 1972).

such a district encompass the entire municipality, and may the municipality be so zoned that there is no permissible use except a residential use and such auxiliary uses as are customarily incidental thereto?⁸⁷

This is really a question of reasonableness and is dependent, as generally conceded, on the facts of the particular situation.

It was held that such a classification was not per se unreasonable citing the situation of Valley View Village, Inc., v. Proffett⁸⁸ and held that the Township of Weston was

⁸⁷Ibid., 583.

⁸⁸221 F.2d 412 (6th Cir., 1955). In this case a local municipality zoned itself a single use and prohibited the operation of sand and gravel pits. The United States Supreme Court held at page 418:

Traditional concepts of zoning envision a municipality as a self-contained community with its own residential business and industrial areas. It is obvious that Valley View, Ohio, on the periphery of a large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and social whole. We cannot conclude as a matter of law that an ordinance which places all of the area of such a village into a residential district is per se arbitrary and unreasonable, with no substantial relation to the public health, safety, morals or general welfare. It would appear contrary to the very purposes of Municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself. We think that it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.

in a similar location. Thus, it was not unreasonable or arbitrary to zone the municipality as one district.

A similar attempt to exclude multi-family uses was found to be valid because the test of what is unreasonable had not been met by the plaintiff-developer. The Court in this case held

Whether the action [dropping apartments from the zoning by-law while an assessment was carried out] is properly characterized as temporary cessation or total prohibition is immaterial. It was an attempt to solve a problem in community planning, where the issues were disputed, and where reasonable minds could differ as to an effective and fair solution.⁸⁹

Thus, while there are some effective challenges to zoning, it is still quite possible to stop urban sprawl using large lot zoning, judicious utility planning, and phased development zoning. In these cases, the test as to whether or not they exceed traditional zoning powers seems to be in favor of the municipality. However, in some cases an expanded definition of "general welfare" will invalidate some techniques of urban planning.

In the City of Petaluma, California, an attempt was made to stop the city's expansion by limiting its population. It is this case which may finally create a uniform means of attack upon urban planning schemes to control municipal growth.

⁸⁹Zelvin v. Zoning Board of Appeals of Town of Windsor, 306 A.2d 151, 159, (Conn., 1973).

CHAPTER FOUR

PETALUMA, CALIFORNIA: POPULATION LIMITS AND

THE RIGHT TO TRAVEL

As previously discussed, the case of Albrecht Realty Company v. Town of New Castle¹ was a primitive form of growth control that was ruled invalid because it was ultra vires the state enabling act. A direct limit on the number of building permits was established and this also ran afoul of the constitutional prohibition against governmental taking of property without just compensation.

A more subtle technique, but applied in a case where the municipal officials admitted the true purpose, is the before-mentioned method of limiting the number of bedrooms in an apartment complex.² The Borough of Glassboro, New Jersey, amended its zoning by-laws to require for apartment complexes the following:

- 1) In 70% of units in garden apartment complex no more than 1 bedroom was permitted; no more than 25% with 2 bedrooms; no more than 5% with 3 bedrooms; and no apartments with four or more bedrooms.
- 2) Minimum floor areas were specified.

¹167 N.Y.S.2d 843 (1957).

²Molino v. Mayor and Council of the Borough of Glassboro, 116 N.J. Super 189, 281 A.2d. 401 (1971).

- 3) A 14 units per acre maximum density.
- 4) 2 off-street parking places per unit.
- 5) Each unit centrally air conditioned.
- 6) Two doorways per unit; separate stairways leading from each doorway in each second story apartment unit.³

The affected developer claimed that the by-law was illegal and unconstitutional because its "requirements were an unreasonable and arbitrary exercise of municipal power in that it was violative of sound zoning..."⁴

The municipality "during the trial admitted on several occasions that its ordinance was designed to keep children out of Glassboro, because more children require more schools and as a result higher taxes."⁵ The municipality defended its action in the name of "control of density of population and the general welfare of the community."⁶

The court found that there was no market for high rental apartments in the municipality and the zoning by-law put the rental out of reach for middle, let alone low, income families.⁷ There was also a need for student housing due to the presence of a state college in Glassboro.

³Ibid., 116 N.J. Super 195, 198-199 (1971).

⁴Ibid., 200.

⁵Ibid., 201-2.

⁶Ibid.

⁷Ibid., 202.

The court held, "There is a right to be free from discrimination based on economic status. There is a right to live as a family, and not be subject to a limitation on the number of members of that family in order to reside any place. Such legal barriers would offend the equal protection mandates of the Constitution...Exclusionary zoning may lead to illegal and unwarranted conditions, which are violative of individual rights. No municipality can isolate itself from the difficulties which are prevalent in all segments of society...Zoning is not a boundless license to structure a community."⁸

Judge Schalick was wrong in part in his decision, but he can not be blamed for false prophesying. When the Judge said that one has a right not to be subject to a limit on the size of his family, he was right if the family is of blood relation or marriage. In an anomaly in the jurisprudence of the zoning law at the United States Supreme Court level, the decision of the Village of Belle Terre v. Boraas⁹ holds that a municipality may zone out a commune, or any other group of people who do not fit the following definition of a family:

One or more persons related by blood, adoption, or marriage, living and cooking together as a simple housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2)

⁸Ibid., 204.

⁹94 S.Ct. 1536 (1974).

living and cooking together a single housekeeping unit, though not related by blood, adoption, or marriage shall be deemed to constitute a family.¹⁰

The Supreme Court approved this as a valid by-law to effectuate a quiet zone. What it does, in an area close to a college town, Stony Brook, New York, is to prevent college students from sharing the cost of housing. It also prevents bachelor-shared apartments of more than two persons. The test is interesting: living and cooking together. What constitutes living together? The Court, according to one commentator,¹¹ is backing off the "effect test" in exclusionary zoning, but this is not a racial exclusion case. The Right to Travel was not raised and is conspicuous by its absence.¹² The ordinance did not deal with transients.¹³

In one of the most important cases in the area of growth planning, Construction Industry Association of Sonoma County v. City of Petaluma,¹⁴ which has been appealed from the United States District Court to the United States Court of Appeals for the 9th Circuit, the grounds of a violation of the "Constitutional Right to Travel" were

¹⁰Ibid., 1537-58.

¹¹Goldstein, Stewart, Belle Terre v. Boraas, 23 Cleveland St. U. L. Rev. 354, 361 (1974).

¹²Ibid.

¹³Dissent, Marshall, 94 S.Ct. 1536, 1542-6 (1974).

¹⁴375 F. Supp 574 (D.C. N.D. Cal., 1974), rev'd 9th Cir., 8-14-75.

directly raised.

The City of Petaluma is in Sonoma County, within a 40 mile commuting distance of San Francisco, where houses are less expensive than in Marin County which is across the Bay. In 1965 the population was 19,000. Petaluma was an urban center in a dairy and poultry farming region. By 1971 the population had increased to 30,000. Five thousand new residents arrived between 1969-1971. Until 1971 the City Council had operated on the principle that "growth was good"¹⁵ but it projected a population of 77,000 in 1985. Housing unit increases for the municipality were as follows:

Year	Unit increased
1964	270
1965	440
1966	321
1967	234
1968	379
1969	358
1970	591
1971	891 ¹⁶

The fair market demand for housing based on demographic and real estate projection is about 1000 units per year.¹⁷

In 1971 the municipality openly set about to curb the increasing population to protect its "rural character." In June the following official goals of the City of Petaluma were adopted by the City Council in a Policy Statement:

¹⁵Ibid., 575.

¹⁶Ibid.

¹⁷Ibid.

- a. to protect the city's "small town character and surrounding open space" by controlling the city's future rate and distribution of growth.
- b. to tie development rate to school and utility capacity.
- c. to limit the growth rate to about 500 dwelling units annually (this is equivalent to the rate of growth in 1960-69; in the years 70-71, the rate was approximately 1500 units per year.)
- d. to encourage a balance of development between eastern and western sections of Petaluma.
- e. to solicit the cooperation of the County of Sonoma to assure that "all urban and suburban development in the vicinity of Petaluma is approved by and is acceptable for annexation to the City without exception."
- f. to provide "a permanent greenbelt of open hills and marshlands together with open space for recreation and for definition of urban form;; and to "fully utilize its own powers of utility extension and annexation to support its green-belt policy in its surrounding hills and valleys."
- g. to require, as proper planning and zoning, Environmental Design Plans, Planned Community District, and Planned Unit Development procedures to gain the best design possible for large scale land development.
- h. to redress a deficiency in multi-family units in Petaluma and to insure "a variety of densities and building types and thus, wide ranges of prices and rents."
- i. to seek "acceptable quality of construction through good site and architectural design and maximum use of available federal subsidies, as local conditions warrant."
- j. to use provisions of the California Subdivision Map Act, to require developers to contribute school sites, parks and greenbelts.
- k. to encourage a limited amount of high density housing and conversion of older homes to apartments in the central business district of the city.

1. to strengthen and rehabilitate the Central Business District.¹⁸

This policy was implemented by Environmental Design Plans and Maps,¹⁹ a Residential Housing Element²⁰ and a Residential Development System.²¹

¹⁸Cranston, Mary, Garth, Bryant, Plattner, Robert, and Varon, Jay, A Handbook for Controlling Local Growth, 1973, page 110.

¹⁹See infra note 21.

²⁰The Residential Housing Element contained an analysis of the housing situation and makes these proposals:

- a. The city's growth rate is twice that of Sonoma County, with the greatest amount of growth in the city on the eastern side in single-family dwellings.
- b. Insufficient rental and low-income housing exists in the city, although housing costs and rents have remained reasonable in amount.
- c. The city should establish an annual percentage of eight to twelve per cent of the annual housing allocation to be devoted to low to moderate income housing.
- d. The city's residential development program for 73-77 should aim for a division of allocation for future housing of 50-50 on either side of the freeway, with "core oriented development" to strengthen the central business district.
- e. Higher density residential development on the east side, stressing townhouses and cluster-dwellings, should be required under planned unit developments.

²¹The Residential Development System was designed to implement the then current zoning scheme. It applies to all subdivisions of five lots or more and established a maximum of five hundred building permits per year with the city council having a ten percent leaway plus or minus, in granting permits. The city council can require that eight to twelve percent of all units built in the year be for low income housing.

A Residential Development Board of 17 members was established to evaluate the proposed subdivision plans. In order to rate approval, the plans must conform to the following specific criteria and the City Master Plan:

I. Availability of Public Services and Facilities

1. the capacity of the water system to provide for the needs of the proposed development without system extensions beyond those normally installed by the developer;
2. the capacity of the sanitary sewers to dispose of the wastes of the proposed development without system extensions beyond those normally installed by the developer;
3. the capacity of the drainage facilities to adequately dispose of the surface runoff of the proposed development without system extensions beyond those normally installed by the developer;
4. the ability of the Fire Department of the city to provide fire protection according to the established response standards of the city without the necessity of establishing a new station or requiring addition of major equipment to an existing station;
5. the capacity of the appropriate school to absorb the children expected to inhabit a proposed development without necessitating adding double sessions or other unusual scheduling or classroom overcrowding;
6. the capacity of major street linkage to provide for the needs of the proposed development without substantially altering existing traffic patterns or overloading the existing street system, and the availability of other public facilities (such as parks and playgrounds) to meet the additional demands for vital public services without extension of services beyond those provided by the developer.

II. Quality of Design and Contribution of Public Welfare and Amenity

1. site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color, and location with respect to existing neighboring development;

2. site and architectural design quality which may be indicated by the amount of character of landscaping and screening;

3. site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on- and off-site traffic safety, privacy, etc.;

4. the provision of public and/or private usable open space and/or pathways along the Petaluma River or any creek;

5. contributions to and extensions of existing systems of foot or bicycle paths, equestrian trails, and the greenbelt provided for in the Environmental Design Plan;

6. the provision of needed public facilities such as critical linkages in the major street system, school rooms, or other vital public facilities;

7. the extent to which the proposed development accomplishes an orderly and contiguous extension of existing development as against "leap frog" development;

8. the provision of units to meet the city's policy goal of 8 per cent to 12 per cent low- and moderate-income dwelling units annually.²²

Points are assigned in the category I on a scale of 0 to 5; in the II, on a scale of 0 to 10. A proposed development must receive a minimum of 25 points in Category I

²²Supra, note 18, page 112-13.

and a minimum of 50 points in Category II.²³

The evaluation points are published and a public hearing must be scheduled. Reconsideration is an option for the developer or he may also request an amendment to the general plan, the zoning by-law, or the Environmental Design Plans of the City.

The City Council receives final ratings and awards development allotments to those with the highest ratings first. A developer has six months to start construction before the building permission lapses. A maximum of 500, plus or minus 10%, may be approved in any one year for construction.

As findings-of-fact, the court found that:

- 1) The city limited new housing units to approximately 1/3 of the demographic and market demands of the 1970-1971 period.²⁴
- 2) The city created an "urban extension line," i.e., an ultimate boundary intended to mark the outer limits of the city's expansion for 20 or more years...[and] set a maximum population of the city at approximately 55,000 as against the 1962 projection of 77,000 by 1985. The 1962 general plan estimate of 77,000 residents in 1985 was a reasonable estimate of those demands...[and remained] reasonable in 1970 and 1971.²⁵
- 3) The area within the "urban expansion limit" was sufficient at the city's chosen densities for growth for the 20 year period only at the 500 annual limit limitation...The effect of

²³Ibid., 113.

²⁴375 F. Supp 574, 576 (D.C. N.D. Cal., 1974).
Finding of Fact No. 9(a).

²⁵Ibid., (b).

the "urban expansion" limit is to limit "excessive" population growth, which limitation was the defendant's purpose. If the 500 unit rate limit were removed, the limit on population set by the "urban extension line" would still act as a substantial deterrent to travel and commerce.²⁶

- 4) The City refused, for 15 or more years, to annex or extend city facilities to land outside the "urban extension line." The City solicited the assistance of the County and the local Agency Formation Commission to prohibit residential growth outside of the "urban expansion line." Thus the extension line inhibited immigration not only to Petaluma, but also into its surrounding areas.²⁷
- 5) While the Master Plan is not intended to be effective beyond 1977, the city has attempted to extend it to 1990 by retaining the 500 unit limit, and limit its water supply.²⁸

The City contended that the court did not have the jurisdiction to examine the motives of the City in implementing the growth limitation policy; however, the city introduced evidence to justify the need for the policy based on the inadequacy of the city's water and sewer treatment facilities. The court found these assertions false.²⁹

The court found the effects of the growth policy in the San Francisco Bay area to be

- 1) The forcing of people to go to another suburb since they do not leave the area.

²⁶Ibid., (c).

²⁷Ibid., (d).

²⁸Ibid., 10. Limit water supply by its contract with the Sonoma County Water Agency to an amount sufficient for a population of 55,000. This contract is in effect until 1990.

²⁹Supra, note 29, page 577-8.

- 2) A limit on the housing supply, an increase in the cost of private housing and rent structure of tenant housing.
- 3) The nature of the housing stock quality will decline because of need for housing and no replacement housing built.
- 4) Growth takes place at a population center, it is not evenly dispersed; Petaluma is such a center of growth.
- 5) New Town "front-end" costs are too high and prohibitive. Public facilities for a new population center are too expensive.³⁰

As to migration, the court found that the people of the San Francisco Region showed a high mobility rate. As of 1970, one half of the population had lived in their current residences for less than 5 years. "This mobility is a reflection of foreign, interstate, intrastate travel and reflects a demand for housing...Interstate, intrastate, and foreign travel would be seriously inhibited, as people trying to move into the region found housing either economically unavailable or simply nonexistent in reasonable quantity."³¹

The court found the program and policy of the City of Petaluma to be invalid³² in that they violated United

³⁰Ibid., 579-81.

³¹Ibid., 580-1.

³²The court specifically invalidated the following:

- 1) The Petaluma Official Development Policy, June 7, 1971, Resolution No. 5760 N.C.S.
- 2) The Petaluma Environmental Design Plans and Maps, March 27, 1962, Resolution No. 6008 N.C.S.

States Constitutionally guaranteed rights.

A fundamental right under the United States Constitution is the right to the freedom of travel which includes the right to enter and live in any state or municipality in the Union.³³ The District Court found that this right was violated. The City of Petaluma wanted to avoid the problems of growth and sought to limit its population by limiting the number of people who would be permitted to move into the municipality. The motives of the municipality are not put in question, but the means fall short of Constitutional validity.³⁴

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- 3) The Resolution of Policy Respecting Residential Policy and Population Growth, April 17, 1972, Resolution No. 6028 N.C.S.
 - 4) The Petaluma Residential Development System, August 21, 1972, Resolution No. 6115 N.C.S.
 - 5) The Petaluma Housing Element, September 5, 1972, Resolution No. 6126 N.C.S.
 - 6) and all implementing elements of the City of Petaluma General [master] Plan for 1-5.

³³Declared to exist by the U.S. Supreme Court in the following cases:

Memorial Hospital v. Maricopa County, _____ U.S. _____, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974);
 Dunn v. Blumenstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1969).

³⁴375 F. Supp 574, 581 (D.C. N.D. Cal., 1974).

Does the growth limit further a "compelling state interest" so as to be valid? A determination that this violates a fundamental right precludes the necessity of showing that any plaintiff was actually denied entrance into the city, i.e. a harm sufficient to give rise to "standing" which first must be independently proved. To justify such a by-law, or any other legislation after this test has been met, the proponent must then show a "compelling state interest" for the by-law's retention. The growth limit must meet the test of a compelling state interest and as noted in *Dunn v. Blumenstein*, 405 U.S. 330 at 343:

It is not sufficient for the State to show that [the rules implemented] further a very substantial state interest. In pursuing that important interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision.' *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963); *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508 (1967), and must be 'tailored to serve their legitimate objectives.' *Shapiro v. Thompson*, supra, 394 U.S. at 631, 89 S.Ct. 1322, at 1329. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).³⁵

Does the by-law meet the test of a compelling state interest? The municipality put forth three reasons why it did:

³⁵*Ibid.*, 592.

- 1) The necessity for adequate sewage treatment facilities and the concomitant problem the municipalities' facilities are inadequate for an uncontrolled population expansion.
- 2) The need to obtain an adequate water supply for the population.
- 3) The right of a municipality to control its own "rate of growth"³⁶ and to protect its "small town character."³⁷

As to claims 1 and 2, the court held that both of these problems were of the municipality's own making. The sewer facilities are at present adequate and fully capable of meeting the needs of a growing population. Using the test of *Dunn v. Blumenstein*, is there a reasonable alternative if the municipality is actually correct? The District Court held

Resting their argument upon the following syllogism, the defendants contend that the new construction is not a "reasonable" alternative. First, they point out that the erection of additional facilities is an expensive proposition. Second, under state law, the necessary funding would have to be approved by the electorate before it could be secured. The ultimate conclusion is that this court must stand ready to order the citizens of Petaluma to vote in a particular manner before those funds could be assured. The assertion that courts do not order the results of elections is so obvious that comment is not required.³⁸

As to the water supply, the record shows "no connection between the availability of water and the exclusionary zoning measures taken."³⁹ The municipality calculated

³⁶Ibid., 583.

³⁷Ibid.

³⁸Ibid.

³⁹Ibid.

the water needs based on their own projections of 500 new housing units per year and then requested that amount from the regional water supply authority. It is obvious that to hear:

a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation.⁴⁰

The sole issue of this case is "whether or not people currently excluded from Petaluma have the right to immigrate into the area."⁴¹ As to the third defense of the municipality:

This last defense assertion states the essence of the matter and aptly defines the issue: may a municipality capable of supporting a natural population expansion limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand. It is our opinion that it may not.⁴²

A municipality may not limit natural growth if it can support it because it does not prefer to grow. The Constitutional right of Freedom to Travel prohibits the city from doing so.

The District Court then adopted as its own the

⁴⁰Ibid.

⁴¹Ibid.

⁴²Ibid.

line of cases from Pennsylvania, previously discussed.⁴³

"A zoning regulation which has as its purpose the exclusion of any additional residents in any degree is not of a compelling governmental interest, nor is it one within the public welfare."⁴⁴ The court then concluded:

Since the population limitation policies complained of are not supported by any compelling governmental interest the exclusionary aspects of the "Petaluma Plan" must be, and are hereby declared in violation of the right to travel and, hence, are unconstitutional.

Such holding is intended to encompass, not only the outright numerical limitations upon the issuance of building permits, but also any and all features of the plan which, directly or indirectly, seek to control population growth by any means other than market demands.⁴⁵

...[It] is appropriate, against the background of the present case, for the court to comment upon not only what has been held but also what has not been held. The issue here has not been whether or not local government may engage in any number of traditional zoning efforts which have been common throughout our history, such as providing for a certain density of population in a given neighborhood, or standards for the type and quality of construction, etc. The only issue presented here, for the first time, is whether or not a municipality may claim the specific right to keep others away. Therefore, the defendants' assertion that the result of this case will destroy or harmfully restrict the zoning and land-use planning power of municipalities is neither pertinent nor correct. No "traditional" powers to zone are affected by the holding in the case.

⁴³ Bilbar Construction Co. v. Board of Adjustment, 141, A.2d 851 (Pa., 1958); National Land and Investment Co. v. Kohn, 215 A.2d 597 (Pa., 1966); Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa., 1970).

⁴⁴ 375 F. Supp 574, 586 (D.C. N.D. Cal., 1974).

⁴⁵ Ibid., 586.

As contended by plaintiffs on pages 7 and 8 of their Trial Brief,

"This case is a study in anti-planning, the refusal of a city to come to grips with the fact that it has joined a metropolitan complex and is no longer the sleepy small town that it once was. In a world in which nothing is as unchanging as change, Petaluma wants to stay the same. The means to that end is to draw up the bridge over the moat and turn people away. This is not the use of police power, but the abdication of that power....

"In a large sense this case sets up the constitutional protections against a single small city's passing laws to keep people away, to maintain 'small town character' at the expense of depriving people of mobility, their right to travel, and of decent housing or perhaps any housing at all....

"In a narrower sense, this case [holds]...that local police power may [not] be used to shift the burden of providing housing to other cities in a metropolitan region which have their own police power and their own problems. This issue...[questions] the jurisdiction of one town to visit its problems on another.

"The prospective resident turned away at Petaluma does not disappear into the hinterland, but presents himself in some other suburb of the same metroplex, perhaps in some town with as many problems or more than Petaluma.... By this means, Petaluma legislates its problems into problems for Napa, Vallejo or Walnut Creek. May Petaluma pass a law to bind the whole world?⁴⁶

Since the District Court found the by-laws invalid on one Constitutional ground, it did not decide the issue of invalidity under the Commerce Clause and Equal Protection

⁴⁶Ibid., 586-7. See Bosselman, Fred, Can the Town of Ramapo Pass a Law to Bind the Whole World? 1 Fla. St. U.L. Rev. 234 (1973).

Clause of the U.S. Constitution and its 14th Amendment.

In an application for stay of Judgment Pending Appeal by the city of Petaluma, a Memorandum was submitted to Justice Douglas on the application which claimed that:

- 1) "The trial Court has held that a city may not adopt zoning regulations which have the effect of limiting the city's growth below market demand. If such holding is correct then every subdivision, land use, zoning and building regulation is invalid because the inevitable result thereof is a limitation on development. Market demand has never been used as a criteria... [and has] no support in law.⁴⁷
- 2) Right to Travel is not involved.⁴⁸
- 3) Boraas v. Village of Belle Terre...is completely determinative...[in that] the trial Court is in direct conflict with the decision...⁴⁹

The Ninth Circuit Court of Appeals decided on 14 August 1975 that the Construction Industry Association of Sonoma County did not have standing to raise the issue of the Right to Travel.⁵⁰ However, they did have the standing to raise the issues of arbitrariness (under the XIV Amendment)⁵¹ and the imposition of an unreasonable burden

⁴⁷In the Supreme Court of the United States, Construction Industry Association of Sonoma County v. The City of Petaluma; Memorandum of Points and Authorities in Support of Application for Stay of Judgment Pending Appeal, July 9, 1974, page 8-9.

⁴⁸Ibid., 9.

⁴⁹Ibid., 9-10.

⁵⁰Construction Industry Association of Sonoma County v. City of Petaluma, Slip Opinion No. 74-2100 filed August 14, 1975, 9th Cir., page 9.

⁵¹Ibid., 11.

on interstate commerce.⁵²

As to the Right to Travel, the Circuit Court held:

Although appellees have suffered or are threatened with direct personal injury, the "zone of interest" requirement poses a huge stumbling block to their attempt to show standing. The primary federal claim upon which this suit is based--the right to travel or migrate--is a claim asserted not on the appellees' own behalf, but on behalf of a group of unknown third parties allegedly excluded from living in Petaluma. Although individual builders, the Association, and the Landowners are admittedly adversely affected by the Petaluma Plan, their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel. Accordingly, appellees' right to travel claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, U.S. at _____, slip op. at 18.⁵³...

The only connection between any of the appellees and any of the persons who purportedly are excluded from Petaluma is the possibility that but for the Plan they would be parties to a purchase-sale agreement.⁵⁴ There exists no special, on-going relationship between appellees and those whose rights allegedly are violated which militates in favor of granting standing. Cf. *NAACP v. Alabama*, supra, at 458-60; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-36 (1925); *Washington Utilities & Transportation Commission v. FCC*, _____ F.2d _____, _____ (9th Cir. 1975); *Akron Board of*

⁵²*Ibid.*, 12.

⁵³*Ibid.*, 9-10.

⁵⁴The Court's footnote, "The Association does not allege that a contractual or other relationship protected under 42 U.S.C. Section 1981 and Section 1982 actually exists between its members and any particular person excluded from residence in the town, or that any such relationship was either punished or disrupted by the City. Compare *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) with *Warth v. Seldin*, _____ U.S. at _____ n.22, slip op. at 23 n. 22."

Education v. State Board of Education of Ohio, 490 F.2d 1285, 1289-90 (6th Cir.), cert. denied, 417 U.S. 932 (1974). Nor have the Association and the Landowners shown that their prosecution of the suit is necessary to ensure protection of the rights asserted. Cf. Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); NAACP v. Alabama, 357 U.S. at 459; Barrows v. Jackson, 346 U.S. at 257. Assuming arguendo that the constitutional right to travel applies to this case, those individuals whose mobility is impaired may bring suit on their own behalf and on behalf of those similarly situated. Although Warth v. Seldin denied standing to a group of low-income and minority-group plaintiffs challenging exclusionary zoning practices, the case is no bar to a suit against the City brought by a proper group of plaintiffs. The Court in Warth v. Seldin left open the federal court doors for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinances, would be able to reside in the community.⁵⁵

As long as there exist parties who could raise the issue the opinion will not be definitive. It is expected that this decision will be appealed to the Supreme Court of the United States.⁵⁶

As to the other issues raised, the court held that zoning restrictions are by their nature exclusionary.⁵⁷ The court found that there was a rational relationship between the exclusion and legitimate state interests:

⁵⁵Ibid., 10-11.

⁵⁶The court cites Belle Terre as authority for the proposition that unless the persons affected are not transients there is no infringement on the Right to Travel.

⁵⁷Ibid., 13.

In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of "public welfare," we are considerably assisted by two recent cases. Belle Terre, supra, and Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir., 1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, are dispositive of the due process issue in this case.⁵⁸

Citing Belle Terre:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within... the police power and not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area sanctuary for people.⁵⁹

The Circuit Court relied on a case it had decided in 1974, Ybarra v. City of Los Altos Hills,⁶⁰ where it was provided that, "no lot shall be occupied by more than one primary dwelling unit. The ordinance as a practical matter prevented poor people from living in Los Altos Hills and restricted the density, and thus the population, of the town."⁶¹ The court found this not to violate the XIV Amendment.

The court expressed its opinion on the general welfare issue thusly:

⁵⁸Ibid., 14.

⁵⁹Ibid.

⁶⁰503 F.2d 250 (9th Cir., 1974).

⁶¹Supra note 50, page 16.

Although we assume that some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region. See, e.g., Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Note, Phased Zoning; Regulation of the Tempo and Sequence of Land Development, 26 Stan. L. Rev. 585, 605 (1974). It does not necessarily follow, however, that the due process rights of builders and landowners are violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state. See Belle Terre, *supra*; Los Altos Hills, *supra*. If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated...the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.⁶²

The Interstate Commerce Clause challenge was dismissed on the authority of Huron Cement Co. v. Detroit:⁶³

When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of the community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of the [state].⁶⁴

⁶²Ibid., 16-17.

⁶³362 U.S. 441 (1960).

⁶⁴Ibid., 448.

The Court makes one finding of fact at odds with the trial court. It found that housing in Petaluma would not be affected by the Petaluma Plan.⁶⁵

⁶⁵Supra note 50, pages 5-6:

In 1970 and 1971, housing permits were allotted at a rate of 1000 annually, and there was no indication that without some governmental control on growth consumer demand would subside or even remain at the 1000-unit per year level. Thus, if Petaluma had imposed a flat 500-unit limitation on all residential housing, the effect of the Plan would clearly be to retard to a substantial degree the natural growth rate of the City. Petaluma, however, did not apply the 500-unit limitation across the board, but instead exempted all projects of four units or less. Because appellees failed to introduce any evidence whatsoever as to the number of exempt units expected to be built during the five-year period, the effect of the 500 development-unit limitation on the natural growth in housing is uncertain. For purposes of this decision, however, we will assume that the 500 development-unit growth rate is in fact below the reasonably anticipated market demand for such units and that absent the Petaluma Plan, the City would grow at a faster rate.

According to undisputed expert testimony at trial, if the Plan (limiting housing starts to approximately 6 per cent of existing housing stock each year) were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 per cent of the units needed). Further, the aggregate effect of a proliferation of the Plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of \$14,000 or less. If, however, the Plan were considered by itself and with respect to Petaluma only, there is no evidence to suggest that there would be a deterioration in the quality and choice of housing available there to persons in the lower and middle income brackets. Actually, the Plan increases the availability of multi-family units (owner-occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days.

On July 18, 1975, a second Right to Travel case was filed in the Supreme Court, Builders Association of Santa Clara-Santa Cruz Counties v. Superior Court of Santa Clara County [real Party in interest: the City of San Jose].⁶⁶ The City of San Jose instituted a zoning "freeze" unless the school board certified that the builder would provide some means of alleviating the construction costs of new schools. The plaintiffs raised the following issues without carrying any:

Plaintiff association asserts that the ordinance (1) unconstitutionally limits the power of city council to rezone property; (2) unlawfully delegates zoning authority to the school district; (3) establishes unreasonable classifications in violation of the equal protection clause; and (4) interferes with the constitutional right to travel.⁶⁷

The Supreme Court ruled on the Right to Travel issue thusly:

Plaintiff finally contends that the initiative ordinance interferes with a constitutional right to travel and to live in the community of one's choosing. We need not, however, explore the unsettled boundaries of this constitutional right, nor confront the difficult task of balancing that right against the right of a city to enact zoning restrictions to promote the quality of civic life (see Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 9, 94 Sup.Ct. 1536, 1541, 39 L.Ed.2d 797). The zoning freeze established by the initiative here at issue is limited to two years duration, and applies only to that portion of the city plagued with the problem of overcrowded schools. Even within that portion of the city, the ordinance permits rezoning

⁶⁶Cal. App. 3rd 255, 118 Cal. Rptr. 158, 529 P.2d 582 (S.C., 1975).

⁶⁷529 P.2d 582, 584.

if the developer will agree to assist the school district in meeting the need for additional facilities which his development has created. Consequently the initiative need not serve to exclude newcomers from San Jose; it may, instead simply divert some development to districts with adequate school facilities, while providing overcrowded districts with the means to accommodate the needs of new residents. The trial court here found that the initiative has not in fact significantly reduced the supply of new housing in San Jose; plaintiff does not challenge that finding. We conclude that plaintiff has failed to demonstrate that the ordinance imposes any noticeable or significant infringement upon the asserted constitutional right to travel. [We see no inconsistency between the San Jose General Plan, which contemplates eventual residential development of land now zoned for agriculture, and the initiative's two-year freeze on new residential zoning].⁶⁸

The Petaluma decision was not cited.

In a second case the California Court of Appeals held that the California Coastal Conservation Act of 1972 did not violate the Right to Travel when it limited the number of residential building permits in coastal communities under its jurisdiction.⁶⁹

The Petaluma case will be appealed on the issue of standing. If the case is reversed, it will still not be decided unless the Supreme Court decides the question of what the Right to Travel encompasses and to whom it applies. But what is the fundamental Right to Travel?

Under the Articles of Confederation of the United

⁶⁸Ibid., 597-8.

⁶⁹CEEED v. California Coastal Zone Conservation Commission, 43 Cal. App. 3rd 306, 118 Cal. Rptr. 315, (Ct. App., 1974).

States, adopted November 15, 1775, a qualified right to travel was granted in Article IV.⁷⁰ No mention was made of this right in the actual text of the Constitution and during the nineteenth century many states passed laws against the immigration of foreign paupers or persons likely to become a public charge.⁷¹

⁷⁰Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

⁷¹Iowa Code as currently enacted, section 252.18 (derived from 1851 Code section 2736):

Foreign Paupers

1. Any person who is a county charge or likely to become such, coming from another state and not having a settlement in any county of this state or any such person having acquired a settlement in any county of the state who removes to another county, may be removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein such person is found, upon petition of said county to the district or superior court of that county.

2. The court or judge shall fix the time and place of hearing on said petition and prescribe the time and manner of service of the notice of such hearing.

Although the Right to Travel was left out of the text of the Constitution, the U.S. Supreme Court "found" or "discovered" it in the Privileges and Immunities Clause,⁷²

3. If upon hearing said petition such person shall be ordered to remove from the state or county and fails to do so, he shall be deemed and declared in contempt of court and may be punished accordingly; or the judge may order the sheriff of the county seeking the removal to return such person to the state or county of his legal settlement.

Iowa Code section 252.19 (derived from the 1851 Code section 2736):

Importation Prohibited

If any person knowingly bring within this state or any county from another county any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be fined not exceeding five hundred dollars, and be charged with his support.

⁷²U.S. Constitution, Article 4, section 2, clause 1 (aka) the XIV Amendment, section 1. This clause has lately been reviewed by the Supreme Court in *Austin v. New Hampshire*, 43 L.Ed.2d 530 (1975), a taxation case, at pages 536-537:

The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, cf. *Allied Stores of Ohio, Inc. v. Bowers*, 358 US 522, 532-533, 3 L Ed 2d 480, 79 S Ct 437 (1959) (Brennan, J., concurring), judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis v. Yale & Towne Mfg. Co.* 252 US 60, 80, 64 L Ed 460, 40 S Ct 228 (1920). Our prior cases, therefore, reflect

the Due Process Clause,⁷³ and the Ninth Amendment. It may also be part of an unwritten promise--an implied right to move freely about as established by the general history of the United States in the spirit of the Constitution.⁷⁴ It has also been based on the Commerce Clause⁷⁵ as held in *Edwards v. California*⁷⁶ where a California law prohibiting assistance to nonresident indigents who wished to enter California was held to be an unconstitutional burden in interstate commerce. The dissent claimed that this was a violation of a fundamental right of national citizenship (a more protected status). In any case, the right seems to exist independent of its derivation.

In the 1960's the right was extended from inter and intra state to international travel.⁷⁷ The Secretary of State claimed the power to deny passports for foreign travel to people who were associates of communists. Here the

an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions.

⁷³Ibid., Article 5 or XIV Amendment.

⁷⁴The Right to Travel and Its Application to Restrictive Housing Laws, 66 Northwestern U.L. Rev. 635, 639 note 18 (1971).

⁷⁵U.S. Constitution, Article 1, section 8, clause 3.

⁷⁶314 U.S. 160 (1941).

⁷⁷*Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Sec. of State*, 378 U.S. 500 (1964).

right of freedom of association⁷⁸ was indirectly violated because in order to exercise one right, you had to relinquish another right. In *United States v. Guest*⁷⁹ the Supreme Court ruled that the right to interstate travel was secured by the Constitution in general rather than by a specific section: "All have agreed that the right exists."⁸⁰ The right was extended to invalidate welfare residency requirements in *Shapiro v. Thompson*⁸¹ and declared in *Dandridge v. Williams*⁸² that the test to support abridgement of this right was the compelling state interest test. Classifications that give rise to a compelling state interest are fundamental rights⁸³ and suspect classifications.⁸⁴ Travel can be regulated by reference to the following two-part test: 1) What penalty is placed on the right? 2) Is there a compelling state interest that cannot be achieved by another means available?

The latest Supreme Court case involving the right to

⁷⁸U.S. Constitution, I Amendment.

⁷⁹383 U.S. 745 (1966).

⁸⁰Ibid., 759.

⁸¹394 U.S. 618 (1969).

⁸²397 U.S. 471 (1970).

⁸³Fundamental rights include voting, aspects of criminal procedure, the I Amendment, marriage and procreation, and travel.

⁸⁴Suspect classifications include religion, race, color, legitimacy, and sex.

travel is Memorial Hospital v. Maricopa County.⁸⁵ The Arizona Supreme Court upheld an Arizona statute requiring a year's residence in an Arizona county as a condition precedent to receiving non-emergency hospital or medical care at the county's expense. There is a mandatory duty imposed by the Arizona State Legislature on the county government to provide necessary medical and hospital care for the county's indigent sick. The indigent, sick plaintiff was a bona fide resident of the county but had not resided there the preceding year (he had been there approximately 6 weeks).

In a prior suit⁸⁶ in another county, this law had been declared invalid as a violation of the Equal Protection Clause of the U.S. Constitution by a federal court. However, in this action, the Supreme Court of Arizona upheld the residency requirement. Thus jurisdiction for the hearing at the U.S. Supreme Court was laid.⁸⁷

The Supreme Court held that the state must justify the law using the compelling state interest test;⁸⁸ that

⁸⁵94 S.Ct. 1076 (1974).

⁸⁶Valenciano v. Bateman 323, F. Supp 600 (D.C., Ariz., 1971); the other suits also invalidating residency requirements in Arizona were Pima County v. Robinson, 457 P.2d 951 (1969), vacated 463 P.2d 536 (1970), and Vaughn v. Bower, 313 F. Supp. 37, aff'd 400 U.S. 884, 91 S.Ct. 139, 27 L.Ed.2d 129 (1970).

⁸⁷Conflict between a Federal Circuit Court and the highest court of a state.

⁸⁸91 S.Ct. 1076, 1081 (1976).

whatever the ultimate parameters of *Shapiro v. Thompson* as to residency requirements were, "medical care is a basic necessity of life;"⁸⁹ and that

[not] unlike the admonition of the Bible that, "ye shall have one manner of law, as well for the stranger as for one of your country." Leviticus 24:22, the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the state to which they migrate as are enjoyed by other residents.⁹⁰

The U.S. Supreme Court found that "the State of Arizona's durational residency requirement for free medical care penalizes indigents for exercising their right to migrate to and settle in that state."⁹¹ No compelling interest was established.

⁸⁹Ibid., 1082.

⁹⁰Ibid., 1084.

⁹¹Ibid.

CHAPTER FIVE

NO GROWTH CITY PLANNING

In 1972 Earl Finkler proposed that the urban planning community investigate what he called "nongrowth."¹ The Club of Rome has described the growth of cities in the United States thus:

American cities grew rapidly until a physical limit was reached--all land in the city center was filled. "The technological answer was the development of skyscrapers and elevators which essentially removed the constraints of land area as a factor in suppressing growth." There was more growth, but then it was found that people and goods would not move in and out from the dense city center fast enough. This time the solution was expressways and (to a lesser extent) mass transit.²

But what about the rights of the land owner who is affected by the limited growth policy? Francis W. Herring suggests:

Tracts on the urban rural fringe would be mapped, and zoning regulations adopted. Every land owner in the area would be guaranteed a sale price at the market value prevailing at the time the regulations were adopted. If, at the time he sells, his land proves to have lost value through restrictions on its use, he can collect from government the difference between the price he would have received had he sold immediately.

[Thereafter the guaranteed value is reduced to the amount of the actual sale price, and runs

¹Finkler, Earl, Nongrowth as a Planning Alternative: A Preliminary Examination of an Emerging Issue, A.S.P.O. - P.A.S. No. 283, 1972.

²Ibid., page 27 quoting Meadows, Donella H. et al., The Limits to Growth, 1972.

with the land at the lower figure.] If the land value has increased by the time of the sale, the land owner may keep the excess over the guaranteed amount although the land will continue to carry the original guaranteed value.³

But non-growth city planning has not found favor in the United States. Attacks from both the developer and the so-called "excluded minorities" have been vociferous.⁴ The United States Supreme Court has found that the indigents are members of a protected class under the 14th Amendment of the Constitution and developers have attacked the plan using the 5th Amendment; and other Constitutionally protected classes have their rights affected.⁵ A Hobson's

³Herring, Francis W., Open Space and the Law, 1965, pages 103-4.

⁴However, reportage of methods is very poor. Gladwin Hill in a series of New York Times articles reported that the City Council of St. Petersburg, Florida, passed an ordinance to require that the last 250,000 people who had moved to the city were to move out (July 28, 1974). The Clerk of Council reports that the ordinance did not pass a second reading.

The best summary of no-growth solutions can be found in A.S.P.O. - P.A.S. No. 283, 1972, and A.S.P.O. - P.A.S. No. 289, 1973.

⁵Mayne, Jr., Wiley E., The Responsibility of Local Zoning Authorities to Non-Resident Indigents, 23 Stanford L. Rev. 774 (1970-71).

Earl Finkler reports in Non-Growth Professionals Needed to Help Slow Things Down, 64 Landscape Architecture, 1966 (1974):

For every nongrowth community taken to court, five were probably scared off by threats from real estate and development interests. The National Association of Home Builders let it be known that it had a war chest assembled to help in propaganda and legal assaults against any community trying to slow or stop growth. Many city attorneys have advised local planners and environmentalists not to even try to stop growth or institute stronger

choice is created by the problem that growth increases the tax base and tightens the local job market; but, it tightens the housing market which comprises the social commitment to the community.⁶

Alfred Hitchcock chose a small town of less than 18,000 people in 1943 to be the set for "Shadow of Doubt." By 1970 the town's population had increased to 50,006; that town is now the City of Santa Rosa in Sonoma County, California. A municipality in the San Francisco Bay Area, it grew under the influence of the expansion of the Bay Area's population growth. As a small town trying to curb the population explosion and retain its character as the urban center of a wine growing region, Santa Rosa is an instructive case on what has been proposed to control urban growth.

Livingston and Blayney, City and Regional planners accounted for the growth as follows:

Santa Rosa's high level growth prospects have resulted largely from external sources. High land prices, tough subdivision improvements and land

land controls because every person has the legal right to put his land to its highest and best use. This is a cloudy area of law, but such conservative advice saves the city attorney a lot of hard work later. Other sincere and not-so-sincere people have raised legal issues revolving around the right to travel, and the danger that nongrowth is just a new twist for exclusion of blacks and the poor.

⁶The urban problem of sprawl creates a major split between the desire for better, low-cost, housing for minorities, both economic and racial, yet demands that some consideration be given to the ecological-environmental nature of the surrounding community. It is necessary to devise some means for protection of the environment and building adequate housing units for the expanding population.

dedication (or in lieu fee) requirements, land development ("bedroom") taxes, and, in a few cases, growth limitation policies of local governments in the inner Bay Region counties have attracted large scale developers to Sonoma County. The extreme shortage of buildable land and the consequent high cost of house building in Marin County have been important factors in this trend. Petaluma [which is south of Santa Rosa] felt the impact first, but when the city imposed a limitation on growth, residential developers started buying up large tracts of land in the Santa Rosa area. According to local builders, an ever increasing percentage of Santa Rosa home buyers commute to work in San Francisco.⁷

People who would otherwise have moved to Petaluma have moved to Santa Rosa. Utility service connections have been allowed by the City of Santa Rosa. But, the county government's liberal approval of subdivisions, which are developed without sewers (even if septic tanks are not desirable) in the Santa Rosa urban fringe, where land prices have been lower, have placed Santa Rosa in a dilemma--should the city annex the subdivisions (as requested by the residents of the subdivision) and assume the financial burden of upgraded, adequate utilities, or allow the substandard developments to continue?⁸

Adding to the problem is Sonoma County's policy of spreading the cost of county supplied utilities by creating large sanitary districts which encourage uncontrolled urban sprawl.⁹

⁷ Livingston and Blayney, Santa Rosa Optimum Growth Study, 1973, page 4.

⁸ Ibid., 6.

⁹ Ibid.

Proposed methods of control in Santa Rosa include:

1. Housing unit rationing like Petaluma;
2. Large lot zoning;
3. Utility timing; or,
4. An urban growth boundary.

The Petaluma-type solution may be invalid because it violates the right to travel of U.S. residents and the evidence indicates that people who would migrate to Petaluma have moved to Santa Rosa. Santa Rosa's possible solution number four has not been challenged in the courts.

The Urban Growth Boundary of Santa Rosa¹⁰ contains two distinct areas. The initial area, called a Compact Growth Boundary by the Santa Rosa City Planning Department, would be an area where urban development-expansion would be controlled, but permitted. Those developments which conform to the following goals would be allowed:

1. Achieve compact growth and efficient, economical utility services by staging such services under a city-county joint policy.
2. Preserve open space.
3. Provide adequate housing for future needs.
4. Maximize use of existing public facilities and services.
5. Location and timing of future development.
6. Stabilize land values and protect property owners' investments.¹¹

The location of the actual boundaries is to be based on the following criteria:

¹⁰Ibid., 97ff.

¹¹Ibid., 97.

1. property lines
2. service assessment boundaries
3. properties fronting on streets and utility lines useful to accommodate growth
4. existing service district and governmental boundaries
5. physical boundaries (natural and artificial)¹²

Between the Compact Growth Boundary and the Urban Growth Boundary, also called an Urban Expansion Line,¹³ would be an area where only rural residential, agricultural, and recreational uses would be supplied but the land would be annexed to the City of Santa Rosa. This second boundary line would be the maximum limit of growth within the city's sphere of influence.¹⁴

This plan would control the ultimate limits of growth and place an upper limit on the municipality's population. The pace of development would not be controlled as in Petaluma-type by-law; but the plan proposes a comprehensive plan for open space control.¹⁵

The state of Oregon has developed an ecological attitude toward land use planning mandating local comprehensive

¹²Ibid., 98.

¹³Ibid., 101.

¹⁴Ibid., 100.

¹⁵cf. Santa Rosa City Planning Department, Open Space Conservation Element, 1974.

plans.¹⁶ A major center of local Oregonian concern is the Willamette Valley and specifically the cities of Eugene, Springfield, and Salem. This valley has had a growth rate of 100 percent between 1940 and 1970 and has reached a population of 1,500,000 people with signs of uncontrolled growth.¹⁷

Salem, the capital city of Oregon, and the County Governments of Polk and Marion, Oregon, entered into an agreement on 2 August 1973, to adopt "Urban Growth Policies for the Salem area and to link a continuing planning process to capital improvement programs and operating budgets." As envisioned, the "Urban Control Policy is a concept approved by local governmental units regarding the geographic limits of urban development in the Salem area. Basic urban services would serve the population within the boundary but services would be limited, or not furnished, outside the boundary."¹⁸

Twenty-five percent of the urban land within Salem

¹⁶Oregon Laws, 1969, c. 324, s. 1; Oregon Revised Code, 308.745, 755(2), 235; Oregon Revised Code, 227.210-227.280; Pending Bills (1975) HR 2885, SB 27, HR 2621, HR 3026.

¹⁷An outline of possible scenarios for the future for the valley can be found in Lawrence Halperin and Associates and the State of Oregon, Willamette Valley - Choices for the Future, San Francisco: Lawrence Halperin and Associates, 1972.

¹⁸Johnson, Donald M., Developmental Effects of an Urban Growth Boundary on the Salem, Oregon, Area, Salem: Mid-Willamette Valley Council of Governments, 1972, (Hereafter cited as Salem 5).

is vacant;¹⁹ development being somewhat preferred outside of the city because of cost factor the result is urban sprawl. Here, as in other agricultural areas, the leap-frog effect causes a loss of prime agricultural land. Thus, the Growth Policy Agreement was entered into.

The Growth Policy Agreement provides, by contract, the following:

1. Future urban development shall be contained within the geographical limits of an urban growth boundary.
2. An urban growth boundary shall be established by the parties here to and said parties will take the necessary action to have the boundary and the policies herein set forth made a part of their respective comprehensive plans.
3. The area outside the urban growth boundary shall be maintained with low-density living areas, open space lands and other uses compatible with the intent of the Urban Growth Policies.
4. All parties shall work toward the development of the most effective and economical method for providing specific urban services to the area into the urban growth boundary.²⁰

The boundary proposed is to encompass 70 square miles and envisions a population of 160,000 by 1990. The boundary would be drawn with the following assumptions:

1. People living with the proposed urban growth boundary are part of the Salem urban community whether they live inside or outside of the present city limits.

¹⁹Salem Planning Department, An Urban Growth Policy for the Salem Oregon Area, Supplement No. 1 to the Salem Area Comprehensive Plan, Salem: Mid-Willamette Valley Council of Governments, 1973-74, page 2.

²⁰Ibid., 6.

2. Residents living in urban areas need basic urban services...²¹

and these considered:

1. The city (Salem) is the logical provider of basic urban services...
2. Newer facilities are necessary for dense urban development; therefore, the planned extension of newer services can aid in directing and controlling urban growth.²²

In 1969, the State of Oregon established boundary commissions to guide the growth of cities and special service districts to "1) prevent illogical extensions of local governmental boundaries; and 2) assure a) adequate quality and quantity of public services and b) the financial integrity of each unit of local government."²³ The adoption of the policy for Salem on 2 September 1970 established a prohibition on new sewer districts and annexation of land outside the Master Sewer Plan for Salem.²⁴

Pursuant to the above adopted policies, the Salem City Council adopted a number of annexation policies including:²⁵

1. The City will extend a water line extraterritorially in specific situations where it appears in the public interest to make a public supply available pending annexation.²⁶

²¹Ibid., 3 and 6.

²²Ibid., 8.

²³Ibid.

²⁴Ibid., 13.

²⁵Ibid., 14.

²⁶Ibid., Appendix, 5.

2. Property that is contiguous to the city limits must be annexed to the city to obtain water and sewer services.
3. The city...will provide water and sewer outside the city limits to access into the Urban Growth Boundary under the following conditions:
 - (a). The property requesting service shall assume the cost assessed for any line construction or an amount equal to such assessment cost by way of a connection charge.
 - (b). The water and sewer service charge shall be 200 percent of the city's base rate.
 - (c). [Agree to future annexation when city becomes contiguous and make this agreement running with the land].
 - (d). [Assessment cost at same rate as city rates.]
 - (e). Such other conditions as the Council may require in specific cases.²⁷

The cost study of the program, as projected by the Mid-Willamette Valley Council of Governments, indicates a rise in the cost of land due to supply and demand factors, but discounts as immaterial effects of the Urban Growth Policy because

1. the supply exceeds the demand
2. low income housing sites have been reserved
3. periodic adjustment to increase the supply of land is provided for.²⁸

The Salem Area Comprehensive Plan provides for 19,000 acres

²⁷Ibid., 3, Resolution of City Council, March 11, 1974.

²⁸Ibid., May 29, 1974.

for residential uses, with a projected need of 134,000 acres for a population of 160,000.²⁹ At a density of 12 persons per residential acre (7.68 persons per square mile), 230,000 persons could be accommodated on 19,150 acres.³⁰

The effect of the Growth Boundary Line, as envisioned by the planner, is to cause a spacial redistribution "scattered development that would have occurred within the boundary."³¹ Would this force up the cost of raw land? The planners are not sure but predict that over the next twenty years it would selectively increase land costs, inside the growth boundary.³² Outside the boundary, the costs and value of land would be dependent on public policies--what the future would bring with respect to future development potential and possibility or probability of a revision in the growth boundary. The saving factor, according to the planners, is that the land is not generally suitable for urban development.³³

South of Salem lies the twin city of Eugene Springfield, Oregon. This metropolitan area is in the Willamette Valley and suffers the same problems as Salem, and unorderedly

²⁹Ibid., 3, 4 Resolution of City Council, April 22, 1974.

³⁰Salem 5, page 28.

³¹Ibid., 32.

³²Ibid., 40.

³³Ibid., 41.

urban growth pattern. To effectuate a solution, the cities adopted a plan for compact urban growth.³⁴ This plan envisions a filling up of urban areas. The objects of the plan are to:

- 1). preserve prime agricultural land
- 2). eliminate development for the flood plain area
- 3). reduce scatteration and urban sprawl
- 4). reduce amount of unneeded public utilities
- 5). encourage use of already serviced land
- 6). reduce need for roads and make mass transportation more attractive.³⁵

The Urban Services Area has one major difference with the Salem Urban Growth Policy; it envisions regular extensions of the area. The Urban Service Area is the actual geographic portion of the metropolitan area at any point in time in which a 'minimum level of urban services' are available or will be imminent[sic]. The limits of such an area will be extended from time-to-time through the cooperation of the developer and local government. The "projected 'Urban Services Area' is the estimated geographic area within which a full range of urban services will need to be excluded or provided to accommodate urban development at any future point in time (such as 1990)."³⁶

³⁴Ibid., 41-2.

³⁵1990 Plan, Eugene-Springfield Metropolitan Area 1990 General Plan, Eugene: Land Council of Governments, 1972 (Adopted 1972).

³⁶Ibid., 11.

The minimum level of urban services "are the following utilities, services and facilities: public water supply, public sanitary services, electric power, urban level of police and fire protection, solid waste collection, streets with curb, gutter and sidewalks, parks."³⁷

The full range of urban services are "those defined as minimum, storm sewers, mass transit, natural gas, street lighting, municipal level police protection, library services, schools located so as to require minimal bussing, local parks and recreation programs, designated open spaces."³⁸

Additional satellite towns, both existing and needed future, can be accommodated within the framework of the development plan.³⁹ But the plan recommends

1. Control of the location, timing and financing of the major public investments that directly influence the growth form of the metropolitan area must be authorized on a metropolitan-wide basis.⁴⁰
2. Implementing the urban service area concept, as the principle means to attain the compact urban growth form recommended in the plan. The planning, programming and financing for the provision of all urban services should then be concentrated inside the urban service area.⁴¹
3. The preservation of designated agricultural lands can be initiated through the use of an exclusive agricultural zone, within which all but

³⁷Ibid., 12-13.

³⁸Ibid., 13.

³⁹Ibid.

⁴⁰Ibid., 17.

⁴¹Ibid., Summary Map, Recommendation 2.

agricultural pursuits would be prohibited. A minimum parcel size sufficient to encourage economic farm management while at the same time prohibiting residential subdivision is a necessity. Taxing policies must also reflect the exclusive agricultural use lands.⁴²

4. The guiding of land development within the metropolitan area will be based upon the current or imminent availability of a minimum level of urban services.⁴³
5. The guiding of land development beyond the projected urban service area will be based upon the following criteria:
 - a. Conformity with the growth objectives and the provisions of the County-wide Comprehensive Plan.
 - b. Conformity with the policies and provisions of the County-wide Comprehensive Plan.
 - c. Rural residential density and other non-urban land uses for which facilities are not necessary.⁴⁴

This plan would, if correct in its projection, correct the confused situation of two central business districts and halt fringe development and resultant urban sprawl.

Other solutions are proposed almost daily in the New York Times⁴⁵ or the A.S.P.O. Zoning Digest articles on

⁴²Ibid., 3.

⁴³Ibid., 33.

⁴⁴Ibid., 56.

⁴⁵Hill, Gladwin, "California Lists Gains of Two Years of Coast Regulation," New York Times, April 22, 1975, at page 22:

The California State Coastal Zone Conservation Commission has planning jurisdiction over the area within 1000 yards of the coast and the power of development permit authorization until December, 1975: the Commission must propose a

what is wrong with the cities and urban areas and what can be accomplished through better planning; yet almost all of these techniques fall into one of two categories, public ownership of a fee or less or a technique of zoning--police power regulation of the use of land. A third category, tax incentives, is usually an alternative to outright public ownership of a fee as in the California Williamson Act,⁴⁶ but this could be viewed as the public's acquiring, by a loss of income from taxation, an agreement not to develop the property in a certain fashion.⁴⁷

As far as public ownership is concerned, as long as the municipality is willing to pay fair market value for the property expropriated, and the land is taken for a proper public purpose, then no real problem exists; but, what municipality can afford to purchase all the property and also afford to lose the tax revenue from it? A

plan for the area within five miles of the coast before its mandate expires in January, 1976. One proposal (now limited to easements) was to have state ownership of all the coast line within the next fifty years or so.

⁴⁶California Land Commission Act of 1965, California Government Code section 51200et seq. Problems with the act include:"(a) areas where development potential is greater than the property tax relief (along the urban fringe) will not be protected. (b) no requirement of co-ordination with local planning decisions."

cf. Stanford Environmental Law Society, The Property Tax and Open Space Preservation in California: A Study of the Williamson Act, 1974.

⁴⁷This may also be termed an easement but the covenant may not run with the land.

purchase-lease back arrangement would also be costly and at one time, though its status is now in doubt with modern constitutional (state) amendments, was thought not to be a proper public purpose.⁴⁸

⁴⁸Markley v. Village of Mineral City, 51 N.E. 28 (Ohio S.C. 1898); State, ex rel, Toledo v. Lynch, 102 N.E. 670 (Ohio S.C., 1913). The Constitution of the State of Ohio provides for certain types of development, Art. VIII, section 2h.

CHAPTER SIX

A REVIEW OF LAND USE CONTROL MECHANISMS IN CANADA AND THE UNITED KINGDOM

Development control is an alternative method of land control employed in Great Britain and authorized by statute in some Canadian Provinces. Ian MacF. Rogers defines Development Control in his treatise:

Development control is the regulation of land use on a permit basis for each proposed use of land. Each proposal for a particular use of a parcel of land is examined on its merits and, if approved by the approving authority, may be proceeded with....Development control is the control of land use by permission rather than [by] legislation.¹

¹Rogers, Ian MacF., Canadian Law of Planning and Zoning, Toronto: Carswell Co. Ltd., 1973.

The Royal Institute of Architecture of Canada in Reflections on Zoning, 1964, at page 5, defines Development Control as follows:

The power to pass zoning by-laws in their present form [1) to control land use against uses and to 2) guide or control development vis a vis a comprehensive plan] should be replaced or supplemented by a power to control certain aspects of individual buildings and groups of buildings according to a plan or development, so that detailed questions usually determined in a zoning by-law of general application and determined at the time the building permit is applied for.

In the United Kingdom the system of planning control, variously known as Development Control, "rests on the assumption that the existing use of land--and the value of that use--is the owner's; but the prospect of developing the land--and the value of that prospect--is the communities." Davies, Keith, Law of Compulsory Purchase and Compensation, London: Butterworths, 1972, page 222.

The control is exercised on the basis of merit of the individual project. Development can be defined to mean buildings, operating, or excavating in, on, over, or under the land or changing its use.²

Development control initially found acceptance in England and it is therefore necessary to discuss how the system evolved; while available to planning jurisdictions in Canada it has not been extensively employed.

In 1947, an effective freeze on land-use was established by the Town and Country Planning Act.³ Permission to develop was required except for specified uses or classes; a local development plan was established and in order for a building to be built, planning permission had to be granted by the local planning authority. The owner of land, therefore, has no automatic right to do what he likes with the land; planning permission is needed. A right of appeal is granted with appeal to the appropriate minister and to the courts on a question of law or jurisdiction only. In effect, there was a "nationalization of development rights and [their] vesting in the local planning

² Ibid., 22. See also Regina v. Grandview Holdings Co. Ltd., (1965) 53 W.W.R. 308, 310 (B.C.): "Development means a change in the use of any land or building, including the Carrying-out of any construction, engineering or other operations in, on, over, or under land or land covered by water."

³ 36 Statutes 22 (U.K.).

authorities."⁴

Once a request for development permissions has been denied, what specific right of appeal is there? When considering a request for planning permission, the local planning authority may make an order in one of three forms, 1) unconditional permission, 2) permission subject to conditions as they think fit, or 3) may refuse permission. The conditions that may be imposed may be those that regulate:

- i) the development of or use of any land under the control of the applicant (whether or not it is the land in respect of which the applicant has been made) provided the condition is reasonably related to the permitted development.
- ii) the permitted works to be removed or the permitted use to be discontinued at the expiry of a specific period, that is, in effect permission granted for a limited period only.⁵

Reasons for the decision to impose conditions must be given.⁶

An appeal can be made to the Minister on the refusal or permission or grant of permission with conditions. The appeal is treated de novo and the Minister may impose other conditions, or even refuse development. Such a decision

⁴Clawson, Marion and Hall, Peter, Planning and Urban Growth, An Anglo-American Comparison, 1973, page 166.

⁵Telling, A.E., Planning Law and Procedure, 3rd edition, 1970, page 115-17; Town and Country Planning Act, 1962, s. 18(1).

⁶Hamilton v. West Sussex C.C., [1958] 2 All. E.R. 174.

is final⁷ except by appeal as provided by Section 179 of the 1962 Town and Country Planning Act. Appeal may be made to the High Court on the grounds that:

either that the Minister's decision was outside the powers conferred by the Planning Acts or some procedural requirement of these Acts had not been complied with. It should be possible therefore to question the Minister's decision on the ground that he had taken into account considerations not relevant to planning, that he had imposed or upheld an improper condition or that there was some breach of the rules of natural justice in the handling of the appeal.⁸

But the proceedings must be commenced within six weeks, "thereafter, the decision may not be questioned in any legal proceedings whatsoever."⁹

On the issue of what kind of conditions may be imposed, Telling states:

"The latter case provided the House of Lords [Fawcett Properties, Ltd. v. Buckingham C.C., [1960] 3 All E.R. 503.] with the opportunity of considering a number of points relating to the validity of conditions. As a result the following principles appear to have been established--

- (1) A condition must "fairly and reasonably relate to the permitted development." This is, it must serve some useful planning purpose.
- (2) A condition must not be wholly unreasonable.
- (3) A condition may be imposed restricting the user of premises according to the personal circumstances of the occupier.

⁷Town and Country Planning Act, 1962, s.23(7). (U.K.).

⁸Telling, supra note 5, 121-122.

⁹Ibid., 122.

- (4) A condition will be declared invalid on the ground that its meaning is uncertain."¹⁰

As to the definition of what is unreasonable, "the task of the court is not to decide what it thinks is reasonable but to decide whether the condition imposed by the local authority is one which no reasonable authority acting within the four corners of their jurisdiction could have decided to impose."¹¹

Under the 1968 amendments to the Town and Country Planning Act, the following grounds of appeal were enacted:

- (a) that permission ought to be granted for the development to which the enforcement notice related, or the condition or limitation in question should be discharged
- (b) that matters alleged in the notice do not constitute a breach of planning control
- (c) in a case to which the four-year rule still applies; time has elapsed
- (d) breach of planning control occurred before 1964
- (e) notice not served per 15(4) (g)
- (f) steps of notice exceed need under remedy
- (g) time specified for compliance is unreasonably short.¹²

Appeals under (b), (c), (d), and (e) may only be made by an appeal to the Minister; but under (a) and (b) there is allowed at least one hearing on the merits of the development.

One commentator has identified the most serious

¹⁰Ibid., 129.

¹¹Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1947] 2 All. E.R. 680, 684.

¹²Town and Country Planning Act, 1968, s. 16(1). (U.K.).

problem of the Town and Country Planning Acts as the:

problem of the unbridled and hidden administrative discretion...[1] the granting of planning permission is virtually unchecked--considerations must only be materially relevant to planning in both the consideration of the appreciation generally and the composition of particular conditions. No further criteria are set out in the Act.¹³

There does exist a master plan for development, but the Development Plan, as it is called, includes what can be called the zoning ordinance, the subdivision ordinance, the urban renewal scheme, and the official street map--but there are omitted specific directions.¹⁴ Revision is required at specific intervals and approval of the plan is subject to objections and a hearing is conducted by a representative of the Minister. The Minister then has the power to approve, disapprove, or approve with modifications.

A method to ease the economic effect of Development Plans was the Betterment Levy.¹⁵ But this legislation is no longer in effect.¹⁶ The levy provided that compensation would be paid for loss of possible development from a fund derived from the profits of land owners derived from planning potential and actually realized.

¹³Makuch, Stanley M., Zoning, Avenues of Reform, (1973) 1 Dalhousie L. Rev. 294, 315.

¹⁴Mandelker, David R., Green Belts and Urban Growth, 1962, page 4-5.

¹⁵Land Commission Act, 1967 (U.K.).

¹⁶Land Commission (Dissolution) Act, 1971 (U.K.).

Thus, under the English Town and Country Planning Acts, the developer may appeal on grounds of law and jurisdiction but appeals on grounds of fact are not authorized.

Canadian land use control and regulation differs from that of the United Kingdom in that there is no centralized planning system nor is there a uniform act governing. In each province the legislature is free to enact what ever and when ever it feels the need to enact legislation and home rule for the municipalities is not employed. In five of the provinces¹⁷ Development Control has been enacted (in addition to zoning) in a limited or modified fashion but it has not been employed to any great extent.

In general in Ontario municipalities have the power to pass by-laws "for prohibiting the use of land, for or except for such purposes as may be set out in the by-law..."¹⁸ However, the Minister may exercise any power conferred on local councils with respect to any land in Ontario the power confirmed by Section 35 of the Planning

¹⁷Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. Interim Development Control is available in Newfoundland but not Development Control. See Milner, J.B., An Introduction to Zoning Enabling Legislation, [1962] 40 Can. Bar Rev. 1, 51.

¹⁸Planning Act, R.S.O., 1970, c. 349, s. 35.

Act.¹⁹

¹⁹Ibid., 32. The Manitoba Planning Act, S.M., 1975, c. 29, s. 12(1), provides for the establishment of special planning areas to provide for the:

- (a) the orderly development of parks, grounds or sites for recreational governmental or educational institutions or other similar undertakings of a public or quasi-public nature in respect of which public moneys may be expended;
- (b) the protection of dams, reservoirs, roads, buildings or other undertakings or works in respect of which public moneys may be expended;
- (c) the protection and conservation of the environment and of natural resources such as lakes, rivers, shorelands, forests, agricultural lands and recreational lands, and lands adjacent to or surrounding airports;
- (d) the preservation of visual corridors and recreation areas;
- (e) the preservation of the landscape and natural beauty of the area;
- (f) the preservation of historic and archeological structures and sites, and areas adjacent thereto;
- (g) the creation and preservation of wilderness areas and wild animal and wild bird sanctuaries;
- (h) the orderly development of a new townsite or a townsite in which a new industry has been established or is expected to be established, if it is considered that the industry will have a significant influence beyond the place where it is or is expected to be established or if it is expected that the industry will be the cause of a marked increase in the demand for urban services in the community; or
- (i) the rehabilitation and restoration of mining areas;
- (j) any other thing that may be considered necessary for the purpose of preventing damage to or the destruction of lands, sites or buildings, or of preventing interference with the use of lands, sites or buildings.

In 1973 the Ontario Planning and Development Act²⁰ was passed. Under this Act the Minister²¹ may designate any area of land in Ontario as a development planning area.²² The Minister may require that such a plan be developed by the local governments.²³ Should problems arise, the Minister may establish by order zoning controls.²⁴

The Niagara Escarpment Planning Act²⁵ grants to the Minister powers of development control by granting the power to control development permits. Ontario Bill 130, An Act to Provide for Planning and Development of the Parkway Belt,²⁶ creates a possibility of districting for which development by Ministerial permit is possible.²⁷ The Minister may designate land uses retroactively to June 4, 1973, and by this means the Ontario Provincial government can enter into the field of land use planning

²⁰S.O., 1973, c. 5.

²¹Minister means Treasurer of Ontario and Minister of Economic and Intergovernmental Affairs.

²²Planning Act, S.O., 1973, c. 5, s. 2(1).

²³Ibid., s. 13.

²⁴Ibid., 11 (1). See Appendix B.

²⁵S.O., 1973, c. 52.

²⁶Ontario, 1973.

²⁷Cohen, Charles B., The Great Land Grab, Land Use "Planning" in Ontario, 6 Chitty's Law J. 195 (1973).

directly.²⁸

Development Control has become a popular concept of late but it has been exercised before under the guise of spot zoning; see for example the decision of *Scarborough v. Bondi*;²⁹ following that decision, if the municipality wanted to, presumably it could zone for each and every parcel since nothing is per se illegal about spot zoning as a result of this Supreme Court of Canada decision.

In a confusion on Development Control, Contract Zoning, and zoning for Planned Unit Developments, the Ontario Land Use Commission described the present situation in the following terms:

Site plan control, or development control, has been increasing in popularity, especially in the Cities of Toronto and London. The system is simple. The existing general or comprehensive zoning by-law permits development at a density that is uneconomic, or for the wrong (i.e. unwanted) purposes, and a prospective developer is confronted with a real barrier. He must persuade the council to amend its by-law to permit his development. At this point, he can come forward and show the council his particular proposal. If it finds the proposal acceptable, the

286.---(1) On and after the day this Act comes into force, the Minister may, in respect of any land within the Parkway Belt Planning Area, make land use regulations and in any such regulations the Minister may exercise any of the powers conferred upon the Minister under clause a of subsection I of section 32 of The Planning Act, and notwithstanding subsection 4 of the said section 32, any such regulation may be made that does not conform to a local plan in effect in the area covered by the regulation.

Supra note 26, s. 6.

²⁹[1959] S.C.R. 444.

council can amend the by-law either by rezoning the land into another existing category that would permit the proposal, or by creating a new and special category. There is, however, a danger in merely rezoning into an existing category. Most such categories have important characteristics which are necessarily too general in nature to achieve the desired effect.

Thus, in most cases, the council enacts a special by-law for the area in which the project will be located. The developer is permitted to erect only the buildings described and sited, with suitable drawings and diagrams, in the by-law. In some instances, the practice has been to enact a by-law which changes the land use to a general classification, but spells out in words the specific restrictions, conditions or regulation applicable to the land, but does not show an actual plan of the development. As a secondary document, the developer is required to sign an agreement with the municipality, stating that he will not apply for a building permit until the detailed plans of the development have been approved by the municipality.³⁰

The Law Reform Commission of Ontario feels that such agreements are unenforceable against subsequent owners.³¹ The solution is the repeal of the amended zoning ordinance. Actions on the action of the city council must first be raised at the Ontario Municipal Board from which appeal lies:

from the Board to the Court of Appeal upon a question of jurisdiction or upon any question of law, but such appeal does not lie unless leave to appeal is obtained from the court within one month after the making of the order or decision sought to be appealed from or within such further time as the court, under the special circumstances of the case, shall allow after notice to the opposite party

³⁰ Ontario Law Reform Commission, Report on Development Control, Toronto: Queen's Printer, 1971, page 11.

³¹ Ibid. But see contra, City of Winnipeg Act, S.M. 1971, c. 105.

stating the grounds of appeal.³²

Under the Planning and Development Act,³³ Saskatchewan municipalities may zone or establish a municipal development plan. A Municipal Development Plan shall consist of:

- (a) the plans and supporting material defining the future physical, social and economic development of the municipality;
 - (b) zoning controls which shall be consistent with the plan, which shall be the means of implementing the plan and which shall comply with the requirements of section 60;
 - (c) a capital works program showing the estimated cost of each project and the proposed sequence of construction or the priority of each project for a period of not less than five years with provision for annual review and revision in order to maintain a five-year advance forecast;
 - (d) provision for the revocation of any zoning bylaws or any other bylaws dealing with matters provided for in the plan with effect from the date of the coming into force of the municipal development plan.
- (2) A municipal development plan may make provision for any other matter pertinent to the encouragement and control of development within the municipality.³⁴

This plan shall be reviewed whenever the council or the appropriate minister deems necessary or every five years from last review or from the adoption of a plan.³⁵

³²Ontario Municipal Board Act, R.S.O., 1970, c. 323, s. 95(1).

³³1973 (Sask.), c. 73: 1973-17 (Sask.), c. 76.

³⁴Ibid., s. 38.

³⁵Ibid., 49.

The power to zone is granted in s. 56;³⁶ subject to the requirement that there was not adopted a prior development plan.³⁷ The zoning by-law or amendment must be passed within one year of the resolution authorizing the preparation of the zoning by-law.³⁸ During this one year interim the municipal council may:

by resolution provide that no person shall carry out any development within the area that will be affected by the proposed by-law except with the written permission of the council of the municipality.³⁹

This is a form of Interim Development Control.

Subject only to a requirement that notice of intent to pass the resolution be published,⁴⁰ the municipality may exercise this power of interim development control as it sees fit. The developer or any person "who desires to carry out any development in an area that will be affected by the proposed zoning by-law shall apply to the

³⁶Ibid., 59:

The council of a municipality may pass a zoning bylaw to control the use of land, for providing for the amenity of the area within the council's jurisdiction and for the health, safety and general welfare of the inhabitants of the municipality.

³⁷Ibid., 56.

³⁸Ibid.

³⁹Ibid., 57(1).

⁴⁰Ibid., 57(2).

council of the municipality for permission to carry out the development and upon receipt of such an application the council of the municipality shall, subject to subsection (4), within sixty days:

- (a) grant the permission applied for;
- (b) grant the permission applied for subject to specified conditions;
- (c) defer making a decision in respect of the application for a period not exceeding six months from the date of the application; or
- (d) refuse the permission applied for."⁴¹

The procedure of the municipal council for issuance of interim development control permits is set out in the act and is declared as follows:

- (4) The council of a municipality may delegate to any office of the municipality the authority to grant permission on behalf of the municipality to an applicant to carry out any development in an area that will be affected by the proposed zoning bylaw.
- (5) Where the officer does not grant to an applicant permission to carry out development in an area that will be affected by the proposed zoning bylaw, the officer shall forthwith advise the council of his decision and shall forward the application for such permission to the council for decision pursuant to subsection (3).
- (6) A person aggrieved by the decision of the council of the municipality under subsection (3) or by the decision of an officer granting permission under subsection (4) may appeal to the zoning appeals board in accordance with this Act or to the Provincial Planning Appeals Board where no zoning appeals board has been established.

⁴¹Ibid., 57(3).

- (7) The council of the municipality shall notify the applicant of its decision and shall inform him of his right to appeal under subsection (6).⁴²

When a council fails to pass a zoning bylaw as provided in the preceding sections, any refusal of permission to, or conditions imposed on a grant of permission to, carry out development made pursuant to section 57 becomes invalid and the development may be carried out as if the resolution to prohibit the carrying out of development had never been passed.⁴³

Also possible under the Saskatchewan Act is a system of development permits.⁴⁴ A permit may be conditioned on whatever the Municipal Council may approve; such permits may only be required for certain areas so designated.⁴⁵

Interim Development Control is available in Newfoundland for a period not to exceed two years.⁴⁶

In order to prevent agricultural land from being converted to urban uses, the British Columbia Provincial Land Commission was established.⁴⁷ The objects of the Commission are to:

⁴²Ibid., 57(4) - 57(7).

⁴³Ibid., 58.

⁴⁴Ibid., 60(2):

A zoning bylaw may provide for a system of development permits and use permits, prescribe the terms and conditions under which any permit may be issued, suspended, reinstated or revoked, and prescribe forms of permits and applications therefor.

⁴⁵Ibid., 60(4).

⁴⁶Urban and Rural Planning Act, R.S.Nfld. 1970, c. 387, s. 13.

⁴⁷Land Commission Act, 1973, (B.C.), c. 46.

- (a) preserve agricultural land for farm use;
- (b) encourage the establishment and maintenance of family farms, and land in an agricultural land reserve, and a use compatible with the preservation of family farms and farm use of the land;
- (c) preserve green belt land in and around urban areas;
- (d) encourage the establishment and maintenance of land in a green belt land reserve for a use compatible with the preservation of a green belt;
- (e) preserve land bank land having desirable qualities for urban or industrial development and restrict subdivision or use of the land for other purposes;
- (f) encourage the establishment and maintenance of land in a land bank land reserve for a use compatible with an ultimate use for industrial and urban development;
- (g) preserve park land for recreational use;
- (h) encourage the establishment and maintenance of land in a park land reserve for a use compatible with an ultimate use for recreation; and
- (hl) advise and assist municipalities and regional districts in the preparation and production of the land reserve plans required for the purpose of this Act:⁴⁸

The Commission may

- (i) purchase or acquire land, except by expropriation, on such terms and conditions as may be negotiated, and hold such land for the purposes of this Act;
- (j) dispose of, by sale, lease, or otherwise, commission land and Crown land that is in an agricultural land reserve, a green belt land reserve, and land bank land reserve, or a park land reserve, subject to such terms and conditions as the commission may determine;
- (k) accept gifts of land subject to such terms and conditions as the commission may determine;
- (l) acquire and hold personal property and dispose of personal property so acquired by sale, lease, or otherwise; and
- (m) if authorized by any other Act, purchase or otherwise acquire, hold, administer, and dispose of land, including Crown land, for the purposes of

⁴⁸Ibid., s. 7(1) (a-hl).

that other Act.⁴⁹

(2) For the purposes of this section, the commission may

- (a) purchase or acquire land, except by expropriation, including Crown land, the present condition or future potential of which merits preservation by reason of its aesthetic quality or its location in or around urban areas, as green belt land;
 - (b) purchase or acquire land, except by expropriation, including Crown land, having desirable qualities for urban or industrial development or redevelopment, as land bank land; and
 - (c) purchase or acquire land, except by expropriation, including Crown land, having desirable qualities for, or future potential for, recreational use as park land;
- and, upon being so purchased or acquired, the green belt land, land bank land, or park land is established as
- (d) a green belt land reserve; or
 - (e) a land bank land reserve; or
 - (f) a park land reserve,
- as the case may be, and shall be subject to this Act and the regulations.⁵⁰

Agricultural land may be designated as an Agricultural Land Reserve⁵¹ with the prior approval of the Lieutenant-Governor in Council and when such land is so designated, then

- (1) No person shall occupy or use agricultural land designated as an agricultural land reserve pursuant to section 8 for any purpose other than farm use, except as permitted by this Act or the regulations or by order of the commission upon such terms and conditions as the commission may impose.⁵²

⁴⁹Ibid., 7(1)(i-n).

⁵⁰Ibid., 2.

⁵¹Ibid., 5.

⁵²Ibid., 10(1).

- (2) On, from, and after the twenty-first day of December, 1972, except as permitted by this Act, or the regulations, or by an order of the commission upon such terms and conditions as the commission may impose,
- (a) no municipality, or regional district, or any authority, board, or other agency established by it shall authorize or permit agricultural land in an agricultural land reserve to be used for a purpose other than farm use, or authorize or permit a building to be erected thereon, except
 - (i) for farm use; or
 - (ii) for residences necessary for farm use; or
 - (iii) such residences for an owner of the agricultural land as may be permitted to be erected by the regulations;
 - (b) no person, designated or appointed under the Local Services Act, shall authorize or permit agricultural land in an agricultural land reserve to be used for a purpose other than farm use, or authorize or permit a building to be erected thereon, except
 - (i) for farm use; or
 - (ii) for residences necessary for farm use; or
 - (iii) such residences for an owner of the agricultural land as may be permitted to be erected by the regulations;
 - (c) no approving officer under the Land Registry Act and no approving officer or Board of Variance under the Municipal Act shall authorize or permit agricultural land in an agricultural land reserve to be used for a purpose other than farm use; and
 - (d) no Registrar of Titles under the Land Registry Act shall accept an application for deposit of a plan of subdivision under the Land Registry Act, or under the Strata Titles Act, or under the Real Estate Act, all or part of which consists of agricultural land in an agricultural land reserve.⁵³

Appeal by an aggrieved land owner may be made only on a

⁵³Ibid., 10(4).

question of law or excess of jurisdiction.⁵⁴

The City of Vancouver, British Columbia, has an Euclidian Zoning by-law with a system of development permits superimposed upon it. The City Council is empowered by its Charter⁵⁵ to prepare a development plan⁵⁶ which may relate to the whole city, a part, or a specific project. Once the plan has been prepared⁵⁷ it can adopt an official Development Plan⁵⁸ and may later revise or amend it in whole or part. But the Council is not committed to undertake any of these development plans.⁵⁹

The Charter specifies that:

1. The Council shall not authorize, permit, or undertake any development contrary to or at variance with the official development plan.⁶⁰
2. It shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan.⁶¹

The Council may also

1. zone the city into districts of such number, shape or size as Council may deem fit;⁶²

⁵⁴Ibid., 5.

⁵⁵Vancouver Charter, 1953 (B.C.), c. 55.

⁵⁶City of Vancouver, Zoning and Development By-Law, No. 3575, s. 562.

⁵⁷Ibid., 561.

⁵⁸Ibid., 562.

⁵⁹Ibid., 536(1).

⁶⁰Ibid., 563(2).

⁶¹Ibid., 563(3).

⁶²Ibid., 565(a).

2. regulating, within any designated district or zone, the use or occupancy of land and land covered with water for or except for such purposes as are set out in the by-laws;⁶³
3. designating districts or zones in which there shall be no uniform regulations and in which any person wishing to carry out development must submit such plans and specifications as may be required by the Director of Planning and obtain the approval of Council to the form of development.⁶⁴

[Council] may make by-laws providing that a development permit may be limited in time and subject to conditions, making it an offense for any person to fail to comply with such conditions:⁶⁵

- (1) providing for the relocation in any case literal enforcement would result in unnecessary hardship of any provision of
 - (i) a zoning by-law...⁶⁶

The Board [of Variance] shall not allow any appeal [by a person aggrieved by a decision on a question of zoning] solely on the ground that if the land or buildings in question can be put to a more profitable use nor unless the following conditions exist:

- (a) The undue or unnecessary hardship arises from circumstances applying to the applicants property only, and
- (b) The strict interpretation of the provision of the by-law would impose an unreasonable restraint or unnecessary restraint or unnecessary hardship on the property inconsistent with the general purpose and intent of the zoning by-law; and
- (c) The allowance of the appeal will not disrupt the official development plan.⁶⁷

Council may by law provide that failure to comply with any restrictions, limitations, or conditions

⁶³Ibid., 565(b).

⁶⁴Ibid., 565(f).

⁶⁵Ibid., 565 (A)(b).

⁶⁶Ibid., 565 (A)(e).

⁶⁷Ibid., 573(2).

imposed by the Board of Variance pursuant to subsection (7)⁶⁸ shall constitute an offence against the by-law.⁶⁹

Schedule A of the Zoning by-law provides for certain types of changes in uses that do not require the issuance of a development permit. Most of these are uses that are accessory to the principle use.

If the Council does not issue a development permit as required in the Act, then the developer has a right to seek arbitration on a claim for damages suffered caused by the Council's refusal to issue the permit. However, in the issuance of a permit the Council may take into consideration then pending by-laws and extend the deliberation of the permit for sixty days after the original thirty. The Council may also impose such conditions that "it may appear to the Council to be in the public interest."⁷⁰ The effect of this by-law is to create an almost discretionary refusal to grant permission to develop.

A Development Permit may also be refused if the application does not

- (1) Conform to an amendment to the Zoning and Development By-Law for which a formal application has been made prior to the application for the development permit.
- (2) Refers to a site or portion thereof required for any civic purpose in which event the Technical Planning Board shall refer the application

⁶⁸Ibid., 573(9).

⁶⁹Ibid., 573.

⁷⁰City of Vancouver, Zoning and Development By-Law, No. 3575, s. 570(2).

- to the City Council for authority to negotiate with the applicant or to issue the development permit.
- (3) Would prejudice the future subdivision of the property.
 - (4) Refers to a site where more adequate draining, sanitary facilities or water supply are not available.
 - (5) Would in the opinion of the City Engineer adversely affect the public safety.
 - (6) Would in the opinion of the Technical Planning Board adversely affect public amenity. If matters of design are involved, the Technical Planning Board may refer the application to the Design Panel to consider and advise.⁷¹

Public amenity is not defined in the by-law. The Design Panel is comprised of the following persons: the Director of Planning, the City Building Inspector, three members of the Architectural Institute of British Columbia, and one member of the Association of Professional Engineers of the Province of British Columbia.⁷²

Development control is authorized in the Alberta Planning Act.⁷³ This type of land use control can be exercised simultaneously with a zoning by-law, but not over the same area. It may also be exercised over land in two or more political subdivisions.⁷⁴ Control over development

shall be exercised over development on the basis of the merits of each individual application for permission to carry out development, having regard to the proposed development conforming with

⁷¹Ibid., 3(12).

⁷²Ibid., 3(10)(b).

⁷³R.S.A., 1970, c. 276, Part 4.

⁷⁴Ibid., s. 100(3); s. 100(4).

the general plan being prepared or as adopted.⁷⁵

The Albertan Minister of Municipal Affairs may make an order known as a development order, which shall

- (a) authorize the repeal of any existing zoning by-law within the area over which development control is exercised, and
- (b) authorize the enactment of such by-laws as may be necessary to enable a council or two or more councils jointly to exercise development control over the described area.⁷⁶

The Act further states

A development control order shall prescribe

- (a) the date upon which the operation of any existing zoning by-law ceases to have any effect, and
- (b) the manner in which development control shall be exercised and administered and the matters to be subject to such control.⁷⁷

and

- (1) A development control by-law shall, subject to this section, provide for the control of developments by means of a system of permits.
- (2) A development control by-law may provide that when an application for a development permit is refused, another application for a permit on the same parcel of land and for the same or similar use of land may not be made by the same or any other applicant until at least six months after the date of the refusal.
- (3) A development control by-law may provide that when a development permit is approved or conditionally approved, the permit may include conditions as to the construction of a public roadway required to give access to the development and the installation of utilities and other necessary services that are necessitated by the development.⁷⁸

⁷⁵Ibid., 100(2).

⁷⁶Ibid., 102(a); 102(b).

⁷⁷Ibid., 103.

⁷⁸Ibid., 104.

In 1974 a new planning act was proposed for Alberta. This act would require all urban municipalities of three thousand persons and rural municipalities of five thousand persons to prepare a general municipal plan⁷⁹ and enact a zoning by-law.⁸⁰

In a description of the current Planning Act and the proposed new act, the drafters of the new act made the following observations:

The current Act contains two parallel mechanisms for implementing land use plans, zoning and development control...

The object of the current Act was to enable municipalities to use whatever development control or zoning or a combination thereof to regulate land use. However, the desired effects have not really been accomplished...

Basically, the zoning by-law (a) provides some of the administrative procedures for making decisions (b) provides for development standards incidental to land use, and (c) divides the municipality into zones and prescribes for each zone uses permitted upon the exercise of discretion by the zoning administrator. However, a municipality could create a zone to which because of its nature, attaches no uses of right. In other words, there may be zones in which discretion is the order of the day. In addition, the developer could come forth with a particular proposed development which although highly desirable, does not conform to any of the standards imposed by the zoning by-law. Under conventional zoning the development would not be accommodated, but under the proposed system, it would.⁸¹

⁷⁹The Alberta Planning Act (Proposed), s. 20(1). The text of the act can be found in Towards a New Town Planning Act for Alberta, Edmonton: Office of the Minister, Municipal Affairs, 1974.

⁸⁰Ibid., 23.

⁸¹Towards a New Town Planning Act for Alberta, supra note 7, pages 19-20.

This type of zoning could also be defined in terms of Planned Unit Development Zoning (P.U.D.).⁸²

Judicial review of the decisions taken on application for development permits and other zoning matters is available on the grounds of the authority failing "a) to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, b) erred in law in making its decision or order, or is failing to do so, whether or not the error appears on the face of the record, or c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it."⁸³

Appeals on refusals to grant development permission, subdivision questions, and valuation matters would be allowed (in the case of the Alberta Planning Board vetoing the issuance of a special planning permit)⁸⁴ but no appeals would be allowed against the Council's refusal to zone or not to zone---this being a political matter in the view of the drafters.⁸⁵

The City of Edmonton has interim development control

⁸²Supra note 79, s. 35.

⁸³Ibid., 93(2).

⁸⁴Ibid., 14.

⁸⁵Supra note 81, page 58.

in all areas that are not specifically zoned.⁸⁶ The Director of Planning is the Development Control Officer⁸⁷ and has the discretion to approve or disapprove all applications for a development permit and may also impose conditions.⁸⁸

The only direct grant of development control in Manitoba is found in the Charter of the City of Winnipeg⁸⁹ Under this provision, the City of Winnipeg has the specific power of English style development control provided that there exists for the area designated under development control a district plan.⁹⁰ Where development control is imposed by the City Council of Winnipeg, the following conditions are imposed:

⁸⁶City of Edmonton Zoning Bylaw No. 2135, s. 3(6). According to Milner, J.B. An Introduction to Zoning Enabling Legislation (1962) 40 Can. Bar. Rev. 1, 3, interim development control had then existed for 6-8 years, and still does (perpetual interim development control).

⁸⁷Ibid., 5(1).

⁸⁸Ibid., 5(8).

⁸⁹S.M. 1971, c. 105, s. 623-636.

⁹⁰Ibid., 626; A district plan is defined by s. 569(d):

"district plan" means a plan for a district within the city or the additional zone which consists of text and maps or illustrations formulating in such detail as the council think appropriate, proposals for the development and use of land in the district, and a description of the measures which the council considers should be undertaken for the improvement of the physical, social and economic environment and transportation within the district.

- (1) development permission is required for any development,⁹¹
- (2) all zoning laws cease to have effect and force in that area,⁹²
- (3) prior development permission is required.⁹³

However, conditions can only be imposed for the following concerns:

- (a) the use of the land, building, or structure in respect of which the application is made;
- (b) the timing of the development;
- (c) the siting and design including exterior materials of the proposed building or structure;
- (d) traffic control and the provision of parking on the land in respect of which the application is made;
- (e) landscaping, the provisions of open space, and the grading of the land in respect of which the application is made; or
- (e.1) the construction by or at the expense, in whole or in part of the owner, of a system work plant, pipeline, or equipment for the transmission, delivery, or furnishing of electricity and water and the collection and disposal of sewage, or any one or more of them;
- (e.2) the payment of a sum of money to the city in lieu of the requirement under clause (e.1) to be used by the city for any of the objects referred to in clause (e.1); or
- (f) any one or more of them...⁹⁴

The Council may revoke a prior grant of development permission so long as a permit for construction has not been issued.⁹⁵ But payment may be required to the developer for expenses incurred prior to building.⁹⁶

⁹¹Ibid., 628(1); development is defined in s. 624(1).

⁹²Ibid., 628(1).

⁹³Ibid.

⁹⁴Ibid., 632(3); S.M. 1972, c. 93, s. 81.

⁹⁵Ibid., 636(1).

⁹⁶Ibid., 636(2); 604.

The Province of Nova Scotia conducted a full scale revision of its Planning Act in 1969,⁹⁷ and retained zoning as the primary method of controlling development. English style development control was not adopted.⁹⁸ However, contract zoning and comprehensive development areas development was adopted.

Under s. 33(2) (b) and 34⁹⁹ a City Council may enter into a contract to approve a development which is consistent with the Municipal Development Plan. This type of zoning is to help overcome two types of problems commonly encountered:

- (1) Developers not keeping their promises. A developer promises one type of development and then, when his rezoning application is approved (perhaps on the strength of his promise), builds something quite different. Typical example: in a residential area, a proposal to erect a small neighbourhood store that ends up being a large supermarket--quite permissible under the zoning bylaw but hardly appropriate in this instance. Under the previous Act, the alternatives open to a Council were (a) approve the rezoning application and hope for the best, (b) reject the application if it appeared to be heading for trouble, and take the consequent loss of what might have been a desirable development, or (c) create a small narrowly defined and

⁹⁷An Act to Amend and Consolidate Chapter 308 of the Revised Statutes, 1967, the Town Planning Act, 1969 (N.S.), c. 16.

⁹⁸Land, R.S., Nova Scotia: Municipal and Regional Planning in the Seventies, Ottawa: Nova Scotia Department of Municipal Affairs and the Central Mortgage and Housing Corporation, 1972, page 132. The Manitoba Planning Act, S.M., 1975, c. 29, failed to adopt English style development control for Manitoba also.

⁹⁹Planning Act, 1969 (N.S.), c. 16.

highly restrictive zone (one of many which follow this precedent), resulting in an extremely complex bylaw that is slow to administer, confusing to applicants, and probably arbitrary.

Contract zoning allows the municipality to enter into an agreement with the developer, thereby overcoming these problems.

- (2) Municipal uncertainty on location of certain developments. A municipality preparing a zoning bylaw wants to provide for a certain type of desirable development--again, say, a corner store in a residential area--but is unable to determine the proper location and number of such uses. The municipality knows that if it designates a site Commercial, the property value may increase to the point where a store is not feasible. Or the municipality may designate a site for a corner store and, unless it has a special zone for this type of use, end up with a shopping centre that is totally inappropriate. Or the municipality may designate no commercial areas, waiting for rezoning applications; again, there is no guarantee that what is proposed will be built.

Contract zoning allows the municipality to express, as a policy in its Plan, that it considers a certain type of use (such as one or more corner stores) to be desirable, without saying where it is to be located, provided such use meets predetermined conditions (e.g., size of commercial floor area, parking, landscaping, design) set out in the zoning bylaw. Owners in the area then know they can expect a corner store somewhere in their neighbourhood--no one knows exactly where--and they have a chance to object when the Plan is being considered (rather than later, when a proposal is ready to go and only a rezoning holds it back). When an applicant is ready to come forward, the Council is able to enter into an agreement with him, knowing that the development of this type of use is consistent with its Plan even if not specified in its bylaw.¹⁰⁰

Comprehensive Development Areas under s. 33(2) (c) and s. 34 allows City Council to create areas that are suited for

¹⁰⁰Supra note 98, page 134-5.

comprehensive and integrated development. It is aimed at

allowing municipalities to permit imaginative development proposals without artificial or arbitrary restrictions, and without having to define in advance in the zoning bylaw the exact nature of permissible developments.

Examples of situations where this technique might apply are downtown areas slated for urban renewal, or large identifiable tracts of raw land well suited to a planned approach by a single developer. In both cases, land use and density mixes are expected--something that is often desirable but difficult to cover in a zoning bylaw.

In effect, the Council is able to create a holding zone within which no development will be permitted as of right, set out the purposes for which the district is to be developed, prohibit any development inconsistent with a comprehensive approach, and deal with developers individually.¹⁰¹

A provision is made for the City Council's refusal to amend its zoning by-laws, as well as for the passage of a zoning by-law. Section 38 (4) provides:

An interested person, the Director or the council of any other municipality may within thirty days of the publishing of the notice under subsection (3) appeal to the board and the board may:

- (a) confirm the decision of the council; or
- (b) confirm the decision of the council with respect to all or part of the land in issue subject to such conditions as the board may prescribe; or
- (c) reverse the decision of the council amending the zoning by-law.¹⁰²

Section 39 provides:

- (1) Any person who wishes to obtain the amendment or the repeal of a zoning by-law shall submit

¹⁰¹Ibid., 135-6.

¹⁰²Planning Act, 1969 (N.S.), c. 16, l. 38(4); 1970-71, c. 71, s. 4.

his application in writing to the clerk of the municipality; the application shall state an address for service and any notice by this Section required to be served on the applicant shall be sufficiently served if sent by registered mail to that address.

- (2) If the council has by by-law so provided, the applicant shall deposit with the clerk an amount estimated by the clerk to be sufficient to pay the cost of advertising required by Section 38. After the advertising has been completed, the applicant shall pay to the clerk any additional amount required to defray the cost of the advertising or, if there is a surplus, the clerk shall refund the same to the applicant.
- (3) The council shall serve on the applicant and the Director within ten days of its decision a notice of its decision.
- (4) The applicant may, where the decision of the council does not result in an amendment to the by-law, appeal within thirty days from the receipt of the notice under subsection (3) to the board and the board may
 - (a) confirm the decision of the council; or
 - (b) instruct the council to amend the zoning by-law in the manner prescribed by the board.
- (5) Notwithstanding anything contained in this Act, if a council has considered an application to amend or to repeal a zoning by-law and has decided not to make the amendment or not to repeal the zoning by-law, it is not required to proceed with the advertising or public hearing. In such case the applicant may appeal under subsection (4) but the appeal shall only be heard after advertising has been carried out in the same way as if the appeal were a public hearing before the council.¹⁰³

In general where development control has been specifically granted by provincial enabling acts it has not been employed to any great extent. Ontario appears to be in the

¹⁰³Ibid., s. 39: 1970-71, c. 71, s. 5.

staging phase of instituting development control, not so much as to create more livable cities, but as a means of protecting an area of environmental worth.

It is also the accepted jurisprudence that in municipalities that do not have home rule, there is no general power that is exercisable without some specific reference to a provision of the enabling act. Is it possible to bring the power of development control into the definition of zoning and in that way create an additional means of stopping urban development without seeking additional powers from the jealous provincial legislative assemblies?

Under the Municipal Act of Manitoba,¹⁰⁴ a municipality may zone provided that it proceeds pursuant to the powers granted in the Planning Act.¹⁰⁵ A development plan may be then prepared.¹⁰⁶ This planning scheme

¹⁰⁴S.M., 1970, c. 100, s. 310.

¹⁰⁵S.M., 1975, c. 29, s. 34(2).

¹⁰⁶Ibid., 27(1): The purposes of a development plan are

- (a) to serve as a framework whereby the district or the municipality and the community as a whole may be guided in formulating development policies and decisions;
- (b) to identify the factors relevant to the use and development of land;
- (c) to identify the critical problems and opportunities concerning the development of land and the social, environmental and economic effects thereof;

will not, by statute, injuriously affect the property

- (d) to set forth the desired timing, patterns and characteristics of future development of land and to determine the probable social, environmental and economic consequences thereof;
- (e) to establish and specify the programs and actions necessary for the implementation of the development plan;
- (f) to outline the methods whereby the best use and development of land and other resources in adjacent municipalities, districts, or affected areas immediately abutting thereto, may be co-ordinated;
- (g) to identify those matters of government concern which affect the use and development of land and other resources within the district or the municipality.

27(4): A development plan shall contain

- (a) statements of aims, objectives and policy with respect to some or all of the following matters
 - (i) the development and use of land and other resources,
 - (ii) the conservation, management and improvement of the physical and social environment,
 - (iii) the control and abatement of all forms of pollution or activities deemed to be detrimental to the natural environment;
 - (iv) the establishment and maintenance of land banks to reserve land for future use and to ensure the orderly, economical, convenient and compatible development of land,
 - (v) the preservation, protection or enhancement of areas of land, buildings and structures by reason of their historical, archeological, geological, architectural, environmental or scenic significance,
 - (vi) proposals relating to the use, changes in use or in the intensity of use of residential, commercial, industrial, recreational and open spaces, institutional, and other activities on or affecting land,
 - (vii) the provision of public services and facilities including,
 - (A) sewage collection, treatment and disposal,
 - (B) water supply and distribution,
 - (C) garbage disposal,
 - (D) educational and cultural institutions
 - (E) recreational facilities, parks, playgrounds and other public open spaces,

rights of

- (F) fire and police facilities,
- (G) transportation and communication facilities,
- (H) facilities for the provisions of health and social services,
- (I) preservation of buildings and sites of historical interest,
- (viii) proposals dealing with
 - (A) the control of hazard areas such as flood plains, soil erosion areas, erosion prone slope lands, valleys and banks of waterways, marsh areas, head water areas, and similar conditions,
 - (B) the management and preservation of agricultural land and activities, forested areas, natural and wildlife areas and water storage areas,
 - (C) the protection, restoration, reclamation or use of shoreland,
 - (D) the subdivision of land in rural areas and the establishment of limited development areas for agriculture, water storage, wildlife,
 - (E) the fringe areas of cities, towns, villages, hamlets and other built-up areas,
 - (F) the location and creation of new communities and settlements,
 - (G) the development, control, rehabilitation and reclamation of top soil removal areas, gravel and sand pits, quarries and other mineral deposits,
- (ix) the spatial distribution of residential development, and the renewal, rehabilitation and improvement of neighbourhoods, and urban cores,
- (x) the co-ordination of programs of the board of a district or the council of a municipality, as the case may be, relating to the economic, social and physical development of the district or of the municipality, as the case may be,
- (xi) the programming of public investment in respect of public and private development, in terms of cost and available financial resources, including the phasing of the development or redevelopment of various areas,
- (xii) such matters other than those mentioned in this clause as are, in the opinion of the board, or council advisable,

Manitobans.¹⁰⁷ But does the statutory authority in Manitoba grant to Manitoban municipalities the power of development control?

Under Section 626(1) of the City of Winnipeg Act, the City of Winnipeg¹⁰⁸ has the power of Development Control by specific legislative grant of authority. By normal legislative construction, what has not been specifically granted is not granted. Therefore, by implication, if the

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- (b) a map or series of maps, showing the division of all or part of the land in the district or municipality, as the case may be, into areas of permitted land uses or permitted densities of population, or both, as the board or council as the case may be, considers necessary for the purposes of the development plan;
 - (c) such proposals as are, in the opinion of the board, or council, advisable for the implementation of policies contained in the plan; and
 - (d) subject to section 28, a 5 year capital works program for the physical development of the district or municipality, as set out in sub-clause (a) (xi), identifying the capital expenditures by municipalities, for implementation at the discretion of the municipalities.

¹⁰⁷Ibid., 88(14). Property shall not be deemed not to be injuriously affected or suffer any diminution of value and a person shall not be considered to suffer any damages by reason of the adoption of a development plan, basic planning statement, the passing of a zoning by-law or any amendment thereof or the revocation of an approval for a subdivision or any action taken under the authority of this Act by the minister, the director, a municipality, the board of a district or any agent of any of them.

Yet there are provisions for payment of compensation if the owner of land has his property injuriously affected [cf. 88(1)-88(13)].

¹⁰⁸S.M., 1971, c. 105, s. 626(1).

City of Winnipeg needs a specific grant of authority to employ the techniques of Development Control, the rest of the municipalities of Manitoba who derive their power from the Planning Act do not have authority to exercise Development Control Powers. Until 1974 this was the generally held view; a series of Ontario cases have put this view in question, in my opinion.

In *Re Kerr and Township of Brock*¹⁰⁹ the Ontario High Court dealt with a case involving the interpretation of the Ontario Planning Act¹¹⁰ which provided as follows:

30(1) By-laws may be passed by the councils of municipalities:

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
2. For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.

The Court held that there was no absolute right of prohibition, but "merely a right to regulate."¹¹¹ The only right of prohibition was for "specially hazardous conditions existing on land..."¹¹²

¹⁰⁹(1968) 69 D.L.R. (2d) 644 (H.C.).

¹¹⁰R.S.O., 1960, c. 296, s. 30, now R.S.O., 1970, c. 349, s. 35.

¹¹¹(1968) 69 D.L.R. (2d) 644, 646 (H.C.).

¹¹²Ibid., 647.

Pursuant to the by-law in question the Town of Brock forbade buildings for all purposes except for some exceptions specified and "single dwellings on lots on a registered plan or on lots of less than one acre or more than 40 acres....[the Court held that the] net effect of the by-law is therefore that no individual possessing a vacant piece of land containing between one and 40 acres can erect any building whatsoever...[unless within an exception]."¹¹³ This by-law is a land use freeze imposed until the municipality can make up its mind as to what type of zoning or regulating by-law it shall adopt. "[T]here is nothing in the above quoted s.30 of the Planning Act which authorizes the municipality to adopt a temporary by-law restricting the use of the land,"¹¹⁴ the Court ruled.

This is very analogous to the effect of Development Control Legislation with the entire municipality being the district under controls. The Court stated that such power had to be specifically granted by the Legislature.

¹¹³Ibid.

¹¹⁴Ibid., 648: The by-law's title is the Temporary Zoning By-Law for the Township of Brock and has the following preamble:

AND WHEREAS the Municipal Council of the Corporation of the Township of Brock until such time as a comprehensive restricted area by-law is prepared and passed, deems it desirable to have temporary control over the use of lands and the character, location and use of buildings and structures within the Township of Brock...

In the case of *Re O'Donnell and the City of Belleville*¹¹⁵ the Ontario High Court, per Justice Stewart, held that a municipality could not require municipal water and sewer service as a condition precedent to obtaining a building permit. Until the passage of the by-law in 1968, the land in question was "adequately serviced by septic tanks and private wells." By requiring municipal utilities and not scheduling their construction (cf. *Ramapo, New York and Phased Timing of Utilities*) the municipality effectively "sterilized" the land. This was not authorized by section 30 of the Planning Act. Justice Stewart concluded:

In my opinion this contention cannot be upheld as it is quite clear to me that the character and use of buildings or structures has nothing to do with whether or not they are supplied with sanitary sewers or municipal water supplies. The contents of a flush toilet are disposed of in precisely the same manner whether it is fed by a well or by municipal water supply and disposed of by a sanitary sewer or a septic tank.¹¹⁶

Though not true Development Control, it has the same effect. A building permit could be granted as soon as the municipality decided to put in the utilities. Instead of a permit for construction, the by-law establishes a requirement of construction of the utilities; thus the developer has to convince the municipality to put in the utilities rather than grant planning and building permission.

¹¹⁵[1969] 1 O.R. 361 (H.C.).

¹¹⁶Ibid., 363.

In *Soo Mill and Lumber Co. Ltd. v. City of Sault Ste. Marie*¹¹⁷ the Ontario High Court was faced with the issue whether "Holding Zones" were permissible under the Ontario Planning Act and whether or not temporary zoning was thereby created.

Plaintiff's parcel was described in the stipulations. The parcel was approximately four hundred ninety-seven feet long by one hundred forty-six feet deep; on the north side of the right-of-way of the Canadian Pacific Railway and south of Buton Road; it is surrounded by single family residences to the west and multiple family residences to the north and south; land to the east is vacant and undeveloped and owned by the defendant city. The property has been used for no purpose at any material time and subdivided into eight lots on the plan, each lot approximately sixty-two feet along Buton Road and one hundred forty-six deep. An Official Plan was approved in 1956, but repealed by the new plan adopted in 1969. The Plan provides for a "Holding Category" to delay development for their otherwise designated use until "ready for such development."¹¹⁸ The Official Plan reads as follows:

Zoning By-Law

The implementing Zoning By-law will translate the intent and policies of The Official Plan into appropriate legal regulations applicable to land and land uses in the entire Planning Area.

¹¹⁷ [1972] 3 O.R. 621 (H.C.).

¹¹⁸ Ibid., 622.

Certain areas designated for specific land uses on the Official Plan may be zoned otherwise under a "holding category" in order to delay their development for their designated use until they appear to be ready for such development and until the standards appropriate to the designated use can be satisfied. Under the "holding category" the lands may be zoned for agricultural use, for parks or recreational use, for open space uses, for other temporary uses, for existing uses (preferably with a restriction prohibiting all enlargement) or for their designated use with a suffix "H" to indicate a temporary holding status. Prior to zoning lands under a holding category the municipality shall be satisfied that the use permitted by such zoning will not exert any adverse effect upon any adjacent existing use, will not jeopardize the future development of the land in conformity with the official plan designation and that all services deemed necessary are provided. When Council receives application for a development project which is deemed suitable by Council and which is in accordance with the designation and policies of the official plan, the holding category may be removed from the implementing by-law by an amending by-law without any need for an amendment to the plan.

Notwithstanding the land use plan in respect of the following, the Zoning By-law shall zone these areas to conform to their present and/or selected temporary uses; however, eventually these areas are to be zoned for the use shown on the plan. This policy will allow maintenance, renovation, repair or reconstruction under a Holding or Planned Development zoning in order to allow the continuance of the existing uses until redevelopment is implemented.¹¹⁹

The Holding Category provisions are as follows:

1. Notwithstanding any other provisions of this by-law, if any zone symbol shown on a zoning map is followed by the suffix "H" while the said zone symbol indicates a proposed future zone designation for the lands in the zone so marked, no person shall use land in such zone or erect or use buildings thereon for any purpose except the following:

¹¹⁹Ibid., 122-23.

- .1 Any use being carried on on such land or in a building thereon on the day of the passing of this by-law,
 - .2 cultivation of land,
 - .3 production of field crops,
 - .4 truck, flower and market gardening,
 - .5 grazing for horses, cattle and sheep,
 - .6 temporary stand for the sale of farm produce produced on the premises,
 - .7 home occupation,
 - .8 accessory use.
8. The property is designated "residential" in the Official Plan and the schedules attached thereto and is zoned R.M. 10H on Map No. 20 of By-law 4500. The permitted uses, requirements and regulations in an R.M. 10 Zone are set out in Section 23 and Table No. 2 of By-law 4500. At the time of passing of By-law 4500, the property was not considered ready for development in accordance with Section 23 and therefore, in accordance with the statements contained in the Official Plan was made subject to Section 40 of By-law 4500 by adding the suffix "H" to the zone designation, to remain until such time as the property was considered ready or mature for development in accordance with Section 23 of the said By-law.
9. By reason of the location and nature of the property there was at the time By-law No. 4500 was passed and approved as aforesaid and there continues to be no practical use for the property other than for development as a building site. The most economical type of development for the property is for the construction and occupation of multiple-family residential buildings. It is not remotely practical or even possible to use this vacant property for cultivation or grazing.¹²⁰

An application was made for a change in the zoning by dropping of the "H" designation by the plaintiff. Defendant City passed the by-law but the Ontario Municipal Board disapproved the by-law. Plaintiff sought in the alternative a declaration that the declaration of the parcel as being in an

¹²⁰ Ibid., 623-24.

"H" category is null and void or that the entire by-law is null and void.

The City defended the by-law (and the category) on the basis that the zoning was not temporary but just a delay of the ultimate zoning which was already designated. The Court held that:

- (1) I suppose it could be argued that a prefix or a suffix is incidental and that the defendant could have zoned the land "agricultural" and then at the propitious time pass a by-law amending the zoning categorization to residential: such a situation, which is not before me, might well invoke the question of the defendant's faith.¹²¹
- (2) Neither counsel pointed out to me, nor have I been able to find any provision of the Planning Act which endows the council of a municipality with the power to pass "temporary zoning by-laws."¹²²

Citing Kerr and Township of Brock:

A restrictive by-law such as this, since it abrogates the common law right of an owner to deal freely with his property, must necessarily be strictly construed against the municipality and if there is any doubt as to its meaning, it should be resolved in favor of the property owner: R. ex. rel. Courneyea v. Girvin, [1956] O.W.N. 11, Re Bridgemen and City of Toronto, [[1951] O.R. 489, [1951] 3 D.L.R. 814].¹²³

The by-law was severable and the provisions of the by-law dealing with Holding Categories was declared void as temporary zoning.

Thus, unless specifically granted, a municipality

¹²¹Ibid., 624.

¹²²Ibid.

¹²³Ibid., 626.

does not have the power of temporary zoning (analogous to development control) under the general zoning powers.

In the last of the series of High Court cases, *Re Sanbay Developments, Ltd. and City of London*,¹²⁴ the opposite view was taken on the validity of the power to pass temporary zoning by-laws. Application was made to build an apartment of one-hundred thirty-six units, zoning was for multifamily-two unit.

The City of London enacted the following amendment to its zoning by-law with the approval of the Ontario Municipal Board:

Holding Regulation: Notwithstanding any other provisions of this by-law to the contrary, no building or structure may be converted or erected to contain three or more dwelling units until this by-law has been amended to contain appropriate schedules and appendices defining the area and illustrating the permitted building areas, parking areas, useable open space areas, and external design, together with regulations governing the size, floor area, character, and use of such building or structure.¹²⁵

The Plaintiff contended that Section 35 of the Planning Act (under old Section 30)¹²⁶ and the case of *Soo Mill and Lumber Co., Ltd. v. City of Sault Ste. Marie*¹²⁷ were controlling and this by-law was also invalid as a temporary zoning by-law. Under this precedent, such by-law would be invalid per se.

¹²⁴ [1973] 1 O.R. 128 (H.C.).

¹²⁵ Ibid., 129.

¹²⁶ R.S.O., 1970, c. 349, s. 35 (re-enactment of R.S.O., 1960, c. 296, s. 35.).

¹²⁷ [1972] 3 O.R. 621.

In this decision, however, Justice Parker held that Justice Addy was wrong in *Re Kerr and Township of Brock* and that the statement there was no enabling legislation was obiter dicta.¹²⁸ The real fault of the Township of Brock legislation was that it was an "absolute prohibition" on the use of the land.¹²⁹ A municipality only has the power to regulate not prohibit the use of land for any purpose under section 35 of the Planning Act.

Justice Parker held that temporary zoning was permissible and even directly sanctioned by the Ontario Municipal Board (but the cases were primarily of the kind found in holding actions while a new comprehensive master plan was being prepared.)¹³⁰ In this case the zoning was valid since it allowed a two-family residential unit and was thereby not totally prohibitive but only regulatory; the by-law was *intra vires* the enabling act.¹³¹

Both Soo Mill and Lumber Co. Ltd. and Re Sanbay Developments Ltd. were appealed to the Ontario Court of Appeal.¹³² In Soo Mill and Lumber Co. Ltd. the developer

¹²⁸ [1973] 1 O.R. 128, 130 (H.C.).

¹²⁹ Ibid.

¹³⁰ Ibid., ¹³¹ citing, *Tingle v. Monroe and Township of Sandwich East*, [1953] O.W.N. 241, and *Re City of Sault Ste. Marie*, [1972] 2 O.R. 1, 24 D.L.R.(3rd) 513.

¹³¹ [1973] 1 O.R. 128, 131.

¹³² Soo Mill and Lumber Co. Ltd., [1973] 2 O.R. 110; Re Sanbay Developments Ltd., [1973] 2 O.R. 757.

prevailed; in Re Sanbay Developments Ltd. the developer also prevailed.

On June 2, 1969, the by-law in question in Soo Mill and Lumber Co. Ltd. had been amended by deletion of the words "while the said zone symbol indicated proposed future zone designation for the lands in the zone so marked."¹³³

¹³³[1973] 2 O.R. 110, 114. The By-Law now reads in full:

- .1 Notwithstanding any other provisions of this By-Law, if any zone symbol shown on a zoning map is followed by the suffix "H", no person shall use land in such zone or erect or use buildings thereon for any purpose except the following:
 - .1 any use being carried on on such land or in a building thereon on the day of the passing of this By-Law;
 - .2 cultivation of land;
 - .3 production of field crops;
 - .4 truck, flower and market gardening;
 - .5 grazing for horses, cattle and sheep;
 - .6 temporary stand for the sale of farm produce produced on the premises;
 - .7 home occupation;
 - .8 accessory use.
- .2 Nothing in this By-Law shall apply to prevent the reconstruction of any building or structure that is damaged by causes beyond the control of the owner subsequent to the date of the passing of this By-Law, provided the reconstruction of such building or structure will not increase the height, size or volume or change the use of such building or structure.
- .3 Nothing in this section shall apply to prevent the strengthening or restoration to a safe condition of any building or structure or part of any such building or structure or the alteration or repair of an existing building or structure, provided such alteration or repair will not increase the height, size or volume or change the use of such building or structure.

The permit use under the by-law was agriculture or open space while the agreed statement of facts reads as follows:

By reason of the location and nature of the property there was at the time Bylaw No. 4500 was passed and approved as aforesaid and there continues to be no practical use for the property other than for development as a building site. The most economical type of development for the property is for the construction and occupation of multiple-family residential buildings. It is not remotely practical or even possible to use this vacant property for cultivation or grazing.¹³⁴

The Court adopted the following as definitions of temporary, permanent, and indefinite zoning:

"permanent" zoning by-law as one which by its terms is irrevocable and thus invalid as an attempt to fetter the discretion of future municipal councils... "temporary" by-law is one of which an essential part is that it must be repealed at a later date and which is accordingly invalid for the same reason...a municipal council can validly pass a by-law effective for an indefinite period.¹³⁵

Under these definitions the Sault Ste. Marie by-law falls under the category of indefinite. Justice Jessup stated that in

reaching that conclusion I respectfully disagree with the decisions of the single Judges who decided Re Kerr and Township of Brock et al., [1968] 2 O.R. 509, 69 D.L.R. (2d) 644, and R. v. Township of King, Ex p. O'Connor et al., [1971] 1 O.R. 441, 15 D.L.R.

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- .4 On land to which this section 40 applies, for a use permitted by this section 40, any person may use land or erect or use buildings thereon in accordance with the lot, yard, building and other regulations provided by this by-Law for such land if the zone symbol were not followed by the suffix "H".

¹³⁴ Ibid., 115.

¹³⁵ Ibid., 117.

(3d) 543, which were in turn followed by the trial judge in this case in so far as they hold that a municipality has no power to pass a temporary zoning by-law under s. 35(1) of the Act. That municipal legislation implementing an official plan is forward-looking and contemplates amendments to fulfill long term objectives and to keep up with developments of the future is made clear by the definition of official plan in the Planning Act:

1. In this Act,
 - (h) "official plan" means a program and policy, or any part thereof, covering a planning area or any part thereof, designed to secure the health, safety, convenience or welfare of the inhabitants of the area, and consisting of the texts and maps, describing such program and policy, approved by the Minister from time to time as provided in this Act;¹³⁶

The Plaintiff also contended that the by-law was prohibitive as to his property and that the permitted uses add a facade to make valid invalid purposes of the municipality. The Court replied that there was no showing of discrimination and as to the issue of unreasonableness:

The municipality must legislate in a general way and, in my opinion, such legislation does not become invalid, in the case of planning legislation, when it produces what seems to be an unreasonable result to a particular person whose land is affected. The Courts in Ontario have consistently declined to strike down municipal legislation on the ground that it is unreasonable....¹³⁷

¹³⁶Ibid., 117-18.

¹³⁷Ibid., 118 citing Craies on Statute Law, 7th edition, 1971, page 333: "When considering whether a by-law is reasonable or not, the courts need a strong case to be made out against it, and decline to determine whether it would have been wiser or more prudent to make the by-law less absolute; nor will they hold that it is unreasonable because considerations which the court would itself have regarded in framing such a by-law have been overlooked or rejected by its framers."

However, with respect to by-laws passed under the authority of the Municipal Act, it is to be noted that s. 241(2) of that statute absolutely restrains any power of the Courts to impugn them on the ground of unreasonableness....A different judicial policy should not be applied to by-laws passed under the authority of the Planning Act as was the by-law.¹³⁸

As to whether or not the Court was right on this issue, suffice it to say at this point that the decision is correct according to statute law and incorrect as to its derivation from the Common Law.

A third contention is that this zoning is zoning by permit, i.e., development control of a fashion. The Court refused to consider this argument and held:

[the developer] puts it this way in his factum:

By temporarily prohibiting the respondent owner from using his land, the Appellant forces the owner to obtain approval in advance of each development project on an individual basis. Only then will the Appellant municipality permit the owner to make any use of his land.

That contention refers to that part of the official plan which I have quoted and which reads in part:

When Council receives application for a development project which is deemed suitable by Council and which is in accordance with the designation and policies of the Official Plan, the holding category may be removed from the implementing bylaw by an amending bylaw without any need for an amendment to the plan.

This objection made would be applicable to any zoning by-law. As conditions change it may be in the interests of sound planning to change the zoning of

¹³⁸Ibid., 119.

particular properties. Subsections (10) and (25) of s. 35 of the Planning Act are intended to ensure that municipal councils will be governed by sound planning policies in effecting such changes and those subsections are applicable to any intended amendments to By-law.¹³⁹

Therefore, development control powers can be exercised if written in the form of holding categories. What now of the dominant purpose test, if applicable?

Re Sanbay Developments Ltd. was decided by the same judge on the basis of his decision in Soo Mill and Lumber Co. Ltd.

Both cases were in turn appealed to the Supreme Court of Canada.¹⁴⁰ The issue of law presented to the Supreme Court in Sanbay Developments Ltd. was "Is section 4 of the By-Law 306 (bc)-504 of the Corporation of the City of London invalid for reason that it permits discrimination or spot-zoning?"¹⁴¹ Laskin dismissed the appeal on the grounds that the by-law was valid even if it could have been better or differently drafted.¹⁴²

In Soo Mill and Lumber Co., Ltd., the issues were whether or not the by-law was (1) prohibitory, (2) was legislation that attempted to bind a future municipal council, and (3) it was zoning by permit rather than under

¹³⁹ [1973] 2 O.R. 110, 119.

¹⁴⁰ Sanbay Developments Ltd. (1974) 45 D.L.R. (3rd) 403; Soo Mill and Lumber Co. Ltd., Slip opinion, May 27, 1974.

¹⁴¹ (1974) 45 D.L.R. (3rd) 403, 404, (S.C.C.).

¹⁴² Ibid., 409.

section 35 of the Planning Act. On issue (3) the Supreme Court, per Laskin, C.J., stated

The fact is, as counsel for the respondent contended, that the removal of the suffix "H", as contemplated by the Official Plan, would leave the property zoned R.M.10, and appellant would then be in the position of being able to proceed with a development under that category without the requirement of any further permit respecting land use. I do not regard it as legally objectionable that the removal of the suffix may have to be prompted by an application for a development project conforming to the Official Plan. This is an obvious method of development control and cannot in itself be regarded as offensive to the Planning Act.¹⁴³

As to a prohibition which amounts to discrimination, the Court held that it was not. The appellant cannot complain

of discrimination merely because the result of the freeze is to sterilize its land in respect of development when this has been done in the context of an overall Official Plan and a general zoning by-law in furtherance thereof. There was no suggestion of bad faith on the part of the respondent in bringing the appellant's land within the holding category. That was a discretion which was reposed in the municipality under the zoning scheme.¹⁴⁴

As to issue (2), the Court held that the "power to enact is equally the power to repeal; and the fact that a by-law contains within its terms provisions that envisage possible changes...does not mean that one municipal council has withdrawn discretion from a successor...The distinction between temporary and other by-laws (save as a by-law may

¹⁴³Soo Mill and Lumber Co. Ltd., Slip Opinion page 5-6.

¹⁴⁴Ibid.

expire by a built-in provision for its expiration) is without legal significance."¹⁴⁵

Development Control has received the authorization of the Supreme Court of Canada if it employs the methods of Holding Categories and Temporary Zoning. Thus, in Ontario and Manitoba where the municipal enabling acts are similar, any municipality may exercise Development Control powers under the guise of zoning.

¹⁴⁵Ibid., 7.

CHAPTER SEVEN

UNREASONABLENESS IN MUNICIPAL LAW

A cardinal principle of Anglo-Canadian representative government is the principle of legislative supremacy. In the area of municipal zoning legislation, the principle gives rise to the problem that in challenging a zoning by-law the council is immune from review by a judicial body under the most fruitful of grounds, unreasonableness as to the particular parcel of property. To guarantee the independence of the administrative agencies against judicial interference with discretionary powers, partial privative clauses have been adopted. In the area of municipal law these clauses have been enacted to remove the grounds of unreasonableness.¹

At the Common Law, courts quashed legislation and acts of municipal corporations on the ground of unreasonableness.² The Ontario Court of Queen's Bench stated the

¹See generally, Laskin, Bora, *Certiorari to Labour Boards: The Apparent Futility of Privative Clauses*, [1952] 30 Can. Bar. Rev. 986 and Carter, Roger, *The Apparent Virility of Privative Clauses*, [1967] U.B.C.L. Rev. - C. de D. 219.

²*Brown v. York*, (1851) 8 U.C.Q.B. 596 (Ont. Q.B.); *Kelly v. Toronto*, (27 Vict.) 23 U.C.Q.B. 425 (Ont. Q.B.); *Regina v. Johnson*, (1876) 38 U.C.Q.B. 549 (Ont. Q.B.); *In re Nasmith and the Corporation of the City of Toronto*, (1883) 2 O.R. 192 (Q.B.); *Simmons v. Mallings R.D.C.*, [1897] 2 Q.B. 433.

Common Law principle thus:

We think that the section of the law moved against is clearly within the powers given to the Corporation, and unless in conforming to the letter of the law they have gone beyond the spirit of the Act, and have passed a by-law manifestly unreasonable and calculated to produce injury to the community, we should not interfere, and even then our interference would not be under the Statute, but in the exercise of our common law jurisdiction.³

Another ground for judicial review and the possibility of a by-law being quashed is discrimination.⁴ But discrimination under Anglo-Canadian law must be direct and not inferred.⁵ If the by-law discriminates, the by-law may not be invalid because the zoning may be valid under the lack of ability by the courts to declare spot-zoning invalid.⁶ A by-law may also be just and reasonable and still valid if it discriminates.⁷

As to what is unreasonable, the Courts recognized that they should give a great deal of leeway to the legislative authority, as one judge said in 1884:

I must not allow a lively imagination to place a limitation on the power of the municipality that the legislature has not seen fit to impose. If

³Kelley v. Toronto, supra, note 2, 426-7.

⁴Jonas v. Gilbert, (1880) 5 S.C.R. 356.

⁵Ibid., 365.

⁶Scarborough v. Bondi, [1959] S.C.R. 444.

⁷Regina v. Russell, [1883] 1 B.C.R. pt. 1, 256 (B.C.S.C.).

the municipality should attempt to enforce the provisions in an unreasonable manner, the Court would interfere.⁸

From where does this reversal develop in the case law of Canada and the United Kingdom? Since it is imperative to know where the case law went wrong, a historical development will follow.

In *Re Fenton v. The Corp. of the County of Simcoe*⁹ the Court of Queen's Bench of Ontario held that it had the power to quash a by-law where the illegality was not in the face of the by-law but was shown extraneously. In Victoria, a by-law was enacted to prohibit the sale of alcoholic beverages between the hours of 12:00 P.M. and 5:00 A.M. Monday through Saturday or between 10:00 A.M. and 5:00 A.M. Sunday by taverns; hotels and restaurants were excepted. The Court held that the by-law was unreasonable (which implicitly says it has the jurisdiction to quash for unreasonableness) and therefore invalid. The Court held:

As it stands the by-law in other respects is unreasonable, making no distinction as to places or requirements for invalids or travellers, and is objectionable as discriminating between hotels, restaurants, and taverns, and compelling parties to pay in particular places for what they do not require, in order that as travellers or invalids they may

⁸*Re Milloy and Onondaga*, (1884) 6 O.R. 573 (C.P.); *In Re Boyland and Toronto*, (1887) 15 O.R. 13 (Q.B.), the Ontario Court stated that if some power was expressly granted to a municipality, exercise of that power could not be found to be unreasonable, oppressive, or in restraint of trade.

⁹(1885) 10 O.R. 27.

get what at the time may be necessary for health or alleviation from pain. Why should a traveller or invalid in his tavern be compelled to go out to an [sic] hotel or restaurant, when the tavern-keeper pays a license to give him what he is to get at the hotel or restaurant.¹⁰

In cases where the by-law was attached directly in a motion to quash, in Ontario in 1886, the Court had jurisdiction to entertain the motion to quash on the grounds that the by-law was unreasonable.¹¹ This jurisdiction was later abrogated in 1913 by R.O., 1913, 3-4 Geo., v. C-43, S-249(2). In 1891 the Court found a by-law to be reasonable, but only after it had reviewed the reason for the by-law's passage.¹²

In a by-law concerning the regulation of milk for health purposes, the Court of Queen's Bench of Manitoba found the regulations as being unreasonable and exceeding the powers of the enabling act.¹³ Thus, the Manitoba Courts exercised jurisdiction, along with Ontario and British Columbia,¹⁴ in the late nineteenth century to quash

¹⁰In re Clay and Victoria, (1886) 1 B.C.R. pt. 2, 300 (B.C.S.C.).

¹¹Regina v. Gravelle, (1886) 10 O.R. 735.

¹²Cribbin and Toronto, (1891) 21 O.R. 325 (Q.B.).

¹³Re Taylor and Winnipeg, (1896) 11 Man. R. 420.

¹⁴The Supreme Court of British Columbia in Regina v. Petersky, (1897) 5 B.C.R. 549, exercised inherent jurisdiction to review by-laws for unreasonableness. The by-law read:

No person shall do or exercise any worldly labour, business, or work of his ordinary calling upon the Lord's Day or any part thereof, works of necessity or charity only excepted [at page 549].

by-laws on the grounds that they were unreasonable.

While the Canadian line of cases was developing, a parallel line also developed in England; in 1896 they diverged temporarily.

A by-law was passed in the Rural Sanitary District of Burnly Union, England, prohibiting the keeping of swine or depositing swine dung within 50 feet of a dwelling place. Authority was claimed to be derived from a statute authorizing the prevention of nuisances arising out of snow, filth, dust, ashes, rubbish, and for the prevention and keeping of animals in any premises so as to be injurious to health.¹⁵ The Court held that this by-law was unreasonable because the area of the district was a country area and that to exclude swine from within fifty feet of a dwelling place would go against the common knowledge that such acts were done in thousands of instances. The Court stated:

The Court held:

It is necessary, therefore, to consider the objection to the by-law itself. The legality of the by-law may be questioned on these proceedings [certiorari], although no application is made to quash it. See *Reg. v. Osler*, *Reg. v. Cuthbert*, 45 U.C.Q.B. 19. The contention of Mr. Williams [plaintiff's attorney] is that the by-law is unreasonable in that it purports to affect all persons without exception, and would include a minister of religion, farmers and others who are not included in Statute 29, par. 2, chpt. 7...The by-law is too wide in its scope and is unreasonable [page 551-2].

¹⁵Public Health Act, 1875, s. 44.

No evidence was given or admission made, before the justice, except the admission the pigs were in fact kept home. I cannot see that would in itself necessarily be a nuisance or injurious to health...The conviction should be squashed.¹⁶

Whether or not the decision was right, the Court exercised jurisdiction derived from the Common Law.

The House of Lords was faced with the question of taking jurisdiction in a review of a by-law for unreasonableness in *Slattery v. Naylor*.¹⁷ The Chief Justice made the following remarks:

The jurisdiction of testing by-laws by their unreasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.¹⁸

It is certainly not clear that Courts of Law are not precluded by s. 158 [Municipalities Act, 1867, power to enact by-laws on matters of municipal health] from inquiry whether or no a bye-law is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every bye-law that it shall be reasonable, that a power to make bye-laws means a power to make reasonable bye-laws, and that no bye-law can acquire the force of law under s. 158, except such as are consistent with the implied as well as the express provisions

¹⁶*Heap v. Rural Sanitary District of Burnley Union*, (1884) 12. U.C.Q.B. 617, 619. Alfred Krupp built his mansion over its stables because he believed that the fumes from manure were beneficial to health.

¹⁷(1886) 13 A.C. 446.

¹⁸*Ibid.*, 452.

of the Act. According to this argument, the question whether a bye-law is reasonable is only one branch of the question whether it is ultra vires.¹⁹

Let it be assumed, notwithstanding s. 158 of the Act, that such a jurisdiction exists. It is quite a different question whether a bye-law can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.

Every precaution has been taken by the legislature to ensure first that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of Law, unless it be in some very extreme case, such as has been indicated.²⁰

The bye-law was found reasonable, but the House of Lords assumed jurisdiction to review the bye-law for unreasonableness.²¹

Ten years later, a trio of cases²² show that the common law jurisdiction to rule bye-laws invalid for reasons of unreasonableness was established law. In *Walker v. Stretton* the Lord Chief Justice, Lord Russell of Killowen is quoted in the Reports:

¹⁹Ibid.

²⁰Ibid., 453.

²¹(1896) 12 T.L.R. 363 (Q.B.).

²²*Kruse v. Johnson*, to be discussed later, was the third. *Alty v. Farrell* is the second.

The Lord Chief Justice said that the question was whether the bye-law was bad or not, and, as questions as to bye-laws were of frequent occurrence and important, he wished to make one or two general observations beyond the scope of this particular case. The Court ought as far as possible to support bye-laws issued by local authorities unless it could be clearly seen that the bye-law was made without jurisdiction or was obviously unreasonable. It was undesirable that the Courts should be, so to speak, astute in picking holes in bye-laws which dealt with matters which were more familiar to the authorities who framed the bye-laws than to the Courts. It was also safe to lay down this general proposition--that, although it was desirable that bye-laws should be so free from doubt that "he who runs may read" yet as even in the case of higher legislative bodies this was not always attained, the Court should strive to so construe this bye-law as to give reasonable effect to the object aimed at.²³ [Emphasis added].

In *Strickland v. Hates*,²⁴ the Court ruled on the validity of the following by-law:

No person shall in any street or public place or land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language.²⁵

Justice Lindley held that the by-law was unreasonable because it prohibited a man from swearing in his own home without annoyance to others.²⁶

Lord Russell of Killowen repeated his views of *Walker v. Stretton* and found a by-law unreasonable. A bi-parte test was set out as such:

²³(1896) 12 T.L.R. 363 (Q.B.).

²⁴[1896] 1 Q.B. 290.

²⁵*Ibid.*, passed pursuant to the Local Government Act, 1888, s. 16.

²⁶[1896] 1 Q.B. 290, 293.

The first question that we have to decide is, therefore, whether this provision enables the authorities of the borough of Blackburn to make such a by-law. I am of the opinion that the section does give local authorities that power so far as the subject matter of the by-law is concerned. The next question however, whether the particular by-law is reasonable, is a more difficult one.²⁷

Lord Russell opined:

Speaking for myself, I am most unwilling, where it can be avoided, to interfere with the exercise by an Act as this.²⁸

Yet in this case the by-law was unreasonable; but there was no discussion of the power to quash for unreasonableness, it is assumed to be a power that the court possesses at common law.

The divergent point occurred in 1898 when Lord Russell decided *Kruse v. Johnson*²⁹ and the courts of Canada started to apply the rationale of the decision. Pursuant to the Local Government Act, 1888 (51, sec.2, Vict., C.4), s. 16, the County Council (Kent), the following by-law was enacted:

4. Playing musical instruments, &c.
No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally or by his or her servant, to desist.³⁰

²⁷ [1896] 1 Q.B. 636, 638-39.

²⁸ Ibid., 638.

²⁹ [1898] 2 Q.B. 91.

³⁰ Ibid., 92.

Kruse was convicted for singing a hymn within fifty yards of dwelling house at an open air religious service after being requested to desist by a constable. It was shown that the occupier of the dwelling house was annoyed, but on a prior day. He had complained to the constables on previous occasions. Kruse contended that the by-law was unreasonable. The appeal was taken to a specially constituted Divisional Court called by Lord Russell.

Lord Russell delivered the opinion of the Court. First he reviewed the authority of the County Council to pass the by-law and found that it was intra vires.³¹ However, he determined that the Court was not relieved of the "responsibility of inquiry into the validity of the by-laws when they are brought in question"³² even if there were other procedural safeguards. He then made the following statement regarding the review of by-laws on the grounds that they are unreasonable:

In this class of case it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and

³¹Ibid., 98.

³²Ibid.

credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of the legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness...

I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.³³

³³Ibid., 99-100.

It is this statement which has been cited as precedent for the proposition that the Anglo-Canadian Courts could not exercise jurisdiction to quash municipal by-law as unreasonable.

As to the effect of *Slattery v. Naylor*, Lord Russell stated the case was strictly analogous. He finished his discussion with the following ambiguous statement:

In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable by-law; but, whether I am right or wrong in this view, I am clearly of opinion that no Court of law can properly say that it is invalid.³⁴

The by-law was found by Lord Russell not to be unreasonable. Under his test, that Parliament never intended such actions to be done this law was valid. Unreasonableness is not that the by-law was improvident or unnecessary, or missing some qualification, but that it is manifestly unjust, discloses bad faith, or is a gratuitous interference with the right of subjects. This test admits of another method of statement, "Could two reasonable legislators disagree?" Should that be met a court should not exercise its power to quash the by-law.

In the concurring opinion by Sir F.H. Jeune *Slattery v. Naylor* was cited as authority for jurisdiction to review for unreasonableness. This court:

acting in the discharge of its undoubted powers and duty, might feel compelled to hold a by-law made by a county council invalid on the ground that it was unreasonable. But, when a question of the requirements

³⁴ [1898] 2 Q.B. 91, 103.

and wishes of the locality is involved, this Court should, I think, be very slow to set aside the conclusions of the local authority. If support be needed for this opinion, it is to be found in the language of the Privy Council in the case of Slattery v. Naylor, an appeal which came from a colony to which the settlers carried the law of England, and which was very fully considered by a Court of high authority. I will quote only one among several passages which might be referred to. Lord Hobhouse, in delivering the judgement of the Court, said "The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."³⁵

The problem of the by-law is in the exercise discretion of the constables; but review of their discretion belongs to the hands of the County Councillors.³⁶

The dissenting opinion by Mathew, L., favored quashing the by-law. Mathew derived the Court's power to review for unreasonableness from the Great Charter³⁷ and held that in order for a by-law to be valid, it had to meet two conditions: "it must be certain, that is, it must contain adequate information as to the duties of those are to obey, and it must be reasonable."³⁸ Mathew concurred with the view that

³⁵Ibid., 104-5 [footnotes omitted].

³⁶Ibid., 106.

³⁷Ibid., 108, "Nullus liber homo, disseisiatur de... libertatibus suis...nisi...per legem terrae."

³⁸Ibid., 108.

Courts should be slow to condemn as unreasonable by-laws, but in this case the by-law was invalid because of the discretion given to the constables.³⁹ He distinguished *Slattery v. Naylor* on the grounds that it was colonial by-law only, not a by-law for the County of Kent which had a different circumstance as its basis.⁴⁰ He then cited *Atly v. Farrell* as authority and claimed high authority on the basis of its decision by the Lord Chief Justice.⁴¹

The English Court interpretation diverged from the Canadian interpretation of this case and before discussing what happened in Canada, the remainder of English law will be discussed.

Kruse v. Johnson was cited as authority for the proposition that city councils should be given wide discretion.⁴² But the Courts still had the power to review for unreasonableness. Lord Alverstone, C.J., in 1904, held:

I wish to point out, holding as I do that the by-law in both cases is bad, that our decision will not in the least interfere, as suggested, with the discretion of local authorities as to making by-laws. On all practical matters, provided they come within the ambit of the powers of the local authority as to making by-laws, the discretion of the local authority ought not, in my opinion, to be lightly interfered with, and only when it is quite clear that the by-law in question is in conflict with some legal principle.

³⁹Ibid., 110.

⁴⁰Ibid., 112.

⁴¹Ibid., 113.

⁴²*White v. Morely*, [1899] 2 Q.B. 44; *Thomas v. Sutters*, [1900] 1 Ch. 10; *Parker v. Mayor*, (1902) 66 J.P. 440 (By-law unreasonable).

I agree with that which Lord Russell of Killowen C.J. said in Kruse v. Johnson, that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness. But, on the other hand, as we pointed out in the previous case of Nokes v. Corporation of Islington (No. 1)⁴³ if a by-law necessarily involves that which is unreasonable, it is our duty to declare it to be invalid; and when one comes to consider the by-laws in question in the present cases and the purposes for which they were enacted, I can see no reason why they could not have been so framed as to avoid the difficulties which have been pointed out in the course of the arguments. I have come to the conclusion that in neither case can the by-law be supported.⁴⁴ (footnotes added)

The by-law in question was a health regulation.⁴⁵

Other by-laws were also held to be unreasonable; granting that the principal of wide discretion was correct, they were still found to be unreasonable.⁴⁶ Some cases

⁴³[1904] 1 K.B. 610.

⁴⁴Stiles v. Galinski, Nokes v. Islington Corporation (No. 2), [1904] 1 K.B. 615, 621-622.

⁴⁵By-law read: The landlord of a lodging house shall in the first week in the month of April in every year, and at such other times as the conditions thereof may render it necessary, cause every part of the premises to be cleaned. He shall at the same time (except in certain specific cases) cause every area, the interior surface of every ceiling and wall of every ceiling and water-closet belonging to the premises and the interior surface of every ceiling and wall of every room, staircase, and passage in the house, to be thoroughly lime-washed. Ibid., 661-17.

⁴⁶Scott v. Pilliner, [1904] 2 K.B. 855 (sale of newspaper with prediction of probable results of races, steeple chases, or other competition unlawful); Davis v. Bromley, [1908] 1 K.B. 170 (C.A.) (action in mandamus correct remedy if power to pass a by-law valid); Arlidge v. Mayor, Alderman, and Councilors of the Metropolitan Borough of Islington [1909] 2 K.B. 127 (re-declaration of Stiles v. Galinski by same judge on re-write of the offending by-law); Attorney-General v. Denby, [1925] 1 Ch. 596.

followed the Kruse v. Johnson requirement that unreasonableness be defined as 1) manifestly unjust, 2) showing bad faith, or 3) oppressive, gratuitous interference with rights of subjects as to be of no justification in minds of reasonable men so that the court could say that Parliament never intended to give such power.⁴⁷ The Court of Appeals added the following test in 1918:

The question is not whether it is possible in some particular cases to find a use of the by-law which is unreasonable, but whether the by-law itself looked at in light of all the cases to which it applies is so vague or so unreasonable as to be invalid.⁴⁸

In a case⁴⁹ concerning licensing of motion picture houses and the admittance of children (no child under fifteen years of age was to be admitted on Sunday whether or not accompanied by an adult) Lord Greene, M.R. of the Court of Appeals, stated the following principles of review:

[The] imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is

⁴⁷Dunning v. Maher, (1912) 106 T.L.R. 846 (K.B.); Attorney-General v. Hodgson, [1922] 2 Ch. 429 (tracing jurisdiction but finding particular by-law not unreasonable because it prohibited, rather than regulated the speed of automobiles in a park totally); Sparks v. Edward Ash Ltd., [1943] 1 K.B. 133, (C.A.).

⁴⁸Repton School Governors v. Repton Rural Council, [1918] 1 K.B. 233, (C.A.).

⁴⁹Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 233 (C.A.).

based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are the principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question the authority must disregard those irrelevant collateral matters there have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but,

generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty--those of course, stand by themselves--unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.⁵⁰

...In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into

⁵⁰Ibid., 223, 228-29.

account matters which they ought not to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authorities have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them.⁵¹

When the Courts are faced with an ambiguous by-law, the Court should not avoid the by-law for uncertainty if a "reasonable" meaning can be imparted; should no reasonable meaning be possible, the by-law is "unreasonable" and void.⁵² Lord Denning restated the authority and tests the Courts should rely on when reviewing by-laws on the grounds of ultra vires:

Next I turn to the question of ultra vires. The local planning authority is empowered to grant permission to develop land "subject to such conditions as they think fit." But this does not mean that they have an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion they must, to paraphrase Lord Green's words in the Wednesbury case,⁵³ have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat

⁵¹Ibid., 233-34..

⁵²Lord Denning, *Fawcett Properties Ltd. v. Buckingham County Council*, [1961] A.C. 636, 677 (H.L.).

⁵³[1948] 1 K.B. 223, 233-34.

my own words in the Pyx case,⁵⁴ the conditions, to be valid must fairly and reasonably relate to the permitted development: or yet again, to borrow the words of Lord Macnaghten and Lord Wrenbury in this House, a public authority which is entrusted with a discretion must act reasonably, see Westminster Corporation v. London & North Western Railway Co.,⁵⁵ Roberts v. Hopwood,⁵⁶ and I take it that if the authority acts reasonably the result will be reasonable. Out of these various shades of meaning I am not sure that the last is not the best; for it puts planning conditions on much the same footing as by-laws made by a local authority, to which they are so closely akin. Indeed, I see no difference in principle between them. As with by-laws so with planning conditions. The courts can declare them void for unreasonableness but they must remember that they are made by a public representative body in the public interest. When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered: see Kruse v. Johnson.⁵⁷ [footnotes renumbered].⁵⁸

If reasonable men could differ, the Court should not invalidate the by-law for unreasonableness,⁵⁹ but English Courts still retain the common law jurisdiction to review by-laws for their reasonableness and to quash them (either partially or wholly) if they are unreasonable in their effect. In Canada, this jurisdiction has been judicially (as well as

⁵⁴ [1958] 1 Q.B. 554, 572.

⁵⁵ [1905] A.C. 426 (H.L.).

⁵⁶ [1925] A.C. 578, 613 (H.L.).

⁵⁷ [1898] 2 Q.B. 91, 99.

⁵⁸ [1961] A.C. 636, 678-79 (H.L.).

⁵⁹ Luby v. Newcastle-under-Lyme Corp., [1964] 2 Q.B. 64, aff'd [1965] 1 Q.B. 217 (C.A.); Manchester Corp. v. Connolly, [1970] 1 Ch. 420 (C.A.).

statutorily) abrogated.

Until 1913, the Courts of Canada applied the Common Law. In an appeal to the Privy Council from the Supreme Court of British Columbia a by-law prohibiting any boy less than twelve years old, any females, and any Chinaman from working below ground in a mine was declared ultra vires the legislature on the grounds that the by-law was beyond the grant of power in the B.N.A.⁶⁰

In one case a Manitoba court refused to rule a by-law unreasonable because the by-law,⁶¹ passed by the city of Winnipeg, simply implemented the delegated power of the Provincial Legislature. The Manitoba court held that it could not review for unreasonableness. But in reality the court was actually holding that since one set of legislators passed a statute granting power to a second set of legislators, the acts of the second could not be unreasonable since the enabling legislation was not unreasonable; the proper action to raise the issue of unreasonableness was to challenge the enabling legislation.⁶² The Court confuses

⁶⁰Union Colliery, B.C., Ltd. v. Bryden, [1899] A.C. 580 (P.C.).

⁶¹Early closing type by-law.

⁶²Stark v. Schuster, (1904) 14 Man. R. 672, 684, per Dubuc, C.J.:

As to its being unreasonable and oppressive, the by-law follows closely, in what it prohibits, the language of the Shops Regulation Act, and under such circumstances, unless the Act itself is declared ultra vires of the legislature, the by-law cannot be held unreasonable. In *Re Boylan and the City of Toronto*, 15 O.R. 13, Armour, C.J., used the following

the passage of by-law by a municipal corporation with limited powers with the power of the Sovereign Parliament.⁶³

The Courts of Canada still continued to determine reasonableness.⁶⁴ British Columbia Supreme Courts

language: "A by-law cannot be held to be unreasonable or oppressive, or in restraint of trade, if the power to pass such a by-law is duly delegated to the body passing it by a legislature having the authority to delegate such a power, and if the body passing the by-law has only done that which the delegating legislature says expressly it may do."

⁶³Ibid. As pointed out by 1 Blackstone's Commentaries, 91,

If Parliament would positively enact a thing to be done which is unreasonable, there is no power in the ordinary form of the constitution that is vested with authority to control it...

If we were to declare invalid for unreasonableness something which has been duly authorized by the Legislature, we would be assuming to override the authority of the Legislature. The Court is not clothed with the power of making laws; its function is to construe the Acts passed by the Legislature and determine their application in the particular areas submitted for adjudication. It is only when the Legislature has exceeded its jurisdiction that it can interfere.

⁶⁴In re Talbot and Peterborough, (1906) 12 O.L.R. 358 (unreasonable as prohibition); Brown v. Calgary, (1907) 4 W.L.R. 576 (N.W.T.) (reasonable); Karry v. Catham, (1909) 1 O.W.N. 291 (reasonable preeminently local issue, court will not sit on wisdom if admits of reasonable justification); Zeats v. Johnston, (1910) 3 Sask. L.R. 364 (Sask. S.C., *en banc*) (give reasonable effect to inconsistent clauses; not quash for want of clarity); Wood v. City of Winnipeg, (1911) 21 Man. R. 426 (reasonable); Crookston v. Miller, (1912) 3 W.W.R. 10, 11 (Alta) ("one of the best tests on reading a conclusion as to whether the sum required to be paid as license [pool table license] is extravagant nad unreasonable, is to be considered whether the license fee is disproportionate to the nature and profits of the

adopted the following rights of British subjects:

- To be free from interference with
- a) personal safety and freedom,
 - b) one's good name,
 - c) enjoyment of advantages ordinarily open to all inhabitants of the Country, e.g., the unmolested pursuit of one's trade or occupation and free use of the highways,
 - d) freedom from malicious vexation by legal process, and
 - e) to one's own property.⁶⁵

It declared a by-law prohibiting peddling of food before 10:00 A.M. on market day ultra vires.

In 1909 Justice Duff of the Supreme Court of Canada held that the City of Montreal did not pass an unreasonable by-law when it enacted a by-law providing "that all shops and places of business, with certain exceptions, within the city where merchandise was offered for sale by retail, should be closed at seven o'clock in the afternoon on certain days, throughout the year, and should remain closed until five o'clock on the following mornings."⁶⁶ The by-law was challenged on the basis of unconstitutionality, unreasonableness, and oppressiveness. Justice Duff held as to unreasonableness and oppressiveness:

business and so in fact amounting to a prohibition."); *Parsons v. London*, (1912) 25 O.L.R. 172 (need fraud); *Re Shelley*, (1913) 4 W.W.R. 741 (Alta.) (mere cost not unreasonable, as to wise discretion, not matter of judicial review).

⁶⁵*Rex. v. Sang Chong*, (1909) 11 W.W.R. 231, 233 (B.C.S.C.).

⁶⁶*City of Montreal v. Beauvais*, (1909) 42 S.C.R. 211, 212.

To establish this contention in any sense germane to the question of the validity of the by-law it was necessary that the respondents should make it appear either that it was not passed in good faith in the exercise of the powers conferred by the statute or that it is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers. [citing *Slattery v. Naylor*, *Kruse v. Johnson*]⁶⁷

Justice Duff then quoted the second paragraph of Lord Killowen's opinion in *Kruse v. Johnson*.⁶⁸

By 1913, the Courts were deciding that by-laws were immune from attack for unreasonableness because of what was said in *Kruse v. Johnson* (1st paragraph), *Slattery v. Naylor*, and *Thomas v. Sutters*.⁶⁹ Justice Meredith opined the following:

The trend of modern judicial decisions is to depart from the practice of former times of applying to bodies of a public representative character, entrusted by Parliament with delegated authority, the rules which were applied in the case of trading corporations, and to recognise the right of such bodies, while acting bona fide and within the limit of the powers conferred upon them by the Legislature, to transact their business without interference by the Courts...⁷⁰

I entirely agree with what was said by Middleton, J., in *Parsons v. City of London*, 25 O.L.R. 172.⁷¹

In the 1900 edition of Biggar's Municipal Manual, reasonableness was cited as a requirement for a valid municipal

⁶⁷Ibid. 216.

⁶⁸Ibid., 217.

⁶⁹[1900] 1 Ch. 10.

⁷⁰*Norfolk v. Roberts*, (1913) 28 O.L.R. 593, 602.

⁷¹Ibid., 603, see supra note 63.

by-law.⁷² But *Re Crabbe and Swan River*⁷³ cites *Kruse v. Johnson and Biggar* for the proposition that you cannot attack a by-law in a motion to squash for unreasonableness (the by-law being authorized by statute). The case should have been decided on the rule of *Stark v. Schuster*.

In 1913 Ontario enacted the following statute withdrawing from the Ontario Courts the jurisdiction to review municipal by-laws on the grounds of reasonableness:

A by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partially, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them.⁷⁴

This clause was subsequently enacted in the following legislation and is effective today:

- 1) Manitoba Municipal Act, S.M. 1970, c. 100, s. 187.
- 2) City of Winnipeg Act, S.M. 1971, c. 105, s. 120.
- 3) Alberta Municipal Government Act, R.S.A. 1970, c. 246, s. 113.
- 4) Saskatchewan Urban Municipality Act, 1970 (Sask.), c. 78, s. 144.
- 5) Municipality of Metropolitan Toronto Act, R.S.O. 1970, c. 295, s. 3(3).
- 6) Vancouver Incorporation Act, 1953 (B.C.) c. 55, s. 148.
- 7) Victoria Act, R.S.B.C. 1960, c. 238.

One argument in some jurisdictions as to the lack of effect of these provisions insofar as land use control by-laws are concerned is that zoning (and development control)

⁷²Biggar, C.R.W., Municipal Manual, part 1, 11th edition, 1900, page 329.

⁷³(1913) 23 Man. R. 14.

⁷⁴R.O., 1913, 3-4 Geo. V. c. 43, s. 249 (2).

is accomplished under the authority of the specific planning statutes and is distinct from the general municipal statute. This argument may not be valid in Manitoba because the Municipal Act incorporates the Planning Act, S.M. 1964 (1st Sess.), c. 39, as part of the Municipal Act⁷⁵ by the following:

Definitions.

307 In this Part

- (a) the expression "planning scheme" means a planning scheme within the meaning of The Planning Act; and
- (b) a reference to The Planning Act, unless the context otherwise requires, includes any Act for which that Act was substituted.

Bylaws respecting subdivisions and buildings lots.

308 (1) The council of any municipality may pass by-laws

- (a) for restricting the number of subdivisions within any designated area in the municipality;
- (b) for regulating and controlling the number and size of the building lots in any one or more subdivisions or any portion thereof, or in any designated area in the municipality; and
- (c) for imposing conditions with which persons laying out and developing new subdivisions must comply.

Powers subject to planning scheme.

308 (2) Where a planning scheme under The Planning Act has been adopted by, and is in force in, a municipality, the powers set out in subsection (1), if exercised by the council, shall be exercised subject to the provisions of that planning scheme.

Creation of restricted zones.

310 Subject to section 311, where a municipality desires to create, and regulate or control, special zones or districts within the municipality, and the uses to which land in those zones or districts, and the buildings or other structures therein, shall or shall not be put, it shall proceed as provided in The Planning Act and not otherwise.

⁷⁵R.S.M. 1970, c. 100. The Planning Act is now R.S., 1975, c. 29.

By-laws for.

311 Notwithstanding section 310, where the council of a municipality has not adopted and put into force a planning scheme for the municipality, or for a specified part thereof, it may pass by-laws, applicable to the whole municipality, or to that specified part thereof, as the case may be,

(a) prohibiting or restricting to a specified area, and regulating, the erection, establishment, maintenance, or continuance of abattoirs, slaughter houses, butcher shops, blacksmith shops, machine shops, forges, foundries, garages, storage houses, mills, factories, laundries, rag, bottle, or junkyards, or other factories or trades that prove, or are likely to prove, nuisances;

(b) designating places within the municipality for the slaughter of animals commonly used for food, and compelling by the use of those places for that purpose;

(c) prohibiting or restricting to a specified area, and regulating the erection, establishment, maintenance, or continuance of schools, hospitals, or other public buildings;

(d) prohibiting, or restricting to a specified area, and regulating,

(i) the erection, establishment, maintenance, or continuance of, barns, or livery, feed, or sale stables, or piggeries, cattle byres, dairies, apiaries or other buildings in which cattle, horses, goats, pigs, or sheep, or bees, are kept;

(ii) the use of other enclosures, structures, or places for the keeping of any of the animals mentioned in sub-clause (i), or bees.

Even without the incorporation of the Planning Act into the Municipal Act, a zoning by-law is still a municipal by-law and the municipality has the power in general to zone by reason of section 310. The method of zoning is outlined in the Planning Act, not the grant of the power of zoning.

In the City of Winnipeg Act, the following clause was enacted:

After a zoning by-law has been approved by the Minister and given third reading and finally passed it has effect as fully to all extent and purposes as if the provisions of the by-law had been enacted by the Legislature and shall conclusively be deemed to have been within the power of the council to enact, and the validity and legality of the by-law shall not be questioned in any action, suit or proceeding in any Court for any cause whatsoever.⁷⁶

Section 120 of the Municipal Act, the anti-unreasonableness clause even further enforces this prohibition.

Thus the effect of the statute is to raise a municipal by-law to the level of a legislative statute and thus

⁷⁶S.M. 1974, c. 74, s. 40(1). This provision was originally enacted in the City of Winnipeg Act, S.M. 1971, c. 105, s. 618:

After a zoning by-law has been approved by the minister and given third reading and finally passed, it has effect as if it were enacted as part of this Act.

This statute was interpreted in *Eaton v. St. James Assiniboia Community Committee*, [1974] 2 W.W.R. 342 (Man. Q.B.):

A by-law which has not been passed by a municipal corporation in good faith and in the public interest, when passed is a nullity, and cannot be changed or made otherwise by lapse of time, approval, registration or promulgation. *Canada Atlantic Ry. v. Cambridge* (1888), 15 S.C.R. 219....

It must be stressed, however, that the curative effect of a failure to quash a by-law is limited to by-laws which are merely voidable and not void....

In other words, valid passage of a by-law is a prerequisite to its validity and if the municipal body passes a by-law that is void the curative provisions cannot validate an otherwise invalid by-law.

The newly enacted Planning Act, S.M. 1975, c. 29, does not contain a provision that tracks s. 618 but does contain the following:

49. After a zoning by-law has been given third reading it shall conclusively be deemed to have been within the power of the municipality to enact; and any proceeding to quash the by-law shall be taken in accordance with the provisions of The Municipal Act.

remove from the Courts the power of judicial review for unreasonableness.

A question to be determined later is whether-or-not reasonableness is a question of law or a question of fact. If it is a question of law then it is still available in Quebec in a motion to quash for illegality.⁷⁷ In Nova Scotia the new Planning Act allows for review by a Provincial Appeal Board which cannot "interfere with the decision of a 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."⁷⁸ Where no Plan, the Board shall not interfere unless the decision is "inconsistent with or unnecessary for the protection of the best interests of the municipality."⁷⁹ Prince Edward Island has an "as if enacted clause"⁸⁰ only; New Brunswick grants specific grounds of appeal.⁸¹

Not surprisingly, in Canada, the trend against

⁷⁷Cities and Towns Act, R.S.Q. 1964, c. 193, s. 411; Urban and Rural Planning Act, R.S. (Nfld.) 1970, c. 387, and Local Government Act, R.S. (Nfld.) 1970, c. 216, matter of law or jurisdiction only.

⁷⁸An Act to Amend and Consolidate Chapter 308 of the Revised Statutes, 1967, the Town and Planning Act, 1969 (N.S.), c. 16, s. 52.

⁷⁹Ibid.

⁸⁰Town Act, R.S.P.E.I., 1951, c. 62, s. 77. See also: Institute of Patent Agents and Lockwood, [1894] A.C. 347; Minister of Health v. The King (on the prosecution of Yaffe), [1931] A.C. 494.

⁸¹Community Planning Act, 1972 (N.B.), c. 7, s. 86.

reviewing municipal by-laws continued.⁸² In 1915, after the passage of the Ontario Codification, Justice Middleton held in *Roberts v. City of Toronto*⁸³

At one time the Courts assumed jurisdiction to review municipal legislative action, upon the ground that the action was unreasonable. There never was in Ontario any real foundation for such jurisdiction. The supremacy of the municipal legislative authority within the sphere of its delegated jurisdiction was not at first recognised. It was assumed that the municipality occupied some subordinate position, and that the principles applicable to the determination of the validity of by-laws of companies, or the rules and regulations of boards exercising a delegated authority, could be applied to municipal action.

This assumed supervisory and paternal jurisdiction

⁸² *Re Maycock and City of Winnipeg*, (1914) 24 Man. R. 646 (K.B.) (reasonableness not grounds, but reasonable anyway); *In re Glover and Sam Kee*, (1914) 20 B.C.R. 219 (C.A.) (no attack if matter purely discretionary); *Re By-Law 8030, Winnipeg*, (1914) 6 W.W.R. 1430 (K.B.) (did not meet criteria of Lord Averstone in *Stiles v. Galinski*); *Jones v. Tuckersmith*, (1915) 33 O.L.R. 634 (A.D.) (public interest determined by Municipal Council); *Davis v. Cree-more*, (1916) 38 O.L.R. 240 (no jurisdiction); *Ramsay v. West Vancouver*, (1916) 10 W.W.R. 1184 (S.C.C.) (no power to sit in judgment over wisdom if admits of reasonable justification); *Leitch v. Strathroy*, (1923) 53 O.L.R. 665 (A.D.) (no jurisdiction); *Re Foxcroft and City of London*, (1927) 61 O.L.R. 209; *Re Goldstein and Windsor*, (1928-29) 35 O.W.N. 9 (matter for council); *Deschenes v. Loreys*, [1936] 3 D.L.R. 210 (only fraud); *Re Rex v. Morello*, [1936] O.W.N. 472 (aff'g *Re Howard and City of Toronto*, infra note 89); *Winnipeg Merchant v. Winnipeg*, [1936] 3 W.W.R. 530 (Man. K.B.) (not unreasonable because of enabling legislation); *Rex v. Awad*, [1937] 2 D.L.R. 136; *Kuchma v. Tache R.M.*, [1945] 2 D.L.R. 13 (S.C.C.); *Minister of National Revenue and Wrights Canadian Ropes, Ltd.*, [1947] A.C. 109 (P.C.); *McCormick v. Toronto*, [1948] O.W.N. 425 (H.C.) (no grounds of unreasonableness but cannot be prohibitory).

⁸³ (1915) 33 O.L.R. 89

of the Courts, although founded in error, became well established, and was only put an end to by the direct action of the Legislature, which enacted that no municipal by-law should be dealt with by the Courts on the ground of unreasonableness or assumed unreasonableness.⁸⁴

...With the wisdom or unwisdom of the council's action I have no concern. If the ratepayers agree with the policy of the municipal council, then all is well. If they disagree, the redress is at the polls, and not through the Courts.⁸⁵

However, in the Province of Manitoba the trend became less clear. In *Re Bylaw No. 72, Town of Winnipeg Beach*,⁸⁶ it was held that:

Such discrimination as does exist in this by-law does not appear to be unreasonable, and in any event it is not the duty of Judges to determine with meticulous care what is and what is not reasonable in a case of this kind. Municipal by-laws as Lord Russell of Killowen remarked, are not like the laws of the Medes and Persians--they are not unchangeable; *Kruse v. Johnson*, [1898] 2 Q.B. 91, at p. 98, 67 L.J.Q.B. 782. The municipality has power to make by-laws from time to time as shall seem meet, and if experience shows that in any respect they work hardly or inconveniently, the municipal council acted upon by public opinion, has full power to repeal or alter them.⁸⁷

...A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. In matters which directly concern the people of the municipality who have the right to

⁸⁴*Ibid.*, 91-2. *Distinguished Crown Tailoring Co. v. City of Toronto* (unreported - given in full by footnote, (1915) 33 O.L.R. 89, 92. But this was 1903, should be invalid because of subsequent legislation).

⁸⁵*Ibid.*, 93.

⁸⁶(1919) 30 Man. R. 192 (C.A.).

⁸⁷*Ibid.*, 193.

choose those whom they think best fitted to represent them in their council, such representatives may be trusted to understand their own requirements better than most Judges. There is a wide diversity of judicial opinion on such subjects and Judges can lay down no definite principle or standard by which reasonableness or unreasonableness may be tested.⁸⁸

But the power to review for unreasonableness is present in a motion to quash under the general power to review for ultra vires-ness.⁸⁹

In *Howard and City of Toronto*⁹⁰ the court held that a motion to quash will lie when the actions of the council members amount to fraud, bad faith, oppression, or improper actions (but that is a matter for the council to determine if the council acts honestly and within the limits of its powers). The Supreme Court of Alberta in 1931 followed the lead of the Province of Ontario and held that unreasonableness was a question of legislative authority.⁹¹

⁸⁸Ibid., 194.

⁸⁹In re Early Closing By-Law, (1919) 30 Man. R. 444, 448-9, citing Reg. v. Gravelle, (1886) 10 O.R. 753 [sic].

⁹⁰(1927-28) 61 O.L.R. 563.

⁹¹*Keily v. City of Edmonton*, [1931] 1 W.W.R. 365, 368: Allegations of unreasonableness, oppressiveness and unequal operations are only of importance so far as they have a bearing upon the questions of "bona fides" and "public interests." We are, therefore, in this province far removed from the supervisory and paternal jurisdiction formerly exercised by the Ontario Courts in the early cases in which the Courts assumed to pass upon the question of reasonableness or unreasonableness of the by-law instead of leaving that question, where it more properly belongs, to the legislative authority.

In *Hignell v. City of Winnipeg*,⁹² a provision of the Charter of the City of Winnipeg was at issue. The clause read as follows:

The enactment of any by-law or regulation under any of the provisions of this or any other section of this Act, or any other powers vested in the council shall be held and construed to be a reasonable and lawful exercise of the power by the Act granted or so vested in the council.⁹³

The court held that (with regard to the main issue of the case, acceptance of tenders for printing the voters lists for 1933):

Although the treatment afforded those whose tenders were the lowest and were rejected was unfair, unreasonable and governed by partiality and a determination to favour the closed shops, yet it is a matter in which, in my opinion, the Courts cannot interfere. The Courts can interfere only when the city council transcends the limits of the jurisdiction conferred upon it. There is no foundation for jurisdiction in the Courts by reason of the fact that the action of the council is unreasonable and unfair.⁹⁴

In *In Re Vancouver Incorporation Act*⁹⁵ the prohibition against quashing by-laws for unreasonableness was upheld. However, in Manitoba when the action is brought to question the authority of the municipality to enact the statute⁹⁶ or challenge it on the grounds of unreasonable-

⁹² [1933] 3 W.W.R. 193 (M.K.B.).

⁹³ *Ibid.*, 195; Winnipeg Charter, 1918 (Man.) c. 120, s. 700(216).

⁹⁴ *Ibid.*, 196-7.

⁹⁵ [1940] 2 W.W.R. 697 (B.C.S.C.).

⁹⁶ *Paulowich v. Dankochuck*, [1940] 2 D.L.R. 106 (Man. C.A.).

ness the statutes do not apply.⁹⁷

A by-law cannot be passed that transforms a power to regulate a "mere administrative and discretionary power to cancel by resolution a right...[which] could only...be regulated."⁹⁸

In 1953, the Alberta Supreme Court, Appellate Division, cited *Kruse v. Johnson* and *Keily v. Edmonton*⁹⁹ as stating the Common Law on the question of unreasonableness or reasonableness of a municipal by-law. In this case no

⁹⁷Rex. rel. *St. Jean v. Knott*, [1944] O.W.N. 432, 435 (H.C.):

It is argued that the ground upon which by-laws are declared invalid for discrimination is that discrimination is unreasonable; and that it follows that the elimination of unreasonableness as a ground for declaring the invalidity of by-laws eliminates discrimination also. I do not agree. The same argument based upon a statute identical in its terms with s. 267(2) was presented to the Court of Appeal in Manitoba in *Paulowich v. Dankochuck*, 48 Man. R. (sub nom. *Rex v. Paulowich*), and was completely disposed of, if I may say so, by Prendergast C.J.M. at p. 6 (Man. R.) pp. 276-7 (C.C.C.). The learned Chief Justice took it that the statute would prevent interference by the Court with the fixing of a licence fee "which, though uniform, might be so high that it could be considered by some to be exorbitant and beyond reason," but he thought that "such considerations of reasonableness or unreasonableness are not in order when the question is whether the council could assume the power that it did assume. In quashing a by-law in such circumstances, the court does not do so on the ground that the council unreasonably exercised its discretion, but simply that the statute does not allow the council to pass it."

⁹⁸*City of Verdun v. Sun Oil Co. Ltd.*, [1952] 1 S.C.R. 222, 229.

⁹⁹[1931] 1 W.W.R. 365.

bad faith was claimed; the Court quoted *Kruse v. Johnson* as follows:

Notwithstanding what Cockburn, C.J. said in *Bailey v. Williamson* (1893) LR 8 QB 118, at 124, 42 LJMC 49, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust, if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because a particular judge may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there....Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide, for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.¹⁰⁰

The Court concluded the effect of this precedent to be:

This principle was adopted by Peterson, J. in *Atty.-Gen. v. Hodgson* [1922] 2 Ch 429, at 439, 91 LJ Ch 426, and has been generally recognized since it was pronounced.

The cases referred to above establish the principle that the council of a municipality, when it acts bona fide (there being no question of bad faith) within the field of its jurisdiction, is the judge of

¹⁰⁰In re Edmonton (city) By-Law No. 1546, (1953-54) 1 W.W.R. 407, 410 (N.S.).

whether or not a by-law is reasonable in the sense of that word as defined in Kruse v. Johnson, *supra*; or in the public interest; and its discretion is to prevail. The section of The Land Titles Act cannot be interpreted to give a discretion to the presiding judge in chambers to substitute his opinion as to what is in the public interest for that of the city council.¹⁰¹

The following of Kruse v. Johnson continued throughout the 1950's.¹⁰² However, a by-law that affected only private interests, such as a licensing fee, was not automatically found to be unreasonable unless it was shown to be against the public interest¹⁰³ and there was at the time of its passage an enacted anti-unreasonableness statute. The

¹⁰¹Ibid., 411.

¹⁰²Murphy v. The Queen, (1934) 111 C.C.C. 91 (ultra vires, not unreasonable); Dionne v. Municipal Court of Montreal [1956], 3 D.L.R.(2d) 727; B.C. Electric Co., Ltd. v. Surrey, (1956) 18 W.W.R. 462 (B.C.S.C.); Hewitt v. Charleswood R.M., (1957) 66 Man. R. 1 (follows Kuchma v. Tache, R.M.); Regina v. Scarborough ex. rel. Blue Sky, [1960] O.W.N. 535 (H.C.) (Cannot order Municipal Court to breach By-law); Dery and Staples v. Victoria, (1962) 38 W.W.R. 215 (S.C.C.); Re Neilson Engineering Ltd., v. City of Toronto, [1969] 1 O.R. 271 (H.C.) (no authority without bad faith or ultra vires power).

Contra: Regina v. Anderson, (1958) 24 W.W.R. 53 (ultra vires, not cured by statute of limitations--now anti-unreasonableness statute); Regina ex. rel. Courbeyer v. Pawych, (1960) 25 D.L.R.(2d) 222 (Ont. H.C.) (second guess city councilors); N. York Restricted Area By-Law, (1960) 24 D.L.R.(2d) 12 (C.A.) (O.M.B. cannot rule on validity of by-law but can review reasonableness).

¹⁰³Re Central Burnaby Citizen's and Ratepayer's Association, (1956) 6 D.L.R.(2d) 511 (B.C.S.C.).

Court could review the amount of the fee independent of the power to pass a licensing fee.¹⁰⁴

In 1959 the Manitoba Court of Queen's Bench reviewed the grounds of unreasonableness when it reviewed a case concerning the by-laws of an optometry society which had delegated powers granted by the Provincial Legislature. While quoting *Kruse v. Johnson* and citing the major authorities, the Manitoba Court found the by-law in question to be unreasonable. The Court relied on Maxwell on Interpretation of Statutes, 10th edition, page 301:

In determining the validity of by-laws made by public representative bodies under Statutory powers, their consideration is approached from a standpoint different from that adopted towards by-laws of

¹⁰⁴*Robert Hudson Construction Co. Ltd. v. Town of Acton*, [1958] O.W.N. 165 (H.C.), at 167, 168:
While I am not permitted in connection with the problem with which I am dealing to consider the reasonableness of all this, I am I think, entitled to consider whether on any reasonable appreciation of the situation, it can be said that these fees are charged for "the inspection and approval of such plans" to quote from the statute. The contention of the applicant is that they are nothing of the sort, and that they are in fact, an attempt to raise revenue from the applicant and other owners of property in Acton...

This admission only goes to buttress the conclusion I have already reached that the amount of these fees are so grossly in excess of any amount that could properly be charged for the inspection and approval of the building plans, that in effect what the Town of Acton is trying to do is to raise general revenue under the guise of charging a fee for a building permit. This is clearly beyond its powers; it is illegal under the authority conferred on the Corporation of the Town of Acton by the Municipal Act and in my view must be quashed for illegality.

railway or other companies, which carry on business for their own profit, although incidentally for the advantage of the public. Courts of justice are slow to condemn municipal by-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by a "benevolent" interpretation, crediting them who have to administer them with an intention to do so in a reasonable manner, and with being the best judges whether a particular by-law is required in their district or not. But, on the other hand, if a by-law necessarily involves that which is unreasonable, it is the duty of the court to declare it to be invalid.¹⁰⁵

The Alberta Courts found the opposite to be the correct interpretation.¹⁰⁶

A regulation may be unreasonable and still be valid if it is not a prohibition where the right to regulate has been granted; however, a reasonable regulation may be invalid if it actually is a prohibition on the conduct. To be valid, a regulation must be general in its scope and not refer to a single individual or class of persons.¹⁰⁷ This

¹⁰⁵Retholz v. Manitoba Optometric Society, (1959) 28 W.W.R. 103, 114 (Q.B.).

¹⁰⁶Re Section 710, The City Act, (1959) 29 W.W.R. 49, 55:

There was a time when a finding by the court that a by-law was unreasonable was in itself a good ground for quashing it in most, if not all, common law jurisdictions.

Nowadays, save in some jurisdictions, in very unusual circumstances, the question of what is reasonable is to be determined solely by the enacting council (The City Act, *supra*, sec. 271; In re Edmonton [City] By-Law 1546, [1953] 10 W.W.R. [N.S.] 407; 24 Halsbury, 3rd edition, 517-8; Leitch v. Strathroy, [1923] 53 O.L.R. 665).

On appeal, (1960) 31 W.W.R. 466, 468 (Alta. S.C.):

Granted jurisdiction, the reasonableness or unreasonableness of a by-law is a question to decide, but in so doing it must act in good faith.

¹⁰⁷City of Toronto v. Mandelbaum, [1932] O.R. 552.

dichotomy was discussed in *T.W. Hand v. Peterborough Fire-works*.¹⁰⁸ The municipality prohibited the use of fireworks by any one under twenty-one years of age. The Court stated, citing *Toronto v. Mandelbaum*, "regulation implies the continued existence and some things as condition precedent [a permit for the display] is not a regulation."¹⁰⁹ The Court then held in dicta:

Boys of 16 to 21 are taught to use fire-arms in the army, they are allowed to hunt with fire-arms, and prohibited by such a by-law to set off fire-works. Obiter Dicta, I may say that a class of limited prohibition to 16 years of age provided adult supervision is given ought to fall under the appellation of being regulated.¹¹⁰

Was this a discussion of unreasonableness couched in terms of discrimination?

In *Scarborough v. Bondi*¹¹¹ the ground of discrimination in questions of zoning matters was abolished. Zoning is by its very nature discriminatory, so the court stated, and therefore, all zoning is discriminatory along the borders of the zone. Since no area is without some kind of discrimination no area can be termed to be discriminated. As such, there is no such thing as a "spot" in zoning ordinances. But this syllogism is dicta too. The effect of this dicta is to seem to remove one more ground for challenging a zoning law,

¹⁰⁸[1962] O.R. 794 (H.C.).

¹⁰⁹Ibid., 796.

¹¹⁰Ibid., 797.

¹¹¹18 D.L.R.(2d) 161, [1959] S.C.R. 444.

the ground of discrimination by parcel size, i.e. spot zoning. Any municipality may zone, so it seems, for each and every parcel if it desired.

Uncertainty has also been confused with unreasonable-ness and established as a separate grounds for attacking municipal by-laws.¹¹²

The Supreme Court of Canada outlined its supervisory powers over the acts of municipal councils in *City of Sillery v. Sun Oil Co., Ltd.*¹¹³ The Court stated

It is well established that the supervisory powers of the Superior Court under that article over the acts of municipal councils and other like bodies, are only to be exercised under exceptional circumstances. The Court cannot merely substitute its opinion for that of the municipal authority.¹¹⁴

Applying these principles to the present case, in order to declare null the decision taken by the appellant as expressed in its By-law 267, the Court must find that, as to the lots in which the respondents are concerned, there had been discrimination and an abuse of power equivalent to fraud which had caused a flagrant injustice.

Admittedly any zoning by-law is discriminatory in the sense that it forbids the construction of certain types of buildings, or the carrying on of certain activities in a zoned area, and permits others. That result flows from the exercise of the statutory

¹¹²*Bunce v. Cobourg*, [1963] 2 O.R. 343 (C.A.) (uncertainty of classifications); *Blue Haven Motel v. Burnaby*, (1965) 52 W.W.R. 345 (B.C.S.C.) (not unreasonably clear and property rights taken not clearly defined); *Frederick v. Horizon Realty*, (1973) 6 N.B.R.(2d) 846; *Re London Drugs*, (1972) 24 D.L.R.(3rd) 308.

¹¹³(1964) 45 D.L.R.(2d) 541.

¹¹⁴*Ibid.*, 544.

authority to enact zoning by-laws in the public interest.¹¹⁵

Scarborough v. Bondi and Kruse v. Johnson together then require the showing of bad faith which amounts to a fraud and not in matters of how the zoning districts are seen to be later but from the point of view of the council members at the time of the enactment of the by-law.¹¹⁶ Yet some discrimination may be actionable.

In an action in mandamus to require the issuance of a building permit, once a prima facie case has been established, the city must establish good faith, rather than have the petitioner show bad faith when bringing a motion to quash.¹¹⁷ This allows for some relief in the burden of going forward with the evidence to the developer-builder.

During the years since 1970, the issue of jurisdiction to quash for unreasonableness has been raised again and again. In 1972, the British Columbia Courts did exercise jurisdiction quoting the obligating passage from Kruse v. Johnson.¹¹⁸ Yet one lot zoning was not discriminatory.¹¹⁹ In Ontario if the Municipal Council was required to act judicially, it must so act in a reasonable manner and the Courts could review

¹¹⁵Ibid., 545.

¹¹⁶Bala Institute v. Hamilton, (1969) 5 D.L.R. (3rd) 696.

¹¹⁷Corporation of the City of Ottawa and Boyd Builders Ltd., [1965] S.C.R. 408.

¹¹⁸Re shops Regulation By-Law, [1972] 2 W.W.R. 625 (B.C.S.C.).

¹¹⁹Cloverland Inst. v. Burnaby, [1972] 1 W.W.R. 628 (B.C.S.C.).

its decisions on that ground.¹²⁰

The latest Manitoba case, *Eaton v. St. James Assiniboia Community Committee*¹²¹ dealt with the issues of bad faith and jurisdiction to pass a rezoning by-law. The opponents to the rezoning were unable to prevail at the council level and have sought to prevail by bringing a lawsuit. The Court held that it "could not substitute its own opinion for that of the elected bodies."¹²² But the Court could pass on good faith and public interest.¹²³

On the issue of the effect of curative legislation, the legislation can be employed if the by-law is found to be voidable and not void.¹²⁴

As discussed, Ontario and each of the provinces of Western Canada have enacted in some form or another a statute prohibiting the quashing of municipal by-laws on the grounds of unreasonableness.¹²⁵ A second formula which

¹²⁰*Re Pescenye and Board of Commissioners of Police for the City of Hamilton*, [1973] 1 O.R. 142 (H.C.).

¹²¹[1974] 2 W.W.R. 342 (Q.B.).

¹²²*Ibid.*, 345.

¹²³*Ibid.*, 346.

¹²⁴*Ibid.*, 347.

¹²⁵Ontario: R.S.O. 1970, c. 284, s. 242 (Municipal Act); Manitoba: S.M. 1970, c. 100, s. 187 (Municipal Act) and S.M. 1971, c. 105, s. 120 (City of Winnipeg Act); Saskatchewan: S.S. 1970, c. 78, s. 144 (Urban Municipality Act); Alberta: R.S.A. 1970, c. 246, s. 113 (Municipal Government Act); British Columbia: R.S.B.C. 1960, c. 255, s. 238 (Municipal Act) and S.B.C. 1953, c. 55, s. 148 (Vancouver Act).

attempts to prevent review of legislation, especially subordinate legislation, is an "as if enacted in this Act" clause. Two interpretations have been given to this clause, one being that the regulation has the same effect as an Act of Parliament; the other, that it is a historical anachronism.¹²⁶ deSmith reviews the decisions in his Administrative Law text and gives the following propositions for the effect of this type clause:

- (a) The appropriate authority may be restrained from proceeding to make or confirm a scheme or order which is ultra vires.^a
 - (b) Any procedural conditions precedent to the making of the order must be complied with.^b
 - (c) If the order, when made, is inconsistent with sections of the Act other than the enabling section, the Act will take primacy and the order will be invalid.^c
 - (d) The Minister must not travel outside the functions altogether.^d
- But (e)
If the order, when made, genuinely purports to be related to the purposes of the enabling section and the Act as a whole, its validity may be upheld although, in the absence of an "as if enacted" clause, it might have been held to be ultra vires.^e ¹²⁷

¹²⁶deSmith, S.A., Judicial Review of Administrative Actions, 3rd edition, London: Stevens and Sons, Ltd., page 330.

¹²⁷Ibid., deSmith's footnotes:

- (a) R. v. Electricity Commissioners, [1924] 1 K.B. 171; R. v. Minister of Health, ex parte Davis, [1929] 1 K.B. 619. But the courts will not directly interfere with parliamentary proceedings on subordinate legislation.
- (b) Minister of Health v. R., ex p. Yaffe...
- (c) Ibid.; Glasgow Insurance Committee v. Scottish Insurance Commissioners, 1915 S.C. 504, 509-510; Foster v. Aloni, [1951] V.L.R. 481; McEwan's Trustees v. Church of Scotland General Trustees, 1940 S.L.T. 357, 359-360 (dicta).

In general, the grounds for quashing a municipal by-law are that it is ultra vires, arbitrary, capricious, confiscatory, in bad faith, or unreasonable. David Mullen has given a definition, however, tautological, of unreasonableness:

Even if the decision-maker in question takes into account relevant factors and does not take into account any extraneous considerations, he may still be subject to review on the basis that the decision or conclusion ultimately reached was so unreasonable that no reasonable authority could ever have come to it.¹²⁸

What constitutes good faith or lack of good faith is outlined by deSmith:

[M]isuse of powers [discretionary] in good faith--by using them for an unauthorized purpose or without regard to legally relevant considerations or on the basis of legally irrelevant considerations--need not be so difficult to prove [as is bad faith]. If a power expressly granted for one purpose is in fact used for a different purpose, the courts ought to pronounce the administrative act invalid.^a If such a power is used to achieve another, unauthorized, purpose as well,^b the courts may apply various tests

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- (d) Minister of Health v. R., ex. p. Yaffe (ante); McEwan's Trustees case (ante) at 360 (dictum).
 - (e) This proposition, although inconsistent with some of the judgments in the Court of Appeal ([1930] 2 K.B. 98) and in the House of Lords ([1931] A.C. 494) in Yaffe's case (where the clause was rendered almost nugatory) is consistent with the judgments of Lord Herschell in Lookwood's case and Lord Strathclyde in the Glasgow case, is supported by commentators (see Graham-Harrison...Willis...) and was adopted in the Australian case of Foster v. Aloni, [1951] V.L.R. 481.

¹²⁸Mullen, David J., Canadian Encyclopedic Digest, (Ontario) Administrative Law, 3:1, section 108, page 3-102
 ct. C.N.R. v. Bell Telephone Co., [1939] S.C.R. 308 ("reasonably" not "arbitrary" or "capriciously"); Martin v. Law Society of B.C., [1950] 3 D.L.R. 1973 (B.C.C.A.)

to determine the validity of the end-product-- for example, what was the dominant purpose^c or the "true purpose"? or was the exercise of power a colourable show? or has the purpose for which the power was granted been substantially fulfilled? If the statutory purpose has not been spelt out, the courts may read implied limitations into an ostensible unfettered grant of power.¹²⁹

Arbitrary, discriminatory, and capricious are related in scope. Charles Rathkopf supplies a workable definition in his Law of Zoning and Planning:

The basic words "confiscatory," "arbitrary," and "discriminatory," although in some instances overlapping, generally are used to depict different situations. In general, it may be said that an

(against all reason); approved in *Re Urbanek and College of Physicians and Surgeons of B.C.*, (1972) 24 D.L.R.(3rd) 96(B.C.). See also the classic statement of Lord Greene, M.R., in *Associated Provincial Picture Houses v. Wednesbury Corporation*, [1948] 1 K.B. 223 at 229.

¹²⁹deSmith, S.A., Constitutional and Administrative Law, Baltimore: Penguin Books, Ltd., 1971, page 571, deSmith's footnotes:

- (a) See for example, *Sydney Municipal Council v. Campbell*, [1925] A.C. 338.
- (b) For example, *R. Paddington & St. Marylebone Rent Tribunal, ex parte. Bell London & Provincial Properties Ltd.*, [1949] 1 K.B. 666 (local council could not use its power to refer contracts of letting to a rent tribunal for the purpose of using the tribunal as a general rent-fixing agency irrespective of the circumstances of the wishes of the individual tenants.)
- (c) *Westminster Corporation v. L. & N.W. Rly. Co.*, [1905] A.C. 426 (power to construct underground public lavatories validly exercised through a subway for non-stopping pedestrians was built.)
- (d) If the Courts had asked themselves this question in the *Soblen*[[1963] 2 Q.B. 243] the result might have been different [no review of...regulations]...

ordinance [by-law] is confiscatory if the property to which it is applied is not reasonably adaptable to any permitted use; it is arbitrary if there is no reasonable relation between the evils reasonably apprehended and the provisions of the ordinance enacted pursuant to the police power to prevent or cure them;^a it is discriminatory if it does not operate with uniformity, being alike in its application to all persons or property in like circumstances.^b In any such situation, it is "unreasonable." "Reasonableness" is the test of validity in every situation.¹³⁰

These definitions have the tendency to blur the distinctions between the three grounds as in the United States the grounds of unreasonableness is still available and usually raised as a Federal Issue (Equal Protection or a Taking without Due Compensation).¹³¹

¹³⁰Rathkopf, Charles A., The Law of Zoning and Planning, New York: Clark Boardman Co., Ltd., 1972, page 4.5-4.6. Rathkopf's footnotes:

- (a) An ordinance is unconstitutional if it: "passes the bounds of reason and assumes the character of a merely arbitrary fiat."
- ...
- (b) Town of Hobart v. Collier (Wisc.) 87 N.W.2d 868; Conner v. Township of Cohasset (Minn.) 81 N.W.2d 789:
 "The application of the ordinance to a single individual and to a particular property, although on its face having uniformity, is, in fact, discriminatory and consequently an unreasonable exercise of the police power...."

¹³¹Ibid., Supplement, page 39-40:
 In upholding an amendment to a zoning ordinance which amendment permitted apartment buildings in a residence zone without restrictions as to number of family units, where the original ordinance limited apartment buildings in such zone to those containing not more than four units, the Ohio Court of Appeals in Denman v. City of Cincinnati, [1959 N.E.2d 805 (C.A., OH., 1959)] laid down the general rule:
 "...that every governmental law or regulation must be reasonable and non-discriminatory in its application, is beyond cavail or controversy.

What is generally called "spot zoning" and is described in general as discriminatory zoning was held to be legal in Canada by the Supreme Court of Canada in *Scarborough v. Bondi*.¹³² The Ontario Court of Appeal had held the by-law in question to be discriminatory in scope and application because it was designed to apply to only one parcel of land. The Supreme Court of Canada reversed stating that it was not discriminatory.¹³²

Justice Judson delivered the opinion of the Court and put the imprimature of the Supreme Court of Canada on "spot zoning" stating:

I do not think that one can characterize this by-law as discriminatory merely because it points to one particular person or lot.¹³⁴

...Far from being discriminatory, the amending by-law is nothing more than an attempt to enforce conformity with the standards established by the original by-law and which have been observed by all

Whether it is reasonable and non-discriminatory is a question of fact in each case. And it is the function of the legislative department of government to determine in the first instance whether legislation is, per se, within constitutional limitations, and then for the judicial department to keep its application within constitutional bounds."

In fact, an ordinance is unconstitutional which is unreasonable in any of the aspects stated in the foregoing cases, the term "unreasonable" being used in the decision as a generic term to describe ordinances which are either arbitrary, confiscatory, or discriminatory.

¹³²[1959] S.C.R. 444.

¹³³Ibid.

¹³⁴Ibid.

owners in the subdivision with this one exception.

The classic definition of discrimination [in Ontario is]:

When the municipality is given the right to regulate, I think that all it can do is pass general regulations affecting all who come within the ambient of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another;...

Although I have a firm opinion that the original and amending by-laws do not infringe this principle, I share the doubt expressed by the learned Chief Justice whether it can ever afford a guide in dealing with a restrictive or zoning by-law. The mere definition of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do. Moreover, within the area itself, mathematical identity does not always exist. All lots are not necessarily of the same frontage or depth. The configuration of the land and shape of the lots may vary. Some lots may have frontage on two streets. These are only some of the considerations which may justify a municipality in enacting these by-laws in exercising a certain amount of discretion.¹³⁵

This case is cited for the proposition that all zoning is by nature discriminatory and therefore the municipality may create zoning districts of any size that it may desire so long as the by-law is not enacted in bad faith and is not otherwise ultra vires. Unreasonableness is not grounds for invalidity.

This decision was unnecessary. Had the Court ruled on the procedural issue it would not have had to reach the conclusion attained. In the last paragraph of Justice

¹³⁵Ibid., 451.

Judson's opinion there appears to be some dicta. However, had the case been decided on the grounds that the by-law was void for failure to have prior approval of the Ontario Municipal Board, the case would have been obiter dicta on the definition of discriminatory zoning.¹³⁶

In short, a municipal by-law can be attacked if there is a showing of bad faith, amounting to fraud or dishonesty; discrimination, but not if it is an issue of spot zoning; and, if it is found to be ultra vires the proper enabling act. A by-law may not be quashed for reasons of unreasonableness because of the interpretation of *Kruse v. Johnson* that has permeated the jurisprudence of Canada and the statutes books of a number of provinces. This interpretation is manifestly wrong in that it misreads the intent and actual statements of Lord Russell of Killowen in *Kruse v. Johnson*.

Built into the Canadian system of municipal legislation in some provinces in the Provincial Municipal Board

¹³⁶Ibid., 452-3: I have thought it unnecessary to consider the application to this problem of the principles stated in the reasons of the learned Chief Justice and the Court of Appeal but there still remains the question whether the prior approval of the Municipal Board under s. 43 of the Municipal Board Act is a condition precedent to the validity of the amending by-law. This was an alternative ground of appeal in the Court of Appeal but the court found it unnecessary to deal with it. On this point I am in agreement with my brother Cartwright that the by-law must be held to be a nullity for lack of prior approval. Consequently, the appeal fails and must be dismissed with costs.

which can act as a check on the zoning power of the local municipality. However, the Municipal Boards may not function as a check on unreasonable zoning by-laws. While it can be said that a municipal board may be a check on the unreasonableness of council by acting as a second review, the review is not necessarily impartial.¹³⁷

The Manitoba Municipal Board has the powers of a court of record¹³⁸ but is not bound by the technical rules of evidence.¹³⁹ The Board may grant an application either partially, wholly, or in addition to that which is requested.¹⁴⁰ All decisions or orders are final subject to a statutory right of appeal.¹⁴¹ But such appeal only lies upon "(a) any question involving the jurisdiction of the board; or (b) any point of law."¹⁴² The appeal must be filed "within one month after the making of the order or decision sought to be appealed from, or within such further time as the judge under special circumstances shall allow."¹⁴³ Thus, if one appeals within one month of the decision of the Municipal Board and has an issue concerning

¹³⁷Adler, Gerald M., Land Planning by Administrative Regulation: The Policies of the Ontario Municipal Board, Toronto: University of Toronto Press, 1971.

¹³⁸Municipal Board Act, R.S.M. 1970, c. 240, s. 10.

¹³⁹Ibid., 24(2).

¹⁴⁰Ibid., 46(1).

¹⁴¹Ibid., s. 56.

¹⁴²Ibid., s. 60(1).

¹⁴³Ibid., s. 60(2).

law or jurisdiction, then the Municipal Board can act as a check on the passage of municipal zoning by-laws.

In Ontario, Writs of Certiorari and Mandamus will not lie against the Municipal Board.¹⁴⁴ Gerald Adler sees Judicial review of the Ontario Municipal Board as follows:

These restrictions have in effect been abrogated by explicit rights of appeal. Section 95 of the Ontario Municipal Board Act, the tribunals organic act, makes provision for appeal by leave to the Court of Appeal on any question of jurisdiction or on a question of law. On the other hand, the determination of the board of any question of fact within its jurisdiction is binding and conclusive.¹⁴⁵

Is unreasonableness a matter of law or fact? If it is a matter of fact, then the Municipal Boards' review would be binding on the courts. If it is a matter of law then the Municipal Boards could be questioned on appeal.

¹⁴⁴Ontario Municipal Board Act, R.S.O. 1960, c. 247, s. 95.

¹⁴⁵Adler, Gerald M., Land Planning by Administrative Regulation: The Policies of the Ontario Municipal Board, 1971, page 6. See also, Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke, (1966) 57 D.L.R. (2nd) 206 (Ont. C.A.).

CHAPTER EIGHT

CONCLUSION

With the demise of spot zoning and the abolition of the grounds of unreasonableness in challenging municipal by-laws, the Canadian land owner is subject to the legislator's and city councilor's view of what should be done in the city without practical remedies in the judiciary.

For an example of what could be done under current statutory power in Manitoba, one needs only to look at section 637 (4) of the City of Winnipeg Act.¹ This section provides that upon two conditions, filing² and notice to the owner subsequent to passage,³ the council "may declare any plan of subdivision or part thereof, of land within the city or the additional zone, that has been registered for eight years or more, not to be a registered plan of subdivision..." The effect of this statute is to abolish all interior plot lines of the subdivision and cause the owner of the subdivision to comply with current subdivision by-laws. In theory, this statute allows the

¹S.M. 1972, c. 93, s. 82.

²City of Winnipeg Act, s. 637 (6); S.M. 1972, c. 93, s. 82.

³Ibid., 677 (7); S.M. 1972, c. 93, s. 82.

city to correct poorly planned subdivisions that have not been "successful." It provides for an after-the-fact notice to the affected property owners without a statutory right of appeal. The by-law is fait accompli and the land owner may be left with an irregular shaped parcel of land with dedicated streets and small lots within the parcel with "substandard" housing built or planned to be built. Any subdivision is subject to this provision so long as it is eight years old. While there is a requirement of three readings for the by-law,⁴ two-thirds of the council may suspend this requirement and enact the by-law at once.⁵ No attack would be allowed on the basis that the by-law was unreasonable.⁶ As stated before, the definition of good faith makes a charge of lack of good faith very difficult to establish without recourse to an analysis of unreasonableness.

The City of Winnipeg Act gives land use planning

⁴Ibid., S.M. 1971, c. 105, s. 117 (1).

⁵Ibid., 117 (2).

⁶Ibid., s. 120: A by-law, order or resolution passed by council in the exercise of any of the powers conferred by, and in accordance with this Act, and in good faith, is not open to question, and shall not be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or alleged unreasonableness of its provisions or any of them.

jurisdiction over the corporate area of the City⁷ and an Additional Zone⁸ to the City of Winnipeg. This is an area of approximately 620 square miles.⁹ A Metropolitan Development Plan¹⁰ for the City of Winnipeg was initially prepared in 1968. This plan provides for areas of limited growth.

The Winnipeg planning area is divided into two areas, those designated for urban expansion and those to be kept in a rural and semi-urban state. Areas of urban expansion are provided for in the plan and the following objective states:

TO GIVE NOTICE OF FUTURE AREAS FOR LIVING AND WORKING

The Land-Use Control By-laws and Detailed Area Plans where applicable, are the instruments whereby those areas that will accommodate urban expansion in the immediate future are indicated, but the Plan, being a longer-range document, must indicate where all of the urban expansion will be accommodated during the time and growth period it covers. The Plan must be sufficiently flexible to provide for changes in the rate of growth due to conditions and circumstances that are not currently apparent.¹¹

⁷The boundaries of the City of Winnipeg are found in the City of Winnipeg Act, S.M. 1971, c. 105, s. 4(1). It is 220 square miles in size.

⁸The boundaries of the Additional Zone are found in section 4(2). It contains an area of 400 square miles.

⁹City of Winnipeg By-Law No. 422/73, Plate 3.1.

¹⁰Initially the Metropolitan Corporation of Greater Winnipeg By-Law No. 1117, Schedule A. It is still in effect by reason of Am.S.M. 1974, c. 73, s. 103, City of Winnipeg Act, s. 663 (2).

¹¹ibid., A.2.30; C.8.1; C.8.2.

Within this area the city's policy is to provide for and maintain an adequate level of services.¹²

Initially the Development Plan provided for areas of no urban expansion.¹³ This would include land primarily within the additional zone and the corporate boundary. This was to provide for "open space use"¹⁴ and to "regulate the haphazard semi-urban development...on the fringe..."¹⁵ of the city. The policy of the city was stated as:

1. TO PREPARE AS A FEATURE OF THE PLAN DETAILED AREA PLANS FOR THOSE VILLAGE COMMUNITIES WHERE SOME FUTURE GROWTH IS EXPECTED.
2. TO PREVENT URBAN DEVELOPMENT IN THE AREAS NOT INTENDED FOR URBAN DEVELOPMENT BY MEANS OF LAND-USE CONTROL BY-LAWS. VILLAGE COMMUNITIES AND LAND ADJACENT TO THEM REQUIRED FOR VILLAGE PURPOSES WILL BE EXEMPT FROM THE PROVISIONS OF THESE BY-LAWS.
3. TO LIMIT IN THE LAND-USE CONTROL BY-LAWS, THE FIVE-ACRE MINIMUM AGRICULTURAL ZONE TO THOSE LOCATIONS SUITABLE FOR THIS CATEGORY AND CURRENTLY BEING UTILIZED, AND TO DESIGNATE THE REMAINDER OF THE "AREAS OF NO URBAN EXPANSION" FOR AGRICULTURAL PURPOSES WITH A MINIMUM SITE AREA OF 40 ACRES.¹⁶

Provision .3 outlines minimum zoning for lot sizes for the enactment of this policy. In 1975 the city was considering minimum lot size within the additional zone of one hundred

¹²Ibid., C.8.4.

¹³Ibid., A.2.32; A.2.33; G.9ff.

¹⁴Ibid., C.9.4.

¹⁵Ibid., C.9.

¹⁶Ibid., C.9.8.

sixty acres for subdivision purposes.¹⁷

In December, 1974, the Development Plan was amended by City of Winnipeg By-Law No. 422/73. This established new objectives for limited expansion and rural areas. These policies are set out in Appendix C.

Within the planning area of Winnipeg, land use policies are specified and the objectives are the control of urban sprawl and development by orderly means. While it is a general plan, it can establish the basis for any zoning by-law and protect the by-law if it were attacked using the grounds that the by-law was an unreasonable exercise of the zoning-police power. What grounds for attack would be available if the following were also adopted?

The city council by by-law enacts a development control by-law pursuant to the City of Winnipeg Act¹⁸ for the areas of limited and no expansion, and, for certain areas enacts a limitation on the number of units that can be built in any one year for dwellings.¹⁹ At the same time it can prepare a capital improvement plan for the total planning area. The capital improvement plan would provide for water,

¹⁷An interview with Mr. Tom Haxby, Supervisor Development Control, City of Winnipeg, 6 March 1975.

¹⁸S.M., c. 105, c. 623ff.

¹⁹S.M. 1974, c. 73, s. 46, City of Winnipeg Act, s. 598 (1) (g): The Council may enact by-laws..."establishing for any designated locality, the number of buildings... that may be erected or placed on any unit of land..."

sewer, power, and other municipal services. The municipal facilities would be built along the anticipated lines for urban development and then into the areas of no or limited expansion in a staged period of twenty to fifty years. The time sequence would be determined by the type of demographic demand the city planners or councilors would deem best.

The effect of these by-laws would be to make all residential plans subject to the will of council which could approve or disapprove at will for areas of limited urban expansion and stop urban sprawl; a limit on the number of new dwelling units would cause the population to stabilize at a specific level (or cause a massive housing shortage); and, for owners of land in the areas of future capital improvements, the land owner would lose the present right to improve by building on the land and its speculative value for a period of years without the need for payment by the municipality for the rights taken. Few subdivisions would be proposed since in most cases the plan would not allow them to be built. By limiting the number of residential units to non-migratory needs, the city council could prevent the development of large scale speculative subdivisions and where development is wished, the city could place the area under development control. In either case the ensuing land use could be effectively controlled.

In these cases, the land owner would be unable to avail himself of the grounds of unreasonableness, both in

general as to the whole plan and specifically to his own parcel. As discussed earlier, bad faith would be hard to prove, and in this case, practically impossible since the development plan besides providing the basis for reasonableness of the by-law, would also establish a defense to bad faith since there was established a proper public purpose for even a "dominant purpose" analysis.

Analysis in terms of capriciousness and arbitrariness are also unproductive in terms of the above discussion. The land owner would not have been deprived of his property, but under the Ramapo, New York,²⁰ decision, the property owner would only have a postponed enjoyment of the use. Since the postponement would be a regulation under the police power there would be no need for compensation.

In Canada a city may not only limit its growth but end growth if it so desires. No affected property owner has the legal ability to bring an action in defense of his property should he wish to build in a way not desired by the city council. The courts do not have the jurisdiction to entertain these actions against the municipal governments.

While it is not the purpose of this thesis to argue for or against parliamentary supremacy, it is the view of this author that some recourse to the courts is necessary to protect the rights of the non-minority, (i.e. racial or religious minorities) land owners and tenants who are

²⁰285 N.Y.S.2d 291 (1972).

affected by the type of legislation presently possible.

Two suggestions are offered, the Supreme Court of Canada should reconsider the decision of *Scarborough v. Bondi* and confine that case to its procedural aspects. Spot zoning should be prohibited in general and the specific definition of a spot zoned parcel should be left to the local courts to decide on a case by case basis where the facts surrounding the individual parcel are available. Secondly, the "anti-unreasonableness" statutes on the books in many provinces should be repealed. They are codifications of a misinterpretation of the decision in *Kruse v. Johnson* and are the means of preventing judicial review of land use by-laws in general. Both singular authority to review a particular zoning classification and the general authority to review the municipal comprehensive plan are needed. What may be unreasonable as to a single lot may not be unreasonable as to the comprehensive plan but the lot has been made the subject of a "spot" and therefore it is discriminated against. The dichotomy of this problem is shown in the two leading United States Constitutional cases, *Euclid v. Ambler Realty Company*,²¹ and *Nectow v. City of Cambridge*,²² where the entire municipal zoning by-law was held valid but a classification attached to a single lot was held to be invalid as to that lot but not

²¹272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

²²277 U.S. 174, 48 S.Ct. 466, 72 L.Ed. 838 (1928).

the rest of the comprehensive plan.

Municipal governments are not fool-proof. They are only creatures of the Provinces and should be subject to review of the judicial branch of government since partisan and personal politics are more likely to interfere with individual rights.

Both Canada and the United States are experiencing urban crises. The nature of land use planning puts in conflict the right of an individual to migrate within the country and the right (or desire) of a land owner to prevent the deterioration of his "environment." While it is generally said that a municipal government is most responsive to local needs it is also true that the local needs are not necessarily those of the general community or the nation as a whole. Some third party is needed to balance the interests of the franchised local population and the disenfranchised migrants who seek to move to the community. The body traditionally charged with this duty is the judiciary; it is equipped to deal with this problem in specific cases.²³ However, Canada has removed the jurisdiction of

²³ Contra, Stickel, Fred C., 50 N. Dakota L. R. 59 (1973):

It would seem the more one reads and analyses decisions in the field of municipal law the more it becomes apparent that one can find equally convincing precedent on both sides of any issue with a result largely dependent upon how a particular court in a particular locale views the particular set of facts in the case at hand.

But is that what is wanted in a third party mediator who can view the individual matter on its particular merits where all sides can be represented without regard to political franchisement?

the courts to act in this matter and has not created a substitute body to take its place. Land use control is a power of the Provincial Legislatures;²⁴ but the problem is at least national in scope.²⁵ As said in the introduction, Canada is experiencing a developing megalopolis along the shores of Lake Erie and seaward: the United States is also experiencing the same problem in the same area and elsewhere. It is only practical that Canadian planners are looking south to see what is being attempted in the United States. In doing so they may import solutions that are impossible of implementation in the United States because of the nature of its legal infrastructure but legal in Canada; however, the solution may be unfortunate for the reason that those adversely do not have the

²⁴British North America Act, 30 & 31 Vict., 1867, s. 92(13).

²⁵Lewis Mumford writes in the M.I.T. Press edition of Garden Cities of Tomorrow, at page 35;

In treating rural and urban improvement as a single problem, Howard [in 1898] was far in advance of his age...His Garden City was not only an attempt to relieve the congestion of the big city...it was equally an attempt to do away with that inevitable correlate of metropolitan congestion, the suburban dormitory...

Ian F. McHarg, Design with Nature, relates the following story by Loren Eiseley, at page 43:

Man in space is enabled to look upon the distant earth, a celestial orb, a revolving sphere. He sees it to be green, from verdure on the land, algae greening the oceans, a green celestial fruit. Looking closely at the earth, he perceives blotches, black brown, gray and from these extend dynamic tenacles upon the green epidermis. These blemishes he recognizes as the cities and works of man and asks, "Is man but a planetary disease?"

legal means by which to complain effectively. Planners should be careful to examine the solution from the perspective of affected minorities who would be unable to make their voices heard in Canada where they are vocal in the United States. Will the problems of the United States be lacking in Canada? I think not. The time to examine the problem is before the solution is adopted. One should adopt the best; but, is what is perceived today really the best?

APPENDIX A

SELECTED SECTIONS FROM THE ZONING BY-LAW OF RAMAPO, NEW YORK

Source: 24 Zoning Digest 99

Section 46-3 Definitions

Development Use, Residential

The erection or construction of dwellings on any vacant plots, lots, or parcels of land. It shall not include the alteration, repair, demolition, or maintenance of existing dwellings or construction or erection of structures accessory to dwellings.

Any person acting in such manner as to come within the definition of development use, residential, shall be deemed to be engaged in residential development which shall be a separate use classification under this ordinance and subject to the requirement of obtaining a special permit from the Town Board.

Developer, Residential

Any person (a) who, having an interest in land, causes it directly or indirectly to be used for residential development, or (b) who directly or indirectly sells, leases, or develops or offers to sell, lease, or develop, or advertises for sale, lease, or development any lot, plot, parcel, site, unit, or interest for a residential development use, or (c) who engages directly or indirectly or through an agent in the business or occupation of selling, leasing, developing, or offering for sale, lease, or development, a residential development use or any lot, plot, parcel, site, unit, or interest for a residential development use, and (d) who is directly or indirectly controlled by, or under direction or indirect common control with, any of the foregoing shall be deemed to be engaged in development use, residential.

Development, Agent

Any person who represents, or acts for or on behalf of a residential developer, in selling, leasing, or developing, or offering to sell, lease, or develop any interest, lot, plot, parcel, site, or unit for residential development use, except an attorney at law whose representation of another person consists solely of rendering legal services.

Capital Budget

The capital improvement program adopted by the Town Board pursuant to s. 99-g of the General Municipal Law for a six-year period of effectiveness for the development of the unincorporated area of the town in accord with the master plan and official map, establishing the order of priority for all capital projects as shown on the official map and master plan in order to provide for maximum orderly, adequate, and economical provision of transportation, water, sewerage, drainage, parks and recreation, schools, municipal facilities and structures, and other public requirements.

Capital Plan

The capital improvement program adopted by resolution of the Town Board for the seventh through eighteenth year period of effectiveness, for the development of the unincorporated area of the Town in accord with the master plan and official map, which shall establish two general orders of priority, the seventh through twelfth year, and the thirteenth through eighteenth year, for all capital projects as shown on the official map and master plan in order to provide for maximum orderly, adequate, and economical provision of transportation, water, sewerage, drainage, parks and recreation, schools, municipal facilities and structures, and other public requirements.

S. 46-13.1. Special Permit Uses--Town Board Residential Development Use.

A. General Considerations

The Town of Ramapo has been experiencing unprecedented and rapid growth with respect to population, housing, economy, land development, and utilization of resources for the past decade. Transportation, water, sewerage, schools, parks and recreation, drainage, and other public facilities and requirements have been and are being constructed to meet the needs of the Town's growing population, but the Town has been unable to provide these services and facilities

at a pace which will keep abreast of the ever-growing public need.

Faced with the physical, social, and fiscal problems caused by the rapid and unprecedented growth, the Town of Ramapo has adopted a comprehensive master plan to guide its future development and has adopted an official map and a capital program so as to provide for the maximum orderly adequate, and economical development of its future residential, commercial, industrial, and public land uses and community facilities including transportation, water, sewerage, schools, parks and recreation, drainage, and other public facilities.

In order to insure that these comprehensive and coordinated plans are not frustrated by disorganized, unplanned, and uncoordinated development which would create an undue burden and hardship on the ability of the community to translate these plans into reality, the following objectives are established as policy determinations of zoning and planning for the Town of Ramapo:

1. To economize on the costs of municipal facilities and services to carefully phase residential development with efficient provision of public improvements;
2. To establish and maintain municipal control over the eventual character of development;
3. To establish and maintain a desirable degree of balance among the various uses of the land;
4. To establish and maintain essential quality of community services and facilities.

The Town, through its master plan, official map, zoning ordinance, subdivision regulations, capital program, and complementary planning programs, ordinances, laws, and regulations has mandated a program of continuing improvements which is designed to insure complete availability of public facilities and services so that all land in the Town is capable of development in accord with proper planning. The haphazard and uncoordinated development of land without the adequate provision of public services and facilities available will destroy the continuing implementation and successful adoption of the program. Residential development will be carefully phased so as to insure that all developable land will be accorded a present vested right to develop at such time as services and facilities are available. Residential land which has the necessary available municipal facilities and services will be granted approval. Residential land which lacks the available facilities and services will be granted approval for development at such time as the facilities and services have been made available by the ongoing public improvement program or in

which the residential developer agrees to furnish such facility or improvement in advance of the scheduled program for improvement of the public sector.

These regulations are adopted pursuant to the authority of the Constitution of the State of New York, the Statute of Local Government, the Town Law, and the Municipal Home Rule Law of the State of New York by providing for comprehensive planning and zoning for the government, protection, order, conduct, safety, health, and well being of the persons and property in the Town and consistent with the purposes set forth in Article 16 of the Town Law in facilitating the adequate provision of transportation, water, sewerage, schools, parks, drainage, municipal facilities and structures, and other public requirements in order to encourage the most appropriate use of land throughout the Town as provided in the master plan, official map, capital program, laws, ordinances and regulations, and other comprehensive planning performed by the Town.

B. Special Permit Required for Residential Development Use

(1) Prior to the issuance of any building permit, special permit of the Board of Appeals, subdivision approval, or site plan approval of the Planning Board for residential development use, a residential developer or development agent shall be required to obtain a special permit from the Town Board.

(2) The provisions of this section shall not be applicable to subdivisions finally approved by the Planning Board and filed in the Rockland County Clerk's Office prior to the effective date of this section.

C. Procedure for Special Permit

(1) The residential developer or development agent shall be required to submit an application to the Administrative Assistant to the Boards and Commissions in such detail as shall be set forth in regulations established by the Town Board of the Town of Ramapo, including a map showing the location of all land holdings of the applicant in the same ownership in the immediate vicinity and the extent of the land proposed for development. Said Administrative Assistant shall review the application with respect to all of the standards set forth in s. 46-13.1D as to the availability of municipal services and facilities and projected improvements scheduled in the capital budget and capital plan of the Town. The Administrative Assistant may request reports from appropriate town, county, or municipal agencies, boards, or officials as may be required. Within forty-five

(45) days of the submission of the application, the Administrative Assistant shall report his findings in writing to the Town Board and the Town Clerk shall proceed to notice the application for public hearing at the first regular meeting of the Town Board not less than two weeks after the submission of the written report.

(2) The Town Board shall within thirty (30) days after conclusion of the public hearing render its decision. In the event of approval of the application without conditions the Town Board shall also render its determination as to the number of residential dwellings that shall be permitted to be built pursuant to the requirements of s. 46-13.1E.

D. Standards for Issuance of Special Permit

No special permit shall be issued by the Town Board unless the residential development has available fifteen (15) development points on the following scale of values:

(1) Sewers

- (a) Public sewers available in RR-50, R-40, R-35, R-25, R-15, and R-15S districts . . . 5 points
- (b) Package Sewer Plants 3 points
- (c) County approved septic system in an RR-80 district 3 points
- (d) All others 0 points

(2) Drainage

Percentage of Required Drainage Capacity Available

- (a) 100% or more 5 points
- (b) 90% to 99.9% 4 points
- (c) 80% to 89.9% 3 points
- (d) 65% to 79.9% 2 points
- (e) 50% to 64.9% 1 point
- (f) Less than 50% 0 points

(3) Improved Public Park or Recreation Facility Including Public School Site

- (a) Within 1/4 mile 5 points
- (b) Within 1/2 mile 3 points
- (c) Within 1 mile 1 point
- (d) Further than 1 mile 0 points

(4) State, County, or Town Major, Secondary, or Collector Road(s) Improved with Curbs and Sidewalks

- (a) Direct Access 5 points
- (b) Within 1/2 mile 3 points
- (c) Within 1 mile 1 point
- (d) Further than 1 mile 0 points

(5) Fire House

- (a) Within 1 mile 3 points
- (b) Within 2 miles 1 point
- (c) Further than 2 miles 0 points

All distances shall be computed from the proposed location of each separate lot or plot capable of being improved with a residential dwelling and not from the boundaries of the entire parcel. The Town Board shall issue the special permit specifying the number of dwelling units that meet the standards set forth herein.

E. Vested Approvals and Relief

(1) Vested Approval of Special Permit

(a) The Town Board shall issue an approval of the application for special permit vesting a present right for the residential developer to proceed with residential development use of the land for such year as the proposed development meets the required points as indicated in the scheduled completion dates of the capital budget and capital plan as amended for failing to meet such points then for the final year of the capital plan as amended. Any improvement scheduled in the capital budget for completion within one year from the date of application for the special permit shall be credited as though in existence on the date of application. Any improvement scheduled in the capital budget or capital plan more than one year from date of application shall be credited as though in existence as of the date of the scheduled completion.

(b) A developer may advance the date of authorization by agreeing to provide such improvements as will bring the development within the required number of points for earlier or immediate development. Such agreement shall be secured by either a cash deposit or surety bond sufficient to cover the cost of the proposed improvement, the form, sufficiency, and amount of which bond shall be determined by the Town Board.

(c) All approved special permits vesting a present right to future development shall be fully assignable without restriction.

(d) Nothing herein contained shall prevent such land from being immediately used for all other uses other than residential development use, as is authorized by the zoning ordinance.

(2) Relief

Any residential developer or development agent who has applied for a special permit from the Town Board pursuant to S. 46-13.1, shall be entitled as of right, to appeal within one year from the Town Board's determination granting the vested approval to the Development Easement Acquisition Commission, pursuant to Chapter 11 of the Code of the Town of Ramapo, for a determination pursuant to S. 11-4(B) of the Development Easement Acquisition Law as to the extent to which the temporary restriction on residential development use of the land shall affect the assessed valuation placed on such land for purposes of real estate taxation and such assessed valuation on such land shall be reduced as provided in the Development Easement Acquisition Law as compensation for the temporary restriction placed on the land.

F. Variances

(1) The Town Board shall have the power to vary or modify the application of any provision of s. 46-13.1 of this ordinance upon its determination in its legislative discretion, that such variance or modification is consistent with comprehensive planning for proper land use including the master plan, official map, capital budget, and capital plan upon which this ordinance is based and with the health, safety, and general welfare of the Town and its inhabitants.

(2) Upon receiving any application for such variance or modification, such application shall be referred to the Planning Board of the Town of Ramapo for a report and recommendation of said Planning Board with respect to the effect of the proposed variance or modification upon the comprehensive planning of the Town including the master plan, official map, capital budget and plan, existing ordinances, laws, and regulations and the health, safety, and general welfare of the Town and its inhabitants.

(3) All applications for variance or modification shall be filed with the Administrative Assistant to the Boards and Commissions who shall forward same within two weeks after receipt to the Planning Board for its report. Such report shall be made in writing and shall be returned by the Planning Board to the said Administrative Assistant within 30 days of such reference. The said Administrative Assistant shall forward said report to the Town Board and the Town Clerk shall proceed to notice the application for public hearing at the first regular meeting of the Town Board not less than two weeks after submission of the written report by the Planning Board. The Town Board shall render its determination within thirty (30) days after conclusion of the public hearing.

G. Fees

(1) The fee for each special permit application pursuant to s. 46-13.1(C) to the Town Board shall be Twenty-five Dollars (\$25.00) plus Ten Dollars (\$10.00) for each proposed dwelling unit, payable at the time of said application and are not refundable.

(2) The fee for each application for a variance pursuant to s. 46-13.1(F) to the Town Board shall be Twenty-five (\$25.00) Dollars plus Ten Dollars (\$10.00) for each proposed dwelling unit payable at the time of the application and are not refundable.

APPENDIX B

OFFICIAL EXPLANATORY NOTE TO ONTARIO BILL 128 (1973), THE PLANNING ACT, S.O., 1973, c. 5, s. 2(1)

The Bill provides for the preparation and implementation of a development plan for any area of land in Ontario designated by the Minister as a development planning area. The principal features of the Bill are the following:

1. When a development planning area has been designated by the Minister, he may cause a development plan to be prepared for such area.
2. One or more advisory committees may be established by the Minister to advise him on the preparation and implementation of any such plan.
3. Provision is made for consultation during the preparation of the plan with municipalities and other affected persons and organizations, and hearing officers will be appointed to receive representations concerning the proposed plan.
4. After consideration of all comments on and representations made concerning the proposed plan, the plan will be submitted to the Lieutenant Governor in Council and the plan as approved by that body becomes the development plan covering the area of land in Ontario defined in it.
5. Provision is made for any ministry, municipality or person affected by the plan to apply for an amendment to the plan, and the provisions of the Bill relating to consultation, hearings, the receiving of representations and the like, apply to the consideration of the application for the amendment.

6. When a development plan is in effect, municipalities in the area covered by it may not pass by-laws or initiate undertakings that conflict with the plan; in the event of conflict between the development plan and any official plan or zoning by-law in effect in the same area, the development plan prevails to the extent of such conflict.
7. Municipalities may be required to adopt official plans or pass zoning by-laws that conform to the development plan or to amend existing official plans or zoning by-laws to resolve any area of conflict with the development plan; provision is made for financial aid to municipalities required to do so.
8. The Province is empowered to acquire land in a development planning area for the purpose of implementing any feature of the development plan and to sell, lease or otherwise dispose of such land; provision is made for financial assistance to persons or corporations, including municipalities, who undertake a program or policy that implements the development plan.
9. Provision is made for undertaking a review of every development plan at intervals not exceeding five years and to any such review all of the provisions of the Bill respecting consultations, hearings, the receiving of representations and the like, apply.

APPENDIX C

SELECTED SECTIONS FROM THE CITY OF WINNIPEG

BY-LAW NO. 422/73

The City of Winnipeg, By-law no. 422/73. A By-law of the City of Winnipeg, to amend By-law No. 1117, The Metropolitan Development Plan, being a statement of the City's policy and general proposals in respect of the development or use of land in the City and the Additional Zone, deemed by the City of Winnipeg Act to be the Greater Winnipeg Development Plan for the City and The Additional Zone.

A.2.32 Objectives - Rural Areas and Areas of Limited Urban Expansion

- .1 To maintain and protect the productive agricultural areas surrounding the city.
- .2 To protect the natural resources of the city and the additional zone from erosion and pollution.
- .3 To further the principle of a compact economically-serviced urban area and to prevent uncontrolled urban fringe development.
- .4 To organize and direct non-farm development in order to achieve orderly and efficient growth in the fringe area of the city.

A.2.33 Policies - Rural Areas and Areas of Limited Urban Expansion

- .1 To prepare district plans for those areas where future limited urban expansion is expected and for the following village communities: Oak Bank, Dugald, Oak Bluff, Headinguy, Rosser, Grosse Isle, Middle Church, Bird's Hill.
- .2 To prevent urban expansion in the areas not intended for this type of development by means of development control and land-use control by-laws.

- .3 To direct and control limited urban expansion in suitable areas into which the extension of the existing water supply and sewerage collecting system of the City of Winnipeg is not anticipated; and that plate 15 be used as a guide for the enactment of land-use control by-laws. (Subject to provisions for zoning variances under the City of Winnipeg Act.
- .4 To develop subdivision requirements which are designed to maintain a basic development standard ensuring that all local services are available at a reasonable cost to the municipality and that in particular there is potable water available; that adequate sewage disposal facilities will be provided which will not cause or be a contributing factor to pollution of water resources; and that there is adequate surface drainage and no periodic flooding.
- .5 To locate only compatible uses as determined by land use control by-laws or development permission, in areas designated as limited urban areas. This would require generally...that such obtrusive operations and industries as found in fringe areas be controlled by the land use control by-law.
- .6 To establish by by-law standards for all private waste disposal systems in order to ensure that the required facilities will have adequate capacity and function properly, applicable to all development in the rural areas and areas of limited urban expansion.

C.9 Rural Areas and Areas of Limited Urban Expansion in the City and Additional Zone

C.9.1 Objectives - Rural Areas and Areas of Limited Urban Expansion

- .1 To maintain and protect the productive agricultural areas surrounding the city.
- .2 To protect the natural resources of the city and the additional zone from erosion and pollution.

- .3 To further the principle of a compact economically-serviced urban area and to prevent uncontrolled urban fringe development.
- .4 To achieve orderly and organized non-farm development in the fringe areas of the city.

C.9.2 The City of Winnipeg has planning jurisdiction not only in The City of Winnipeg but also in the area known as the Additional Zone which extends some five miles beyond the boundaries of the City as shown on Plate #3.1. This Additional area of jurisdiction is intended to allow the City of Winnipeg to regulate the haphazard semi-urban development which usually occurs on the fringes of urban communities.

C.9.3 Rural areas: There are certain areas within the City's boundaries and the Additional Zone where only rural development is proposed during the time and growth period of the Plan. Designation of these Rural Areas is based on existing knowledge of future requirements for land, and on the logical extension of services.

A major part of the area of planning jurisdiction will continue in rural or "open land use," which means that the productive farm lands will be maintained. The rural or "open land use" areas include farming and market gardening, land used for public and private recreational services, airfields and any other activities permitted in areas zoned for agricultural uses. These areas will be maintained and protected from unacceptable uses through the large minimum lot size requirements established by land-use control by-laws.

The concept of maintaining farms especially in the rural control area should be extended with respect to recognition and special provision for family farms in the land use control by-law. The main concern with these provisions should be to satisfy the planning authority that the family farm is being preserved.

C.9.4 Areas of Limited Urban Expansion: In order to accommodate some people who wish to live in a rural setting and not carry on farming activities certain areas within the City's boundaries and the Additional Zone have been designated areas of

limited urban expansion in order to provide for a variety of small lot, non-farm, residential developments. The direction and control of development in these areas will be through land-use control and development control by-laws. The basic control will be by minimum lot size and width requirements, such as 5 acre, 2 acre, and 1/2-acre lots, which will offer a variety of alternatives for residential living while still maintaining some "rural character." The Limited Urban Expansion Areas have for the most part; good ground-water, are not subject to periodic flooding, have soil that is capable of handling septic fields or other forms of sewage disposal systems and are not prone to ground-water pollution.

There is still a possibility that within the areas of limited urban expansion there may be local sectors not suitable for residential uses due to such functions as local flooding, a high water table, soil subject to groundwater pollution, or other adverse factors which may be detrimental to development. Such types of problems should be brought to light in the new land use control by-laws or development permission.

- C.9.5 Plate 15 indicates three main development categories for purposes of general development control; urban areas, limited urban areas, and rural areas. The urban areas represent the built up portion of the city which includes the vacant lands that are expected to develop within the time and growth portion of the Plan. The Limited Urban and Rural Areas represent fringe areas of the city and land use control in these areas should be aimed at regulating haphazard urban sprawl. The control measures and the proximity of these areas to the developing city means that in many cases the limited Urban and Rural Areas could be considered as Holding or Urban Reserve Areas. In the future, changes in these land designations to the Urban category could occur where there is an obvious demonstrated need for more urban land. The new areas of land under the urban designation should reflect the potential for a more intensive use of the land brought about by urban expansion in accordance with the stated city growth policies.

- C.9.6 As part of the planning process land use control or development control and private waste disposal by-laws should be adopted as necessary in order to reinforce the basic planning policies set out in this plan.
- C.9.7 The Additional Zone contains existing village communities designated as areas of limited urban expansion where some people have indicated a preference to live with a somewhat lower standard of services than the City. These areas offer rural-residential living and may be allowed to expand as the demand dictates. However, expansion of these villages should be based on the establishment of adequate services and should proceed according to an adopted district plan in order to ensure that all persons in that community receive adequate protection from pollution and other problems related to uncontrolled development. Usually the expansion of these communities will be in the form of relatively small lots with the size of the lots and the extent of the expansions varying between villages and depending on the extent of services offered. The servicing of the Villages will not be through extensions of the City's services but will be similar to the self-contained systems used by small communities in other rural parts of the Province.
- C.9.8 Administration of development in the Additional Zone is a complex matter requiring special coordination between the City of Winnipeg and several rural municipalities. In order to carry on this coordinating activity an Additional Zone Committee has been established consisting of members from both the Additional Zone municipalities and City Council. Such a committee should be continued to ensure that both the City and the rural municipalities are afforded the opportunity to participate in development decisions concerning fringe development.
- C.9.9 The concepts included in this Section are based on an earlier technical report, "Development Plan Report - The Additional Zone" published August 22, 1961, which is supplement #5 of this plan. These concepts have been expanded to include further details on development in the Additional Zone in a City of Winnipeg working paper, "Draft Report on the Areas of No Urban Expansion for the City of Winnipeg," March, 1973.

C.9.10 Policies - Rural Areas and Areas of Limited Urban Expansion

- .1 To prepare district plans for those areas where future limited urban expansion is expected and for the following village communities: Oak Bank, Dugald, Oak Bluff, Headingley, Rosser, Grosse Isle, Middlechurch, Bird's Hill.
- .2 To prevent urban expansion in the areas not intended for this type of development by means of development control and land-use control by-laws.
- .3 To direct and control limited urban expansion in suitable areas into which the expansion of the existing water supply and sewage collection system of The City of Winnipeg is not anticipated; and that plate 15 be used as a guide for the enactment of land use control by-laws. (Subject to provisions for zoning variances under The City of Winnipeg Act).
- .4 To develop subdivision requirements which are designed to maintain a basic development standard ensuring that all local services are available at a reasonable cost to the municipality and that in particular there is potable water available; that adequate sewage disposal facilities will be provided which will not cause or be a contributing factor to pollution of water resources; and that there is adequate surface drainage and no periodic flooding.
- .5 To locate only compatible uses as determined by land use control by-laws or development permission in areas designated as limited urban areas. This would require generally that such obtrusive operations and industries....as found in fringe areas be controlled by the land use control by-law.
- .6 To establish by by-law standards for all private waste disposal systems in order to ensure that the required facilities will have adequate capacity and function properly, applicable to all development in the rural areas and areas of limited urban expansion.

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