THE ZONING GAME—ALBERTA STYLE PART II: DEVELOPMENT CONTROL

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Adding to his study of land use planning in Alberta begun in The Zoning Game—Alberta Style, *(1971) 9 Alta. L. Rev. 268, the author now examines the alternative to zoning—that of development control as exemplified by the English Town and Country Planning Act of 1947. The features of Euclidean zoning and development control are compared and contrasted prior to his undertaking an analysis of the hybrid system as adopted in Alberta, a system which incorporates elements of both. In the author's opinion, this hybrid combines the best features of zoning and development control while retaining the maximum flexibility for both the planner and the developer. The author examines the Planning Act provisions which govern the system of development control in use in Alberta today with a view to clarifying inconsistencies, possible misinterpretations and existing misinterpretations of these provisions by both the courts and the administrators charged with their implementation. In the course of this examination, the author outlines the characteristics of a typical development control by-law; the development control administrative structure, including the use of the land use classification guide, the amendment of same, and appeal procedures available thereunder; and the methods of judicial review available to a party adversely affected by the decision of any segment of this administrative structure. Special reference is made to the development control by-laws of several municipalities in Alberta and to relevant authorities on development control and land use.*

I. INTRODUCTION

The town planner and the inferior legislative body charged by enabling legislation with giving legal effect to planning decisions of necessity base their decisions on certain objectives and on forecasts and predictions of the future. The prescribed objectives should ideally reflect the aspirations of the community as a whole, but more often than not they reflect the personal prejudices of the planner and local elected officials. Furthermore, the forecasts and predictions about such factors as population trends, employment opportunities, technological advancement in transportation and industry and the like are necessarily imprecise to say the least and subject to unforeseen errors. In this milieu of circumstances it is not difficult to see that even the most well-considered land use plan may prove itself to be inappropriate as time passes and circumstances change. Needless to say, the more long-range and detailed the plan is at the outset the more scope there is for error.

Obviously, land use plans can be changed to meet new situations, but the ease with which this can be accomplished is often illusory. Furthermore, the necessity for change and the actual change itself almost invariably produce highly undesirable consequences. There is always a lapse between when it becomes evident that a plan is wrong and when the plan is eventually changed. Indeed, there may be some considerable reluctance on the part of those responsible for it in the first instance to alter the plan since such a change may be subject to being construed as a tacit admission that an avoidable error had been made. In any event, since time is of the essence in land

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development, the longer the lapse becomes the more the shape of the community may be distorted or the more likely the community itself may stagnate. To illustrate, assume that a developer comes forth with a prospective development—be it residential, commercial or industrial—which is one that meets the needs of the community and will be an obvious benefit, but which does not conform to the land use plan designations for the site chosen. The delay in approving the development may result in increased costs of development which the ultimate users will have to bear or, worse yet, it may result in the developer deciding not to proceed at all or to move his project to another community. Depending upon the type of development, the social and economic consequences to the community concerned are obvious. On the other hand, if the land use plan is expeditiously altered to accommodate the prospective development the change could create havoc with surrounding property values, which values reached their level on the basis of the land uses prescribed by the original plan. In the absence of a scheme for compensating property owners for diminution in the value of their land caused by planning decisions,[1] this in turn provides impetus to affected property owners bringing court actions to block the proposed development. It also tends to undermine the confidence the members of the community have reposed in the administrative and political structure of their locale.

These and other considerations have prodded several generations of planning experts into devising a variety of schemes, all aimed at producing a land use regulatory system which is, at one and the same time, both flexible and certain so as to afford adequate protection for existing land uses from incursions by incompatible uses, and yet be capable of adjusting with ease to unforeseen circumstances. The Alberta Planning Act, as presently written, might well be regarded as a model statute which attempts to achieve this end. Whether or not it is successful in its goals remains to be seen. But first, a few general comments about the two extremes of the planning administration spectrum are deemed to be in order.

II. EUCLIDEAN ZONING COMPARED WITH ENGLISH DEVELOPMENT CONTROL (1947)

1. Euclidean Zoning

The dominant feature of Euclidean zoning[2] is that it implements a land use plan, if there is one,[3] by dividing the community into zones or districts and detailing precisely what can or cannot be done with land in each such zone or district. One of the major effects of this, as one commentator has put it,[4] has been to segregate rather than integrate functional portions of cities. In addition, by its very nature the use of zoning to implement land use plans tends to force planners to disregard the interrelationships that exist between apparently widely separated categories of uses.

[1] *See e.g.*, Planning Act, R.S.A. 1970, c. 276, s. 135.

[2] The phrase "Euclidean Zoning" stems from the United States Supreme Court decision of *Village of Euclid* v. *Ambler Realty Co.* (1926) 272 U.S. 365, in which zoning was upheld as being a constitutionally proper exercise of the police power. At that time zoning was and still is looked upon by many as a means of segregating land uses by dividing the community into zones, each with designated use, bulk and open space requirements.

[3] In many communities the zoning map and schedule themselves constitute the plan.

[4] Reps, *Requiem for Zoning*, American Society of Planning Officials, Planning 1964, 56 at 60.

The built-in inflexibility of the standard zoning by-law has been to some extent modified by the introduction of such concepts as buffer zones, conditional uses, variances and, of course, the amendment procedure itself. Nevertheless, the fact remains that, for the most part, zoning maps, which are an integral part of the zoning by-law, are prepared in a vacuum with the only real guidelines being existing land uses, population and the like. The map will prescribe for a particular parcel of undeveloped land the activities that may be engaged in on that land before the demand for development actually arises but no real power exists in the local authority to ensure that the property will be used as designated.[5] The owner may subsequently and quite rightly decide that the prescribed uses are uneconomic and may seek to develop the land in some non-permitted fashion. If his intended development does not fall within the variance provisions (if any exist) of the by-law, he has two alternatives: he may seek an amendment to the zoning map or he may be able to strike the existing zoning down through legal action as being contrary to sound planning principles since the existing classification prescribes an uneconomic use.[6] In any event, by designating a land use before the fact, the zoning by-law intrinsically invites judicial review initiated either by the landowner or by surrounding property owners who may raise the spectre of "spot zoning"[7] should the owner be successful in getting an amendment through.

Another dominant feature of pure Euclidean zoning is that it is extremely parochial in nature. The interdependence of a local government unit with its neighbors is often disregarded in favour of absolute local autonomy with the consequence that expanding communities frequently find themselves in a position of having no adequate room to expand because of the zoning policies of adjacent municipalities. In addition, the edict of zoning, that neighbouring land uses must be "compatible" with one another,[8] is often breached by the fact that one municipality may develop its perimeter for one purpose, such as residential, while an adjoining municipality may designate its abutting areas for another, such as heavy industry.

Finally, and perhaps most important of all, much zoning enabling legislation, past and present, does not require the zoning map to be based upon any comprehensive long range plan which would set out in orderly fashion the development objectives and standards of the

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[5] Several methods suggest themselves by which government can induce private development where normal market forces would not put it: government can use the threat of criminal sanction, it can remove market impediments through tax concessions, it can restrict alternative uses available to the private owner to the point where the only remaining profitable use is the one which is desired and, finally, it can expropriate the land. But these techniques are often not successful or will not be used for political and other reasons.

[6] One of the prime functions of a land use plan is to insure that land is developed in an economic fashion. *See e.g.*, Planning Act, s.3:

> 3.The purpose of this Act is to provide means whereby plans and related measures 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.

If a plan calls for a use that is not in keeping with the enunciated principles it may be possible for the owner to demonstrate to a court's satisfaction that the planners have exceeded their authority.

[7] The term "spot zoning" is a colloquial expression used to describe the passage of a zoning by-law which discriminates in favour of or against a developer. For a detailed discussion of the legal principle involved *see* Anderson, *American Law of Zoning* 240-271 (1968).

[8] At one time the cardinal rule of planning was that only uses of similar type should exist side by side. In the gradual movement away from placing the emphasis on the physical to placing it on the social considerations there has been a tendency away from a strict application of the rule.

community. In consequence many communities engage in zoning on a piecemeal basis. Their zoning endeavors, when looked at separately and in isolation from one another, may look reasonable and in keeping with sound planning principles, but when considered collectively and as a whole the total effort may turn out to have produced a planner's nightmare of an inconsistent and variated patchwork of land uses.

2. English Development Control (1947)

The opposite end of the planning spectrum is probably best exemplified by the rules and regulations prescribed by the English Town and Country Planning Act of 1947.[9] In one broad sweep the English, in that Act, appear to have met most of the previously discussed problems associated with regulating land use through the exercise of the zoning power.

Speaking in general terms, the legislation directed that within three years after an appointed day (July 1, 1948) each local planning authority[10] was to submit to the Minister of Town and Country Planning a development plan indicating the manner in which land in the area under the jurisdiction of the authority would be used and the stages by which development, if any, would be carried out. The plan was to consist of a report on a survey[11] conducted in the area prior to its preparation together with "such maps and such descriptive matter as may be necessary to illustrate the proposals aforesaid with such degree of particularity as may be appropriate to different parts of the area."[12] The distinguishing feature between the development plan and a zoning by-law was that where the latter was precise and detailed the former was imprecise and generalized. For example, instead of prescribing detailed uses such as single-family dwelling, duplex or apartment for a particular area, the development plan was simply and in rough terms to designate an area as residential and propose a gross density to be permitted in the area. In addition, no attempt was to be made to set forth with precision such matters as height, bulk or yard requirements, which are the hallmarks of a zoning by-law.

The development plan was to take effect if and when it received formal approval of the Minister. It was at this stage that a form of regional planning was to take effect in that the Minister could disallow or require an amendment to a plan where the plan as submitted was not compatible with existing and projected land uses in neighbouring development areas. To insure an element of currency the Act required the local planning authority, at least once every five years, to carry out a fresh survey of its area and submit to the Minister a report of the survey, together with proposals for any alterations or additions to the plan rendered necessary by the effluxion of time.

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[9] 10 and 11 Geo. 6, c.51.

[10] These authorities were to consist of county borough councils and county councils, with power in the Minister of Town and Country Planning to combine areas, or parts of areas of such counties and county boroughs, and to set up joint boards.

[11] The survey was to involve a physical, economic and sociological analysis of each area covering such matters as natural resources, distribution of industry, communication, living requirements and the like.

[12] S. 5(2).

To give effect to the development plan the Act required that most developments[13] were to be preceded by an application to the local planning authority for permission. The planning authority was given almost unfettered discretion in considering the application; the statutory prescription being that it "shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."[14] If an applicant was refused permission or was granted permission with conditions attached with which he was dissatisfied, he was entitled to launch an appeal to the Ministry. An examiner was then to be dispatched to conduct, in the locale in question, a hearing at which interested parties were entitled to make submissions and, in due course, the appeal would either be allowed or be dismissed in the name of the Minister.[15]

3. Comparison

Two particularly striking and contrasting characteristics can be detected from an even superficial examination of these two systems. Firstly, in contrast with standard zoning, detailed planning decisions were not to be taken until after the fact under the English system. This created the somewhat anomalous situation that a socialist type government[16] devised and implemented a land use regulatory scheme which both recognised and gave considerable scope to private initiative in land use planning in the sense that the detailed planning decision relating to a specific parcel was often not taken until after a private developer had come forth with a specific proposal. On the other hand, American Euclidean zoning, which was devised and is kept current by a political system committed to the principle of free enterprise, by its very nature, drastically limits, or at least purports to do so on paper, the role of the private developer in formulating and implementing the community plan.

The second striking feature is a by-product of the first and likely explains the anomaly contained therein. Under zoning, detailed use regulations are made by and attached to specific properties at the political level whereas the English system envisaged that these decisions be made at the administrative level. To illustrate, if a prospective developer's property is governed by the usual zoning by-law, he need merely leaf through the by-law, a creature of the local municipal council, to determine where he stands. If he wishes to engage in a development which does not conform and which could not be fit into the by-law's variance provisions, he would ultimately seek an amendment through the local council of the zoning by-law. The administrators of the by-law acted as mere conduits with virtually no discretion. By contrast, if the developer's property is governed by a system similar to that provided for in the 1947 English legislation he will find that appointed administrators play the leading role and to a

[13] Section 12 required permission in respect of any development of land, but in defining the term "development" excluded a number of activities, the most important being the maintenance and alterations of buildings provided no material change was made in external appearance, and the change from one particular use to another within certain classes of use as prescribed in supplementary ministerial orders.

[14] S. 14(1).

[15] For detailed analysis of the 1947 Act see Kekwick, *Town and Country Planning Law* (1947); Wood, *Planning and The Law* (1949); Harr, *Land Planning Law in A Free Society* (1951); Lamb and Evans, *The Law and Practice of Town and Country Planning* (1951); Leach, *Planning and Compensation Law* (1955); Blundell and Dobry, *Town and Country Planning* (1963).

[16] The 1947 Act was a creature of the Labour Government then in power in England.

large degree make the effective decisions. This difference pinpoints one of the fundamental issues in land use planning: to what extent ought effective decision-making power relating to the use of private property be delegated to appointed technocrats as opposed to being exercised by elected representatives?

III. INTRODUCTION OF DEVELOPMENT CONTROL INTO ALBERTA

To what extent, if any, does the Alberta Planning Act fuse these two systems of regulating land use? Zoning, in the form that it is recognized today, was first introduced into the statute books of Alberta by the Town Planning Act, 1929.[17] The draftsmen of that Act drew heavily from the American experience in both concepts and terminology. A degree of flexibility, not then prevalent in American zoning, was introduced by conferring a right of appeal to any person considering "himself aggrieved by the provisions of a zoning by-law"[18] to a locally appointed commission and thence to a provincially appointed planning board. In considering appeals the board was directed to adhere to the "spirit" of the zoning by-law but given authority to "make such regulations as special cases seem to it to call for."[19] In addition the Act provided that the board "shall endeavor to see that substantial justice is done and that the interests of any individual are not unduly or unnecessarily sacrificed for the benefit of the community."[20] The same statute conferred discretionary authority on local authorities to prepare and adopt an "Official Town Plan" for the purpose of providing for the development of the municipality in an "orderly and convenient manner."[21] Although the Act prohibited local authorities from undertaking public improvements which were inconsistent with or at variance from the official plan, it was silent as to the connection between the official town plan and a zoning by-law of the municipality.

An element of regionalism was introduced in the Act by conferring on two or more adjoining municipalities authority, on the approval of the Minister of Municipal Affairs, to appoint a regional planning commission and to delegate to it such authority as "may be necessary for the purpose of carrying into effect a town planning scheme."[22] This anti-parochial theme was reinforced by such provisions as those relating to a provincially constituted Town and Rural Planning Advisory Board, charged with cooperating with and assisting local authorities in formulating and carrying into effect official town plans,[23] and those requiring the Minister's approval prior to the coming into effect of official town plans and zoning by-laws.[24]

A major revision of the 1929 Act appeared in the Revised Statutes of 1942 consisting largely of the consolidation of a variety of minor amendments that had been made in the interval. The Act of 1942[25] added authority to regulate billboards and signs, the erection of

[17] S.A. 1929, c. 49.
[18] S. 36 (1) (a).
[19] S. 36(3).
[20] *Id.*
[21] S. 19(a).
[22] S. 18(1).
[23] S. 3.
[24] Ss. 21 and 31 (5).
[25] R.S.A. 1942, c. 169.

fences and the construction of chimneys to the list of matters that could be dealt with in a zoning by-law. In addition, the terms of reference of the zoning appeal board were altered, which had the effect of narrowing its discretion.[26]

The 1950 amendments to the Act introduced some fairly radical changes in planning technique and administration, particularly in creating a system of land use control fashioned in part on the English model, thereby receding from zoning as the sole means of implementing a plan.[27] In the first place, the Act was amended to change the name of the master plan of a community from "official town plan" to "general plan".[28] Secondly, previous sections relating to regional planning commissions, of which none had ever been constituted, were amended to change their titles to "District Planning Commissions" and to confer on them power to make recommendations to member municipalities relating to the preparation and adoption of general plans, zoning by-laws and schemes.[29] Of particular significance, each commission was authorized to appoint such planning engineers, consultants, and other officers as was necessary for its purposes and within its budget, which was to be contributed to by both member municipalities and the provincial government.[30] Thirdly, the amendments provided for the creation by municipalities of "Technical Planning Boards",[31] to be comprised of municipal officials, and of "Planning Advisor Commissions",[32] to be comprised of citizens-at-large for the purpose of advising council on planning matters and, generally, promoting a public interest in town planning. By far the most significant change was that conferring authority upon the Minister on application by a municipality to suspend the operation of any existing zoning by-law where the municipality had passed a resolution providing for the preparation of a general plan.[33] The Minister's directive, referred to as an "interim development order", was to prescribe the manner in which development was to be controlled during the interval between the passage of the general plan resolution and adoption of the general plan. The legislation was silent as to how development was to be controlled thereafter.

Two years later the Town and Rural Planning Act was revised and reorganized.[34] The new consolidation was much more explicit in describing how the general plan was to be prepared and what it should contain.[35] In addition, the Act was more detailed in

[28] Section 28(3) provided:

> In the disposition of all appeals, the Zoning Appeal Board shall deal with each specific case, having regard to its merits and circumstances, and having regard always to the general scheme of the by-law or regulations, and may make such order *within the limits, if any, set for it by the by-law* or the regulations as may seem to it in the circumstances proper and expedient. [Emphasis added].

[27] Town and Rural Planning Act, S.A. 1950, c. 71.

[28] S. 3(a).

[29] S. 9.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] S. 11.

[34] The Town and Rural Planning Act, 1953, S.A. 1953, c. 113.

[35] The plan was to be based on surveys of land use, population, transportation, communication services and social services within the municipality (s.65(1)) and was to be prepared by "qualified persons" (s.65(2)). At the discretion of the municipality, it could include proposals relating to the manner in which land in the municipality should be developed, whether for public or private purposes, and the stages or sequence in which development should be carried out; relating to the allocation of areas of land for agricultural, residential, industrial, commercial or other classes of use; relating to roads, services, public buildings, schools, parks and open spaces and their location; and relating to the nature and contents of the zoning by-law that may be required to insure that private development conforms to the plan.

describing the time period during which interim development control could be operative and how the municipality should exercise its regulatory function during the continued existence of development control:

> 69.(1) The council, at any time after passing a resolution authorizing the preparation of a general plan, may make application to the Minister for authority to exercise control over development which takes place in the municipality or part thereof prior to
> (a) the completion and adoption of the general plan, and
> (b) the passage of a zoning by-law prepared in accordance with the general plan.
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> (2) Control shall be exercised over the development within the municipality by the council on the basis of the merits of each individual application for permission to develop, having regard to the proposed development conforming with the general plan being prepared.

Up to this point, although regional planning had been recognized in principle in the provincial planning legislation, no real attempt had been made by the legislature to put regional planning on an equal footing with that at the local level. This state of affairs was altered in 1957. Pursuant to the amendments to the Town and Rural Planning Act occurring in that year,[36] any district planning commission that had been established was required to prepare and adopt a "district general plan" in which the district was to be divided into zones to be designated either low density agricultural, high density agricultural, small holdings, country residences, highway commercial, district recreational, general urban, new general urban, major industrial or "such other zones as the commission may deem necessary and essential for the purpose of the plan."[37] The district general plan was to define the uses of land and buildings to be permitted within each such zone as well as establish the sequence of development. More particularly, it was to prescribe the nature of and minimum regulations required to be in any zoning by-law to be put into effect by a municipality covered by the district plan. The preparation and adoption of a district general plan of the magnitude envisaged by the Act was obviously going to take a considerable period of time. Accordingly, the Act further provided that each commission prepare and adopt, as soon as possible after the commission commenced operation, a "preliminary district plan" which was to be operative during the interim period prior to the coming into effect of a district general plan.[38] The preliminary district plan was to consist of a map showing the district planning area or part thereof divided into the same type of zones as for the final district plan and a schedule designating the type of uses permitted, restricted or prohibited in each zone. It should be noted at this point that the intent was that the district plans be general in nature, leaving the specifics to individual municipalities.[39]

The relationship of the district general plan or preliminary district plan to individual developments occurring within a municipality was established by a variety of sections which in essence prohibited a

[36] S.A. 1957, c. 98.

[37] S. 21.

[38] *Id.*

[39] To illustrate, the district plans would designate areas which it affected as general urban, but it was left to local municipalities to break down the general urban classification into more specific uses such as single-family dwelling, duplex and apartment zones.

municipality from adopting a general plan, passing any by-laws or resolutions or issuing any development permits for either private or public projects which were at variance with the district plan.[40] Lest one conclude that the power of local government to plan land uses within its boundaries was effectively eliminated, reference should be made to those sections which assured municipalities voting membership on the district planning commissions, and also those sections conferring broad rights of appeal in favour of municipalities to the Provincial Planning Advisory Board from decisions of the district commissions confirming the district general plan or adopting the preliminary district plan or failing to consider, adopt or confirm amendments to these plans as proposed by a municipality.[41] Nevertheless, local autonomy in land use planning was severely limited compared with twenty and thirty years earlier.

Although Alberta planning legislation has experienced numerous amendments including one complete re-writing since 1957 which have affected terminology, details of administration, and the like, it seems fair to say that the basic philosophy of planning in Alberta had been fixed by that year, with one particularly noticeable exception which will be referred to shortly. At the top of the planning ladder is the Minister of Municipal Affairs who administers the Act. Immediately below him is the Provincial Planning Board which, with the exception of questions of law and jurisdiction, is the final arbiter in a variety of planning matters. Next are the regional planning commissions which are charged with the responsibility of preparing and adopting regional plans, each of which cover substantial areas of the province.[42] At the bottom are the local government units consisting of cities, towns, villages, rural municipalities, rural counties and urban counties, each of which is charged with implementing that part of the regional plan affecting it. A local government unit may administer planning within its boundaries either with or without adopting a general plan. In either event, the actual implementation by a municipality of broad-based planning decisions is effected by way of zoning or development control. Whether and when either zoning or development control or both may be used by a municipality is the subject matter of the next heading.

IV. USE OF DEVELOPMENT CONTROL AS A PLANNING TOOL

When development control was introduced in England in 1947 it was designed to be of a permanent nature. In contrast, when introduced into Alberta it was clearly envisaged as an interim measure capable of being used by a municipality only between the time that a municipal council resolved to prepare a general plan and when such a plan was adopted by council, at which time the general plan would be implemented through standard zoning techniques. Indeed, the adjective "interim" was used in the planning legislation to describe development control.[43] However, in a re-writing of the Act in 1963[44] the term

[40] S. 21.

[41] *Id.*

[42] There are presently seven planning regions in the province covering the more populated areas. The regional aspects of planning in the rest of the province are administered directly by the Department of Municipal Affairs, Planning Branch.

[43] S.A. 1950, c. 71, s. 11.

[44] S.A. 1963, c. 43.

"interim" disappeared. Nevertheless, it was still abundantly clear that development control was to be available to municipalities as a means of regulating land use only until a general plan had been adopted:

> 100. (1) A council, on passing a resolution authorizing the preparation of a general plan, shall forthwith apply to the Minister for an order authorizing the exercise of control over development in the areas to be included in the general plan or parts thereof before
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> (a) the completion and adoption of the general plan, and
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> (b) the passage of a zoning by-law prepared in accordance with the general plan.
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> 99. When a general plan has been adopted,
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> (a) the council shall proceed with the enactment of a zoning by-law to regulate the use and development of land in the manner prescribed and within the area or areas referred to in the general plan, and
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> (b) the council or any other public authority shall not enact any by-law, take any action or carry out or commence any undertaking or public project that is inconsistent or at variance with the general plan.
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> 119. (2) Where a council adopts part of a general plan with respect to specific areas of land that are subject to a development control by-law, the council shall pass a zoning by-law with respect to those areas, and the development control by-law then ceases to apply to and within those areas.

In 1967, sections 99 and 100(1) were amended to read as follows:[45]

> 100. (1) A council, on passing a resolution authorizing the preparation of a general plan or a by-law adopting a general plan, shall apply to the Minister for an order authorizing the exercise or the continuance of the exercise of development control in the areas included or to be included in the general plan or parts thereof.
>
> 99. (1) When a general plan has been adopted,
>
> (a) the council shall proceed with the enactment of a zoning by-law to regulate the use and development of land in the manner prescribed and within the area or areas referred to in the general plan, and
>
> (b) the council or any other public authority shall not enact any by-law, take any action or carry out or commence any undertaking or public project that is inconsistent or at variance with the general plan.
>
> (2) Notwithstanding clause (a) of subsection (1) of this section and subsection (2) of section 119, the council may exclude from the provisions of a zoning by-law any areas of land included in the general plan and may exercise or continue to exercise development control in the areas excluded, in which case sections 100 to 113 apply.

The present wording of these sections is:[46]

> 100. (1) A council, on passing a resolution authorizing the preparation of a general plan or a by-law adopting a general plan, shall apply to the Minister for an order authorizing the exercise or the continuance of the exercise of development control in the areas included or to be included in the general plan or parts thereof.
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> 98. When a general plan is adopted, the council
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> (a) may, at any time thereafter, exercise or continue to exercise development control over all or part of the land included in the general plan, in which case sections 100 to 113 apply, and
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> (b) shall immediately thereafter proceed with the enactment of a zoning by-law to include those areas of land within the general plan in respect of which development control is not exercised.

Subsection (2) of section 119 was repealed in 1968.[47] In light of the forgoing amendments, it would appear that both development control

[45] S.A. 1967, c. 60, ss. 10 and 12.

[46] R.S.A. 1970, c. 276.

[47] S.A. 1968, c. 77, s. 15.

and zoning can be used as a means of regulating land use at one and the same time after a general plan has been adopted.

Assuming that a particular area of land is under development control at the time of the passage of the by-law adopting a general plan, does development control automatically continue? This appears to be the effect of section 98(a). However, that subsection makes sections 100 to 113 applicable and subsection (1) of section 100 provides in essence that on adoption of a general plan a council "*shall* apply to the Minister for an order authorizing the... continuance of the exercise of development control."[48] Obviously the requirement of the Minister's approval to the exercise of development control in the first instance is tied in with whether or not the municipality in question is capable of properly administering such a highly discretionary system of land use control. This should not be a concern with respect to a municipality which has once been adjudged qualified. Accordingly, it is debatable whether the apparent requirement of a new development control order after adoption of a general plan was by accident or by design.

Can a municipal council later turn to development control as a means of regulating land which at the time of the passage of a general plan by-law was controlled by zoning and, if so, what steps must it take? Again sections 98 and 100 shed light on the question. Section 98(a) authorizes council to exercise development control over all or any part of the land covered by the general plan, "at any time" after adopting the general plan. But such action appears to be possible only after an application is made to and approved by the Minister, at which time the Minister's order must authorize the repeal of the zoning by-law.[49] Indeed, an argument can be made that upon adopting a general plan by-law a municipality must apply for authority to exercise development control over all of its territory irrespective of the type of control exercised prior to the general plan by-law. The difficulty arises out of the use of the word "shall" in subsection (1) of section 100. This subsection does not say that a municipality, if it decides to exercise development control over land previously under zoning, shall apply to the Minister for approval, rather it affirmatively requires a municipality, upon passing a resolution authorizing the preparation of a general plan or upon adopting a general plan to apply for the right to exercise development control. However, section 98(a) appears to confer a discretion in this regard. Subsection (b) of that section further confuses the matter. It requires a municipality to enact a zoning by-law immediately after adoption of a general plan to include those lands not covered by development control, whereas section 98(a) authorizes council "at any time" after its adoption to exercise development control. Presumably section 98(b) is intended only to insure that at any given time all land governed by the general plan is either under zoning or under development control, otherwise the effect of the phrase "at any time thereafter" contained in section 98(a) would be completely negated. These conflicts ought to be resolved in future redrafts of the Act.

It can be seen that after adoption of a general plan, the status of both development control and zoning are, under the present wording

[48] Emphasis added.

[49] S.A. 1970, c. 276, s. 102.

of the Act, uncertain to say the least. What of the period between the resolution to prepare a general plan pursuant to section 94(1) and adoption of the general plan pursuant to section 96(1)? Again section 100(1) raises difficulties. A literal interpretation of that subsection would lead to the conclusion that, upon passing a resolution resolving to prepare a general plan, the council must apply to the Minister for an order authorizing the exercise of development control in the areas to be included in the general plan. If the order is granted, sections 102 and 103, read together, result in any existing zoning by-law having to be declared inoperative upon a certain date, which would mean that development control would be the only means left of regulating land use. Again, it is doubtful that this is the intent. Surely it was envisaged that a municipality could apply for the right to exercise development control over selected areas of its territory and retain its existing zoning for the remainder. Indeed, this is in fact the manner in which some municipalities have carried on during the interim period.[50]

Assuming that after passage of a resolution to authorize the preparation of a general plan a municipality is permitted to use both methods of control and in fact does so, could the municipality take land currently under the zoning by-law and place it under development control and vice versa? In a recent case Sinclair J. of the Alberta Supreme Court faced this very issue.[51] After giving the Act and subordinate legislation careful consideration. His Lordship concluded that areas of land could be removed from development control and placed under a zoning by-law but that the reverse was not possible. The reasoning, in part, of the learned Justice was that the Planning Act contemplates a movement from the uncertainty of development control to the certainty of zoning but that to permit zoned land to be dezoned and placed under development control would be to permit a retrograde step in the planning process. In support of his conclusions Sinclair J. cited subsection (3) of section 125 which provides that "A non-conforming lawful use of land or a building may be continued, but if that use is discontinued or changed, any future use shall conform to the provisions of the zoning by-law." His reasoning was that to permit the zoning -law to be amended so as to remove from under the zoning umbrella land which was being used in a non-conforming fashion and place it under development control would be to abrogate the effect of that subsection. However, it is respectfully submitted that section 125(3) presupposes that the land in question remains under the zoning by-law and if the use is changed it must be in conformity with that by-law. But there is nothing contained therein that prohibits the land in question from being put under development control, in which case section 125(3) becomes inoperative but it is not abrogated since it is still applicable to any land remaining under zoning.

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[50] For example, on December 14, 1964 the Council of the City of Edmonton passed a resolution authorizing the preparation of a general plan for the city. Subsequently, it applied under section 100 of the 1963 Act for an order authorizing development control. The order, dated December 31, 1964, stated in part:

> 4.The Council upon the enactment of a by-law pursuant to this Order, to be known as the 'Development Control By-Law No. 1(1964)' is hereby authorized to exercise development control *over development within the part of the City of Edmonton not contained within zoning By-law No. 2135 as amended* during the period of preparation of the general plan. [Emphasis added].

Pursuant to the Order the city has used both development control and zoning to regulate land use during the period of preparation of the plan.

[51] *Bobey* v. *City of Edmonton* (unreported) S.C. 69658, April 1, 1971.

Furthermore, the court's decision perhaps fails to give effect to section 4 of the Minister's order[52] which provides that council is authorized to exercise development control during the period of preparation of the general plan "within the part of the City of Edmonton not contained within Zoning By-law No. 2135 *as amended.*"[53] Can the term "as amended" not be construed to include amendments to the zoning by-law removing land from, as well as amendments placing land under the by-law?

As mentioned previously, Sinclair J. was of the view that the Planning Act envisaged a progression from a resolution to prepare a general plan to exercise of development control to adoption of a general plan by by-law and ultimately to a zoning by-law covering all of the areas of a municipality affected by the general plan. With respect, it would appear that in reaching this conclusion, His Lordship did not consider the effect of the phrase in section 98(a) of the Act, "at any time thereafter," which authorizes a municipality to exercise development control after adoption of the general plan. Since a municipality after adopting a general plan clearly must exercise control over land either by means of development control or zoning and since it can at any time after adoption of a plan exercise development control, it must follow, if the phrase in question is to have any meaning, that development control may follow on the heels of zoning.[54]

Before moving to a consideration of the actual nature of development control and the manner in which it is put into effect in Alberta, one more question arises with respect to when development control is available as a method of land use regulation, namely, can a municipality exercise development control before it resolves to prepare a general plan?[55]

Development control is by its very nature supposed to be *ad hoc* in the sense that applications for permission to develop are dealt with on their merits without any attempt being made to lay down hard and fast rules before the fact. However, at the same time, there should be some yardstick by which the merits of an application can be measured. Under the 1947 English legislation the yardstick was to be the development plan. In Alberta the yardstick is either an emerging or completed general plan or an emerging or completed regional plan or both. At least, this seems to be the intent of the Planning Act, although once again a number of inconsistencies occur in its provisions.

Subsection (2) of section 100 provides that development control "shall be exercised... having regard to the proposed development conforming with the general plan being prepared or as adopted." *Prima facie,* in the absence of either an emerging general plan or a completed one, it would not be possible for a municipality to use development control as a means of regulating land use because this subsection could

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[52] The case arose in the City of Edmonton and, therefore, the order referred to in n. 50 was applicable.

[53] Emphasis added.

[54] For instance, a municipality might exercise control exclusively by means of a zoning by-law during the interim period and after adoption of a general plan. In such a case, since section 98(a) permits development control to be exercised at any time after a general plan by-law, it must follow that if the municipality subsequently decides to use development control for a given parcel of land within its borders, the development control must have been preceded by zoning.

[55] Note that a municipality need not resolve to prepare a general plan:

94(1)A council may resolve to prepare a general plan . . . .

not be complied with. However, section 100(2) must be read with sections 70 and 71, which in themselves raise a number of questions.

> 70. Where a commission resolves to prepare and adopt a regional plan, each council having jurisdiction over any part of the regional planning area to which the regional plan is to apply shall
>
> (a) exercise control over development in accordance with the terms of any existing development control by-law or zoning by-law enacted under Part 4, or
>
> (b) in the absence of such a by-law, apply to the Minister for authority to exercise development control in the manner provided by Part 4.
>
> 71. (1) A commission shall prepare a preliminary regional plan for the whole of the regional planning area, and development within the area may be governed by the exercise of development control or by adopting a zoning by-law.
>
> (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.

Does section 70(a) mean that, if a municipality has a zoning by-law but no development control by-law at the time the regional planning commission resolves to prepare and adopt a regional plan, the municipality *must* continue to exercise control under that by-law to the exclusion of converting to development control? If so, what is the effect of sections 98 and 100? Are these two sections operative only if no action has been taken by a regional planning commission with respect to a regional plan? If at the time the regional planning commission resolves to prepare and adopt a regional plan the municipality has neither a development control by-law nor a zoning by-law, does section 70(b) require the municipality to exercise development control to the exclusion of zoning? What is the effect of the clause in section 71(1) authorizing control over development by means of either development control or zoning in light of sections 70, 98 and 100? These and other questions are simply not capable of being answered definitively having regard to the obvious conflicts in the Act.

However, it would seem likely that the legislature intended that a municipality be entitled to apply for the right to exercise development control in two separate circumstances. Firstly, notwithstanding that it has not resolved to prepare a general plan, a municipal council may (not "shall" as it is stated in section 70) apply for permission to exercise development control when a regional planning commission has either prepared a preliminary regional plan or has resolved to prepare and adopt a regional plan. Secondly, a municipal council may exercise development control after it has resolved to prepare a general plan or has one in effect irrespective of the status of a preliminary regional plan or regional plan. A major difficulty associated with this interpretation arises out of sections 101 and 102. Section 101 provides that, on applying for the right to exercise development control under section 100, a council must submit to the Provincial Planning Board, *inter alia,* a certified copy of the resolution authorizing the preparation of the general plan and a statement indicating the arrangements made by the council for the preparation of that plan. If the Board is satisfied with these arrangements it is to so report to the Minister who may then make his order. Needless to say, if an application is made by a municipality on the basis of a regional or preliminary regional plan and it has not resolved to prepare a general plan, this part of the Act cannot be complied with.

Section 70(b) provides that in the absence of either a development control or zoning by-law a municipality "shall... apply to the Minister

for authority to exercise development control in the manner provided by Part 4." Does this mean that the application must be in the form provided for in Part 4, which includes the aforementioned section 101? If so, a municipality must have resolved to prepare a general plan in order to qualify to exercise development control. However, it is submitted that the phrase "in the manner provided by Part 4" modifies the term "development control" and not the verb "apply". In other words, the application under section 70 need not be in the manner provided for in Part 4 but the method of using development control must be that set out in that Part. This interpretation is supported by the first phrase in section 101 which provides that "A council, in applying under section 100 shall" submit the material previously mentioned. Presumably, if the application is made under section 70 such supporting material is unnecessary with the result that development control can, in the proper circumstances, be exercised in the absence of a resolution to prepare a general plan or general plan by-law. The difficulty with this interpretation is that there may be no authority in the Minister to authorize development control in the absence of a report from the Board as prescribed in section 101. Section 102 states in part:

> The Minister, upon the report of the Board made under section 94, 100 or 101, may make an order . . . .

The three sections mentioned all relate to general plans. In the absence of a general plan, the Board cannot make a positive report. Is the Minister precluded from issuing a development control order if he has no such report from the Board? If the answer to this is in the affirmative, the effects of sections 70 and 71(1) would be abrogated.

To summarize, although the intent of the Act is not clear, common sense would prescribe that a municipal council is authorized to employ development control as a planning tool at any time after either a resolution to prepare a regional plan has been passed by the regional planning commission having jurisdiction in the area or the regional planning commission has prepared a preliminary regional plan or after the municipal council has passed a resolution to prepare a general plan, but not otherwise. This is in keeping with the general principle that development control is capable of being a sound device for regulating land use only if decisions to permit or reject developments are based upon some existing or emerging overall plan. If that is in fact the intent then, provided that any one or combination of more than one of these conditions exist, there are no compelling reasons as to why a municipality should not be permitted to change from zoning to development control and the reverse for all or part of its territory as changing conditions in the community warrant.

V. CHARACTERISTICS OF A TYPICAL DEVELOPMENT CONTROL BY-LAW

The contents of a development control by-law are dictated by Part 4 of the Planning Act and, pursuant to section 103, by the terms of the Minister's development control order. Thus, a few words about the contents of an order are perhaps appropriate at this point.

A typical development control order has four main components: firstly, it authorizes the use of development control as a means of regulating land use in the municipality in whose favour the order is

made; secondly, it requires the municipality to enact a development control by-law and spells out to some extent what the by-law must and may contain; thirdly, it provides for the suspension of any existing zoning by-law respecting the areas covered by development control; and finally, the order dictates when development control is to commence and when it is to expire. Apparently the intent of the Planning Act is to permit a municipality to exercise development control over all or parts of its area. If a municipality desires to place all of its territory under development control the order simply reflects this by declaring that any zoning by-law then in effect in the municipality is suspended. On the other hand, if a municipality seeks development control for only part of its area the order makes no attempt to spell out specifically what parts are to be so regulated. To illustrate, when the City of Edmonton applied for development control in 1964, pursuant to the 1963 Act, it had already formulated relatively firm plans for about eighty-five per cent of its area and wished to exercise development control for the remainder only. Accordingly, the development control order, which was issued in that year and which is still in effect, authorized development control "within the part of the City of Edmonton not contained within Zoning By-law #2135 as amended during the period of preparation of the general plan."[56] The right to decide what parts of a municipality are to be governed in what manner is thus left primarily in the hands of the municipality itself.

Development control becomes operative, by the terms of the order, upon a development control by-law being passed by the municipality concerned. The typical order also dictates that the right to exercise development control expires:[57]

> 7.(a)... when the council adopts a general plan and enacts a zoning by-law in conformity therewith under the provisions of the Act, provided that if a zoning by-law is enacted for only part of the municipality then development control shall remain in effect in the remainder of the municipality, or
>
> (b) when this order is rescinded.

Thus, if a municipality adopts a general plan and enacts a zoning by-law for the whole of its area pursuant to the plan and if it wishes later to revert to development control, as it is authorized to do under section 98,[58] it would appear that a new development control order would be necessary.

The development control by-law, which is one of the conditions precedent to the right of the municipality to adopt development control as a technique of regulating land use, is usually a surprisingly short document compared to the standard zoning by-law, which it parallels to a large degree. The reason for this will become evident shortly. The standard by-law is necessarily divided into a number of parts: definition, administrative agencies, permit requirements, appeals, and enforcement. The definition part characteristically contains an innocuous purpose section,[59] followed by definition of a variety of

[56] *Supra*, n. 50.

[57] This passage is taken from the current standard form development control order prepared by the Department of Municipal Affairs, Planning Branch, for use by smaller municipalities, a copy of which may be obtained from its offices in Edmonton.

[58] *Supra*, at 12-13.

[59] *See e.g.*, City of Edmonton Development Control By-law No. 2624:

> 1.The purpose of this By-law is to control development until the general plan is adopted so that such development shall be orderly and economical and in keeping with the general plan being prepared.

terms, some of which are a mere repetition of those found in section 2 of the Planning Act. The part dealing with agencies creates the office of development control officer, as prescribed by section 105(a) of the Act and may provide for the establishment of a development appeal board.[60] The most important part of the by-law from the point of view of the private developer is that which dictates when and how a permit is required and obtained. Like the standard zoning by-law, the development control by-law prohibits all development[61] unless a permit has been issued or unless the proposed development falls within those types specifically exempted from permit requirements. Those specifically exempted usually consist primarily of activities such as alterations and repairs of a minor nature, erection of fences and temporary signs and the like.[62] The by-law further prescribes to whom application must be made—either the development control officer or municipal planning commission or both depending on the type of development[63]—and the form which it must take.[64] Section 110 of the Act confers a right of appeal to certain interested parties and section 128 prescribes the procedures to be followed in exercising this right. The by-law itself usually elaborates on this matter with respect to procedures to be followed by the appellate tribunal and the like.[65] Finally, the development control by-law, under the auspices of section 139 of the Planning Act and section 112 of the Municipal Government Act,[66] usually provides a penalty for its contravention.

VI. ADMINISTRATION OF DEVELOPMENT CONTROL

To this point one is struck with the obvious similarity between zoning and development control by-laws. However, unlike the former, the development control by-law does not create a number of land use categories and prescribe uses and manners of use permitted and prohibited in each. It is this dissimilarity which primarily distinguishes these two methods of land use control. Where the zoning by-law prescribes by mean of a combination of maps and schedules a set of minute rules ranging from laying down the permitted uses to side-yard requirements for a given parcel of land, the development control by-law, in keeping with the theory of development control, is silent. The underlying principle of development control is that an application for development is to be dealt with on its particular merits having regard to a plan which is emerging or has been adopted, a plan which by its nature is general and expressed in broad terms. In contrast, under

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[60] Section 108(1) of the Act confers a discretion on the municipal council to create a development appeal board. If no such board is created, section 128(8) requires that appeals normally considered by such a board be heard by the municipal council. If a development appeal board already exists by virtue of a zoning by-law, that board is often named as the appeal body for purposes of the development control by-law. *See e.g.*, Edmonton By-law No. 2624, ss. 2 and 6(1)(a).

[61] The term "development" is usually defined to cover nearly every conceivable operation affecting land or buildings: *see e.g.*, Calgary Development Control By-law No. 7839, s. 2(f).

[62] *See e.g.*, Calgary By-law No. 7839, s. 5; and Edmonton By-law No. 2624, s. 4.

[63] Section 105 of the Planning Act requires that the development control by-law authorize the development control officer or a municipal planning commission to receive, consider and decide on applications for permits. The Edmonton By-law delegates authority to consider all applications to the development control officer whereas in Calgary all applications must initially be dealt with by the development control officer, but with authority in him to refer any application to the planning commission for a decision (s.11(e) of Calgary By-law).

[64] Supporting material usually must consist of a site plan showing floor layout, elevations and perspective of the building and a statement of intended uses.

[65] *See* section 108(5) and *infra* at 21-23.

[66] R.S.A. 1970, c. 246.

zoning, a development application must fit into a pre-determined set of exhaustive rules in order to provide the degree of certainty inherent in the zoning process.

The philosophy of development control is embodied in the Planning Act:

> 100.(2) Control shall be exercised over development on the basis of the merits of each individual application for permission to carry out development, having regard to the proposed development conforming with the general plan being prepared or as adopted.

However, this section is somewhat illusory having regard to later sections of the Act and to the manner in which the powers conferred in these sections have been utilized by Alberta municipalities.

1. The Land Use Classification Guide

Section 106 of the Planning Act authorizes a municipal council to make resolutions respecting "the use of land in specific areas, or any special aspects of specific kinds of development and the manner of their control," and Section 107 permits a council to adopt by resolution a "land use classification guide and a schedule of permitted uses ... under section 106 for the purposes of development control."[67] The burning issue raised by these two sections is, what is the legal effect of such resolutions, particularly the resolution adopting a land use classification guide? This question becomes extremely significant when one has regard to the nature of a typical land use classification guide.

Put simply, a land use classification guide is virtually identical to the standard form zoning by-law minus its general part relating to permits, applications, appeals and enforcement, which as has been noted earlier, are to be found in similar form in the development control by-law itself. In other words, the written part of the guide creates a number of land use categories ranging from parkland to heavy industry, and dictates in detail both the type and manner of use permitted in each classification.[68] The narrative portion is always accompanied by a map dividing the area affected into classified districts.[69]

To what extent must local administrators adhere to the guide in deciding upon whether or not to issue a development permit? May the approving authority, for example, waive the parking requirements imposed by the guide if the proposed development otherwise conforms and the authority deems it expedient? May the approving authority reject an application even though the proposed development conforms in all respects to the uses and manners of use prescribed by the guide? The development control by-laws in use in both major cities in Alberta provide that the development control officer or the municipal planning commission, as the case may be, "shall be governed by the land use classification guide."[70] The model by-law prepared by the department of municipal affairs is less certain.[71] Section 10(2) thereof authorizes the development control officer to

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[67] Nowhere in the Act is a land use classification guide defined nor does the Act state what the guide should contain.

[68] In fact the Edmonton Land Use Classification Guide incorporates by reference some of the city's zoning by-laws. *See* section 4(2) (1) of the Guide as an illustration.

[69] In the City of Edmonton the Zoning Map and Land Use Classification Map are one and the same.

[70] Calgary By-law No. 7839, s. 11(i); and Edmonton By-law No. 2624, s. 7(3) (b).

[71] *Supra*, n. 57.

decide on development applications and provides that if a development control resolution has been passed by the council, "he shall be governed thereby in his consideration and decision of the application." However, in the immediately preceding section the model by-law appears to differentiate between a development control resolution and a resolution adopting a land use classification guide:

> 9. (1) A development control resolution passed by the Council pursuant to Section 6(4) of the Order and a resolution adopting a land use classification guide and a schedule of permitted land uses are not deemed part of this Bylaw.
>
> (2) A development control resolution may be withdrawn, replaced or repealed at any time, and the land use classification guide amended by resolution of the Council.

If this distinction is to be carried through section 10, the only section of the model by-law that deals with the question, the failure to include the land use classification guide within the terms of that section is significant.

Irrespective of the by-law, the final determinant of whether or not the approving authority is governed by the land use classification guide is, of course, the Planning Act. For the purposes of the ensuing discussion it is expedient to quote the two relevant sections in their entirety:

> 106. (1) A council may by resolution make rules respecting
>
> (a) the use of land in specific areas, or
>
> (b) any special aspects of specific kinds of development and the manner of their control,
>
> by which the municipal planning commission, or development control officer shall be governed in dealing with applications.
>
> (2) A resolution passed under subsection (1), or under section 107,
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> (a) shall be submitted to the Board for its approval and shall be accompanied by a report in writing indicating the considerations on which the resolution is based,
>
> (b) has no force or effect until it has been approved by the Board, and
>
> (c) upon being approved by the Board, shall be published in such manner as the Board may require.
>
> 107. A land use classification guide and a schedule of permitted land uses may be prepared and adopted by a resolution of a council under section 106 for the purposes of development control, but such a guide or schedule is not part of the development control by-law.

Subsection 1 of 106 clearly envisages that the approving authority be governed by the types of resolutions referred to therein. However, section 107 is silent on the point other than to refer back in a somewhat uncertain fashion to section 106. It is submitted that, on a proper interpretation of the two sections in question, the approving authority was not intended to be bound by a guide and schedule of permitted uses. Section 106(1) refers to resolutions of a type that relate to either a specific area of land within the municipality or to specific kinds of development. On the other hand, section 107 refers to a resolution of a general nature. In short, two types of resolution are envisaged. This interpretation is supported by section 106(2) which refers to "a resolution passed under subsection (1), *or* under section 107."[72]

It follows that since the act specifically requires the approving authorities to be bound by only the first type of resolution and is silent

[72] Emphasis added.

as to the second, the intent was that the authority was not to be bound by the second, the land use classification guide. This conclusion is supported by section 100(2) which provides that development control is to be exercised "on the basis of the merits of each individual application for permission to carry out development." If the development control officer or municipal planning commission, as the case may be, is governed by a resolution of general application, of which the typical land use classification guide is one, then it cannot be said that he or it is exercising control over development on the basis of the merits of each individual application. It is trite law that any administrative body charged with exercising its power on the basis of the merits of each case before it cannot fetter its discretion by issuing general policy declarations and then applying the general policy to a given case.[73] Nor, it is submitted, can such a body lawfully have its statutory authority fettered by the subordinate legislative act of an inferior body such as a municipal council. Indeed, to so construe the law as to require the approving authority to follow the type of land use classification guide in use in Alberta is to effectively negate the distinction between development control and zoning which in turn would tend to frustrate the whole intent and purpose of the development control provisions of the Act.[74]

The only major hurdle to the reasonable conclusion that the land use classification guide is no more than a guide as indicated by its name and that it is not equivalent to a statutory directive to the development control officer or municipal planning commission is that portion of section 107 which speaks of a "resolution of a council under section 106." Prima facie that clause seems to consider a resolution adopting a land use classification guide as a resolution under section 106, which would make all of that section applicable. But this would be inconsistent with the first part of section 106(2) and, in addition, would result in the absurd conclusion stated above. Accordingly, if any reasonable effect is to be given to the phrase in question it must be that only subsection (2) of section 106 is applicable to a land use classification guide.

Even if the initial approving authority is not in law bound to follow the dictates of the land use classification guide, in practice it will in the vast majority of cases abide by the guide's provisions both for the sake of administrative expediency and in deference to the collective expertise that went into making up the guide. However, on occasion a developer may come forth with a proposal for development which will not fit into the four corners of the guide but which is nevertheless one that, in light of all the circumstances, is desirable. In such cases, if the development control officer or municipal planning commission rejects the application either because they regard themselves as bound by the land use classification or because they exercise their discretion against him, the developer still, apart from whatever judicial remedies are available, has two avenues open to

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[73] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] 2 W.L.R. 924 (C.A. and H.L.); *Jackson et al* v. *Beaudry* (1969) 70 W.W.R. 572 (Sask. Q.B.); *Lloyd* v. *Superintendent of Motor Vehicles* [1971] 2 W.W.R. 523 (B.C.S.C.); *Alden* v. *Gaglardi et al* [1971] 2 W.W.R. 148 (B.C.C.A.).

[74] *But see Zorba's Food Services Ltd.* v. *City of Edmonton* (1970) 74 W.W.R. 218 (Alta. C.A.) and *Figol* v. *Edmonton City Council* (1969) 71 W.W.R. 321 (Alta. C.A.) in which the courts appear to have accepted the proposition that the development control officer is bound to follow the land use classification guide.

him: he may launch an administrative appeal to another tribunal, or he may take steps to have the land use classification guide amended as it affects his property.

2. Administrative Appeals

Pursuant to sections 110 and 128 of the Planning Act a person affected by a decision of a development control officer or municipal planning commission made under a development control by-law is entitled to appeal to the development appeal board, or, in the case of a municipality which has no such board, to the council. This right of appeal is similar to that conferred on parties affected by a decision made under a zoning by-law[75] with the major distinction that whereas no right of appeal exists in the case where an application is approved for a proposed use that complies with the provision of the zoning by-law relating to permissible uses,[76] no such exception exists with respect to development control since in development control there is no distinction drawn between permissible and conditional uses.[77] The fact that the Act does not differentiate between these two types of uses in its development control provisions, thereby conferring a full right of appeal from all decisions of the development control officer or municipal planning commission, adds ammunition to the argument that these two bodies are not bound by the land use classification guide. The basic philosophy of zoning is that it be certain and predictable in application, consequently the by-law is made binding on all. However, to achieve a degree of flexibility, certain uses are classed as conditional and the approving authority is given a discretion as to whether or not to grant a permit for such a use. The exercise of this discretion is made subject to the right of appeal but the grant of a permit for a permissible use, in which no discretion is involved, is not. This logically leads to the conclusion that since the right of appeal is not withheld in any case under development control all initial decisions made thereunder result from the exercise of a discretion and not from the dictates of the municipal council as embodied in the land use classification guide.

Whether or not the development control officer or municipal planning commissioner are bound by the land use classification guide, it is clear that the development appeal board is not. In considering appeals the board is directed by the Act to have "due regard to the circumstances and merits of the case... and to the development control or zoning by-law which is in force, as the case may be."[78] However, the land use classification guide is not part of the development control by-law.[79] In addition, subsection (4) of section 128 concludes by prohibiting the development appeal board from allowing "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." Note

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[75] *See* Laux, *The Zoning Game: Alberta Style*, (1971) 9 Alta. L. Rev. 268 at 285-290.

[76] S. 128 (2).

[77] For a consideration of the difference between permissible and conditional uses and the reasons for the distinction *see* Laux, *supra*, n. 75 at 273-274.

[78] S. 128(4).

[79] The Planning Act provides:

> 107.A land use classification guide and a schedule of permitted land uses may be prepared and adopted by a resolution of a council under section 106 for the purposes of development control, *but such a guide or schedule is not part of the development control by-law.* [Emphasis added].

the conspicuous absence of mention of a development control by-law or land use classification guide. Reading these sections together and bearing in mind that the development control by-law does not include provisions relating to the formulation and designation of land use classifications, it seems reasonable to conclude that the legislature did not intend that the appellate tribunal be bound by the guide. This conclusion is in conformity with the principle of development control and is supported by judicial authority.[80] If the development appeal board were bound by the land use classification guide then for all intents and purposes the difference between zoning and development control would be in name only.[81]

To insure that affected persons other than the applicant are made aware of the issuance of a permit in order that they be able to take advantage of their right of appeal within the statutory period of fourteen days, section 105 of the Act directs that a development control by-law shall:

> (c) require that when an application for a development permit is approved
>
> (i) an official of the municipality shall post a notice of the decision conspicuously on the property for which the application has been made, or
>
> (ii) a notice in writing shall be mailed immediately to all property owners who, in the opinion of the council, may be affected, or
>
> (iii) a notice shall immediately be published in a newspaper circulating in the municipality stating the location of the property for which the application has been made and the use approved of.

The standard development control by-law will contain provisions to give effect to this subsection.[82] These statutory provisions and those in the development control by-law might be compared with the notice requirements under zoning, in which the same type of notice is required but, with one minor exception,[83] only on the issuance of a development permit for a conditional use.[84] This difference again indicates the discretionary nature of development control.

If an appeal is launched by a developer whose application for a permit was rejected by the development control officer or municipal planning commission, then, of course, no notice would be required under section 105(c). However, section 128(4) requires that the de-

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[80] *Figol* v. *Edmonton City Council, supra,* n. 74 at 322. *Quaere* the effect of the following sections of the Edmonton Development Control By-law and Municipal Affairs' standard form by-law, respectively:

> 8.(4) The Development Appeal Board on deciding an appeal shall have regard to the general scope and intent of the By-law and the general plan that is being prepared and Development Control Resolutions that have been passed by the Council.
>
> 12.(2) The Development Appeal Board shall consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of the general plan that is being prepared or that has been adopted, and to this By-law and to any development control resolution that has been passed.

[81] The only significant distinction that would remain is that under development control land is classified by resolution whereas under zoning this is accomplished by by-law. Even this distinction disappears having regard to the procedures followed by municipal councils in adopting resolutions affecting the land use classsification quide: *infra* at 25.

[82] Edmonton By-law No. 2624 provides as follows:

> 7.(4) (b) Following the issuance of a Development Permit the officer shall notify by ordinary mail the applicant and assessed owners within a distance of 200 feet of the site, of his decision and right of appeal to the Development Appeal Board, provided that no such notification shall be required in respect to one-family dwellings and buildings accessory thereto and minor additions or alterations to existing buildings.

To what extent does the exception in the foregoing subsection comply with section 105(c) of the Act?

[83] S. 124(3). This subsection authorizes a development control officer or municipal planning commission to issue a development permit for a use not provided for in the zoning by-law provided the use is similar to another use that is provided for. In such a case the notice requirements of section 124(1) become applicable.

[84] S. 124(1).

velopment appeal board mail a notice of the hearing of the appeal at least seven days (exclusive of Saturday, Sunday and other holidays) prior to the date of the hearing to the appellant and "to all assessed owners of land who, in the board's opinion, are affected," thus assuring notice to at least some affected persons.[85]

On hearing an appeal, although it is not bound by the land use classification guide *per se,* in practice the development appeal board usually adheres to its provisions. However, if an appeal is taken by a permit seeker whose proposed development is reasonably close to that prescribed for his land the board may allow the appeal, often with conditions attached.[86] On the other hand, if the proposed development involves a completely different use or manner of use than is provided for in the guide, the applicant will likely have to go to the municipal council to seek an amendment to the guide prior to being issued a permit.

3. Amendments to the Land Use Classification Guide

Amendments to the development control by-law are governed by the same provisions of the Act as those relating to the zoning by-law.[87] Since the land use classification guide is not part of the development control by-law different considerations apply. The guide is adopted in the first instance by a simple resolution of council.[88] It follows that it can be amended in the same fashion. The most obvious and important distinction in the procedures for amending the guide as opposed to the classification part of the zoning by-law is that, with respect to the latter, the Planning Act calls for public notice and a hearing prior to adoption of an amendment whereas there is no such requirement in that Act or in any other municipal legislation when a council proposes to make a change by adopting a resolution. Theoretically, in so far as the Planning Act is concerned, a developer could make an application to the municipal council to reclassify his property from, for instance, single family dwelling to highrise apartment and have the application for amendment passed upon by the council without notice to or hearing of potentially affected persons.

Once the reclassification has been adopted the developer must then submit an application for a development permit to either the

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[85] It is worthy of note that under section 128(4) (b) the legislature has delegated authority to determine to whom notice of appeal is to be provided to the development appeal board whereas at least one Alberta municipal council has purported to exercise this power. Edmonton by-law No. 2624 provides:

> 8.(3) The Board's secretary shall, not less than five (5) days before the date of hearing of any appeal, mail a notice by ordinary mail to the assessed owners of all lands lying within 200 feet of the land which is the subject of the appeal, provided that if, due to inadvertance, a copy is not mailed to an assessed owner of any such lands, the validity of the Board's decision shall not be questioned merely by reason of such omission.

The legality of this subsection was questioned by the Appellate Division of the Supreme Court of Alberta in *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton and Madison Development Corporation Limited, supra,* n. 117 at 637. In the writer's view, this is merely one of the many illegal, inconsistent and outmoded sections that permeate that city's zoning and development control by-laws.

[86] Section 128(6) (a) of the Act tacitly authorizes the type of horse-trading that is often engaged in between developers and the board:

> 128.(6) In determining an appeal, a development appeal board,
>
> (a) may confirm, reverse or vary decisions appealed from and may impose such conditions or limitations as it considers proper and desirable in the circumstances.

[87] S. 134.

[88] The Planning Act calls for the land use classification guide to be adopted by resolution. It seems, however, that it is possible for a municipality to do so by by-law, Municipal Government Act, R.S.A. 1970, c. 246:

> 104.(3) A council may exercise or perform by by-law any power or duty that is stated in this or any other Act to be exercisable by resolution.

development control officer or the municipal planning commission, as the case may be.[89] If the application now conforms to the new classification and is consistent with the provisions relating to height, density and the like for that classification, the approving authority will undoubtedly grant the permit having regard to the fact that re-classification by council will likely be taken by the authority to be a directive to it to issue the permit. At this point the provisions relating to notice[90] will take effect and the prescribed notices will be issued. Now persons deeming themselves affected are, for the first time, made aware of the reclassification that has taken place. Their sole administrative remedy is to appeal to the development appeal board, but that body is most unlikely to reverse the approving authority's decision on the mere ground that the re-classification should not have occurred in the first place.[91]

The only statutory protection that potentially affected property owners have with respect to re-classification by resolution is that afforded by subsection (2) of section 106 of the Act which requires the amendment resolution to be submitted to and approved by the Provincial Planning Board prior to its becoming effective. But this safeguard is more apparent than real in that the Board and, through it, the Department of Municipal Affairs is most unlikely to wish to incur the wrath of a municipal council, with the result that their approval will likely be a matter of course.

The deficiencies in the Act relating to notice, however, might very well be made up by the common law. If the function of a municipal council in re-classifying land under development control can be characterized as the exercise of a judicial or quasi-judicial power then the rules of natural justice are applicable and these in turn may require a council, prior to adopting an amendment resolution, to give notice to affected persons and to afford them an opportunity to be heard. However, the determination of whether a function is judicial or administrative has been most aptly described recently by one Ontario High Court Justice as "almost as illusive as the Scarlet Pimpernel."[92]

There do not appear to be any judicial pronouncements on the exact point in issue but there is authority for the proposition that a municipal council, when enacting a zoning amendment affecting isolated and particular parcels of land, is exercising a quasi-judicial function.[93] It is submitted that the same conclusion should be forthcoming in the case of an amendment to the land use classification guide. It is conceded, however, that in theory a land use classification guide or an amendment thereto does not have the same legal effect on the rights of an individual as does a zoning by-law or amendment. That is to say, when a municipal council amends the zoning by-

[89] The reclassification of the developer's property does not of itself operate as permission to proceed. An application must still be made to the appropriate authority, partially to insure that the proposed development will in fact conform to the new classification.

[90] *Supra*, at 22.

[91] Presumably a disgruntled elector could attempt to have the matter placed upon the agenda of council at a subsequent meeting for reconsideration.

[92] *Voyageur Explorations Ltd.* v. *Ontario Securities Commission* [1970] 1 O.R. 237 at 242.

[93] *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg* [1965] S.C.R. 512. However, where the amendment was of general application thereby affecting a substantial area of land and was initiated by planners rather than private developers another court characterized the exercise of the power as administrative: *McMartin and Gage* v. *City of Vancouver* (1968) 65 W.W.R. 385 (B.C.C.A.).

law, such action amounts to a change of a law which in turn operates as a directive to administrators. On the other hand, a change in the land use classification guide can be construed as merely a suggestion to the administrators, with their discretion remaining unfettered. On this basis it could be argued that an amendment to the guide is similar to an award of a conciliation board, as opposed to that of an arbitration board, leading to a characterization of the function as administrative rather than judicial.[94] However, in practice a change in the land use classification guide is treated by administrators as a mandatory direction with the result that the decision of a council to amend the guide operates such as to have a *de facto* binding effect on the rights of individuals.

Even assuming that the exercise of the power to amend a land use classification guide is judicial or quasi-judicial in character, the common law would not necessarily provide a definitive answer as to the nature and scope of the notice and hearing.[95] In any event, although the statute is silent on the point and the common law is uncertain, many municipal councils do in fact afford potentially affected persons notice of an intended amendment and provide an opportunity to be heard on the subject.[96]

Occasionally a developer comes forth with a proposed development which is not only inconsistent with the uses prescribed for the affected area by the land use classification guide but which is of such a nature that none of the classifications of use and details respecting methods of use contained in the guide are appropriate. In such instances the council, if it is amenable to the scheme, could create a new classification and set the standards in accordance with the proposal. However, the usual practice is for the council to pass a special resolution de-classifying the subject lands and in the same resolution authorizing the proposed development subject to such terms and conditions as it may decide to impose.[97] This procedure is sanctioned by subsection (1) of section 106 of the Planning Act:

> 106. (1) A council may by resolution make rules respecting
> (a) the use of land in specific areas, or
> (b) any special aspects of specific kinds of development and the manner of their control, by which the municipal planning commission or development control officer shall be governed in dealing with applications.

It is worthy of note that the Act declares that the development control officer or municipal planning commission is governed by such a resolution. The consequence of this statutory prescription should be that on passing the type of resolution envisaged in subsections (a) and (b) of section 106(1) council can clearly be considered as exercising a judicial or quasi-judicial function with all the attendant consequences.

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[94] *Ayriss and Company* v. *Board of Industrial Relations* (1960) 30 W.W.R. 634 (Alta. S.C.).

[95] De Smith, *Judicial Review of Administrative Action* 135 ff. (1968).

[96] For example, in Edmonton public notices of an intended amendment are printed in the local daily newspaper and public hearings are held.

[97] Notwithstanding that the lands are de-classified (i.e. the use designation is removed) they still remain under development control. This procedure merely paves the way for council to exercise direct control pursuant to section 106(1) of the Planning Act.

VI. JUDICIAL REVIEW OF DECISIONS UNDER DEVELOPMENT CONTROL

This subject is best dealt with by considering separately each of the three bodies, the development control officer or municipal planning commission, the development appeal board and the municipal council, which exercise powers under the development control provisions of the Planning Act.

1. The Development Control Officer or Municipal Planning Commission

No statutory method of judicial review or right of appeal to a court of law is conferred upon aggrieved parties from the decisions of either of these two bodies.[98] Consequently, if any form of judicial review is available is must be by way of the prerogative writs, the equitable remedies of declaration or injunction or by way of some common law action for damages. In so far as *certiorari* and prohibition are concerned, they are available only if these bodies, in passing upon development applications, are exercising a judicial or quasi-judicial function. The authorities are in conflict on the question of characterization.

In *Re Pyrch and Company Limited and City of Edmonton,*[99] Kirby, J., characterized the function of the development control officer, at a time when development control was still considered an interim measure, as judicial and therefore amenable to *certiorari* proceedings. However, in the recent case of *Zorba's Food Services Limited* v. *City of Edmonton,* Johnson J.A., of the Appellate Division of the Supreme Court of Alberta stated in *dicta:*[100]

> There can, I think, be no doubt that this officer's functions were purely administrative and the permit, if it can be considered as an order, is an administrative one.... No matter how illogical it may appear, the permit to develop when leaving the hands of the development officer was purely an administrative order....

The courts frequently utilize a number of criterion in determining the nature of the function of the tribunal under review: whether the exercise of the tribunal's power affects existing rights or obligations or whether it creates new rights or obligations; whether its decision is based on policy rather than on law; whether its decision is based on the exercise of discretion and if so whether the discretion is limited or absolute; whether there is a *lis inter partes* before the tribunal; and whether the statute conferring the power on the tribunal clothes it with the trappings of a court of law.[101] These criterion are, of course, not mutually exclusive and often overlap one another. Indeed, in many cases one criterion will lead to one conclusion while another leads to

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[98] Section 146 of the Act confers a right of appeal "upon a question of jurisdiction or upon a question of law... from an order of a tribunal made pursuant to sections 6, 20, 89, 110 or 128" (as amended by S.A. 1971, c. 84) to the Appellate Division of the Supreme Court. Section 110 refers to the decision of a development control officer or a municipal planning commission made under a development control by-law and provides for an appeal to the development appeal board from such a decision. However, section 149 defines the term "tribunal" as used in section 146 to mean the development appeal board, council or the Provincial Planning Board, thereby making it clear that the reference to section 110 in section 146 was not intended to confer an appeal directly to the courts from the decisions of the development control officer or municipal planning commission.

[99] (1962) 35 D.L.R. (2d) 732 (Alta. S.C.).

[100] (1970) 74 W.W.R. 218 at 221-222.

[101] For a comprehensive analysis of the characterization question see de Smith, *supra*, n. 95 at 51-80. A new and valuable Canadian text which is highly recommended, particularly to practitioners, is Reid, *Administrative Law and Practice* 111-176 (1971).

the opposite conclusion. In this milieu it is extremely difficult to predict with any degree of certainty how a court will react in given circumstances.

If one accepts the proposition that the development control officer or the municipal planning commission in passing upon permit applications is entitled to base the decision on the merits of each case having regard to the policy expressed in sections 3 and 100(2) of the Planning Act and is not bound by the land use classification guide, one might easily conclude that an administrative characterization is in order.[102] On the other hand, one can take the view that the two bodies do not have a "complete, absolute and unfettered discretion"[103] or that their decisions affect the rights of subjects[104] and are, therefore, judicial in nature. If one does characterize the function of issuing development permits as judicial or quasi-judicial the question immediately arises, to what extent do the rules of natural justice apply? Must a development control officer or municipal planning commission give notice to potentially affected parties before deciding whether or not to issue a permit? Must they hold a hearing and afford an opportunity to interested parties to be heard?[105]

Mandamus, which is available in the proper circumstances irrespective of the characterization of the nature of the function of the tribunal in question, lies to secure the performance of a public duty, a duty which must be obligatory and not merely discretionary. That is to say, a court may by order compel a tribunal to carry out a function that it must perform upon all statutory conditions having been met. It will even compel a tribunal to exercise a discretionary power where the statute requires the power to be exercised but it will not generally compel the discretionary power to be exercised in a particular fashion.[106] Thus, whether or not *mandamus* lies to compel the development control officer or municipal planning commission to issue a development permit is dependent upon the view one takes as to the extent of the discretion reposed in these two bodies under the development control parts of the Planning Act. If they are bound by the land use classification guide and if an application for a permit conforms in all respects with the guide relative to the parcel of land in question, if follows that a refusal to issue a permit would be redressable by way of *mandamus.* But if the development control officer or municipal planning commission is not so bound and these bodies have a discretion as to whether or not to issue a permit, at most a court could only compel these bodies to consider an application, it could not compel the issuance of a permit. Again, it is submitted that the latter is the proper interpretation of the nature of development control and, therefore, *mandamus* would not lie to oblige the development control

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[102] *Calgary Power* v. *Copithorne* [1959] S.C.R. 24.

[103] This was the indicia, the absence of which led the court to a quasi-judicial characterization in *Re Ashby* [1934] O.R. 421.

[104] *Ridge* v. *Baldwin* [1963] 2 All E.R. 66 (H.L.).

[105] The Calgary Land Use Classification Guide directs the municipal planning commission, prior to deciding on an application for a development permit for certain uses, to post a notice on the site (s.8(1)). The notice, which must be displayed for seven days prior to the decision, is to set out the proposed uses of the building or site and a statement that any proprietory elector who objects to the proposed use may deliver to the commission a written statement of his objection setting out, among other things, his reasons for objecting (s.8(2)). The commission must then, in coming to its decision, consider all objections received (s. 10(3)). However, no actual hearing is required by the Guide.

[106] *Supra,* n. 95 at 564-566. *But see Lee* v. *Workmen's Compensation Board* [1949] 2 D.L.R. 665 (B.C.C.A.).

officer or municipal planning commission to issue a development permit.[107]

In so far as the remaining remedies of injunction, declaration and damage actions are concerned, a development control officer or municipal planning commission is as amenable to such suits as is any other inferior statutory body provided, of course, that the grounds exist.

2. The Development Appeal Board

The first line of attack that one is likely to choose against the actions of this body is by way of the appeal to the Appellate Division of the Supreme Court on questions of law or jurisdiction accorded by section 146 of the Planning Act.[108] The appeal provided for in this section is not absolute, but is dependent upon leave having been obtained from a judge of the Appellate Division within thirty days after the making of the order or decision of the tribunal whose decision is being questioned.[109] The application for leave is by way of ordinary notice of motion and the practice to be followed in applying was recently commented upon by the Appellate Division in *Figol* v. *Edmonton City Council.*[110] The Court, speaking through Allen J.A., remarked that leave should be granted "only upon specific questions of law or jurisdiction which should be set out in the order granting leave."[111] These stated questions would then be the only ones that the appeal court would consider. The effect of this directive may well be that an appellant must be in a position to fully argue the grounds of appeal on the application for leave, for if these arguments are not made at that point they may not later be raised at the hearing of the actual appeal.

Prior to 1971 the Appellate Division was authorized only to confirm the order under appeal or to vacate it, in which case the matter was to be referred back to the tribunal in question for further consideration. However, a 1971 amendment now authorizes the court to "vary or reverse" the decisions of the lower tribunal.[112] This should in many cases eliminate the need for further time consuming and expensive deliberation by the tribunal whose decision has been impugned.

Early in 1959, Riley J., held that the deliberations of the interim development appeal board made pursuant to the then existing Edmonton Interim Development Control By-law were purely administrative in nature and, therefore, not amenable to *certiorari* proceedings:[113]

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[107] There are no reported cases on the point, but one Edmonton practitioner has had at least two cases in recent years in which the courts issued an order compelling the development control officer to issue a permit for land under development control. The two cases, which are unreported, are *McBain* v. *City of Edmonton* and *Lockerbie & Hole* v. *Letourneau.* Information respecting these decisions, may be obtained from J. N. Agrios of the firm of Hurlburt, Reynolds, Stevenson and Agrios.

[108] The appeal will be from a decision of the board taken under section 128 of the Act.

[109] S. 146(2). The thirty days probably begins to run from the date the decision or order is publicly pronounced or when the parties have been notified thereof: *Re Hache and Minister of Municipal Affairs* (1969) 2 D.L.R. (2d) 186 (N.B.C.A.).

[110] *Supra*, n. 74.

[111] *Id.* at 333.

[112] S.A. 1971, c. 84, s. 20.

[113] *Dobson et ux* v. *Edmonton City and Board of Trustees, Metropolitan United Church* (1959) 27 W.W.R. 495 at 507. *Compare* the decision in *Re Herron's Appeal* (1959) 28 W.W.R. 364. (Alta. S.C.), in which the court found that the appeal board in hearing an appeal under a *zoning* by-law was exercising a quasi-judicial function.

> The function of the appeal board was not of a judicial or *quasi*-judicial character. It was purely administrative. The appeal board was free to have regard to its own views as to general policy. There was no *lis inter partes*. The decision is plainly a policy decision, and there is no suggestion of bad faith on the part of the appeal board. The board's decision was to be governed solely by the criterion 'when they deem it to be consistent with the intent of the Interim Development By-Law (1339) and the evolving general plan.'

In contrast, nearly ten years later, Milvain J., as he then was, characterized the function of a development appeal board as judicial and therefore its proceedings were governed by the rules of natural justice.[114]

In *Zorba's Food Services Ltd.* v. *City of Edmonton*[115] the Appellate Division was faced with characterizing the function of a development appeal board in hearing an appeal from a decision of the development officer under development control for the purpose of determining whether the principle of *res judicata* applied to the board's ruling so as to preclude it from reconsidering an earlier decision in a particular case, which would be the situation if the function was judicial in nature. After having observed that the development control officer's function in dealing with development applications was administrative in nature, the court arrived at the somewhat strange conclusion[116] that the development appeal board exercised a judicial function on hearing an appeal under section 128. Allen J.A., in delivering the judgement of the court, laid considerable stress on subsection (7) of section 128, which makes the board's decision "final and binding on all parties and all persons subject only to appeal under section 146" in arriving at his conclusion. Similarly, the Appellate Division had earlier allowed an appeal from the dismissal of an application for an order of *certiorari* to quash the decision of the development appeal board in *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton and Madison Development Corporation Limited.*[117]

In so far as the remedy of *mandamus* is concerned, similar considerations apply with respect to the development appeal board as with a development control officer or municipal planning commission. If *mandamus* does not lie against the latter then *a fortiori* it should not lie against the development appeal board to oblige the issuance of a development permit although, of course, it would lie to compel it to fulfill some mandatory statutory requirement such as those relating to notice and hearing. On the other hand, even if *mandamus* is available against a development control officer to require him to issue a development permit in certain circumstances, there is a stronger argument for concluding that it is nevertheless not an available remedy *vis-à-vis* the board since the board quite clearly appears to be free from the dictates of the land use classification guide.[118] The other administrative law remedies require no special consideration with respect to their availability against this particular tribunal.

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[114] *Michie* v. *Municipal District of Rocky View No. 44* (1968) 64 W.W.R. 178 (Alta. S.C.).

[115] (1970) 74 W.W.R. 218.

[116] The conclusion of the court is unusual to say the least in that it found a planning tribunal which exercised more discretion than another such body to be acting judicially whereas the one with the least discretion was regarded as administrative in nature.

[117] (1969) 71 W.W.R. 635.

[118] *Supra*, at 21-22.

3. The Municipal Council

The function of a municipal council in development control matters is basically two-fold: to pass a development control by-law, and to make resolutions governing the use and manner of use of land placed under development control, including adopting a land use classification guide and amendments thereto from time to time.[119] The Planning Act confers no power on a municipal council to directly receive, consider and decide on applications for development permits.[120] Accordingly, attacks against the actions of a council will be attacks against a by-law or resolution. Therefore, one method of redress available to any elector of the municipality is that afforded in section 397 of the Municipal Government Act which authorizes an application by way of notice of motion to a district court to quash any "by-law, order or resolution of the council in whole or in part for illegality."[121]

A party may, for one reason or another, not wish or may not be able to invoke the procedures for quashing prescribed in the Municipal Government Act, in which case he will be obliged to fall back on the normal administrative law remedies.[122] Provided that council in passing a resolution is exercising a judicial function, *certiorari* will be available to review the exercise of this power. Presumably, similar considerations will apply in characterizing the function of council with respect to a development control resolution as for a zoning by-law.[123] Since the power to pass resolutions regulating the use of land is within the discretion of the council, *mandamus* will not lie to compel it to pass a particular resolution, but it would likely be available to compel it to follow any mandatory statutory procedures and the like. Declaration and injunction are also appropriate remedies in the proper circumstances.

4. Grounds for Judicial Review

No useful purpose would be served in this paper by entering into a lengthy and detailed discourse of the law relating to this topic since the applicable principles are common to all inferior statutory tribunals. One would be best served by making reference to those standard administrative law texts which give the matter the detailed consideration that it warrants. However, it may be useful to outline briefly the grounds upon which some courts have upset or refused to upset, as the case may be, development control decisions.[124]

One of the earliest cases arising out of the exercise of development control illustrates the scope that section 3, the purpose section of the Act, affords to the courts in reviewing planning decisions. In *Re Giannone's Appeal,*[125] the appellant owned a large tract of land

[119] In addition, in those municipalities with no development appeal board the council is required to exercise the review powers conferred in section 128(8).

[120] Pursuant to section 105 this function, it seems, must be delegated in the development control by-law to the development control officer or municipal planning commission.

[121] For a detailed discussion of this remedy see Rogers, *The Law of Canadian Municipal Corporation* 985-999 (1971).

[122] For example, an interested party may not be an "elector" or he may be outside the two month time period imposed by the statute within which an application must be launched or he may prefer to have his case heard in Supreme Court or he may wish the advantage of an examination for discovery which an action for declaration affords.

[123] *Supra*, at 24.

[124] Reported cases in this area of the law are few in number. Many of the cases that follow have been referred to earlier in connection with other issues.

[125] (1961) 35 W.W.R. 320.

in the City of Edmonton on which he wished to construct a hotel, shopping centre and service station. He applied for a permit to the interim development officer who, in accordance with the legislation of the time, referred the application to the interim development appeal board which granted a permit. The matter then came before the city council[126] which affirmed the board's decision but attached the proviso that the proposal to build the hotel be deleted from the plan. The appellant launched an appeal from this decision to the Provincial Planning Advisory Board[127] but that body affirmed council's decision. On appeal to the Trial Division of the Supreme Court of Alberta,[128] Milvain J., as he then was, applied section 2(a)[129] of the Act and ruled that once having decided to permit commercial development in the nature of a shopping centre and service station, it was illogical and inconsistent with sound planning to discriminate against a hotel which involved the same type of use as that which the authorities were prepared to permit:[130]

> In my view the city council and the provincial planning advisory board once they gave countenance to a commercial development in the way of a shopping centre and service station, usurped a jurisdiction not given by the Act in discriminating against a hotel as part of the development.

Several years later a developer applied for a permit to construct a service station on a given site in the City of Medicine Hat but was turned down by both the interim development appeal board and the city council. There was some irregularity in the fashion in which the application was dealt with in that the development appeal board, after rendering a negative decision, forwarded the case directly to the city council which dealt with the matter without providing notice to the developer or affording him an opportunity to be heard.[131] In any event, the developer appealed to the Provincial Board which affirmed the council's decision on the ground that the proposed use would "adversely affect adjoining property holders and [was] inappropriate having regard to the greater public interest and the orderly development and use of land."[132] An appeal was subsequently launched to the Trial Division and Milvain J., as he then was, ruled, again applying section 2(a), that there was no evidence before the provincial board that the proposed development was necessarily against the greater public interest. On appeal by the City of Medicine Hat to the Appellate Division, Kane J.A., with whom the majority concurred, reviewed the evidence which had been before the board and concluded that there in fact was some evidence to support its conclusion. His Lordship was most careful to point out that since the appeal provided for in the legislation was limited to questions of law or jurisdiction it was im-

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[126] At that time the Act conferred a right of appeal from the development appeal board to the municipal council.

[127] During some of the 1960's it was possible to appeal on zoning and development control matters to the provincial board. This right was finally removed in 1968 (S.A. 1968, c. 77, s.17).

[128] Up until 1967 the appeal under the present section 146 of the Act was to the Trial and not the Appellate Division.

[129] Now section 3.

[130] (1961) 35 W.W.R. 320 at 327-328.

[131] The developer was later held by the Appellate Division to have waived the right to object to the procedural irregularities.

[132] The decision of the board is reproduced verbatim in *City of Medicine Hat et al.* v. *Rosemount Rental Developments Ltd.* (1964) 49 W.W.R. at 449 - 463.

proper for a court hearing the appeal to weigh the evidence presented before the lower tribunal and to substitute its own opinion.[133]

In *Edmonton (City) and Laychuck* v. *Uram*,[134] Milvain J. again allowed an appeal from the decision of the Provincial Planning Advisory Board on the ground that the Board had not properly applied section 3 of the Planning Act. The Appellate Division, Porter J.A., dissenting,[135] reaffirmed its decision in the *Memorial Gardens* case and held that the Chambers Judge had erred in substituting his findings on the evidence for that of the board.

These three cases illustrate the difference of opinion existing at the time between the Trial and Appellate Divisions respecting the scope of judicial review under the appeal provided for in the Planning Act. It may be also fair to observe that this obvious difference of opinion was in no small way responsible for the eventual elimination of the Trial Division from the appeal process.

Two more cases in which review was by way of appeal are worthy of mention. In *Re Fitzpatrick and City of Calgary*[136] the court held that a decision of the development appeal board was a nullity in view of the fact that the board has failed "to keep a written record of its proceedings" contrary to section 145 of the Planning Act. Since that case was decided the Act has been amended to clarify the type of record that must be made and kept:

> 145... (c) shall make and keep a written record of its proceedings, which may be in the form of a summary of the evidence presented to it at hearings.

One further point relating to a substantive issue was raised by the court. The appellant owned land in the vicinity of a major city park but wished to use it for a canning and a rendering plant and made an application for a permit accordingly. In denying the application the planning commission concluded its decision by observing that the land, being in the location it was, might very well be necessary for the purposes of a regional park. McDermid J.A. observed that if the planning commission took into consideration the possibility of the city acquiring the site in future for park purposes, then its decision was based upon improper motives and, therefore, invalid.[137]

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[133] Kane J.A., *id.* at 465:

> Normally the function of an appellate court is confined to being satisfied that there was evidence to support the finding of the body appealed from. In my view section 2a does not impose any greater duty.... I do not think the legislature ever intended that the judge on appeal would substitute his finding on the evidence for that of the council and the advisory board.

Porter J.A., in dissenting, raised the interesting point that the Town and Rural Planning Act, section 71a (8a) required the provincial board in coming to its decision to "have regard to... the general plan that is being prepared," but that the board exceeded its jurisdiction in failing to comply with this section in that at the hearing of the appeal it did not have the plan before it (at 457):

> When the statute requires the board to have regard to the general plan it must mean that the examination will be open for all to see and an opportunity given to the parties affected to correct or contradict. Otherwise, the board would "have regard" secretly to something hidden from the parties affected. The board cannot "have regard" to the plan in such a manner and determine the matter "in a judicial spirit in accordance with the principles of substantial justice".

The majority judgment did not consider the issue raised by Porter J.A.

[134] (1966) 57 W.W.R. 529.

[135] His Lordship's ground for dissent was that the requirements of section 3 of the Act, whether there has been an infringement on the rights of individuals and whether the public interest has been served, are questions of law. In order to answer these questions the judge appealed to not only may, but must, examine the evidence to ascertain whether the tribunal appealed from instructed itself in the law and came to a correct conclusion on the facts in light of such instruction. The learned Justice concluded that on the evidence it appeared that the board did not direct itself to these issues and, accordingly, must be regarded as having committed an error of law.

[136] (1964) 47 D.L.R. (2d) 365. This case involved a decision by a development appeal board under a zoning by-law but the principles are equally applicable to a decision made pursuant to development control.

[137] It was not necessary for the court to decide this point.

The second case is that of *Figol* v. *Edmonton City Council*[138] in which several major points were raised by counsel. A development company had applied to and received from the development control officer of the City of Edmonton a permit to construct a high-rise apartment, office and parkade structure on land which was under development control. The application was granted subject to a number of conditions, two of which required that the parking layout be satisfactory to the traffic engineer of the city and that the access points and drainage be to the satisfaction of the city engineer. A neighbouring property owner appealed firstly, to the development appeal board, which affirmed the decision of the development officer, and then to the Appellate Division under section 146. One argument raised on behalf of the appellant was that there had been an improper subdelegation of authority by the development officer to the traffic and city engineers. After reviewing a number of cases, including *Michie* v. *Municipal District of Rocky View No. 44*,[139] the court rejected that argument on the basis that the development control officer in fact approved the application and merely attached conditions as he was entitled to do by the Planning Act. The appellant also contended that the development control officer and development appeal board refused or neglected to consider restrictions and impediments on the developer's title to part of the site. The court went through the various restrictions and concluded that nowhere in the Act or in the development control by-law was it required that the development control officer or development appeal board inquire into questions of title, nor would it be reasonable to expect them to do so. In addition, the court was of the view that it would be equally unreasonable to expect a developer to spend sums of money to obtain a perfect legal title before finding out whether the proposed development would be approved or not. Finally, the appellant argued that the board misinterpreted the land use classification guide respecting allowable densities in the classification under which the site fell (R-6) dealing with front yard requirements and in connection with whether the proposed development in fact constituted a commercial garage, which was not permitted in the R-6 classification. The Appellate Division dismissed each of these objections on the ground that the board had evidence before it on each point which led it to conclude that the development did in fact conform to the guide and therefore no misinterpretation of the guide had occurred. The court did not concern itself with the quality of the evidence.[140]

The next case that falls to be considered is *Michie* v. *Municipal District of Rocky View No. 44*[141] which the court referred to and distinguished in *Figol*. In this case an order in the nature of *certiorari* was being sought to quash the issuance of a development permit under a development control by-law. The permit had been "approved" in the following terms, as evidenced by the minutes of the approving authority's meeting:

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[138] *Supra*, n. 74.

[139] (1968) 64 W.W.R. 178.

[140] A number of other interesting arguments were raised by counsel for the appellant but each was rejected by the court.

[141] *Supra*, n. 139. The facts of this case, as set out in the oral judgment of Milvain J. illustrate the utter state of confusion in which some local authorities find themselves with respect to the administration of development control.

> Mr. Reid moved that the Commission,... be prepared to approve the application subject to compliance with Mount View Health Unit requirements....

The chambers judge took the view that this minute demonstrated that the authority had "abrogated its function" to the health unit. He remarked (at 183):

> Though they have, at law, power to stipulate conditions, the resolution states badly that the commission be prepared to approve; they do not say they approve it; but they be prepared to approve the application subject to compliance with the Mount View Health Unit requirements.

A particularly interesting case arose out of a high rise residential development in the City of Edmonton in which even the Canadian Bill of Rights was argued. The respondent had applied for a permit to erect an apartment on certain lands but was denied the permit on the basis that the proposed development grossly exceeded allowable densities and would aggravate the shortage of schools and parks in the area as well as generate a traffic problem. An appeal was taken to the Provincial Planning Board, which allowed the appeal and directed the issue of a development permit subject to the condition that the developer enter into an agreement, which was to constitute a covenant running with the land, with the City restricting children between the ages of 3 and 18 from residing in the apartment. The City subsequently refused to issue the development permit on the advice of its solicitor and, accordingly, the developer brought an application for *mandamus* to require the City to issue the permit. The Chief Justice of the Trial Division granted the order but declared the aforementioned condition to be "not binding upon the parties". An appeal by the City to the Appellate Division affirmed the order to issue the permit but with the condition to be in full force and effect.[142] Firstly, the court was of the view that the Chief Justice's action was tantamount to substituting one order for another which is improper in an application for *mandamus*.[143] Secondly, the court held that the condition was in fact not offensive despite arguments that it contravened the Canadian Bill of Rights,[144] that it was so vague as to be meaningless, and that, under the relevant sections of the Planning Act, only the municipal council could approve a condition in order that it be a covenant running with the land. In the final analysis the City found itself in the unenviable position of having to argue against a condition which met the very objection to the development that it had raised at the outset.

One side feature of this case which does not appear in the judgement is the fact that at the time the matter was before the courts the apartment building was nearly completed, notwithstanding the absence of a development permit. This raises the question of why the City failed to take steps to prevent commencement of construction as it is authorized to do;[145] and, further, what if the court had decided the developer was not entitled to a permit? If this had been the case the developer may have been faced with the prospect of being required

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[142] *Re Hartford Holdings (1963) Ltd. and City of Edmonton* (1969) 4 D.L.R. (3d) 27.

[143] The appeal court took the position that since the condition was not severable from the main part of the order, the Chief Justice, having concluded that the condition was invalid, should have refused the order in its entirety.

[144] The Court quickly and properly disposed of this argument by pointing out that an order of a provincial tribunal made under provincial legislation is in no way affected by the federal Bill of Rights.

[145] *See* sections 138 and 140 of the Planning Act and section 405 of the Municipal Government Act.

to demolish the structure.[146] Would it be fair to say that the fact that substantial work has taken place on a project might unduly influence an appellate tribunal which is called upon to consider whether a permit ought to issue?[147]

The final case to be considered is that of *Canadian Industries Ltd.* v. *Development Appeal Board of Edmonton and Madison Development Corporation Ltd.*[148] in which an application was made to a development officer for a permit to build a motel on a certain site on the eastern extremities of the City of Edmonton. The application was refused on the ground that the site area did not conform to requirements for the building proposed. An appeal was taken to the development appeal board, notice of which was not given to the appellant, and a decision favourable to the developer was made. Subsequently, the board was notified that the appellant, which operated a chemical plant in close proximity to the site in question, had not been notified of the board's hearing and that the appellant opposed the development. A few weeks later the board reheard the case, this time the appellant appeared and argued that the first decision was a nullity. On the suggestion of counsel for the appellant, a hearing *de novo* was proceeded with resulting in a reaffirmation of the previous decision. The appellant then launched an application by way of *certiorari* to quash the board's order, but this was denied. The Appellate Division ruled that, firstly, the appellant ought to have been notified of the first hearing and, in the absence of this, the decision then taken was a nullity; and, secondly, that the board, in the absence of statutory authorization, had no power to re-hear the application. Accordingly, both orders of the board were quashed.

VII. CONCLUSION

This paper began by expressing the obvious—the more detailed a community attempts to be in structuring its future physical layout the less likely it will be successful in actually achieving all of its stated objectives. This in itself is not particularly disturbing; but, many planners will argue that if the objects are put into statutory form and particularized by detailed regulations, as is the case with zoning, an undesirable degree of inflexibility is created. This inflexibility in turn prevents a proper assimilation of new construction techniques and changing social conventions and requirements into the planning of the physical environment.

This planners' lament should not necessarily be accepted without question. Admittedly, it is more difficult, expensive and time consuming to obtain a development permit for a use not provided for in

[146] *See* section 126 of the Planning Act.

[147] The question, "When can a developer safely proceed to commence work after receiving a development permit?" also arises. It is possible that the order issuing the permit could be quashed up to six months later on *certiorari* and even longer if an action for a declaration is used to attack the order. In *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg* (1970) 72 W.W.R. 705 (Man. C.A.), a zoning amendment was passed on April 13, 1962. Acting in reliance on this amendment, Welbridge Holdings took a number of time consuming and expensive steps such as incorporation, preparation of leases, demolition of existing buildings, etc., in preparation of commencement of construction of a high rise apartment. On November 28, 1963 an action was commenced by interested parties for a declaration that the zoning amendment was invalid. Shortly thereafter Welbridge applied for and obtained a building permit. Judgement was given in favour of the plaintiff in the declaration action on January 28, 1964 after which work stopped. This was nearly two years later. An action by Welbridge against the city to recover damages, including reimbursement of amount actually spent, was unsuccessful.

[148] *Supra*, n. 117.

the zoning by-law than it is if the site in question is regulated by development control. But if the project is worthwhile, having regard to all the circumstances, it is not impossible to have it come to fruition under zoning. If the variance and conditional use aspects of the zoning by-law are not appropriate to meet the new need, there is always the last resort of rezoning, a function which is exercised at the political level.

Those who champion the cause of putting the planning process into the hands of appointed administrators with wide discretionary powers tend to overlook the needs and aspirations of persons who have chosen their plots of land in reliance on the activities being engaged in or likely to be engaged in on neighbouring properties. These persons find reassurance in the fact that the zoning by-law prohibits a neighbour from building within several feet of his property line or prohibits him from operating a dog kennel. If there is no such by-law and only the discretion of the planners to protect the individual then, subjectively, he will not feel as safe. Is a property owner entitled to the type of reassurance that emanates from zoning? It is submitted that for the most part he is, even though it may be to some extent illusory having regard to the fact that the zoning could be changed at any time in the future.

Assume, for example, that an average wage-earner has purchased a home in a relatively new residential subdivision adjacent to a vacant parcel of land zoned and used as a community park.[149] If it is later decided that the site should be used for commercial purposes of such a nature that detract from the quality of enjoyment of the wage earner's home, the wage earner will have a greater opportunity to protect his investment under present zoning systems than if the decision to change the use hinges upon the exercise of a discretion by a planning expert or experts. Admittedly, the cause may still be lost but not so swiftly and not so assuredly.

This type of reasoning may be regarded by many as somewhat reactionary having regard to the general trend in land use planning toward placing more emphasis on the public interest and less on individual rights. However, so long as our system purports to recognize private ownership of land, it is as wrong in principle for the system to expect the individual owner to subsidize the needs of the community in the form of giving up part of the value of his property without compensation to accommodate the community's needs as it is to expect him to turn over his fee simple interest in his property for some public purpose without compensation. The difference is only a matter of degree. Any system of land use control which makes it easy for administrators to ignore private property rights may well be ill-conceived unless accompanied by a system of compensation.

That is not to say that a property owner is entitled to expect that no change will ever take place in his immediate area. Nor can he reasonably expect always to be governed by a system of control which is as certain and predictable as the standard zoning by-law. There will always be parts of any given community which are undeveloped or developed parts which are undergoing rapid transition

[149] This illustration is obviously theoretical in that the average wage-earner is most unlikely to be able to afford to purchase a home under existing conditions unless he has sources of capital other than his wages.

due primarily to obsolescence. In these areas the planners must have more discretion in planning and administering uses than is afforded by the ordinary zoning by-law and it is reasonable to expect that the exercise of the discretion will have less disastrous consequences than in more developed and stable section of the community. Development control or some variation thereof may well be the answer.

The advocates of development control base their expressed contentions on the need for flexibility in land use planning. To what extent is the underlying motivation for their efforts a firm opinion that planning is too important to be left in the hands of politicians? The major decisions in zoning are obviously taken at the political level since the by-law, which includes the schedule of land uses and the zoning map, is a creature of the municipal council. In a jurisdiction in which pure development control, and not the hybrid in use in Alberta, is in effect the major decisions are likely to be in the hands of non-elected experts. The planners may be justified in having little or no confidence in politicians when it comes to taking effective action in this area. No one can dispute that the politicians do not exactly have an unblemished record. They have been known to put personal, economic or political advantage before the public interest in making decisions. But one does not cure the disease by killing the patient. Furthermore, what assurance is there that the experts are not as readily influenced by other than sound planning considerations?

In the final analysis, it is submitted that the people should decide what their physical environment is to be and not the so-called experts. Therefore, the policy aspects of land use planning should be primarily a legislative function with only such administrative refinements as are necessary to meet the day to day exigencies that arise. Land use planning as generally practiced in Alberta comes reasonably close to meeting this objective. Efforts will have to be made in the future to eliminate some of the inconsistencies that appear here and there in the Planning Act. In addition, perhaps the Act should restrict the use of development control, after a general plan has been adopted and the municipality is in a position to prepare a comprehensive zoning by-law, to those areas of the municipality which are undergoing a transition, to undeveloped areas and possibly the downtown core of major urban centres. If this is not accomplished in the legislation, perhaps efforts should be made to ensure that the Minister so restricts its use to the types of areas mentioned. Finally, if Alberta's zoning enabling legislation is too restrictive, thereby producing an inflexibile regulatory system, changes should be made to reintroduce the variance concept and to broaden the scope of conditional uses.