THE ZONING GAME: ALBERTA STYLE

FREDERICK A. LAUX*

Zoning has had a checkered existence in the growth of society, arising originally in tort in the private remedies of nuisance and in the use of the restrictive covenant and actions for breaches thereof. Professor Laux cites the Industrial Revolution as having a profound effect on the society of the eighteenth century, with a corresponding result of rendering ineffective the private controls of land use. From this ineffective control has sprung a zoning system introduced by various levels of government, Alberta being no exception. The author examines the system of zoning in Alberta today to evaluate whether said system achieves comprehensive planning. The characteristics of a typical zoning by-law; zoning administration and adjustments; enforcement of the zoning by-law; and the methods of judicial review of the zoning process are examined by the author with special reference to the zoning by-laws of several municipalities in Alberta, and by reference to the relevant authorities on zoning and land use.

I. INTRODUCTION

In the early history of organized society people, whether pursuing an agrarian or craftsman way of life, lived near their work. The two classes, the haves and the have-nots, were separated from one another in space as well as in wealth. The Industrial Revolution materially altered these conditions. Factories began to dot the landscape and people took to earning their livelihood in one place while living in another. The have-nots began to acquire wealth. One important consequence was that the two classes emerged as several.

Dictated in part by human nature, the populace gradually developed a set of values relative to its physical environment: no one of consequence ought to be required to live in close proximity to the type of factory that emitted noxious material, smells or sounds; people ought to live separate from their work places lest their repose be interrupted by unpleasant reminders of toil; and one should live in a community surrounded only by persons of one's own social and economic class.

These and related values were initially given legal effect through the medium of tort law and the restrictive covenant. One simply did not erect a brick factory next to a private residence or a hotel unless prepared to defend a nuisance action. Similarly, one insured the quality of one's neighbours by acquiring a large tract of land, building a home in the centre and selling off surrounding parcels subject to restrictive covenants requiring a particular use by a particular social and economic class of persons.

The rapid population growth of North America in the last two decades of the nineteenth and the early part of the twentieth centuries, resulting from high birth and immigration rates along with a drastic reduction of the death rate, transformed many centres into overcrowded, blight-ridden enclaves. The dislocation of land use became the rule rather than the exception. Previously adequate private land use controls proved to be totally inadequate to bring order from the chaos. Of particular concern to those with roots in the community

* B.A., LL.B., LL.M., Associate Professor, Faculty of Law, University of Alberta.

was the fact that formerly homogeneous single-family residential districts were being threatened by encroaching multiple-family structures, which in turn attracted both "undesirable" occupants and business enterprises that thrived in high density areas. In addition, the advent of the automobile generated high volumes of dangerous and frustrating traffic. This created a situation which was particularly detrimental to those districts exemplifying an uncontrolled residential-commercial mix.

In response to these conditions and in the hope that the former "good life" could be restored, it was a simple matter for local authorities to draw lines on municipal maps dividing the municipalities into districts or zones and limiting the uses and methods of use in each zone. From this humble attempt at environmental control has sprung the great zoning game[1] which has perhaps bemused and chagrined local authorities more than any other municipal function during the last half century. The municipalities of Alberta have been no exception.

II. ZONING AND COMPREHENSIVE PLANNING

The constitutional basis of the zoning power in Canada rests largely in subsections (8), municipal institutions; (10), local works and undertakings; and (14), property and civil rights, of section 92 of the British North America Act and is, therefore, exercisable by the provinces.[2] Pursuant to that power, the Alberta Legislature has enacted a number of statutes directly related to land use control, beginning with the Town Planning Act of 1913 and culminating in the Planning Act of 1963.[3] The power to zone is there expressly delegated to municipal councils:[4]

> 119. A council may pass a zoning by-law to regulate the use and development of land within its municipal boundaries and for that purpose may divide the municipality into zones of permitted land use classes, of such number, shape and area as it considers advisable, prescribe the purposes for which buildings and land may be used, and regulate or prohibit the use of such land or buildings for any other purpose.

In the early days of planning in Alberta, local authorities exercised

---

[1] Babcock, *The Zoning Game* (1966) gives an excellent account of the behind-the-scenes activities in land use planning, including a consideration of the politics of zoning. Most of the piercing comments contained therein are apropos the Canadian scene.

[2] Parliament, of course, has certain powers to regulate land use which is incidental to its power to make laws in relation to such matters as inter-provincial communications and transportation. An example of this incidental power is found in the Aeronautics Act, R.S.C. 1952, c. 2, s. 4 and regulations made thereunder relating to zoning of land around airports. In contrast to the United States, the constitutionality of zoning has never been seriously questioned in Canada. In that country the challenge to the constitutionality of zoning regulations was based upon the "due process" clause of the Federal Constitution and upon similar provisions in many state constitutions or provisions such as is contained in the New York State Constitution which provides that "private property shall not be taken for public use without just compensation". Many state courts took the view that zoning ordinances so restricted the use of private lands that they constituted a taking without due process of law. However, the United States Supreme Court in *Village of Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926) firmly established comprehensive zoning as constitutional on the basis of the police power. However, although comprehensive zoning in general was thereafter regarded as valid, specific regulations or their application to particular parcels of land were still subject to and have been declared *ultra vires* on the basis of either the federal constitution or state constitutions. The position is best summed-up by the Supreme Court of Illinois in *La Salle National Bank* v. *Chicago* 125 N.E. 2d 609 (1955):

> The police power... is that power required to be exercised in order to effectively discharge, within the scope of constitutional limitations, its paramount obligation to promote and protect the health, safety, morals, comfort and general welfare of the people... While a city may thus enact zoning ordinances imposing burdens and restrictions upon private property and its use, the governmental power so delegated to interfere with the general rights of property owners is not unlimited. An exercise of power is valid only when it bears a reasonable relation to the public health, safety, morals or general welfare...

[3] S.A. 1963, c. 43, as amended S.A. 1964, c. 68; S.A. 1965, c. 70; S.A. 1967 c. 60; S.A. 1968, c. 77; S.A. 1969, c.86; S.A. 1970, c.89.

[4] The term "municipal councils" includes the elected councils of cities, towns, villages, summer villages, municipal districts and counties as constituted under the Municipal Government Act, S.A. 1968, c. 68 and the County Act, R.S.A. 1955, c. 64.

the zoning power in an ad hoc fashion without particular regard to any overall plan to regulate the future growth of the community. The zoning by-law together with the zoning map was nearly the sum total of land use planning. By contrast, modern zoning is based upon and is in reality the legal device which gives effect to a comprehensive planning program that attempts to set the pattern of land use well into the foreseeable future—a program that is local, regional and provincial in scope.[5]

1. *The Regional Plan*

In recognition of the fact that, although it is expedient for political and other reasons that decisions affecting the right of the individual to use his land as he wishes and affecting the physical, social and economic environment of a community ought to be made primarily at the local level, effective planning cannot be carried on by local government units in isolation from one another, the Planning Act provides for the establishment of what is termed regional planning commissions.[6] These commissions, of which there are presently seven in Alberta,[7] are comprised of individual representatives of those member local government units that fall within the boundaries of the region over which the particular commission has jurisdiction together with appointed individuals representing the general public and the provincial government.[8] The budgeting of a commission's annual operations is financed by annual subscriptions of member municipalities based upon an agreed sliding scale of rates which is matched by the provincial government on a dollar for dollar basis. The functions of a regional planning commission are set out in section 14 of the Act and include, *inter alia:* the preparation and implementation of regional plans and preliminary regional plans, the giving of advice and assistance to municipalities within the regional planning area with respect to planning in general and, more particularly, the assisting of municipalities in the preparation of general plans, development control by-laws[9] and zoning by-laws.[10] In order that it carry out its functions efficiently, a commission is entitled to and does hire professional planners and other employees and consultants as circumstances dictate.[11] It also has ready access to professionals in provincial government departments which it can consult as the need arises.

Each regional planning commission in the province is required by the Act to prepare and adopt a preliminary regional plan within a prescribed period of time[12] and each may undertake to prepare and adopt a regional plan.[13] The latter, in essence, is merely a more re-

[5] Current concern over pollution is beginning to give land use planning a national dimension as well.

[6] S.9.

[7] Battle River, Calgary, Edmonton, Medicine Hat, Oldman River, Peace River and Red Deer Regional Planning Commissions.

[8] S. 10.

[9] Development control is a method of land use control much like zoning, discussion of which is beyond the scope of this paper. For the statutory provisions see The Planning Act, ss. 100-113. For a discussion of these provisions, generally, see Milner, *An Introduction to Zoning Enabling Legislation*, (1962) 40 Can. Bar Rev. 1 at 50-56.

[10] Another important function of regional planning commissions relates to their role as an approving authority for subdivision applications: The Subdivision and Transfer Regulations. 215/67.

[11] S. 14(2) (a).

[12] S. 71 (2) A preliminary regional plan shall be completed in its entirety before January 1st, 1972 or such further time as may be prescribed by the Board.

[13] S. 67.

fined version of the former and seeks to map out the future development of the region in a more detailed fashion than the preliminary regional plan, which is intended to be an interim measure until such time as a full-blown regional plan can be prepared and adopted. The feature common to each is that the plan must consist of a map "showing the division of all or part of the land in the regional planning area into areas of permitted land use classes or permitted densities of population, or both,"[14] plus a schedule prescribing the uses of lands and buildings or population densities, or both, permitted within each of those areas.[15] When a preliminary regional plan or regional plan has been adopted by a commission as prescribed by the Act,[16] it does not take effect until approved by the Provincial Planning Board,[17] thus bringing in a province-wide feature to land use planning.

The significance of preliminary regional plans and regional plans to the exercise of the zoning function of local authorities is made apparent by sections 79 and 91 of the Act which positively require the zoning by-laws of each municipality within the region to conform to any preliminary regional plan or any regional plan which is either in preparation or has been adopted by the regional planning commission. Hence, no municipality can lawfully exercise its zoning power in isolation and without regard to its neighbouring municipalities.[18]

2. *The General Plan*

Section 95 of the Planning Act provides that a municipal council may resolve to prepare a general plan, a type of plan which has been described as a constitution for all future development within a city. It constitutes a plan for the division of land between public and private uses, specifying the general location and extent of new public improvements, such as roads, schools, police stations, fire stations, recreational facilities and, in the case of private development, the general distribution of land in the municipality amongst various classes of uses such as residential, commercial and industrial. A plan of this type is normally designed for a considerable period into the future, fifteen to fifty years. Consequently, it is based upon a comprehensive and detailed survey of things as they are at the time of its preparation, such as the distribution of existing developments,

---

[14] Ss. 69 (c) (i) and 72 (a).

[15] Ss. 69 (c) (ii) and 72 (b). These land use classifications are similar to those found in a zoning by-law, although much more general in nature. For example, the portion of the Edmonton Regional Planning Commission's preliminary regional plan relating to the metropolitan part of the region contains eight use classifications: "general urban", "agricultural general urban reserve", "industrial", "metropolitan recreational", "country residence", "small holdings", "low density agricultural" and "airport". No attempt is made to delineate on the map the different type of uses permitted in each of these classifications. This is left to the individual municipality to be effected in its development control and zoning by-laws.

[16] Ss. 74-77.

[17] S. 78. The Provincial Planning Board is also a creature of the Planning Act consisting of full-time civil servants whose function, among other things, is to coordinate planning in Alberta and to hear appeals from certain lesser planning agencies: ss. 5-8.

[18] The importance of this feature of the Planning Act becomes more apparent by considering a hypothetical example. Municipality A lies directly to the east of Municipality B. The western portion of A is zoned for residential use and is fully developed. Municipality B decides to zone its undeveloped lands on its eastern boundary, which abuts on municipality A, to heavy industrial. If this were permitted the effect on A's residential lands would, due to prevailing winds, be disastrous. However, if a regional plan has been adopted, and assuming it was properly considered, it would impose use restrictions on the lands lying to the west of Municipality A to insure compatibility with the use already effected on A's western perimeter. Thus, if B attempted to zone its eastern lands in the foregoing fashion it would doubtless be in conflict with the regional plan and, therefore, the zoning would be invalid.

both public and private, the trend toward redistribution and growth of population, industry and business, estimates of future trends of growth and distribution of population, industry and the like. From this type of data emerges a document which allots the territory of the city so as to provide the necessary public facilities and the necessary area for private development corresponding to the needs of the community, present and prospective. Included in this document by statutory prescription and of particular significance to the exercise of the zoning power by a municipality which has adopted such a plan is a map showing the division of land covered by the plan into areas of permitted land use classes.[19] The land use designations allotted to each district are described in general terms, but with a slightly more detailed breakdown of types of uses then appears in the regional plan.[20] These use descriptions must, however, conform to the uses allotted to a particular parcel of land by any preliminary regional plan or any regional plan that is under preparation or that has been adopted by the regional planning commission having jurisdiction over the area in question.[21] Similarly, it would appear that once a municipal council has adopted a general plan by by-law[22] any zoning by-law, existing or future, must be consistent with the plan.[23]

Thus, when all the steps envisaged by the Planning Act relating to regional planning and the preparation and adoption of a general plan have been taken, a zoning classification for any given parcel of land within a municipality will have been arrived at with due regard for land uses, present and prospective, in the rest of the municipality, the planning region within which it is located and even land uses in neighboring regional planning areas, having regard to the veto powers of the Provincial Planning Board contained in section 78 of the Act.[24]

III. *CHARACTERISTICS OF A TYPICAL ZONING BY-LAW*

First and foremost a zoning by-law aims at regulating the type and method of use of land and buildings. This is accomplished by dividing the area of land falling under the by-law into districts or zones and prescribing in some considerable detail the uses and methods of use permitted or prohibited in each zone. The underlying purpose of segregating different types of uses can be summed up as follows:[25]

1. To prevent the mixing of incompatible uses which may otherwise have such deleterious effects on one another as to depreciate property values and desirable environmental features; and

---

[19] S. 96 (c) (i).

[20] For example, the Edmonton General Plan, which at the time of writing has yet to be adopted by the Edmonton city council, divides the city into districts of low density residential; medium density residential; high density residential; commercial; downtown wholesale and industry; industrial, railway and other warehousing; government, public and semi-public; parks, open space, private recreational, *etc.* uses.

[21] S. 91.

[22] Quere whether a municipal council could adopt a general plan by resolution.
s. 97 (1) A council *may* adopt a general plan by by-law ... [Emphasis added]

[23] S. 120 (a). Section 99 (b) of the 1963 version of the Planning Act contained the following:
The council or any other public authority shall not enact any by-law, ... that is inconsistent or at variance with the general plan.
This subsection has since been removed.

[24] This, of course, does not accurately describe the zoning process as it relates to stable older sections of a municipality. For these areas the land use designation allotted by the regional and general plan is dictated by uses existing at the time of preparation of the plans. These existing uses have in turn been prescribed by a zoning by-law whcih preceded regional and general planning. Thus, in the final analysis, for many parts of a municipality zoning dictates the terms of a regional or general plan rather than vice versa.

[25] Goodman and Freund, *Principles and Practice of Urban Planning* (1968) at 424.

2. To insure that uses requiring expensive public service facilities such as major utility lines and high volume transportation arteries are restricted to those areas where these facilities exist or can be provided for most efficiently and economically.

Expressed in this way, the typical Alberta zoning by-law conforms to the avowed purpose of the Planning Act from which it derives its essential validity:

> 3. The purpose of this Act is to provide means whereby plans and related measure-s may be prepared and adopted to achieve the orderly and economical development of land within the Province without infringing on the rights of individuals except to the extent that is necessary for the greater public interest.

Before considering the four or five major types of zones or districts which are commonly created by a zoning by-law, it is well to point to the distinction that must be borne in mind between "permitted uses" and "conditional uses",[26] a distinction which takes on particular significance in relation to the scope of administrative appeals from the decisions of zoning administrators.[27] A permitted use or "permissible use" or "special use"[28] as it is sometimes referred to, is that type of use to which all lands in the particular zone may be put almost as of right. For example, if a by-law lists a dressmaker's shop under the heading of permitted uses in a commercial zone an owner of land in that zone upon application is entitled, provided that his intended development conforms in other respects to the zoning by-law, to a permit without regard to where the land is situated in that zone and the issuance of that permit is not dependent to any appreciable extent on the exercise of a discretion by the decision making authority.[29] On the other hand, if a use is listed as a conditional use an owner will find that the decision making authority is given almost total discretion as to whether or not to approve an application for a development. He will also find, at least in Alberta, that the decision, whether it approves or rejects an application for a conditional use, is subject to appeal to an administrative board either by himself or some other interested party.[30]

Those uses which fall under the heading of permitted uses in a zoning by-law are considered to be of the type that are clearly compatible with one another and, therefore, unlikely to affect neighboring properties adversely. By way of contrast, conditional uses have been classed as such because, by their nature, applications for permits to effect such uses require special consideration as to their proper location in relation to adjacent uses or to the development of the community as a whole. This special consideration is necessitated by the fact that, although it is recognized in the by-law that such uses are desirable in the zone in question, the use will likely, if permitted, have a detrimental effect on the character of the im-

[26] S. 120 (b) requires that a zoning by-law "shall prescribe for each zone established the uses of lands and buildings that are *permitted* or *conditionally permitted* [emphasis added] or prohibited therein". Ss. 124 (1) and (3) carry forward the distinction by requiring one procedure to be followed in processing an application for a "conditional use" and another for a "permissible use". Finally, section 128 differentiates between the two types of uses by conferring certain rights of appeal from decisions relating to conditional uses, but not from decisions relating to the other.

[27] *Infra*, at 285.

[28] City of Edmonton Zoning By-law 2135, s. 2 (78A).

[29] In the Edmonton Zoning By-law it seems the only discretionary aspect left to the deciding authority relates to architectural design: s. 7 (1); and to whether or not satisfactory arrangements have been made by the applicant for the supply of water, power, sewer, etc.; by s. 3(4) (a).

[30] S. 128. *Infra*, at 288.

mediate neighbourhood unless it is wisely located in the zone. Consequently, an elaborate procedure is formulated to insure that the decision which is taken reflects what is considered to be in the best interests of all concerned. Needless to say, a use which is not listed under either permitted uses or conditional uses for a given zone is, by implication, prohibited.[31]

A further distinction is frequently made in zoning by-laws between two different types of permitted uses. One type is permitted anywhere in the zone, while the other continues to be a permitted use only so long as the land upon which the use is to be effected is located in a certain relationship to adjoining zones in which an entirely different type of use is permitted, otherwise it is usually listed with the conditional uses. Hence, the latter type of permitted use is termed a "permitted transitional use" and is one outgrowth of what is commonly termed "buffer zoning". An illustration is frequently to be found in the zoning classification R-2, a two-family dwelling residential district in which such uses as kindergarten, parking areas and public buildings may be listed as "permitted transitional uses" for property which abuts upon lands zoned commercial or industrial and are listed as conditional uses for other lands in the R-2 zone not so situated.

1. *Residential Districts*

The typical zoning by-law creates five or six different residential zones ranging from R-1, in which the major permitted use is single-family detached dwellings, to R-5 or R-6 classifications in which the major permitted use is multi-story high density apartments. The segregation of different residential uses on the basis of intensity of use has been predicated on a variety of premises, many of which no longer reflect prevailing social values and modern construction techniques. The proponents of strict segregation of types of residential use according to density of population support their position by contending that multiple-family developments in single-family neighbourhoods tend to diminish property values, that they tend to cut off light and air from neighbouring single-family dwellings, that they create traffic congestion and parking problems, that they overtax utility systems and public services such as schools and playgrounds and, in general, are aesthetically displeasing.[32] In communities in which such views prevail, multiple-family housing is relegated to areas which are not considered desirable for single-family units—they are placed adjacent to commercial or industrial districts or along major traffic arteries to act as a buffer between such uses and the single-family zone.[33] It is interesting to note, however, that the zoning by-laws of both major cities in Alberta adopt the "cumulative"

[31] This proposition is qualified by s. 124 (3):
A zoning by-law may provide that a development officer or municipal planning commission may determine that a specific use of land or a building that is not provided for in a zone in the by-law is similar in character and purpose to another use of land or a building that is included in the list or permissible or conditional uses prescribed for that zone in the by-law.

[32] Some of these arguments have considerably less force when multiple family units are interspersed with single-family units in new subdivisions. However, they often serve to block such developments on vacant parcels of land located in established single-family areas. Two commentators, Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, (1963) 111 U. Pa. L. Rev. 1040, express what they consider to be the true reasons for the suburban home-owners' resistance to the encroachment of apartments: apartments attract persons of the "lower classes" and they bring in transients who have no interest in the neighborhood.

[33] *See, e.g.*, Edmonton By-Law, s. 21 (3) (k).

zoning approach which in a residential zone permits all uses permitted in the preceding classification. Thus, R-1 uses are permitted in R-2 zones, R-1 and R-2 uses in R-3 zones and so forth. It would seem that the councils of both cities are determined to stop encroachment of more intense residential uses in the districts zoned for less intense uses, but they do not have equal concern over protecting more intensive use zones from encroaching less intense uses. The conclusion one naturally arrives at is that the foregoing expressed reasons for segregating different types of residential uses are given effect primarily, if not exclusively, to protect the suburban enclaves of single-family homes.

Even within the single-family land use classification there are usually a number of sub-classifications. For example, the Edmonton Zoning By-law provides for four distinct types of single-family detached dwelling zones designated RRA, RRB, RRC, and R-1, representing, in descending order, the degree of "exclusiveness" of each district. If one has doubts whether or not zoning is one of the most effective methods of segregating people according to their social and economic standing one need merely apply for a permit to build a fifteen thousand dollar house in a RRA district.[34]

In the development of any large urban area certain types of non-residential uses tend to be associated with residential neighbourhoods. Thus, it is not unusual to find provisions in zoning by-laws for the inclusion as conditional uses of schools, libraries, churches, health clinics, certain home occupations and the like in residential zones. Again, the "higher" the residential use the fewer conditional uses will be listed for the zone, until one arrives at the RRA level in which no conditional uses are permitted whatever.

2. *Commerical Districts*

The standard zoning by-law creates a number of categories of commercial zones designated as C-1, C-2 and so on, the object again being to segregate business uses in accordance with such factors as, for example, physical size of operations; the volume and nature of traffic they generate; their aesthetic qualities; and the amount of noise, odor, and physical matter they emit. Hence it is not unusual for a by-law to permit a motel or car distributorship or drive-in restaurant in one commercial zone but not in another. Similarly, a use which is classed as conditional in a C-1 zone may be classified as a permitted use in a C-2 zone.

If a particular community regulated by a zoning by-law is relatively small, commercial zones are generally restricted to the central business area of the community and along several major traffic arteries. However, the larger the community the more problems that arise in designating commercial zones. For obvious reasons, the larger cities must provide shopping services within reasonable proximity to the re-

[34] In Edmonton the minimum ground floor area permitted of a one-story dwelling in an RRA zone is 1200 square feet: Edmonton By-law, s. 18 (b) (i). In Calgary the equivalent type of district is designated RR-1 and the minimum floor area for a one-story dwelling in such a zone is 1400 square feet: Calgary Zoning By-law 7500, Table D. (Note that the Calgary By-law was declared invalid in *City Abattoir* v. *Council of City of Calgary* (1969) 70 W.W.R. 460 (Alta. C.A.). An appeal of this decision is pending before the Supreme Court of Canada at the time of writing. Although the Calgary By-law is not in effect at present it will be referred to from time to time for illustrative purposes.)

[35] For example, in the Edmonton By-law laundry shops, service stations, showrooms and poolrooms are listed under conditional uses in a C-1 zone and are permitted uses in a C-2 zone: ss. 25 (3) and 26 (1).

sidential subdivisions springing up on their outer fringes, subdivisions which are often as much as five or ten miles or thirty minutes to an hour travelling time from the downtown business core. Since it is difficult if not impossible in advance of development to designate a particular location as the shopping centre district for the area, local authorities faced with the problem of rapidly expanding residential suburbs simply designate the undeveloped fringe areas in a general way and await proposals from developers.[36] When a developer comes forward with a plan of subdivision which includes proposals for the construction of a local, district or regional shopping centre, the local authority will, if the proposal meets with its approval after considering all things, simply rezone the area selected as the shopping centre site to an appropriate commercial classification.[37]

3. *Industrial Districts*

Consistently, with the assumption that residential uses rank first and commercial uses second in the zoning-value scale, all or most of the useful land in an urban municipality was restricted to residential and commercial uses except for those lands already occupied by industry or unsuitable to "higher" uses. This resulted in scattered residential development of land particularly suited for industiral development, and subsequent zoning amendments to provide for a new industry or the expansion of an existing one. If land was set aside for industrial purposes no distinction was made between different types of industrial uses—any business uses not provided for in the commercial zones were automatically relegated to the industrial zone.[38]

The modern approach has been to affirmatively provide lands particularly suited for industrial development rather than choosing residential and commercial lands first and designating the remainder industrial. In addition, current zoning by-laws, as in the case of residential and commercial districting, provide for two or more industrial districts in recognition of the fact that all industries are not alike and that some are capable of injuring others. The distinction is usually made between light industry and heavy industry. For example, the Calgary Zoning By-law creates three distinct industrial zones labelled "M-1 Restricted Light Industrial Districts", "M-2 General Light Industrial Districts", and "M-3 Heavy Industrial Districts", and lists in detail the uses permitted and conditionally permitted in each district, with the general proviso that a use which in the opinion of the Planning Commission is likely to become a nuisance by reason of the emission of odor, dust, and so forth is not to be carried on in an M-2 district. There is also a further proviso that an industry is not to be permitted in any industrial zone in the city if the Planning Commission is of the opinion that the nuisance or hazard created by the industry "is of such a nature that the safety

[36] *Infra*, at 278.

[37] *Infra*, at 300.

[38] To choose an example at random, the Village of Sangudo Zoning By-law illustrates this approach. The by-law creates one industrial zone, M-1, and permits "any manufacturing, processing, repairing, storage, warehousing, distribution or servicing establishments [which] will not have restrictive effects on the industrial district in which it is located and which by its operation will not cause an objectionable or dangerous condition to exist beyond any building or area, wherein such conditions may be produced. . . ." Presumably any industry not capable of meeting these conditions would be precluded from setting up in Sangudo.

and comfort of the inhabitants of Calgary or any area thereof is endangered by the use."[39]

Another approach currently in vogue is to abandon the listing of specific industrial uses permitted in each zone and to permit any industry to locate in a particular zone provided that certain performance standards are met. Typical standards imposed are in terms such as permitted levels of smoke, dust, noise, glare, and radiation, and the limits are stated in qualities and quantities capable of measurement. Hence, a by-law does not permit, as an unqualified use, a metal fabricating plant in a particular district, but will simply permit it if it is capable of operating without emitting smoke which measures beyond a certain level at the property line, or without producing noise beyond a certain specified number of decibels, also measured at the property line of the site. In this way the zoning by-law assures some measure of protection for adjacent properties. The Edmonton Zoning By-law is an illustration of the employment of the performance standard technique of delineating uses in industrial districts, although it differs in some important respects from the method outlined in the foregoing. The by-law creates M-1, M-2 and M-3 zones. The permitted use in the M-1 zone is any industrial use which does not "cause nor permit any external objectionable or dangerous condition" to emanate beyond the building in which the activity is conducted.[40] The objectionable or dangerous conditions include, *inter alia,* noise, vibration, smoke, dust, odor, and toxic matters. In the M-2 zone these emissions are permitted beyond the building but not beyond the property lines of the site on which the industry is situated[41] and in the M-3 zone the limit of emissions is the boundary of the zone itself.[42] The inherent defect in employing the performance standard technique, or a variation thereof, is, of course, that it is difficult if not impossible in advance of the construction and operation of an industry to determine whether or not the performance standards prescribed by the by-law will be met; particularly with respect to new industries or older industries which are adopting new and untried methods of operation. If by-law provisions of this type were to be strictly enforced, it would almost be incumbent on administrators to issue development permits only on a condition to the effect that if the industry in question exceeds the standards of the by-law when it goes into operation, the permit is automatically revoked. In practice, however, administrators use what information is available to them to determine whether the proposed industry is likely to exceed the standards for the zone in which it is to be located and, if not, a permit is issued. If, when the industry goes into operation, it turns out to be exceeding the prescribed performance standards the owner is technically in breach of the by-law and may find himself in difficulty if the local administration effects a change in policy.[43]

[39] Calgary By-law, Tables N, O and P.

[40] Edmonton By-law, s. 28 (1).

[41] *Id.* s. 29 (1).

[42] *Id.* s. 30 (1).

[43] One of the many problems created by the Edmonton By-law with respect to industrial uses is that no provision is made for the location of an industry within the city limits which in fact emits pollutants that go beyond the boundary of the zone in which it is located. Does this mean that no such industry may be located in the city and that if a permit were issued for such an industry it would be subject to attack by interested parties as being unauthorized by the by-law? What about existing industries that pollute neighboring residential and commercial districts? Should someone advise militant anti-pollution groups about section 10 of the by-law, the penalty section?

4. *Open Land Districts*

The boundaries of most urban municipalities at any given time extend well beyond the outer reaches of the fully developed residential or industrial subdivisions. It is vital for the municipality to exercise stringent control over the resulting open spaces to prevent piece-meal development which might later impede the economical development of the remainder. Allotting detailed specific zoning designations to these open spaces is not likely to be the answer since it cannot be foreseen with precision whether the demand will correspond to the zoning. The desirable and most frequently adopted solution in Alberta is for the municipality to apply a general zoning classification such as agricultural general-urban, AG-U,[44] which permits uses for agricultural purposes, public parks, and municipal and public utilities development; none of which uses is likely to interfere with the ultimate conversion of the area into more specific residential, commercial or industrial uses. When the demand for full-scale development presents itself it is a relatively simple matter for the municipal council to rezone the area in accordance with an acceptable plan of development.

It might also be noted in passing that in light of the ever-increasing demand for space of the urban complexes it is essential that their future land needs be protected and assured. To this end the regional planning commissions play a vital role in land use planning in areas which ultimately may be annexed to a city or town but which are currently beyond the legislative control of the city or town. If a rural municipality bordering upon a city were permitted to regulate land use within its territorial boundaries without regard to its neighbour's future requirements, ultimate annexation and development by the city would prove excessively costly and then not particularly conducive to a desirable physical environment—expanding residentially into an area already dotted with houses, nurseries, auto-wrecking yards, chicken farms and the like, is the type of fate one only wishes upon his worst enemies.

5. *Miscellaneous Districts*

In addition to the foregoing types of districts, most comprehensive zoning by-laws create districts for recreational, public park and public service uses. A particular problem arises with respect to creation of these zones on the zoning map when the land to be affected is privately owned. It is obvious that if a piece of private property which is prime for residential, commercial or industrial development is zoned to a public park use, the owner is deprived by the zoning by-law of virtually the full value of his property.[45] To avoid this type

---

[44] Edmonton By-law, s. 16-B, is an example of this.

[45] Zoning of any type obviously has a direct effect upon property values. Thus, if an R-1 property is rezoned to R-4 the value of the property is likely to increase. On the other hand, if C-1 property is rezoned to R-1 the value will likely diminish. When this happens there is, in a sense, an expropriation of part of the value of private property for the public benefit. This was the ground upon which early zoning by-laws in the United States were declared unconstitutional—they represented a taking without compensation. There is, of course, no similar constitutional principle in Canada but there is a canon of construction to the effect that no statutory power shall be construed as giving a public authority the power to expropriate without paying compensation unless authorized by statute. However, in *Regina Auto Court* v. *Regina (City)* (1958) 25 W.W.R. 167, Graham, J. of the Saskatchewan Court of Queen's Bench held that the fact a zoning by-law is to some extent confiscatory in nature does not affect its validity. In order to put the matter beyond dispute the Alberta legislature specifically negated the possibility of a zoning by-law being construed as confiscatory and therefore either invalid or requiring the payment of compensation:

of taking without compensation, the Planning Act prohibits the establishment of such a zone unless the municipality or other public authority either owns the land at the time of the zoning or unless it acquires it within six months of the date of the zoning.[46] Thus, if a municipality zones private property for parks, playground, school, recreation or public building use the zoning automatically becomes ineffective after six months unless the municipality acquires the property by purchase or expropriation in the meantime.

A community may have an existing major land use such as an airport or university which requires a special zoning district to ensure its safe or economical operation and to provide space for future expansion. Unfortunately, planners are rarely able to predict with accuracy the future needs of such institutions, with the consequence that expansion often entails an expensive acquisition of adjoining lands which may have been devoted to some other use.[47]

Rural municipalities that use zoning as a form of land use control are not likely to create the variety of residential, commercial and industrial zones common to larger urban municipalities; instead, their zoning by-laws usually contain a variety of agricultural and semi-agricultural use districts. There is a tendency in some quarters to ignore rural zoning as being inconsequential relative to the zoning problems of the larger cities. This view, however, fails to recognize that proper rural zoning is the last clear chance to prevent the chaotic development of land beyond the boundaries of cities and towns. Wisely implemented it can to some extent at least assure an efficient transition with a minimum of waste of productive agricultural land to accommodate public facilities and the recreational and other uses which city dwellers demand. It can also be a potent weapon in the struggle against the waste of natural resources and the spoiling of the physical environment by man.

6. *Site and Structural Regulations*

Although the primary object of zoning is to regulate type of use to which land is subjected, the standard zoning by-law contains a number of important provisions relating to how a particular use is to be effected.[48] Regulations pertaining to the height, size of buildings, the percentage of lot which may be occupied by a building or structure, the size of lots, courts and open spaces are designed, among other things, to prevent the overcrowding of land; to secure adequate light, air and privacy; to afford sufficient and safe play areas for children and to reduce fire hazards. The typical by-law expresses regulations of this type in terms of feet or, where appropriate, in terms of percentages. For example, the Edmonton By-law prescribes that in an R-1 zone, with some exceptions,[49] the maximum building height is to be thirty-five feet or two and one half stories;

S. 135 (1) No person is entitled to compensation by reason only of
(a) the making or passing of a zoning by-law, or
(b) any provisions contained in a zoning by-law, or
(c) any lawful action taken under a zoning by-law.

[46] S. 120 (c).

[47] An excellent illustration is the University of Alberta in Edmonton which several years ago found itself in the position of having to purchase or expropriate several square blocks of an expensive fully-developed residential district in order to cater to its growing pains.

[48] Statutory sanction for such provisions is contained in s. 121 (1) of the Act.

[49] Corner lots. These site requirements are also waived in cases in which buildings comprising a single development are grouped in such a pattern as to satisfy the zoning administrator. This is termed "cluster zoning".

total site area is to be not less than five thousand square feet of which no more than thirty five percent is to be covered by the principal building and accessory buildings;[50] the front yard must be no less than twenty feet in depth; the side yards must be no less than ten percent of the width of the site or seven feet, whichever is the lesser; and the rear yard no less than twenty-five feet in depth.[51] The other residential, as well as commercial and industrial, zones are similarly regulated.[52]

7. *Density Regulations*

The Planning Act expressly authorizes local authorities to regulate both maximum and minimum densities of population in the residential zones they establish.[53] The primary expressed object of density controls is to insure that the population is at least to some extent commensurate with the public facilities such as roads, utilities and schools planned for a particular area. Needless to say, population density of an area is in large part prescribed by many of the site and structural regulations and the zoning classification itself. If a particular area is zoned R-1, a site may be used lawfully only for single-family dwellings and the number of such dwellings to be erected in a given area is determined by regard to the minimum lot size permitted in the zone. However, with respect to some of the other residential districts, such as R-3 and R-4 zones, it is necessary to prescribe permitted densities specifically. This will be done in terms of specifying the number of dwelling units per acre or the number of sleeping rooms per area of site or in some similar fashion.[54]

8. *Parking Regulations*

The automobile quite naturally receives considerable attention in a zoning by-law. In addition to regulations relating to size, height and placement of buildings which house automobiles, the typical by-law, for obvious reasons, prescribes the number of off-street parking and loading or unloading spaces required for any particular development, together with a set of rules relating to the size, location and manner of construction of such facilities.[55]

9. *Aesthetic Regulations*

To some extent almost every aspect of zoning relates to aesthetics. For example, some uses may in no way cast-off any tangible external harm onto neighbouring properties yet they will be segregated from dissimilar uses for the simple reason that their external architecture or the activity carried on in them is of such a repulsive nature to the average citizen as to devalue neighbouring properties. Similarly, size, height and arrangement of buildings in relation to one another is in part dictated by aesthetic considerations. However, the legislature has seen fit to specifically authorize a municipal council in its zoning by-law to regulate "the design, character and appear-

[50] An accessory building is defined in the Edmonton By-law, s. 2 (1), as a "building naturally and normally incidental, subordinate and exclusively devoted to the principal use or building and located on the same lot or site".

[51] Edmonton By-law, s. 21 (2).

[52] *Id., passim.*

[53] S. 121 (1) 6.

[54] Edmonton By-law, ss. 24 (2) (a) and 24-A (2) (g) are examples of this.

[55] *Id.*, s. 12 (11), (12), (13) and (14).

ance of buildings",[56] "the outdoor storage of goods, machinery, vehicles, building materials, waste materials and other items";[57] "the placement, construction, height, size, and character of signs and advertising devices or their prohibition";[58] and "the conditions under which dilapidated signs and advertisements may be required... to be renovated or removed".[59] Admittedly some of these powers relate to the securing of safe vehicular and pedestrian traffic, however, there is no question but that aesthetics generally was of prime concern to the legislature. Pursuant to these powers, it is common for a council to include in its zoning by-law such provisions as "no person shall keep in any yard in any residential district any object or chattel which, in the opinion of the Director, is unsightly or tends to adversely affect the amenities of the district"[60] and "the Director may approve, subject to conditions or refuse, stating reasons, any building structure or sign in any district if in his opinion it is unsatisfactory by reason of design, character or appearance".[61]

The major difficulty associated with regulating land use on the basis of aesthetics is, of course, that decisions are by necessity based for the most part on subjective values. This can lead to uncertainty, lack of uniformity of application of regulations and, occasionally, arbitrariness in the exercise of powers. What may be ugly to one zoning administrator may be beautiful to another. Also, it affords an almost unreproachable basis for rejecting an application which otherwise conforms to the zoning by-law. For these reasons many planning critics express the view that aesthetic considerations should not be a criterion in land use planning. They emphasize that state interference with private property rights is justified only to prevent a particular land use from casting an external harm on neighbouring properties, the type of harm that offends senses other than those of sight. On the other hand, an argument can always be advanced that an aesthetically offensive land use, which is otherwise innocuous, may have a serious detrimental effect on the value of neighbouring properties. Thus, since one of the objects of planning is to preserve property values,[62] it follows that any use which for aesthetic reasons diminishes property values ought to be closely regulated and at times prohibited.

Even if aesthetic zoning is considered acceptable in principle it engenders serious administrative difficulties, particularly with respect to residential developments. The erection of billboards in a developed residential district clearly would affect property values—no one will pay as much for a house which is surrounded by advertising signs expounding the virtues of cigarettes, soft drinks and the like than for one which is not. But when does a proposed design for a house, if permitted to be followed, becomes so tasteless as to diminish the value of the house next door? It is considerations of this nature that

[56] S. 121 (1) 7.

[57] S. 121 (1) 8.

[58] S. 121 (1) 11.

[59] S. 121 (1) 12.

[60] Edmonton By-law, s. 12 (4) (d). "Director" means Development officer who is the Director of Planning for the city: s. 5 (1).

[61] *Id.*, s. 7 (1).

[62] Recall that section 3 of the Planning Act recites that one of the objects of the Act is to achieve the economical development of land.

has led many courts in the United States to strike down zoning enabling legislation and zoning ordinances which incorporate the type of provisions outlined above on the ground that such provisions have no substantial relation to the public health, safety, morals and general welfare and are, therefore, unconstitutional.[63] No similar avenue of attack is open in this jurisdiction. Nevertheless, a zoning by-law provision in Alberta relating to aesthetics could be subject to being declared *ultra vires* if it were demonstrated that the provision did not further the purposes expressed in section 3 of the Planning Act. The decisions of zoning administrators could perhaps similarly be voided if it could be established to a court's satisfaction that the denial of a development permit on aesthetic grounds bore absolutely no relationship to the orderly and economical development of land.[64] On the other side of the coin, a decision to permit a particular development may be subject to being held by a court, on review, to have been made in excess of jurisdiction if it could be demonstrated that the architectural design of the development was such as to without question devalue neighbouring properties.[65]

IV. *ZONING ADMINISTRATION*

The basic instrument prescribed by the Planning Act[66] and employed by municipalities to secure compliance with zoning regulations is the development permit, which ought to be distinguished from a building permit. The former document is issued by zoning administrators as evidence that a proposed development conforms to the zoning by-law and often operates as a condition precedent to the issuance of the latter, which is issued as evidence that the plans for the development conform to all regulations adopted by the local authority in a building by-law vis-a-vis materials to be used in and manner of construction of a building.[67] It should be noted, however, that the Planning Act permits a municipality to combine its zoning and building regulations in one by-law, which is frequently done by smaller municipalities.[68] In such cases one application and one permit are involved rather than two as is the case in those municipalities which have separate zoning and building by-laws being administered by separate civic departments.

Zoning by-laws, with certain exceptions which vary from muni-

[63] *Passaic* v. *Paterson Bill Posting and Sign Painting Co.*, 62 A. 267 (1905):
Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

[64] A provision such as s. 7 (1) of the Edmonton By-law to the effect that a permit may be refused by the administrator for "any building, structure or sign in any district if in his opinion it is unsatisfactory by reason of design, character or appearance", would not necessarily shelter the administrator's decision from judicial review. Although the section is broadly worded, it must still be interpreted in light of the purposes of the enabling legislation from which it derives its validity. Thus, if the decision to reject the application does not further the objects of the enabling legislation then, notwithstanding that the administrator honestly believed the proposed building, structure or sign was unsatisfactory by reason of its design, the decision could perhaps be quashed on review: de Smith, *Judicial Review of Administrative Action* (1968) at 301-339, and note particularly *Padfield* v. *Minister of Agriculture* [1968] A.C. 997.

[65] Assuming a by-law provision of the type referred to, *supra*, n. 64, it is the administrator's duty to formulate an opinion as to the architectural design. If he formulates his opinion in the teeth of the evidence before him he is said to have acted upon "unreasonable grounds" and if the reviewing court concludes that no reasonable administrator would have come to the conclusion under review it is open to the court to declare that the perverse exercise of the discretion was tantamount to a refusal to exercise the discretion and therefore in excess of jurisdiction: *Roberts* v. *Hopwood* [1925] A.C. 578, and *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 (C.A.).

[66] S. 122 (a).

[67] Authority to enact by-laws relating to building permits is conferred by section 239 of the Municipal Government Act, S.A. 1968, c. 68.

[68] S. 121 (2).

cipality to municipality, typically require that a development permit be applied for and issued prior to the commencement of any development.[69] For instance, the Edmonton By-law[70] limits development without permit to certain repairs and alterations to existing buildings provided there is no substantial change in the building's external appearance, construction of buildings accessory to single-family dwellings, temporary hoardings, certain official or temporary signs, erection of fences, reduction of intensity of use of residential buildings[71] and changes of an office or retail store use to another type of office or retail store use. By contrast, the Calgary by-law permits considerably more development without the necessity of obtaining a certificate of compliance.[72] In the smaller municipalities in which one permit operates as both development and building permit the exceptions to the general requirement of a permit are understandably considerably fewer.[73]

1. *Zoning Administrators*

The responsibility for administering zoning by-laws is assigned to a municipal official designated the development officer, whose appointment by the municipality on its enactment of a zoning by-law is made compulsory by the Act.[74] The Act imposes no particular qualifications upon the holder of the office, but the common practice of those municipalities which are large enough to afford to employ professional planners is to designate the chief planner as the development officer.[75] Those municipalities which are unable to hire planners usually appoint the municipal secretary or the holder of a variety of other municipal positions to this post.

The Act makes provision for the establishment, on a voluntary basis, of two other administrative bodies to which may be assigned a variety of tasks relating to the administration of a zoning by-law. The first of these is the municipal planning commission, which a municipal council may establish by by-law[76] and which, in the case of a city, is to be composed of no less than five members of whom at least one half must be appointed city officials[77] and, in the case of municipalities other than cities, no less than three members.[78] Among the other duties imposed by the Act upon such a commission, it must perform all those zoning functions assigned to it by the muni-

---

[69] The Planning Act defines development as:
S. 2. (f)
(i) The carrying out of any construction or excavation or other operations in, on, over or under land, or
(ii) the making of any change in the use or intensity of use of any land, buildings or premises.
The zoning by-law may adopt the same definition; as for example Edmonton By-law S. 2 (28); or an expanded one; see the zoning and building by-law form prepared by provincial government planners for use by smaller urban and rural municipalities.

[70] Edmonton By-law, s. 4.

[71] *Id.* s. 4 (1). A decrease in intensity can occur by the change of a structure containing one or more housekeeping or dwelling units to a structure containing a lesser number of the same units and change of a boarding house, lodging house, fraternity or sorority house to a one family dwelling.

[72] Calgary By-law, s. 17.

[73] By-law, *supra*, n. 69.

[74] S. 123 (a).

[75] Both the Edmonton and Calgary Zoning By-laws appoint the City Director of Planning to this office.

[76] S. 15 (1).

[77] S. 15 (2) (a). For example, the Edmonton Municipal Planning Commission is made up of eight heads of a variety of civic departments: engineering, planning, public works, assessors, transportation, property management, legal and parks and recreation.

[78] S. 15 (2) (b).

cipal council.[79] The other body which a municipality may establish in its zoning by-law[80] is termed the development appeal board. The board, if established, must be composed of a chairman and no less than two other members, of which at least one must be a member of the municipal council, but the majority must not. Municipal employees, irrespective of their rank, and the members of the municipal planning commission are expressly prohibited by the Act from being appointed to the Board.[81]

In addition to the foregoing statutory bodies, municipalities hire a host of other personnel, the number of which are in direct proportion to the size and wealth of a municipality, many of whom play a key but unofficial role in the administration of zoning by-laws.

2. *Processing Development Applications*

An application for a development permit, in the form prescribed by the municipality, must be filed with the department of the municipality prescribed by the zoning by-law accompanied by such drawings and statements sufficient to enable either the development officer or the municipal planning commission, whichever is the approving authority for that particular type of application, to determine whether or not the proposed development complies with the provisions of the by-law as to use, set back requirements, parking and other by-law requirements.[82]

If the proposed development falls within the permitted uses listed for the district in which it is to be located the decision to approve or reject the application is usually taken by the development officer. If the application is for a conditional use, the by-law may provide that it be passed upon by the municipal planning commission.[83] The body charged with responsibility to pass upon the application may approve the application unconditionally or upon such conditions "considered appropriate"[84] or refuse the application in its entirety. In Alberta cities the practice has quite naturally developed of civic employees in the planning department other than the development officer deciding development applications. Indeed, the Edmonton Zoning By-law specifically authorizes the development officer, who is the Director of Planning, to decide on applications for development permits.[85] The by-law also states that "the Development Officer may exercise his powers and perform his functions under this by-law through such members of the planning department as he sees fit, provided that he exercises a general superintendence over all such persons and that all notices, forms, letters, documents and other acts are signed or done in his name or on his

[79] S. 15 (3).

[80] S. 127.

[81] S. 109 (2).

[82] Zoning by-laws vary considerably in this respect but the minimum generally is several copies of a site plan showing the front, rear and side yards and any provision for loading and parking; the floor plan and elevations of the building; and a statement of the intended use of each room in the building: Edmonton By-law, s. 5(3).

[83] Section 123(b) of the Act provides that a municipal council may assign authority in part to a municipal planning commission to receive, consider, and decide an application for a development permit: Edmonton By-law, ss. 16-A(3), 16-C(3) and 24-A (4) and Calgary By-laws, s. 7 (1) (b).

[84] S. 123 (c).

[85] Edmonton By-law s. 5(1) (b):

Subject to Subsection (8a) of this Section 5, the Development Officer is hereby authorized to receive, consider and decide an application made under this Section 5.

It might be noted in passing that there is no subsection (8a) of section 5 to be found anywhere in by By-law.

behalf".[86] This immediately raises the interesting question of whether such sub-delegation of authority is in conformity with section 123 of the Planning Act which states that "a zoning by-law shall... authorize the development officer or municipal planning commission to decide on applications for a development permit...". The *prima facie* rule is that a body or person authorized by statute to perform more than a ministerial function may not subdelegate that function to any other body or person.[87] The rule, of course, may be displaced by express words in the statute authorizing a sub-delegation or by implication if the policy scheme of the statute is such that it could not easily be realized without a *de facto* sub-delegation of authority.[88] However, if a court were to take a hard line similar to that taken by the British Columbia Supreme Court[89] recently it may well conclude that the purported delegation of powers contained in the Edmonton by-law to other than the development officer is *ultra vires*.[90]

3. *Administrative Appeals*

The distinction outlined previously between "permitted" and "conditional" uses takes on vital significance with respect to the question of the right of appeal afforded by the Act to a person dissatisfied with a decision on a development application. Section 128(1) confers upon "a person claiming to be affected by a decision of a development officer or municipal planning commission" the right to appeal that decision to the development appeal board or, in municipalities in which no such board has been established, to the municipal council.[91] The scope of this subsection is however, seriously limited by the following proviso:

> 128. (1a) No appeal exists where a development permit is issued in an area under a zoning by-law and approved for the reason that the proposed use complies with the provisions of the by-law relating to permissible uses.

Thus, it seems patently clear that if a development application relates to either a permitted use or a conditional use and such application is not approved or is approved subject to some condition with which he is not prepared to abide, the applicant is entitled to appeal the decision. If the application relates to a conditional use and it is approved, then any person claiming to be affected by the decision may also appeal. But, if the application is for a permitted use and is approved it would appear that the intent of subsection (1a) is not to provide the right of appeal to an affected person, who would obviously be someone other than the applicant. On the other hand, a valid argument could be advanced that an appeal lies in such circumstances notwithstanding that the application is for a permitted use. The difficulty arises from the use of the clause "approved for the reason that the proposed use complies with the provisions of the by-law relating to permissible uses". The clause is subject to at least

[86] Edmonton By-law, s. 5(1) (e).

[87] *Reference Re Chemical Regulations* [1943] S.C.R. 1 and Willis, *Delegatus Non Potest Delegare*, (1943) 21 Can. Bar. Rev. 257. It is submitted that the development officer in deciding an application for a permit is exercising either an administrative or judicial function and not a purely ministerial one.

[88] *Id.*

[89] *Regina* v. *Horback* (1967) 64 D.L.R. (2d) 17 (B.C.S.C.).

[90] On the other hand, it may be arguable that the fact the by-law requires the development officer to maintain a "general superintendence" over his staff precludes the subsection of the by-law being regarded as a delegation of authority.

[91] S. 128 (7).

two interpretations. Firstly, if the reason advanced by the deciding body for approving the application is that the proposed use complies with the zoning by-law relating to permitted uses then no appeal is available. If no such reason is articulated then there is a right of appeal. Secondly, the clause can be construed to mean that if in fact the application complies in all respects with the by-law relating to permitted uses there is no appeal; if it in fact does not comply then there is a right of appeal. Both interpretations are fraught with difficulty. It seems somewhat incongruous that a decision-making body could shelter its decision from appeal by merely advancing as its reason for decision that the application complies with the by-law, whether or not it in fact does comply. By the same token, if the second interpretation is invoked the situation becomes even more absurd for the simple reason that the condition precedent to the right of appeal is the very ground upon which the appeal body could reverse the first decision. The only way that these absurd results could be avoided would be by interpreting subsection (1a) as not related to the question of whether there is a right of appeal, but rather to the question of the grounds for appeal. But this interpretation itself raises considerable difficulties. Firstly, it is in the face of the plain meaning of both subsections (1) and (1a); secondly, it would give a right of appeal in every case from the decision of the development officer and municipal planning commission, which is not likely to have been intended; and, thirdly, such an interpretation of (1a) would render that subsection redundant having regard to 128 (3) (c).

This raises the fundamental question, on what grounds may the appeal body, "affirm, reverse or vary"[92] the decision being appealed? Assume, firstly, that a developer is applying for a permit for a permitted use but the proposed development involves a building which would cover more of the site than permitted in the by-law for that particular classification and his application is for that reason rejected by the development officer. Section 128(1) clearly gives the developer a right of appeal since the proviso contained in (1a) is applicable only where a permit has been issued.[93] Can the development appeal board reverse the development officer and order that a permit be issued notwithstanding that the site coverage is excessive? The answer to this question may be dependent upon whether or not the zoning by-law confers a discretion on the development officer to waive site coverage requirements.[94] If there is no discretion in this regard and the by-law contains a mandatory provision that site coverage shall not exceed a specified percentage of the total area of the property then, it is submitted, the development appeal board has no authority to reverse the decision in question. If the development officer has a discretion then perhaps the appeal body can reverse his decision although it is arguable, having regard to what the term "appeal" is usually taken to mean, that the decision could only be reversed if the discretion was exercised in a perverse fashion.

Let us now assume that an application is made for a development

[92] S. 128 (5) (a).

[93] Subject to the possibility that subsection (1a) relates only to grounds of appeal and not to the right of appeal.

[94] Under the Edmonton By-law the only discretion which the development officer has relating to the issuance of a permit for a permitted use concerns the design, character or appearance of the proposed development, and whether or not the applicant has made adequate provision for utilities: *supra*, n. 29.

permit relating to a conditional use. The owner-occupant of a dwelling in a R-1 zone wishes to engage in the business of providing group dancing lessons to students for profit in his home. This constitutes a development as defined by the Act since it involves a change in the use of a building from a purely residential use to a mixed residential-business use. Assume that it is the type of development for which a permit is required and is one which is classed as a conditional use. If the application is rejected by the development officer or the municipal planning commission, as the case may be, the decision may be appealed by the applicant or, if approved, the decision may be appealed by any other affected person. Clearly the development officer or municipal planning commission is exercising a discretionary power in deciding whether or not to issue the development permit—this homeowner does not have the same right to a permit as does an applicant for a permitted use. On what basis can the appeal board reverse that decision? Again it may be open to that body to exercise the discretion *de novo* or merely to reverse the development officer's decision if he has committed some type of error in exercising his discretion.

Section 128 (3)(c) is relevant in considering which option is open to the appeal body:

> 128. (3) The development appeal board
> (c) shall consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan that is under preparation or is adopted and to the development control or zoning by-law which is in force, as the case may be.

The requirement that the appeal body is to consider each appeal having due regard to the circumstances and merits of the case appears to give that body the mandate to consider an application *de novo,* which would entitle it to substitute its opinion for that of the development officer or municipal planning commission if its opinion differed. It is to be noted, however, that the appeal body must also have due regard to the zoning by-law. Hence, it must surely follow that any mandatory provisions or absolute prohibitions contained in the by-law also bind the appeal body. In other words, if the development officer or municipal planning commission is exercising a power conferred upon him or it in the zoning by-law which contains no discretionary element, the appeal body should reverse the decision being appealed only if it has been arrived at contrary to the dictates of the by-law. In fact, it is the appeal body's duty to reverse the decision in such a case. If the development officer or municipal planning commission is exercising a discretionary power then the board may or may not interfere with this decision, as it wishes, provided that it also has due regard to sound planning principles. It is submitted that for it to do otherwise in either case would be reversible error.

It would seem, however, that in practice development appeal boards have exercised powers in hearing appeals that section 128 in fact does not confer upon them. For example, the Edmonton Development Appeal Board has continued up to the present to waive, in certain cases, mandatory side-yard, set back and site coverage requirements and even use limitations without regard to the mandatory requirements and prohibitions contained in the zoning by-law which it helps to administer. If there is any doubt about the legal impropriety of such action it

must surely be dispelled now by having regard to the addition of subsection (d) to 128 (3) in 1970:

> 128. (3) The development appeal board
> (d) shall not allow the permanent use of land or a building in a manner not permitted by the zoning by-law in the zone in which the building or land is situated.

This is not to say that it is not desirable for a development appeal board to permit occasional deviations from a strict compliance with a zoning by-law, it is only to say that in Alberta the board is not entitled by law to permit such deviations on appeal.

Who is entitled to appeal the decision of a development officer or municipal planning commission? Unfortunately, section 128 is as imprecise in this connection as it is in stating when a right of appeal exists and the grounds of appeal. Subsection (1) confers the right of appeal on "a person claiming to be affected by a decision of a development officer or a municipal planning commission". This would obviously include an applicant for a development permit, whether the application was for a permitted use or a conditional use, whose application has either been rejected or has been approved subject to conditions with which the applicant is unprepared to abide. With respect to persons other than the applicant, the situation is less clear. Presumably, the section cannot be taken literally since a literal interpretation would open the avenue of appeal to practically every resident of the municipality within which the subject lands are located who subjectively regards himself as affected.[95] The near universal requirement that courts have imposed in order that an individual have *locus standi* to institute legal proceedings is that the individual "must have a special personal interest in the proceeding which he institutes".[96] Where the legislature has provided a statutory procedure for challenging an administrative act, it usually restricts the right to implement such procedure to "persons aggrieved". This term has been subjected to a variety of judicial interpretations over the years, but the modern approach seems to be to apply a liberal construction as is exemplified by Lord Denning's views as expressed in *Attorney-General of the Gambia* v. *N'Jie*:[97]

> They [persons aggrieved] do not include, of course, a mere busy body who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.

Hence, a householder anticipating a serious loss of visual amenities, although not a loss of air and light, as a result of the construction nearby of a building in excess of one hundred feet in height was held to be a person aggrieved and therefore entitled to institute an administrative appeal from a decision permitting the development, pursuant to a legislative provision that conferred such a right of appeal on a "person who may deem himself aggrieved".[98] Lord Denning, however, was of the view that the words "person aggrieved" meant the same thing as "person who shall deem himself aggrieved", thereby reading out the subjective element in the statutory provision. This is in accord with earlier authorities which established that where a statute uses the words

---

[95] Indeed, a literal interpretation would open the door to the whole world.

[96] De Smith, *supra*, n. 64 at 423.

[97] [1961] A.C. 617 at 634 (P.C.).

[98] *Maurice* v. *London County Council* [1964] 2 Q.B. 362 (C.A.).

"thinks himself aggrieved" there must exist reasonable criteria for one thinking himself aggrieved.[99]

Section 128 confers the right of appeal to any person "claiming to be affected" by the decision of a development officer or municipal planning commission. Obviously only those persons who consider themselves adversely affected by the decision will ever invoke the section, in other words, aggrieved persons. Thus, it follows that the legislature should be taken to have intended that only aggrieved persons be entitled to appeal and, therefore, judicial pronouncements on what constitutes an aggrieved person become relevant in interpreting the meaning of the section in question, with the consequence that only those persons who can establish a reasonable apprehension that the decision in question will prejudicially affect their special interests ought to be entitled to invoke the process provided for in section 128.[100]

The appeal provided for under section 128 is also out of the ordinary in that it envisages that certain parties other than those customarily heard on appeal be entitled to appear at the hearing of the appeal. More particularly, the section specifically provides that the development officer or a member of the municipal planning commission, whose decision is being impugned, shall be afforded an opportunity to be heard.[101] It also requires that seven days notice of the hearing of the appeal be given to "all assessed owners of land who, in the board's opinion are affected".[102] Nowhere in the section is there a requirement that such persons be heard on the appeal, but this surely must be the implication since no other useful purpose would be served in giving such persons notice.[103] It should be noted that only those persons who fall within the category of "assessed owners" are entitled to statutory notice, whereas prior to a 1970 amendment "all persons who in the opinion of the board may be affected" were so entitled.[104] The effect of the amendment is to disentitle a very important class of persons from statutory notice, namely tenants. This becomes very significant having regard to the fact that the interests of tenants do not always coincide

---

[99] *R.* v. *Bislot* (1834) 5 B & Ad. 942.

[100] In *Re Herron's Appeal* (1959) 28 W.W.R. 364 (Alta. S.C.) Egbert J. was interpreting the meaning of a clause appearing in the 1955 Town and Rural Planning Act which was similar to the clause in question, and in so doing observed at 374:

> I am of the opinion that the "person" [in the term "person not satisfied with a decision"] referred to in section 81 (3) (b) must be confined to the person who has made application to the planning board and is dissatisfied with its decision, or to any other owner or resident of the zone who has objected to the application and who is dissatisfied with the decision. Either the clause must be given a literal interpretation so as to give any person in the world at any time a right of appeal which I consider so unreasonable that it could not have been intended by the legislature, or it must be given a restricted interpretation...

[101] S. 128 (4) (a).

[102] Prior to a 1970 amendment (S.A. 1970, c. 89) "all persons who in the [Board's] opinion may be affected" were entitled to notice.

[103] Section 145(b) of the Act requires the board to "afford to every person concerned the opportunity to be heard, to submit evidence and to hear the evidence of others".

[104] It is worthy of note that as a matter of practice where a statutory right of notice is conferred upon "affected" persons, those charged with responsibility of deciding to whom the notice ought to be sent frequently formulate a policy to the effect that owners within a certain radius of the subject property be served with notice with the result that persons outside the prescribed radius, although seriously affected, do not receive any notice of an impending appeal, unless they happen to be the appellants. City council of Edmonton has itself provided in section 8(9) of the Zoning By-law that assessed owners of land lying withing two hundred feet of the land which is the subject of the appeal be given written notice of an impending appeal. In addition to the figure two hundred feet being arbitrary and not necessarily related to determining who might reasonably be expected to be affected by a decision, the whole subsection is probably invalid as amounting to the usurpation by council of a statutory duty which is imposed upon the appeal body. The Planning Act provides that statutory notice must be given to those assessed owners who in the *board's* opinion are affected, not who in the *council's* opinion are affected. For some discussion of the rights of interested parties to notice of appeals to the development appeal board see *Canadian Industries Limited* v. *Development Appeal Board of Edmonton and Madison Development Corporation Ltd.* (1969) 71 W.W.R. 635 (Alta. C.A.).

with those of their landlords so that there is not always assurance that the interests and views of the former are being adequately put forward to the appeal body.[105]

Finally, it should be noted that the decision of the appeal body is final and binding on all parties and persons[106] save and except for a right of appeal to the Appellate Division of the Supreme Court of Alberta on a question of law or jurisdiction.[107] This should be contrasted with the situation that prevailed prior to 1968 when a further appeal from the development appeal board to the municipal council and thence to the Provincial Planning Board was provided on an on again—off again basis.

V. ZONING ADJUSTMENTS

The Planning Act envisages that a zoning by-law be based on a general plan or survey of existing uses and conditions of lands and buildings, that it be comprehensive in scope and that it be as certain and uniform in application as possible. Nevertheless, zoning should and usually is capable, through a variety of techniques, of being relatively flexible so as to be able to respond favorably to unique circumstances and changing conditions. The concept of the conditional use has already been considered as a means of insuring that a zoning by-law does not become so rigid as to create injustices. In addition, there exist the concepts of the non-conforming use, the variance and, of course, amendment to the by-law itself as means of alleviating against the rigidity and occasional injustice inherent in comprehensive zoning.

1. Non-Conforming Uses and Structures

Imagine a bustling urban municipality in which no zoning exists. Now impose a standard form zoning by-law with a conventional zoning map which divides the municipality into a number of clearly defined districts and which prescribes permitted and conditional uses for each district. It would be fortuitous beyond belief if it were possible to accomplish this without finding that certain uses and structures fail to conform to the zoning classification or site regulations now imposed for the zone in which the use is carried on or the structure is located. This could, of course, be accomplished by carving out pockets from otherwise homogenous groupings of uses and attributing a land use classification to that pocket which assures that the activity carried on therein will conform to the classification, but this is not zoning as it is presently understood.

Similarly, in municipalities in which zoning has been employed for a time, the need eventually arises, because of a variety of circumstances[108] to change the land use classification for a particular district, or part thereof, from one use to another. Again, if the area has been developed for some considerable time, it is more likely than not that at least some of the former uses which conformed to the previous land use

[105] Notwithstanding that the Act does not require tenants to be given notice of a pending appeal, it is always open to argument that since the development appeal board is exercising a judicial function (*Re Herron's Appeal* (1959) 28 W.W.R. 364 (Alta. S.C.) and *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton* (1969) 71 W.W.R. 635 (Alta. C.A.), the common law rules of natural justice dictate that notice and an opportunity to be heard be afforded to those whose rights will be affected, including tenants. This is also the effect of section 145 (b).

[106] S. 128 (6). This subsection is not capable of being construed as precluding judicial review in the appropriate case by way of the prerogative writs or the equitable remedies of declaration and injunction: *Regina* v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574 (C.A.).

[107] S. 146.

[108] *Infra*, at 300.

classification will be continued and thus not conform to the new zoning designation and regulations. In both illustrations, in the absence of provisions in the enabling legislation and in the zoning by-law designed to require forthwith conversion into a use which conforms with the new use classifications and site regulations, the non-conforming use is brought into being.[109]

Needless to say, the continued existence of non-conforming uses is undesirable by reason of the deleterious effects they will likely have on surrounding conforming properties. Nevertheless, no legislature which is politically astute is likely to require their immediate discontinuance as this would in many cases constitute a taking of property without compensation which, although perhaps theoretically possible in this jurisdiction, is not likely to sit well with those persons whose opinions count in the existing political structure. Accordingly, the Planning Act specifically provides that a "non-conforming lawful use of land or a building may be continued";[110] however, the continuation of the use is conditonal upon a number of factors, each of which is designed to lead to its eventual elimination.

Non-conforming uses have not as yet posed a particularly significant problem for Alberta communities primarily because urban areas in this province are for the most part recent in origin. Obsolescence and deterioration have not set in to the extent that they have in the metropolitan areas of eastern Canada and the United States. Furthermore, comprehensive planning was well entrenched in Alberta before the large-scale development of the metropolitan areas really commenced. The same is not true of the eastern urban complexes. Edmonton and Calgary, however, are now undergoing extensive changes in land use patterns both in the downtown core areas and the surrounding older residential districts, changes which breed scattered pockets of non-conforming uses. On the other hand, these changes in use have usually been from the less intensive to the more intensive, thereby rendering most non-conforming uses uneconomic operations. This in turn brings significant pressure to bear on the non-conforming user to convert the use of his land to one which conforms to that of surrounding properties. Similarly, the provisions of the Planning Act, which prohibit the alteration, rebuilding or enlargement of non-conforming building,[111] if strictly enforced, operate to bring about the natural demise of a non-conforming use. For example, if an owner is carrying on a small manufacturing operation as a non-conforming use, the Act for the most part prohibits him from incorporating any of the major technological advances which are available to his competitors, thereby putting him into such a disadvantageous position in the market place that eventually he must either move his operations to a zone in which they are permitted or discontinue carrying on business. On the other hand, the nature of the non-conforming use may be such that its creation confers upon the owner a monopoly position in the area in which it is located with the consequence that, instead of the operation eventually being eliminated, it flourishes. Here we have an illustration of a monopoly being both created and protected by law.

[109] It should be noted in passing that if a zoning by-law or zoning amendment creates a very large number of non-conforming uses it may be that the by-law or amendment is ill-conceived and subject to attack on the basis that it fails to further the objects of planning as expressed in section 3 of the Act.

[110] S. 125 (3).

[111] S. 125 (1).

When does a use become a non-conforming use or a building become a non-conforming building within the meaning of the Act? The definition section of the Act describes a non-conforming building as a building that is "lawfully constructed or lawfully under construction . . . at the date of first publication of an official notice of a proposal to pass a zoning by-law affecting the land on which the building is situated, and that does not or will not conform to the requirements" of the zoning by-law when it becomes effective.[112] Similarly, a non-conforming use is defined as a "lawful specific use made of land or a building or intended to be made of a building lawfully under construction" at the time of first publication of a notice of intention to pass a by-law that does not or will not conform to the proposed by-law.[113] It is simple enough to establish in any given fact situation whether or not, at the relevant time, a building has been constructed or a use put into effect, in which case the use is entitled to continue.[114] Of considerably more difficulty is the question, when is a building lawfully under construction? If a project is lawfully under construction at the material time, it may be completed and put into use notwithstanding a change in zoning. On the other hand, if it is not, any further movement toward completion of the development would be unlawful.[115] In one case the court held that a residence was "lawfully under construction" at a point of time when the "dug-out" for the basement had been completed.[116] Would the erection of hoardings around a site or the demolition of existing buildings in preparation of new construction also constitute construction within the meaning of the meaning of the Act? The word construction denotes some physical act, thus it is unlikely that a court would regard a development as lawfully under construction where no physical work has been commenced on the site notwithstanding that tens of thousands of dollars may have been spent by the developer in architects plans and the like. In such a situation it would appear that the only recourse the prospective developer would likely have is to attack the zoning by-law which renders his proposed use non-conforming with the view to having it declared invalid.[117] In fact, it would seem that in certain circumstances a municipality could effectively block a proposed development which conforms entirely with existing zoning even in the absence of an actual zoning change. There are a number of recent reported cases in which developers had applied for

---

[112] S. 2 (k).

[113] S. 2 (1).

[114] There is a problem where at the time of publication of the notice of intention to zone or rezone, a use is temporarily in abeyance. Does this constitute a use, within the meaning of the subsection, which is entitled to be resumed after the passage of the by-law?: *Infra*, at 293.

[115] It is interesting to compare the Alberta legislation with that of Ontario in this regard. The Ontario Planning Act, R.S.O. 1960, c. 296 provides:

> 30.(7) No by-law under this section applies,
>
> (b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure the plans for which have, prior to the day of the passing of the by-law been approved by the municipal architect or building inspector, so long as the building or structure when erected is used for the purpose for which it was erected and provided the erection of such building or structure is commenced within two years after the passing of the by-law and such building or structure is completed within a reasonable time after the erection thereof is commenced.

Two cases in which the above subsection has been interpreted are *Mapa et al.* v. *Township of North York and Beckett* [1967] S.C.R. 172, and *Regina* v. *City of Barrie et al, Ex parte Bernick* (1969) 8 D.L.R. (3d) 52 (Ont. C.A.).

[116] *Shaul* v. *Town of Jasper Place* (1953) 10 W.W.R. 265 (Alta. D.C.). Similarly, in *Farr* v. *Grant* (1913) 12 D.L.R. 575 (Alta. S.C.) it was held that work of excavation in preparation for the erection of a building was a work of construction within the meaning of the Mechanic's Lien Act.

[117] His grounds for attack would, however, have to be other than that the by-law has caused him a substantial financial loss: S. 135 and *Regina Auto Court* v. *Regina (City)* (1958) 25 W.W.R. 167 (Sask. Q.B.).

permits for developments that met existing zoning requirements, which applications were rejected by zoning administrators on the ground that the municipality was about to effect a zoning change. The courts have consistently refused to grant applications for *mandamus* in these circumstances where the municipality could demonstrate that it had a clear plan for a zoning change and was proceeding to effect such change with dispatch and in good faith.[118]

Once a non-conforming use is established within the meaning of the Act, the use must not be changed unless it is to a conforming use. Similarly, if a non-conforming use is discontinued any resumption of use must conform to existing zoning.[119] Again the Act leaves it to the courts to decide what constitutes a discontinuance of use or change in use. In *Gayford* v. *Kolodziej*[120] the Ontario Court of Appeal held that the owner of property which was being used in a non-conforming manner as a resort and tourist home discontinued that use and thereby lost the right to resume it as a non-conforming use after having leased out the premises as a private residence for a period of two months. On the other hand, the Ontario Supreme Court held two years later that a non-conforming use as a funeral parlour was not discontinued, even though no funerals had been conducted in the parlour for almost a year, in light of evidence that during that time alterations for funeral parlour purposes were in progress and that the building remained equipped to receive funerals and in the absence of evidence that the premises had been used for some purpose other than as a funeral parlour.[121]

In *Regina* v. *Cappy and Smith*[122] a premises had been used for the public staging of athletic events such as soccer, rubgy, track and field and for motorcycle and auto races. The premises proved to be unsuitable for motor racing and this use was discontinued for a period of about ten years, after which new owners took over the premises and began staging stock car races. The question arose as to whether or not that specific use had been discontinued and the court held that the use of the premises was a general one, that of staging public exhibitions and performances of all kinds and, therefore, it could not be said that there had been a discontinuance of a use which precluded the owners under the non-conforming use provisions of the applicable planning legislation from staging stock car races.

In another case an owner of property carried on a dairy operation. At the time it became a non-conforming use, the dairy building itself

---

[118] *Texaco Canada Limited* v. *Corporation of Oak Bay* (1969) 68 W.W.R. 373 (B.C.S.C.) in which Wilson C.J. held that if the purpose of the municipality in refusing a development permit to which an applicant is *prima facie* entitled is solely to defeat the development application, the municipality's action would be invalid and *mandamus* would lie to compel the issuance of the permit. On the other hand, if the purpose were to further a planning scheme of general application the municipality's actions would be beyond reproach notwithstanding that it also had actual knowledge that its action would defeat a particular application. *See also Toronto Corporation* v. *Toronto R.C. Separate School Trustee* [1936] A.C. 81 (J.C.); *Canadian Petrofina Ltd.* v. *Martin and St. Lambert* [1959] S.C.R. 453; *Re Bondi and Scarborough* [1959] S.C.R. 444 and *Ottawa (City)* v. *Boyd Builders Ltd.* [1965] S.C.R. 408.

[119] S. 125 (3).

[120] (1959) 19 D.L.R. (2d) 777.

[121] *O'Sullivan Funeral Home Ltd.* v. *Corporation of City of Sault Ste Marie and Evans* (1961) 28 D.L.R. (2d) 1 (Ont. S.C.). Anderson, *American Law of Zoning* (1968) at 434-443 has a detailed examination of American jurisprudence on the question of discontinuance of a non-conforming use. The general proposition emerges that an involuntary discontinuance caused by such circumstances as economic depression, inability of a landowner to find a tenant, mortgage foreclosure or a death seldom result in a loss of the right to continue a non-conforming use. The American courts seem intent on finding an intention to abandon before they are prepared to hold that a right to continue such a use has been lost.

[122] [1953] 1 D.L.R. 28.

was located near the back of the premises. Subsequently, the owner razed the building and erected a new one closer to the front of the lot. The land upon which the old building had been positioned was then used as a parking lot for the dairy's vehicles. This was held not to constitute a change in use. The reasoning employed by McRuer C.J.O. was to the effect that the use of the premises was for dairy purposes and that this use had in no way been changed—"the character of the user was merely changed".[123] This case was expressly followed in *Regina* v. *Nimak Investments Ltd.*[124] in which it was held that a use had not been changed by the mere fact that an owner, who once leased the land in question to a motor car garage company for the storage of its own and customers' automobiles, subsequently used the land for the parking of vehicles of members of the public for a fee. Similarly, a British Columbia County Court Judge has held that conversion of a storage room in an apartment to a bedroom did not constitute a "change in use of any land or building".[125] In the United States, where the jurisprudence is more abundant, the following have been held to be an unlawful change in use: auto repair shop to gasoline station, storage rooms to a sheet metal business, garage to storage of machinery and equipment, grocery store to a store selling beer.[126]

It is interesting to note that a non-conforming use of part of a building may lawfully be extended throughout the building provided that no enlargements, additions or structural alterations are involved,[127] but that the Act prohibits the extension of a non-conforming use of part of a parcel of land to any other part of the land.[128] If this provision were strictly enforced it would appear, for example, that if a vacant lot was used for outdoor storage of automobiles at the time of the zoning change, it would be unlawful for the user, subject to the *de minimus* rule, to ever store in future in excess of the number of automobiles in storage at the time of the change. Needless to say it is highly unlikely that the Act will ever be given such a strict construction by zoning administrators, although the possibility exists.

The elimination of non-conforming uses involves, as does the regulation of land use in general, a compromise between two policy considerations. Firstly, there is the general aim of restricting the commencement, extension and continuation of land uses and structures which do not fit into the general character of the neighbourhood in which they are located. Secondly, there exists the notion that the rights and interests of the individual must be considered and protected to the extent that is possible without compromising the public interest. Section 125 of the Planning Act attempts to achieve a compromise between these frequently conflicting principles. On the one hand, the legislature has given effect to the claims of the private citizen by permitting a non-conforming use to continue; on the other, it has protected the public interest by severely restricting the enlargement, rebuilding or altera-

---

[123] *Regina* v. *Rutherford's Diary Ltd.* [1961] O.W.N. 146 at 147-148 (Ont. S.C.) *(aff'd* [1961] O.W.N. 274).

[124] (1964) 46 D.L.R. (2d) 712 (Ont. S.C.).

[125] *Regina* v. *Grandview Holdings Co. Ltd.* (1965) 53 D.L.R. (2d) 276 (B.C. Co. Ct.). Section 2 (k) (i) of the Act employs the expression "a lawful specific use" in defining the term non-conforming use. The use of the word "specific" may be taken to mean that the legislature did not intend that a use be considered in general terms. If this is so the *Rutherford Dairy* and *Grandview Holdings* cases are distinguishable.

[126] Anderson, *supra*, n. 121 at 439.

[127] S. 125 (4).

[128] S. 125 (5).

tion of non-conforming uses to the point where there is a reasonable expectation that they will, for the most part, be eliminated reasonably quickly by the vagaries of the market place. In addition, a municipality could speed their elimination or reduce their deleterious effects on surrounding properties by invoking the powers conferred upon it in the Municipal Government Act to abate nuisances and otherwise unsightly, unsafe and unhealthy premises and uses.[129] The private sector of the community may also take a hand in the appropriate case through the law of nuisance.

The exercise of the municipal power of expropriation is another possible method of eliminating non-conforming uses. In this connection municipalities, sometimes by accident and occasionally by design, decide to locate public roads, buildings, and the like on properties which are non-conforming. Urban renewal schemes, whether brought to fruition by expropriation or otherwise, by their very nature drastically reduce the incidence of the non-conforming uses. The possibility also exists of a municipality expropriating, not an owner's fee simple, but his non-conforming use or building. Under such a scheme, the compensation payable to the landowner would be a fair market value of the non-conforming use to which he is putting his land or the non-conforming building situated thereon. Once the non-conforming use or building is terminated or removed, after payment, the owner would be free to carry on any activity on his land subject only to the condition that it now conform to the zoning by law.[130] Needless to say, such an approach could prove burdensome on the public purse, but it does have the redeeming quality of giving effect to both the public and the private interest. If the public interest is great enough to warrant interference with an existing use of private property which does not amount to a nuisance and which but for a zoning change would have been lawful, it seems only reasonable and just that the cost of the loss of value of the use be borne by the public rather than the individual landowner, since it is the public which benefits.

An alternative and considerably less expensive method, from the taxpayers' point of view, of terminating a non-conforming use but which still gives effect to the interest of the landowner or user is that of employing the amortization technique, which is gaining prevalence in the United States. This device seeks to find a middle ground between compulsory immediate cessation of a use and the indefinite continuation thereof by the adoption of regulations which permit a non-conforming use to be continued for a specified period, but which require it to be terminated without compensation upon the expiration of that period. The term "amortization" springs from the notion that the non-conforming user can amortize or depreciate his investment to zero or near zero during the period of permitted non-conformity. The underlying theory is that the period of tolerance enables the owner's loss, if any, to be spread out over a period of time so as to give him an opportunity to prepare for the future and also that it enables him to make up for the loss of his original investment with profits gained through his monopolistic position as a non-conforming

[129] Municipal Government Act, S.A. 1968, c. 68, ss. 157 and 158.

[130] A municipal council is authorized by section 127 of the Municipal Government Act to acquire land by purchase, expropriation or otherwise "for any municipal purpose". Is it a municipal purpose to eliminate non-conforming uses? If not, a municipality's powers of expropriation as contained in the Act would have to be broadened.

user. The assumption is that he is in fact benefitted in this fashion, whereas it may be that a particular user is not given a monopoly advantage and yet, in the end, he loses his investment. Furthermore, if the grace period is lengthy, for example ten or twenty years, the effect of the remedy is nil until sometime in the remote future, whereas the injury that a non-conforming use may inflict on a neighbourhood or the degree to which it interferes with a plan for the efficient development of the community is immediate.[131]

2. Zoning Variances

A zoning variance[132] is an authorization for the establishment or continuance of a building, structure or use of land which is prohibited in the zoning by-law. It is a form of dispensation granted in certain situations by an administrative body to relieve against the rigours of a strict application of zoning regulations—it is "designed as an escape hatch from the literal terms of the ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to confiscation".[133] The power of an administrative agency to grant a variance is a delegated power. Hence, authority to grant variances must be traced back to the zoning enabling legislation. Applying an elementary principle of administrative law, if no such authorization is contained in the enabling legislation it follows that variances cannot lawfully be granted.

Up to 1967 section 128 of the Planning Act contained typical provisions authorizing the granting of variances:

> 128. (1) An appeal to the development appeal board may be made by a person
>
> (a) who claims that the strict enforcement of the requirements of a zoning by-law or of section 125 would cause him special and unnecessary hardship because of circumstances peculiar to the use, character or situation of his land or building...
>
> (3) The development appeal board shall consider and determine each appeal having due regard to the circumstances and merits of the particular case and the general purposes and intent of the zoning by-law and any general plan that has been adopted and, in the case of an appeal made under clause (a) of subsection (1), shall seek to relieve the appellant from unnecessary hardship to such extent as in its opinion will not be unduly adverse to the public interest.

The conditions upon which a variance may be granted under this type of section are threefold:

(1) The applicant must be able to show "unnecessary hardship" because of circumstances peculiar to the use, character or situation of his land or building.

(2) The applicant's position must be special and not one commonly shared by others.

(3) The applicant must be able to persuade the board that granting the application would not be unduly adverse to the public interest.

The term "unnecessary hardship" is imprecise to say the least

[131] Certain authors have commented on the amortization technique of eliminating non-conforming uses: Anderson, *supra*, n. 121 at 445-468; Rathkopf, *The Law of Zoning and Planning* Vol. 1, c. 42 (1964); Comment, *The Elimination of Non-conforming Uses*, (1955) 7 Stan. L. Rev. 45; Comment, *The Abatement of Preexisting Non-conforming Uses Under Zoning Laws: Amortization*, (1962) 57 N.W. U.L. Rev. 323.

[132] A variance should be distinguished from a conditional use. The latter is a species of legislative relief. It is a use contemplated by and provided for in the zoning by-law to be permitted in a particular zone in special circumstances. A variance, if granted, is a form of administrative relief which involves a use that is either expressly or impliedly prohibited in a given zone by the by-law.

[133] *Lincourt* v. *Zoning Board of Review*, 201 A. 2d 482 (1964) (R.I.S.C.).

and as such has been the subject of considerable judicial comment, particularly in the United States. Generally speaking, the principle has emerged that if, in the absence of a variance, a fair return cannot be earned from the property in question, or that anyone living on it will suffer severe personal discomfort, or if excessive costs would be required to comply with the by-law, a case of unnecessary hardship is made out.[134] For example, where land is located in a district zoned for residential uses but is surrounded on three sides by land zoned for commercial uses, residential use possible but at a considerably reduced financial return than is normal for residential property, the owner may be subject to unnecessary hardship.[135] On the other hand, proof that a better financial return would be made possible by the granting of a variance is not proof of unnecessary hardship; as for example, showing that garden apartments would yield a higher income than the more restricted residential uses permitted by the zoning by-law in a particular district.[136] Needless to say, the distinction between lack of a fair return and reduction of return as a result of existing zoning is blurred in most instances.

The condition that the hardship be special to the applicant in order that variance be granted is designed to avoid the use of the variance procedure as a method of rezoning land. Conferring a variance when the conditions which create the hardship are not special to an applicant but are shared by his neighbours would probably result in a flood of applications from all the neighbouring landowners suffering the same hardship. If their requests for variances were also granted the board would in effect be rezoning the whole area. The result of such action would amount to a usurpation by the board of a legislative function of the local council.

It should also be noted that the unique circumstances of the applicant are required by the section to arise out of circumstances peculiar to the use, character or situation of the applicant's land or building and not be merely personal to the current owner of the property. In the words of one American judge "it is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight that is the criterion".[137] Consequently, courts have consistently held that such personal difficulties as physical infirmities of the applicant, ill health of a member of his family or the size of his family are irrelevant in determining whether or not a case for uniqueness has been made out.

The third requirement, that the public interest not be adversely affected by the granting of the variance, usually operates, by the wording of the enabling legislation, as an objective condition upon the exercise of the variance power by the board. The aforementioned Alberta provision introduced a subjective element in that the board needed merely to have been of the opinion that the public interest was not being compromised. The grounds upon which a decision of the board may be upset on judicial review are more limited where subjective ingredients are included in the powers conferred on a tribunal, but such ingredients do not confer an "untramelled dis-

[134] Anderson, *supra*, n. 121 at 610-668.

[135] *State ex rel. Killeen Realty Co.* v. *City of East Cleveland*, 160 N.E. 2d 1 (1959) (Ohio S.C.).

[136] *Held* v. *Livingston*, 204 N.Y.S. 2d 66 (1960) (N.Y.S.C.).

[137] *Congregation Beth El* v. *Crowley*, 217 N.Y.S. 2d 937 (1961) (N.Y.S.C.).

cretion".[138] Hence, if the tribunal formulated its opinion on irrelevant grounds or without regard to relevant considerations or in bad faith the exercise of the discretion would be subject to being invalidated on judicial review.[139]

Whether or not the public interest will be unduly affected by a development if a variance is granted is entirely dependent upon the circumstances of the case, as are each of the other two conditions. Thus, it is virtually impossible to express any general rule other than to say that if the proposed development should bring about a significantly increased fire hazard, generate a traffic problem, inordinately reduce surrounding property values, seriously alter the character of a neighbourhood, or bring about some other type of injury to surrounding properties then a variance ought not to be granted.[140]

After reading existing jurisprudence on the granting of variances, one would quite naturally conclude that persuading a board to grant a variance is a difficult task. In practice, however, quite the opposite is true in many Alberta municipalities. Development appeal boards, by virtue of the fact that some members are elected council members and the rest owe a debt of gratitude to the municipal council for their lucrative appointments, are to a considerable degree politically motivated.[141] Thus, a variance application is likely to be given a favorable reception by a board if it generates no opposition from surrounding property owners, regardless of whether the applicant can fit himself into the statutory prerequisites.[142] By the same token, if an application for a variance generates stiff opposition from enfranchised neighbouring property owners, it is likely to be rejected whether or not the three prerequisities have been met and irrespective of whether the opposition is justified from the point of view of sound planning principles.

As indicated previously, a typical variance provision appeared in the Alberta Planning Act until 1967 when, by amendment to section 128, the express power of the development appeal board to relieve an appellant from a strict application of the zoning by-law in the case of unnecessary hardship was removed. Notwithstanding this change in the Act, some development appeal boards have continued to grant variances. It is submitted that such action is *ultra vires*. The only authority the board has under section 128 since 1967 is to hear an appeal from the decision of a development officer or municipal planning commission and, after considering the merits of the case having regard to the zoning by-law, to confirm, reverse or vary the decision in question. The basis upon which the appeal board may vary or reverse the decision appealed from must surely, in the absence of express

[138] *Roncarelli* v. *Duplessis* [1959] S.C.R. 122.

[139] *Westminster Corporation* v. *London and North Western Ry.* [1905] A.C. 426, *Roberts* v. *Hopwood* [1925] A.C. 578; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 (C.A.); *Smith and Rhuland* v. *The Queen*, [1953] 2 S.C.R. 95 and *Shawn* v. *Robertson* (1964) 46 D.L.R. (2d) 363 (Ont. S.C.).

[140] For a more detailed discussion see Anderson, *supra*, n. 121 at 682-693.

[141] This is more obvious in those municipalities in which a municipal council acts as the variance granting agency.

[142] For example, the Edmonton Development Appeal Board has permitted home owners to add extensions to their homes which raise site coverage of the total building beyond that permitted by the zoning by-law on the ground that the applicants have large families and, therefore, need the space. It is difficult to imagine any other case which demonstrates more clearly a hardship (or more accurately, inconvenience) peculiar to the owner rather than peculiar to the use, character or situation of the lands or building or, for that matter, which is not unique to the applicant. The Board, in such cases, appears to place more emphasis on not unduly infringing the rights of individuals than it does on finding a unique and unnecessary hardship. Perhaps this is as it should be.

provisions to the contrary, be that the development officer or municipal planning commission erred either on a question of fact, law or jurisdiction, or all three, in applying the zoning by-law. In addition, of course, the development appeal board may vary or reverse the development officer or municipal planning commission where they are given a discretion either in the Planning Act or the zoning by-law. These approving authorities are not given a discretion to relieve an applicant from a strict application of a zoning by-law on the grounds that the applicant is suffering a special and unnecessary hardship or, for that matter, on any other ground. It follows that if the development officer or municipal planning commission has not made the type of error described and is not exercising a discretion, the development appeal board must affirm his or its decision.

It has been suggested in some quarters that the subsections in the Act which require the development appeal board to consider appeals having regard to the merits of the case authorizes the board to permit a development where the merits of the case warrant such development irrespective of the zoning by-law. Thus, it is said that the board retained its variance powers after the 1967 amendments. This argument fails to give effect to the fact that prior to 1967, and while the variance provisions were still in section 128, the board was also directed by the section to have due regard to the circumstances and merits of the appellant's case. Thus, if the statute at one time contained both provisions it must follow that each provision was intended to cover different situations. The logical conclusion must be that after 1967 the legislature no longer intended that the development appeal board grant variances. In any event, any doubts about whether the board has power to grant permanent relief against the strict application of the zoning by-law must now be clearly dispelled by the 1970 addition to section 128:

> 128. (3) The development appeal board
>
> (d) shall not allow the permanent use of land or a building in a manner not permitted by the zoning by-law in the zone in which the building or land is situated.

If section 128 effectively precludes the use of the variance procedure as a device to adjust the rigor of zoning, and it is submitted that it does, the question naturally arises, should the variance power of the development appeal board have been eliminated? Admittedly, conferring the variance power on an administrative body can have many undesirable consequences. Since the standards articulated in statutes by necessity do not provide particularly meaningful indicia as to when a variance ought to be granted, the power can and has been abused. Variances have been granted without sufficient cause with the result that numerous pockets of non-conforming and often incompatible uses have been created, thereby undermining the whole purpose of zoning. The vague standards prescribed by the legislation make the variance procedure particularly susceptible to being employed as a means of dispensing special privileges to select people. The imprecisions of the statute renders judicial control over the process somewhat ineffective. This difficulty is augmented by the fact that persons adversely affected by a decision to grant a variance are unlikely to be so seriously affected as to warrant the expenditures incident to a court application, but they are nevertheless adversely affected. In addition, the variance

power, as usually conferred and administered, can create a substantial degree of uncertainty as to whether or not one's neighbour will in the future be permitted to conduct an activity which is detrimental to the use, enjoyment and value of one's own property. On the other hand, the absence of a variance procedure may well result in injustice in individual cases. Unusual circumstances which are unforeseeable and which for that reason cannot be provided for in advance in the zoning by-law may well arise to deny an individual a reasonable use of his property. In such cases the hardship perhaps cannot be alleviated by any method other than providing dispensation from the application of the zoning by-law short of requiring compulsory compensation from public funds on the theory that the benefit of the non-use of the land in the manner desired, but prohibited, is being conferred on the community as a whole and, consequently, the cost of such benefit should be borne by the community and not the individual affected.

3. Amendments

Zoning restrictions seek to control community development by undertaking to provide space for the projected needs of the municipality and at the same time protect the existing and future users of land from the hazards associated with the development of incompatible uses. Implicit in the notion of zoning is that it provide certainty and a high degree or permanency of land use patterns. Individuals purchase homes and businessmen build factories and establish stores in the expectation that existing zoning will continue in force. If these expectations are frustrated the result often is a gross diminution in property values for those properties proximate to areas in which the change has been made, not to mention the possibility of the reduction of public confidence in the integrity of local governments. For these reasons, zoning changes should be undertaken only in cases in which there are compelling needs. Whether such a compelling need exists should, of course, be determined by a consideration of whether the public interest demands a change, and not of whether it will be to the particular advantage of those individuals seeking a change.

Although rezoning should be undertaken with caution, situations do arise in which a change is not only justified but dictated by good zoning practices. As has been said:[143]

> It is a matter of common sense and reality that a comprehensive plan is not like the Medes and the Persians; it must be subject to reasonable change from time to time as conditions in the area or a township or neighbourhood change.

Whether or not the circumstances in a particular case warrant a zoning change is a question of fact. Thus, it is difficult, if not impossible, to articulate any general principles as to when conditions have altered sufficiently to justify a rezoning, although it is possible to give a few illustrations.

Perhaps the most common change of conditions which warrants an amendment to existing zoning is that relating to population. Areas which have undergone substantial population increases may well find that the new condition has made desirable or necessary additional multiple residential, commercial, or industrial zones. This may result in the need to change districts from less intensive to more intensive

[143] *Furniss* v. *Township of Lower Merion*, 194 A. 2d 926 (1963) (Penn. S.C.).

uses, particularly where outward expansion into the undeveloped agricultural areas is rendered impractical for one reason or another. Likewise, a shift in population from one part of a municipality to another may necessitate a zoning change in order to insure the continued efficient and economical use of land.

A new development considered to be in the public interest or the spacial expansion of an existing development may also justify a zoning change. For example, a municipality may wish to erect, either with private or public funds, a sports and convention centre in an already developed location, the site of which is dictated by, among other factors, economic considerations and existing transportation facilities. Similarly, the expansion of a public facility such as a university or community college may necessitate a rezoning of surrounding properties. A zoning change may naturally follow extensive highway improvements. The variation in traffic patterns usually accompanying highway improvements may dictate the relocation of business enterprises which are dependent upon ready vehicular access. Obsolescence and deterioration of uses and building may similarly dictate a rezoning. For instance, a single-family district close to the downtown area of a rapidly growing community may have taken on blight conditions, thereby rendering its continued existence as a single-family district economically and socially undesirable. Finally, changes in land use planning concepts may bring pressure to bear to amend the zoning map. An example that readily comes to mind is that of public and other forms of low-income housing. Several decades ago the customary practice was to isolate such developments from the ordinary type of residential district. For sociological and other reasons the present-day trend is to locate low-income housing in or at least in close proximity to the standard single-family district. Hence, lands which may have been set aside in the midst of a developed residential district as parkland may be subject to rezoning to accomodate low-income families.

In order to provide the degree of flexibility required of zoning to accommodate changing conditions, most enabling statutes confer upon the zoning authority the power to amend any zoning by-law.[144] The procedurial limitations which apply to the enactment of a zoning by-law proper apply equally to zoning amendments. Although on occasion proposed zoning amendments originate with a municipal planning department, by far a majority are proposed by private developers. Accordingly, it may be convenient at this point to outline briefly the steps involved in obtaining a rezoning of property.[145]

The first step usually entails the submission of a written application in a prescribed form to the municipal planning commission together with a set fee.[146] The application is required to disclose, *inter alia,* the type of zoning change requested and the grounds upon which the application is made. Upon submission of the application, the municipal planning commission is required to examine the proposed

[144] S. 134 (1) of the Alberta Act.

[145] There may be some variation in the procedure from municipality to municipality. Compare Edmonton, By-law, s. 9 and Calgary By-law, ss. 74-78.

[146] In addition to the application fee, the applicant is often required to give a written undertaking to indemnify the municipality for all expenses incurred by it in processing the amendment application. Expenses that are most often incurred relate to map printing, reproduction costs, surveys and advertising.

amendment and advise the applicant what recommendation it will make to the municipal council vis-a-vis its adoption. Whatever the commission's recommendation, it must submit the application to council for consideration. If the municipal planning commission's recommendation is negative, the applicant may decide to withdraw or alter his application, which he is entitled to do. If the applicant desires to proceed with the amendment after learning of the commission's initial reaction, the application is then forwarded to the planning department of the municipality where all necessary investigations and analyses are made and a detailed report prepared. When all the preliminary work has been completed the application, in the form of a draft by-law, is placed on council's agenda, and copies of the reports containing the recommendations of the municipal planning commission are made available to members of council. Prior to either the first or second reading of the proposed by-law, notice of the proposed amendment and the time and place for a public hearing on the matter must be published in two issues of a newspaper circulating in the municipality.[147] The council is then required to hold a public hearing, no earlier than ten days after the last publication of the notice,[148] at which shall be heard:

> 130. (5) (a) ...[A] person who wishes to make representations concerning the manner in which any provision of the proposed by-law may affect him or an owner of land whom he represents,
> (b) the public at large,
> (c) a local group of residents or property owners, and
> (d) a representative of a municipal planning commission or an official designated in clauses (a), (b), and (c) of subsection (1).

Council, if it wishes, may hold subsequent public hearings, notice of which must be given in the same fashion as notice of the first meeting.[149] The council is then required to pass upon the proposed amendment after considering the advice given it by the planning agency to which the application was made and all representations made at the public hearing or hearings. If the amendment is passed, copies of the by-law along with other data are to be submitted to the planning authorities prescribed by the Act.[150]

Before passing from a consideration of amendment procedures, it should be noted that if the proposed amendment would be such as to render the new zoning at variance with the land use designation provided for in any existing preliminary regional plan or a regional plan itself, the zoning amendment by-law would likely be invalid.[151] Indeed, the municipal planning commission will normally advise the applicant whether or not the proposed amendment is inconsistent with the preliminary regional plan, at which point and prior to the matter going to council, the applicant will seek to have the plan amended, thereby becoming involved in the procedures pre-

---

[147] S. 130 (2).

[148] S. 130 (2) (c).

[149] S. 130 (6).

[150] S. 130 (7) (c) and (d). Note that pursuant to s. 134 (3) the official notice of intention to pass a by-law or a public hearing are not required in those cases in which the Director of Planning certifies that the proposed amendment is only for the purpose of clarifying a provision of the existing by-law. This subsection is apparently not available, however, to circumvent the statutory procedures contained in s. 130 when a council is passing a completely new zoning by-law, although not appreciably different from the existing one, following its adoption of a general plan: *City Abattoir* v. *Calgary (City)* (1969) 70 W.W.R. 460 at 464 (Alta. C.A.).

[151] S. 91.

scribed in sections 74 to 77 of the Act. Similarly, if the municipality has previously adopted a general plan by by-law, it may be necessary that the general plan itself be amended in a case in which the proposed zoning amendment would be in conflict with it.[152]

Aside from issues arising out of the procedures to be followed in passing a zoning amendment, the most frequently litigated point is whether or not an amending by-law is discriminatory and, therefore, *ultra vires.* The argument that an amendment is discriminatory arises naturally out of the fact in most instances that a small parcel of property has been rezoned at the request of the owner with a consequential benefit being conferred upon him. A classic example of a case in which a zoning amendment was successfully challenged on the ground of discrimination, or "spot zoning" as it is sometimes called, is that of *Miller* v. *Rural Municipality of Charleswood*[153] in which an area of approximately seven hundred acres had been zoned so as to prohibit the establishment of fox and other fur farms. Upon the application of the owner, the by-law was amended to permit a mink farming operation on a ten acre parcel situated within the seven hundred acre site which had become residential properties. In quashing the amending by-law Dysart J. expressed the opinion that the enactment was for the private interest of the land owner and in disregard of the interests of the community as a whole as was evident from the fact that no public need to locate a mink farm in the midst of a residential district in which fur farming was otherwise prohibited was demonstrated by the applicant.[154]

However, the mere fact that a zoning amendment singles out and affects but one small parcel, thereby creating an island of land use different from the surrounding area, does not *ipso facto* render the amendment discriminatory. In *Napier* v. *City of Winnipeg*[155] Canada Safeway Limited applied for a change in zoning of a parcel of land from R-2 and R-3 designations to a C-1 designation to permit the construction of a large supermarket with parking facilities, which application was approved. In dismissing an application to quash the amending by-law on the ground of discrimination Monnin J. observed:[156]

> Applicant's counsel has placed great reliance on two decisions of the late Mr. Justice Dysart: *Wallace* v. *Dauphin (Town)* 40 Man. R. 474, [1932] 2 W.W.R. 405; and *Miller* v. *Charleswood R.M.,* 45 Man. R. 451, [1937] 3 W.W.R. 686, and the well-known words used by that able judge, at page 480, that "the primary moving force behind the by-law must be looked at". Admittedly Canada Safeway Ltd. was the primary force behind the by-law and it undoubtedly is working for the interest of its shareholders, but its representatives gave cogent evidence to the council that there was a need for such a store and that a portion of the public was interested in its location at the proposed area. It is impossible for me

[152] S. 120.

[153] [1937] 3 W.W.R. 686 (Man. K.B.).

[154] The learned justice seemed almost to apply the principle of *res ipsa loquitur.*

[155] (1962) 67 Man. R. 332 (Man. Q.B.).

[156] In this case petitions both opposing and favouring the proposed development had been presented to the municipal council. At a public hearing into the question, a straw vote of those residents of the area attending the meeting indicated about sixty persons in favour and twenty opposed. *See also Re Central Burnaby Citizen's and Ratepayers Association* (1956) 6 D.L.R. (2d) 511 (B.C.S.C.); *Re North York Township* (1960) 24 D.L.R. (2d) 12 (Ont. C.A.), and *Re Giannone's Appeal* (1961) 35 W.W.R. (ns) 320 (Alta. S.C.). The importance of the use of petitions to support or oppose an amendment application should not be underestimated. A municipal council is, after all, an elected body and therefore responsible to and influenced by the wishes of the electorate. Consequently, the side that can muster the most support on a quantitative basis often succeeds even though qualitatively its position might be weak.

to find that the purpose of the by-law was to benefit the company solely and directly and the municipality and its residents only indirectly.

Occasionally, a case comes before the courts in which the allegation is that a zoning amendment discriminates against an owner rather than in his favour. In the leading case of *Township of Scarborough* v. *Bondi*[157] a zoning by-law permitted the erection of one dwelling unit per one hundred feet of frontage on a public street. This by-law was amended on several occasions at the request of individual property owners so as to permit the erection of dwellings on parcels of less than one hundred feet frontage, but on each occasion the parcels in question were deep. Subsequently, property owners in the area heard of a proposal to erect two houses on a particular parcel owned by the respondent which, although each house would conform to the by-law by having the required one hundred feet of frontage, would result in a total of ten thousand square feet of ground area per house whereas the average in the neighbourhood was forty-five thousand square feet per house. In order to block the proposed development the residents petitioned for and obtained a zoning amendment which had the effect of prohibiting the erection of more than one house on the respondent's property. On application to have the amendment declared invalid the respondent was successful but on appeal to the Supreme Court of Canada it was held that, although only the respondent's property was affected by the amendment, the amendment rather than being discriminatory, sought merely to require the respondent's use of his land to conform to the standards of the neighbourhood:[158]

> The intent and effect of the amending by-law are clear to compel the respondent to fall in with the general standards of the neighbourhood and prevent him from taking advantage of the district amenities, the creation of the by-law, to the detriment of other owners. 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 owners in the subdivision with this one exception.

On the other hand, in *Re Dillabough,*[159] in an area zoned for apartment use, two properties had been spot-zoned for commercial use; one was being used to carry on a confectionary store operation and the other as a land-fill site. Subsequently, the regional planning board recommended to the municipal council, after an extensive land use study of the area, that both properties be rezoned to apartment use. However, council did not act upon the recommendation for a period of nine months when, after discovering that the applicant had purchased the property unaware of the proposed rezoning and that he desired to develop it as a site for a professional office building, it rezoned the applicant's property to an apartment designation. Mr. Justice Ruttan held the amendment discriminatory on the ground that it was confined only to the applicant's property, but had it been in general terms and therefore included the second spot-zone it would have been free from objection.

The case of *Re Rosling et al. and City of Nelson*[160] affords another,

---

[157] [1959] S.C.R. 444.

[158] *Id.* at 451 (Hudson, J.).

[159] (1967) 62 D.L.R. (2d) 653 (B.C.S.C.).

[160] (1967) 64 D.L.R. (2d) 82 (B.C.S.C.).

although slightly different, example of the principle that a zoning amendment must not be discriminatory. The property in question in this case was rezoned from an R-1 to a C-2 classification. However, the amendment restricted the use of the subject property to a cleaning centre, laundry and car wash facility; whereas the general zoning by-law permitted a variety of uses such as drug stores, grocery stores, coffee shops, barber shops, coin operated laundries and the like in C-2 zones. Macdonald J. quashed the amendment on the ground that once a zoning classification has been established by a zoning by-law and certain uses are prescribed for that type of zoning classification, council may not subsequently prescribe a use limited in application only to certain parcels of land in the zone and not applying to all the rest of the land under the zoning classification.[161]

VI. *ENFORCEMENT OF THE ZONING BY-LAW*

Any commentary on this matter can be little more than a summary of the legislative provisions dealing with enforcement due to the absence of reported cases on the subject, which in turn may be the result of the failure of zoning administrators to invoke legal sanctions against offenders.[162]

As might be expected, the Planning Act makes it an offence for any person to commence a development on any land without having obtained a development permit as required by a by-law or for failing to comply with any condition of a development permit which has been granted.[163] The conviction of a person of such an offence does not constitute a bar to further prosecutions for the continued neglect or failure to comply with the Act or the relevant by-law.[164] No other offences are provided for in the Act related to breaches of zoning regulations. Thus, a person who decides to lease his basement in an R-1 zone as a dwelling unit without asking for municipal sanction, which is unlikely to be forthcoming in any event, is subject to being charged under the Act. If a charge is laid under the Act it will of necessity have to be one of failing to obtain a development permit rather than of effecting a use prohibited by the zoning by-law. Since his actions would constitute a change in use, which in turn amounts to a development within the meaning of the Act,[165] and since it is a type of development for which the by-law would require a permit, the person would be guilty of the offence under the Act. A person who enlarges a non-conforming use beyond that permitted

[161] The council was apparently prepared to grant a zoning change from R-1 to C-2 uses but only on condition that the owner carry on the type of enterprise which his application for amendment disclosed and no others. In short, council wished to insure that once the applicant obtained the amendment on the basis that he was intending to set up a laundry business on the site he would not later change his mind and apply for a development permit for a more intensive use. It is common for a rezoning to be effected on condition that the applicant restrict the use of the property to that outlined in his amendment application; however, the usual method of enforcing the condition is to require the applicant to enter into a contract with the municipality, which contract may become a convenant running with the land: see s. 143 of the Planning Act. The scope of a planning agency's authority to impose conditions prior to issuing permits and the whole question of "contract zoning" raise many complex and interesting issues which, unfortunately, cannot be considered within the scope of this paper.

[162] See, however, *City of Calgary* v. *Reid* (1959) 27 W.W.R. 193 (Alta. C.A.), and *District of Foothills* v. *Besselink* (1964) 44 D.L.R. (2d) 564 (Alta. S.C.).

[163] S. 139 (1). The offence is punishable on summary conviction by a fine of not more than $500 and, in addition, to a fine of not more than $100 for each day the offence continues and in default of payment of the fine levied to imprisonment for a term not exceeding 30 days.

[164] S. 139 (3).

[165] S. 2 (f) (ii).

by section 125 of the Act could similarly be charged with commencing a development without a permit.

Alternatively, it is possible for a municipality to create offences in its zoning by-law to cover the foregoing illustrations directly and thus avoid the circuitous reasoning necessary to enforce the by-law under the penalty section of the Act. Section 140 authorizes a council to invoke the powers conferred upon it under the municipal act by which it is governed for the purposes of carrying out sections 95 to 139 of the Planning Act, which include the zoning powers. Section 113 of the Municipal Government Act, which governs all Alberta cities, towns, villages, summer villages, municipal districts[166] and counties,[167] authorizes a council to impose a penalty of a five hundred dollar fine for contravention of any by-law passed under either that Act or any other act. Pursuant to this authority a municipal council could declare it an offence to contravene any provisions of the zoning by-law in the by-law itself.[168]

In addition to or in lieu of proceeding by way of charging an offender under the penalty section of either the Act or the by-law, a municipality could invoke the broad powers conferred upon it in section 126 of the Planning Act to stop a contravention of either the Act or the zoning by-law.[169] It could also elect to proceed by way of a court injunction for the purposes of enforcing the zoning regulations.[170]

VII. *JUDICIAL REVIEW OF THE ZONING PROCESS*

This topic is itself worthy of a major paper but, due to the already lengthy nature of this article, can be subjected to only a few general remarks. The scope of judicial review of administrative decisions relating to zoning, as with any decision of an inferior statutory tribunal, revolves around two main considerations; firstly, the method of judicial review and, secondly, the grounds.

It is trite law that the prerogative writ of *certiorari* is available only against a tribunal which exercises a judicial or quasi-judicial function.[171] In deciding upon an application for a development permit the development officer has been held to exercise such a function and, therefore, his decision was held subject to review on *certiorari*[172] as has that of a municipal planning commission.[173] The decision of a development appeal board carrying out its functions under section

---

[166] Municipal Government Act, S.A. 1968, c. 68, s. 2(18).

[167] County Act, R.S.A. 1955, c. 64, s. 13.

[168] Edmonton By-law, s. 10 and the Calgary By-law, ss. 82 and 83.

[169] This section authorizes a municipal council, after due notice, to order the removal, demolition or alteration of any building or the filling in of any excavation or the cessation of any work or use to which land or a building is put in contravention of the Act or Zoning by-law. If the order is not complied with, the council, by its officers or servants, is authorized to enter onto the premises to carry out its order and the expenses thereby incurred are payable by the owner as a charge or lien on the property.

[170] S. 138 of the Planning Act and s. 405 of the Municipal Government Act. In order that a municipality can effectively carry out its planning functions, including the enforcement of regulations, municipal appointees are given broad powers to enter upon and inspect private premises: Planning Act, s. 137. Section 142 of the Planning Act authorizes the Minister in charge of the Act to order a municipal council to carry out its planning functions as prescribed by the Act, including the enforcement of any land use regulations it has enacted. If the council fails to comply, the Minister may excercise all the powers conferred in the Act on a municipal council in the name of the council.

[171] *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 (C.A.).

[172] *Re Pyrch and Company Ltd. and City of Edmonton* (1962) 35 D.L.R. (2d) 732 (Alta. S.C.).

[173] *Michie* v. *M.D. of Rocky View* (1968) 64 W.W.R. 178 (Alta. S.C.).

128 of the Act has also been held amenable to *certiorari*.[174] Similarly, the Provincial Planning Board, on hearing an appeal pursuant to section 85 of the Planning Act from a decision of a regional planning commission concerning an amendment to a preliminary regional plan, must act judicially and if it fails to do so its decision can be quashed on notice of motion in the nature of *certiorari*.[175] In *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*[176] the Supreme Court of Canada ruled that in considering and enacting a by-law amending a previous zoning by-law to change the use classification of approximately 3.4 acres of land in downtown Winnipeg, the municipal council was exercising a quasi-judicial, as distinct from legislative, function and was required to follow the dictates of natural justice. On the other hand, the British Columbia Court of Appeal has held that a rezoning by a municipal council at the request of a civic department of a large area of a city is a legislative act.[177]

Mandamus, which is of course not dependent upon a characterization of the nature of the power of the tribunal, will not lie to compel an administrative tribunal to exercise a discretion in a certain way, although it will lie to compel the tribunal to exercise its discretion where it has refused to do so or where it has exercised its discretion in an *ultra vires* fashion. Thus, it is unlikely that *mandamus* would issue to compel a planning body to approve a development permit where it has a discretion to reject or accept an application or to compel a rezoning by a municipal council since it obviously has a discretion as to whether or not to amend its own by-laws. On the other hand, *mandamus* may issue for a development permit where the proposed use clearly falls within the types of uses listed as permitted within a particular zone, provided that it also complies with the zoning by-law in other respects.[178]

Declaration and injunction, which are being employed more and more in administrative law, are a viable alternative to many other methods of judicial review and as such are being used to upset planning decisions.[179] The statutory procedure provided for in the Municipal Government Act[180] to quash invalid by-laws does not seem to have affected the availability of the declaratory judgment for this purpose, notwithstanding the rather strong wording in the Act to effect that "no application to quash a by-law, order or resolution in whole or in part shall be entertained unless the application is made within two months..." after its passage.[181] In the *Wiswell* case an action for a declaration

[174] *Re Herron's Appeal* (1959) 28 W.W.R. 364 (Alta. S.C.) *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton* (1969) 71 W.W.R. 635 (Alta. C.A.). *But see Dobson* v. *Edmonton (City)* (1959) 27 W.W.R. 495 (Alta. S.C.).

[175] *County of Strathcona* v. *Provincial Planning Board* (1970). (Alta. S.C. unreported).

[176] [1965] S.C.R. 512.

[177] *McMartin* v. *City of Vancouver* (1968) 65 W.W.R. 385 (B.C.C.A.). The Court distinguished *Wiswell* on the basis that in that case only a small piece of property which was owned by the applicant for rezoning was under consideration by the Winnipeg Council.

[178] *Re Greene and Ottawa (City)* [1951] O.W.N. 674 (Ont. S.C.); *Re Cookville Co. and York* [1953] O.W.N. 849 (Ont. S.C.). *See Generally* Rogers, *Law of Canadian Municipal Corporations* (1959) at 743-751.

[179] *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512.

[180] 397 (1) An elector of the municipality may, by notice of motion, apply to a judge of the district court to quash any by-law, order or resolution of the council in whole or in part for illegality.

[181] S. 397 (9). The application need not be heard by the judge within the two month period, but the notice of motion must be filed and be returnable within that time, if not, a judge has no jurisdiction to hear the application: *Singer et al* v. *Calgary (City)* (1963) 45 W.W.R. 542 (Alta. D.C.). This case, however, was decided under the City Act which applied only to cities. The statutory procedure outlined in section 397 of the Municipal Government Act applies to rural municipalities as well. A time limit of two months, and one month for some

that a zoning by-law was invalid was upheld by the Supreme Court of Canada. Speaking for the majority, Hall J. dismissed an argument that a clause in the Manitoba legislation similar to section 397(9) of the Alberta Act barred the use of any form of judicial review after the expiry of the time specified in the section, observing:[182]

> The section in question appears to provide a summary procedure to quash by-laws of the metropolitan council but it does not apply to an action such as this. There is nothing in the section depriving the appellants of their rights to bring an action to have the by-law declared invalid.

Similarly, in *Fransden* v. *Lethbridge (City)*[183] the existence of a like clause in the City Act,[184] did not concern Riley J. in an action for a declaration that a by-law was invalid. However, the statutory procedure to impugn a by-law may be invoked by any elector living in the municipality, whereas the *Fransden* case indicates that in order that he have *locus standi* to bring an action for declaration the plaintiff must show that the by-law affects his private rights or that he has suffered some special damage peculiar to himself. *Certiorari* is likely also available to quash an invalid by-law notwithstanding the statutory remedy, provided, of course, that the nature of the council's power in passing the by-law under attack was judicial and not administrative.[185]

In addition to the common law, equitable and statutory procedures outlined above being available to attack planning decisions, the Planning Act itself confers a right of appeal to the Appellate Division of the Supreme Court of Alberta from a decision of the development appeal board or council, as the case may be, made under the auspices of section 128.[186] The appeal, however, is limited to questions of jurisdiction or law and is available only if leave is obtained from a judge of the Appellate Division within thirty days of the date of the decision being appealed. The existence of this form of redress may preclude the use of some other type of remedy such as *certiorari*, although the right of appeal does not *ipso facto* bar *certiorari* proceedings.[187] To illustrate, the Appellate Division of the Supreme Court of

by-laws, may well be adequate in the city, but is it for the rural areas in which district court sittings are quite infrequent? It is submitted that the filing of an application should be within the statutory period but not necessarily the hearing. This type of interpretation would fall in line with decisions rendered in other provinces on the point.

[182] *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512 at 527. Following the *Wiswell* case the Manitoba legislation was charged.

> ...[W]here one year has elapsed since the passing of a by-law... no application to the court of Queen's Bench for a declaratory judgment or order that a by-law is invalid or void, shall be made or entertained by, the Court: Municipal Act. S.M. 1966, c. 38, s. 392 (1) (b).

British Columbia has a clause in its legislation similar to that of Manitoba: Municipal Act R.S.B.C. 1960, c. 255 as amended S.B.C. 1962, c. 41. Brown, J. in *Battistutta* v. *Prince George (City)* (1967) 59 W.W.R. 612 (B.C.S.C.) indicated that at most a clause of this type would preclude attack by declaration where the by-law was merely voidable. However, where the by-law "was in reality a nullity and void ab initio" such legislation would not preclude review by declaratory proceedings after the lapse of the statutory time period. For a further discussion of this point see Harvey, *Statutory Limitations upon the Use of the Declaration as Means of Attacking Municipal By-laws*, (1968) 3 Man. L. J. 141.

[183] (1965) 52 W.W.R. 620 (Alta. S.C.).

[184] R.S.A. 1955, c. 42, s. 267 (1).

[185] *Certiorari* proceedings might be preferable to the statutory remedy in certain circumstances since the latter imposes a two month limitation period whereas the Alberta Rules of Court prescribe a six month period for proceedings in the nature of *certiorari*:

> *742. A notice of motion for an order in the nature of certiorari shall be filed and served within six months after the judgment, order, warrant or inquiry to which it relates and Rule 548 does not apply to this Rule.*

[186] S. 146.

[187] *Samuels* v. *Council of Physicians and Surgeons of Saskatchewan* (1966) 57 W.W.R. 385 (Sask. Q.B.). *See also Smith* v. *The Queen* [1959] S.C.R. 638 and *Re Camac Explorations Ltd. and Alberta Oil and Gas Conservation Board* (1964) 43 D.L.R. (2d) 755 (Alta. S.C.).

Alberta allowed an appeal in *Canadian Industries Limited* v. *Development Appeal Board of Edmonton*[188] from the dismissal of an application for *certiorari* to quash orders of the development appeal board made pursuant to section 128 of the Planning Act notwithstanding the existence of a right of appeal under section 146. In speaking for the majority Johnson J.A. observed:[189]

> There is a discretion to refuse *certiorari* in certain circumstances. One is where a right of appeal exists, but, as pointed out by this court in *Re Solicitor; the Legal Professions Act* (1967) 60 W.W.R. 705 it must be an effective right of appeal. In the present case the appellant was not a party to the proceedings and no notice of the decision was recieved until the statutory period for appeal had expired. Under these circumstances the court should not exercise a discretion to refuse to grant the order merely because provision for appeal is given by statute.

Finally, an aggrieved party may also be able to question the validity of zoning decisions and by-laws collaterally such as in proceedings to enforce an order or by-law.[190]

The grounds upon which an administrative zoning decision can be set aside or a by-law quashed are the same as those generally available against the decision of any inferior public body or any exercise of the power to pass by-laws by a municipal council. Some of these grounds as they specifically relate to the zoning process have already been considered. As to the others, one can do no more in the space allotted than refer the reader to the standard works on the subject and the authorities cited therein.[191]

---

[188] (1969) 71 W.W.R. 635 (Alta. C.A.).

[189] *Id.* at 640.

[190] *Regina* v. *Morin* (1965) 53 W.W.R. 234 (B.C.S.C.); *Regina* v. *Pride Cleaners and Dyers Ltd.* (1965) 49 D.L.R. (2d) 752 (B.C.S.C.); *City of Calgary* v. *Reid* (1959) 27 W.W.R. 193 (Alta. C.A.).

[191] de Smith, *Judicial Review of Administrative Action supra*, n. 64; Griffith and Street, *Principles of Administrative Law* (2nd ed. 1967); Garner, *Adminstrative Law* (2nd ed. 1967); Wade, *Administrative Law* (2nd ed. 1967); Allen, *Law and Orders* (3rd ed. 1965); Foulkes, *Introduction to Administrative Law* (2nd ed. 1968); Rogers, *supra*, n. 178.