SURVEY OF CANADIAN LAW

COMMUNITY AND MUNICIPAL PLANNING LAW

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I. INTRODUCTION

Some six years have passed since the appearance of the last Survey of Municipal Law[1] and eight years since that of the last one treating Community Planning Law.[2] The present Survey, which covers the period 1977 to 1979,[3] differs from past Surveys in that it concentrates solely on land use planning law. A traditional, or functional, breakdown of the subject has been adopted, which looks at planning as a process. The procedure to attack by-laws is not considered in view of the recent appearance of the Survey of Administrative Law.[4]

Every effort has been made to give equal attention to developments in each Canadian jurisdiction, but with limited success. The extensive reporting of Ontario decisions in comparison with those of other provinces has meant, inevitably, a disproportionate discussion of Ontario law. Further, the author's personal interest lies in the law of Quebec, which appears generally to be ignored elsewhere in Canada.

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[1] Harvey, *Annual Survey of Canadian Law: Municipal Law*, 8 OTTAWA L. REV. 462 (1976).

[2] Harvey, *Annual Survey of Canadian Law: Municipal Law*, 6 OTTAWA L. REV. 485, at 496 (1974).

[3] Occasional consideration has been given to events outside these rather arbitrary dates: prior events because of the time since the last Survey and subsequent ones because of the delay until publication. In the latter context, particular effort has been made to note appeal decisions, and statutory references have been updated.

[4] Macdonald & Paskell-Mede, *Annual Survey of Canadian Law: Administrative Law*, 13 OTTAWA L. REV. 671 (1981). Several observations about the procedure to attack by-laws are, however, appropriate here.

First, a number of cases considered statutory applications to quash by-laws and, particularly, the time limits involved (*see also* Brunner, *Judicial Review of Municipal By-laws: Is There a Limitation Problem?*, 1 ADVOCATES' Q. 71 (1977)). In *Re* Texaco Canada Ltd. and City of Vanier, 28 O.R. (2d) 517, 8 M.P.L.R. 128, 95 D.L.R. (3d) 753 (H.c. 1978), *aff'd* 27 O.R. (2d) 415, 106 D.L.R. (3d) 706 (C.A. 1979), *rev'd on other grounds* [1981] 1 S.C.R. 254, 120 D.L.R. (3d) 193 (*see* Makhuch, Annot., 15 M.P.L.R. 200 (1981)), the Court rejected the somewhat original argument that, in an application to quash an amending by-law, the relevant time period ran from the date of passing of the original by-law and not from that of the amendment. In Fraser v. City of Calgary, 10 A.R. 455, 6 Alta. L.R. (2d) 210, 88 D.L.R. (3d) 510 (C.A. 1978), the Court, while seeking to give the elector the longest time possible to challenge the municipal action, was forced to conclude that the relevant statute required the application to be both filed and returnable within the specified time period. A similarly strict interpretation obtained in Murray v. Paterson, 9 B.C.L.R. 337 (S.C. 1978), *rev'd on other grounds sub nom.* Boss v. Broadmead Farms Ltd., 16 B.C.L.R. 268, 106 D.L.R. (3d) 160, (C.A. 1979), *leave to appeal denied* [1980] S.C.R. vi, 106 D.L.R. (3d) 160n, where jurisdiction to give leave to amend pleadings to allege bias was denied because the relevant statutory provision required service, within one mouth of the date of passing of the by-law, of not only the notice of application but also a statement of the grounds in support thereof. Finally, Wedman v. City of Victoria, 7 B.C.L.R. 30, 11 M.P.L.R. 68, 105 D.L.R. (3d) 94 (S.C. 1978) applied the statutory time limits to summary applications for declaratory relief as well as to applications to quash. (For subsequent proceedings, *see Re* Wedman, infra note 250.)

Second, the following cases reaffirmed that another form of direct action was available notwithstanding the passage of the statutory time limit: Duquette v. Port Alberni, 3 M.P.L.R. 177 (B.C.S.C. 1977); G. Gordon Foster Devs. Ltd. v. Township of

II. LITERATURE AND LEGISLATION

In light of the thematic organization of the Survey, it was felt more useful to mention legal writings or legislative developments within the context of the subject matter treated. Nevertheless, some are sufficiently important or general to be singled out here.

Such is the case, for example, of two books: *Canadian Law of Planning and Zoning*, by Ian McFee Rogers[5] and *Aspects juridiques du règlement de zonage au Québec*, by Professor Lorne Giroux.[6] Most readers are probably already familiar with the former, but some explanation of the latter might be appropriate. In spite of its apparently restrictive title, this excellent book in fact covers case law from all provinces. This is so because Quebec law in the area is, statutory differences aside, similar in principle to the law elsewhere in Canada.

Langley, 5 B.C.L.R. 42, 5 M.P.L.R. 228, 81 D.L.R. (3d) 216 (S.C. 1977), *rev'd on other grounds*, 14 B.C.L.R. 29, 102 D.L.R. (3d) 730 (C.A. 1979), *leave to appeal denied* 11 M.P.L.R. 1n, 30 N.R. 268n; Bourdeau v. Ville de St. Jean, [1977] Que. C.S. 407; Bourassa v. City of Saskatoon, [1980] 1 W.W.R. 590 (Sask. C.A. 1979), *aff'g* [1979] 5 W.W.R. 380 (Q.B.). However, Hobby Ranches Ltd. v. The Queen in Right of the Province of B.C., 8 B.C.L.R. 247, 94 D.L.R. (3d) 529 (S.C. 1978) and Jericho Area Citizens' Ass'n v. City of Vancouver, 12 B.C.L.R. 313 (S.C. 1979) admitted that a common law action could nevertheless be barred by effluxion of time. *But see Bourdeau, supra*, imposing the thirty-year prescription period under QUE. CODE OF CIVIL PRO., art 33. That an alternative procedure was available (on the facts, an application for judicial review), even if the statutory application to quash was not statute barred, was reaffirmed in *Re* Holmes, 16 O.R. (2d) 263, 2 M.P.L.R. 153 (H.C. 1977) (*and see* Makuch, Annot., 2 M.P.L.R. 153 (1977)) and Homex Realty & Dev. Co. v. Village of Wyoming, [1980] 2 S.C.R. 1011, 13 M.P.L.R. 234, 116 D.L.R. (3d) 1, *aff'g* 23 O.R. (2d) 398, 95 D.L.R. (3d) 728 (C.A. 1979). Finally, although the actual issue (the validity of a water tax assessment) is outside the scope of this Survey, Duquet v. Town of Sainte-Agathe-des-Monts, [1977] 2 S.C.R. 1132, 13 N.R. 160 (1976), recognized that a municipal action could be directly challenged in Quebec by an application for a declaratory judgment under QUE. CODE OF CIVIL PRO., art. 453.

As well, three Quebec cases cast doubt on the possibility of a collateral attack on a by-law: Entreprises Herskel Ltée v. Town of Greenfield Park, [1977] Que. C.S. 396; Village de Val-David v. Lacroix, [1979] Que. C.S. 109, 9 M.P.L.R. 49; Riendeau v. Cité de Beauharnois, 6 M.P.L.R. 94 (Que. C.S. 1978).

On standing, *see*: Giroux, *L'intérêt à poursuivre et la protection de l'environnement en droit québécois et canadien*, 23 MCGILL L.J. 292 (1977). *See also*: Bedford Serv. Comm'n v. A.G.N.S., [1977] 2 S.C.R. 269, 80 D.L.R. (3d) 767; Bedford Serv. Comm'n v. Provincial Planning Appeal Bd., 28 N.S.R. (2d) 605, 6 M.P.L.R. 241 (S.C. 1978); W.A.W. Holdings Ltd. v. Sundance Beach, 27 A.R. 468, [1980] 1 W.W.R. 97, 12 M.P.L.R. 1, 105 D.L.R. (3d) 403 (Q.B. 1979), *rev'd in part* 27 A.R. 451, 117 D.L.R. (3d) 351 (C.A. 1980).

[5] CANADIAN LAW OF PLANNING AND ZONING (1973). While its initial publishing date is outside the Survey period, this book is continually updated by the publication of subsequent "Releases". From 1977 to 1979, such releases updated the chapters on zoning (1977, now partly updated to 1981), building permits (1977), subdivision control (1978) and planning (1979).

[6] ASPECTS JURIDIQUES DU RÈGLEMENT DE ZONAGE AU QUÉBEC (1979). Reference should also be made to another work admittedly published outside the survey period: Kenniff, *Le contrôle public de l'utilisation du sol et des ressources en droit québécois*, 16 C. DE D. 763 (1975), 17 C. DE D. 85, 437, 667 (1976).

Secondly, two reporting services have greatly increased the accessibility of jurisprudence in the area, particularly that of Ontario.[7]

As for legislation, three provinces significantly amended their basic enabling legislation. This is particularly true of Quebec which, for the first time, adopted a comprehensive planning act, entitled An Act respecting land use planning and development.[8] In addition, much of rural Quebec is now zoned for agricultural uses as a result of the adoption of An Act to preserve agricultural land.[9] Alberta also enacted a new act, The Planning Act, 1977,[10] and in the same year British Columbia substantially revised the relevant parts of the Municipal Act.[11]

This legislative activity in turn generated legal writing. Alberta's legislation resulted in the publication of a book[12] and several articles.[13] The British Columbia changes stimulated a Continuing Legal Education seminar in 1979, with publication of resulting materials both in looseleaf form[14] and partially in the form of an article.[15]

While Ontario did not revise its Planning Act in the period under survey, such action was actively under consideration as witnessed by the number of official and semi-official reports.[16] These reports in turn

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[7] ONTARIO MUNICIPAL BOARD REPORTS (1st vol. published 1973) [herein cited as O.M.B.R.] and MUNICIPAL AND PLANNING LAW REPORTS (1st vol. published 1976) [herein cited as M.P.L.R.].

[8] S.Q. 1979, c. 51 [R.S.Q., c. A-19.1] (*amended by* S.Q. 1979, c. 72; 1980, cc. 16, 34; 1981, c. 59; 1982 cc. 2, 18, 21, 63) (also known as Bill 125).

[9] S.Q. 1978, c. 10 [R.S.Q., c. P-41.1] *amended by* S.Q. 1979, c. 72; 1982, c. 40) (also known as Bill 90). *See infra*, the text accompanying note 48.

[10] S.A. 1977, c. 89 (*replaced by* R.S.A. 1980, c. P-9 (*amended by* S.A. 1981, c. R-9.1; 1982, c. 29)); in force as of 1 Apr. 1978: (15 Apr. 1978) (74 ALTA. GAZETTE PT. 1, 1159).

[11] Municipal Amendment Act, 1977, S.B.C. 1977, c. 57 (*replaced by* R.S.B.C. 1979, c. 290 (*amended by* S.B.C. 1980, cc. 17, 18, 29, 38, 49, 50; 1981, cc. 4, 5, 11, 15, 21)).

[12] F. LAUX, THE PLANNING ACT (ALBERTA) (1979).

[13] Elliott, *The Planning Act, 1977 — The Next Step*, 4 M.P.L.R. 243 (1978); Elder, *The New Alberta Planning Act*, 17 ALTA. L. REV. 434 (1979).

[14] LAND USE CONTROL IN BRITISH COLUMBIA (1979). *See also* J. INCE, LAND USE LAW: A STUDY OF LEGISLATION GOVERNING LAND USE IN BRITISH COLUMBIA (Univ. of B.C. Centre for Continuing Educ. 1977). This latter work was admittedly not in response to legislative change; nor was the Continuing Legal Education seminar which was held at Dalhousie: THE LAW OF LAND USE AND DEVELOPMENT IN NOVA SCOTIA (P. McDonough & B. Stuart eds. 1977).

[15] MacKenzie, *Land Use and Development Control in British Columbia: Official Plans, Subdivision Control and Zoning*, 36 ADVOCATE 511 (1978).

[16] REPORT OF THE ONTARIO MINISTRY OF HOUSING, PLANNING ACT REVIEW COMMITTEE (1977). While this was the first such report in the review period, it was in fact preceded by two reports prepared by the late J.B. Milner for the Ontario Law Reform Commission: TENTATIVE PROPOSALS FOR THE REFORM OF THE ONTARIO LAW RELATING TO COMMUNITY PLANNING AND LAND USE CONTROLS (1967) and DEVELOPMENT CONTROL: SOME LESS TENTATIVE PROPOSALS (1969) as well as a study for the Ontario Economic Council (SUBJECT TO APPROVAL: A REVIEW OF MUNICIPAL PLANNING IN ONTARIO (Comay Report) (1973)). *See also* REFORM PLANNING IN ONTARIO: STRENTHENING THE MUNICIPAL ROLE (Bossons Report) (1978), prepared for the Ontario

inspired articles or reports criticizing or commenting upon them.[17]

Interestingly, Quebec's legislative changes, arguably the most radical or far-reaching of all, did not seem to generate the same amount of public comment and analysis. As far as preliminary studies are concerned, even stepping outside the period under survey, one finds only the *Rapport La Haye*,[18] the *Rapport Castonguay*[19] and a series of booklets[20] entitled *La décentralisation: une perspective communautaire nouvelle.*

III. Private Law

Many areas of private law have an impact on the use of land. Nuisance[21] and restrictive covenants are obvious examples.[22] In this Survey, however, it is not proposed to discuss private law controls in detail but merely as regards their interrelationship with public law control. For example in *Seifeddine v. Hudson's Bay Traders*,[23] both at first instance and on appeal, the Court refused an application to modify or discharge a restrictive covenant limiting construction to one private dwelling house per lot in an area then zoned to permit apartment houses and other multiple-family dwellings as well as single-family dwellings. There was no "conflict" between the two provisions on the facts; and while the existence of the particular zoning by-law, designed to permit an

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Economic Council; ONTARIO WHITE PAPER ON THE PLANNING ACT (1979); THE PLANNING ACT: A DRAFT FOR PUBLIC COMMENT (1979). [Editor's note: The Planning Act, 1983, S.O. 1983, c. 1 was proclaimed in force on 1 Aug. 1983].

[17] J. CULLINGWORTH, ONTARIO PLANNING: NOTES ON THE COMAY REPORT ON THE ONTARIO PLANNING ACT (Univ. of Toronto Dep't of Urban & Regional Planning 1978); Bureau of Municipal Research, *Changing the Ontario Planning Act: Risks and Responsibilities,* 18 PLAN CANADA 208 (1978); Fitzpatrick, *Sorting out the Responsibilities: The Ontario Planning Act Review*, 18 PLAN CANADA 212 (1978); Katary, *Subject to Disapproval: The Ontario Planning Act Review*, 18 PLAN CANADA 220 (1978); McCallum, *Editorial Comments on the Comay Report*, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 100 (Law Soc'y of Upper Canada 1978).

[18] RAPPORT DE LA COMMISSION PROVINCIALE D'URBANISME (QUÉBEC) (La Haye président 1968).

[19] RAPPORT DU GROUPE DE TRAVAIL SUR L'URBANISATION: L'URBANISATION AU QUÉBEC (Castonguay président 1976).

[20] LA DÉCENTRALISATION: UNE PERSPECTIVE COMMUNAUTAIRE NOUVELLE (undated), prepared for the *Ministère du Conseil exécutif.* To this list could perhaps be added: M. TESSIER, PROPOSITION DE RÉFORME DES STRUCTURES MUNICIPALES (1971); RAPPORT DES COMMISSAIRES CHARGÉS DE LA REFONTE DES LOIS MUNICIPALES (Hébert président 1974, 1976). These reports seem to have been written in isolation, however, and did not build upon each other as in Ontario. This is perhaps understandable in view of the fact that there was no pre-existing legislation to provide a focus for debate.

[21] *See, e.g.*, Hétu, *L'application de la théorie des troubles de voisinage au droit de l'environnement du Québec*, 23 MCGILL L.J. 281 (1977).

[22] Another example is private rights over, or public access to, shorelines: Cossette, *Le droit de propriété des grèves le long des rivières navigables*, 81 R. DU N. 377 (1979); Lacasse, *Réserve des trois chaînes et gestion du domaine public foncier du Québec*, 8 R. GEN. 101 (1977).

[23] 16 A.R. 252, 8 Alta. L.R. (2d) 253, 94 D.L.R. (3d) 549 (S.C. 1978), *aff'd* 22 A.R. 111, 108 D.L.R. (3d) 671 (C.A. 1980).

orderly transition of use, was evidence that a modification or discharge would be in the public interest, it was not conclusive in this regard.[24]

IV. The Constitution

Two constitutional questions concerning land use control have been before the courts in the period under consideration: the division of powers[25] and section 96 courts.

A. *Division of Powers*

The assumption that legislative jurisdiction over land use rests with the provinces was given jurisprudential sanction in *Hamilton Harbour Commissioners v. City of Hamilton*:[26]

> The City as a creature of provincial legislation derives its authority to enact by-laws to control land use through the provisions of the *Planning Act*. . . . Although it has never been expressly decided, legislative authority to control the use of land generally undoubtedly belongs to the Province under s. 92 of the B.N.A. Act within head 13, 'Property and Civil Rights in the Province', or head 16, 'Generally all Matters of a merely local or private Nature in the province'.[27]

Nevertheless, questions of legislative competence do occur and the *Hamilton Harbour* case itself is a good example,[28] since at issue there was legislative authority with respect to "land use within a harbour". Both the trial Judge and the Court of Appeal agreed that this was not exclusively a matter of federal jurisdiction but rather one of concurrent or overlapping jurisdiction, that the federal government had not occupied the field, and that the by-laws of the Commissioners and the zoning by-laws were not in conflict (in the sense that compliance with one would involve breaching the other) so as to require the application of the doctrine of paramountcy. Only land within the harbour area owned by the Crown in Right of Canada was unaffected by the municipal zoning, by virtue of the principle of federal immunity. The same issue, land use within a harbour, arose in *Township of Moore v. Hamilton*.[29] The Ontario Court of Appeal, in a short oral judgment, interpreted the Navigable Waters Protection Act[30]

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[24] *See also* Décary, *De la validité d'une "servitude" de non-usage à des fins commerciales dans une zone commerciale*, 80 R. DU N. 63, 137 (1977).

[25] Although the subject matter is larger than that of the present survey, *see* Beaudoin, *La protection de l'environnement et ses implications en droit constitutionnel, 23* McGILL L.J. 207 (1977). On the Yukon and Northwest Territories: *see* J. NAYSMITH, NORTH OF 60: LAND USE AND PUBLIC POLICY IN NORTHERN CANADA (Dep't of Indian & N. Affairs 1977).

[26] 21 O.R. (2d) 459, 1 M.P.L.R. 133, 91 D.L.R. (3d) 353 (H.C. 1976), *aff'd without reasons* except for two points, 21 O.R. (2d) 459, at 491, 6 M.P.L.R. 183, at 183, 91 D.L.R. (3d) 353, at 385 (C.A. 1978).

[27] *Id.* at 482, 1 M.P.L.R. at 158, 91 D.L.R. (3d) at 376 (Griffiths J.).

[28] Other examples are the body-rub parlour cases, *infra* note 239.

[29] 23 O.R. (2d) 418, 96 D.L.R. (3d) 156 (C.A. 1979).

[30] R.S.C. 1970, c. N-19.

in such a way as to avoid conflict with a municipal zoning by-law, holding that a licence to operate a commercial gravel dock issued pursuant to that Act did not operate to control the use of the land to which the licence related.[31] The Court therefore allowed the appeal and ordered an injunction to prevent the defendant from using his land as a commercial gravel dock contrary to a municipal by-law.

B. *Section 96*

A second major issue is the application of section 96 of the B.N.A. Act (now Constitution Act, 1867). Whenever a provincially appointed administrative tribunal is established, its jurisdiction is open to challenge on the grounds that it ought properly to be exercised by federally appointed judges.[32] The tribunals are, of course, aware of this difficulty and try to avoid a section 96 challenge by refusing to decide questions of law without, however, abdicating their basic responsibilities:

> The Courts have previously held that it is not the function of this Board to determine the validity of by-laws; that is a question of law which has been entrusted to the Courts. This Board has, however, maintained the position that if the Board is completely satisfied that what is proposed is contrary to law or *ultra vires* the municipality, it would not lend its stamp of approval to such a by-law.[33]

In so conducting itself, however, a tribunal inevitably finds itself between Scylla and Charybdis. Its decision will be challenged in the courts,

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[31] Thereby overruling the trial Judge who had said: "I adopt that reasoning [in *Hamilton Harbour*] and find that the by-law, though not *ultra vires per se*, is ineffective when it attempts to regulate the use of the defendant's lands in such a way as to prevent their use for purposes related to navigation and shipping. The paramountcy principle must prevail." *Supra* note 29, at 420, 96 D.L.R. (3d) at 158.

[32] A somewhat similar problem arises in Quebec, where by-law enforcement is a function of the *Cour municipale*, a provincially appointed court. In Roy v. Ville d'Anjou, [1978] Que. C.S. 28, the Superior Court rejected an argument that such a court lacked jurisdiction to adjudicate where the defence of acquired rights was raised. For a general description of such a court, *see*: Labrosse, *Juridiction de la Cour municipale de Montréal et de ses juges*, 29 R. DU B. 678 (1979).

[33] *Re* Oshawa Restricted Area By-Law 69-77, 9 O.M.B.R. 65, at 66 (Mun. Bd. 1978) (Board approving by-law and declining to hold it *ultra vires*).

See also: Dzioba v. City of Hamilton, 7 O.M.B.R. 110 (Mun. Bd. 1977) (Board approving rezoning application but declining to make finding concerning legal status of agreement for sale); *Re* Kingston Restricted Area By-Law 76-26, 9 O.M.B.R. 72 (Mun. Bd. 1978) (Board refusing to hold that by-law zoning airport lands ineffective); Clutterbuck v. Township of Hamilton, 9 O.M.B.R. 227 (Mun. Bd. 1978), *aff'd without written reasons* 9 O.M.B.R. 227n (Lieutenant Governor in Council [hereafter cited as L.G. in C.] 1978) (Board refusing to give declaratory judgment that enforceable right to develop established); McLaughlin v. Borough of Etobicoke (No. 2), 10 O.M.B.R. 22 (Mun. Bd. 1979) (Board issuing final order incorporating both its own decision and modifications thereof imposed by Cabinet, but declining to canvass extent of its jurisdiction in this regard).

But see: *Re* Port McNicoll Restricted Area By-Law 533, 7 O.M.B.R. 215 (Mun. Bd. 1977) (Board holding *ultra vires* attempts to vest control of certain land uses in Committee

whether it denies jurisdiction, as in *Houston v. Cirmar Holdings Ltd.*,[34] *Re Downtown Churchworkers Ass'n and Regional Assessment Commissioner*[35] and *Re Hart and 240953 Developments Ltd.*,[36] or accepts it. This latter situation has been before the courts three times. In both *Texaco Canada Ltd. v. Clean Environment Commission*[37] and *A.G.N.S. v. Gillis*[38] the courts canvassed the factors or tests traditionally referred to in deciding whether a provincially appointed tribunal has jurisdiction: whether the powers are judicial or administrative, whether there is an appeal to the courts, whether historically an analogous function was exercised by the courts and whether the judicial function is necessarily incidental to the exercise of its basic administrative function. The Manitoba case therefore held *ultra vires* a provision authorizing the Clean Environment Commission to determine who is responsible at law for payment of costs assessed in relation to an environmental contamination.

> For, whatever be the strength of the factual inquiry I would approve, and its severability from the work of a court, it cannot be said that the further inquiry into the consequence of the disaster, namely, liability for and the extent of the cost of restoring the affected area, is a matter "foreign to the jurisdiction of section 96 courts". . . . Indeed, the identification of fault between subject and subject or — as here — between the state and its subjects, has ever been jealously prized as the hallmark of justice as we know it, namely, the objective inquiry, under established rules and subject to impartial review, by an appellate tribunal.[39]

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of Adjustment or Planning Board, and rejecting other dispositions concerning seasonal dwellings as being invalid by virtue of decision in Mueller v. Township of Tiny, 13 O.R. (2d) 626, 1 M.P.L.R. 1, 72 D.L.R. (3d) 28 (H.C. 1976)); *Re* Toronto Restricted Area By-Law 413-78, 10 O.M.B.R. 38, 9 M.P.L.R. 117 (Mun. Bd. 1979) (Board holding by-law restricting occupancy to "senior citizens, individuals or couples over the age of 55 years" as being *ultra vires* "people zoning" within the context of Bell v. The Queen, *infra* note 227; permission to state the case granted).

[34] 7 O.M.B.R. 270, 4 M.P.L.R. 37 (Div'l Ct. 1977), holding that the Board rightly refused to decide a question of title: "We all agreed . . . that the Board has been right as far as the issues stated therein were concerned in declaring that only the Courts should be resorted to 'for the protection of any legal rights that might be interfered with by this application.' I do not propose to examine at length the reasons why this should be so, other than to say that questions of title to land are, generally speaking, only to be entertained in the Supreme Court. . . ." *Id.* at 277,4 M.P.L.R. at 46-47 (Hughes J.).

[35] 18 O.R. (2d) 302, 8 O.M.B.R. 249, 5 M.P.L.R. 261, 82 D.L.R. (3d) 271 (Div'l Ct. 1978), *aff'd without written reasons* 28 O.R. (2d) 662, 111 D.L.R. (3d) 178 (C.A. 1979), in which the Court agreed with the Ontario Municipal Board that the question of exemption from taxation is a question of law which can be decided only by a section 96 judge and not by one of the hierarchy of appeal tribunals under The Assessment Act, R.S.O. 1970, c. 32 (*replaced by* R.S.O. 1980, c. 31 (*amended by* S.O. 1981, c. 47)).

[36] 9 O.M.B.R. 310, 8 M.P.L.R. 149 (Div'l Ct. 1979), holding that the issue of the conformity of a by-law with an official plan was irrelevant before the Ontario Municipal Board. "The Board has no general power to determine the legal validity of by-laws: that function is reserved to the Courts.": *id.* at 314, 8 M.P.L.R. at 154 (Reid J.).

[37] [1977] 6 W.W.R. 70, 79 D.L.R. (3d) 18 (Man. Q.B.).

[38] 39 N.S.R. (2d) 110, 71 A.P.R. 110 (S.C. 1979); *aff'd* 39 N.S.R. (2d) 97, 111 D.L.R. (3d) 349 (C.A. 1980).

[39] *Supra* note 37, at 83-84, 79 D.L.R. (3d) at 30 (Wilson J.).

In *City of Mississauga v. Regional Municipality of Peel*,[40] the Supreme Court of Canada applied principally the functional integration test, the last of the tests referred to above, in considering whether the Ontario Municipal Board could validly be given jurisdiction to determine the ownership of certain assets (trunk water and sewer facilities) upon the creation of the regional municipality. Although this would involve interpreting the water and sewer agreements as well as the Act constituting the new regional municipality, functions traditionally regarded as judicial, the Court was of the opinion that one had to consider the challenged judicial function in relation to the Board's other duties and powers. One could not simply detach a particular power or authority from the legislative scheme in which it was found, but must consider "its setting in the institutional arrangements in which it appears and is exercisable. . .".[41]

V. PLANNING

A. *Provincial*

One of the characteristic features of land use control over the last decade has been the realization that control at the local level is not sufficient; that, for one thing, intervention at the provincial level is required. Such intervention can take two forms. It can be direct, with the provincial government itself assuming control over land use through legislation or regulation, or indirect, with the provincial government having increasing influence on, or control over, local decisions.[42]

1. *Direct Intervention*

An example of direct intervention is provincial control over the use of agricultural land. British Columbia's Agricultural Land Commission

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[40] [1979] 2 S.C.R. 244, 9 M.P.L.R. 81, 97 D.L.R. (3d) 439.

[41] *Id.* at 252, 9 M.P.L.R. at 88, 97 D.L.R. (3d) at 445 (Laskin C.J.C., quoting Tomko v. Nova Scotia Lab. Rel. Bd., [1977] 1 S.C.R. 112, 14 N.S.R. (2d) 191, 69 D.L.R. (3d) 250 (1975)).

Whether area municipalities have the right to apply to the Ontario Municipal Board for the adjustment of certain assets and liabilities under The Regional Municipality of Ottawa-Carleton Act, R.S.O. 1970, c. 407 (*replaced by* R.S.O. 1980, c. 439) was also at issue in Township of Goulbourn v. Regional Municipality of Ottawa-Carleton, [1980] 1 S.C.R. 496, 10 O.M.B.R. 491, 101 D.L.R. (3d) 1, *rev'g*, *sub nom. Re* Regional Municipality of Ottawa-Carleton, 18 O.R. (2d) 615, 83 D.L.R. (3d) 391 (C.A. 1978), *aff'g* 15 O.R. (2d) 588, 76 D.L.R. (3d) 254 (Div'l Ct. 1977); but a s. 96 argument was not raised therein.

[42] *See* Glenn, *L'aménagement du territoire en droit public québécois*, 23 MCGILL L.J. 242 (1977). For a discussion of the interrelation of the intervention by various levels of government within a specific area, *see* Makuch, *Legal Authority and Land Uses in Central Toronto*, 1 M.P.L.R. 241 (1977).

Act,[43] and in particular the procedure to be followed under it was considered in *Hobby Ranches Ltd. v. The Queen in Right of the Province of British Columbia.*[44] The Court decided that when a land reserve plan is amended to include lands previously excluded, the Commission is required to give the affected landowner notice and an opportunity to make representations; a decision to include particular lands in the reserve is a decision affecting the rights of the landowner and the Commission is therefore under a duty to act judicially.[45] Similar to the British Columbia statute is Quebec's Act to preserve agricultural land,[46] which gives the government power to declare an area a "designated agricultural region". Municipalities in the region then negotiate with the *Commission de protection du territoire agricole du Québec* to establish (or the *Commission* imposes) "agricultural zones" within which all non-agricultural uses and all subdivision of land[47] require the permission of the provincially appointed *Commission.* The government has used this power rather liberally to date, designating six regions which cover most of settled rural Quebec.[48]

Environmental control is another area of direct provincial intervention.[49] In Alberta, The Department of the Environment Act,[50]

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[43] R.S.B.C. 1979, c. 9 (*amended by* S.B.C. 1980, cc. 36, 49). This act was originally adopted as the Land Commission Act, S.B.C. 1973 (1st sess.), c. 46; the powers of the Commission were modified and the title was changed by the Land Commission Amendment Act, S.B.C. 1977, c. 73. Under this Act, land in a given area is designated by the provincially appointed Commission, with the approval of the Lieutenant Governor in Council, as an "agricultural land reserve".

[44] *Supra* note 4. *See also Re* Meadow Creek Farms Ltd. and District of Surrey, 7 M.P.L.R. 178, 89 D.L.R. (3d) 47 (B.C.C.A. 1978).

[45] Notwithstanding that its decision is subject to the approval of the Lieutenant Governor in Council.

[46] *La Loi sur la protection du territoire agricole*, S.Q. 1978, c. 10. *See* Cossette, *Étude sur la Loi sur la protection du territoire agricole,* [1979] C.P. DU N. 43.

[47] *See infra*, text accompanying notes 435-37.

[48] This Act, in force as of 9 Nov. 1978, applied initially to the St. Lawrence Lowlands and the Gatineau Valley. A further part of the Gatineau was added as of 5 Apr. 1980: Décret 966-80 (19 Apr. 1980) (112 GAZETTE OFFICIELLE DU QUÉBEC, PT. 1, 5206). A third region comprising the Eastern Townships, the Beauce, Saguenay, Lac Saint-Jean, Abitibi-Témiscamingue and the Côte-du-Sud was added as of 13 Jun. 1980: Décret 1694-80 (21 Jun. 1980) (112 GAZETTE OFFICIELLE DU QUÉBEC, PT. 1, 7139). The fourth region, Rivière-du-Loup, was added on 24 Oct. 1980: Décret 3314-80 (1 Nov. 1980) (112 GAZETTE OFFICIELLE DU QUÉBEC, PT. 1, 10711). A fifth, the Lower St. Lawrence and the Gaspé, was added as of 19 Jun. 1981: (5 Sep. 1981) (113 GAZETTE OFFICIELLE DU QUÉBEC, PT. 1, 9750); and a sixth, the Outaouais and the Laurentians, Haute-Côte-Nord, Iles-de-la-Madeleine and the non-organized territories south of the 50° parallel, as of 7 Nov. 1981: Décret 3020-81 (21 Nov. 1981) (113 GAZETTE OFFICIELLE DU QUÉBEC, PT. 1, 12360).

[49] The discussion which follows is centred around cases having a "land use" component. It is not intended to be a comprehensive review of environmental protection in all the provinces, for which *see* Swaigen, *Annual Survey of Canadian Law: Environmental Law 1975-1980*, 12 OTTAWA L. REV. 439 (1980).

[50] S.A. 1971, c. 24 (*replaced by* R.S.A. 1980, c. D-19 (*amended by* S.A. 1981, c. 67)).

which gives to the Lieutenant Governor in Council authority to establish "restricted development areas" to protect the environment therein, was considered in *Heppner v. Province of Alberta*.[51] This case held *ultra vires* an order in council establishing as a restricted development area a narrow strip almost encircling Edmonton; although the preamble to the order listed the requisite environmental concerns, other evidence revealed that the real purpose had been to create a transportation and utilities corridor.

Ontario statutes concerned with protecting the environment which have been judicially considered are The Pits and Quarries Control Act, 1971[52] and The Niagara Escarpment Planning and Development Act, 1973.[53] The former was at issue in *E.R.S. Holdings Ltd. v. Town of Pickering (No. 1)*[54] and *(No. 2)*[55] and in *Re Schutz*,[56] in all three of which it was held that a report by the Ontario Municipal Board to the Minister responsible, concerning his refusal to issue or his revocation of a licence to operate a pit or quarry, was not a "decision, approval or order" of the Board and that, accordingly, no motion to rehear,[57] appeal to the courts or application for judicial review[58] was available. The Niagara Escarpment Planning and Development Act, 1973[59] was considered in *Re Braeside Farms Ltd.*,[60] in which the Divisional Court decided that the designation by the Minister responsible of lands as an "area of development control" (the effect of which was to prevent any development within the area without the permission of the provincially appointed Niagara Escarpment Commission) was a legislative act, so that landowners affected did not have a right to a hearing:

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[51] 6 A.R. 154, 4 Alta. L.R. (2d) 139, 80 D.L.R. (3d) 112 (C.A. 1977).

[52] S.O. 1971 (1st sess.), c. 96 (*replaced by* R.S.O. 1980, c. 378).

[53] S.O. 1973, c. 52 (*replaced by* R.S.O. 1980, c. 316 (*amended by* S.O. 1981, c. 19)). A sister act is The Parkway Belt Planning and Development Act, 1973, S.O. 1973, c. 53 (*replaced by* R.S.O. 1980, c. 368), whose effect on the assessment value of land was considered in *Re* Debellen Invs. Ltd., 23 O.R. (2d) 307, 9 O.M.B.R. 5 (Div'l Ct. 1978); and *see also*, *Report of the Hearing Officers re Parkway Belt West Plan*, 1 M.P.L.R. 181 (1977). A third such act is The Ontario Planning and Development Act, 1973, S.O. 1973, c. 51 (*replaced by* R.S.O. 1980, c. 354).

[54] 8 O.M.B.R. 455 (Div'l Ct. 1978).

[55] 8 O.M.B.R. 458 (Div'l Ct. 1978).

[56] 20 O.R. (2d) 104, 2 M.P.L.R. 285 (Div'l Ct. 1977).

[57] Under The Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 42 (*replaced by* R.S.O. 1980, c. 347, s. 42).

[58] Under The Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 95 (*replaced by* R.S.O. 1980, c. 347, s. 95) or The Judicial Review Procedure Act, 1971, S.O. 1971 (1st sess.), c. 48 (*replaced by* R.S.O. 1980, c. 224).

[59] S.O. 1973, c. 52 (*replaced by* R.S.O. 1980, c. 316 (*amended by* S.O. 1981, c. 19)).

[60] 20 O.R. (2d) 541, 5 M.P.L.R. 181, 88 D.L.R. (3d) 267 (Div'l Ct. 1978). *See also*: Ontario Hydro v. Halton Hills, 10 O.M.B.R. 216 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 216n (L.G. in C. 1979) (zoning by-law amendment approved notwithstanding portion thereof would be dormant until The Niagara Escarpment Planning and Development Act changed in way that could revive it); Preece v. Aikens, 10 O.M.B.R. 493 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 493n (L.G. in C. 1979) (effect on severance application of zoning restrictions rendered ineffective by regulations under same Act).

> The passing of the Regulation did not have the effect of resolving anything resembling a *lis inter partes* where the rules of natural justice should prevail. In making his decision to impose development control on certain lands, the Minister was not acting in accordance with reasonably well settled principles or objective standards so that it could be said he was exercising a *quasi*-judicial function. Rather, the Minister, in implementing the features of this relatively new legislation with its novel concepts of land control, was concerned with subjective considerations of policy and expedience to achieve the purpose of the Act.[61]

Environmental protection legislation was also considered in the Prince Edward Island case of *Prevost Investment & Development Ltd. v. Prince Edward Island*.[62] In this case, the creation by the provincial government, under the Planning Act,[63] of a "special recreation and tourist project area", within which no structure could be erected without the approval of the Lieutenant Governor in Council, was held valid; but a subsequent designation of the same area as a "protected area" under the Recreation Development Act[64] was *ultra vires* for failure to comply with the notice provisions of the statute. Somewhat wider in scope is the Saskatchewan provision allowing the Minister responsible to establish "special planning areas" — for reasons which range from recreational to environmental to developmental — within which he has full powers of control. A 1977 amendment enables him to delegate his powers to a Special Planning Commission for the area; but the majority of its members must be nominated by the local councils.[65] To this list of environmental protection legislation can be added a series of statutes adopted by Quebec to provide a form of interim provincial development control over certain special regions, in that no development can take place without the permission of the Minister or his delegate during the time required for the preparation of a development plan by the Minister.[66] The first such special region legislation, An Act respecting the vicinity of the new international airport,[67] was a factor in *Carrières T.R.P. Ltée v. Corporation Municipale de Mirabel*,[68] in which a request for *mandamus* for a building permit would have been refused as the applicant did not

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[61] *Re* Braeside Farms Ltd., *supra* note 60, at 549, 5 M.P.L.R. at 189, 88 D.L.R. (3d) at 275 (Griffiths J.). For further discussion, *see infra* note 304.

[62] 15 Nfld. & P.E.I.R. 135, 38 A.P.R. 135, 89 D.L.R. (3d) 308 (P.E.I.C.A. 1978).

[63] R.S.P.E.I. 1974, c. P-6 (*amended by* S.P.E.I. 1975, c. 20; 1976, c. 22; 1981, c. 28).

[64] R.S.P.E.I. 1974, c. R-9 (*amended by* S.P.E.I. 1975, c. 23).

[65] The Planning and Development Act, 1973, S.S. 1973, c. 73, *amended by* S.S. 1976-77, c. 58 adding new s. 193A (*replaced by* R.S.S. 1978, c. P-13, s. 194).

[66] *See also infra*, text accompanying note 282ff.

[67] S.Q. 1970, c. 48 (*amended by* S.Q. 1979, c. 51). Other regional acts were: An Act respecting Forillon Park and its surroundings, S.Q. 1970, c. 32 (*amended by* S.Q. 1970, c. 76) (*replaced by* R.S.Q. c. P-8); An Act respecting the neighbourhood of Mont Sainte-Anne Park, S.Q. 1971, c. 58 (*amended by* S.Q. 1979, c. 51); An Act respecting Mauricie Park and its surroundings, S.Q. 1972, c. 50 (*replaced by* R.S.Q., c. P-7 (*amended by* S.Q. 1979, c. 51)).

[68] [1978] Que. C.S. 769, 6 M.P.L.R. 151, *aff'd on other grounds* 12 M.P.L.R. 104 (C.A. 1979).

have the requisite ministerial permission to develop.[69]

Further examples of direct provincial control of land use are the several provincial statutes[70] restricting or controlling the establishment of retail stores and shopping centres over a given gross floor area.

Finally, one could mention provincial protection of public property, especially historic buildings.[71]

2. *Indirect Control*

Indirect control over local land use decisions provides a further method for the province to ensure that regard is had to its priorities. This was eloquently stated by the Ontario Municipal Board in *Re Oakville Planning Area Official Plan Amendments 28, 31 & 32*:

> No municipality is an island unto itself. No municipality in this Province has the right to deny people affordable homes, jobs and shopping facilities within the municipality if private or public enterprise is willing and can provide such homes, jobs and shopping facilities without doing violence to sound planning principles. While protecting the old the town must prepare for the new major wave of change that is coming. It cannot be stopped by a wall and a "go away — I'm all right Jack" philosophy; that is morally wrong, fiscally irresponsible and against provincial policy.[72]

The influence of provincial policy can be illustrated by looking at some decisions of the Ontario Municipal Board. The provincial policy of protecting agricultural lands, particularly as articulated in the *Food Land Guidelines*,[73] has been influential in at least five decisions of the Board: *Lakeshore Developments Ltd. v. County of Huron*,[74] *Molnar v. Town of Ancaster*,[75] *Re Richmond Hill Proposed Plan of Subdivision*,[76] *Re Thorold Restricted Area By-Laws 18(75) & 34(75)*[77] and *Re Niagara*

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[69] The company did have the right to carry on a gravel pit operation, however, under the *Boyd Builders* principle. *See infra* note 407.

[70] Shopping Centre Development Act, S.N.S. 1978-79, c. 74 (*amended by* S.N.S. 1981, c. 9); Shopping Centres (Development) Act, S.P.E.I. 1979, c. 17 (*repealed by* S.P.E.I. 1981, c. 28). For a case involving provincial control in P.E.I. of the size of shopping centres prior to the adoption of this Act, *see* Beaton v. Prince Edward Island Land Use Comm'n, 20 Nfld. & P.E.I.R. 140, 101 D.L.R. (3d) 404 (P.E.I.C.A. 1979).

[71] *See infra*, text accompanying notes 431-34.

[72] 9 O.M.B.R. 412, at 415 (Mun. Bd. 1978), *varied* 9 O.M.B.R. 412, at 448 (L.G. in C. 1979).

[73] ONTARIO MINISTRY OF AGRICULTURE FOOD LAND GUIDELINES: A POLICY STATEMENT OF THE GOVERNMENT OF ONTARIO ON PLANNING FOR AGRICULTURE (1978), also referred to as the GREEN PAPER.

[74] 7 O.M.B.R. 24 (Mun. Bd. 1977) (application for approval of plan of subdivision refused because need for cottages outweighed by desirability of retaining land in agricultural use).

[75] 7 O.M.B.R. 87 (Mun. Bd. 1977) (consent to sever refused partly because of testimony of representative of Food Land and Development Branch).

[76] 9 O.M.B.R. 119, 3 M.P.L.R. 257 (Mun. Bd. 1978), *aff'd without written reasons, sub nom. Re* Parsham Subdivision, 9 O.M.B.R. 119n (L.G. in C. 1978).

[77] 8 O.M.B.R. 290, 7 C.E.L.R. 121 (Mun. Bd. 1978), *aff'd without written reasons* 8 O.M.B.R. 290n (L.G. in C. 1978) (rezoning application refused; *see infra* note 171). *But see* McWilliam v. County of Oxford, 8 O.M.B.R. 317 (Mun. Bd. 1977), *rev'd* 8 O.M.B.R.

Planning Area Official Plan Partial Referral.[78]

Quebec would also seem to be moving towards provincial supervision of local land use decisions in that the above-mentioned special regional legislation[79] calls for ministerial approval of all by-laws. This requirement was considered in *Ville de Blainville v. Charron Excavation Inc.*,[80] which held that existing by-laws did not become unenforceable during the time required to obtain such ministerial approval.[81] This move towards provincial control in Quebec was confirmed in its recently-adopted comprehensive planning act,[82] which provides that the Minister responsible may require a region to amend its

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317, at 319 (L.G. in C. 1978) (overturning Ontario Municipal Board decision, based on policy outlined in GREEN PAPER, *supra* note 73, of protecting good agricultural land and which refused rezoning and severance application).

[78] 9 O.M.B.R. 286 (Mun. Bd. 1979), *aff'd without written reasons* 12 O.M.B.R. 300 (L.G. in C. 1981); motion for rehearing denied: Klydel Holdings Inc. v. Regional Municipality of Niagara, 10 O.M.B.R. 208 (Mun. Bd. 1979) (in approving official plan, certain areas excluded from development area and included in agricultural area). (For related proceedings, *see Re* Klydel Holdings Inc., *infra* note 128.) *See also* Devon Downs Devs. Ltd. v. West Gwillimbury, 9 O.M.B.R. 464, 9 M.P.L.R. 27 (Mun. Bd. 1979), *aff'd* 10 O.M.B.R. 334 (L.G. in C. 1979) (application to develop 606 acre "agrominium" denied). For further proceedings, *see* Devon Downs Devs. Ltd. v. West Gwillimbury (No. 2), 12 O.M.B.R. 404 (Mun. Bd. 1981).

Further examples of the influence of provincial government policy on the Board's decisions can be found in: Smith v. Leeds & Grenville, 7 O.M.B.R. 115 (Mun. Bd. 1977) (application for severance refused because of objection of Minister of Transportation and Communication to creation of new access onto provincial highway); *Re* Sandwich S. Planning Area Official Plan Amendment 9, 10 O.M.B.R. 226 (Mun. Bd. 1979), *rev'd* 10 O.M.B.R. 229 (L.G. in C. 1979) (set of guidelines, THE LAND USE POLICY NEAR AIRPORTS, applied); and *Re* Township of Innisfil, 17 O.R. (2d) 277, 6 O.M.B.R. 313, 3 M.P.L.R. 47, 80 D.L.R. (3d) 85 (Div'l Ct. 1977), *leave to appeal refused* 17 O.R. (2d) 277n, 80 D.L.R. (3d) 85n (*see* Onyschuk, Annot., 3 M.P.L.R. 47 (1978)) (application for judicial review to prohibit Ontario Municipal Board from continuing annexation hearing refused; held within Board's jurisdiction both to admit letter from responsible Minister expressing government's agreement to task force report as to future population and to hold itself bound thereby). After the hearing resumed, 7 O.M.B.R. 225, 4 M.P.L.R. 72 (Mun. Bd. 1977) (*sub nom. Re* City of Barrie Annexation), argument on what was substantially the same issue, no argument as to *res judicata* having been made, continued in *Re* Township of Innisfil, 23 O.R. (2d) 147, 7 M.P.L.R. 96, (*sub nom.* Township of Innisfil v. City of Barrie (No. 2)), 8 O.M.B.R. 392, 95 D.L.R. (3d) 298 (C.A. 1978), *rev'd* [1981] 2 S.C.R. 145, 123 D.L.R. (3d) 530 after review of administrative law notions of natural justice and procedural fairness. The last word in the matter, however, was legislative, with the adoption of the Barrie-Innisfil Annexation Act, 1981, S.O. 1981, c. 63 and the Municipal Boundary Negotiation Act, 1981, S.O. 1981, c. 70.

[79] Text at note 66 *supra*.

[80] [1977] Que. C.S. 170, *aff'd* (unreported, C.A., 10 May 1978).

[81] Bergeron J. said: "Cette Loi [An Act respecting the vicinity of the new international airport, S.Q. 1970, c. 48 (*amended by* S.Q. 1979, c. 51)], à mon avis, vise principalement tous les nouveaux règlements que les municipalités, qui y sont soumises, veulent édicter. Elle soumet aussi tous les anciens règlements à une approbation nouvelle mais sans pour autant les abroger tous et les rendres caducs pendant le temps nécessaire à l'approbation du ministre." *Id.* at 172.

[82] An Act respecting land use planning and development, S.Q. 1979, c. 51 (*amended by* S.Q. 1979, c. 72; 1980, cc. 16, 34; 1981, c. 59; 1982, cc. 2, 18, 21, 63).

development plan (which in turn controls the content of local plans and by-laws) if he "considers that the development plan is not consistent with the aims or projects of the Government, the government departments and agencies or the public bodies". If the region does not so amend its plan within ninety days, the government itself may do so.[83]

A similar provision was added to the British Columbia legislation in 1977, whereby the Minister may require amendments to a local or regional plan or by-law if he feels it is "contrary to the public interest of the Province". A right of appeal from the Minister's decision lies to the Lieutenant Governor in Council.[84]

3. *Priority*

As might be expected, this increased provincial activity in the field of land use control has raised the issue of the priority between provincial acts or regulations and municipal regulations.[85] In *Union Gas Ltd. v. Township of Dawn*,[86] for example, the Divisional Court of Ontario held that a municipal by-law regulating the location of major gas transmission lines was *ultra vires* and that, consequently, the Ontario Municipal Board was without jurisdiction to approve it. In language familiar to constitutional lawyers, Mr. Justice Keith, speaking for the Court, said:

> In my view this statute [the Ontario Energy Board Act, R.S.O. 1970, c. 312 as amended] makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under The Planning Act.[87]

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[83] Ss. 27-29.

[84] Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, s. 28, adding new s. 879 to the Municipal Act (*replaced by* R.S.B.C. 1979, c. 290, s. 942) (*amended by* S.B.C. 1980, cc. 17, 18, 29, 38, 49, 50; 1981, cc. 4, 5, 11, 15, 21)).

[85] *See* Barbe, *De certains aspects de la juridiction de la Régie des services publics en matière de droit municipal*, 19 C. DE D. 447 (1978).

[86] 15 O.R. (2d) 722, 2 M.P.L.R. 23, 76 D.L.R. (3d) 613 (Div'l Ct. 1977).

[87] *Id.* at 731, 2 M.P.L.R. at 34, 76 D.L.R. (3d) at 622. In *Re* Township of Southwold, 22 O.R. (2d) 804, 8 M.P.L.R. 1, 94 D.L.R. (3d) 134 (Div'l Ct. 1978), *leave to appeal refused, sub nom.* Southwold v. Director Environmental Approvals, 8 C.E.L.R. 11 (C.A. 1978) (*see* Makuch, Annot., 8 M.P.L.R. 1 (1978)), the Court held that the Minister of the Environment had jurisdiction under subs. 35(5) of The Environmental Protection Act, S.O. 1971, c. 86 (*replaced by* R.S.O. 1980, c. 141), to decide that a municipal by-law did not apply to a waste disposal site proposed by a private corporation. For a further discussion, *see infra* note 153. On the other hand, in *Re* Halton Hills, 26 O.R. (2d) 341, 10 O.M.B.R. 223, 102 D.L.R. (3d) 457 (Div'l Ct. 1979), the Court refused to make a statement concerning the interrelationship between an order in council under The Power Commission Act, R.S.O. 1970, c. 354, (*amended by* S.O. 1972, c. 1, s. 73; 1973, c. 56) (*replaced by* R.S.O. 1980, c. 384) and an order of the Ontario Municipal Board (*see* Ontario Hydro v. Halton Hills, *supra* note 60), on the ground that no useful purpose would be served, since both orders properly authorized construction of the lines. For an earlier Board discussion of the same matter, *see* Ontario Hydro v. Halton Hills, 7 O.M.B.R. 408 (Mun. Bd. 1978).

The priority of provincial legislation over municipal by-laws was affirmed in similar terms in *Re Minto Construction Ltd. and Township of Gloucester*,[88] which examined regulations under The Building Code Act, 1974.[89] On the other hand, in *Re Meadow Creek Farms Ltd. and District of Surrey*,[90] the British Columbia Court of Appeal categorized control over agricultural land as an area of concurrent jurisdiction, with very limited application of the doctrine of paramountcy. In deciding whether a decision of the agricultural Land Commission permitting horse racing on a given parcel of land "overrode" or was "paramount" to a municipal by-law prohibiting the same, McFarlane J.A., speaking for the Court, stated:

> In my opinion the answer must be no. While a less restrictive municipal by-law relating to use of land might be in conflict, inconsistent or repugnant, I do not think that is so in the case of a more restrictive by-law like the by-law which applies in this case. I think the by-law and the permission given by the Commission can stand together. . . .[91]

Similar efforts to interpret a provincial statute and a municipal by-law in a non-conflicting manner can be seen in *Ville de Lachenaie v. Hervieux*,[92] where the issue was the interrelationship between a by-law forbidding used car dumps throughout the municipality and the Roads Act[93] prohibiting them within 500 feet of a road; and again in *Wahl v. Medicine Hat*,[94] which considered the possibility of conflict between a resolution adopted under The Municipal Government Act[95] and The Alberta Uniform Building Standards Amendment Act, 1975.[96]

B. *Regional*

Hand in glove with the trend towards increased provincial planning has been the establishment of planning on a regional scale. Regionalization represents the traditional, decentralized form of planning, but accepts that the municipal level is not always the most appropriate, and that some land use problems are regional in scope so that their control best belongs at that level.

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[88] 23 O.R. (2d) 634, 8 M.P.L.R. 172, 96 D.L.R. (3d) 491 (Div'l Ct. 1979). The interrelationship between the BUILDING CODE and The Planning Act was also an issue in *Re* Chief Bldg. Official for City of Toronto, 22 O.R. (2d) 60 (H.C. 1978).

[89] S.O. 1974, c. 74, s. 18 (*replaced by* R.S.O. 1980, c. 51, s. 19).

[90] *Supra* note 44.

[91] *Id.* at 190, 89 D.L.R. (3d) at 58. A similar approach would seem to be followed by the *Commission de protection du territoire agricole du Québec.*

[92] [1977] Que. C.S. 391, *rev'd on other grounds* (unreported, C.A. 23 Feb. 1979).

[93] S.Q. 1979, c. 51, s. 15 (*replaced by* R.S.Q., c.V-8).

[94] [1979] 2 S.C.R. 12, 27 N.R. 271, 105 D.L.R. (3d) 649, *rev'g* 8 A.R. 367, 83 D.L.R. (3d) 65 (C.A. 1978).

[95] R.S.A. 1970, c. 246, subs. 128(1) (*amended by* S.A. 1977, c. 89, s. 164) (*replaced by* R.S.A. 1980, c. M-26, subs. 127(1)).

[96] S.A. 1973, c. 85, s. 3 (*amended by* S.A. 1975 (2nd Sess.), c. 86, s. 3; S.A. 1977, c. 46, s. 4) (*replaced by* R.S.A. 1980, c. U-4, s.4).

Quebec's recently adopted Act respecting land use planning and development[97] is based on this premise. It provides for the establishment of "regional county municipalities"[98] which have responsibility for drafting a "development plan". Each component municipality must then adopt a more specific "planning programme", together with zoning, construction and subdivision by-laws that implement it. These documents must conform to the regional plan, and the Act itself sets up elaborate procedures for ensuring this conformity.[99]

This process of regionalization is similar to moves in other provinces, where regional planning is provided for either in a general planning act, as in Quebec,[100] or in specific acts setting up regional municipalities, as in Ontario.[101]

1. *Content of Plans*

Where plans are to be adopted at two levels, regional and local, one question is their interrelationship as to content, in particular the degree of specificity of the regional plan. In some jurisdictions this is set out in the enabling legislation. For instance, in Quebec the Act stipulates that regional development plans must include, *inter alia*, the general aims of land development policies in the region, the boundaries of urban development, the identification and approximate location of intermunicipal public services and the approximate location of the major utility

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[97] S.Q. 1979, c. 51 (*replaced by* R.S.Q., c.A-19.1) (*amended by* S.Q. 1979, c. 72; 1980, cc. 16, 34; 1981, c. 59; 1982, cc. 2, 18, 21, 63).

[98] "Regional county municipalities" are not to be confused with the older "county corporations" governed by the MUNICIPAL CODE.

[99] For a discussion of local and regional planning before the adoption of Bill 125, *see* L'Heureux, *Plans directeurs et schémas d'aménagement au Québec*, 8 R. GEN. 185 (1977).

[100] In British Columbia, for example, Part 24 of the Municipal Act deals with planning within regional districts. This Part was considerably strengthened in 1977 by the Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, ss. 766A, 796B (*replaced by* R.S.B.C. 1979, c. 290, ss. 809, 810) (*amended by* S.B.C. 1980, c. 50, s. 69), which provided for the mandatory adoption by the regional board of "offical settlement plans" for areas outside the boundaries of a municipality.

[101] The Regional Municipality of Durham Act, 1973, S.O. 1973, c. 78 (*replaced by* R.S.O. 1980, c. 434); The Regional Municipality of Haldimand-Norfolk Act, 1973, S.O. 1973, c. 96 (*replaced by* R.S.O. 1980, c. 435); The Regional Municipality of Halton Act, 1973, S.O. 1973, c. 70 (*replaced by* R.S.O. 1980, c. 436); The Regional Municipality of Hamilton-Wentworth Act, 1973, S.O. 1973, c. 74 (*replaced by* R.S.O. 1980, c. 437); The Regional Municipality of Niagara Act, R.S.O. 1970, c. 406 (*replaced by* R.S.O. 1980, c. 438); The Regional Municipality of Ottawa-Carleton Act, R.S.O. 1970, c. 407 (*replaced by* R.S.O. 1980, c. 439); The Regional Municipality of Peel Act, 1973, S.O. 1973, c. 60 (*replaced by* R.S.O. 1980, c. 440); The Regional Municipality of Sudbury Act, 1972, S.O. 1972, c. 104 (*replaced by* R.S.O. 1980, c. 441); The Regional Municipality of Waterloo Act, 1972, S.O. 1972, c. 105 (*replaced by* R.S.O. 1980, c. 442); The Regional Municipality of York Act, R.S.O. 1970, c. 408 (*replaced by* R.S.O. 1980, c. 443); The District Municipality of Muskoka Act, R.S.O. 1970, c. 131 (*replaced by* R.S.O. 1980, c. 121).

corridors.[102] The relevant section of the British Columbia statute[103] defines a regional plan as "a general scheme without detail for the projected uses of land within the regional district, including the location of major highways". This provision was considered in *Capozzi Enterprises Ltd. v. Central Okanagan*,[104] where the Court rejected the argument that, because of the specificity of its contents, the regional plan in question was properly a zoning by-law and hence procedurally *ultra vires* since it had been enacted in conformity with the procedure for regional plans but not for zoning by-laws.

In Ontario, on the other hand, the various acts constituting regional municipalities[105] are not explicit as to the content of regional plans, in that they merely incorporate by reference the relevant provisions of The Planning Act.[106] The Ontario Municipal Board has, however, articulated the difference between the two levels of plans in the following terms:

> The planning hierarchy as so laid down, dictates that the regional plan before the Board is not the only official plan for any one of the area municipalities and thus performs a slightly different role than the area plans or, for that matter, any other official plans for which approval has been sought to date in the Province of Ontario.
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> The difference would appear to the Board to be that the regional plan should only be a guideline or strategy, as it is sometimes referred to in the text, and avoid, where possible, the danger of becoming a statement of specific controls and rules. If the plan engages in the setting down of specifics regarding matters over which the region has not primarily the decision-making authority, it would seem logical to suggest that the power given to area municipalities to determine each in their own way their destiny in planning terms would be unduly eroded.[107]

2. *Legal Effect of Plans*

A second question concerning regional plans is their legal effect. One obvious point is that regional plans and policies are taken into consideration when an approving agency is considering other requests

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[102] An Act respecting land use planning and development, S.Q. 1979, c. 51, s. 5. Section 6 provides that the regional plan may also contain somewhat more detailed matters such as the approximate density of occupation in various areas, including those areas within the urban boundaries and the land uses within the urbanized area that are of interest to the regional municipality. The provisions of ss. 5 and 6 can be compared with those of ss. 83-87, which set out the content of local plans.

[103] Municipal Act, R.S.B.C. 1979, c. 290, s. 807.

[104] 94 D.L.R. (3d) 80 (B.C.S.C. 1978).

[105] *Supra* note 101.

[106] Now R.S.O. 1980, c. 379 (*amended by* S.O. 1981, c. 15).

[107] *Re* Ottawa-Carleton Planning Area Official Plan, 9 O.M.B.R. 332, at 338 (Mun. Bd. 1978), *varied* 10 O.M.B.R. 10 (L.G. in C. 1979). *See also Re* Regional Official Plan for Waterloo Planning Area, 8 O.M.B.R. 346 (Mun. Bd. 1978).

such as applications for rezoning[108] or for a severance.[109] This latter matter came before the courts in *Sheckter v. Alberta Planning Board*,[110] in which leave to appeal the Planning Board's decision that a subdivision application was contrary to the spirit of a regional plan was refused for the reason that the Board's decision was an interpretation that the plan could reasonably bear. More generally, the Court described its jurisdiction in the following terms:

> A Regional Plan is not a general public enactment of the legislature, the interpretation and scope of operation of which is for this Court. . . . On such an instrument this Court is limited in its inquiry as to whether the interpretation and application of the Regional Plan adopted by the Board are such as it can reasonably bear. We are not to subject it to the same authoritative examinations that we would a statute.[111]

The question of the legal effect of regional plans was most directly raised in *Campeau Corp. v. Township of Gloucester*.[112] This was an application for an injunction to restrain the issuance of a building permit for the construction of a shopping centre, a development which was permitted under the existing local municipal plan and zoning by-law but prohibited under the existing regional plan. The Court granted the injunction because the applicable regional municipality act required a local municipality to amend "forthwith"[113] its own official plan and zoning by-law to conform with a regional plan once the latter was adopted and approved. Accordingly, there was a statutory obligation on the municipality to amend its by-laws and, in the interval, "its obligation was to refuse any application for a building permit which did not conform with the official plan of the regional municipality."[114] The Court in

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[108] *See, e.g., Re* Niagara Falls Restricted Area By-law 76-225, 7 O.M.B.R. 206 (Mun. Bd. 1977) (decision on rezoning application deferred until 1 June 1978 to allow regional municipality to acquire lands for freeway at lower price).

[109] *See, e.g.*, 351836 Ont. Ltd. v. Regional Municipality of Niagara, 7 O.M.B.R. 456 (Mun. Bd. 1977) (severance refused because it would not conform to regional policy plan); *but see* Regional Municipality of Durham v. Storie, 9 O.M.B.R. 172 (Mun. Bd. 1978) (severance granted in spite of objections from regional municipality).

[110] 14 A.R. 492, 9 Alta. L.R. (2d) 45 (C.A. 1979).

[111] *Id.* at 496, 9 Alta. L.R. (2d) at 49 (Clement J.A.). *See*, to same effect, Figol v. City of Edmonton, 11 Alta. L.R. (2d) 9 (Q.B. 1979).

[112] 22 O.R. (2d) 652, 8 M.P.L.R. 147, 96 D.L.R. (3d) 320 (C.A. 1979), *aff'g* 21 O.R. (2d) 4, 6 M.P.L.R. 290, 89 D.L.R. (3d) 135 (H.C. 1978) (*see* Jaffary & Makuch, Annot., 6 M.P.L.R. 290 (1978)).

[113] The Regional Municipality of Ottawa-Carleton Act, R.S.O. 1970, c. 407, para. 68(7)(*a*) (*replaced by* R.S.O. 1980, c. 439, para. 96(7)(*a*)).

[114] *Campeau, supra* note 112, at 653, 8 M.P.L.R. at 148, 96 D.L.R. (3d) at 321 (Lacourcière J.A.). A similar provision in The District Municipality of Muskoka Act, R.S.O. 1970, c. 131, para. 68(6)(*a*) (*amended by* S.O. 1974, c. 119, subs. 3(4)) (*replaced by* R.S.O. 1980, c. 121, subs. 51(6)) was considered in *Re* Gravenhurst Restricted Area By-law P 361-77, 9 O.M.B.R. 77 (Mun. Bd. 1978). The Board refused to approve a zoning by-law which did not conform to a local official plan despite its conformity to the district plan. The statutory requirement that local plans and by-laws be amended "forthwith" to conform to the district plan did not apply in this case because the district plan itself provided that it was not to come into force until a secondary plan for the relevant

Campeau also admitted the possibility of an application for a mandatory order directing the municipality to amend its by-law, although it held such an application inappropriate in this case.[115] A similar result to that reached in the *Campeau* decision could also be obtained in other jurisdictions requiring local plans and by-laws to be brought into conformity with a regional plan. For example, the new Quebec act requires every municipality in a regional county municipality to adopt or amend conflicting plans and by-laws within twenty-four months of the coming into force of the region's development plan.[116]

C. *Local*

1. *Procedure*

Since most of the jurisprudence concerning local plans, and particularly the procedure for their adoption, has emanated from Ontario, the discussion which follows will concentrate on that province. However, one must not overlook legislative development in this regard in other provinces. British Columbia amended its Municipal Act in 1977 to provide for a mandatory public hearing before an official plan is adopted, and to eliminate the requirement that a plan be approved by the Lieutenant Governor in Council before it comes into effect; in 1978, it changed the majority required for adoption of a plan from two-thirds of all members present to a simple majority.[117] In Quebec, the new legislation outlines in some detail the procedure for adoption of local plans, including ample provisions for public participation.[118] This is a striking contrast to the previous legislation in Quebec, which omitted all reference to public consultation.[119]

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municipality had been approved, and no such secondary plan for Gravenhurst had been approved.

[115] Similarly, in Regional Municipality of Niagara v. Niagara Falls, 7 O.M.B.R. 412 (Mun. Bd. 1978), *aff'd without written reasons*, 8 O.M.B.R. 263 (L.G. in C. 1978), the municipality applied to the Board for an order to force the city to amend its official plan and zoning by-law to accommodate a rezoned site for seasonal storage of digested sewage sludge. The Board refused, stating it was inappropriate at that time to make such an order.

[116] An Act respecting land use planning and development, S.Q. 1979, c. 51, ss. 33, 34. Subsequent sections establish the procedure for evaluating the conformity of the local action with the regional plans.

[117] Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, s. 11; Municipal Amendment Act, 1978, S.B.C. 1978, c. 30, s. 8 (*replaced by* R.S.B.C. 1979, c. 290, s. 711 (*amended by* S.B.C. 1980, c. 50, s. 66)). Note also that the 1977 amendments substituted for the provincial approval prerequisite a right of the Minister to require an amendment if he is of the opinion that the plan is contrary to the public interest of the province. *See* note 84 and accompanying text *supra*.

[118] An Act respecting land use planning and development, S.Q. 1979, c. 51, ss. 88-96. Public consultation is required for (optional) preliminary proposals setting out possible options and their estimated costs and for the actual plan the municipality intends to adopt.

[119] *See* L'Heureux, *supra* note 99.

In Ontario, the procedure which has existed for some time calls for a public meeting by the local planning board[120] before the plan is adopted by the Council and submitted to the Minister for approval. The Minister may either approve the plan himself[121] or, on his own initiative[122] or at the request of an individual,[123] refer all or part of it to the Board for approval.[124] The Board then holds a hearing before coming to its decision.[125] Although on a partial referral the Board does not have jurisdiction to amend that part not referred to it (but rather retained by

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[120] The Planning Act, R.S.O. 1970, c. 349, para. 12(1)(*b*) (*replaced by* R.S.O. 1980, c. 379, para. 12(1)(*b*)).

[121] S. 14 (*amended by* S.O. 1974, c. 53, s. 1) (*replaced by* R.S.O. 1980, c. 379, s. 14).

[122] *See, e.g., Re* Hamilton Restricted Area By-law 76-228, 7 O.M.B.R. 141 (Mun. Bd. 1977) (official plan amendment refused because of objections raised by city planners); *Re* Brampton Planning Area Official Plan Amendment 9, 9 O.M.B.R. 112 (Mun. Bd. 1978) (hearing adjourned *sine die* and matter referred back to the Council for reconsideration); *Re* Seven Links Planning Area Official Plan, 9 O.M.B.R. 483 (Mun. Bd. 1978) (amendments approved); *Re* Bradford and West Gwillimbury Planning Area Official Plan Amendments 13, 13A & 13B, 10 O.M.B.R. 257 (Mun. Bd. 1979) (official plan approved with some modifications to increase its flexibility).

[123] Most often a referral is made at the request of an individual who objects to the amendment, and the amendment is approved despite the objections: *Re* Scarborough Official Plan Amendment, 7 O.M.B.R. 31, 2 M.P.L.R. 283 (Mun. Bd. 1977); *Re* Newmarket Planning Area Official Plan, 8 O.M.B.R. 319 (Mun. Bd. 1978), *varied* 9 O.M.B.R. 69 (L.G. in C. 1978); *Re* Tosorontio Planning Area Official Plan Amendment 3, 9 O.M.B.R. 144 (Mun. Bd. 1979); *Re* Harrow & Colchester Planning Area Official Plan Amendment Act No. 1, 10 O.M.B.R. 303 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 504 (L.G. in C. 1980).

In Chadwill Coal Co. v. Borough of Etobicoke, 6 O.M.B.R. 296 (Mun. Bd. 1977), an amendment so referred was refused, while in *Re* Town of Markham Planning Area Official Plan Amendment 57, 7 O.M.B.R. 67, at 69 (Mun. Bd. 1977), the proponent of the amendment requested the Minister to refer the plan "if he intended not to approve it".

S. 17 requires the Minister, at the request of the individual concerned, to refer to the Board proposed amendments which the municipality has failed or refused to adopt. The Board approved such amendments in: Cadillac Fairview Corp. v. Town of Vaughan, 7 O.M.B.R. 502 (Mun. Bd. 1977); Morsyd Inv. Ltd. v. Town of St. Marys, 9 O.M.B.R. 80 (Mun. Bd. 1978), *aff'd* 10 O.M.B.R. 241 (L.G. in C. 1979); *Re* Burlington Subdivisions, 9 O.M.B.R. 206 (Mun. Bd. 1978). The Board refused an amendment in Southwick Inv. Ltd. v. Town of Orangeville, 8 O.M.B.R. 341 (Mun. Bd. 1978).

[124] S. 15. The usual practice of the Board is to hear an official plan amendment along with an implementing zoning by-law, but this can be varied on occasion: *Re* East Gwillimbury Planning Area Official Plan Amendment 8, 9 O.M.B.R. 104 (Mun. Bd. 1978).

[125] Several miscellaneous decisions of the Ontario Municipal Board concerning the procedure on official plan hearings are as follows: Line v. Township of Artemesia, 9 O.M.B.R. 107 (Mun. Bd. 1978) (second adjournment refused); *Re* Caledon E. and Lawson Subdivision, 9 O.M.B.R. 188, at 198-99 (Mun. Bd. 1978) *var'd* 10 O.M.B.R. 505 (L.G. in C. 1980) (burden of proof discussed); *Re* Central Wellington Planning Area Official Plan Amendment, 8 O.M.B.R. 263 (Mun. Bd. 1978), *aff'd* 8 O.M.B.R. 263 (L.G. in C. 1978) (citizens' right to hearing; no order as to costs unless their objections were frivolous and without merit); *Re* Hamilton-Wentworth Planning Area Official Plan Amendment 125, 9 O.M.B.R. 238 (Mun. Bd. 1978) (adjournment granted with costs).

the Minister for approval),[126] it may take into account policies contained in the parts which have not yet been approved.[127] The Board may itself divide the referrals into subgroups for separate hearings, which may be held before the same panel[128] or different panels.

As with decisions of the Board in other matters, application may be made to the Board for a rehearing[129] of an official plan decision, or an appeal may be had to Cabinet[130] or to court on a question of law or jurisdiction.[131] Whether or not such an appeal lies to Cabinet, specifically when the plan has been referred to the Board by the Minister, was canvassed in *Re Rush*.[132] The Court rejected the argument that the Board's decision was properly a decision of the Minister and that,

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[126] *Re* Ennismore Planning Area Official Plan, 8 O.M.B.R. 226 (Mun. Bd. 1978), *aff'd* 9 O.M.B.R. 29 (L.G. in C. 1978). *See also* Thicket Builders Inc. v. Minister of Hous., 18 O.R. (2d) 104, 7 O.M.B.R. 334, 3 M.P.L.R. 297 (H.C. 1977) discussed *infra*, text accompanying note 136.

[127] *Klydel, supra* note 78.

[128] *Re* Klydel Holdings Inc., 10 O.M.B.R. 203 (Div'l Ct. 1979). The applicant argued that, in reaching its decision on the first hearing (*Re* Niagara Planning Area Official Plan Partial Referral, *supra* note 78), the panel had demonstrated an anti-development bias.

[129] The Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 42 (*replaced by* R.S.O. 1980, c. 347, s. 42). A rehearing would not be ordered unless there was a reasonable probability of a different conclusion being reached: *Klydel, supra* note 78.

[130] S. 94. *See, e.g.*, the following decisions of the Lieutenant Governor in Council affirming the Board's order: *Re* Vaughan Official Plan Amendment 74, 7 O.M.B.R. 369, 7 C.E.L.R. 132 (*sub nom. Re* Maple Amusement Theme Pk.) (1978) (approving the location of the park); Regional Municipality of Niagara v. Niagara Falls, *supra* note 115; *Re* Central Wellington Planning Area Official Plan Amendment, *supra* note 125 (approving site for bridge); *Re* Newmarket Planning Area Official Plan, 8 O.M.B.R. 311 (1978) (approving urban residential designation within town); *Re* Vaughan Planning Area Official Plan Amendment 19, 8 O.M.B.R. 312 (1978) (refusing to change designation in official plan from rural to residential); *Re* Hamilton-Wentworth Planning Area Amendment 116, 8 O.M.B.R. 494n (1978) (approving shopping centre site; leave to appeal to Divisional Court refused); *Re* Ennismore Planning Area Official Plan, *supra* note 126 (approving modification of the official plan to permit estate residential uses); *Re* Hamilton-Wentworth Official Plan Amendment 126, 9 O.M.B.R. 162n (1978) (approving a change from agricultural to residential zoning to permit subdivison); *Re* North York Planning Area Official Plan Amendment D-10-24, 9 O.M.B.R. 344n (1978) (approving an increase in apartment density).

The Board's order was reversed or varied by the Lieutenant Governor in Council in the following cases: *Re* Moore Planning Area Official Plan Amendment 10, 8 O.M.B.R. 421 (1978) (approving senior citizen complex, subject to site plan agreement); *Re* Toronto Central Area Official Plan, 9 O.M.B.R. 3 (1979), *implemented in* 10 O.M.B.R. 78 (1979); *Re* Newmarket Planning Area Official Plan, *supra* note 123 (approving change of designation to suburban residential but varying order to include some protection to neighbouring chicken farmer); *Re* Oakville Planning Area Official Plan Amendments 28, 31 & 32, *supra* note 72; *Re* Sandwich S. Planning Area Official Plan Amendment 9, *supra* note 78 (order rescinded and matter sent back to Board for reconsideration).

[131] S. 95. Judicial review is also available by way of The Judicial Review Procedure Act, 1971, S.O. 1971 (1st sess., vol. 1), c. 48 (*replaced by* R.S.O. 1980, c. 224).

[132] 21 O.R. (2d) 592, 9 O.M.B.R. 21, 7 M.P.L.R. 196, 92 D.L.R. (3d) 143 (H.C. 1978). For earlier proceedings, *see* note 176 *infra*; for a fuller discussion, *see* note 197 and accompanying text *infra*.

therefore, no appeal would lie. In the event of such an appeal, the usual practice of the Board is to withhold its own formal order until final determination is made by Cabinet, at which time the Board's order is issued incorporating the final result.[133] The interrelationship between a hearing application and an appeal to the courts, for which the statute imposes a time limit of one month, was discussed in *Re Schutz*.[134] The dilemma facing an applicant was explained and resolved in the following terms:

> One might understandably be uncertain whether to seek an appeal from a decision of the Board, or to seek a rehearing under s. 42 of The Ontario Municipal Board Act. Should he choose to seek a rehearing, the month limited for appealing might expire. Should he seek leave to appeal he might be met with the contention that he has lost his right to seek a rehearing. Faced with this dilemma he can find little to guide him.
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> It is my view that this Court should do nothing to disturb the right to seek a rehearing by the Board. It is a valuable right and, no doubt, can lead to the resolution of problems that make resort to this Court unnecessary. I think, therefore, that the Divisional Court should, in proper cases, permit an application for leave to be filed and adjourned to a hearing date to be fixed after a concurrent application for a rehearing has been disposed of by the Board.[135]

The possibility of a hearing appears at several points in the procedure thus described. Nevertheless, the right to a hearing in Ontario can perhaps be described on occasion as rather chimeric, as illustrated by the cases of *Thicket Builders Inc. v. Minister of Housing of Ontario*,[136] *Re Maple Leaf Mills Ltd.*[137] and *Re Starr*.[138] The first two cases concerned essentially the right to a hearing before the Minister. The *Maple Leaf Mills* case held that the Minister was not under an obligation to give notice and to hold a hearing before he approved a plan; the onus was upon the individual concerned to monitor the procedure and to request that the matter be referred to the Ontario Municipal Board should he desire a hearing. The *Thicket Builders* case would have the same rule obtain even where the Minister was contemplating an amendment to the plan as submitted to him. These two cases also considered the right to a hearing before Council and applied the *Re Zadrevec* case[139] in deciding that there was no right to a hearing at this level, either when Council adopted the plan or when it considered amendments suggested by the

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[133] *McLaughlin*, *supra* note 33.

[134] 15 O.R. (2d) 795, 2 M.P.L.R. 295 (Div'l Ct. 1977).

[135] *Id.* at 798-99, 2 M.P.L.R. at 299 (Reid J.). For the final disposition of the application for leave to rehear, *see Re* Schutz, *supra* note 56.

[136] *Supra* note 126. For related proceedings, *see Re* Vaughan Planning Area Official Plan Amendment 70, 8 O.M.B.R. 235 (Mun. Bd. 1977).

[137] 24 O.R. (2d) 685, 10 M.P.L.R. 196, 99 D.L.R. (3d) 345 (Div'l Ct. 1979).

[138] 20 O.R. (2d) 313 (C.A. 1978), *aff'g* 16 O.R. (2d) 316, 2 M.P.L.R. 208 (Div'l Ct. 1977). *See* Makuch, Annot., 2 M.P.L.R. 209 (1977).

[139] [1973] 3 O.R. 498, 37 D.L.R. (3d) 326 (C.A.). *See also* discussion of notice in Onyschuk, *Some Aspects of Practice before the Ontario Municipal Board*, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 47 (Law Soc'y of Upper Canada 1978).

Minister. In both situations, the Council was not exercising a judicial function; its action lacked "the finality necessary for an act of a judicial nature".[140] *Re Starr* is the most encouraging of the three cases. Although the Court classified the planning process as "purely legislative", in which the members of the public "are represented by the members of the council, and have no right to participate except as provided by statute",[141] it specifically declined to decide whether the holding of a public meeting by the planning board, as required by statute, was a condition precedent to the adoption of a valid official plan. This is perhaps the most important element of the case as it would appear to represent a qualification of those earlier cases holding that the hearing requirements are not mandatory.[142] The Court also suggested that failure to inform the Minister that such a meeting was not held, or, although held, was deceptive, might be a ground for setting aside the Minister's decision as one made without sufficient knowledge of the facts.[143]

2. *Legal Effect of Plans*

As with regional plans, the question of the legal effect of local plans is important. In this regard, the legislation of the various provinces attributes to such plans either a positive or a negative effect. The recent Quebec legislation is an example of the former, in that it stipulates that the council of a municipality must "within ninety days following the coming into force of the planning programme, adopt for its whole territory a zoning by-law in conformity with the planning programme".[144] Ontario, on the other hand, is an illustration of the latter approach: while the municipality is not obliged to implement the plan, any action it takes, such as the approval of severances[145] or plans of subdivision,[146] must be in conformity with the official plan. This is particularly so in the case of public works and by-laws, as section 19 of The Planning Act makes clear.

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[140] *Maple Leaf*, *supra* note 137, at 688, 10 M.P.L.R. at 201, 99 D.L.R. (3d) at 348 (Southey J.).

[141] *Supra* note 138, at 318.

[142] See Makuch, *supra* note 138.

[143] *Re* Starr, *supra* note 138, at 319. In this cas, the draft plan submitted to the public meeting suggested that subsequent amendment to the official plan would be required before any new gravel pit could be established. The plan submitted to the Minister for approval was substantially amended in this regard, but this amendment was not drawn to the attention of the Minister. No request was made for referral to the Ontario Municipal Board and the Minister approved the plan as submitted to him.

[144] An Act respecting land use planning and development, S.Q. 1979, c. 51, s. 102. The sections following provide a rather elaborate mechanism for ensuring that the by-laws so adopted do in fact conform.

[145] *See* cases listed in note 499 *infra*, and particularly *Re* Lamont and Charlebois, 3 M.P.L.R. 195 (Mun. Bd. 1977); *Re* Van Vlasselaer, 16 O.R. (2d) 762 (Div'l Ct. 1977); Weber v. County of Bruce, 7 O.M.B.R. 507 (Mun. Bd. 1977); *Molnar*, *supra* note 75; Hill v. Township of Eramosa, 7 O.M.B.R. 99 (Mun. Bd. 1977); Rose Holdings Ltd. v. Essex Land Div. Comm., 8 O.M.B.R. 488 (Mun. Bd. 1978).

[146] See cases listed in note 514 *infra*.

For example, when approving a zoning by-law, the Ontario Municipal Board must consider its conformity with the plan. In one interesting application,[147] the Board resisted what must have been a tempting argument that it had jurisdiction to approve a non-conforming by-law since the very approval of the Board would mean that the by-law in question "shall be conclusively deemed to be in conformity with the official plan then in effect in the municipality".[148]

The effect of section 19 (and similar sections in other jurisdictions) was considered in the two decisions entitled *Re Holmes*,[149] and in *Stocker v. City of Fredericton*.[150] In the first two cases, various by-laws to permit the establishment by the regional municipality of a waste disposal site[151] were quashed for non-conformity with the relevant official plans and, in the latter case, a zoning by-law was challeged because, *inter alia*, it conflicted with the municipal plan.[152]

Finally, in *Re Township of Southwold*[153] and *Capozzi Enterprises*

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[147] *Re* Caledon Restricted Area By-law 77-69, 9 O.M.B.R. 184 (Mun. Bd. 1978). Other applications were: *Re* St. Marys Restricted Area By-law 32-77, 9 O.M.B.R. 64 (Mun. Bd. 1978) (zoning by-law approved as conforming to official plan); *Re* South Dumfries Restricted Area By-law 17-77, 9 O.M.B.R. 109 (Mun. Bd. 1978) (zoning change rejected as not being in conformity); *Re* Niagara Falls Restricted Area By-law 77-249, 9 O.M.B.R. 367 (Mun. Bd. 1978) (zoning refused because of non-conformity with official plan); *Re* Georgian Bay Restricted Area By-law 77-281, 9 O.M.B.R. 14 (Mun. Bd. 1979), *rev'd* 9 O.M.B.R. 19 (L.G. in C. 1979) (by-law permitting a seasonal tent and trailer camp rejected by the Board as contrary to official plan, but approved by Lieutnant Governor in Council even though it did not conform in all aspects). *But see Hart, supra* note 36, which implied that the Board did not have jurisdiction to decide whether a by-law conformed with a plan since this would require it to rule on the legality of a plan.

[148] The Planning Act, R.S.O. 1970, c. 349, subs. 35(28) (*amended by* S.O. 1978, c. 93, subs. 6(2)) (*replaced by* R.S.O. 1980, c. 379, subs. 35(28)). For an example of the Board invoking this section, *see Re* Kingston Restricted Area By-law 76-26, *supra* note 33.

[149] *Supra* note 4, and 19 O.R. (2d) 468, 5 M.P.L.R. 158, 7 C.E.L.R. 88 (H.C. 1978).

[150] 21 N.B.R. (2d) 587, 37 A.P.R. 587 (Q.B. 1978).

[151] By-laws designating the site, authorizing negotiation of its purchase, servicing and approval by the Environmental Review Board, and authorizing hydrogeological investigations in the first case; and by-laws authorizing expenditure for the development of the site, providing for levies on area municipalities, approving the acquisition of the site and authorizing application to the Ministry of the Environment for a certificate of approval in the second case.

As a result of the *Holmes* cases, The Planning Act was amended to permit a municipality to consider the undertaking of (but not actually to undertake) a public work that does not conform to the official plan: R.S.O. 1970, c. 349, s. 9 (*amended by* S.O. 1978, c. 93, s. 1) (*replaced by* R.S.O. 1980, c. 379, s. 19).

[152] Held in conformity with spirit and intent of plan but void on procedural grounds.

[153] *Supra* note 87. The Ontario Divisional Court dismissed an application for judicial review of decisions of the Minister of the Environment and of the Director of Environmental Approvals authorizing a waste disposal site proposed by a private corporation, notwithstanding its non-confirmity with the relevant official plan, for the reasons that s. 19 prohibited a *municipality* from acting contrary to the official plan (as illustrated by the *Holmes* cases) but not a *private individual.*

Ltd. v. Central Okanagan,[154] it was reaffirmed that neither local nor regional plans have any legal effect upon private landowners.

VI. ZONING[155]

A zoning by-law does have legal effect upon private individuals and for this reason is a most important tool to control land use and development. Its importance is reflected in the amount of litigation generated by it.

A. *Procedure*

A self-evident proposition is that under the general run of statutory schemes, the zoning power must be exercised by by-law. In *Harrietsfield-Grand Lake Community Ass'n v. County of Halifax*,[156] this apparently innocuous proposition had the effect of striking down a municipality's effort to control an individual parcel of land by a combination of by-law and collateral contract.[157] The latter was held to differ from the former in form, substance and effect. A contract is an exchange of consensual covenants whereas a by-law is a command or order by the state; its method of enforcement is different; contracts, unlike by-laws, are unenforceable against future owners of land; a contract impliedly binds the municipality not to change the zoning, which is itself illegal.[158]

Most procedural challenges to by-laws, however, deal with the requirements of provincial supervision and of notice and hearings.

1. *Provincial Supervision*

Whether or not a municipal by-law requires provincial approval to become effective is one characteristic that distinguishes the various statutory schemes. It is well-known that in Ontario a zoning by-law must be approved by the Ontario Municipal Board before it comes into

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[154] *Supra* note 104. A 1977 amendment of the Municipal Act, R.S.B.C. 1960, c. 255, subs. 698(1) (*amended by* S.B.C. 1961, c. 43, s. 39; 1977, c. 57, s. 12) (*replaced by* R.S.B.C. 1979, c. 290, s. 712) clarified any ambiguity in this regard. Previously the section provided that the Council could not "authorize, permit or undertake" anything contrary to a local plan, whereas the amended section reads, "enact any provision or undertake any work".

[155] *See generally* Kenniff, *Approche réglementaire de l'aménagement urbain*, 18 C. DE D. 797 (1977).

[156] 26 N.S.R. (2d) 198, 40 A.P.R. 198, 6 M.P.L.R. 186, 87 D.L.R. (3d) 208 (C.A. 1978). *See* Makuch, Annot., 6 M.P.L.R. 187 (1978).

[157] A similar issue concerns the interrelationship between licensing and zoning by-laws. *See* text accompanying notes 238-41 *infra*.

[158] *Supra* note 156, at 204-05, 40 A.P.R. at 204-05, 6 M.P.L.R. at 191-92, 87 D.L.R. (3d) at 212-13 (MacKeigan C.J.N.S.).

force.[159] The Board normally holds a hearing[160] which is essentially adversarial in nature: although it has the right to conduct an independent investigation beyond the issues raised before it, it is not under a duty to do so.[161] The time of holding the hearing, and granting an adjournment thereof, are within the jurisdiction of the Board and not open to review by the courts unless the circumstances would amount to a denial of natural justice.[162]

One interesting line of enquiry might be to ask whether, and in what circumstances, the approving authority upholds decisions of municipal councils or favours individual applicants. Without claiming total accuracy, an analysis of the decisions of the Ontario Municipal Board during the period under survey would seem to indicate the following.[163]

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[159] The Planning Act, R.S.O. 1980, c. 379, subss. 39(10) & (11). The only exception is where there is an official plan in effect, notice has been given and no objection received: subs. 39(26). Once the by-law is approved by the Ontario Municipal Board, however, it is effective as of the date it was passed by council. For enforcement problems engendered by this interplay of dates, *see* Township of Oro v. Kneeshaw, 24 O.R. (2d) 690, 9 M.P.L.R. 306, 99 D.L.R. (3d) 373 (H.C. 1979).

For the suggestion that the Ontario Municipal Board's Revised Rules of Procedure [*now* R.R.O. 1980, Reg. 722] concerning the giving of notice may well be invalid, *see* Matlow, *Ontario Municipal Board Rules of Procedure for Zoning By-law Approvals —Whether Ultra Vires*, 2 ADVOCATES' Q. 121 (1979).

Note that in *Re* Township of Cavan and Heidenreich, 9 O.M.B.R. 183 (Mun. Bd. 1978), the Board decided that it had no jurisdiction to hold a hearing where the Minister on his own initiative decided to revoke a ministerial zoning order made under The Planning Act, R.S.O. 1970, c. 349, s. 32 (*amended by* S.O. 1976, c. 64, s. 4) (*now* R.S.O. 1980, c. 379, subs. 35(18)); it had jurisdiction to hold a hearing only where an application to revoke had been made to the Minister: subs. 32(9) (*now* subs. 35(10)).

[160] *See* note 216 *infra* for examples of the Board dispensing with a hearing.

[161] *Re* Pugliese and North York, 24 O.R. (2d) 532, 10 O.M.B.R. 112 (H.C. 1979).

[162] *Re* Loblaws Ltd. and Ont. Mun. Bd., 25 O.R. (2d) 539, 9 O.M.B.R. 154 (H.C. 1979) (Board not outside jurisdiction in refusing adjournment even though counsel and experts were occupied with a second hearing, and proceedings to determine validity of by-law were before the courts. The case referred to here was, *semble*, Loblaws Ltd. v. Township of Gloucester, 25 O.R. (2d) 225, 10 C.P.C. 232, 100 D.L.R. (3d) 536 (Div'l Ct. 1979).) On this second point, the court held that the Board had jurisdiction to hear the appeal notwithstanding that s. 56 of the Ontario Municipal Board Act, *now* R.S.O. 1980, c. 347, s. 56, prevents the Board from issuing its order until the validity of the by-law has been determined. For an example of the application of s. 56, *see Re* Tiny Restricted Area By-law 30-77, 10 O.M.B.R. 3 (Mun. Bd. 1979). Here, the Board refused to issue a formal order pending the outcome of an action to quash the by-law (Smith v. Township of Tiny, 27 O.R. (2d) 690, 12 M.P.L.R. 141, 107 D.L.R. (3d) 483 (H.C. 1980), *aff'd* 29 O.R. (2d) 661, 114 D.L.R. (3d) 192 (C.A. 1980), *leave to appeal denied* 29 O.R. (2d) 661n, 114 D.L.R. (3d) 192n (C.A. 1980)) notwithstanding that verbal approval of the by-law zoning "seasonal residential" had been given during the hearing.

Adjournments were granted in: *Re* Uxbridge Restricted Area By-law 69-10, 9 O.M.B.R. 490 (Mun. Bd. 1978); *Re* Timmins Restricted Area By-law 1979-1158, 10 O.M.B.R. 193 (Mun. Bd. 1979); *Re* Huntsville Restricted Area By-law 78-47, 10 O.M.B.R. 311 (Mun. Bd. 1979).

[163] This analysis examines express statements of preference to see if they are reflected in the actual decisions reached. A further indication might have been the awarding of costs, but the practice of the Board is not to have costs follow the event (*Re* Halton Hills Restricted Area By-law 76-100; *Re* Official Plan Amendment 22, 7

Where the by-law comes before the Board after having been adopted by the municipality, either on its own initiative or at the instance of the landowner concerned, the jurisprudence of the Board attests to a presumption in favour of upholding decisions of elected representatives[164] although, upon analysis, this presumption is not as strong as it first appears. For example, of the twenty-four by-laws that were apparently passed by the various municipalities on their own initiative,[165] only fifteen were approved[166] and, even then, occasionally in an amended

O.M.B.R. 424 (Mun. Bd. 1978); *Re* Vaughan Restricted Area By-law 170-78, 9 O.M.B.R. 1 (Mun. Bd. 1979)) except in unusual circumstances: *Re* Medonte Restricted Area By-law 1314, 7 O.M.B.R. 312 (Mun. Bd. 1977); *Re* Flamborough Restricted Area By-law 77-19-WF-Z, 8 O.M.B.R. 462 (Mun. Bd. 1978) (objectors failing to appear at hearing without adequate excuse).

[164] Statements such as "The Board is further guided by the principle which it never failed to observe, that it has respect for decisions made by democratically elected representatives of the voters. . ." (*Re* Pembroke Restricted Area By-law 77-85, 9 O.M.B.R. 496, at 500 (Mun. Bd. 1978)) abound.

In some jurisdictions, this bias or presumption is imposed by statute. In Sydney Mines v. Provincial Planning Appeal Bd., 28 N.S.R. (2d) 79, 43 A.P.R. 79 (S.C. 1977), the Appeal Board ordered Council to rezone an area from residential to commercial and the Court refused an application for an order of *certiorari* to quash this decision on the grounds that no error on the face of the record had been shown; the Board had exercised its jurisdiction in accordance with s. 52 of the Planning Act, S.N.S. 1969, c. 16 (*now* R.S.N.S. 1979, c. P-15, subs. 52(2)) which permits interference with Council's decision only if that decision "cannot reasonably be said to carry out the intent of the municipal development plan" or (if there is no plan) the decision "is inconsistent with or unnecessary for the protection of the best interests of the municipality".

[165] In that they were comprehensive by-laws, by-laws with an explicit public purpose (such as providing for road widenings) or by-laws down-zoning a particular piece of property.

[166] *Re* Stoney Creek Restricted Area By-law 259-75, 7 O.M.B.R. 58 (Mun. Bd. 1977) (building set-back to provide for eventual road widening); *Re* Metropolitan Toronto Restricted Area By-law 163-74, 7 O.M.B.R. 103 (Mun. Bd. 1977) (building set-back in anticipation of expropriation for utilities easement); *Re* Scarborough Restricted Area By-law 16917, 7 O.M.B.R. 135 (Mun. Bd. 1977) (prohibiting industrial development until new municipal services available); *Re* London Amending Restricted Area By-laws, 7 O.M.B.R. 168 (Mun. Bd. 1977) (adding to permitted uses in residential zones); *Re* Hope Restricted Area By-laws 1634 & 1703, 7 O.M.B.R. 201 (Mun. Bd. 1977) (by-law freezing development and subsequent spot amendments lifting freeze); *Re* Scarborough Restricted Area By-law 17182, 7 O.M.B.R. 331 (Mun. Bd. 1977) (down-zoning service station); *Re* Partial Referral of Orillia Official Plan, 7 O.M.B.R. 402 (Mun. Bd. 1978) (down-zoning); *Re* Markham Restricted Area By-law 127-76, 8 O.M.B.R. 284 (Mun. Bd. 1978) (down-zoning to prohibit drive-in restaurant), *rev'd* 8 O.M.B.R. 284, at 289 (L.G. in C. 1978); *Re* Mara Restricted Area By-law 1319, 8 O.M.B.R. 492 (Mun. Bd. 1978) (redefining "seasonal dwelling house"); *Re* Mississauga

form.[167] Of the nine that were rejected, five involved down-zonings,[168] to which the Board is overtly unfavourable.[169] Where, however, the by-law was passed by the municipality on the application of the landowner concerned, the Board has been more ready to uphold the local decision. In the period under consideration, twenty-six such by-laws were

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Restricted Area By-laws 2-78, 3-78 & 4-78, 9 O.M.B.R. 180 (Mun. Bd. 1978) (altering parking standards for multiple family dwellings); *Re* Ennismore Restricted Area By-law 20-74, 9 O.M.B.R. 258 (Mun. Bd. 1979), *varied* 9 O.M.B.R. 258, at 266 (L.G. in C. 1979) (exemptions from "seasonal residential" category); *Re* Toronto Restricted Area By-laws 234-75 & 300-75 (No. 2), 9 O.M.B.R. 266 (Mun. Bd. 1979), *aff'd* 10 O.M.B.R. 78 (L.G. in C. 1979) (down-zoning); *Re* Pembroke Restricted Area By-law 77-85, *supra* note 164 (more restrictive comprehensive by-law); *Re* Haldimand Restricted Area By-law 610, 10 O.M.B.R. 344 (Mun. Bd. 1979) (comprehensive by-law requiring frontage on maintained public road); McDonalds Restaurants of Canada Ltd. v. City of Mississauga, 10 O.M.B.R. 90 (Mun. Bd. 1979) (down-zoning).

[167] *Re* London Amending Restricted Area By-laws, *supra* note 166 (all permitted uses additions approved except that of dancing studios); *Re* Mississauga Restricted Area By-laws 2-78, 3-78 & 4-78, *supra* note 166 (parking standards of certain types of dwellings exempt); *Re* Ennismore Restricted Area By-law 20-74, *supra* note 166 (all exemptions denied); *Re* Pembroke Restricted Area By-law 77-85, *supra* note 166 (limited exemption granted to individual developer); *Re* Scarborough Restricted Area By-law 16917, *supra* note 166 (property of three of four objectors exempted).

[168] *Re* Burlington Restricted Area By-law 4000-205, 7 O.M.B.R. 129 (Mun. Bd. 1977); *Re* East York Restricted Area By-law 1323, 7 O.M.B.R. 218 (Mun. Bd. 1977), *aff'd* 8 O.M.B.R. 369 (L.G. in C. 1978) (by-law prohibiting day nurseries in residential area); *Re* Scarborough Restricted Area By-law 17201, 7 O.M.B.R. 313 (Mun. Bd. 1977) (down-zoning of service station; *but see Re* Scarborough Restricted Area By-law 17182, *supra* note 166, where a similar by-law was approved); *Re* Toronto Restricted Area By-laws 234-75 & 300-75, 7 O.M.B.R. 344 (Mun. Bd. 1977) (down-zoning site from commercial to residential; for related proceedings, *see Re* Toronto Restricted Area By-laws 234-75 & 300-75 (No. 2), *supra* note 166, and *see* text accompanying notes 181 and 284 *infra*); *Re* Nepean Restricted Area By-law 145-77, 9 O.M.B.R. 359 (Mun. Bd. 1978).

Refused for other reasons were: *Re* Scarborough Restricted Area By-law 17100, 7 O.M.B.R. 305 (Mun. Bd. 1977) (by-law based on future road closings premature); *Re* Cumberland Restricted Area By-law 2222, 9 O.M.B.R. 363 (Mun. Bd. 1978) (by-law rezoning undeveloped park to residential premature, as residents should be given chance to submit development proposals for it); *Re* Stanhope Restricted Area By-law 78-23, 10 O.M.B.R. 313 (Mun. Bd. 1979) (part of by-law permitting construction of permanent dwellings on private roads contrary to generally accepted planning principles); *Re* Caledon Restricted Area By-law 78-131, 10 O.M.B.R. 499 (Mun. Bd. 1979) (by-law to legalize existing set-back offences).

[169] "The Board has always been of the general view that there must be substantial reasons in order to justify a down-zoning.": McDonalds Restaurants of Canada Ltd. v. City of Mississauga, *supra* note 166, at 94.

approved[170] and twelve rejected.[171] The philosophy of the Board in such applications is reflected in the following statement:

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[170] *Re* North York Restricted Area By-law 26421, 6 O.M.B.R. 290 (Mun. Bd. 1977), *rev'd* 8 O.M.B.R. 369 (L.G. in C. 1978); *Re* Halton Hills Restricted Area By-laws 75-93 & 76-11, 7 O.M.B.R. 47 (Mun. Bd. 1977); *Re* Fort Erie By-law 575-76, 7 O.M.B.R. 51 (Mun. Bd. 1977); *Re* Shelburne Restricted Area By-law 31-1976, 7 O.M.B.R. 72 (Mun. Bd. 1977); *Re* Sault Ste. Marie Restricted Area By-law 76-351, 7 O.M.B.R. 117 (Mun. Bd. 1977) (by-law in accord with official plan, in which case:

> [The Board] would have no proper reasons for withholding its approval unless it could be shown to the Board that the zoning proposed for these lands was premature. To make such a finding the Board would have to satisfy itself that there was an unavailability of municipal services to properly serve the subject lands or in the alternative, that a need for housing had not been shown.

Id. at 120-21); *Re* London Restricted Area By-law 3700-118, 7 O.M.B.R. 124 (Mun. Bd. 1977); *Re* Sault Ste. Marie Restricted Area By-law 77-37, 7 O.M.B.R. 131 (Mun. Bd. 1977); *Re* Guelph Restricted Area By-law 1976-9299, 7 O.M.B.R. 144 (Mun. Bd. 1977); *Re* Oakville Restricted Area By-law 1976-127, 7 O.M.B.R. 198 (Mun. Bd. 1977); *Re* Official Plan Amendment 22, *supra* note 163; *Re* Thunder Bay Restricted Area By-law 40-1977, 7 O.M.B.R. 436 (Mun. Bd. 1978); *Re* Cochrane Restricted Area By-law 1590-76, 7 O.M.B.R. 429 (Mun. Bd. 1978); *Re* Gravenhurst Restricted Area By-law P356-77, 7 O.M.B.R. 471 (Mun. Bd. 1977); *Re* Beachburg Restricted Area By-law 461, 2 M.P.L.R. 276 (Ont. Mun. Bd. 1977); *Re* Vaughan Restricted Area By-laws 128-74, 42-75 & 164-75 (No. 2), 8 O.M.B.R. 355 (Mun. Bd. 1978) (for earlier proceedings *see* 6 O.M.B.R. 372 (Mun. Bd. 1977)); *Re* Flamborough Restricted Area By-law 77-19-WF-Z, *supra* note 163; *Re* Vaughan Restricted Area By-law 170-78, *supra* note 163; *Re* St. Marys Restricted Area By-law 32-77, *supra* note 147; *Re* Guelph Restricted Area By-law (1977)-9660, 9 O.M.B.R. 352 (Mun. Bd. 1978); *Re* Etobicoke Restricted Area By-law 3411, 9 O.M.B.R. 502 (Mun. Bd. 1978); *Re* Espanola Restricted Area By-law 593, 10 O.M.B.R. 39 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 39n (L.G. in C. 1979); *Re* Collingwood Restricted Area By-law 78-57, 10 O.M.B.R. 198 (Mun. Bd. 1979); *Re* Shuniah Restricted Area By-law 1308, 10 O.M.B.R. 309 (Mun. Bd. 1979); *Re* Bosanquet Restricted Area By-law 8-79, 10 O.M.B.R. 469 (Mun. Bd. 1979); *Re* Georgian Bay Restricted Area By-law 78-349, 10 O.M.B.R. 481 (Mun. Bd. 1979), *Aff'd without written reasons* 10 O.M.B.R. 481n (L.G. in C. 1979); *Re* Etobicoke Planning Area Official Plan Amendment D8-13-78, 10 O.M.B.R. 151 (Mun. Bd. 1979), *varied* 10 O.M.R. 151, at 154 (L.G. in C. 1979).

[171] *Re* Thorold Restricted Area By-law 128(76), 6 O.M.B.R. 500 (Mun. Bd. 1977) (by-law to permit addition to private nursing home in landmark residential building; appealed to Lieutenant Governor in Council who directed hearing *de novo*, after which by-law approved by Board: 7 O.M.B.R. 444 (Mun. Bd. 1978)); *Re* Leamington Restricted Area By-law 2871, 7 O.M.B.R. 211 (Mun. Bd. 1977) (by-law to permit apartment building near lands designated in official plan as hazard lands in such a way that border difficult to determine, also premature until further flood control measures taken); *Re* Seymour and Nappan Island Subdivision, 9 O.M.B.R. 213 (Mun. Bd. 1978) (application to amend official plan and zoning by-laws not shown to conform to appropriate planning principles); *Re* Sarnia Restricted Area By-law 73 of 1976, 9 O.M.B.R. 219 (Mun. Bd. 1978) (application by Township to expand existing shopping mall rejected as premature as it would deny city full chance to attract major department stores to its central business district); *Re* Thorold Restricted Area By-laws 18(75) & 34(75), *supra* note 77 (by-law rezoning from agricultural to prestige commercial industrial to permit furniture warehouse premature on many counts); *McWilliam*, *supra* note 77 (by-law changing zoning from agricultural to restricted rural residential, together with related severance application, rejected as contrary to official plan and therefore contrary to sound planning principles); *Re* Georgian Bay Restricted Area By-Law 77-281, *supra* note 147; *Re* Sault

> On a number of occasions the Board has indicated that in administrative matters such as this, there is not the onus of burden of proof in the legal sense. Certainly there are various stages during the planning process when various bodies must be convinced that a change is reasonable and proper. That commences with the desire of a land-owner to amend or alter the permitted uses applicable to his site. . . . Once council has made that decision . . . the burden then, *if any*, in the administrative sense, shifts. If council has decided in favour of a proposal and enacts a by-law, then those who oppose the application giving rise to a hearing, must convince the Board that council has acted irresponsibly in arriving at its decision or did not consider or weigh all of the evidence available to it and thereby arrived at an improper decision.[172]

Similarly, a sentiment in favour of upholding the decisions of the local Council guides the Board in deciding the appeals of individuals[173] from Council's refusal to amend a zoning by-law. This is reflected, firstly, in a number of decisions holding that the Board has no jurisdiction to hear a zoning appeal that is substantially different from the original application made to city council.[174] It is reflected, secondly, in statements such as the following:

Ste. Marie Restricted Area By-Law 77-299, 9 O.M.B.R. 383 (Mun. Bd. 1978) (by-law reducing size of lots on single parcel rejected as "a classic case of spot-rezoning. That term indicated to me a rezoning of a single parcel of land in the absence of proper planning considerations for the entire area.": *Id.* at 384); *Re* Belleville and Suburban Planning Area Official Plan Amendment 21, 10 O.M.B.R. 129 (Mun. Bd. 1979) (application to amend official plan and rezoning by-law from industrial to residential to permit townhouse development rejected as Council misdirected itself as to issue involved and acted contrary to planning advice, and because application premature in that no final site plan available for public to see); *Re* Kingston Official Plan Amendment 97, 10 O.M.B.R. 185 (Mun. Bd. 1979) (application to amend official plan and zoning by-law to permit apartment building near historic homes rejected as too great a departure from previous development policy); *Re* Georgian Bay Restricted Area By-law 78-321, 10 O.M.B.R. 335 (Mun. Bd. 1979), *rev'd* 10 O.M.B.R. 335, at 338 (L.G. in C. 1979) (by-law rezoning lots from recreational to seasonal residential to fulfill condition of severance postponed until proper impact studies made as required by the official plan); *Re* Haldimand-Norfolk Restricted Area By-law 5000-146-H, 10 O.M.B.R. 472 (Mun. Bd. 1979) (by-law permitting farm supply store and fertilizer storage facilities adjacent to creek rejected as environmentally ill-advised although in conformity to official plan).

[172] *Re* Guelph Restricted Area By-law (1977)-9660, *supra* note 170, at 354 (emphasis in original).

[173] Under the Planning Act, R.S.O. 1980, c. 379, subs. 39(23).

[174] Dankiw v. City of Toronto, 10 O.M.B.R. 1 (Mun. Bd. 1979); Northumberland Mall Ltd. v. Town of Cobourg, 10 O.M.B.R. 16 (Mun. Bd. 1979); Murray v. Township of Erin, 10 O.M.B.R. 156 (Mun. Bd. 1979). Although the application made to the Board has to be identical to that originally made to Council, these cases held that in a subs. 35(22) [*now* subs. 39(23)] appeal, the decision in *Re* Mississauga Golf & Country Club Ltd., [1963] 2 O.R. 625, 40 D.L.R. (2d) 673 (C.A.) meant that the Board has jurisdiction to grant something less than the relief sought. And Dalewest Construction Ltd. v. City of Burlington, 7 O.M.B.R. 82 (Mun. Bd. 1977), added a jurisdiction to consider an area different (here, an adjoining area was included) from that set out in the application. (For subsequent proceedings, *see infra* text accompanying notes 186-90.)

Re Timmins Restricted Area By-law 1977-859, 9 O.M.B.R. 113 (Mun. Bd. 1978) underlined that this extended jurisdiction exists only on subs. 35(2) [*now* subs. 39(23)] appeals. When a by-law is presented by the municipality for approval, the Board's

> It should be noted that the power conferred on this Board by s. 35(22) [now subs. 39(23)] of the *Planning Act* is an extraordinary power which should only be used in compelling circumstances, and this Board is reluctant to exercise that power against the will of a municipal council unless it can be shown that the council has not acted properly in disposing of the matter before them.[175]

Nevertheless, while the Board upheld Council's decision and denied the appeal in nine instances,[176] it admitted the appeal in eleven.[177]

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jurisdiction is limited to approving the by-law in whole or in part or withholding approval. It may however, approve the by-law on conditions (*see, e.g.*, *Re* Durham Restricted Area By-law 695A, 9 O.M.B.R. 70 (Mun. Bd. 1978)) and does in fact suggest amendments that would make the by-law acceptable to it (*see, e.g.*, *Re* North York Restricted Area By-law 26587, 7 O.M.B.R. 96 (Mun. Bd. 1977)).

[175] Asep Invs. Ltd. v. East Gwillimbury, 9 O.M.B.R. 278, at 285 (Mun. Bd. 1979). Similar statements by the Board can be found in Valtrent Devs. Ltd. v. City of Peterborough, 7 O.M.B.R. 327 (Mun. Bd. 1977), *aff'd* 8 O.M.B.R. 364 (L.G. in C. 1978) and in *Re* Wondown Devs. Ltd. and Borough of Scarborough, 3 M.P.L.R. 13 (Ont. Mun. Bd. 1977). In the latter case, the applicant was required to demonstrate that "Council's action was not for the greatest common good or that it created an undue hardship, or that any private right was unduly interfered with or denied, or that Council acted arbitrarily on incorrect information or advice or otherwise improperly". *Id.* at 17. A similar philosophy was articulated by the Nova Scotia Planning Appeal Board in *Re* Calnen and City of Halifax, 1 M.P.L.R. 316, at 325 (1977):

> In general, the Board is of the opinion that in appeals by applicants for spot rezoning, it would only approve the rezoning if the proponents of the rezoning establish that from a planning point of view the zoning change is both proper and necessary and that there would be no substantial adverse effects on those persons who have relied on the zoning by-law being amended.

(*See also* Cameron & Makuch, Annot., 1 M.P.L.R. 317 (1977).)

[176] Goring v. Niagara-on-the-Lake, 7 O.M.B.R. 40 (Mun. Bd. 1977) (application to change zoning on farm from agricultural to industrial); Rush v. Township of Scugog, 8 O.M.B.R. 370 (Mun. Bd. 1978), *rev'd* 8 O.M.B.R. 370, at 373 (L.G. in C. 1978) (application to permit residence and orchard on reduced acreage; for subsequent proceedings, *see supra* note 132); Valtrent Devs. Ltd. v. City of Peterborough, *supra* note 175 (application to change zoning from low density to medium high density residential to permit construction of townhouses); *Re* Wondown Devs. Ltd. and Borough of Scarborough, *supra* note 175 (application to amend zoning by-law to permit multiple unit residential development concentrated in small area); Victoria Way Corp. v. Borough of Etobicoke, 9 O.M.B.R. 102 (Mun. Bd. 1978) (application for development requiring raising of road level); Clutterbuck v. Township of Hamilton, *supra* note 33 (application to lift rural zoning on checkerboarded lots to permit residential development); Asep Invs. Ltd. v. East Gwillimbury, *supra* note 175 (application to permit townhouse development in single family residential area); Devon Downs Devs. Ltd. v. West Gwillimbury, *supra* note 78 (application to permit "agrominium" pilot project); Levitt v. North York, 10 O.M.B.R. 108 (Mun. Bd. 1979) (application by owners of medical-dental building to convert existing parking to pay parking lot).

[177] Chadwill Coal Co. v. Borough of Etobicoke, *supra* note 123 (developer's application to rezone residential preferred to city's application to designate industrial); Dzioba v. City of Hamilton, *supra* note 33 (rezoning from suburban residential to urban protected residential as required by city as condition on sale of land); *Re* Offman Holdings Ltd. and City of Toronto, 7 O.M.B.R. 184, 3 M.P.L.R. 169 (Mun. Bd. 1977) (*see* Cameron, Annot., 3 M.P.L.R. 170 (1977)) (rezoning from residential to commercial to permit additional parking), *rev'd* O.C. 3139/77 (L.G. in C. 1977), *application for judicial review dismissed, sub nom. Re* Offman Holdings Ltd. and Minister of Justice, 25 O.R.

With zoning matters, as with other matters, a party dissatisfied with a decision of the Board can either apply to the Board for a rehearing[178] or appeal by way of petition to the Lieutenant Governor in Council[179] (the "political route"), or he can appeal, with leave, to the court on a question of law or jurisdiction[180] (the "legal route"). These routes are not mutually exclusive, as several examples will illustrate. The first two examples involve the political route. *Re Toronto Restricted Area By-law 234-75 and 300-75* was an application by the City of Toronto to down-zone some six lots from commercial to residential. The Board, in its first decision,[181] approved all changes except on one lot. The City and the local residents' association appealed this one refusal to the Lieutenant Governor in Council, who ordered a new public hearing as to the zoning on the lot in

(2d) 501, 9 O.M.B.R. 404, 9 M.P.L.R. 152, 101 D.L.R. (3d) 330 (Div'l Ct. 1979). *See infra* text accompanying note 200; Dalewest Constr. Ltd. v. City of Burlington, *supra* note 174 (rezoning to permit McDonald's Restaurant); *Re* Penco Constr. Ltd. and Borough of Etobicoke, 2 M.P.L.R. 318 (Ont. Mun. Bd. 1977) (rezoning to permit residential development); Morsyd Invs. Ltd. v. Town of St. Marys, *supra* note 123 (rezoning from industrial to commercial to permit peripheral shopping centre); *Re* Elliot Lake Restricted Area By-law 77-27, 9 O.M.B.R. 248 (Mun. Bd. 1978) (zoning to permit trailer park with longer time limitation attached than city wished); Hollywood v. Township of Brock, 9 O.M.B.R. 351 (Mun. Bd. 1978), *aff'd without written reasons* 9 O.M.B.R. 351n (L.G. in C. 1979) (rezoning to permit construction on lot not fronting on open public highway); Di Gregorio v. Town of Ancaster, 10 O.M.B.R. 161 (Mun. Bd. 1979) (zoning to permit commercial development notwithstanding proposal not necessarily in conformity with Council's *ad hoc*, arbitrary "heritage concept"), for further proceedings, *see* Di Gregorio v. Town of Ancaster (No. 2), 11 O.M.B.R. 31 (Mun. Bd. 1980); Bayley MacLean Ltd. v. City of Burlington, 10 O.M.B.R. 213 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 213n (L.G. in C. 1979) (rezoning to permit using existing structure as real estate office without imposing road widening condition); *Re* Nepean By-laws 94-78 & 120-78, 8 M.P.L.R. 44 (Ont. Mun. Bd. 1979), *aff'd without written reasons* 8 M.P.L.R. 44n (L.G. in C. 1979) (two by-laws approved: one brought by municipality and one by individual, to permit roller skating arenas on neighbouring sites; market to determine which actually to be built).

[178] Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 94.

[179] S. 94. *See, e.g.*, *Re* Markham Restricted Area By-law 127-76, *supra* note 166; *Re* Ennismore Restricted Area By-law 20-74, *supra* note 166; *Re* Toronto Restricted Area By-laws 234-75 & 300-75, *supra* note 166; *Re* East York Restricted Area By-law 1323, *supra* note 168; *Re* North York Restricted Area By-law 26421, *supra* note 170; *Re* Espanola Restricted Area By-law 593, *supra* note 170; *Re* Georgian Bay Restricted Area By-law 78-349, *supra* note 170; *Re* Etobicoke Planning Area Official Plan Amendement D8-13-78, *supra* note 170; Valtrent Devs. Ltd. v. City of Peterborough, *supra* note 175; Rush v. Township of Scugog, *supra* note 176; *Re* Offman Holdings Ltd. and City of Toronto, *supra* note 177; Bayley MacLean Ltd. v. City of Burlington, *supra* note 177; *Re* Nepeans By-laws 94-78 & 120-78, *supra* note 177; Hollywood v. Township of Brock, *supra* note 177. It is difficult to draw any general conclusions as to Cabinet's tendencies to either uphold the decision of Council, favour the individual applicant or uphold the decision of the Board.

[180] S. 95 or under the Judicial Review Procedure Act, R.S.O. 1980, c. 224, s. 2. For example, the legal route was chosen in *Re* Township of Smith and City of Peterborough, 10 O.M.B.R. 85 (Div'l Ct. 1979) (failure of Board to provide the township with opportunity to delay development was not a denial of natural justice).

[181] 1 M.P.L.R. 337 (Ont. Mun. Bd. 1977).

question.[182] In its second decision,[183] the Board ordered that the particular lot also be down-zoned, whereupon an application was made to the Board for a rehearing. The Board's order granting a rehearing was then appealed to the Lieutenant Governor in Council and the appeal rejected.[184] Finally, in its third decision on the merits, the Board reaffirmed the down-zoning of the property in question, which decision was upheld by the Lieutenant Governor in Council.[185]

A second example of the political route is *Dalewest Construction Ltd. v. City of Burlington*. This originated as an appeal by a landowner from a refusal of Council to enact a zoning by-law to permit the establishment of a McDonald's restaurant. The Board, in its first decision,[186] allowed the appeal, which decision was confirmed by Cabinet without written reasons.[187] Thereafter, various ratepayers applied to the Board for a rehearing,[188] which was denied on the grounds that Cabinet's confirmation of the original decision precluded a rehearing. This decision denying a rehearing was itself appealed to Cabinet, which ordered a rehearing and revoked its own earlier decision confirming the original appeal.[189] After the new public hearing, the Board reversed its original decision and denied the application for rezoning.[190]

One final example illustrates the legal route, and the interplay between Board decisions and court actions. The *Sorokolit* saga (also known as *Dunbar Meadows*) began as an appeal by the owner from the City's refusal to rezone to permit the erection of townhouse units. The Board, in its initial decision,[191] allowed the appeal on condition that the developer pay substantial lot levies. The developer appealed to the Divisional Court,[192] which decided that the Board did not have the power to impose such conditions and therefore erred in law in so doing. The Court did, however, refuse to order the Board to delete the condition from its order but otherwise have the order stand; it merely left it to the Board to take whatever action it deemed appropriate in the light of the

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[182] Unreported (23 May 1977), referred to in 7 O.M.B.R. 344, at 345.

[183] *Supra* note 168.

[184] Unreported O.C. 3508/78 (6 Dec. 1978).

[185] *Supra* note 166.

[186] *Supra* note 174.

[187] Unreported O.C. 2996/77 (26 Oct. 1977).

[188] They also initiated two court applications, one for an order extending the time to appeal the Board's decision and requesting leave to appeal, which was refused, and another for judicial review of the Board's decision, which was abandoned: 10 O.M.B.R. 401.

[189] Dalewest Construction Ltd. v. City of Burlington (No. 2), 8 O.M.B.R. 444 (Mun. Bd. 1978), *rev'd* 8 O.M.B.R. 444n (L.G. in C. 1978).

[190] Dalewest Construction Ltd. v. City of Burlington (No. 3), 10 O.M.B.R. 399 (Mun. Bd. 1980).

[191] Sorokolit v. City of Mississauga, 5 O.M.B.R. 431 (Mun. Bd. 1976).

[192] *Re* Sorokolit and Regional Municipality of Peel, 16 O.R. (2d) 607, 2 M.P.L.R. 249, 78 D.L.R. (3d) 715 (Div'l Ct. 1977).

Court decision.[193] Accordingly, at its rehearing of the matter, the Board declined to order the by-law amendment without the conditions attached.[194] The developer again turned to the Court for a ruling that the second hearing was invalid for lack of proper notice and a fair hearing and the decision an abdication of responsibility, which ruling the Court refused to make.[195] The final step was a petition to the Lieutenant Governor in Council, who merely confirmed the Board's second decision without written reasons.[196]

Three court decisions dealt with the powers of the Lieutenant Governor in Council on zoning appeals. One, *Re Rush*,[197] gave rise to a challenge of Cabinet's authority in an indirect manner, as it was an application for an order in the nature of *mandamus* directing the municipality to amend its by-law in accordance with an order of the Lieutenant Governor in Council. The Court held that Cabinet's power to "vary" a decision of the Board included the power to reverse the order appealed from and to substitute therefor the order it thought ought to have been made.[198] The other two cases arose on direct challenges in the form of applications for judicial review: *Re Davisville Investment Co. and City of Toronto*[199] and *Re Offman Holdings Ltd. and Minister of Justice*.[200] Both held specifically that the court had jurisdiction to review the order in council in question.[201] Both, however, continued the trend towards a wide interpretation of Cabinet's powers. In *Davisville*, the Court held[202] that Cabinet's power to "confirm, vary or rescind" the Board's order *or* to "require the Board to hold a new hearing" allowed Cabinet *both* to rescind an order *and* to order a new hearing, the former being necessarily incidental to the latter.

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[193] *Id.* at 616, 2 M.P.L.R. at 258, 78 D.L.R. (3d) at 724-25.

[194] Dunbar Meadows v. City of Mississauga, 7 O.M.B.R. 496 (Mun. Bd. 1977).

[195] Dunbar Meadows v. City of Mississauga, 9 O.M.B.R. 257 (Div'l Ct. 1979).

[196] Dunbar Meadows v. City of Mississauga, 9 O.M.B.R. 392 (L.G. in C. 1979).

[197] *Supra* note 132.

[198] The Board had refused to order the municipality to amend its by-law. The municipality argued that the right to "vary" was limited to a right to alter, modify or adapt but not to make a fundamentally different order than the one appealed from. (Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 94 gives Cabinet the right to "affirm, vary or rescind".)

[199] 15 O.R. (2d) 553, 2 M.P.L.R. 81, 76 D.L.R. (3d) 218 (C.A. 1977).

[200] *Supra* note 177.

[201] As being made pursuant to a statutory provision and not as an exercise of a prerogative of the Crown: *Davisville, supra* note 199, at 556, 2 M.P.L.R. at 86, 76 D.L.R. (3d) at 222. Also in *Re* Offman Holdings Ltd. and Minister of Justice, *supra* note 177, at 505, 9 O.M.B.R. at 407, 9 M.P.L.R. at 155, 101 D.L.R. (3d) at 333, the Court was particularly forceful in this regard: "The Lieutenant-Governor is not above the law, and does not claim to be. The law applies equally to all." (Reid J.).

[202] Blair J.A. dissenting. In 1968 the Board had approved certain by-laws without a hearing after the local residents' association had withdrawn its objection. In 1972 the association applied to the Board for reconsideration of its 1968 decision, which the Board refused to do. This refusal was petitioned to the Lieutenant Governor in Council, who eventually (in 1975) allowed the petition and ordered that the Board's 1972 decision be rescinded and a new public hearing held.

> Section 94 of the *Ontario Municipal Board Act* should not be construed restrictively as if it involved an inferior tribunal to which certain matters had been committed by the Legislature. I prefer to regard the power as being one reserved by the legislative to the executive branch of Government acting on broad lines of policy. There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.[203]

Re Offman Holdings Ltd. and Minister of Justice emphasized further the nature and breadth of the discretion conferred on the Lieutenant Governor in Council. While its action is subject to review by the courts if it exceeds its jurisdiction, what is essentially a political decision cannot be interfered with if no error occurred in the process and if the decision promoted the objectives and effected the policies of the relevant acts. In particular, Cabinet is not bound by findings of fact of the Board and can receive submissions from anyone claiming an interest, even persons who did not participate before the Board. As well, Cabinet need not rest its decision on established policy but may compose a policy to fit the particular problem.[204]

2. *Notice and Hearings*

A second important aspect of procedure is the notion of *audi alteram partem*, including notice and the right to be heard. Where the relevant statute provides that notice must be given, either of an intention to pass a by-law or of a public hearing, these notice requirements are a condition precedent to the passing of a valid by-law and must be strictly complied with, both as regards the method of publication and the content of the notice.[205] The method of publication was underlined in three cases, *Village of Lameque v. Noel*,[206] *Re Little and Cowichan Valley Regional District*[207] and *Sunshine Hills Property Owners Association v. Delta*,[208] and the content of the notice was underlined in two others, *Pullen v.*

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[203] *Supra* note 199, at 557, 2 M.P.L.R. at 87, 76 D.L.R. (3d) at 223 (Lacourcière J.A.).

[204] *Supra* note 177, at 406-07, 9 O.M.B.R. at 408-09, 9 M.P.L.R. at 157-58, 101 D.L.R. (3d) at 335-36.

[205] For a detailed consideration of alleged procedural irregularities, especially concerning notice, *see* Bourdeau v. Ville de St-Jean, [1979] C.S. 118 (under appeal). For apparently related proceedings, *see* Bourdeau v. Ville de St-Jean, *supra* note 4.

[206] 17 N.B.R. (2d) 55 (Q.B. 1977) (publication in parish bulletin of notice of intention to pass by-law not publication in newspaper within meaning of the Community Planning Act, S.N.B. 1960-61, c. 6, s. 48).

[207] 8 B.C.L.R. 369, 94 D.L.R. (3d) 417 (C.A. 1978), *aff'g in part* 2 B.C.L.R. 309 (S.C. Chambers 1977) (publication of notice of public hearing in free weekly news publication delivered to area residents not publication in newspaper within meaning of the Municipal Act, R.S.B.C. 1960, c. 42, s. 33).

[208] [1977] 6 W.W.R. 749, 80 D.L.R. (3d) 692 (B.C.S.C. Chambers) publication of last notice in newspaper not at least three days, exclusive of Sunday, before date of hearing).

Regional District of Nanaimo[209] and *Seguin v. Ville de Laval.*[210] Two cases held that if the notice of hearing is insufficient, an objector is not estopped from challenging a by-law on this ground if he in fact receives notice and attends the hearing.[211] However, *Re Focal Properties Ltd. and Halton Hills*[212] indicates that failure to give notice does not always vitiate the by-law if, for example, the person aggrieved has had an opportunity to present his point of view on an application for rehearing by the Board. Whether a municipality is required to comply a second time with the statutory requirements as to notice and a hearing if it reconsiders an initial decision to defeat a by-law and later adopts it is not clear, as the jurisprudence is conflicting.[213] Somewhat similar is the issue of whether a second hearing is required if a proponent (or opponent) of a by-law makes submissions in the absence of representatives of the other side[214] or whether one is required if council amends the by-law between the date of hearing and the date of adoption.[215] Finally, the applicable statutory schemes sometimes give authority to dispense with either notice or a hearing, in which case the provisions must be strictly complied with.[216]

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[209] 5 M.P.L.R. 63, 81 D.L.R. (3d) 751 (B.C.S.C. 1977) (omission from notice of hearing of days and hours that by-law might be inspected grounds for quashing by-law).

[210] [1977] R.P. 385 (Que. C.S.) (notice of motion not sufficiently detailed). *See also* Hill v. Municipal Dist. of Rockyview No. 44, 7 Alta. L.R. (2d) 247 (C.A. 1978) (held, Morrow J.A. dissenting, by-law authorizing construction of new municipal building invalid as notice of plebiscite had been incomplete and misleading).

[211] *Re* Little and Cowichan Valley Regional Dist., *supra* note 207; *Stocker*, *supra* note 150.

[212] 18 O.R. (2d) 673, 4 M.P.L.R. 9 (Div'l Ct. 1977).

[213] *Stocker*, *supra* note 150 (subsequent reconsideration and passing of by-law without further notice grounds for quashing by-law); *contra*, Wingold Construction Ltd. v. Surrey, 11 B.C.L.R. 215 (S.C. 1979) (no requirement to hold second hearing before adopting by-law following timely reconsideration). *See also Re* Uxbridge Restricted Area By-law 69-10, *supra* note 162 (adjournment granted because of lapse of four years between circulation of by-law and hearing).

[214] *Re* Bourque, 6 B.C.L.R. 130, 6 M.P.L.R. 144, 87 D.L.R. (3d) 349 (C.A. 1978) (by-law quashed, Bull J.A. dissenting, for violation of hearing requirements where proponent heard after public hearing by standing committee of Council which reported to Council); *contra*, Lewis v. District of Surrey, 10 M.P.L.R. 123, 99 D.L.R. (3d) 505 (B.C.S.C. 1979) (visit to site by individual councillors with developer after public hearing did not invalidate by-law).

[215] Duquette v. Port Alberni, *supra* note 4. *See also* Murray v. Paterson, *supra* note 4 (in both, second hearing not required where amendment did not alter substance of by-law).

Somewhat similar is the Ontario Municipal Board's policy of dispensing with notice and a hearing upon receipt of a by-law incorporating amendments it has itself suggested. *See, e.g., Re* Fort Erie By-law 575-76, *supra* note 170; *Re* Cochrane Restricted Area By-law 1590-76, *supra*note 170; *Re* Vaughan Restricted Area By-law 128-74, 42-75 & 164-75 (No. 2), *supra* note 170; *Re* Mississauga Restricted Area By-laws 2-78, 3-78 & 4-78, *supra* note 166.

[216] For example, the Ontario Municipal Board may dispense with notice in certain limited circumstances. In this regard, *see Re* King Township Library Bd. and Township of King, 15 O.R. (2d) 249, 7 O.M.B.R. 1, 2 M.P.L.R. 98 (Div'l Ct. 1977) *leave to appeal to C.A. denied* 15 O.R. (2d) 249n, 7 O.M.B.R. 1n (C.A. 1977) (notice improperly dispensed with where the Board did not purport to act under statutory authority) (by-laws

3. *Miscellaneous*

A variety of other procedural points were also decided in the period under survey. Two cases held that the failure of a municipal council to follow its own procedural by-law was not necessarily fatal to the zoning by-law itself.[217] In another, a by-law was invalidated because the Community Committee's recommendations to Council on a zoning application did not set out the supporting reasons, as the Act required.[218] Still another held that the requirement that a by-law be given "readings" or be "read" did not necessitate that it be read out loud.[219] Another ruled that a statutory provision to the effect that a by-law was not invalid only because a disqualified person voted for it saved the by-law, even though, without this vote, it would not have received the requisite majority.[220] Finally, another case held that one procedural error did not necessarily render the entire procedure void: a court has power to sever the council's procedure and to set aside the erroneous procedure only.[221]

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subsequently approved by the Board in *Re* King Restricted Area By-laws 76-11 & 76-82 (No. 2), 8 O.M.B.R. 260 (Mun. Bd. 1977)).

The Board may also dispense with a public hearing if it deems the objection insufficient, but it exercises this discretion sparingly. *See, e.g., Re* North York Restricted Area By-law 27217, 10 O.M.B.R. 103 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 103 (L.G. in C. 1979) (hearing required); *Re* Shelburne Restricted Area By-law 39-1977, 9 O.M.B.R. 374 (Mun. Bd. 1978) (hearing dispensed with and by-law approved where by-law of general nature and objectors not stating reasons); *Re* McMurrich Restricted Area By-law 11-78, 10 O.M.B.R. 211 (Mun. Bd. 1979) (hearing dispensed with and by-law approved where reasons for objection insufficient).

[217] Lewis v. District of Surrey, *supra* note 214 (not fatal where no evidence of bad faith or fraudulent intent); Figol v. City of Edmonton, *supra* note 111.

[218] Manitoba Pool Elevators v. Assiniboine Park-Fork Garry Community Comm., [1978] 2 W.W.R. 486, at 499 (Man. Q.B.) (Hewak J.):

> Although the hearing held by the community committee and its report with resulting recommendations is in the nature of a preliminary step leading to a final result, nevertheless this process does play an important part in the final decision and consequently there is, in my view, an obligation to have the requirements of the act complied with.

See also Revie v. St. Vital Community Comm., [1978] 3 W.W.R. 117, 85 D.L.R. (3d) 381 (Man. Q.B.), discussed *infra* note 344. *See also Re* Hannley and City of Edmonton, 12 A.R. 473, 7 Alta. L.R. (2d) 394, 8 M.P.L.R. 220, 91 D.L.R. (3d) 758 (C.A. 1978) and Couillard v. City of Edmonton, 18 A.R. 31, 10 Alta. L.R. (2d) 295, 11 M.P.L.R. 190, 103 D.L.R. (3d) 312 (C.A. 1979), both holding that in repeating word for word the provisions of the legislation ("the development will not adversely affect the amenities of the neighbourhood") the Board stated a conclusion and did not give reasons, as required by the Planning Act, S.A. 1977, c. 89, subs. 83(2) (*now* R.S.A. 1980, c. P-9, subs. 85(2)).

[219] Village de Val-David v. Lacroix, *supra* note 4. It also held that the by-law need not necessarily be read and adopted at the meeting immediately following the one at which the notice of motion had been given.

[220] Boss v. Broadmead Farms Ltd., *supra* note 4.

[221] Watko v. St. Clements, [1979] 3 W.W.R. 279 (Man. Q.B.) (the final two steps, second and third readings of the by-law, held *in camera*, were severed).

B. *Substance*

1. *Uncertainty*

Sometimes by-laws are set aside by courts because their content is uncertain, as was the fate of a by-law prohibiting building "near" the bank of any watercourse or construction "at variance with" a technical report referring to "estimated" flood channels,[222] one requiring levelling of quarries to prevent "ponding",[223] one defining an amusement place as a place "principally" equipped with pin-ball machines[224] and one with an equally vague definition of "*appareils de jeu*".[225]

2. *Ultra Vires*

More often, however, the by-law is attacked because it does not come within the scope of authority delegated by the relevant enabling legislation — in other words, because it is *ultra vires*.[226] Occasionally, the by-law is attacked under a general notion of lack of statutory authority, as was the situation in *Bell v. The Queen*.[227] In this case, a by-law restricting the occupation of a dwelling unit to a "family", defined by reference to consanguinity, marriage and adoption only, was held[228] *ultra vires* as constituting regulation in respect of the "users" of property and not of the "use" thereof.[229]

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[222] Barthropp v. West Vancouver, 17 B.C.L.R. 202 (S.C. 1979).

[223] *Re* Campeau Corp. and City of Ottawa, 22 O.R. (2d) 40, 92 D.L.R. (3d) 413 (Div'l Ct. 1978).

[224] *Re* Leavey and City of London, 27 O.R. (2d) 649, 11 M.P.L.R. 19, 107 D.L.R. (3d) 411 (H.C. 1979) (by-law also held invalid as unlawfully discriminating between businesses of same class and between persons. *See* discussion accompanying note 250 *infra*).

[225] Fountainhead Fun Centres Ltd. v. Ville de St-Laurent, [1979] Que. C.S. 132, 7 M.P.L.R. 53. *Contra*, Horseshoe Valley Ltd. v. Township of Medonte, 16 O.R. (2d) 709, 79 D.L.R. (3d) 156 (H.C. 1977) (by-law permitting "seasonal dwelling houses" not void for uncertainty); Farkas v. White Rock, 13 B.C.L.R. 372 (S.C. 1979) (by-law requiring height of building of be "vertical distance between highest point of the building and the average of the natural ground elevation within 10 feet of the centre point of each wall", *id.* at 373, not void for uncertainty).

[226] *See generally* Emond, *Comment on the Report of the Royal Commission on Metropolitan Toronto*, 3 M.P.L.R. 1 (1977).

[227] [1979] 2 S.C.R. 212, 26 N.R. 457, 9 M.P.L.R. 103, 98 D.L.R. (3d) 255 (1978) (*see* Goyette & Makuch, Annot., 9 M.P.L.R. 104 (1980); Himel, Comment, 1 SUP. CT. L. REV. 367 (1980)).

See also Tegon Developments v. City of Edmonton, 8 A.R. 384, 5 Alta. L.R. (2d) 63, 81 D.L.R. (3d) 543 (C.A. 1977), *aff'd* [1979] 1 S.C.R. 98, 121 D.L.R. (3d) 760 (1978) (not valid exercise of zoning power to use it to preserve historical sites); Ivanhoe Corp. v. Beauport Realties (1964) Inc., 9 M.P.L.R. 300 (Que. C.A. 1979) (zoning power did not authorize municipality to limit distance between shopping centres).

[228] Martland and Ritchie JJ. dissenting.

[229] As a result of the decision in the *Bell* case, the Ontario Municipal Board refused to approve a site-specific by-law restricting occupancy to senior citizens for the reason that the by-law was invalid as "people zoning": *Re* Toronto Restricted Area By-law

More numerous, however, are the examples of by-laws held *ultra vires* for one or a combination of the following reasons: unlawful delegation, disguised expropriation, discrimination, unreasonableness and bad faith.

(a) *Unlawful Delegation*

By-laws have been held invalid on this ground in five cases in the period under consideration[230] and upheld in one.[231]

(b) *Disguised Expropriation*

The second category involves down-zoning to such an extent as to amount to confiscation.[232] Three cases from British Columbia, *Re Rodenbush and North Cowichan*,[233] *Duquette v. Port Alberni*[234] and

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413-78, *supra* note 33. *But see* Ville de St-Hubert v. Riberdy, [1977] Que. C.S. 409 and City of Charlottetown v. Charlottetown Ass'n for Residential Servs., 9 M.P.L.R. 91, 100 D.L.R. (3d) 614 (P.E.I.S.C. 1979) (both concerned with the interpretation of "family" in a zoning by-law). *See also* Horseshoe Valley Ltd. v. Township of Medonte, *supra* note 225 (by-law restricting use to "seasonal dwelling house", that is, one used "as a secondary place of residence", not invalid as discriminating against the sort of persons who would be excluded from using summer cottages). All three cases were decided before the Supreme Court's decision in the *Bell* case. Although each is outside the period under survey, mention should also be made of *Mueller*, *supra* note 33, and *Smith*, *supra* note 162, both of which dealt with "seasonal residential" zoning.

[230] Township of Tiny v. Srenk, 6 M.P.L.R. 49 (Ont. H.C. 1978) (by-law requiring applicant for licence to hold public festival to pay fee "as fixed by resolution of Council" and to post bonds or deposit money in amount, *inter alia*, estimated necessary by senior police official for additional police protection); *Re* Campeau Corp. and City of Ottawa, *supra* note 223 (City Council reserving to itself discretion in enforcement of pits and quarries by-law); *Re* Minto Constr. and Township of Gloucester, *supra* note 88 (powers concerning construction and siting of buildings delegated to Fire Chief); *Re* Leavey and City of London, *supra* note 224 (unlawful delegation of licensing pin-ball parlours delegated to City Clerk); *Barthropp*, *supra* note 222 (discretionary permission to build "near the bank of any watercourse delegated to municipal official). Although decided prior to the period under survey, mention should also be made of the 1976 Supreme Court of Canada judgment in Lamoureux v. City of Beaconsfield, [1978] 1 S.C.R. 134, 10 N.R. 413 (in French at 9 N.R. 395), holding, Pigeon J. dissenting, that it was not unlawful delegation by a municipality to include in a by-law a provision preventing establishment of service stations in a commercial zone if two-thirds of property owners within a 500-foot radius of a proposed site objected. *See also* Canadian Inst. of Public Real Estate Companies v. City of Toronto, *infra* note 289.

[231] *Re* Kingsway Lodge St. Marys Ltd. and St. Marys, 26 O.R. (2d) 707, 103 D.L.R. (3d) 764 (Div'l Ct. 1979) (by-law restricting use of land to nursing home not invalid delegation of discretion to Director under Nursing Homes Act, *now* R.S.O. 1980, c. 320).

[232] *See* Krivel, *Compensation for Downzoning; Levies for Upzoning*, 25 CHITTY'S L.J. 20 (1977); Potter, *Compensation on Expropriation: The Effect of Zoning and Other Land Use Restrictions on the Award*, 3 DAL. L.J. 775 (1977).

[233] 3 M.P.L.R. 121, 76 D.L.R. (3d) 731 (B.C.S.C. 1977) (rezoning from rural to restricted in order to prevent operation of shake and shingle mill, the only use to which the property could effectively be put).

[234] *Supra* note 4 (by-law prohibiting any building on land otherwise zoned residential within 100 feet of river).

Karamanolis v. Port Coquitlam,[235] and one from Quebec, *Aubry v. Trois-Rivières Ouest*,[236] found the by-law, or parts thereof, offensive on this ground, whereas this attack failed in one Ontario case, *Re Kingsway Lodge St. Marys Ltd. and St. Marys*.[237]

(c) *Licensing*

A variation of this same issue is the question of the extent to which a power to regulate includes a power to prohibit. This issue has come before the courts with varying results in regard to body-rub parlours, pinball arcades and gas stations.[238] The body-rub parlour cases involved, for the most part, licensing by-laws. In three such cases,[239] the argument was that the stringent regulations contained in the licensing by-laws, governing such matters as the hours of opening and the attendant's clothing, together with a high annual licence fee, were designed to be prohibitory in effect. This argument was rejected by all three Courts of Appeal.[240] The

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[235] 8 B.C.L.R. 282, 8 M.P.L.R. 215, 97 D.L.R. (3d) 289 (C.A. 1978). (*See* Gall, Comment, 13 U.B.C.L. REV. 409 (1979); Makuch, Annot., 8 M.P.L.R. 215 (1989).) The by-law included a one-half acre lot on which the owner proposed to build a restaurant in a zone permitting agricultural and one-family residential use on lots of one acre or more.

> [The] intended effect of the by-law was to prevent use of Lot 74 temporarily: to prevent use of the lot until further studies and negotiations could be completed by the people responsible for planning. It is my opinion, accordingly, that the Council . . . has attempted to do indirectly that which it has no power to do directly, namely, to create a holding zone.

8 B.C.L.R. at 285, 8 M.P.L.R. at 218, 97 D.L.R. (3d) at 291 (McFarlane J.A.).

[236] 4 M.P.L.R. 62 (Que. C.A. 1978) (by-law zoning property for parks and public institutions held invalid even where, *semble*, adopted with consent of owner on approval of subdivision plan in lieu of outright transfer of land for park purposes). *See also* Campeau Corp. v. City of Calgary, 12 A.R. 31, 8 M.P.L.R. 88 (C.A. 1978) (decision of City not to reclassify land from low density to high density residential because land more suitable for park purposes, thereby freezing development, a nullity as made in bad faith on irrelevant evidence); *Re* Harrow and Colchester Planning Area Official Plan Amendment No. 1, *supra* note 123 (private landowner should not be required to provide parkland or open space for public).

[237] *Supra* note 231 (by-law restricting use of land to single use, nursing home, was valid; not sufficient grounds of attack that no use might result from loss of nursing home licence).

[238] This same issue has arisen in other circumstances. *See* Labelle v. Cité de St-Laurent, 10 M.P.L.R. 251 (Que. C.S. 1979) (by-law enacted under regulatory power prohibiting use of trailers as homes invalid); *Re* Malette and Township of Eldon, 17 O.R. (2d) 576, 4 M.P.L.R. 287 (Div'l Ct. 1977) (power to license cannot be used to prohibit salvage yards); the Quebec Court of Appeal decision in Ville de Mirabel v. Carrières T.R.P. Ltée, *supra* note 68.

[239] *Re* Try-San International Ltd. and City of Vancouver, 5 B.C.L.R. 193, 6 M.P.L.R. 39 (*sub nom. Re* Vancouver Licence By-law 4957), 83 D.L.R. (3d) 236 (C.A. 1978); Cal Invs. Ltd. v. City of Winnipeg, 6 M.P.L.R. 31, 84 D.L.R. (3d) 699 (Man. C.A. 1978); *Re* Moffat and City of Edmonton, 15 A.R. 530, 9 Alta. L.R. (2d) 79, 99 D.L.R. (3d) 101 (C.A. 1979).

[240] The first two based their decisions in part on the fact that the evidence did not prove that the by-law was prohibitory in effect. The second main argument, that such

issue in *Prince George v. Payne*[241] was, however, slightly different in that no general by-law was under attack; the municipality had merely refused an application for a business licence[242] under a general power to do so.[243] The Supreme Court of Canada held Council's action *ultra vires* as being prohibitory rather than regulatory and as being an effort to prohibit land use through the mechanism of a licensing by-law. The jurisprudence concerning pinball arcades has been divided, with three examples held invalid as prohibitory,[244] one invalid as discriminatory[245] and one valid although prohibitory.[246]

Finally, two cases involving gas stations raised issues similar to that of *Prince George v. Payne*. *Gulf Canada Ltd. v. City of Vancouver*[247] held that a by-law limiting the number of licences for self-service gas stations was a licensing and not a zoning by-law, whereas in *Re Texaco Canada Ltd. and City of Vanier*,[248] the Supreme Court of Canada classified a by-law requiring property used as a public garage to be fenced or hedged as a zoning and not a licensing by-law:

> The impugned provision of the respondent's by-law does not relate to the business that is being licensed and regulated; it has nothing to do with the character of the business, nor with any factors touching its conduct. Rather, it is concerned with esthetic considerations, with the external appearance of the

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by-laws were unconstitutional as being legislation in the field of criminal law, was also rejected.

Note that Ontario substantially increased a municipality's control over body-rub parlours and other similar operations: The Municipal Amendment Act, 1978, S.O. 1978, c. 17 (*now* Municipal Act, R.S.O. 1980, c. 302, ss. 221, 222).

241 [1978] 1 S.C.R. 458, 15 N.R. 386, [1977] 4 W.W.R. 275, 2 M.P.L.R. 162, 75 D.L.R. (3d) 1 (1977); *see* Rust-D'Eye, Comment, 16 OSGOODE HALL L.J. 761 (1978).

242 More particularly, for an "adult boutique". The matter came before the Court on an application for *mandamus*. *Re* Tomaro and City of Vanier, 20 O.R. (2d) 657, 6 M.P.L.R. 104, 89 D.L.R. (3d) 265 (C.A. 1978), also involved such an application, this time for a licence to operate a body-rub parlour. *See* text accompanying note 396 *infra*.

See also Dinallo v. The Queen, 21 O.R. (2d) 379 (Cty. Ct. 1978) (applicant has "procured" licence to operate body-rub parlour once permission given, notwithstanding prescribed fee of $3,355 not paid and actual licence not issued).

243 *See* Municipal Act, *now* R.S.B.C. 1979, c. 290, s. 508.

244 Fountainhead Fun Centres Ltd. v. Ville de St-Laurent, *supra* note 225; Fountainhead Fun Centres Ltd. v. Ville de Montréal, [1981] Que. C.A. 486, *rev'g* 4 M.P.L.R. 193 (Que. C.S. 1978), *leave to appeal granted* 39 N.R. 353 (S.C.C. 1981); *Re* Leavey and City of London, *supra* note 224.

245 Fountainhead Fun Centres Ltd. v. Ville de Montréal, *supra* note 244 (by-law prohibiting minors from entering pinball arcade and from using pinball machines located elsewhere).

246 *Re* Kit and Metropolitan Toronto, 26 O.R. (2d) 323, 104 D.L.R. (3d) 641 (Div'l Ct. 1979) (holding that the Planning Act, *now* R.S.O. 1980, c. 379, gives power to "prohibit" as well as to regulate, and that there is a clear difference in this regard between zoning and licensing cases). *See also Re* King Restricted Area By-law 78-32, 10 O.M.B.R. 234 (Mun. Bd. 1979), *aff'd* 10 O.M.B.R. 234, at 240 (L.G. in C. 1979) (by-law approved on an interim basis).

247 17 B.C.L.R. 273, 9 M.P.L.R. 283 (B.C.S.C. Chambers 1979), (Makuch, Annot., 9 M.P.L.R. 283 (1979)), *rev'd* 118 D.L.R. (3d) 552 (C.A. 1979).

248 *Supra* note 4.

> property on which the business is being carried on. . . . The desirability of a fence, or hedge, is not the question that has to be answered but rather whether it falls within the power under which alone it is authorized.[249]

(d) *Discrimination*

The allegation that a by-law is discriminatory is one that is often made.[250] It is made successfully where the by-law in question discriminates between properties located in the same zone, as was the case in *Duquette v. Port Alberni*[251] and in *Ivanhoe Corp. v. Beauport Realties (1964) Inc.*[252] More often, however, the charge of discrimination is made against site-specific, or "spot" zoning by-laws: while all properties within the zone are treated in the same manner, the designation of the zone itself is alleged to be discriminatory, in that it singles out a lot or lots owned by one person.[253] Such by-laws are normally upheld if the municipality is acting in good faith and in the public interest in passing the by-law.[254] Where, however, there are no "proper planning grounds" to warrant the discriminatory treatment, no "rhyme nor reason in a planning sense, for it",[255] such by-laws are held invalid as discriminatory.[256] This is so even

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[249] *Id.* at 258, 120 D.L.R. (3d) at 195 (Laskin C.J.C.). Both the High Court and the Ontario Court of Appeal had classified the by-law as licensing and regulatory.

The issue in all these cases is, of course, whether the by-law had been adopted by the correct procedure. *See also* Capozzi Enterprises Ltd. v. Central Okanagan, *supra* note 104.

[250] For example, the licensing by-laws discussed above were attacked on this ground. *See especially* Fountainhead Fun Centres Ltd. v. Ville de Montréal, *supra* note 244; *Re* Moffat and City of Edmonton, *supra* note 239; Fountainhead Fun Centres Ltd. v. Ville de St-Laurent, *supra* note 225; *Re* Leavey and City of London, *supra* note 224. This is particularly true of those pinball parlour by-laws that tried to limit access of children. For other miscellaneous by-laws attempting to distinguish between users, *see* Adams v. Cranbrook, 11 B.C.L.R. 206, 99 D.L.R. (3d) 484 (S.C. 1979) (imposition of fee on non-residential users of city recreation facilities); Wedman v. City of Victoria, 15 B.C.L.R. 303, 105 D.L.R. (3d) 94 (S.C. Chambers 1979) (discrimination against apartment dwellers as to free garbage collection).

[251] *Supra* note 4.

[252] *Supra* note 227.

[253] This is a reference to by-laws that restrict the use of land. Sometimes, of course, site-specific by-laws may confer an advantage on the owner that is not given to his neighbours or others in similar circumstances. Such by-laws are not normally regarded as discriminatory. *See, e.g., Re* Etobicoke By-laws 1978-21 & 1978-232, 8 M.P.L.R. 25 (Ont. Mun. Bd. 1979) (*see* Goyette & Makuch, Annot., 8 M.P.L.R. 25 (1979)) (by-law permitting mausoleum and cremation facilities at one cemetary in spite of objections by another cemetary owner where such uses were prohibited).

[254] *See, e.g.*, Lees v. West Vancouver, [1980] 1 W.W.R. 124 (B.C.C.A.), *aff'g* 6 M.P.L.R. 66 (B.C.S.C. 1978); Papolis v. Borough of Scarborough, 3 M.P.L.R. 302 (Ont. H.C. 1977). *See also* Wahl v. Medicine Hat, *supra* note 94.

[255] *Re* H.G. Winton Ltd. and North York, 20 O.R. (2d) 735, at 745, 6 M.P.L.R. 1, at 12, 88 D.L.R. (3d) 733, at 741 (Div'l Ct. 1978) (Makuch, Annot., 6 M.P.L.R. 2 (1978)) (by-law prohibiting use of Mazo de la Roche mansion as Zoroastrian Temple).

[256] In addition to the *Winton* case, *id.*, *see Re* Rodenbush and North Cowichan, *supra* note 233; R. v. Vanguard Hutterian Brethren Inc., [1979] 6 W.W.R. 335 (Sask. Dist.

where there is no discrimination on the face of the by-law,in that it nominally applies to a larger area but is discriminatory in effect.[257]

(e) *Unreasonableness*

The leading case on attacking a zoning by-law on grounds of unreasonableness is undoubtedly *Bell v. The Queen*.[258] In that case, Spence J., speaking for the majority, admitted that this ground had been limited by the provisions of The Municipal Act,[259] but held that, although limited, it still exists. He found that the "family zoning" by-law in question represented:

> such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men and, therefore,. . . the Legislature never intended to give authority to make such rules and the device of zoning by relationship of occupants rather than the use of the building is one which is *ultra vires* the municipality under the provisions of the *Planning Act*.[260]

(f) *Bad Faith*

Running like a thread through all these cases is the possibility that the by-law in question is invalid for having been made in bad faith. Perhaps the only case that should be mentioned specifically in this regard is *Re H. G. Winton Ltd. and North York*,[261] in which Mr. Justice Robins, speaking for the Court, explained the use of "bad faith" in the following terms:

> To say that Council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members. . . . But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily without the degree of fairness, openness and impartiality required of a municipal government. . . .[262]

Ct.).For related proceedings of a procedural nature, *see* R. v. Vanguard Hutterian Brethren Inc., [1979] 4 W.W.R. 173, 46 C.C.C. (2d) 389, 97 D.L.R. (3d) 86 (Sask. C.A.).

[257] *See Winton, supra* note 255, and the *Hutterian Brethren* case, *supra* note 256.

[258] *Supra* note 227.

[259] *Now* R.S.O. 1980, c. 302, subs. 103(2) of which stipulates that by-laws passed under "this Act" shall not be set aside on account of "unreasonableness or supposed unreasonableness". Spence J. would appear to admit, therefore, that this constraint applies to by-laws passed under the Planning Act, R.S.O. 1980, c. 379, as well as those passed under the Municipal Act.

See Falardeau v. Hinton, 5 Alta. L.R. (2d) 122 (Dist. Ct. 1977) holding that a similar provision in Alberta (the Municipal Government Act, R.S.A. 1970, c. 246, s. 113 (*now* R.S.A. 1980, c. M-26, s. 108)) prevented an attack on the grounds of unreasonableness.

[260] *Supra* note 227, at 222, 26 N.R. at 466, 9 M.P.L.R. at 114, 98 D.L.R. (3d) at 263, citing Lord Russell in Kruse v. Johnson, [1898] 2 Q.B. 91, at 99-100 (Div'l Ct.).

[261] *Supra* note 255. *See also Re* Vista Hills Farms Ltd., *infra* note 298.

[262] *Supra* note 255, at 744, 6 M.P.L.R. at 11, 88 D.L.R. (3d) at 741, citing authority throughout. *See also* Muskoka Mall Ltd. v. Town of Huntsville, 3 M.P.L.R. 279 (Ont. H.C. 1977); *Re* McGillivray and Township of Cornwall, 18 O.R. (2d) 283, 4

C. *Interpretation*

Several cases in the period under survey have turned on the interpretation of the by-law. One involved an interpretation of the parking requirements under a by-law,[263] four concerned the definition of a "lot",[264] two the meaning of "*garage*",[265] another that of "*enseigne*",[266] another that of "*maison de chambres*" and "*logement automne*",[267] still another that of "trailer"[268] and one that of "agricultural".[269] Finally, two other cases, decided before the decision of the Supreme Court in *Bell v. The Queen*,[270] considered the word "family".[271]

VII. Development Control

Development control, in a large sense, is a method of controlling the timing and quality of development on a site-by-site basis.[272] It may be either interim or permanent.

M.P.L.R. 18 (C.A. 1977) (by-law declaring land vested in municipality by registration of tax arrears certificate required for public purposes void as being enacted solely for improper motive of enabling municipality to sell land free from statutory right of redemption); Wells v. Village of Marmora, 9 M.P.L.R. 22 (Ont. H.C. 1979) (no bad faith in circumstances); W.A.W. Holdings Ltd. v. Sundance Beach, *supra* note 4 (onus of proving bad faith not discharged).

263 Blouin v. Longtin, [1979] 1 S.C.R. 577, 29 N.R. 317 (1978).

264 *Re* Jarvis and Resort Municipality of Whistler, 82 D.L.R. (3d) 409 (B.C.S.C. Chambers 1977) (by-law excluding strata lots from definition of "lot" meant strata lots unregulated; for another case dealing with the problem of condominium development on a lot, *see* Furnival v. City of Calgary, 18 A.R. 67, 10 Alta. L.R. (2d) 289, 11 M.P.L.R. 77, 103 D.L.R. (3d) 303 (C.A. 1979)); Ville de Montréal v. L. & M. Parking Ltd., [1977] Que. C.S. 414 (prohibition of "*terrains publics de stationnement*" extends to entire lot and not just part thereof); *Re* Amantides and Borough of Etobicoke, 15 O.R. (2d) 615 (Div'l Ct. 1977) (triangular shaped lot did not have "rear lot line"); *Re* Kelley and Redmond, 26 O.R. (2d) 417, 103 D.L.R. (3d) 542 (Div'l Ct. 1979) ("lot" implied parcel of land with separate legal identity, that is, already severed).

265 Ville de Montréal v. Lareau Automobile Inc., [1977] R.L. 509 (Tribunal de Montréal) (definition of "*garage*" in residential zone as "*dépendance . . . severant au remisage des automobiles*" authorized public garage); St-Basile-le-Grand v. Baptiste, 10 M.P.L.R. 113 (Que. C.S. 1979).

266 Ville de Montréal v. Julien, [1978] R.L. 97 (Tribunal de Montréal 1976) (exclusion from definition of "*les écussons, lettrages et figures formées de matériaux incorporés aux matériaux de construction*" authorized poem painted on side of building).

267 Ville de Montréal v. Alcindor, [1977] R.L. 419 (Tribunal de Montréal).

268 Farr v. Township of Moore, [1978] 2 S.C.R. 504, 19 N.R. 341, 81 D.L.R. (3d) 755 (by-law prohibiting living in "trailer" held not to include "mobile home").

269 Penner v. Lumsden, [1979] 4 W.W.R. 563, 101 D.L.R. (3d) 115 (Sask. C.A.) (operation of greenhouse as principal use held not to be agricultural use); St-Basile-le-Grand v. Baptiste, *supra* note 265 (concerned with meaning of "*cultivateur qui tire de sa ferme sa principale subsistance*").

270 *Supra* note 227.

271 Ville de St Hubert v. Riberdy, *supra* note 229 (included "*famille d'accueil*" for elderly); City of Charlottetown v. Charlottetown Ass'n for Residential Servs., *supra* note 229 (included group home for mildly mentally retarded persons).

272 *See particularly* Kenniff, *supra* note 155, for an overview of techniques tending to greater flexibility in the administration of land use planning.

A. *Interim Development Control*

Quebec's recently adopted Act respecting land use planning and development[273] provides for interim development control during the period of adoption and coming into force of both regional and local plans,[274] a period which could conceivably be as long as nine years.[275] During this period, a fairly rigorous freeze is in force throughout the area with the only new use permitted being agricultural; no new subdivision or construction is possible (except for energy and communication networks) without permission, which may be given only in very limited circumstances.[276] As the prospective plan crystallizes, however, the extent of the freeze can be mitigated, either geographically or substantively, by means of a development control by-law. In this case, permission may then be given for developments otherwise prohibited by the by-law if, presumably, they will be in keeping with the plan eventually adopted.[277]

These dispositions are somewhat similar in effect to sections 31 to 34, particularly section 34, of The Planning and Development Act[278] of Saskatchewan. These sections were judicially noted in *Re Cadillac Developments Corp. and City of Regina*,[279] in which it was held that because the period of the freeze had been improperly extended, it was no longer effective, so that an application for an order for *mandamus* for a building permit would properly lie.

It is also arguable that even in the absence of an equivalent statutory provision in Ontario, a somewhat similar result obtains. This would seem to flow from the decision of the Court of Appeal in *Campeau Corp. v. Township of Gloucester*.[280] Mr. Justice Lacourcière, speaking for the Court, said:

> We are all of the view that the obligation of the Township of Gloucester after approval of the official plan by the Minister was to amend the by-law forthwith, and that in the interval its obligation was to refuse any application for a building permit which did not conform with the official plan of the regional municipality.[281]

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[273] S.Q. 1979, c. 51 (better known as Bill 125).

[274] Ss. 61-75, 111, 112. This aspect of Bill 125 is modelled on the 1974 amendment to the Outaouais Regional Community Act, S.Q. 1969, c. 85 (*amended by* S.Q. 1974, c. 85) (*now* R.S.Q., c. C-37.1, ss. 91-104). The province also experimented with interim development control in the special region legislation, *supra* note 67.

[275] A regional county municipality is required to undertake elaboration of a *schema* within three years of the coming into force of the Act and to adopt it within a further four years (s. 3). A local municipality has a further two years to adopt the implementing by-laws together with its own plan (s. 33).

[276] Ss. 61, 62.

[277] Ss. 64, 65.

[278] S.S. 1973, c. 73 (*now* R.S.S. 1978, c. P-13).

[279] 3 M.P.L.R. 88, 74 D.L.R. (3d) 497 (Sask. C.A. 1977).

[280] *Supra* note 112. The *Boyd Builders* mechanism, discussed *infra* text accompanying note 404, also serves this function.

[281] *Supra* note 112, at 653, 8 M.P.L.R. at 148, 96 D.L.R. (3d) at 321.

The important point, for our purposes, is the use of the words "in the interval", which interval commences at the date of approval of the regional plan.

B. *Permanent Development Control*

Permanent development control, at its most general, is a two-step transaction, involving adoption of a restrictive by-law of general application, designed to freeze development, followed by successive "spot" amendments lifting the freeze on particular sites.[282]

This technique was reinforced in Ontario in 1973 with the adoption of section 35*a* of The Planning Amendment Act, 1973.[283] This was apparently intended to permit the municipality to designate by by-law an area as one of development control and then to negotiate specific agreements with individual owners concerning such matters as widening of abutting highways, pedestrian and vehicular access and lighting, with a right of appeal to the Ontario Municipal Board.[284] This disposition was before the courts on several occasions. In *Re Thomas C. Assaly Corp. in Trust and City of Ottawa*,[285] the Court considered whether the applicant's proposal came within the meaning of "development or redevelopment of lands or buildings" so as to entitle the municipality to apply the section. Two other related cases concerned the right of appeal. In *240953 Developments Ltd. v. City of Hamilton*,[286] the Court refused an order in the nature of *mandamus* directing the municipality to process a request for a development agreement because an applicant had an effective alternate remedy in the right of appeal to the Board: "In our view, this right of appeal . . . applies where improper reasons are given or no reasons are given at all by the municipality for its refusal."[287] In

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[282] *See, e.g., Re* Sarnia Restricted Area By-law 73 of 1976, *supra* note 171.

[283] S.O. 1973, c. 168, s. 10. *See generally* M. REED, SITE PLAN CONTROL IN ONTARIO, Paper 20 (U. of Toronto, Dep't of Urban and Regional Planning: Papers on Planning and Design 1978).

[284] For specific examples of the Ontario Municipal Board's decisions involving s. 35a, *see Re* Toronto By-law 234-75, 1 M.P.L.R. 337 (Ont. Mun. Bd. 1977) (Makuch, Annot., 1 M.P.L.R. 337 (1977)); *Re* Sault Ste. Marie Restricted Area By-law 77-37, *supra* note 170; *Re* Port McNicholl Restricted Area By-law 533, *supra* note 33; *Re* Cambridge Restricted Area By-law 763, 8 O.M.B.R. 374 (Mun. Bd. 1978); *Re* Hamilton Restricted Area By-law 77-283, 9 O.M.B.R. 66 (Mun. Bd. 1978); *Re* London Restricted Area By-law C.P. 315 (lg)-569, 10 O.M.B.R. 18 (Mun. Bd. 1979).

[285] 18 O.R. (2d) 198, at 201, 4 M.P.L.R. 213, at 217, 82 D.L.R. (3d) 124, at 128 (Div'l Ct. 1977): "[I]t is my view that the emphasis is not whether such development or redevelopment constitutes one or more buildings but the emphasis is upon the magnitude of the project which may require the imposition of conditions. . ." (Craig J.). *See*, along the same lines, *Re* Nepean Restricted Area By-law 73-76, 9 O.M.B.R. 36 (Mun. Bd. 1978), *new hearing ordered* 10 O.M.B.R. 76 (L.G. in C. 1979), in which the Board suggested, at 45-46: "The provisions of s. 35a are a 'city thing'. In our view they have no place in a by-law that affects a rural farming area."

[286] 3 M.P.L.R. 232 (Ont. Div'l Ct. 1977).

[287] *Id.* at 236 (Griffith J.).

subsequent proceedings in the same matter, the Court held that on the appeal to settle the terms of the agreement, the Board was correct in refusing standing to interested parties other than the municipality and the landowner: "It was not to be a forum for the making of an agreement."[288]

By far the most important case, however, was *Canadian Institute of Public Real Estate Cos. v. City of Toronto*,[289] in which the Supreme Court of Canada effectively rendered the section as then drafted impossible of application by holding that a by-law which designated an area as one of development control by simply repeating *verbatim* the provisions of section 35*a* was invalid. It was the "mere simple repetition of the power and not the exercise of the power"; it turned "a legislative power into an administrative one" and amounted to "a redelegation . . . to itself in a form different from that originally authorized".[290] The Court reached this decision fully aware of the difficulty, if not the impossibility, of enacting a regulatory scheme of the requisite specificity: "That will be a matter upon which the Legislature will have to come to a decision as a matter of policy."[291] The Legislature responded to this suggestion almost immediately by amending section 35*a* to make it clear that the municipality was authorized to pass a by-law in general terms designating an areas as a "site plan control area" and then to negotiate development on an individual basis.[292]

British Columbia has been struggling in similar fashion to Ontario with development control legislation. In 1971, it repealed the then existing section 702A, enacted in 1968,[293] (which had empowered a municipality to designate "development areas" within which it was authorized to waive provisions of the applicable by-law and to substitute other terms and conditions therefor) and replaced it with a new section 702A empowering the municipality to designate "development areas" within which land could be developed by means of a "land use contract".[294] Several cases in the period under survey considered such land use contracts but in most the contract was peripheral to the main issue. For example, in two cases, the issue was the adequacy of the notice and hearing, to which issue the normal zoning by-law provisions applied.[295] In another, the question was whether the registration of a land

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[288] *Re* Hart and 240953 Devs. Ltd., *supra* note 36, at 314, 8 M.P.L.R. at 153 (Reid J.). *Quaere* the correctness of this decision on the facts, as it was an appeal from a refusal to enter into an agreement and not as to the terms thereof.

[289] [1979] 2 S.C.R. 2, 7 M.P.L.R. 39, 103 D.L.R. (3d) 226 (Eberts & Makuch, Annot., 7 M.P.L.R. 40 (1979)).

[290] *C.I.P.R.E.C.*, *supra* note 289, at 9, 7 M.P.L.R. at 50, 103 D.L.R. (3d) at 231, Spence J. citing as to the second point Laskin J., as he then was, in Brant Dairy Co. v. Milk Comm. of Ont., [1973] S.C.R. 131, at 146, 30 D.L.R. (3d) 559, at 582.

[291] *Supra* note 289, at 11, 7 M.P.L.R. 52, 103 D.L.R. (3d) at 233.

[292] The Planning Amendment Act, 1979, S.O. 1979, c. 59, s. 1.

[293] Municipal (Amendment) Act, 1968, S.B.C. 1968, c. 33, s. 166.

[294] Municipal (Amendment) Act, 1971, S.B.C. 1971, c. 38, s. 52.

[295] *Re* Bourque, *supra* note 214; *Re* Boss and Broadmead Farms Ltd., *supra* note 4. *See also* Gow, *Public Hearings and Land Use Contracts in Municipal Law*, 11 U.B.C.L. REV. 285 (1977).

use contract against the title could be modified or discharged.[296] In yet another, the Court treated a land use contract as any other contract and applied private law rules in deciding whether the municipality could be restrained from passing a by-law revoking rights under such a contract.[297] Probably the most important case was *Re Vista Hills Farms Ltd.*,[298] in which the British Columbia Court of Appeal held valid a by-law down-zoning a parcel of land specifically to require a developer to enter into a land use contract so as to include a term requiring the payment of impost charges.[299]

Because municipalities were resorting to this technique so often, rather than to traditional zoning, the Legislature repealed this second section 702A in 1977 and substituted therefor section 702AA, providing for control of land by way of "development permit".[300] This section more closely resembles Ontario's section 35*a* than did its predecessors. It has come before the courts once in the period under review, in *Delsom Estates Ltd. v. Delta.*[301] Munroe J. rejected, without expanding on the reasons, an argument based upon the *C.I.P.R.E.C.* case[302] that the by-law in question was void because the Council had simply repeated therein the powers given to it in the words in which the powers were conferred, leaving the ultimate decision to be made on an *ad hoc* discretionary basis, thereby abdicating its role as legislator.

"Development control" can also be used in more a precise sense than it has been above to refer to that form of land use control, of which the English model is the archetype, under which development proposals are assessed on an individual basis and authorized by a development permit, thereby by-passing the traditional zoning step. Ontario, for instance, has included this technique in The Niagara Escarpment Planning and Development Act.[303] Under this Act, the Minister is empowered to designate any area within the Niagara Escarpment Planning Area as one of development control, within which no development may take place without a development permit issued by the Minister or, as the case may be, his delegate, the Niagara Escarpment Commission. As previously

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[296] West v. District of Surrey, 18 B.C.L.R. 375 (S.C. 1979). Application to modify or discharge was brought under s. 31 of the Conveyancing and Law of Property Act, S.B.C. 1978, c. 16 (*now* Property Law Act, R.S.B.C. 1979, c. 340) which includes land use contracts in a list of essentially private law matters (easements, restrictive convenants, *profits à prendre*) in relation to which such applications may be made. The application was refused notwithstanding that the municipality had already approved cancelling the contract.

[297] Delta v. Nationwide Auctions Inc., 11 B.C.L.R. 346, 100 D.L.R. (3d) 272 (S.C. 1979).

[298] 6 B.C.L.R. 43, 6 M.P.L.R. 217 (*sub nom.* Vista Hills Farms Ltd. v. White Rock) (C.A. 1978).

[299] *See* text accompanying note 547 *infra.*

[300] Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, s. 13 (*now* R.S.B.C. 1979, c. 290, s. 17).

[301] 15 B.C.L.R. 397 (S.C. 1979).

[302] *Supra* note 289.

[303] R.S.O. 1980, c. 316, ss. 22-23.

noted, *Re Braeside Farms Ltd.*[304] established that the initial designation by the Minister of an area as one of development control was a legislative act, which could be made without notice to the owners affected.[305] Appropriate safeguards for the individual are provided upon the application to be released from the controls and to be granted a development permit: at this stage, the rules of natural justice apply.[306]

Alberta is the province that has experimented most with the concept of development control in the more limited sense here being used. Its former Planning Act[307] gave municipalities the choice of regulating land use either by means of a traditional zoning by-law or by development control. Under the latter method, the initial decision to grant a permit would be made by the approving officer, with right of appeal to a Development Appeal Board. While the municipal council could limit the approving officer's discretion by passing a land use resolution, such resolutions were not binding on the Appeal Board.[308] At that level, therefore, the full discretionary effect of development control was felt. Most of the cases decided within the survey period dealt with the right of appeal,[309] but one, *Tegon Developments Ltd. v. City of Edmonton*,[310] dealt with the substance of the development control mechanism, holding

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[304] *Supra* note 60. Hughes v. Peel Land Div. Comm., 8 O.M.B.R. 499 (Mun. Bd. 1978); Clement v. Brouwers, 9 O.M.B.R. 31 (L.G. in C. 1978) and Niagara Escarpment Comm. v. Alexander, 10 O.M.B.R. 182 (Mun. Bd. 1979) illustrate the interrelationship between decisions under the Planning Act, R.S.O. 1980, c. 379, and the development permit system.

[305] *See* text accompanying note 61 *supra.*

[306] In the particular instance, the decision of the Minister to refuse a development permit was quashed as the hearing officer's report did not contain a "summary of the representations made", as the Act required.

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

[308] Pacific Devs. Ltd. v. Council of City of Calgary, [1973] 6 W.W.R. 406 (Alta. C.A.), a case outside the parameters of the study.

[309] Binder v. City of Edmonton, 5 A.R. 211, 3 Alta. L.R. (2d) 94 (S.C. 1977) (no power in municipality to require a payment of fee as condition precedent to exercise of right of appeal); Stuart Olson Constr. Ltd. v. Council of City of Edmonton, 5 A.R. 44, 3 Alta. L.R. (2d) 239 (C.A. 1977) (Board's decision outside its jurisdiction as notice of appeal was served one day beyond statutory time limit and no circumstances justifying extension of delay); *Re* McArthur and Municipal Dist. of Foothills No. 31, 78 D.L.R. (3d) 359 (Alta. C.A. 1977) (in absence of Development Appeal Board, Act gives Council jurisdiction to hear appeal, even of its own application to operate a gravel pit on its own land in residential area); O'Hanlon v. Municipal Dist. of Foothills No. 31, 17 A.R. 477, 11 M.P.L.R. 56 (C.A. 1979) (appeal granted and rehearing ordered as failure of Development Appeal Board to give written reasons made determination of validity of other grounds of appeal impossible). For subsequent proceedings, *see* O'Hanlon v. Municipal Dist. of Foothills No. 31 (No. 2), [1980] 1 W.W.R. 304, 11 M.P.L.R. 56 (Alta. C.A. 1979); Maysky v. City of Edmonton, 7 A.R. 262 (C.A. 1977) (Board having no jurisdiction to hear appeal from decision of development officer made under zoning by-law with which the proposed development complies in every respect). This last case neatly illustrates the difference between traditional zoning and development control.

[310] *Supra* note 227. *See also* Schmal v. City of Calgary, 9 A.R. 396 (Dist. Ct. 1977), dealing with the procedure to be followed by the city under its own development control by-law.

that it did not entitle a municipality to preserve historic sites and induce others to advance money for their preservation.

The 1977 revision of The Planning Act[311] has substantially modified the development control aspect of Alberta's legislation: "The dual system under the old Act had been a source of considerable confusion and no small amount of litigation. With that in mind, but also considering that each system had much to commend itself, the Legislature has adopted a single mechanism that purports to incorporate the best of both worlds."[312] The attributes of development control are incorporated both in the "discretionary uses" concept of land use by-laws and especially in the "direct control districts".[313] Two cases have been decided under the new Act. *Re Hannley and City of Edmonton*[314] involved an appeal under the mechanism of the new Act on a substantive question governed by the old Act; *Re Alberta Giftwares Ltd. and City of Calgary*[315] decided that rather than bringing an application for an order in the nature of *certiorari* to quash a development permit, an individual should normally follow the appeal procedure under the Act.[316]

VIII. Minor Variances

The problem with zoning by-laws is their inflexibility; this is particularly so where, as is most often the case, the zoning by-law is comprehensive or Euclidean in nature. To import a measure of flexibility, most jurisdictions have adopted a procedure whereby an administrative body is authorized to permit "variances" from the terms of the by-law. In Saskatchewan, for example, The Planning and Development Act, 1973,[317] provides for an appeal to a District Zoning Appeals Board, with a further appeal to the Provincial Planning Appeals Board, for a "relaxation" of the provisions of a by-law in the event of practical difficulties or unnecessary hardships resulting from exceptional conditions of the site. According to *Re Dome Construction Ltd. and Rural Municipality of Moose Jaw, No. 161*,[318] this relaxation must be

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311 The Planning Act, 1977, S.A. 1977, c. 89 (*now* The Planning Act, R.S.A. 1980, c. P-9).

312 Laux, *supra* note 12, at 36.

313 Ss. 68-70.

314 *Supra* note 218. *See also* Belvedere Devs. Ltd. v. County of Beaver, No. 9, 8 Alta. L.R. (2d) 122 (Dist. Ct. 1978).

315 10 Alta. L.R. (2d) 221, 103 D.L.R. (3d) 556 (Q.B. 1979).

316 An action for *certiorari* would lie only if the development officer had violated his duty to be fair. In this regard, the court noted "a movement away from the strict attempt of classification of statutory functions as judicial, quasi-judicial or administrative and instead . . . into an examination of whether or not the authority in question has acted fairly and in good faith"; *id.* at 224, 103 D.L.R. (3d) at 558 (Forsyth J.).

317 S.S. 1973, c. 73, ss. 82, 83 (*replaced by* R.S.S. 1978, c. P-13, ss. 83, 84).

318 100 D.L.R. (3d) 729 (Sask. C.A. 1979). In Robichaud v. Development Officer, Belledune Planning Dist., 2 M.P.L.R. 246 (1977) the New Brunswick Planning Appeal Board granted an appeal for a variance to permit a canteen operation from a garage because of special or unreasonable hardship of a financial nature.

granted unless two conditions are present: that it be contrary to the purposes and intent of the by-law and that it would injuriously affect neighbouring properties. In Ontario, a local municipality may create a Committee of Adjustment[319] to grant variances, either with or without conditions,[320] with appeal from its decision to the Ontario Municipal Board.[321] And, as is the case for all its decisions, the decision of this latter body may in turn be appealed either by way of rehearing before the Board[322] or by petition to Cabinet.[323] Alternatively, the applicant can make subsequent application if his application is denied, but there is a possibility that such successive applications constitute an abuse of process.[324]

Whether someone has standing to appeal a decision granting a variance has been considered by the courts in *Re Ledohowski Hotels Ltd.*

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[319] Planning Act, R.S.O. 1980, c. 379, s. 48. *See* Rodgers, *Committees of Adjustment*, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 73 (Law Soc'y of Upper Canada 1978).

[320] But the condition imposed must bear a reasonable relationship to the variance sought: *Re* Texaco Canada Inc. and Comm. of Adjustment of Guelph, 10 M.P.L.R. 202 (Ont. Mun. Bd. 1979) (not sufficent relationship between application to build kiosk for self-service gas station and condition requiring dedication of land for road widening).

[321] Subs. 48(13); Kerr v. Stoney Creek, 7 O.M.B.R. 154 (Mun. Bd. 1977) (hearing before Board trial *de novo* with Board required to hear all evidence and reach decision unmindful of what Committee of Adjustment did); Ruttan v. Gosselin, 7 O.M.B.R. 81 (Mun. Bd. 1977) (appeal dismissed; the grounds of appeal, being interference with right of way, not sufficient to require full hearing and civil remedy available); East York Bd. of Educ. v. East York, 8 O.M.B.R. 445 (Mun. Bd. 1978) (appeal dismissed as variance not necessary in circumstances).

[322] Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42; Hagopian v. Joyce, 9 O.M.B.R. 126 (Mun. Bd. 1978) (motion for rehearing denied, since neither procedural defect, error in the previous decision, changed circumstance nor new evidence shown). Note that in Hightower Inv. Ltd. v. East York, 9 O.M.B.R. 178 (Mun. Bd. 1978), the Board rejected as improper an individual application to rezone to permit conversion of apartment recreational space to other uses; previous decision had permitted such conversion as a minor variance for five years and the rezoning was an attempt to remove indirectly the time limit. Also concerned with the question of conversion of apartment recreational space to residential use was *Re* Borough of Scarborough and Comm. of Adjustment of Scarborough, 10 M.P.L.R. 205 (Ont. Mun. Bd. 1979) (minor variance refused as change would result in Board fulfilling legislative rather than administrative function) (*see* Goyette, Annot., 10 M.P.L.R. 205 (1980)).

[323] Nagy v. Garbaliauskas, 8 O.M.B.R. (L.G. in C. 1978) (reduction of side yard variance to permit swimming pool after construction substantially completed denied); Macaulay v. Prime Equities Inc., 8 O.M.B.R. 358, at 363-64 (L.G. in C. 1978), appeal from *sub nom. Re* Macaulay and City of Toronto, 2 M.P.L.R. 142 (Ont. Mun. Bd. 1977) which resulted in order for new public hearing (*see* Cameron, Annot., 2 M.P.L.R. 142 (1977)).

[324] Massa v. Corfinio Constr. Ltd., 10 O.M.B.R. 116 (Mun. Bd. 1979) (three applications within 14-week period; construction almost completed before variance sought).

and Winnipeg Committee on Environment[325] and in *Re Victoria Wood Development Corp. and Jan Davies Ltd.*[326] In the former, the Manitoba Court of Appeal held that the City Planner did not having standing to appeal as she was not a person who had "[made] representations" at the meeting:[327] merely appearing as a resource person to give advice and direction did not constitute playing the active adversarial role implied by the phrase. In the latter case, the Ontario Court of Appeal held that an owner of property located eight miles from the site in question did not have standing to appeal as a person "who has an interest in the matter",[328] notwithstanding that the appellant was a resident and taxpayer in the municipality. Although the test of interest is relative, some geographic proximity is necessary.[329]

Most enabling legislation restricts the scope of such administrative adjustments in the application of zoning by-laws to those that are "minor" or represent "the minimum necessary". For example, in Ontario, variations in side yard requirements from six feet to one[330] or two [331] feet were refused as not being minor, as was an increase from six to ten in the maximum number of children in a group foster home.[332] On the other

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[325] 6 M.P.L.R. 229, 89 D.L.R. (3d) 333 (Man. C.A. 1978).

[326] 25 O.R. (2d) 774, 10 O.M.B.R. 47, 102 D.L.R. (3d) 184 (C.A. 1979); leave to appeal to S.C.C. denied: 25 O.R. (2d) 774n, 10 O.M.B.R. 503, 102 D.L.R. (3d) 184n.

[327] The City of Winnipeg Act, S.M. 1971, c. 105, subs. 621(5).

[328] The Planning Act, R.S.O. 1970, c. 349, subs. 42(13) (*replaced by* R.S.O. 1980, c. 379, subs. 49(13)).

[329] To like effect, *see* Halifax Atlantic Invs. Ltd. v. City of Halifax, 28 N.S.R. (2d) 193, 43 A.P.R. 193 (C.A. 1978) (Hotel Association appealing decision of city to consolidate several lots to permit construction of new hotel; *held*, not "person aggrieved" within meaning of statute: not person whose lands are adjacent or even near consolidated lots; real cause of complaint not consolidated lots but unwanted competition from the resulting hotel). *But see*, in the same vein, *Re* McNamara Corp. and Colekin Invs. Ltd., 15 O.R. (2d) 718, 2 M.P.L.R. 61, 76 D.L.R. (3d) 609 (Div'l Ct. 1977) (Jaffary, Annot., 2 M.P.L.R. 62 (1977)) (standing of appellant, owner of nearby building, not questioned, notwithstanding that real cause of complaint probably fear of resulting competition).

[330] Franks v. Friesen, 7 O.M.B.R. 57 (Mun. Bd. 1977).

[331] Tenis v. Pantaleo, 7 O.M.B.R. 320 (Mun. Bd. 1977) (holding as well that variance neither desirable nor in keeping with general intent and purpose of by-law). Further examples concerning lot size are: Ellis v. Dellio, 7 O.M.B.R. 179 (Mun. Bd. 1977); Fattore v. North York, 7 O.M.B.R. 63 (Mun. Bd. 1977); Cassidy v. Infante Bros. Gen. Contractors Ltd., 7 O.M.B.R. 149 (Mun. Bd. 1977).

[332] Borough of York v. L.G.B. Holdings Inc., 8 O.M.B.R. 437 (Mun. Bd. 1978) (emphasis on fact that standard of six children had been suggested by Metropolitan Toronto following detailed study and adopted by local municipality after much consideration). *See also* Pavlinak v. Stoney Creek, 6 O.M.B.R. 362 (Mun. Bd. 1977) (teaching art in home in residential zone requires by-law amendment); Peel Condominium Corp. No. 30 v. Ticon Dev. Ltd., 7 O.M.B.R. 165 (Mun. Bd. 1977) (signs advertising commercial uses outside apartment buildings not minor variance); *Re* Howold and City of Kitchener, 9 O.M.B.R. 495 (Mun. Bd. 1978) (access to light industrial area through residential zone).

hand, various other reductions in set-back,[333] side yard[334] and frontage[335] requirements, variations in height restrictions[336] and parking requirements[337] as well as changes in use,[338] were permitted, with[339] or without conditions.

It is no longer clear, however, whether the question of whether a variance is "minor" or "the minimum necessary" goes to jurisdiction. In other words, is the classification of the variance reviewable by the courts?[340] The traditional response that judicial review obtains is reflected in the decision of the Court of Queen's Bench of Manitoba in *Wiens v.*

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[333] Gasse v. Knights of Columbus, 7 O.M.B.R. 172 (Mun. Bd. 1977) (rear yard set-back reduced from 10 to 5 feet); Porter v. G. Gatto Constr. Ltd., 7 O.M.B.R. 451 (Mun. Bd. 1978) (front yard set-back reduced from 25 to 10 feet); Bronfman v. Marker 88 Enterprises Ltd., 8 O.M.B.R. 459 (Mun. Bd. 1978) (front lot reduced from 20 to 16 feet and rear lot from 25 to 15 feet).

[334] Murray v. Bernachia, 8 O.M.B.R. 463 (Mun. Bd. 1978) (reduction from 8 to 1.5 feet to permit continuance of breezeway that had stood for years without objection); Calandra v. Scarborough Comm. of Adjustment, 10 O.M.B.R. 106 (Mun. Bd. 1979) (variance reduced from 4 to 2 feet to save line of established trees from being destroyed); Paolini v. North York Comm. of Adjustment, 10 O.M.B.R. 50 (Mun. Bd. 1979) (reduction from 4 to 1.17 feet to regularize completed garage additions: $500 paid to neighbour to compensate for diminution of value of his property). Note that, more often, applications for minor variances are refused even though the building has been substantially completed: *e.g.*, Smith v. Kincardine, 8 O.M.B.R. 309 (Mun. Bd. 1978).

[335] Derbyshire v. Portscheller, 9 O.M.B.R. 341 (Mun. Bd. 1978) (reduction from 50 to 40 feet).

[336] *Re* Masztaler and Toronto, 8 C.E.L.R. 15 (Ont. Mun. Bd. 1978) (extension from 30 to 52.5 feet to permit the installation of a solar collector on the roof).

[337] Rizzo v. Robinson, 8 O.M.B.R. 453 (Mun. Bd. 1978).

[338] Hodgins v. Bilton, 7 O.M.B.R. 452 (Mun. Bd. 1978) (permission given to use part of dwelling house as photographic studio).

[339] Hoppe v. North York, 7 O.M.B.R. 102 (Mun. Bd. 1977) (side yard variance allowed for a period of five years, *citing Re* McNamara Corp. and Colekin Invs. Ltd., *supra* note 329); Logan v. Borough of Scarborough, 7 O.M.B.R. 353 (Mun. Bd. 1977) (townhouses permitted to exceed maximum building coverage on condition that landscaped buffer of trees and shrubs be provided); Samra v. Township of Goulbourn, 7 O.M.B.R. 465 (Mun. Bd. 1977) (parking in rear yard of restaurant permitted on condition that site plan agreement be entered into with municipality); *Paolini*, *supra* note 334; Chandler v. Toronto Comm. of Adjustment, 10 O.M.B.R. 325 (Mun. Bd. 1979) (side yard reduction permitted to accommodate wooden deck on condition that height of railing be extended); Mathews v. Township of Eramosa, 10 O.M.B.R. 479 (Mun. Bd. 1979) (permission given to construct accessory building prior to main building, with variance to terminate on fixed date, by which time main building must be completed, otherwise, owner could be required to remove accessory building). *But see Re* Texaco Canada Inc. and Comm. of Adjustment of Guelph, *supra* note 320 (although committee of adjustment has wide discretionary powers to impose conditions, conditions imposed must be reasonably related to relief sought).

[340] It is clear that a committee can classify a variance as minor and nevertheless refuse to approve it. *See, e.g.*, Leib v. Canadiana Towers Ltd., 7 O.M.B.R. 161 (Mun. Bd. 1977); Diamantopoulos v. Borough of Scarborough, 9 O.M.B.R. 254 (Mun. Bd. 1978); Winter Masonry Ltd. v. Belle River, 8 O.M.B.R. 327 (Mun. Bd. 1978); M & C Landscapers Ltd. v. Town of Caledon, 7 O.M.B.R. 49 (Mun. Bd. 1977).

The issue is whether a committee's approval of a variance can be challenged before the courts on the grounds that the variance is not minor. Or alternatively, can refusal of a variance on the grounds that it is not minor be challenged?

City of Winnipeg,[341] holding that a variance permitting a "semi-institutional home for retarded children" in an area zoned for single families exceeded the jurisdiction of the authorizing committee[342] because it was not "the minimum variance. . . necessary to relieve against the injurious and unnecessary effect of the zoning by-law upon the applicant, his property or his rights".[343] The variance ought properly to have been framed in a more restrictive manner; as drafted, it constituted a by-law amendment.[344] The decision of Ontario's Divisional Court in *Re McNamara Corp. Ltd. and Colekin Investments Ltd.*,[345] however, would seem to suggest that the minor nature of a variance may not be reviewed by the courts. In that case, the Ontario Municipal Board had granted an appeal from a decision of the Committee of Adjustment granting an application for a minor variance for the reason that "[t]here is no jurisdiction in the Committee of Adjustment or in the Board to find a variance. . . which completely eliminates the requirement [of the by-law] as minor."[346] At Divisional Court level, however, after holding that there was nothing in the Act to deprive the Committee or the Board of jurisdiction in the event a variance eliminates a by-law requirement or fully exempts an owner from it, and after saying that the term "minor variance" is a relative one and should be flexibly applied, the Court went on to say, "it is for the committee and, in the event of an appeal, the Board to determine the extent to which a by-law provision may be relaxed and a variance still classed as 'minor'," and further, "there must be many instances where full exemption can properly be considered no more than a minor variance. It is, as I have said, for the committee and Board to make that determination."[347] These statements go rather far, it would seem, in suggesting that the classification of a variance as minor is within the sole jurisdiction of the administrative body and is not subject to judicial review. In reaching its decision, however, the Court did not have before it the decision of the Supreme Court of Canada in *Min-En*

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[341] [1977] 6 W.W.R. 568 (Man. Q.B.).

[342] The St. Vital Community Committee at first instance and the Committee of Environment on appeal. The appeal is now to "the designated committee": The City of Winnipeg Act, S.M. 1971, c. 105, subs. 621(9) (*amended by* S.M. 1977, c. 64, s. 98).

[343] Subs. 621(3) (*repealed by* S.M. 1974, c. 73, s. 62).

[344] In Revie v. St. Vital Community Comm., *supra* note 218, involving the same section of the Act, an order permitting the establishment of two lots smaller than required under the by-law was struck down as being *ultra vires* for the procedural reason that the order granting the variance did not contain a statement setting out the essential elements of the Committee's jurisdiction, as the Act required.

[345] *Supra* note 329.

[346] *Id.* at 721, 2 M.P.L.R. at 64, 76 D.L.R. (3d) at 612. The variance requested was from a requirement of the by-law that a retail store of the given floor area have one loading dock. The variance granted exempted the lands from the by-law requirement on condition that a particular form of loading chute be installed.

[347] *Id.* at 721-22, 2 M.P.L.R. at 65, 76 D.L.R. (3d) at 612. Such a decision should not be made by the Board on a preliminary objection as to jurisdiction, but rather after a full hearing on the merits. *See* Deem Management Servs. Ltd. v. City of Mississauga, 10 O.M.B.R. 455, 11 M.P.L.R. 289 (Mun. Bd. 1979); Horne v. Shaw Pipe Protection Ltd., 10 O.M.B.R. 315 (Mun. Bd. 1979).

Laboratories Ltd. v. Board of Variance of Vancouver.[348] Before the Court in that case was a provision permitting a Board of Variance, upon application of someone alleging that enforcement of a zoning by-law with respect to siting, size or shape of a building or of a structure would cause him undue hardship, to exempt the applicant from the relevant provisions of the zoning by-law "to the extent necessary to give effect to its determination".[349] The Board of Variance of Vancouver had allowed such an application for a variance based on hardship and had exempted the owner of property in an industrial zone from a twenty-foot side yard requirement, thereby permitting him to build a warehouse to the full extent of its fifty-foot frontage. This variance had been quashed at first instance as exceeding the Board's jurisdiction and then restored by majority decision of the British Columbia Court of Appeal. In the Supreme Court of Canada, while it is true that Laskin C.J.C., speaking for the majority, did hold that the granting of the exemption and its extent was for the Board to decide and was not reviewable on *certiorari*,[350] he specifically contrasted the wide power given to a Board of Variance in British Columbia with the more restricted one in Ontario, of allowing only "minor variances".[351] By implication, therefore, the Supreme Court would seem to regard a variance award in Ontario as reviewable by the courts.

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[348] [1978] 1 S.C.R. 696, 13 N.R. 409, 1 M.P.L.R. 306, 74 D.L.R. (3d) 18 (*see* Makuch, Annot., 1 M.P.L.R. 307 (1978)).

[349] Municipal Act, R.S.B.C. 1960, c. 255, para. 709(1)(*c*) (*amended by* S.B.C. 1961, c. 43, s. 44; 1962, c. 41, s. 30; 1968, c. 33, s. 171; 1974, c. 56, s. 24; 1977, c. 57, s. 18).

[350] It is for the Board to determine how far the exemption should go in respect of siting, size and shape, and necessarily any exercise of its exempting power by the Board will result in a particular modification of the zoning by-law. The power given to the Board, in the terms in which it is couched, must have been designed *to relieve a reviewing Court from making distinctions of degree in variances.*

. . .

The Board may decide that to forbid him any leeway would be undue hardship. How much leeway goes to the unchallengeable power of the Board. . . ."

Supra note 348, at 701, 13 N.R. at 413-14, 1 M.P.L.R. at 311, 74 D.L.R. (3d) at 20-21 (emphasis added).

[351] Mr. Justice Spence, dissenting, analyzed the relevant section in the context of the Municipal Act as a whole, and decided that the power of the Board was limited to granting minor variances and was hence reviewable by the Court. He would have allowed the appeal and restored the trial judgment which quashed the award. It is interesting to note that in 1977, s. 709 was amended to limit specifically the power of the Board of Variance to that of authorizing "minor variances": Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, s. 18 (*replaced by* R.S.B.C. 1979, c. 290, s. 727).

IX. NON CONFORMING USES[352]

A. *Criteria*

The general rule, reiterated in several recent cases,[353] is that by-laws, such as zoning by-laws, do not apply to uses or structures lawfully in place before the by-law came into force — that is, that by-laws cannot interfere with acquired rights — and that such rights, once established, are not lost on sale of the parcel but rather benefit successors in title of the original owner.[354]

1. *Lawfulness of Prior Use*

Two cases have addressed the issue of the lawfulness of the prior use. Mr. Justice Steele in *City of Toronto v. San Joaquin Investments Ltd.*[355] would have limited this to require conformity with that part of the by-law that permits the use and not with the regulatory part thereof.[356] Along the same line, in *Richmond Hill v. Miller Paving Ltd.*,[357] Saunders J. was of the opinion that the failure to obtain a building permit prior to commencing the use "is irrelevant to the question as to whether the lands were being used for an unlawful purpose".[358]

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[352] *See* Lyons, *Legal Non-Conforming Uses*, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 25 (Law Soc'y of Upper Canada 1978).

[353] Ville de Lachenaie v. Hervieux, *supra* note 92 (acquired rights); Ville de Blainville v. Charron Excavation Inc., *supra* note 80 (no acquired rights).

In Ontario at least, however, maintenance standards by-laws do have retrospective effect in the sense that they apply to existing buildings: *Re* George Sebok Real Estate Ltd. and City of Woodstock, 21 O.R. (2d) 761 (C.A. 1978).

[354] Town of Midland v. Fred D'Silva Enterprises Ltd., 16 O.R. (2d) 657, 3 M.P.L.R. 158, 79 D.L.R. (3d) 88 (C.A. 1977) (building permit issued by one municipality gave acquired rights notwithstanding subsequent annexation of area by another municipality); R. v. Québec Lait Inc., [1978] R.L. 77.

[355] 18 O.R. (2d) 730, 5 M.P.L.R. 113, 83 D.L.R. (3d) 584 (H.C. 1978), *aff'd on other grounds* 26 O.R. (2d) 775, 106 D.L.R. (3d) 546 (C.A. 1979), *leave to appeal to S.C.C. denied* 26 O.R. (2d) 775n, 106 D.L.R. (3d) 546n (1980).

[356] *Id.* at 742, 5 M.P.L.R. at 126, 83 D.L.R. (3d) at 596:

> I am of the opinion that it is the use and not the regulations that are the operative part relating to the exemptions under s-s.(7) and I am therefore of the opinion that notwithstanding the failure of the owners to comply with all the regulatory aspects under the then applicable zoning by-law, they in fact had a use of the lands that was a lawful use.

The order made did, however, require the defendants, their successors and assigns to comply with the regulations.

[357] 22 O.R. (2d) 779, 94 D.L.R. (3d) 145 (H.C. 1978).

[358] *Id.* at 783, 94 D.L.R. (3d) at 149 (footnotes omitted).

He also felt there was doubt whether a building permit was required (for an asphalt plant for "hot mix asphalt") or, if required, could have been refused. *See also* text accompanying notes 422-24 *infra*.

2. *Existence of Prior Use*

A second line of cases considered the question of whether or not the structure was in fact in place, or the uses commenced, at the requisite time.[359] In British Columbia the applicable section stipulates that a building or structure "lawfully under construction at the time of the coming into force of a zoning bylaw" shall be deemed to be an existing building.[360] According to *Campbell River v. Driemel*,[361] the test for deciding whether a building is so under construction is whether it is possible, with trifling or no expense, to restore the ground to the condition in which it was before the work was started. This position is similar to that adopted in Quebec, where case law has consistently held that in order to have acquired rights the landowner must not only have a building permit but must also have commenced work pursuant thereto.[362] The Ontario statute, on the other hand, exempts buildings for which a building permit has been obtained even though construction has not yet begun, with the added proviso that construction must be begun "within two years after the day of the passing of the by-law" and completed "within a reasonable time after the erection thereof is commenced".[363] In *Re Bay Charles Centre and City of Toronto*,[364] the Ontario Divisional Court refused to grant an application for a declaration that a building had been commenced within the requisite time for the reason that it would be inappropriate to make a declaration of conformity with one wing of the proviso (date of commencement) before conformity with the other wing (time of completion) could also be shown, a decision which this writer finds somewhat restrictive. Finally, the Saskatchewan Act resembles both the British Columbia and Ontario statutes, according non-conforming use status where a building is either "lawfully under construction or all

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[359] This issue is related to the issue of *mandamus* applications for building permits: *see* text accompanying note 386 *infra*.

[360] Municipal Act, R.S.B.C. 1979, c. 290, s. 722(1).

[361] 10 B.C.L.R. 209 (S.C. 1979).

[362] Brasserie Ratafin Inc. v. Ville de Montréal, [1978] Que. C.S. 777, at 778, 5 M.P.L.R. 135, at 138, where Mr. Justice Gonthier said:

> De l'ensemble de la preuve, le Tribunal croit devoir conclure qu'il n'y a pas eu de travaux de construction ni de travaux de démolition préparatoires à la construction. Certes, il y a eu de la planification, des enquêtes, prises de renseignements et évaluation des travaux à faire. Cependant, au point de vue matériel tout au plus y a-t-il eu quelques sondages des fondations et des murs pour en déterminer la structure. Ces travaux n'étaient pas assez importants pour qu'une personne examinant de l'extérieur s'en rende compte.

See also Santilli v. City of Montreal, [1977] 1 S.C.R. 334, 10 N.R. 511 (landowner having neither obtained a building permit nor started construction; no vested rights); B.P. Oil Ltd. v. Ville de Montréal, [1979] Que. C.A. 404 (landowner having demolished existing buildings as necessary step in construction of new; vested rights). These last two cases were brought under a provision of the Charter of the City of Montreal, S.Q. 1959-60, c. 102, para. 524.2*b*, which requires payment of an indemnity to any owner whose vested rights are interfered with by the passing of a by-law.

[363] Planning Act, R.S.O. 1980, c. 379, subs. 39(8).

[364] 3 M.P.L.R. 31, 3 C.P.C. 343 (Ont. Div'l Ct. 1977).

required permits for the construction . . . have been issued", provided erection is commenced within twelve months.[365] This provision was held in *Re Cadillac Developments Corp. and City of Regina*[366] to apply to a shopping centre of which only the foundation had been constructed pursuant to a building permit limited to the foundation.

B. *Enlargement or Extension*

Three cases have dealt with the difficult problem of the extension of the area of a non-conforming use either as to land or throughout a building. *Re Thorman and City of Cambridge*[367] reaffirmed the principle that, under Ontario legislation at least, a non-conforming use of part of a building can be extended throughout the entire building. *R. v. Barry Humphrey Enterprises Ltd.*[368] confirmed that the same principle should be applied when dealing with vacant land alone: "The *bona fide* use of a substantial part of the land in question is sufficient to exempt the whole of that land under what is now s. 35(7) of the *Planning Act*."[369] The Court in *Campbell River v. Gibson*[370] avoided the question of the extension of a non-conforming use over land by deciding that the facts represented a mere continuation of the use rather than its extension.[371] It would seem from the judgment, however, that the Court was of the opinion that the British Columbia legislation precluded the possibility of a lawful extension of a non-conforming use over land alone.

C. *Loss*

A further issue is whether the non-conforming use is lost through discontinuance or abandonment resulting either from non-use or from a change of use.

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[365] The Planning and Development Act, 1973, S.S. 1973, c. 73, s. 75 (*replaced by* R.S.S. 1978, c. P-13, s. 76).

[366] *Supra* note 279.

[367] 18 O.R. (2d) 142, 4 M.P.L.R. 220, 81 D.L.R. (3d) 736 (H.C. 1977) (building in area zoned "detached single family residential" used partially as butcher shop and partially for two separate and self-contained apartments; butcher shop use discontinued; apartment use extended throughout building).

[368] 15 O.R. (2d) 548, 2 M.P.L.R. 54, 76 D.L.R. (3d) 550 (Div'l Ct. 1977).

[369] *Id.* at 551, 2 M.P.L.R. at 59, 76 D.L.R. (3d) at 553. The Court did not necessarily mean, however, that a non-conforming use could always be extended over an entire cadastral lot; the boundaries of the land would be a question of fact to be established in each case.

Note that Quebec legislation specifically restricts the area over which acquired rights may be extended to one-half hectare for residential uses and one hectare for commercial and industrial uses: Act to preserve agricultural land, S.Q. 1978, c. 10, s. 103 (*now* R.S.Q., c. P-41.1).

[370] 8 B.C.L.R. 166 (S.C. 1978).

[371] Eight spaces had been prepared for mobile homes but only two were actually so used at the time the by-law came into effect; the remaining six spaces were subsequently occupied by mobile homes. In classifying this as a continuation of an existing use, the judges accepted the analogy to vacant apartments in an apartment building.

1. *Discontinuance*

In some provinces, such as British Columbia, the relevant statute provides that future uses must conform to a by-law if a non-conforming use is "discontinued" for a stipulated period, such as thirty days.[372] In such a case, as was held in *Re Ponteix Properties Ltd. and City of Victoria*,[373] all that need be shown is the objective fact of discontinuance for the stipulated period; it is not necessary to prove intention to abandon.[374] In other jurisdictions, such as Ontario, where there is no similar legislative provision, the interruption of the use must be pursuant to an intention to abandon. This issue has been addressed in two recent Ontario High Court decisions. In one, *City of Toronto v. San Joaquin Investments Ltd.*,[375] it was held that a cessation of use for over a year, to avoid confrontation with a municipality over enforcement of a by-law, did not amount to abandonment,[376] whereas in the second, *Re Thorman and City of Cambridge*,[377] an interruption in excess of twenty months, coupled with other factors, was held so to be.[378] It is interesting that in the former, the Court placed the onus on the landowner to prove the continuance of the use, whereas in the latter, the municipality conceded it had the onus of proving discontinuance.

2. *Change of Use*

The question of loss of protection through change of use was approached in the traditional manner by Mr. Justice Reid in *Re Weir and Town of Collingwood*,[379] where His Lordship held that the statutory provision that a non-conforming use may continue so long as it is used for the "purpose" for which it is used when the by-law was passed should not be interpreted too narrowly: "if the purpose for which the premises are

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[372] Municipal Act, R.S.B.C. 1979, c. 290, subs. 722(2). Quebec's Act respecting land use planning and development, S.Q. 1979, c. 51, s. 113, para. 2(18) (*a*) provides that a municipality may by by-law require that a non-conforming use cease "if such use has been abandoned, has ceased or has been interrupted for such period of time as it may define, which must be a reasonable period, taking into account the nature of the use, but must not in any case be shorter than six months".

[373] 2 M.P.L.R. 242, 75 D.L.R. (3d) 155 (B.C.C.A. 1977).

[374] In the instant case, the property had not been used as a restaurant (the non-conforming use) because prolonged litigation with the landlord over the validity of the use had made it impossible to find a sub-tenant.

[375] *Supra* note 355.

[376] *See also* Riendeau v. Cité de Beauharnois, *supra* note 4, holding that where a building is illegally demolished by a municipality, the landowner has the right to rebuild in a non-conforming manner (that is, not respecting the relevant set-back provisions).

[377] *Supra* note 367.

[378] *See also* Ville de Mont-Laurier v. Cyr, [1978] Que. C.S. 781, holding that a cessation of user for some fourteen months by virtue of a restraint of trade clause in a sale contract entailed a loss of acquired rights, notwithstanding that the contract of sale was later rescinded.

[379] 25 O.R. (2d) 641, 10 M.P.L.R. 133, 101 D.L.R. (3d) 380 (H.C. 1979).

used has not changed a reasonable rearrangement of the uses of individual parts of the premises does not amount to a discontinuance of the general use. . . ."[380]

D. *Administrative Flexibility*

Questions of enlargement or extension of non-conforming uses and questions of change of use are, therefore, difficult ones under general law. Some jurisdictions have given a measure of flexibility in this regard by providing for such changes with permission of an administrative tribunal. In Ontario, for example, Committees of Adjustment perform this function, with the usual right of appeal to the Ontario Municipal Board and then to Cabinet.[381] Under the relevant legislation, however, a Committee of Adjustment has jurisdiction to authorize such changes only where the land or building continues to be used for the same non-conforming purpose from the date the by-law was passed until the date of the application for an extension or a change of use. It follows, therefore, that the Committee has jurisdiction to authorize only one such change in any given situation; any further changes must proceed by way of by-law amendment.[382] This provision of The Planning Act[383] has been before the courts once in the period under review, with the Divisional Court holding in *Re Roman and Andersen*[384] that in an application under subsection 42(2) (for enlargement or extension of a non-conforming use or for a change of use) the Committee is not to be limited by the qualifying phrases of subsection 42(1) (application for a minor variance): subsection 42(2) provides a "code in itself".[385]

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[380] *Id.* at 643, 10 M.P.L.R. at 135, 101 D.L.R. (3d) at 382.

[381] Planning Act, R.S.O. 1980, c. 379, subs. 49(2). *See, e.g.*, East York v. Standard Auto Glass Ltd., 9 O.M.B.R. 255 (Mun. Bd. 1978), *aff'd* 9 O.M.B.R. 255n (L.G. in C. 1978) (without stated reasons) (application for extension of automobile glass, upholstery and trim shop approved); Ozard v. Connell, 9 O.M.B.R. 372 (Mun. Bd. 1978), *aff'd* 9 O.M.B.R. 372n (L.G. in C. 1979) (without stated reasons) (application for change of use from machinery storage to body shop refused); Hamilton Builders' Supply Ltd. v. City of Hamilton Committee of Adjustment, 10 O.M.B.R. 95 (Mun. Bd. 1979) (application for extension of existing warehouse granted).

[382] *Re* Hagopian, 9 O.M.B.R. 175 (Mun. Bd. 1978); City of Toronto v. Comm. of Adjustment of Toronto, 8 M.P.L.R. 33 (Ont. Mun. Bd. 1979) (Goyette, Annot., 8 M.P.L.R. 33 (1979)); MacPherson v. Town of Newmarket, 10 O.M.B.R. 26 (Mun. Bd. 1979).

[383] R.S.O. 1970, c. 379, subss. 42(1) & (2) (*replaced by* Planning Act, R.S.O. 1980, c. 379, subss. 49(1) & (2)).

[384] 23 O.R. (2d) 442, 9 O.M.B.R. 137 (Div'l Ct. 1979).

[385] *Id.* at 443, 9 O.M.B.R. at 139.

For cases in which applications for minor variances and for extensions or changes of use are interrelated, *see* Chokan v. Legault, 6 O.M.B.R. 303 (Mun. Bd. 1977); Tortorella v. City of St. Catharines, 7 O.M.B.R. 498 (Mun. Bd. 1977); *MacPherson, supra* note 382.

X. BUILDING PERMITS[386]

A. *Non-Issuance by Municipality: Mandamus*

Closely related to the notion of non-conforming use is the issue of whether or not a municipality can be required to issue a building permit and, particularly, whether an application for an order in the nature of *mandamus* will lie therefor.[387]

1. *Requirements*

Five cases dealt with the basic requirement that the applicant must have a right to a building permit before the order will lie. In *Re Jarvis and Resort Municipality of Whistler*,[388] the issue was whether strata lots could qualify as building lots under the applicable by-law; in *Entreprises Herskel Ltée v. Greenfield Park*,[389] *St. Antoine de Tilly v. Houde et*

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[386] Russell, *Rezoning Principles — Building Permits — Natural Justice*, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 1 (Law Soc'y of Upper Canada 1978).

[387] Applications for such orders are, of course, not restricted to requests for a building permit but are available in a wide variety of situations, whenever a public official has a legal duty to perform. *See, e.g.*, Minto Constr. Ltd. v. Township of Nepean, 2 M.P.L.R. 195 (Ont. Div'l Ct. 1977) (application to compel municipality to dedicate to public usage one-foot strip of land as required by Minister as condition of approval of subdivision; application denied as no legal duty to dedicate and accept reserves as public highway).

In some jurisdictions a refusal to issue a building permit may be appealed to an administrative tribunal. *See*, in this regard, City Constr. Ltd. v. Building Inspector of Fredericton, 2 M.P.L.R. 149 (N.B. Provincial Planning App. Bd. 1977) and Evans v. Placentia Town Council, 24 Nfld. & P.E.I.R. 85, 65 A.P.R. 85, 108 D.L.R. (2d) 452 (Nfld. C.A. 1979).

The reverse side of this coin is whether an injunction will issue to restrain the issuance of a building permit. *See, e.g., Campeau Corp., supra* note 112.

[388] *Supra* note 264. In *Re* G. Roger Rivard Constr. Ltd. and East Gwillimbury, 27 O.R. (2d) 34, at 40, 105 D.L.R. (3d) 114, at 120 (Div'l Ct. 1979), *leave to appeal denied* 27 O.R. (2d) 34n, 105 D.L.R. (3d) 114n (C.A.), a municipality was held entitled to revoke building permits once it discovered that the lots in question did not conform to the definition set out in the applicable regulation.

For other cases dealing with revocation of a building permit, *see Re* Smith and Prince Edward Island Land Use Comm'n, 11 Nfld. & P.E.I.R. 450 (P.E.I.C.A. 1977) (procedure on application for writ of *certiorari* also considered); Beaton v. Prince Edward Island Land Use Comm'n, *supra* note 70; *Couillard, supra* note 218 (building permit erroneously granted for more than one building on lot, contrary to zoning regulations); *Furnival, supra* note 264 (building permit erroneously granted for same reason, notwithstanding that various units part of condominium development); H.L. & M. Shoppers Ltd. v. Town of Berwick, 28 N.S.R. (2d) 229, 3 M.P.L.R. 241, 82 D.L.R. (3d) 23 (S.C. 1977) (successful negligence action for damages resulting from erroneously granted building permit).

[389] *Supra* note 4.

Bergeron Ltée[390] and *Mahone Bay v. Saunders*[391] the petitioners were not entitled to building permits because, *inter alia*, their applications were not in order; finally, in *Winsor Homes Ltd. v. St. John's Municipal Council*,[392] the Court underlined that compliance with the formal requirements of subdivision approval is a prerequisite to the issuance of a building permit.[393]

On the other hand, two other cases, *Re George Stinson Construction Inc. and Township of Ameliasburgh*[394] and *Re Weir and Town of Collingwood*,[395] emphasized that *mandamus*, as a prerogative writ rather than a writ of right, is discretionary and could be refused by reason of the applicant's conduct, notwithstanding his technical entitlement thereto. This same theme, the discretionary nature of a *mandamus* action, was taken up in *Re Tomaro and City of Vanier*.[396] This case held that although an application for judicial review in the nature of *mandamus* is discretionary, it is not a request for equitable relief, so that the applicant is not necessarily precluded if he does not come with clean hands.

2. *Defences*

The major problem is to determine under what circumstances, if at all, a municipality is justified in refusing an application for a building permit and a court justified in adjourning an application for *mandamus*, if the proposed development, while conforming to existing by-laws, will contravene such by-laws as amended.

(a) *Statutory Freeze*

Some jurisdictions have express statutory provisions providing for a freeze on the issuance of building permits during the time required to adopt a by-law.[397] Quebec, for example, prohibits the issuance of building

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[390] [1977] Que. C.A. 381. The application for *mandamus* was also refused because the applicant owned only a minor portion of the land required for the project in question (a ship launching slip), the rest being federal land.

[391] 2 M.P.L.R. 307 (N.S.S.C. 1977).

[392] 20 Nfld. & P.E.I.R. 361, 53 A.P.R. 361 (Nfld. C.A. 1978).

[393] Specifically, "approval in principle" of twenty townhouses without requiring the detailed submissions stipulated by statute (The City of St. John's Act, R.S.N. 1970, c. 40, s. 403) was procedurally *ultra vires* and did not constitute formal subdivision approval.

[394] 15 O.R. (2d) 547 (Div'l Ct. 1977). *See also* Burton, *Judicial Discretion and the Granting of Mandamus in Cases Involving Various Schemes under The Planning Act*, 1 ADVOCATES' Q. 355 (1978).

[395] *Supra* note 379.

[396] *Supra* note 242 (application for licence for body-rub parlour).

[397] The statutory freezes to be discussed in this context are somewhat limited in scope, having a maximum duration of, say, 90 days and being designed principally to give the municipality sufficient time to adopt a by-law. Less restrictive both in time and purpose are those statutory freezes known as "interim development control". *See* text accompanying note 272ff. *supra*.

permits that will not conform to the by-law ultimately adopted once "notice of motion has been given to amend a zoning by-law".[398] Although one could argue that this provision applies only to amendments of zoning by-laws and not to their initial adoption, such a literal construction was rejected in *Tardif v. Ayer's Cliff*.[399] A similar provision in British Columbia[400] makes clear that it applies both in the event of adoption and of amendment of zoning by-laws: unlike the Quebec provision, however, time begins to run from the date of application for a building permit rather than the date of notice of motion. In *Esselink v. Matsqui*,[401] the British Columbia Supreme Court held that time did not begin to run until a formal application (including the deposit of plans and payment of fees) was filed; various informal enquiries did not constitute an application within the meaning of the statute. The British Columbia statute also differs from the Quebec one in stipulating that if the proposed by-law is not adopted within the requisite time, "the owners of the land for which a building permit was withheld under this section are entitled to compensation for damages arising from the withholding of the building permit. . . ."[402] For this reason, municipalities sometimes prefer to rely on the more informal mechanism of *Boyd Builders*.[403]

(b) *Boyd Builders*

Most of the ligitation in this area has involved the applicability of the *Boyd Builders* test.[404] One line of cases considered the question of whether this test applied to the institution of the statutory freeze. The

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[398] An Act respecting land use planning and development, S.Q. 1979, c. 51, s. 114. This freeze ceases if the by-law is not adopted within two months or put into force within four months of its adoption. *See, e.g., Entreprises Herskel, supra* note 4.

[399] [1979] Que. C.S. 106. The Court was considering an identical section in the Municipal Code, which has since been replaced by s. 114.

[400] Municipal Act, R.S.B.C. 1979, c. 290, s. 724.

[401] 11 B.C.L.R. 180 (S.C. 1979).

[402] Municipal Act, R.S.B.C. 1979, c. 290, subs. 724(3).

[403] City of Ottawa v. Boyd Builders Ltd., [1965] S.C.R. 408, 50 D.L.R. (2d) 704. *See, e.g.*, Monarch Holdings Ltd. v. Oak Bay, 4 B.C.L.R. 67, 4 M.P.L.R. 147, 79 D.L.R. (3d) 59 (C.A. 1977); Lees v. West Vancouver, *supra* note 254. *Re* Buhler and Rural Municipality of Stanley (No. 2), 5 M.P.L.R. 142, 84 D.L.R. (3d) 692 (Man. C.A. 1978) is also authority for the availability of the extra-statutory *Boyd Builders* mechanism in jurisdictions where a statutory freeze is provided for. (For related proceedings *see* note 445 *infra*.)

[404] An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, *e.g.*, nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.

Boyd Builders, supra note 403, at 410, 50 D.L.R. (2d) at 705 (Spence J.).

answer is not clear, however, as two Quebec cases held that the test did apply[405] whereas two British Columbia cases suggested that it did not.[406]

A second line of cases pursued the question of whether the *Boyd Builders* test goes to the issuance of a building permit or merely to the granting of an adjournment of the *mandamus* hearing. The former interpretation was followed, without discussion, in *Ville de Mirabel v. Carrières T.R.P. Ltée*[407] and, although the matter is not free from doubt, in *Rethazy v. Town of Lincoln*[408] and in *Re Hall and City of Toronto*.[409] The issue was faced squarely in *Monarch Holdings Ltd. v. Oak Bay*,[410] in which the British Columbia Court of Appeal held, Robertson J.A. dissenting, that the *Boyd Builders* requirements are relevant to the question of adjournment of a *mandamus* application and not to the question of a right to a building permit. When, as was the situation in the *Monarch* case, the amending by-law had already been passed and put into force at the time the *mandamus* application came on to a hearing, the court could not grant the *mandamus* application: "To allow the appellant's motion at that stage would have required the trial Judge to order a writ of *mandamus* directing the building inspector of the respondent to do that which was directly forbidden by a by-law of the municipality."[411] Questions such as the intent of the municipality when the building permit was first applied for were, by that time, irrelevant. Similar results obtained in three other British Columbia cases, *Duquette*

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[405] Page v. Municipalité de Contrecoeur, 7 M.P.L.R. 173 (Que. C.S. 1979) (notice of motion met test); Ville de Beloeil v. Guy, 9 M.P.L.R. 44 (Que. C.S. 1979) (notice of motion did not meet test).

[406] Buschmann v. Prince Rupert, [1980] 1 W.W.R. 193, 11 M.P.L.R. 39, 103 D.L.R. (3d) 461 (B.C.S.C.); Absalon Constr. Ltd. v. City of Victoria, 18 B.C.L.R. 76 (S.C. 1979).

[407] *Supra* note 68 (order for *mandamus* granted notwithstanding by-law arguably prohibiting desired use adopted and approved prior to court hearing, albeit after application for building permit). This same interpretation seems to have obtained in Ville de Berthierville v. Dupuis, [1979] Que.C.S. 475.

[408] 2 M.P.L.R. 198 (Ont. H.C. 1977).

[409] 23 O.R. (2d) 86, 8 M.P.L.R. 155, 94 D.L.R. (3d) 750 (C.A. 1979). Although this was in fact an appeal from two orders granting adjournments in a *mandamus* application (once to enable Council to pass the by-law and a second time to enable the Ontario Municipal Board to consider it), the language of the Court and the order it made (setting aside the adjournment order and directing the issuance of the building permit) would seem to indicate that the *Boyd Builders* test was being applied to the question of the issuance of building permits. On the other hand, *Re* Twigg Holdings Ltd. and City of Toronto, 12 O.R. (2d) 523 (Div'l Ct. 1976), *aff'd* 14 O.R. (2d) 344 (C.A. 1977), is not indicative either way, indicating merely that the *Boyd Builders* test applies notwithstanding that the eventual by-law might be *ultra vires* or that it was temporary in nature.

[410] *Supra* note 403.

[411] *Id.* at 86, 4 M.P.L.R. at 166, 79 D.L.R. (3d) at 75 (McIntyre J.A.). Mr. Justice McIntyre also distinguished the *Boyd Builders* case as being limited in application to the "situation in Ontario or other Provinces where zoning by-laws require approval, after passage by municipal councils, by an external approving authority", but this ground of distinction would seem rather wide. *Id.* at 84, 4 M.P.L.R. at 165, 79 D.L.R. (3d) at 74.

v. Port Alberni,[412] *Buschmann v. Prince Rupert*[413] and *Re Wilkin and White*.[414]

Implicated in the above discussion is the question of the time at which the *Boyd Builders* test is to be applied. As is perhaps to be expected, the cases first mentioned above, particularly *Carrières T.R.P. Ltée*,[415] looked to the date of the application for the building permit. If at that time the municipality does *not* have a pre-existing plan with which it is proceeding in good faith and with dispatch, the applicant's *prima facie* right to a building permit has not been defeated and *mandamus* will lie. The later-mentioned cases, on the other hand, looked principally to the date of adjudication of the *mandamus* application. If at that time a by-law has been passed and is in force, the order for *mandamus* will not lie and the individual's *prima facie* right to a building permit has been defeated, regardless of the municipality's intention when the building permit was first applied for. It is only if, at the date of the hearing, the by-law is not yet in force — so that the municipality must request an adjournment — that the court will look to the facts as of the date of the building permit to determine whether the municipality should be granted its request:

> To the argument, again based on the *Boyd* case, that the rights of the appellant fell to be determined as of the date of the application for a permit, while I am of the view that such a proposition applies where adjournment is sought as in the *Boyd* case it does not apply where there exists a by-law that has effectively rezoned the lands in question.[416]

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[412] *Supra* note 4.

[413] *Supra* note 406 (*Monarch* applied).

[414] 11 M.P.L.R. 275, 108 D.L.R. (3d) 468 (B.C.S.C. 1979) (*Monarch* applied to application for approval of subdivision plan).

[415] *Supra* note 68. In *Page*, *supra* note 405, the judge looked at the facts both as of the date of the issuance of the writ of *mandamus* (the date followed in the majority of Quebec cases) and as of the date of the request for a building permit (applying the trial division judgment in *Carrières T.R.P. Ltée*) and held that the individual's rights had been defeated whichever date was chosen. *See also Rethazy*, *supra* note 408; North American Life Assurance Co. v. City of Chatham, 10 R.P.R. 144 (Ont. Div'l Ct. 1979) (Sinclair, Annot., 10 R.P.R. 144 (1979)).

For an example of the general run of Quebec cases (looking to the date of issuance of the writ of *mandamus* and not considering the *Boyd Builders* test), see Fleming v. Ville de Montréal, [1977] Que. C.S. 1021, (*appeal abandoned* [1978] Ann. de Juris. de Qué. 746).

[416] Monarch Holdings Ltd. v. Oak Bay, *supra* note 403, at 89, 4 M.P.L.R. at 170, 79 D.L.R. (3d) at 78 (McIntyre J.A.). *See also* Duquette v. Port Alberni, *supra* note 4, and Buschmann v. Prince Rupert, *supra* note 406 (where a by-law passed during an adjournment which arose fortuitously, rather than being requested, defeated the applicant's right to a building permit).

An interesting variation on this timing theme arose in Ville de Berthierville v. Dupuis, *supra* note 407, at 478 (Meyer J.), in which the *mandamus* line of cases was applied by analogy to validate a building permit retroactively:

> Par analogie, il semblerait que dans le cas d'un permis *accordé* en vertu d'un règlement qui est en voie d'être adopté, mais qui n'est pas encore en vigueur, le dit permis devient valable rétroactivement dès que le nouveau règlement est adopté par le conseil municipal. . . .
>
> Ainsi il semble au Tribunal qu'on doit se placer aujourd'hui ou au plus tôt à la date de la requête en démolition, pour déterminer si l'immeuble est en

Another issue involving the *Boyd Builders* case is whether the three-pronged test set out therein is exhaustive, or whether, even if the municipality has shown intent, good faith and dispatch, the court may nevertheless invoke other criteria and grant the application for *mandamus*. Courts have done so in two recent cases. In *Rethazy v. Town of Lincoln*,[417] the Ontario High Court decided that although the municipality had itself fulfilled the three requirements, material and substantial delays of some four years, not specifically attributable to the municipality, amounted to a denial of justice. It therefore granted the *mandamus* application. And in *Re Hall and City of Toronto*[418] the Ontario Court of Appeal decided that a court must look not only to the three requirements but also to the "balance of equities" between the parties:

> With respect, in not referring to 'discretion', the Divisional Court appears to have granted the adjournment as if the municipality was entitled to it once it had found that the three prerequisites had been met.
>
> The decision in these cases whether to adjourn the application and thus defeat the owner's *prima facie* right involves an exercise of judicial discretion; the equities between the parties have to be weighed to determine whether the balance of fairness and convenience favours the owner of [*sic*] the municipality. . . .[419]

Still concerning the *Boyd Builders* criteria, the question of their applicability to situations involving a prospective expropriation rather than a rezoning was raised but not answered in *North American Life Assurance Co. v. City of Chatham*.[420]

3. *Standing*

A final issue in *mandamus* applications is that of standing. The Court in *McDonalds Restaurants of Canada Ltd. v. Etobicoke*[421] held, Van Camp J. dissenting, that an application by a ratepayer (a local homeowners' association representing the majority of residents in the

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> conformité avec le règlement en vigueur ou non, et non pas se placer à une date antérieure où la construction n'était pas permise.

But see Ville de Mirabel v. Carrières T.R.P. Ltée, 12 M.P.L.R. 104, at 112 (Que. C.A.). The technique used in the *Dupuis* case is, however, somewhat similar to that available under the interim control provisions of the new Quebec planning act. *See* note 277 and accompanying text *supra*.

[417] *Supra* note 408.

[418] *Supra* note 409.

[419] *Id.* at 95, 8 M.P.L.R. at 165, 94 D.L.R. (3d) at 759 (Lacourcière J.A.). These two cases concern the residual discretion to refuse to grant an adjournment. *See* notes 394-96 and accompanying text *supra* for cases illustrating the discretionary nature of an order for *mandamus per se*.

[420] *Supra* note 415. A somewhat similar set of facts was present in *Re* Brunswick Constr. Co., 2 M.P.L.R. 114 (N.B. Provincial Planning App. Bd. 1977) (Cameron, Annot., 2 M.P.L.R. 114 (1977)), although the case did not involve an application for *mandamus*.

[421] 5 C.P.C. 55 (Ont. Div'l Ct. 1977).

area) to be added as a party respondent should be denied because, on the facts, the position of the association was adequately represented by the municipality.

B. *Non-Application by Individual*

The above discussion has been concerned with the circumstances in which a building permit should be issued. Three cases in the period under survey dealt with the converse proposition, that of work undertaken without a valid permit. In one,[422] the main issue was the absence of a permit rather than the conformity of the work to the applicable regulations, whereas in two others,[423] it was quite the reverse: the Court was more concerned with whether or not the work done conformed in fact to the regulations, rather than whether a permit had been issued therefor.[424]

XI. Demolition Control

A. *Residential Property*

Closely related to the question of the issuance of building permits is that of demolition control: an individual cannot construct a new building on a piece of property if he is prohibited from demolishing the old. This interrelation is apparent in Quebec's Act to establish the *Régie du logement* and to amend the Civil Code and other legislation.[425] This Act provides that a municipality can pass a by-law prohibiting an owner from demolishing a residential building without the consent of a committee and requiring him to submit, as part of his application for demolition, "a preliminary programme of re-utilization of the vacated land".[426] It was made explicit by the Divisional Court of Ontario in *Re A. W. Banfield*

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[422] R. v. Cocks, 24 N.S.R. (2d) 269, 35 A.P.R. 269 (C.A. 1977) (sentence of fine for constructing non-conforming garage without permit affirmed).

[423] *Re* Hadley and Santos, 18 O.R. (2d) 221 (H.C. 1977) (order to demolish work in fact complying with regulations refused, notwithstanding done without permit); *Re* Chief Building Official for Toronto and Manolan Enterprises, *supra* note 88 (owner responsible for work done in contravention of regulations whether or not building permit issued).

[424] In *Re Hadley*, however, the court recognized that it would restrain future work being undertaken without a building permit, regardless of whether or not it would in fact conform to the regulations.

To this list of three cases could perhaps be added Richmond Hill v. Miller Paving Ltd., *supra* note 357, and *Re* Lakusta and City of Edmonton, 107 D.L.R. (3d) 766 (Alta. S.C. 1979) (by-law requiring demolition invalid for lack of proper notice), although it is not clear from the facts why the property was ordered demolished.

See also text accompanying note 574 *infra*.

[425] S.Q. 1978, c. 48.

[426] Ss. 120 (adding ss. 412.1 ff. to the Cities and Towns Act, R.S.Q., c. C-19) and 123 (adding ss. 393*g* ff. to the Municipal Code). *See also* ss. 32 ff.

Construction Ltd. and City of Oshawa.[427] The Court held that while a municipality could validly refuse a demolition permit in a demolition control area[428] if the individual did not intend to replace the housing stock thereby demolished, it was not entitled to refuse an application for a building permit otherwise in order: once the demolition permit had been issued, a municipality would be required to issue the building permit, although it could attach conditions thereto.[429] In other words, subsection 45(2) is directed towards maintaining an acceptable quantity of residential housing stock and not to preserving particular buildings.[430]

B. *Heritage Preservation*

This problem has been the subject of several articles in the period under review.[431] Further, British Columbia enacted a Heritage Conservation Act[432] in 1977, which, *inter alia*, authorizes the Lieutenant Governor in Council to designate property as a provincial heritage site, with compensation payable to the owner for any resulting economic loss. The means of providing such compensation was the subject of litigation in *Re City of Victoria.*[433] In this case the Assessment Authority successfully attacked a municipal by-law purporting to freeze the assessed value of designated heritage sites under the authority to provide tax relief to owners of property affected in order to compensate them; while Council could afford relief by reducing the amount of municipal tax after assessment, it could not affect the amount assessed: "Assessments and taxation are not the same. Jurisdiction to give tax relief does not imply a jurisdiction to ascertain the value of land for taxation purposes."[434]

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[427] 21 O.R. (2d) 157, 6 M.P.L.R. 61 (Div'l Ct. 1978) (Makuch, Annot., 6 M.P.L.R. 61 (1978)).

[428] The Planning Act, R.S.O. 1970, c. 349, s. 37*a* (*amended by* S.O. 1974, c. 53, s. 6) (*replaced by* R.S.O. 1980, c. 379, subs. 45(2), authorizes a municipality to establish by by-law a demolition control area within which no residential building can be demolished without a demolition permit.

[429] An appeal lies from the decision of the municipality to the Ontario Municipal Board both as to the issuance of the permit (subs. 45(4)) and as to the conditions (subs. 45(9)). The section also stipulates that in such appeals (unlike others) the decision of the Ontario Municipal Board is final, so that there is no further appeal to the Lieutenant Governor in Council.

[430] This is confirmed by the approach taken in Duration Invs. Ltd. v. City of Toronto, 9 O.M.B.R. 503 (Mun. Bd. 1978) (demolition permit refused).

[431] L'Heureux, *La protection de l'environnement culturel canadien et québécois*, 23 McGILL L.J. 306 (1977); Denhez, *La protection de l'environnement bâti du Québec*, 38 R. DU B. 605 (1978). The latter is the first in a series of articles by the same author on protecting the built environment. The other articles deal with: Ontario, 5 QUEEN'S L.J. 73 (1979); Manitoba, 10 MAN. L.J. 453 (1980); Alberta and the Northwest Territories, 18 ALTA. L.R. 396 (1980); Newfoundland and Nova Scotia, 6 DALHOUSIE L.J. 471 (1981).

[432] S.B.C. 1977, c. 37 (*see now* R.S.B.C. 1979, c. 165). For Quebec, see Cultural Property Act, R.S.Q., c. B-4, *amended by* S.Q. 1978, c. 23.

[433] 15 B.C.L.R. 254, 10 M.P.L.R. 235 (S.C. 1979).

[434] *Id.* at 259, 10 M.P.L.R. at 240 (Andrews J.).

XII. SUBDIVISION CONTROL

In 1978, Quebec adopted obligatory subdivision control for the first time when it enacted An Act to preserve agricultural land.[435] Under this Act, permission of an administrative body, the *Commission de protection du territoire agricole du Québec*, is required either to alienate a lot while retaining a right of alienation over a contiguous lot or to subdivide land by way of a plan and book of reference.[436] The Quebec Act thus reflects the factual duality under which subdivision of land may be effected: that is, on a small scale, whereby one lot or unit of ownership is severed into a limited number of smaller lots or units of ownership, or on a more extensive scale, whereby a large number of lots, usually residential, are created by registered plan of subdivision. In some provinces, such as British Columbia and Quebec, the procedure to be followed is the same in each situation, whereas in other provinces, notably Ontario, it is different.[437]

Most of the jurisprudence concerning subdivision control has emanated from Ontario.[438] In that province, an individual has a right to alienate his property if it is already within a registered plan of subdivision or if he does not retain the fee in the abutting land. Otherwise, permission to subdivide is required, either by way of consent to convey or by way of approval of a plan of subdivision.[439]

A. *Right to Alienate*

1. *Registered Plan of Subdivision*

First, therefore, is the question of whether the land is within a registered plan of subdivision. This has been given a rather extended meaning in two recent cases, as it has been held to include both a town plot survey effected in 1856[440] and a composite plan registered pursuant to provisions of the Registry Act.[441] Nevertheless, a plan once registered is not necessarily registered for all time, as subsection 29(4) of the Planning

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[435] S.Q. 1978, c. 10.

[436] Ss. 28, 29.

[437] *See, e.g.*, Planning Act, R.S.O. 1980, c. 379, ss. 29, 36.

[438] *See generally* WOODS, THE PLANNING ACT, LAND DIVISIONS (THE LAWYERS' BEAR TRAP!), (Can. Bar. Ass'n (Ont.), Continuing Legal Education 1978); Woods, Conveyancing Note, 2 R.P.R. 295 (1978).

[439] S. 29. Other exemptions are when the land is being acquired or disposed of by the federal, provincial or local governments, or when the land is being acquired for a transmission line.

For an example of a contract for sale being frustrated by reason of the vendor's failure to obtain registration of subdivision plans prior to the closing date *see* George Wimpey Can. Ltd. v. Focal Properties Ltd., [1978] 1 S.C.R. 1, 78 D.L.R. (3d) 129 (1977).

[440] *Re* Alron Invs. Ltd. and Greenvest Holdings Ltd., 16 O.R. (2d) 822 (Cty. Ct. 1977).

[441] *Re* Courneyea and Smith, 16 O.R. (2d) 269, 26 CHITTY'S L.J. 63 (H.C. 1977).

Act expressly provides that a municipality may by by-law "designate" any plan of subdivision, with the effect that it is no longer a registered plan of subdivision within the meaning of this exemption. The sole requirement is that the plan have been registered for at least eight years, whether or not it is in fact obsolete or dormant.[442] No ministerial approval is required for the deregistration by-law and it is now clear that in Ontario, at least, prior notice need not even be given to the affected landowner. A 1978 amendment to the Act expressly stated that "[n]o notice or hearing is required prior to the passing of a by-law. . ." (although there is provision for notice subsequent to its repeal, together with an opportunity to be heard as to its amendment or repeal).[443] This amendment has thus considerably restricted the practical effect in Ontario of the holding of the Supreme Court of Canada in *Homex Reality & Development Co. v. Village of Wyoming*[444] that notice is required. In Manitoba, on the other hand, the equivalent provision was amended in quite the opposite way, to provide expressly for notice to affected parties as a condition precedent to the passage of such a by-law.[445]

2. *Fee in Abutting Land*

(a) *General*

Whether or not the vendor retains the fee in the abutting lands has been before the courts on a number of occasions. Options to purchase

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[442] *Re* Chartrand and Town of Hawkesbury, 20 O.R. (2d) 428, 6 M.P.L.R. 161, 88 D.L.R. (3d) 569 (H.C. 1978).

[443] The Planning Amendment Act, 1978, S.O. 1978, c. 93, subs. 2(4).

[444] *Supra* note 4. The 1978 amendment did not apply, as the deregistration by-law was passed in 1976.

Mr. Justice Estey, speaking for the majority (Laskin C.J.C., Martland, Beetz and Chouinard JJ. concurring), classified the action of Council in passing the deregistration by-law as "quasi-judicial" rather than "legislative", so that the principle of notice and the consequential doctrine of *audi alteram partem* attached, but exercised the discretion of the Court to refuse, on the particular facts, to issue the order of judicial review in the nature of *certiorari* quashing the by-law. The minority (Dickson J., Ritchie J. concurring) felt that, whether the municipality's action was "legislative" or "quasi-judicial", there was a duty to act fairly, embracing at least the duty to give notice and an opportunity to be heard, and declined to hold that the conduct had been such as to disentitle it to relief. *See also Re Chartrand*, *supra* note 442 (prior notice required).

[445] An Act to Amend the Planning Act, S.M. 1977, c. 35, s. 34, adding a new subs. 60(5) ff. This amendment followed the decision of the Manitoba Court of Appeal in *Re* Buhler and Rural Municipality of Stanley, 2 M.P.L.R. 118, 72 D.L.R. (3d) 447 (1976), quashing, for bad faith, a deregistration by-law passed without notice. (Note that in subsequent litigation between the same parties the Manitoba Court of Appeal held that an earlier town planning scheme (*i.e.*, a plan of subdivision) had been revoked and replaced by a subsequent one: *Re Buhler (No. 2)*, *supra* note 403. In Nocita v. Municipal Bd. Man., 10 L.P.C. 50, 95 D.L.R. (3d) 677 (*sub nom. Re* Nocita and Municipal Bd. Man.) (Man. C.A. 1979), the issue was the very narrow one of whether there could be an appeal from an order refusing leave to appeal from a decision of the Manitoba Municipal Board on a cancellation of a registered plan of subdivision.

were at issue in *Yield Investments Ltd. v. Newton*[446] and in *Ameri-Cana Motel Ltd. v. Miller*.[447] In both cases, the Court held that the statute had not been violated as the vendors did not retain the "fee", defined as the real disposable interest in the property, in abutting lands, but had transferred it to the potential purchasers.[448] In contrast, a right of first refusal is subject to the Act, as the effective power of disposal remains with the vendor.[449] The question of retaining the fee also arose in *Re Gerace and Thompson*[450] in which the issue on a vendor-purchaser motion was whether, where a husband and wife held property as joint tenants, the release by the wife of her interest to her husband required a consent by virtue of the fact that the couple also held the adjoining property as joint tenants. Citing in support of its decision several cases in which two persons owned one property together and one of the two also held the adjoining property in severalty, the sale of either the solely owned[451] or the jointly owned property[452] had been permitted without consent, the Court held that no consent was required for the release in question: the abutting lands still held in joint tenancy were not the wife's to dispose of absolutely. The result of this holding was that when two people owned abutting land jointly, they could freely dispose of one parcel indirectly by means of a two-step transaction when they could not have done so directly, in a one-step transaction. And, it was arguable, this case could also have been used as the basis for a three-step transaction effectively circumventing subdivision control legislation in the following manner: simultaneous conveyance of all lots owned by a single vendor to himself and another jointly, followed by a release by that other to the vendor of his interest in half the parcels in a checkerboard fashion, and

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[446] 18 O.R. (2d) 1, 81 D.L.R. (3d) 444 (C.A. 1977) (purchaser acquiring one property by long-term agreement for sale, which left fee in vendor, and in same agreement getting an option to purchase with same closing date over adjoining lands).

[447] 24 O.R. (2d) 449, 8 R.P.R. 134 (H.C. 1979), *aff'd* 31 O.R. (2d) 577, 17 R.P.R. 264, 120 D.L.R. (3d) 89 (C.A. 1981), *leave to appeal granted* [1981] 1 S.C.R. x, 31 O.R. (2d) 577n, 120 D.L.R. (3d) 89n (lease with option to purchase lands together with an option to purchase landlord's adjoining lands, which option was exercisable at a later date than the first option). *See also* Reiter, Annot., 8 R.P.R. 135 (1979).

[448] This was so notwithstanding that the two options might be exercised at different times. The Act would be violated if the vendor exercised the option over one property but repudiated it over the other. Note that in the *Ameri-Cana* case the issue of simultaneous conveyances was not raised.

[449] Horne v. Requisition Invs. Ltd., 16 O.R. (2d) 260 (C.A. 1977).

[450] 15 O.R. (2d) 689, 1 R.P.R. 130 (*sub nom.* Gerace v. Thompson) (H.C. 1977).

[451] *Re* Priamo and H. Harman Leader Co., [1970] 1 O.R. 591 (Cty. Ct. 1969); *Re* Dean and Coyle, [1973] 3 O.R. 185, 36 D.L.R. (3d) 209 (Cty. Ct.). *See also* Uranowski v. Regional Municipality of Niagara, 6 O.M.B.R. 132 (Div'l Ct. 1976).

[452] *Re* MacDonald and Yates, 4 O.R. (2d) 547, 48 D.L.R. (3d) 507 (H.C. 1974); *Re* Murray and Clark, 5 O.R. (2d) 261, 50 D.L.R. (3d) 71 (H.C. 1974). These two cases referred to two Ontario Court of Appeal decisions: *Re* Redmond and Rothschild, [1971] 1 O.R. 436, 15 D.L.R. (3d) 538 (1970) (sale by an owner who was also mortgagee of abutting land was held valid without consent); 229822 Realty Ltd. v. Reid, [1973] 1 O.R. 194, 30 D.L.R. (3d) 542 (1972) (vendor was still owner of abutting land that he could be compelled to convey to third party to rectify deed).

ending with a conveyance of the individual parcels with impunity. Such a possibility was stopped by an amendment to section 29, adding subsection 5*f*:

> Where a joint tenant or tenant in common of land releases or conveys his interest in such land to one or more other joint tenants or tenants in common of the same land while holding the fee in any abutting land, either by himself or together with any other person, he shall be deemed, for the purposes of subsections 2 and 4, to convey such land by way of deed or transfer and to retain the fee in the abutting land.[453]

Even if such an amendment had not been made, the validity of the initial simultaneous conveyances might have been open to question.

(b) *Simultaneous Conveyances*

A vendor disposing of adjoining lands by simultaneous conveyance has, since 1971,[454] been deemed to hold the fee in abutting lands, thereby bringing the transaction within the aegis of the subdivision control legislation. This issue has been raised in a number of recent Ontario cases. In three, the properties in question had been conveyed simultaneously by separate deeds but to the same purchaser.[455] In all three, it was held that one should look to the substance rather than to the form of the transaction and that such a situation was not within the mischief contemplated by the statute:

> While the conveyance of abutting land to various and diverse purchasers is within the purview of the s-s. (5a), the conveyance of a single building which occupies two lots by separate deeds consecutively registered to a single purchaser for a unit price is not within the scope of the legislation as it in fact constitutes in substance a single transaction effecting no severance of land.[456]

In *Captain Developments Ltd. v. Marshall*,[457] it was held that where a common trustee holds title to adjoining parcels of land for different beneficial owners, a conveyance by the trustee of one of the parcels without consent would not violate the Planning Act. And the same result

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[453] The Planning Amendment Act, 1978, S.O. 1978, c. 93, subs. 2(3).

[454] The Planning Amendment Act, 1971, S.O. 1971, vol. 2, c. 2, subs. 1(1), adding new para. 29(5*a*).

[455] *Re* Szegho and Baril, 19 O.R. (2d) 95, 3 R.P.R. 252 (*sub nom.* Szegho v. Baril) (H.C. 1978) (sale of one property in which two conveyances were used because title to garage was registered under Land Titles system and title to the house under Registry system); Pierotti v. Lansink, 25 O.R. (2d) 656 (C.A. 1979) (sale of two adjoining parcels to one purchaser under two separate agreements of sale, both of which were completed on the same date); *Re* Baker and Nero, 23 O.R. (2d) 646, 97 D.L.R. (3d) 750 (H.C. 1979) (sale of two adjoining townhouses to single purchasers). *See also Re* Purolator Courrier Ltd. and MacLeod, 9 O.R. (2d) 256 (Cty. Ct. 1975).

[456] *Re* Baker and Nero, *supra* note 455, at 648, 97 D.L.R. (3d) at 752. The effect of the 1971 amendment was raised but avoided in *Yield Invs.*, *supra* note 446, because it was held that the amendment in question did not have retrospective effect.

[457] 11 R.P.R. 87 (Ont. Cty. Ct. 1979). *See also* Reiter, Annot., 11 R.P.R. 88 (1979).

obtained in *Re Copley and Hudson*,[458] where title to adjoining parcels was held by the wife as surviving joint tenant of one parcel, and by the wife and her son as executors of her husband's will on behalf of herself as beneficiary of the other parcel. In the *Copley* case, the Judge was influenced by the fact that the Committee of Adjustment had already consented to severance of the two parcels in a previous transaction. This was also the case with the *Captain Developments* properties. In both cases, therefore, the transactions would have been permitted by a recent amendment to the Act to the effect that once a parcel of land has been conveyed with consent, no consent is normally required for any subsequent dealing with the identical parcel.[459] Finally, the question of a solicitor's negligence and the measure of damages in a checkerboarding arrangement involving simultaneous conveyances was considered in *Clements v. Wyatt*.[460]

(c) *Mortgages*

It has always been clear that partial mortgages (mortgages created over some property while the mortgagor retains the fee in abutting lands) are prohibited by the Planning Act. Nevertheless, in *Porter v. Clutterbuck*,[461] the Divisional Court decided that such a mortgage was not thereby void: while it did not create an interest in land, it was still valid as a contract containing an enforceable convenant to pay.

What was less clear, however, was the situation as regards partial discharges and partial foreclosures. Both required specific amendments

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[458] 26 O.R. (2d) 601 (H.C. 1979). *But see Re G. Roger Rivard Constr.*, *supra* note 388 (where adjoining parcels were owned by different trustees for the same beneficial owner, they could not be individually conveyed without contravening the Planning Act).

[459] The Planning Amendment Act, 1978, S.O. 1978, c. 93, subs. 2(1).

[460] 9 R.P.R. 1 (Ont. H.C. 1979). *See also* Reiter & Swan, Annot., 9 R.P.R. 3 (1979). The conveyance in question took place after the *Reference* case (Reference *re* Certain Titles to Land in Ontario, [1973] 2 O.R. 613, 35 D.L.R. (3d) 10 (C.A.)) but was commenced before the 1971 amendment. The solicitor was negligent in not ascertaining properly whether the vendor retained the fee in abutting lands. For requisitions on title in this regard, *see Re* Bedwell and Renshaw, 15 O.R. (2d) 233, 75 D.L.R. (3d) 364 (H.C. 1977); *Re* Cohen and McClintock, 19 O.R. (2d) 623, 86 D.L.R. (3d) 16 (H.C. 1978).

[461] 3 R.P.R. 317 (Ont. Div'l Ct. 1978). *See also* MacEwan, Annot., 3 R.P.R. 317 (1978). Along the same lines *see* Dynamic Transp. Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072, 9 A.R. 308, 85 D.L.R. (3d) 19, in which the Supreme Court of Canada upheld a decree of specific performance of an agreement of sale of land notwithstanding that obtention of consent to sever was a condition precedent to the sale, which consent had not been applied for. The purchaser was entitled to a declaration that the contract between the parties was binding in accordance with its terms, including the implied term that the vendor would seek subdivision approval.

See also Re Cohen and McClintock, *supra* note 460, to the effect that *bona fide* purchasers for value, not knowing and unable to know of breaches of the Planning Act, are not affected thereby (as they are not to be deprived of the protection of the Registry Act, R.S.O. 1980, c. 445).

On the general question of the effect of transactions that do not comply with the relevant subdivision control legislation *see* Real Property Transfer Validation Act, S.N.S. 1977, c. 16, s. 2.

to the Act to make them subject to the subdivision control provisions. In 1973, partial discharges were brought within the Act by deeming the person giving the discharge to hold the fee in abutting lands,[462] although in one recent case consents were held not to be required for a partial discharge of mortgage in respect of land that had been validly severed by other means. To require such consents would be, in the terms of the judge, "incongruous".[463] Further, in 1975, the Planning Act was amended to require ministerial approval of any foreclosure or exercise of a power of sale under a mortgage unless all of the land subject to the mortgage is included, the lots are within a registered plan of subdivision or the parcels do not abut parcels still subject to the mortgage.[464] This section was held in *Re Tawse and Roslis Developments Ltd.*[465] to apply even where two owners of separate but adjoining parcels of land together mortgaged both properties in a single mortgage securing a single amount of money payable by both of them: the mortgagee could not foreclose on the property of one of them without consent.

(d) *Partition*

Whether or not the subdivision control legislation applies has generated considerable controversy as regards two specific fact situations: applications for partition and transmission on death. In some provinces, the response to the former question has been legislative. Either the priority of the subdivision control legislation is set out explicitly[466] or the Minister responsible for it must be given notice of an application under a Partition Act.[467] In other provinces, the matter has been left to the courts. In Ontario, in particular, the issue has been before the courts on five separate occasions in the period under survey, with varying results. The earliest decision was that of the County Court in *Re Lama and*

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[462] The Planning Amendment Act, 1973, S.O. 1973, c. 168, s. 6 (*amended by* S.O. 1974, c. 53, s. 4).

[463] *Re* Winters and Ho, 25 O.R. (2d) 587, at 591, 8 R.P.R. 290, at 291, 102 D.L.R. (3d) 180, at 184 (H.C. 1979). *See also* Reiter, Annot., 8 R.P.R. 291 (1979).

[464] The Planning Amendment Act, 1975 (2nd Session), S.O. 1975 (2d sess.), c. 18, s. 1 (*replaced by* S.O. 1976, c. 38, subs. 2(2)). Note that in *Re* George Stinson Constr. Inc. and Township of Ameliasburgh, *supra* note 394, it was held that under the unamended legislation a foreclosure of the half of the lots covered by a mortgage was not a conveyance of land within the meaning of s. 29, even when the result was a checkerboard arrangement made for the purpose of evading the object of the statutes. In the circumstances, an order for *mandamus* for a building permit was refused.

Quebec has similar but less elaborate provisions concerning *dation en paiement* clauses: An Act to preserve agricultural land, S.Q. 1978, c. 10, para. 1(3)(*c*).

[465] 23 O.R. (2d) 444 (Cty. Ct. 1979).

[466] Partition of Property Act, R.S.B.C. 1979, c. 311, s. 17; The Partition and Sale Act, S.A. 1979, c. 59, s. 14 (*see also Re* Wensel, 5 A.R. 379, 72 D.L.R. (3d) 1 (C.A. 1976)); *quaere* The Planning Act, S.M. 1975, c. 29, subs. 60(1) (*as amended by* S.M. 1978, c. 37, s. 12). *See also* Planning Amendment Act, 1981, S.O. 1981, c. 15, s. 1.

[467] The Planning Amendment Act, 1978, S.O. 1978, c. 93, s. 5 (*replaced by* R.S.O. 1980, c. 379, s. 37).

Coltsman,[468] in which it was held that a judicially ordered partition of land did not contravene the subdivision control provisions of section 29 of the Planning Act. Two High Court decisions, *A.G. Ont. v. Harry*[469] and *Re Barchuk and Valentini*,[470] then reached the opposite conclusion, with another High Court decision, *Re Winters and Ho*,[471] subsequently holding that a consent to sever was unnecessary. The Divisional Court in *Re Hay and Gooderham*[472] granted an appeal from a judgment dismissing an application for partition in these terms: "[w]e are satisfied that a judicially ordered partition of a parcel of land is not an event or disposition of lands which comes within the provisions of s. 29 just as has been held in a number of cases that the transfer of land by way of testate or intestate succession is not covered by s. 29."[473] Although this decision was subsequently followed by the Divisional Court on the appeal of *Re Barchuk and Valentini*,[474] it was distinguished by Montgomery J. in the subsequent hearing for a permanent injunction in *A. G. Ont. v. Yeotes*.[475] In overturning Mr. Justice Montgomery's decision to make permanent the injunction, however, the Court of Appeal[476] reverted to the approach taken in *Re Hay and Gooderham*. Arnup J.A. eloquently outlined the difficulties presented not only by partition actions but by all other "loophole" conveyancing devices:

> There is no doubt that the policy of the *Planning Act* is to prevent subdivision of land except within stated limitations, the chief of which is to register an approved plan of subdivision or obtain a consent to severance from the appropriate local authorities. The method of drafting employed in the Act, is, however, fundamentally different from that used in the Alberta statute (and there are others similar to Alberta's). The Alberta Act starts out with a blanket prohibition against the subdivision of land except upon certain terms and conditions. The Ontario statute prohibits subdivision by specified methods, and sets out how legal subdivision is to be carried out. There is no blanket prohibition against subdivision expressed in the Act.[477]

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[468] 20 O.R. (2d) 98 (Cty. Ct. 1978) (vendor and purchaser application).

[469] 22 O.R. (2d) 321, 8 M.P.L.R. 179, 93 D.L.R. (3d) 332 (H.C. 1979) (Labrosse J.) (application for interim injunction). *See* note 475 and accompanying text *infra*.

[470] 23 O.R. (2d) 710, 6 R.P.R. 224, 96 D.L.R. (3d) 753 (*sub nom.* Barchuk v. Valentini) (H.C. 1979) (Carruthers J.) (partition application). *See* note 474 and accompanying text *infra*.

[471] *Supra* note 463 (Krever J.) (vendor and purchaser application).

[472] 24 O.R. (2d) 701, 98 D.L.R. (3d) 383 (Div'l Ct. 1979).

[473] *Id.* at 702, 98 D.L.R. (3d) at 384 (Maloney J.).

[474] 27 O.R. (2d) 53, 107 D.L.R. (3d) 510 (1980).

[475] 28 O.R. (2d) 577, 12 R.P.R. 166, 111 D.L.R. (3d) 488 (H.C. 1980). *See also* Reiter, Annot., 12 R.P.R. 167 (1980). Montgomery J. would have continued the injunction.

It is interesting to note that the Court decided that the Attorney General had jurisdiction to intervene as *parens patriae*, notwithstanding that the amendment to the Planning Act to this effect did not apply as it did not have retroactive application.

[476] 31 O.R. (2d) 589, 18 R.P.R. 161, 120 D.L.R. (3d) 128 (C.A. 1981), *leave to appeal denied* [1981] 1 S.C.R. v, 37 N.R. 356.

[477] *Id.* at 604, 18 R.P.R. at 185, 120 D.L.R. (3d) at 144.

His Lordship then went on to decide that an order for partition could not "by any stretching of language" be brought within any of the proscribed methods or instruments.[478] The Legislature has now intervened to include partition orders within the list of proscribed methods,[479] and the particular matter of partition applications would thereby seem to have been put to rest.

(e) *Transmission on Death*

As Mr. Justice Maloney's comment in *Re Hay and Gooderham* indicates, a second contentious issue has been that of transfer and resulting subdivision of property on death. Here, the answer of the Ontario courts is clear: such a transfer is outside the purview of the Planning Act, whether the lots be devised directly to the legatees[480] or to executors who subsequently convey to the legatees.[481] Quebec's legislation is also explicit in this regard, excluding from the definition of alienation "transmission owing to death".[482] Nova Scotia, as well, has legislated to the same effect.[483]

(f) *Miscellaneous*

Finally, subdivision control has been held not to apply in a *potpourri* of factual situations: a sale where the vendor owned three abutting lands each exempt from control under a different provision of section 29;[484] a

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[478] *Id.* at 606, 18 R.P.R. at 187, 120 D.L.R. (3d) at 145. The Court also held, Houlden J.A. dissenting, that the particular facts did not constitute a "fraud upon the Act": there was no "conspiratorial attempt to deceive the public administration or the Court by concocting transactions which were not in truth and substance what they were put forward as being". *Id.* at 608, 18 R.P.R. at 190, 120 D.L.R. (3d) at 148. (However, the Court refused to order costs, but did send the matter back to Montgomery J. for a decision whether an inquiry should issue as to damages against the Attorney General of Ontario; held, no inquiry as to damages should issue: 35 O.R. (2d) 248, 132 D.L.R. (3d) 73 (H.C. 1982)).

[479] Planning Amendment Act, 1981, S.O. 1981, c. 15, s.1.

[480] *Re* Kilbourn and Committee of Adjustment, 8 O.R. (2d) 142, 57 D.L.R. (3d) 334 (Div'l Ct. 1975).

[481] *Re* Ferguson, 23 O.R. (2d) 533, 6 R.P.R. 66 (H.C. 1978) (*see also* Lockie, Annot., 6 R.P.R. 66 (1978)); *Re* Pollock and Wilkinson, 22 O.R. (2d) 663, 6 R.P.R. 337, 94 D.L.R. (3d) 470 (*sub nom.* Pollock v. Wilkinson) (H.C. 1979).

See also Re Davidson, 25 O.R. (2d) 534, 101 D.L.R. (3d) 372 (H.C. 1979) in which, when it was found that on a devise of a house and lot to one daughter and an adjoining vacant lot to the south to another daughter, the house encroached on the second lot, the Judge ordered that the boundary line of the first daughter's property be the south wall of the house, thereby including a portion of the vacant lot. No reference to the issue of severance was made, although the Judge did observe that the result would violate the municipality side yard requirements: "The testatrix obviously gave no thought to that problem. . . ." *Id.* at 537, 101 D.L.R. (3d) at 375.

[482] An Act to preserve agricultural land, S.Q. 1978, c. 10, para. 1(3)(*a*).

[483] Real Property Transfer Validation Act, S.N.S. 1977, c. 16, s. 4.

[484] Carmine Crisante Ltd. v. Weizenbluth, 14 O.R. (2d) 776, 74 D.L.R. (3d) 598 (C.A. 1977) (no requirement that all parcels be exempt under the same provision).

quitclaim deed required so that registered title would coincide with possessory title;[485] the conveyance of certain easements in fulfilment of a condition set by the Minister of Housing for approval of a plan of subdivision;[486] and the subsequent sale of land contained in a subdivision effected at a time when there was no requirement for approval and, apparently, nothing requiring registration of the plan.[487] Conversely, it was held to apply to a lease of an undivided acre of a much larger parcel of land[488] and to the settlement of a boundary dispute by resort to the conventional line theory.[489]

B. *Permission to Subdivide*

1. *Consents to Sever*

In Ontario, application for consent to sever is made by the owner[490] to the requisite approving body.[491] This body has authority either to grant the application, with or without conditions,[492] or to refuse it: it may not

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[485] *Re* Duthie and Wall, 24 O.R. (2d) 49 (H.C. 1979).

[486] *Re* Boughner and Malcom, 21 O.R. (2d) 848 (Cty. Ct. 1978).

[487] Dougan v. Falkenham, 24 N.S.R. (2d) 662, 35 A.P.R. 662 (S.C. 1978). The Planning Act, R.S.N.S. 1979, c. P-15, imposed subdivision control only where a subdivision by-law was in effect or a ministerial order applied, neither of which was the case at the relevant time.

[488] Otan Devs. Ltd. v. Kuropatwa, 12 A.R. 15, 7 Alta. L.R. (2d) 274, 94 D.L.R. (3d) 37 (C.A. 1978), *caveat* protecting lease properly removed from title since its purport "could almost be termed colourable", an attempt "to obtain the benefits of a subdivision under the guise of calling it a lease but without having to within the foreseeable future comply with the applicable legislation." *Id.* at 25, 7 Alta. L.R. (2d) at 286, 94 D.L.R. (3d) at 48-49 (Morrow J.A.).

[489] Bea v. Robinson, 18 O.R. (2d) 12, 3 R.P.R. 154, 81 D.L.R. (3d) 423 (H.C. 1977).

[490] Planning Act, R.S.O. 1980, c. 379, subs. 49(3); Billie v. Mic Mac Realty (Ottawa) Ltd., 3 R.P.R. 48 (Ont. H.C. 1977); Ontario Line Contractors Ltd. v. Mitchell, 10 O.M.B.R. 45, 10 M.P.L.R. 177 (*sub nom. Re* Ontario Line Contractors Ltd. and Halton Land Div. Comm.) (Mun. Bd. 1979). *See* particularly *Re* A.A.F.-Ltd. and Committee of Adjustment of Etobicoke, 13 O.R. (2d) 666, at 668 (H.C. 1976), holding that the holder of an option to purchase should be considered an "owner" within the terms of the statute:

> [A] person holding such an inchoate conditional interest is in the position where he can, without the assistance of any other person, become the registered owner of the fee simple, and must therefore have some part of that interest which we commonly refer to as ownership.

In any event, the case went on, the word "owner" should be construed widely.

The status of an intended purchaser to launch an appeal from a Planning Board decision refusing a severance was raised but not decided in Sheckter v. Alberta Planning Bd., *supra* note 110.

[491] A Committee of Adjustment, a Land Division Committee or the Minister of Housing, as the case may be: paras. 29(1)(*a*), (*b*) and (*c*). *See* Rogers, *supra* note 319.

[492] Including a condition that levies be paid (*see Re* Frey and Peel Land Div. Comm., 2 M.P.L.R. 52 (Ont. Div'l Ct. 1977); *see* text accompanying notes 506 and 552 *infra*; Cimas Constr. Ltd. v. Borough of Scarborough, 10 O.M.B.R. 306 (Mun. Bd. 1979),

arbitrarily change the application and grant something for which application has not been made.[493] Its decision, including the conditions imposed, cannot be varied except by way of appeal, which lies to the Ontario Municipal Board.[494] The decision of this Board, as with all its decisions, can in turn be appealed either by way of rehearing before the Board,[495] by petition to Cabinet,[496] or by appeal to the courts on

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aff'd 10 O.M.B.R. 504 (L.G. in C. 1980) (particular levies not shown to be necessary, equitable and reasonable)) or that a zoning amendment be approved (*See Re* Oakville Restricted Area By-law 1976-127, *supra* note 170; *Re* Flamborough Restricted Area By-Law 78-49-WF-Z, 10 O.M.B.R. 72 (Mun. Bd. 1979) (by-law amendment refused because the objector had not received notice of the severance application)), but not that a legal non-conforming use be removed (*see* Saunders v. North Dorchester Comm. of Adjustment, 10 O.M.B.R. 502 (Mun. Bd. 1979)).

[493] Huffman v. County of Hastings, 7 O.M.B.R. 350 (Mun. Bd. 1977) (decision of Land Division Committee couched as grant of application to sever was on condition that different parcel of smaller dimensions be conveyed instead of parcel for which consent had been requested). Nor can the Ontario Municipal Board vary the application on appeal: Robinson v. Town of Wallaceburg, 7 O.M.B.R. 108, at 110 (Mun. Bd. 1977); Bruce County South Planning Bd. v. Farrell, 7 O.M.B.R. 65 (Mun. Bd. 1977), *citing Re* Colicchia Constr. Ltd. and Schmidt, [1968] 2 O.R. 806 (C.A.).

[494] *Re* Wimpey Devs. Ltd. and Land Div. Comm. of Frontenac, 25 O.R. (2d) 350, 100 D.L.R. (3d) 732 (Div'l Ct. 1979) (Committee itself not having power to waive a condition, requiring zoning by-law amendment, imposed at request of municipality, even where municipality in question agreed to waiver). For examples of decisions of the Board to strike out conditions imposed at first instance, *see* Ondaatje v. City of Toronto, 9 O.M.B.R. 489 (1978); Queen's Court Devs. Ltd. v. Halton Land Div. Comm., 10 O.M.B.R. 66 (1979); Grainger v. London Comm. of Adjustment, 10 O.M.B.R. 498 (1979). Robinson v. Town of Wallaceburg, *supra* note 493, is an example of a condition (widening of easement from 10 to 20 feet) being upheld as not being unreasonable in the circumstances.

Note that the appeal to the Board is in the nature of a trial *de novo*: *see* Yolles v. Merber, 9 O.M.B.R. 271, at 272 (Mun. Bd. 1979). The appellant must lead evidence indicating why the decision below should be overturned: *see* Konig v. Regional Municipality of Waterloo, 7 O.M.B.R. 471 (Mun. Bd. 1977). On an appeal concerning conditions it is open to the Board to refuse the severance itself: *see* Bedford v. Sandwich South, 10 O.M.B.R. 476 (Mun. Bd. 1979).

In Nova Scotia, the Planning Appeal Board does not have power to impose conditions on subdivision appeals: *see* Epstein, *infra* note 498.

[495] Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42; Ondaatje v. City of Toronto, *supra* note 494. A disappointed applicant must make application for review of the Board's decision rather than bring a new application to sever in substantially the same terms. In Tibbits v. Regional Municipality of Hamilton-Wentworth, 8 O.M.B.R. 313 (Mun. Bd. 1978), *aff'd* 9 O.M.B.R. 21 (L.G. in C. 1978), and in Baccilieri v. Township of Essa, 10 O.M.B.R. 174 (Mun. Bd. 1979), such subsequent applications were dismissed as abuse of process.

[496] S. 94. Examples of petitions to Cabinet in severance matters are: Tibbits v. Regional Municipality of Hamilton-Wentworth, *supra* note 495 (a question of procedure), and on questions of substance: Rush v. Regional Municipality of Durham, 8 O.M.B.R. 257 (Mun. Bd. 1978), *aff'd* 9 O.M.B.R. 20 (L.G. in C. 1979) (severance refused); Lowrey v. Regional Municipality of Niagara, 8 O.M.B.R. 315 (L.G. in C. 1978) (severance granted); Heathcote v. Regional Municipality of Hamilton-Wentworth, 8 O.M.B.R. 303 (L.G. in C. 1978) (severance granted); Laviolette v. Town of Rockland, 8 O.M.B.R. 297

questions of law or jurisdiction.[497]

When the approving body considers the severance application, it is limited in the matters it may consider:

> The Province has legislated in the field and in so doing requires the Board as it does a committee of adjustment or land division committee to have regard for the same matters as would an approving body in considering a draft plan of subdivision, namely, the matters set out in s. 33(4) of the *Planning Act*. . . . It should be remembered that this is not a rezoning matter nor a variance application where such concerns of a planning nature relating to form and type of development could come under review.[498]

Accordingly, these bodies have considered, for example, the conformity of the application to the existing official plan and zoning by-laws,[499] its

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(L.G. in C. 1978) (severance granted in part); Clements v. Brouwers, *supra* note 304 (severance allowed on conditions); Dobbin v. Lambton Land Div. Comm., 10 O.M.B.R. 322 (L.G. in C. 1979) (severance granted). *See also* South Rosedale Ratepayers' Ass'n v. Prime Equities Inc., 8 O.M.B.R. 294 (L.G. in C. 1978) (Board's decision to sever confirmed without written reasons).

[497] S. 95, or under the Judicial Review Procedure Act, R.S.O. 1980, c. 224. *See, e.g., Re* Van Vlasselaer, *supra* note 145 (appeal concerning the Board's interpretation of the word "adjacent" in an Official Plan in deciding that the proposed severance not in conformity therewith); Linnemann v. County of Wellington, 6 O.M.B.R. 44 (Div'l Ct. 1976) (Municipal Board correct in deciding that County (as well as Land Division Committee) had standing to appear before it, and in taking into account Official Plan passed by County but not yet approved by Board).

Note that a consent is not final while there is still a possibility of appeal: *see* Smale v. Van der Weer, 17 O.R. (2d) 480, 80 D.L.R. (3d) 704 (H.C. 1977).

[498] South Rosedale Ratepayers' Ass'n v. Prime Equities Inc., *supra* note 496, at 296; Planning Act, R.S.O. 1980, c. 379, subs. 29(24). *Compare* the approach of the Board in the *South Rosedale* case with its approach in Macaulay v. Prime Equities Inc., *supra* note 323. Both cases dealt with substantially similar developments in the same area, but the latter involved an application for a minor variance as well as an application to sever. *See also Re* London Restricted Area By-law C.P. 374(hf)524, 7 O.M.B.R. 91, at 95 (Mun. Bd. 1977) (application for approval of zoning by-law and severance refused as being "premature and not in accordance with established sound planning principles"); McDonald v. City of London, 7 O.M.B.R. 182, at 184 (Mun. Bd. 1977) (application for severance and minor variance refused as a result would not be "compatible in aesthetic terms with the existing development and thus would not be in [the] public interest or the interests of good planning").

In Nova Scotia, questions of planning are germane to the question of whether the proposed subdivision is "inconsistent with and unnecessary for the protection of the best interests of the Municipality": *Re* Fitzgerald and City of Dartmouth, 1 M.P.L.R. 287, at 289 (N.S. Planning App. Bd. 1977). *See also* Epstein, Annot., 1 M.P.L.R. 288 (1977).

[499] Severance was granted in: Forman v. Hewett, 7 O.M.B.R. 36 (Mun. Bd. 1977); Patzer v. Township of Ameliasburgh, 7 O.M.B.R. 71 (Mun. Bd. 1977); Weber v. County of Bruce, *supra* note 145; Ginou v. Regional Municipality of York, 8 O.M.B.R. 332 (Mun. Bd. 1978); *Rose Holdings, supra* note 145; *Re* Van Vlasselaer, *supra* note 145; Yolles v. Merber, *supra* note 494. *See also* Boyd v. County of Wellington, 7 O.M.B.R. 468 (Mun. Bd. 1977) (no official plan or zoning by-law yet in existence). In Boyd v. Grey and Div. Comm., 10 O.M.B.R. 14 (Mun. Bd. 1979), severance (rendered necessary by a merger of two parcels as a result of premature death of the applicant's husband, owner of one of

prematurity or necessity in the public interest,[500] the adequacy of access to a public road,[501] the suitability of the land[502] and the dimension and shape

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the two parcels) was granted in spite of non-conformity with both the official plan and zoning by-laws:

> In the Board's respectful opinion, planning is not, or should not be, quite that mechanical. A better view of the function of planning, in my opinion, is that it can quite properly make allowances for the unavoidable difficulties that people get into, no matter what an official plan may say.

Id. at 16.

But in *Re* Ontario Hydro and Bruce Land Div. Comm., 10 M.P.L.R. 223 (Ont. Mun. Bd. 1979), an application for severance was refused for non-conformity, notwithstanding that contiguous lots had been acquired by Ontario Hydro (with intent to resell) merely as a result of its policy of assisting owners of residential property who felt the creation of a nearby nuclear power plant had devalued their property and who therefore wished to sell. Severance was also refused in Goodmurphy v. Ameliasburg Comm. of Adjustment, 10 O.M.B.R. 497 (Mun. Bd. 1979), where the result would not conform to by-laws passed but not yet approved, and in Preece v. Aikens, *supra* note 60, where the potential non-conformity was with by-laws rendered dormant by regulations under the Niagara Escarpment Planning and Development Act, *now* R.S.O. 1980, c. 316. *See also* Molnar v. Town of Ancaster, *supra* note 75; Hill v. Township of Eramosa, *supra* note 145; Leslie v. County of Wellington, 7 O.M.B.R. 163 (Mun. Bd. 1977); Regional Municipality of York v. Anderson, 7 O.M.B.R. 170 (Mun. Bd. 1977); Township of Vespra v. Struik, 7 O.M.B.R. 176 (Mun. Bd. 1977); *Re* Lamont and Charlebois, *supra* note 145. Severance of lands within the Niagara Escarpment development area was granted on condition that a development permit be obtained first in: Hughes v. Peel Land Div. Comm., *supra* note 304; Niagara Escarpment Comm. v. Alexander, *supra* note 304.

For similar requirements in Alberta, *see Sheckter, supra* note 110.

[500] *See* Quigley v. Regional Municipality of Niagara, 6 O.M.B.R. 294 (Mun. Bd. 1977) (severance granted). Severances were refused in: *Re* London Restricted Area By-law C.P. 374(hf)524, *supra* note 498; Smith v. Leeds & Grenville, *supra* note 78 (premature since parcel recently severed); Richards v. Weldon, 7 O.M.B.R. 121 (Mun. Bd. 1977) (severance and minor variance to create two building lots from grounds of stately old home); Leslie v. County of Wellington, *supra* note 499; 351836 Ont. Ltd. v. Regional Municipality of Niagara, *supra* note 109 (fact that proposal meets requirements of zoning by-law "no automatic guarantee" (*id.* at 457) that severance will be granted); Cameron v. County of Bruce, 7 O.M.B.R. 460 (Mun. Bd. 1977); Weekes v. Northumberland Land Div. Comm., 8 O.M.B.R. 509 (Mun. Bd. 1978) (plan of subdivision pending before Minister); Rittenhouse v. Regional Municipality of Haldimand-Norfolk, 10 O.M.B.R. 463 (Mun. Bd. 1979) (severance to provide retirement lot for 48-year-old active farmer premature); Rogers v. Deerwood Devs. Ltd., 10 O.M.B.R. 20 (Mun. Bd. 1979) (under subs. 49(3) consents to sever to be granted only if Committee or Board satisfied that plan of subdivision not necessary). On this last point, *see also* Risatti v. County of Lanark, 7 O.M.B.R. 210 (Mun. Bd. 1977), and Dougharty v. Huron Land Div. Comm., 9 O.M.B.R. 152 (Mun. Bd. 1978).

[501] *See* Regional Municipality of Durham v. Storie, *supra* note 109 (access by right-of-way, severance granted); Lindblad v. Bruce Land Div. Comm., 9 O.M.B.R. 247 (Mun. Bd. 1978) (severance granted); Stuckler v. Muskoka Land Div. Comm., 9 O.M.B.R. 439 (Mun. Bd. 1978), *aff'd* 8 O.M.B.R. 439n (L.G. in C. 1978) (access by right-of-way in urban setting, severance refused). In these three cases the relevant plan or zoning by-law required that a lot front on a public road. In Smith v. Leeds & Grenville, *supra* note 78, severance was refused in view of the undesirability of creating more accesses onto a provincial highway.

[502] There is a burden of proof on the applicant to establish this: *see* Regional Municipality of York v. Anderson, *supra* note 499.

of lots,[503] conservation of natural resources and flood control[504] and the adequacy of utilities, municipal services and school sites.[505] Whether the approving authority can also consider and impose conditions as to the area of land to be conveyed or dedicated for public purposes, or to require a money payment in lieu thereof, is doubtful in the light of the decision of the Divisional Court in *Re Frey and Peel Land Division Committee*.[506]

Once the consent to sever is granted, the Committee issues a certificate to that effect, which certificate is conclusive evidence that the consent has been validly granted.[507] Such consents lapse, unless acted

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[503] It is particularly in conjunction with this head and the preceding one that the approving agency often considers the compatibility of the proposed development with the appearance and character of the neighborhood. Compatibility was found in Boyd v. County of Wellington, *supra* note 499, and in Town of Markham v. Luftman, 8 O.M.B.R. 422 (Mun. Bd. 1978) (Board also looked at other factors such as topography in general balance of public and private interests). Incompatibility was found in the following cases: Strome v. Regional Municipality of Peel, 7 O.M.B.R. 174 (Mun. Bd. 1977) (*citing as authority Re* Westmount Park Road Homeowner's Assoc. and J.M. Peebles Ltd. (unreported, Ont. Div'l Ct., 18 Mar. 1974)); McDonald v. City of London, *supra* note 498; Hearn v. Chiavatti Devs. Ltd., 7 O.M.B.R. 205 (Mun. Bd. 1977).

[504] Severance was refused for conservation reasons in Buck Lake Dev. Ltd. v. Frontenac Land Div. Comm., 9 O.M.B.R. 452 (Mun. Bd. 1979), *leave to appeal denied* 9 O.M.B.R. 452n (Div'l Ct. 1979). In Town of Markham v. Wood, 9 O.M.B.R. 250 (Mun. Bd. 1978), the Land Division Committee had imposed as a condition of severance that the applicant convey to the town that portion of the lot located in the flood plain. In striking out the condition the Board decided, *inter alia*:

> Section 33(4) of the *Planning Act* sets out matters that must be considered in connection with a severance of land, but such subsection does not, in the Board's view, authorize the imposition of conditions relating to such matters, unless collaterally authorized by s. 33(5) [am. 1972, c. 118, s.5(1)] of the Act.

Id. at 253.

[505] *See* Forman v. Hewett, *supra* note 499.

[506] *Supra* note 492, at 53-54. Weatherspoon J. stated:

> The language of subs. (5) is not wholly appropriate to small parcels of land. Manifestly, it would not be sensible, in the present case, for the land division committee to impose as a condition of its consent, under s. 33(5)(a), that land not exceeding 5 per cent of the land included in the plan be conveyed to the municipality for park purposes. Since such a conveyance would not be a sensible condition of consent, subs. (8), which authorizes a municipality to accept money in lieu of land, is not applicable.

In County of Lambton Rds. Comm. v. Sarnia Comm. of Adjustment, 10 O.M.B.R. 65 (Mun. Bd. 1979), an appeal by the Roads Committee was based on the Committee of Adjustment's failure to impose a road-widening condition in granting a severance. The Board emphasized that road widening dedications could not be considered a matter of right: "Surely there must be established a definite need for the dedication just as the Courts have considered lot levies." *Id.* at 66. *See also* Queen's Court Devs. Ltd. v. Halton Land Div. Comm., *supra* note 494; Town of Markham v. Wilson, 7 O.M.B.R. 189 (Mun. Bd. 1977).

[507] Planning Act, R.S.O. 1980, c. 379, subs. 49(21). If the certificate is not available, the vendor must otherwise prove compliance with the Act: *see Re* Carey and LaPrise, 23 O.R. (2d) 299 (Cty. Ct. 1978).

upon,[508] after two years.[509]

2. *Approval of a Plan of Subdivision*

In Ontario, approval of a plan of subdivision is given by the Minister of Housing[510] and not, as is the case with consents to sever, by a Land Division Committee or a Committee of Adjustment. The Minister may, however, refer the matter to the Ontario Municipal Board for decision under the general power of referral.[511] In this case, a further appeal lies to the Lieutenant Governor in Council.[512]

In deciding whether to approve a plan of subdivision, regard must be had to the same factors as with consents to sever:[513] conformity with the official plan[514] and adjacent plans of subdivision, prematurity or necessity in the public interest,[515] suitability of the land,[516] location of highways, dimension and shape of lots, existing or proposed restrictions, conservation of natural resources and flood control, adequacy of utilities and municipal services[517] and of school sites, and the area of land to be dedicated for public purposes. The Minister or the Board is entitled to impose such conditions as thought fit, dealing with such matters as the amount of land to be dedicated for park purposes[518] and for public

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[508] S. 29(17). This may be by way of agreement of sale, mortgage or charge, or power of appointment as well as by conveyance. The requirement of conveyance is satisfied by the execution and delivery of the deed within two years. Registration is not essential. *See Re* Carey and LaPrise, *supra* note 507.

[509] Or such shorter time as the granting authority provides, in which case there is an obligation on the municipality to so inform the individual applicant. *See Re* McCann and Land Div. Comm. for Renfrew, 19 O.R. (2d) 349 (Div'l Ct. 1978).

[510] Planning Act, R.S.O. 1980, c. 379, s. 36.

[511] S. 51. *See, e.g.*, Schmidt v. Township of Wicksteed, 7 O.M.B.R. 195 (Mun. Bd. 1977); *Re* Whitchurch-Stouffville Restricted Area By-law 77-50, 7 O.M.B.R. 403 (Mun. Bd. 1978) (request for adjournment of hearing in order to consolidate applications denied).

[512] *See, e.g., Re* Saugeen Plan of Subdivision, 7 O.M.B.R. 401 (L.G. in C. 1978), *varying* 7 O.M.B.R. 316 (Mun. Bd. 1977); *Re* Richmond Hill Proposed Plan of Subdivision, *supra* note 76; *Re* Burlington Subdivisions, *supra* note 123.

[513] Subs. 36(4).

[514] Lakeshore Devs. Ltd. v. County of Huron, *supra* note 74; *Re* Caledon E. and Lawson Subdivision, *supra* note 125.

[515] Schmidt v. Township of Wicksteed, *supra* note 511; *Re* Caledon E. and Lawson Subdivision, *supra* note 125.

[516] *Re* Richmond Hill Proposed Plan of Subdivision, *supra* note 76 (application for subdivision of prime agricultural land dismissed as government policy as outlined in FOOD LAND GUIDELINES, *supra* note 73, that such land be preserved); *Re* Saugeen Plan of Subdivision, *supra* note 512 (subdivision approved once drainage problems solved).

[517] *Re* Saugeen Plan of Subdivision, *supra* note 512; Schmidt v. Township of Wicksteed, *supra* note 511; *Re* Przekop Subdivision and City of Guelph, 10 O.M.B.R. 175 (Mun. Bd. 1979). *Contra*, Stobbe v. Regional Municipality of Waterloo, 6 O.M.B.R. 352 (Mun. Bd. 1977).

[518] Or the acceptance of money in lieu thereof: subss. 36(8)-(11); Dix v. Metropolitan Toronto, 10 O.M.B.R. 464 (Mun. Bd. 1979), *aff'd without written reasons* 10 O.M.B.R. 464n (L.G. in C. 1980) (Board has authority to require cash payment where

highways[519] or that the requisite zoning by-law be passed.[520] He may also impose as a condition "that the owner of the land enter into one or more agreements with the municipality . . . dealing with such matters as the Minister may consider necessary, including the provision of municipal services".[521] This has been held to include conditions concerning the payment of levies.[522] Such conditions may be appealed to the Ontario Municipal Board.[523]

In British Columbia, before a subdivision plan can be deposited for registration, it must first be approved by the designated "approving officer", who is empowered to refuse the application if "in his opinion the anticipated development of the subdivision would injuriously affect the established amenities of adjoining or reasonably adjacent properties."[524]

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land unsuitable for park purposes). For an example of a condition to dedicate land for park purposes, *see* Houston v. Cirmar Holdings Ltd., *supra* note 34.

Most provinces have a similar provision. The Alberta Act has been the subject of two decisions in this regard: Highfield Dev. Corp. (Calgary) v. Provincial Planning Bd., 4 A.R. 603; 3 Alta. L.R. (2d) 1, 78 D.L.R. (3d) 376 (1977), where the Court of Appeal decided that a reserve for school and other public community purposes did not include a dedication for streets and lanes, so that such a dedication on an earlier subdivision did not preclude the municipality from requiring a "reserve" on application for resubdivision of part of the area; and in *Re* Bennett and Emmott Ltd., 15 A.R. 442, 9 Alta. L.R. (2d) 373, 8 M.P.L.R. 257, 101 D.L.R. (3d) 473 (*sub nom. Re* City of Calgary and Provincial Planning Bd.) (C.A. 1979), where it was decided (Prowse J.A. dissenting) that in the event of payment in lieu of reserve, land was to be valued not by reference to the highest and best use but rather by reference to the uses and purposes permitted by statute for land reserved: public parks, public recreation areas, school sites, buffer strips and public highways.

Aubry v. Trois-Rivières Ouest, *supra* note 236, illustrates the danger of proceeding by zoning by-law rather than by formally requiring dedication of land.

[519] In Minto Constr. Ltd. v. Township of Nepean, *supra* note 387, the Minister required as a condition of approval of a plan of subdivision that the developer apply to the township to have dedicated to public use a one-foot strip along the boundary of a road, which reserved strip blocked traffic movement between the subdivision in question and an adjoining subdivision. When the Township refused to lift the reserve, the developer's application for a mandatory injunction or *mandamus* was rejected as there was no legal right in the applicant to have the reserve lifted.

[520] In such a case, Ontario Municipal Board approval of the zoning by-law is not *pro forma*. *See particularly Re* Dysart Restricted Area By-law 78-29, 9 O.M.B.R. 326 (Mun. Bd. 1978), for a discussion of the interrelationship of the two applications. *See also Re* Cochrane Restricted Area By-law 1590-76, *supra* note 170; *Re* Gravenhurst Restricted Area By-law P356-77, *supra* note 170; *Re* Tiny Restricted Area By-law 30-77, *supra* note 162; *Re* Collingwood Restricted Area By-law 78-57, *supra* note 170.

[521] Para. 36(5)(*d*).

[522] Pinetree Dev. Co. v. Minister of Hous. for Ont., 14 O.R. (2d) 687, 1 M.P.L.R. 227 (Div'l Ct. 1976).

[523] Subs. 36(7). *See Re* 262827 Inv. Inc. and Village of Cookstown, 8 O.M.B.R. 328 (Mun. Bd. 1978).

[524] Land Title Act, R.S.B.C. 1979, c. 219, subs. 86(1). The corresponding section, s. 96, in the Land Registry Act, R.S.B.C. 1960, c. 208, added "or would be against the public interest". This was transferred to subs. 85(3) when the Land Registry Act was repealed and the Land Title Act substituted therefor by S.B.C. 1978, c. 25.

Note that under the Strata Titles Act, S.B.C. 1974, c. 89, creation of strata title lots was outside the control of the local municipality: *see Re Jarvis*, *supra* note 264. This has apparently been remedied by the Condominium Act, R.S.B.C. 1979, c. 61, s. 2.

He also has authority to consider conformity with plans and by-laws[525] as well as more technical matters such as access to highways, drainage and environmental concerns[526] and cost of services.[527] The relevant section was amended in 1977 to give a municipality substantially increased powers to require the installation of sewers, roads and other public works and services and the dedication of land for public open space and access to water.[528] An appeal from the decision of the approving officer lies to the Supreme Court[529] of the province which, it used to be thought, constituted a review of the decision on the merits. In *City of Vancouver v. Simpson*,[530] however, the Supreme Court of Canada limited this review to a jurisdictional appeal, holding (Spence J. dissenting) that the Court cannot interfere with the approving officer's decision in the absence of bad faith or discrimination. *Re Ball*[531] would add to the list the possibility of overturning a decision made "speciously or on a totally inadequate factual basis".[532]

Whether or not a decision granting or refusing an application for subdivision approval is reviewable by the courts and, if so, on what grounds, has also been the subject matter of litigation in other provinces. In *Re Butler*[533] Chief Justice Nicholson, after observing that "constant amendment of the Act and Regulations have made it somewhat difficult to set out with certainty the steps which an applicant must follow in order to have land subdivided,"[534] decided that the initial decision was an administrative one made by the Minister of Municipal Affairs or his delegate[535] but that the Land Use Commission hearing an appeal from the Minister's decision was exercising a judicial function and was accordingly

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[525] The most important such by-law would undoubtedly be a subdivision control by-law adopted by the municipality under the Municipal Act, R.S.B.C. 1979, c. 290. In *Re* Wilkin and White, *supra* note 414, a subdivision plan was rejected because it did not conform with a by-law adopted after the plan was submitted.

[526] *See, e.g.*, Dyck v. Stinson, 9 B.C.L.R. 220 (S.C. 1978) (dedication of land for highway).

[527] Subs. 729(4). In Hunter v. District of Surrey, 18 B.C.L.R. 84, 108 D.L.R. (3d) 557 (S.C. 1979), the Court held that the approving officer may validly take into consideration a development cost levy by-law adopted between the date of formal application for permission to subdivide and the date of his decision. He has a delay of two months in which he must decide: Land Title Act, R.S.B.C. 1979, c. 219, subs. 85(1).

[528] Municipal Amendment Act, 1977, S.B.C. 1977, c. 57, s. 19 (*now* R.S.B.C. 1979, c. 290, s. 729).

[529] Land Title Act, R.S.B.C. 1979, c. 219, s. 89. S. 90 provides that the Lieutnant Governor in Council may also forbid the deposit of a subdivision plan if it appears that the deposit "is against the public interest".

[530] [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97, 65 D.L.R. (3d) 669, followed in *Re* Gray and City of Vancouver, 5 B.C.L.R. 1, 3 R.P.R. 288, 82 D.L.R. (3d) 77 (S.C. 1977), which also contains an analysis of the interrelationship of the subdivision control provisions of the Land Registry Act and the Vancouver Charter.

[531] 18 B.C.L.R. 272, 107 D.L.R. (3d) 758 (S.C. 1979).

[532] *Id.* at 275, 107 D.L.R. (3d) at 761 (Wetmore J.).

[533] 20 Nfld. & P.E.I.R. 469, 53 A.P.R. 469, 78 D.L.R. (3d) 164 (P.E.I.S.C. 1977).

[534] *Id.* at 474, 53 A.P.R. at 474, 78 D.L.R. (3d) at 167.

[535] *Id.* at 478, 53 A.P.R. at 478, 78 D.L.R. (3d) at 170.

required to act judicially.[536] In *Harvie v. Calgary Regional Planning Commission*[537] the Alberta Supreme Court, Appellate Division, decided that an adjoining landowner had a right to notice and to be heard on a subdivision application,[538] which common law right had not been abrogated by the fact that the statute restricted the right of appeal to the applicant landowner.[539] This same Court ruled in *Funk v. Alberta Planning Board*[540] that it was proper for the Board to consider the provisions of a draft General Municipal Plan in rejecting a subdivision proposal as premature. Finally, in the Nova Scotia case of *Central & Eastern Trust Co. v. King*,[541] an amendment to a subdivision plan at the instance of a mortgagor was held invalid because the consent of one of the "owners", the mortgagee, had not been obtained.

XIII. Lot Levies

Making the developer pay for the costs generated by a development was the focus of considerable attention during the period under review. As the principal sources of concern were for off-site "hard" services (such as a new sewage treatment plant) and for "soft services" (such as libraries, recreational and educational facilities), the technique used was a lump sum payment by the developer to the municipality calculated on the basis of anticipated density. These payments bear a variety of labels, such as lot levies (in Ontario) and subdivision charges, impost fees or development cost charges (in British Columiba). The particular question is, for which forms of development is the local authority authorized to impose such a payment.[542] The courts have concentrated on payments on subdivision approval, severance, condominium conversion and rezoning.

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[536] *Id.* at 481, 53 A.P.R. at 481, 78 D.L.R. (3d) at 173. But later he classified the decision of the Land Division Commission as being "one of a highly administrative character and only incidentally judicial" which must stand in the absence of evidence of bias or bad faith. Notice and an opportunity to be heard had, however, been given to the applicant. The holding that the Land Use Commission's function was judicial, and hence reviewable on a motion for *certiorari*, was followed in Country Estates Ltd. v. Prince Edward Island Land Use Comm'n, 24 Nfld. & P.E.I.R. 496, 65 A.P.R. 496 (P.E.I.S.C. 1979). *See also Re* Rogers, 20 Nfld. & P.E.I.R. 484, 53 A.P.R. 484 (P.E.I.S.C. 1978).

[537] 12 A.R. 505, 8 M.P.L.R. 227, 94 D.L.R. (3d) 49 (S.C. 1978). For earlier litigation in the same matter, *see* Harvie v. Provincial Planning Bd., 5 A.R. 445 (S.C. 1977).

[538] Although the Court spoke in terms of a general duty to be fair, the action of the Commission was classified as quasi-judicial. *See also* Bowen v. City of Edmonton No. 2, [1977] 6 W.W.R. 344, 3 M.P.L.R. 129, 4 C.C.L.T. 105, 80 D.L.R. (3d) 501 (Alta. S.C.) (replotting scheme for subdivision is a quasi-judicial function; municipality not liable for negligence). *See also* Sharpe, Annot., 3 M.P.L.R. 129 (1977); Laux, *A Comment on Bowen v. Edmonton*, 4 C.C.L.T. 132 (1977).

[539] The Planning Act, R.S.A. 1970, c. 276, s. 20 (*repealed and replaced by* S.A. 1977, c. 89).

[540] 19 A.R. 552, 11 Alta. L.R. (2d) 316 (C.A. 1979).

[541] 41 N.S.R. (2d) 270, 76 A.P.R. 270, 107 D.L.R. (3d) 374 (S.C. 1979).

[542] *See* McCallum, *Recent Decisions on the Validity of Municipal Levies and*

A. *Subdivision Approval*

Most of the litigation concerning levies on subdivision has emanated from British Columbia.[543] Two cases[544] considered whether impost fees could be levied under an approving officer's discretionary power to refuse to approve a subdivision plan "if he is of the opinion that the cost to the municipality . . . would be excessive",[545] and both held the action of Council in this regard *ultra vires*. Although each could arguably be restricted to their particular facts,[546] the validity of impost fees was put into doubt. A third case,[547] therefore, considered whether a municipality which doubted the validity of such impost fees was entitled to enact a by-law greatly increasing the minimum size of lots so as to force the developer wanting development on smaller lots to enter into a land use contract,[548] one of the terms of which would validly be the paying of impost charges. Such action was held valid notwithstanding that a motivating factor was to enable the municipality to enforce payment of impost charges by a particular developer:

Impost Fees, in ONTARIO PLANNING AND ZONING: BACK TO BASICS 91 (Law Soc'y of Upper Canada 1978).

Herman Bros. v. City of Regina, [1978] 1 W.W.R. 97, 4 M.P.L.R. 233, 81 D.L.R. (3d) 693 (Sask. C.A.), is authority for the proposition that whether or not the enabling legislation specifically provides for a particular levy, the levy cannot be applied to property lying outside the municipal boundaries in the absence of a specific provision to this effect.

One should perhaps note in passing that several Alberta cases have dealt with the payment of a fee as a condition precedent to a change in land use classification (Schmal v. City of Calgary, 9 A.R. 396 (Dist. Ct. 1977)) or to an appeal to a Development Appeal Board (Binder v. City of Edmonton, *supra* note 309), but these are not lot levies in the sense of payment for services.

[543] That levies on subdivision are valid in Ontario was accepted in principle in *Re* Mills and Land Div. Comm. of York, 9 O.R. (2d) 349, 60 D.L.R. (3d) 405 (Div'l Ct. 1975). *See also* Pinetree Dev. Co. v. Minister of Hous. for Ont., *supra* note 522.

[544] G. Gordon Foster Devs. Ltd. v. Township of Langley, *supra* note 4; Wilkin Holdings Ltd. v. City of Nanaimo, 5 R.P.R. 312 (B.C.S.C. 1978).

[545] Municipal Act, R.S.B.C. 1960, c. 255, subs. 711(3) (*see now* R.S.B.C. 1979, c. 290, subs. 729(4)).

[546] In that both involved flat rate formulas of general application set out in a council by-law or resolution rather than the approving officer's calculation of the excessive cost of a particular subdivision.

The principal issue in each case was whether, assuming the fee illegal, the individual applicant was entitled to recover the monies paid after the plan had been approved. In each, the Court applied the rule that where money is paid under mistake of law, it is not recoverable unless paid under compulsion of urgency or pressing necessity (*G. Gordon Foster*: no compulsion; *Wilkin Holdings*: compulsion). For an Ontario case holding that a developer was entitled to the return of monies paid under protest in satisfaction of a levy on subdivision unlawfully imposed by a site plan agreement, *see* Jay-Del Devs. Ltd. v. Regional Municipality of Durham, 4 M.P.L.R. 132 (Ont. H.C. 1977). *See generally* McKenna, *Mistake at Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid*, 37 U. TORONTO FAC. L. REV. 223, at 223-35 (1979).

[547] *Re* Vista Hills Farms Ltd., *supra* note 298.

[548] *See* text accompanying note 294 *supra*.

> I think that if one section of the Municipal Act, in this case s. 711(4), does not confer on council the power to control the costs of residential subdivisions but if, through the utilization of powers conferred by other sections of the Act, in this case ss. 711(1)(a) and 702A, council can control those costs and it acts under the latter sections, it cannot be said that council acted in bad faith, i.e., for an improper motive.[549]

In view of the controversy concerning impost fees, British Columbia amended the Municipal Act in 1977 to abolish impost fees and subdivision charges by way of land use contracts and to provide more clearly for the levying of "development cost charges".[550] As originally enacted, such charges were to be levied on subdivisions creating more than three lots; this restriction was, however, removed in 1979.[551]

B. *Severances*

It follows from the above discussion that in British Columbia, development cost levies are now permitted on what in Ontario are called severances, as well as on more extensive subdivisions of land. In Ontario, the validity of imposing lot levies as a condition of severance was confirmed in *Re Frey and Peel Land Division Committee*.[552] In such cases, the onus is on the municipality to prove that the amount levied is necessary for the purpose stated, equitable, reasonable and relevant.

C. *Condominium Development*

Levies are equally possible in Ontario on a condominium development, which is really a form of subdivision of land,[553] but similar constraints apply: the levy must be necessary, equitable, reasonable and relevant. It is for this reason that the Ontario Municipal Board refused the levies requested in *Anglo York Industrial Ltd. v. City of Oshawa*,[554] *Glenworth Homes Ltd. v. City of Oshawa*[555] and *City of Ottawa v. Slice Construction Ltd.*[556]

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[549] *Re* Vista Hills Farms Ltd., *supra* note 298, at 51, 6 M.P.L.R. at 225 (Taggart J.A.).

[550] *See* text accompanying note 300 *supra*.

[551] S.B.C. 1979, c. 22, s. 35. For a case concerning these amendments, *see Hunter*, *supra* note 527.

[552] *Supra* note 492. This had also been established by the *Mills* case, *supra* note 543. In *Frey*, the Court accepted the validity of imposing a levy for park purposes (notwithstanding that it also held that in the circumstances, the municipality would not be entitled to require the dedication of land for park purposes nor the payment of money in lieu thereof) but left the amount to be determined by the approving authority. In subsequent proceedings, the Board held that a levy for park purposes had not been justified but did accept levies for other purposes: *Re* Frey and Peel Land Div. Comm., 2 M.P.L.R. 1, 6 O.M.B.R. 444 (*sub nom.* Frey v. Phi Int'l Inc.) (Mun. Bd. 1977).

[553] *Pinetree Dev. Co.*, *supra* note 522.

[554] 3 M.P.L.R. 313, 7 O.M.B.R. 359 (Mun. Bd. 1977), *aff'd without written reasons*, 8 O.M.B.R. 293 (L.G. in C. 1978).

[555] 9 M.P.L.R. 1, 9 O.M.B.R. 242 (Mun. Bd. 1978).

[556] 10 O.M.B.R. 242 (Mun. Bd. 1979).

D. *Rezoning*

Somewhat paradoxically, Ontario courts have denied the right of municipalities and of the Ontario Municipal Board to impose lot levies on rezoning applications,[557] notwithstanding that the increase in density could be substantially greater than that resulting from a severance and as great or greater than that resulting from a subdivision of land or a condominium development. The new British Columbia legislation is less restrictive in this regard and permits the imposition of development cost charges on issuance of a building permit.[558]

XIV. Enforcement of By-laws

Many of the cases discussed thus far involved applications to enforce a by-law; whether the application should be granted, however, raised such issues as constitutional validity,[559] jurisdiction of the court,[560] validity of the by-law,[561] interpretation of the by-law[562] and the existence of acquired rights.[563] The cases will not be reconsidered in this section and only cases in which the enforcement of by-laws was a central issue will be discussed.

Several such cases were procedural in nature. For example, *Township of Oro v. Kneeshaw*[564] held that a writ issued before a by-law had been approved by the Ontario Municipal Board, although after it had been passed by Council, was ineffective notwithstanding that, once approved, the by-law would be effective as of the date passed:

> [a]s of the date that the writ was issued in this matter, the zoning by-law was not an enforceable by-law. Its vitality was fed by the subsequent Ontario Municipal Board approval. Its effective date then, but only then, became the date it was passed by Municipal Council.[565]

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[557] *Re* Sorokolit and Regional Municipality of Peel, *supra* note 192. (For a discussion of related proceedings in *Sorokolit*, *see* text accompanying note 191 *supra*). *See also Re* Shelburne Restricted Area By-law 31-1976, *supra* note 170; Victoria Way Corp. v. Borough of Etobicoke, *supra* note 176.

Some limited authority to require the dedication of land for park purposes, and the acceptance of cash in lieu thereof, as a condition of development or redevelopment is given by s. 41 of the Planning Act, R.S.O. 1980, c. 379.

[558] *Supra* notes 550, 551.

[559] *See, e.g.*, Township of Moore v. Hamilton, *supra* note 29.

[560] *See, e.g.*, Roy v. Ville d'Anjou, *supra* note 32.

[561] *See, e.g.*, Bell v. The Queen, *supra* note 227.

[562] *See, e.g.*, Blouin v. Longtin, *supra* note 263; Ville de Montréal v. Julien, *supra* note 266; Farr v. Township of Moore, *supra* note 268.

[563] *See, e.g.*, Ville de Lachenaie v. Hervieux, *supra* note 92; R. v. Québec Lait Inc., *supra* note 354.

[564] *Supra* note 159.

[565] *Id.* at 692, 9 M.P.L.R. at 308, 99 D.L.R. (3d) at 375 (Osborne J.). The question of the enforceability of by-laws over time was also an issue in Ville de Blainville v. Charron Excavation Inc., *supra* note 80.

A second case, *R. v. Fred's Tuck Shoppes Ltd.*,[566] discussed the court before which an action for breach of a zoning by-law had to be brought and held, in particular, that a municipality did not have authority to name the forum where, nor the judicial officer before whom, an alleged contravention would be tried.

Most cases, however, dealt with the remedy in the event of breach. Basically, three remedies are available to a local authority seeking to enforce a by-law: penal sanctions under the by-law, injunctions and orders to demolish. Five Quebec cases considered their interrelationship. *Ville de Lachute v. Caron*[567] was concerned with the suitability of an interlocutory injunction in the circumstances, rather than penal sanctions or a permanent injunction. *Ville de Mont-Laurier v. Cyr*[568] reaffirmed that an application for an injunction is not precluded by the fact that another remedy, a penal sanction, is also available (especially since the particular by-law specifically reserved "*tous les recours*"). Along the same lines, *Ville de Montréal v. L. & M. Parking Ltd.*,[569] rejected the argument that after a defendant had been acquitted in a prosecution under the by-law, an application for an injunction was unavailable as such an application would constitute an indirect appeal against the acquittal. The Court of Appeal in *Nadeau v. Ville de Montréal*[570] underlined that an application for demolition could be supported under article 1066 of the Civil Code even if a similar remedy under the Cities and Towns Act[571] was unavailable.

> Il est inexact de prétendre, comme le fail l'appelant, que l'article 1066 C.C. ne s'applique qu'aux recours fondés sur des obligations contractuelles.
>
> . . . .
>
> Les règlements de la Ville de Montréal sont loi et créent des obligations.[572]

The decision in *Nadeau* accepted that an application for demolition under the Cities and Towns Act was unavailable if it was not specifically provided for in the by-law in question, which suggestion was taken up in

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The *Kneeshaw* case also held that a municipal corporation, as well as the chief building official of the municipality, is a proper plaintiff in an action to remedy a violation of The Building Code Act, 1974, S.O. 1974, c. 74.

566 18 O.R. (2d) 576, 39 C.C.C. (2d) 201 (Div'l Ct. 1978).

567 [1979] R.P. 205 (Que. C.S.).

568 *Supra* note 378.

569 *Supra* note 264. For a discussion of the procedure on an application for injunction, *see* Ville de Blainville v. Charron Excavation Inc., *supra* note 80.

570 [1977] Que. C.A. 402.

571 R.S.Q., c. C-19, s. 412 (*amended by* S.Q. 1978, c. 48, s. 120). For a discussion of the procedure to be followed under a similar article in the MUNICIPAL CODE, s. 392g, *see* Municipalité de Val-David v. Bertrand, [1977] Que. C.S. 1032. The case of Riendeau v. Cité de Beauharnois, *supra* note 4, emphasized that a demolition under this section must be ordered by a judge of the Superior Court and could not be done by the municipality on its own initiative.

572 *Supra* note 570, at 407 (Lajoie J.).

St-Basile-le-Grand v. Baptiste.[573] The Court there suggested possible procedural differences between the two actions.

The cases on enforcement show a concern of the courts with the appropriateness of the particular remedy, especially that of demolition. Two[574] held it inappropriate to order demolition where the building in question had been built in conformity with the existing by-laws, albeit without a permit; one[575] delayed the effect of the order for six months to give the defendant time to correct the situation and bring himself within the by-law; one[576] even refused to order the demolition of a non-conforming structure where it would have been an economic waste to do so, ordering the defendant instead to pay heavy punitive damages if he could not reduce the size of the building so as to make it conform. This last would appear to be an unusual case. More often, the non-conforming structure is ordered demolished, regardless of the resulting expense or inconvenience to the defendant property owner.[577]

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[573] *Supra* note 265, at 122. Nichols J. stated:

> La différence entre le recours prévu à 1066 C.C. et la requête visée par l'article 4261[0]b de la loi des Cités et Villes est au niveau de la procédure, le recours sous 1066 devant s'exercer par action alors que la requête suffit dans l'autre cas.
>
> Ici, la requérante a procédé par voie de requête. C'est donc dire qu'elle a voulu se prévaloir du recours visé par la loi des Cités et Villes. Il n'est pas certain que ce recours puisse s'exercer quand il n'est pas prévu dans le règlement de la municipalité.

[574] Municipalité de St-Adolphe d'Howard v. Stern, [1977] Que. C.S. 1030; St-Basile-le-Grand v. Baptiste, *supra* note 265. To the same effect *see* Nadeau v. Ville de Montréal, *supra* note 570. However, *Re* Hadley and Santos, *supra* note 423, held that an injunction could issue to restrain construction without a building permit, regardless of whether the work being done conforms with the relevant by-laws.

[575] Village de Val-David v. Lacroix, *supra* note 4.

[576] Town of Stettler v. Bartscher, 16 A.R. 205, 8 Alta. L.R. (2d) 347 (S.C. 1978). Waite J. founded his authority to impose punitive damages on his authority "to make any other order that in his opinion the justice of the case requires" (The Municipal Government Act, R.S.A. 1970, c. 246, s. 405). He was, however, concerned with the deterrent effect of such a sanction:

> Nevertheless [in spite of the attractive appearance of the garage], the zoning by-law must be enforced, and with sufficient severity that the penalty imposed may not be construed as an economical form of licence by which others might be invited or encouraged to ignore the building restrictions contained in planning legislation at the local level.

Id. at 209, 8 Alta. L.R. (2d) at 351-52. This is also one of the concerns with the imposition of fines as set out in the by-law.

[577] *See, e.g.*, Ville D'Esterel v. Bucker, [1977] Que. C.S. 414 (appeal abandoned: [1978] Ann. de Juris. de Qué. 745). *But see* Ville de Berthierville v. Dupuis, *supra* note 407.