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DEVELOPMENT CONTROL VS. ZONING: THE EMERGENCE OF LAND USE CONTROLS IN ALBERTA

by

J. WEST MUNSON

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled, "DEVELOPMENT CONTROL VS. ZONING: THE EMERGENCE OF LAND USE CONTROLS IN ALBERTA," in partial fulfillment of the requirements for the degree of Master of Arts.

Supervisor, Dr. E. E. Dais
Faculty of Law

Dr. S. Drabek
Department of Political Science

Dr. D. Detomasi
Faculty of Environmental Design

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ABSTRACT

This paper undertakes through a comparative format to assess the relative merits of zoning as it exists in Edmonton, development control as exercised in Calgary, and the proposed new land use control structure as put forth by the provincial government.

A brief, background survey of the derivation of land use controls is followed by a more specific review of the development of zoning and how it is applied in Alberta. The British origins of development control are briefly stated to provide necessary understanding of the system to better understand its application in Calgary, as outlined in some detail in the fourth chapter.

A rigidity-flexibility spectrum is then brought into the study in order to provide a reference for analysis and comparison of the two systems, which are compared on the basis of a number of common elements. The new provincial proposals are then situated on the spectrum, in an absolute and a relative sense, in order to establish a comparative situation.

This leads to a situation where the three systems can be related to each other, but not, in any meaningful way, to those who must use the land use control process. The conclusion attempts to relate the various aspects of the land

use control process to those parties affected by its exercise. This leads to a demonstration of the relative superiority of one system over the others, given a particular set of circumstances.

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CHAPTER I

INTRODUCTION

Prelude

Calgary and Edmonton are two cities with virtually identical population and growth statistics. Both are located in one of the more affluent provinces in Canada. The former is the location of the head offices of many oil and financial operations, and the latter is the home of the Provincial Government and hence most of the government departmental offices. They are alike in many respects, but not in the form of land use controls exercised by the municipal government.

Theoretically, the cities are quite distinct in terms of land use controls. Calgary uses development control in theory, but in practice uses it only in areas where transition and/or major development is taking place. Established use areas and new residential subdivisions are generally administered as if under zoning, although the Development Officer does retain the seldom-used initiative to refuse permission to a development which meets the requirements set out in the administrative guidelines. However rare the exercise of this power may be, merely its existence, as we shall see, provides a considerable amount of discretion to the system.

Edmonton uses both zoning and development control, under two separate bylaws. Development control, as in Calgary,

is used primarily in areas where concentrated development activity occurs, while zoning governs those areas which have established uses or are undergoing smaller-scale development - areas such as low-density residential and service-oriented commercial operations. The existence of the two bylaws in Edmonton raises an interesting point regarding equal treatment under the law. Property owners in different areas of the city are receiving different treatment, or in terms of economics, horizontal equity may be violated. Zoning implies strict regulation, permitted uses and limited discretionary authority, while development control implies no uses as of legal right, and rule by administrative discretion. Some owners have rights in their land and are free from the discretionary factor, while others have no such specific rights and are subject to administrative rulings as opposed to legislative authority.

For the sake of analysis, let us assume a spectrum with zoning on one extreme, representing rigidity, and development control on the other, representing flexibility. Rigidity and flexibility, for purposes of this paper, are not to be taken as purely negative or purely positive in meaning. The rigidity extreme is intended to represent the pure zoning, with its clear-cut land use divisions, its inherent specific rights in the use of land, and its complete protection of

established uses, hence its inflexibility. The flexibility extreme is intended to represent the pure theory of development control, with its total absence of established land use districts, its wide administrative discretion, and its principle of considering each application on its merits, hence its extensive flexibility. If we also assume that neither extreme is totally acceptable on the basis of being either too restrictive or too arbitrary, then an optimum combination of the various elements should lie somewhere between the two. Calgary and Edmonton have each incorporated modifying techniques to their systems, so they lie well within the extremes of the spectrum, Edmonton toward the rigidity end, and Calgary toward the flexibility end. The new provincial Planning Act proposals outline a system putatively intended to combine the desirable aspects of the systems of both Edmonton and Calgary.

Earliest Forms of Land Use Controls

The systems under comparison in this study are the results of an evolutionary process which began when one man was first adversely affected by his neighbour's use of land. We have progressed from individual litigation, through rigid and flexible control systems, to a point where we seek to combine their best features.

Initial land use control techniques originated on the basis of a landowner using his right of ownership to his

own advantage without regard for the consequences of his actions. Land use controls are not an inherent aspect of society, but rather have evolved as a result of increasing organization in the pattern of human existence. As people began to crowd into villages, towns and cities, one's use of his property could lead to serious objectionable or harmful effects on the property of his neighbour. In a radical departure from the basic belief in individual rights of property, necessary controls were introduced. The concept of private property and individual rights relating thereto included more than merely land. In a social context, property is "the exclusion of the rights of others over particular physical objects of the world with a view to enhancing the returns made from its use or exchange to other people which would benefit its present rightful owner."[1] Such a definition serves to underscore the highly individualistic aspect of property rights which came to be curtailed in an urban environment.

A much more restrictive, contemporary view of property rights in an urban context was expressed by Mayor Rod Sykes, Mayor of Calgary, in words to the effect that in most areas an owner has a right to reasonable uses which are reasonably compatible with neighbouring uses.[2] The idea of individual rights is considerably weakened in such a definition, by the high levels of uncertainty contained in the terms 'reasonable'.

The element of uncertainty is centered around the authority who determines the specifications of reasonability and circumstances surrounding the use being proposed. This element of authority is found in government regulations which influence the ownership and use of land in all areas of the country and at all levels of society. "It is evident that.....land is a resource which must be managed in the interest of all citizens; and is not simply a commodity to be bought and sold."[3] One must avoid doing harm to others through the use of his land, placing the public interest before private interests.

This concept of public interest had created a new outlook toward the use of property, and in particular, land use. To protect the public interest at the expense of certain individual rights, systems of controls had been introduced "to provide for the orderly and economical development of communities, the conservation of natural resources, and a healthy environment."[4] But prior to legislatively-introduced systems of land-use controls, individuals had only private remedies to achieve some form of protection. One of the earliest forms was nuisance law, which protected one man's right of property from the harmful effects of a neighbouring use, and which involved neighbours in the process of litigation in two areas of the law.[5] The first area was tort law,

which determined liability for wrongful acts, and the second was property law, concerned with rights accompanying the ownership and occupation of land, rights of unimpaired use and enjoyment, and the protection of those rights from neighbouring land use.

The other form of private remedy which was in relatively common use was the restrictive covenant. Under this method, an individual could purchase a tract of land larger than necessary for his own needs, locate his desired use in the central area of such a tract, and subdivide the remainder into parcels of a size desirable to himself. These adjoining parcels would then be sold to interested purchasers subject to a clause in the agreement of sale which would restrict the use of that particular parcel of land to a type of use clearly compatible with that of the original owner. A restrictive covenant is a condition of sale or a term in a contract which attaches to the title of land, and as such is differentiated from the liability aspect of nuisance law.

These private remedies worked rather well until their utility was surpassed in most urban areas by rapid growth rates and increasing technology. The growth rate of urban areas in North American society was the outcome of both an influx of immigrants from Europe and Asia, and

a rural to urban population shift which gained great momentum in the early twentieth century. Improvements and advances in technology contributed to expanding industrialization and the creation of new manufacturing and commercial enterprises, which chose to locate in urban centers for reasons of economics and convenience. Subsequent increases in employment opportunities led even greater numbers of rural inhabitants into towns and cities which began to feel pressures of conflict between landowners over entitlement to use of land.

Some municipalities in North America set out to remedy the major difficulties through a comprehensive zoning process, whereby certain uses of land were limited to certain areas; the uses permitted within such areas were also limited.[6] The institution of such controls was necessary to restrict the overlapping of commercial and residential uses and hopefully limit the negative repercussions resulting therefrom. The private remedies of nuisance law and restrictive covenant were difficult to apply in changing circumstances, and even where applicable were subject to lengthy delays in court proceedings. The zoning concept as introduced in New York City was subject to extensive litigation, but the courts generally upheld the principles involved, thereby establishing the new form of control.

Zoning as it is known in the North American situation is somewhat different from its counterpart in England. Throughout most of the United States, and in many Canadian cities, the American technique is favoured, a system "based on the regulation of land development through the enactment of local zoning ordinances which allocate land uses by district."[7] The English technique, which is being incorporated into American zoning ordinances, especially in urbanizing areas,[8] has no such zoning ordinance. Development is guided by a general plan and proceeds on the basis of permission from local planning authorities, who may grant or refuse permission on any application. A national ministry reviews local planning decisions.[9]

According to Mandelker, this development control technique is finding more ready acceptance in growing North American urban areas, though not in exactly the same form. Reasons for adoption of the English techniques may be two-fold. First is administrative pressure, in that it provides planning administrators with an enormous club to wield over developers. The second reason may be founded on citizen pressure in that people in cities, especially in older areas undergoing change, are demanding input into the planning process, something which American-style zoning does not provide.

Thesis

It is the intent of this thesis to compare the techniques of zoning and development control as used in Calgary and Edmonton, not only to each other, but also to the technique proposed by the provincial government. Based on the previously stated premise that an optimum form of land use controls will be found between the extremes of rigidity and flexibility, it is intended to demonstrate that with the exception of some centralizing clauses, the scheme put forth in the new proposals is closer to an optimum technique than either the development control or zoning techniques as they are now used in Calgary and Edmonton.

The new proposals are based primarily on zoning legislation - they allow permitted uses, and all the regulatory instruments are part of the bylaw. But they also include some broad discretionary provisions, such as conditional uses and direct control zones with no uses as of right. Established uses are protected, while unplanned, undeveloped areas are subject to strong administrative controls. This may be closer to an optimum technique than that of either Calgary or Edmonton, but to claim that it is the optimum combination would be unrealistic since so many different variables must be considered in each set of circumstances.

In considering an optimum as a goal, a number of diverse elements must be taken into account. The required balance between rigidity and flexibility must be determined, by considering the needs of the various participants in the land use control process after having analyzed the elements of the techniques to be compared. The rigidity elements of protection and stability must be balanced with the flexibility requirements of versatility and adaptability in balancing the needs of homeowners - who will desire protection, the civic administrators - who will seek flexibility, and developers - who will desire certain degrees of both rigidity and flexibility. Further consideration will be given to the administrators, who are not only participants in the land use control process, but will be seen to be an integral part of the process regardless of technique. The authority of elected municipal councils and political considerations evolving therefrom are further elements to be considered. This analysis does not intend to establish a single optimum approach to land use control, but rather to demonstrate that the system put forth by the province is closer to that goal than either of the types currently in use in Calgary and Edmonton.

If for the purposes of analysis we set aside the possibility of other control techniques, and the special

circumstance of a total absence of legislative regulations of land uses such as in Houston,[10] we can visualize a rigidity-flexibility spectrum, equating zoning with rigidity and development control with flexibility. Calgary and Edmonton have modified the basic techniques, Calgary by applying limitations on administrative discretion which exists under development control, and Edmonton by using discretionary techniques such as conditional uses and development control in what is essentially a zoning system of control. As the analysis proceeds it will become clearer that the two cities under review have changed their techniques in such a way as to move inward from the extremes of the spectrum, but to what extent and with what comparative results remains to be seen. The proposals of the Provincial Government with respect to creation of a new Planning Act can also be assessed and located on our spectrum, to see how the present practices and the new proposals relate to each other.

Common criteria will be needed to accomplish this purpose, and these criteria can then be complemented by relevant details which will serve to clarify the location of one approach to land use regulation in relation to the others on the spectrum. Such things as the bylaw and its instruments, the structure and powers of the relevant

planning authorities, and the appeal procedures will be assessed to help situate each approach. The extent of rigidity and flexibility will in each instance be as objectively appraised as possible in the hope of determining an accurate categorization.

Analysis

We will then begin in the next chapter by looking more closely at the legal concept of zoning, the North American technique, starting with its origins and rationale, on through its growth, acceptance and development. Canadians adopted many aspects of the American technique regardless or in spite of the differences of political structures and legislative practices which exist in the two countries. The second part of that chapter will start by considering the development of zoning in Alberta, and proceed through the creation of zoning legislation in the province. This will be done by analyzing a number of items which must be considered when creating a zoning ordinance, as well as reviewing the basic elements which comprise such a legislative output. Then the City of Edmonton zoning bylaw will be analyzed with reference to unusual or significant aspects concerning its administration.

The third chapter will be a general review of the origins and growth of development control from its 1947 initiation in Great Britain through its commencement and development in the province of Alberta, showing differences between the two concepts as well as any similarities. We will attempt to define the idea of development control based on the Alberta Planning Act terminology, as well as that of the Town and Country Planning Act of Great Britain. Then a brief analysis will be made of the Alberta form of development control outlining some of the more specific aspects of its operation in the local setting.

This will be followed in the fourth chapter by an assessment of the practices of development control in the City of Calgary. This will include a brief summary of its development within the city leading up to its present structure, and will go on to outline the procedures and instruments used in its current operation. Some mention will also be made here of the use of this approach in Edmonton.

The fifth chapter provides a comparative assessment of a number of major elements of the two approaches, with the intent of illustrating the flexibility of each element in its appropriate setting, and in relation to its equivalent in the other city. This comparison is made by

deriving a combined flexibility-rigidity assessment of the elements of both bylaws in Edmonton, and relating this assessment to the one for Calgary.

The sixth chapter will review the new provincial Planning Act proposals, and endeavour to locate them on our spectrum, in both an absolute and a relative sense. This assessment will be made subject to a major qualification - the new proposals were prepared under the auspices of the provincial government, and include many steps to centralize authority at that level. For purposes of this analysis, authority is considered to exist at the municipal level (subject, of course, to provincial enabling legislation), so the analysis can be based on a considered exclusion of some of the centralizing provisions. Such an exclusion is thought to be necessary for purposes of analysis and comparison. To compare two municipally-controlled systems with a provincially-dominated system must be a specious exercise, since the focus of authority in the latter is so dissimilar to that in the others. The provincial government in Alberta may indeed be moving in the direction of centralized control of urban land use, but for purposes of comparison it is assumed that such control will rest with the municipality. Hopefully this analysis will lead to an assessment which demonstrates that the provincial proposals, subject to the

stated qualification, are comparatively closer to an optimum system than either one presently in use in Calgary or Edmonton.

The concluding chapter will start with a discussion of the criteria of flexibility and rigidity, as they relate to the participants in the process of land use control, and as they relate to what we will perceive to be an optimum. These criteria include considerations of protection, stability, versatility, and administrative convenience and the relative balances which are required in determining an optimum. Such an optimum is also considered in relation to the interests of the participants, whose interests are further related to the actual land use control process. The elements of the process, as given in the middle chapters of the analysis, will be further reviewed in the conclusion with the intention of demonstrating that the new proposals can indeed be construed as superior to either of the other two techniques in terms of better serving the interests of the participants in the process.

FOOTNOTES

1. Bettison, D.G., Kenward, J.K., Taylor,L. URBAN AFFAIRS IN ALBERTA. Edmonton: 1975, The University of Alberta Press; pp. 180-181.

2. From ideas expressed by Mayor R. Sykes in two lectures given at the University of Calgary: Jan. 21 & 28, 1976.

3. Esau, A.A.H. LAND OWNERSHIP RIGHTS. Law and Land:An Overview The Alberta Land Use Forum; Sumary Report No. 9, 1974, p.1

4. The City of Calgary THE CALGARY PLAN. City of Calgary Planning Department, 1973; p.14.5.

5. This discussion derives primarily from the first chapter, on Nuisance, and the seventh chapter, on Land Use Control by Private Agreement, in COMMUNITY PLANNING. A Casebook on Law and Administration, edited by J.B. Milner; Toronto; University of Toronto Press, 1963.

6. Laux, F.A. The Zoning Game: Alberta Style, in ALBERTA LAW REVIEW, vol. 9, 1971, pp.268-269. The New York situation will be discussed a little more extensively in the next chapter.

7. Mandelker, D.R. THE ZONING DILEMMA. The Bobbs-Merrill Co. Inc., 1971; p.xi.

8. Ibid; p.xii.

9. Ibid; p.xi.

10. Altshuler, A.A. THE CITY PLANNING PROCESS. Ithaca: Cornell University Press, 1965; p.437. The appropriate discussion found in this source revolves around restrictive covenants, which represent the major control in Houston: "...the classic example of its success (is) in Houston, the largest American city with no public land-use controls whatever".

CHAPTER II

THE CONTENT AND APPLICATION OF ZONING LEGISLATION

Purpose

This chapter provides a brief description of the process of zoning. It is designed to elucidate such points as the history and legal bases of zoning, significant principles relevant to the analysis, a survey of definitions to clarify the possible ambiguities in the term developed through practice, structural aspects of a zoning ordinance, governmental considerations in implementation and administration of zoning, and the practical application of zoning in Alberta, seen through discussion of some of the aspects of zoning as practised in Edmonton. The purpose is to provide background on zoning in Alberta, with specific reference to certain structural essentials, which will later be used in a comparative format with development control techniques used in Calgary.

Origins and Development

The most common form of governmental land use control in North American society is zoning, a relatively rigid, highly structural form of control based upon specific rights in the use of land. Virtually any book, article or

document on zoning stipulates that one of the primary purposes of zoning is to implement planning by restricting certain types of land uses to certain areas of a municipality. Most sources also claim that another principal function of zoning is to protect established areas, especially single-family residential areas, from unwanted land uses - again concerned with the use of land, but from a preventive viewpoint: to prevent the intrusion of nonconforming uses and hence protect the value of each man's property. The first purpose relates to future planning, while the second involves protection of existing values.

Laux states that zoning restrictions are "to control community development by undertaking to provide space for the projected needs of the municipality and at the same time protect the existing and future uses of land from the hazards associated with the development of incompatible uses. Implicit in the notion of zoning is that it provides certainty and a high degree of permanency of land use patterns."[1] This opinion expresses many of the ideas on which zoning seems to rest. The elements of comprehensiveness and planning are apparent in the ideas of community development and the projected needs of the municipality. Protection of existing uses from incompatibilities is stated quite plainly, and the idea of future expectations of similar land use is expressed through the terms certainty and permanency.

Laux's concept of the purpose of zoning is somewhat in accord with the views of Babcock, who maintains that the paramount objective of zoning is protection of the single-family residential neighbourhood, although the purpose is rarely if ever stated in those terms.[2] Such purpose is most commonly expressed in one of two theories, the Property Value theory, or the Planning theory. The former theory is predicated on the assumption that zoning serves to maximize property values. Each piece of property in a given community has an optimum value, and the zoning will eventually stabilize when that plateau is reached.

> "The basic axiom of this theory is that each piece of property should be used in the manner that will insure that the sum of all pieces of property will have maximum value,.... The zoning ordinance can achieve this goal by prohibiting the construction of 'nuisances',.... any use which detracts from the value of other property to a degree significantly greater than it adds to the value of the property on which it is located."[3]

This may impose undue restrictions on the use of a piece of property but if such restrictions give to it and the neighbouring properties a higher dollar value, then it is in accord with the highest and best use of land.

Once that plateau has been reached, zoning serves to maintain the value of property. In micro-and macroeconomic

terms, to increase the zoning density of a particular lot in the middle of an established residential area would possibly cause a decrease in the value of surrounding lots to an extent greater than the increase in value of the single lot. Such an action would be contrary to the ideas of the Property Value theory.

The Planning theory of zoning sees the comprehensive or general plan of a municipality as the basis for zoning legislation. The zoning ordinance is merely one of a number of elements necessary to fully implement a comprehensive plan, and as a subordinate instrument to the plan, the zoning ordinance must draw its validity therefrom.

Babcock views the purpose of zoning as far too complex to be satisfactorily explained by either of the foregoing theories. The concept of value is too vague and too restrictive to include sufficient concerns, and hence can not be the sole purpose. Similarly, he refutes the concept of the planning theory as the basis of zoning validity by stating that the "municipal plan may be just as arbitrary and irresponsible as the municipal zoning ordinance if that plan reflects no more than the municipality's arbitrary desires."[4] A zoning ordinance based on poor planning should be as subject to criticism as one based on no planning.

Prior to the introduction of generalized zoning legislation, private remedies or specific land use legislation were the only controls. Before the New York zoning of 1916, other legislation of a much more particularized nature had been used to restrict land uses. However, the City of New York felt a need for much greater control, and had to enact it in such a way that it would stand up in the courts under questions of its constitutionality. The State of New York established the first zoning enabling act in 1914, which was followed in two years by the first comprehensive zoning ordinances.[5] Courts in the United States upheld the legislation, establishing the concept of zoning which then spread rapidly. Five years later, seventy-six American municipalities were zoned, and by 1929 the number had swelled to seven hundred fifty-four.[6]

The notion of judicial support of zoning legislation was necessary under certain constitutional provisions in the United States, but the situation in Canada was quite different. The Canadian system of government is based upon the principle of parliamentary supremacy rather than on separation of powers as in the United States. The legislative, executive and judicial functions are not separate and independent; instead, the legislature is supreme, provided it acts within the powers granted to it

by the British North America Act, which sets out a list of powers for each of the federal and provincial levels of government in our federal system. Section 91 of the BNA Act sets out the powers granted to the federal government, and Section 92 lists those of the provincial governments:

> "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, -
>
> (8) Municipal Institutions in the Province.
>
> (13) Property and Civil Rights in the Province."[7]

These clauses gave clear authority to provincial governments in the establishment and regulation of municipal governments, and unfettered control over regulation and distribution of property and rights. Thus when zoning was introduced by provinces into the Canadian setting, there was no ground for municipalities to instigate constitutional debate over its legitimacy.

Principles of Zoning

The introduction of zoning brought a sense of security to property owners in zoned areas in two forms: first, protection of their districts from the intrusion of

incompatible uses; and second, a sense of stability to land use planning, for developers could now make some assessment of the potential uses of their land, based on the notion that similar treatment would be accorded to land in similar circumstances. The court interpretation of this idea is:

> "The constitutional and statutory zoning principle is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division."[8]

The statement of the suitability of particular uses for particular areas expresses the idea of the permitted use, a particular classification of use which may be applied to all lands in a specific zone. This is centered around the certainty element which was mentioned earlier. If a zone is deemed suitable for a particular type of use, then any proposed use which meets the specifications as set down in the zoning bylaw should be considered compatible and will be granted a development permit upon application. The permitted use is generally a use of neighbours or neighbouring uses.

It is possible to envision a use which belongs in a particular zone, yet which could cause problems for surrounding properties. Such a use is referred to as a conditional

use, and the issuance of a development permit will depend on the circumstances surrounding the location of the proposed use. The element of administrative discretion comes into play with conditional uses, in deciding whether or not to permit the conditional use to locate at the proposed site. One important difference between permitted and conditional uses is that upon an application having been made, a permit shall be issued for the former, while it may be issued for the latter.[9] More will be said on the conditional use later in this chapter.

The decisions on permitted and conditional uses within a zone had to be made prior to the enactment of a zoning ordinance for they were a crucial part of the ordinance. The expression of rights in property in a zoning ordinance is done through the permitted use listings. The determination of which uses to place in which category is acheived through a planning process, the extent of which is determined by the attitude of the local authorities towards zoning, and the approach taken to implement it. At the outset, zoning was intended to keep incompatible uses of land from interfering with each other. Two approaches were possible to achieve this end - one was to adopt a neutral, conciliatory posture, while the other entailed positive action. The first role required the zoning

authority to mediate in conflicts between private interests, attempting to reach a settlement most satisfactory to both sides. The other approach places the zoning authority in a planning oriented position in that it had to partake of an allocative function, distributing development opportunities throughout the community in such a way as to further the public interest.[10]

The second approach is in accord with the position of Hubbard and Hubbard who felt that the purpose of zoning was a positive function, and that the "stabilizing of uses and types of development, and the resultant stabilization of values....are means to promote community welfare, not ends in themselves."[11] The purpose of zoning must be for the regulation of land use throughout the entire community, and hence zoning must be comprehensive, so that limitations apply to the entire community, not just to a few individuals.

In order to provide the second, more positive approach to planning, a municipality would be required to have established some type of planning organization to establish priorities among the areas of concern, to determine goals or satisfactory levels of control within each of the areas, and to set these out in a general plan. Once priorities and goals had been established, then a legislative framework could be constructed to pursue them, and zoning would be one

of the 'planks' of the legislative structure. The zoning ordinance thus enacted would give legal effect to the desired land uses as set out in the comprehensive plan, which by itself would lack the necessary powers of enforcement. What zoning could do was protect existing developed areas from encroachment of incompatible uses, and outline acceptable forms of development in changing or newly emerging areas.

Whether it is used as a technique for regulating future land use or for controlling change in areas of existing development, zoning is primarily involved with the allocation of land uses within a community. This allocative function has important distributive consequences in terms of establishing property values. Land within any community is necessarily a scarce resource, so specific allocations of uses are required and, under such a scheme, some owners will suffer a relative loss in value while others will be rewarded with relative increases. The reasons for one gaining and another losing may relate to political factors within the local governmental operations, but theoretically the reasons will be as a result of government policy for land use based on a comprehensive plan and requirements of the general welfare. Such planning places limits on the amount of land available for any specific use, and the

market for it then helps establish its value.

> "In themselves, the physical objects of the world have no value. Only when related by one man to another man is 'capital value' accrued. 'Capital value' is a social phenomenon, not a physical one.....".[12]

Definitions

After the zoning technique had been established, it became a complex legal instrument which imposed limitations and also implied some guarantees (with respect to rights in the use of land). Different theorists through the years have defined zoning across a spectrum ranging from very flexible to very rigid, depending on the requirements of their definition, their individual preference with respect to zoning, or the particular instance or instances to which they referred. One American court decision expressed the view that after a zoning ordinance had been enacted, it should be subjected to continous study and change "according to a coordinated plan designed to promote zoning objectives," a view which emphasizes a dynamic aspect not normally attributed to zoning.[13] Mandelker's opinion of what zoning has become follows that definition. Zoning, to Mandelker, is initially a method for preallocating development opportunities (presumably implying that zoning provides development "rights"), but has become "an administrative

system for managing environmental change, and which operates by responding to pressures for change as they occur in the market place",[14] hence weakening the previously ascribed "rights" principle. This view claims that zoning has become what the former opinion would wish it to be - much more flexible and oriented to change.

Another American court decision which imputes more certainty, and hence rigidity, into the zoning concept, defines zoning as follows:

> "Zoning is the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan."[15]

The opinion relates land use and comprehensive planning, an element which was one of the important ingredients of early zoning legislation, and is intended to make relatively clear and certain how particular areas of land can be used.

In continuing with our definitions, the next step in completing the range will require a very rigid definition of zoning, one which may be considered an expression of 'pure zoning' theory. Such a concept is stated in The Calgary Plan, a document produced by an administration which uses and prefers the administrative technique of development control,

more along the lines of English than American land use control. (The English technique is discussed in the next chapter.) Here one must assess the preferences when considering the terminology:

> "Zoning is essentially a legislative enactment which prohibits evolutionary changes in land use. Because zoning prescribes which activities are permitted or prohibited, and ignores the processes of growth and change, it is inherently inflexible. Consequently, zoning is an ideal method for maintaining stable communities and a high degree of permanency of land use patterns. For the same reasons it is unsuitable for planning areas characterized by growth and change."[16]

This conception is based on an inherent assumption of the pure theory of zoning and as such presents the extreme in zoning rigidity, allowing no room for flexibility. Certainty, security, and permanency are all found to the utmost extent under the terms of this expression.

The Zoning Ordinance

Any zoning ordinance requires a minimum number of elements, and more may be included according to circumstances. Following is a brief rundown of some of the major elements of a typical zoning ordinance:[17]

- a preamble, which is considered optional, setting out the purpose and objects of the ordinance, and possibly the intent of Council;
- a zoning map illustrating the legal boundaries of each zone in the municipality; this is compulsory under the terms of the Edmonton bylaw;
- a list of use regulations, by district, stipulating permitted uses and, where applicable, conditional uses, with requirements and situations for each;
- special regulations for variances and non-conforming uses, to allow for incompatible uses both existing and proposed;
- administrative and enforcement specifications, to explain application and development procedures;
- appeal procedures (for those decisions subject to appeal) for refusals, or for approval of proposals which, in the opinion of affected parties, will have injurious effects;
- an outline of fees, charges, and expenses for the application and appeal procedures;
- the amendment process, including initiation, requirements, public hearing rules, and rights of affected individuals;
- a system of complaint procedures and penalites for violations;

- a separability clause, to protect the validity of the balance of the bylaw if a clause therein is declared void;
- a list of definitions of terms used in the bylaw to clarify ambiguities and assist court interpretations;
- a clause to repeal all previous relevant ordinances to avoid legislative conflict.

The enactment of a zoning ordinance usually requires participation from legislative, administrative, and judicial elements of a municipal government. The legislative process at the local level is carried out by the elected council, who are ultimately responsible for all facets of the ordinance, but who are directly responsible for passage of the initial bylaw and any subsequent amendments. The administrative functions are performed at the local level by various branches of the municipal bureaucracy. Each of the various city departments may have some input into the contents of the ordinance and be involved in supervisory capacities after its completion. The planning department, development officer, and municipal planning commission (if one is used) all play concrete roles in formulation, implementation, administration and enforcement of the terms of the ordinance. The judicial aspects are handled by an appointed appeal agency or the council, which functions as a quasi-judicial body making

decisions on appeals from administrative decisions. In the United States, appeal can be made to the courts on constitutional grounds, but in Canada appeals to the courts can only be made on the basis of mistakes in law or questions of jurisdiction of the decision-making body.

Technically, each of the elements has separate and relatively distinct functions, but if the elected officials choose to avoid acting or refuse to act upon an issue where a decision is required, administrators may become policy makers by default. Or an aggressive administration may actively pursue and campaign for implementation of its own policies, either with or without the support of the elected officials. If the administration usurps or inherits the policy-making function of government, the principles of responsible government must suffer. The aspect of accountability to the electorate will have been broached in that the actual policy-makers -- the administrators -- would be insulated from the power of the electorate. This will occur in any government where the politicians avoid decision-making, or where the people fail to require accountability from their elected representatives.

Zoning in Alberta

Municipal zoning authority in Alberta, as in all

the other provinces, derives from provincial enabling legislation, since all municipalities are technically (constitutionally recognized as) creatures of the provinces. Alberta's first general legislation concerning municipal planning was the Town Planning Act of 1913, which has evolved to the Planning Act, and amendments, of 1970, being Chapter 276 of the Revised Statutes of Alberta.

The first zoning legislation in Alberta was introduced subsequent to the announcement of the 1929 Town Planning Act. Prior to 1929, no city in Alberta had a plan in effect, or a planning commission. Bylaws were implemented to control specific problems. For example, Edmonton in 1923 enacted a bylaw to implement a form of building restrictions, and in 1925 enacted another to set aside certain areas for industrial use.[18]

During the first year after its enactment, the purpose of the 1929 zoning bylaw was defeated by many successful appeals, and this was coupled with the problem of expansion in the peripheral areas of the city and on its fringes. Private developers were quietly taking control of the development process due to ineffectiveness of existing legislation. In 1948 the province stepped in and exercised its reserve power in taking over the zoning functions in both Calgary and Edmonton, resulting

from their loss of control over development. The Minister of Municipal Affairs exercised this power as necessary while the cities were preparing plans and drafting zoning ordinances.

This exercise of power was handled through an amendment to the 1929 Act, and the amendment also stipulated that the cities would resume control when they were adequately prepared to enforce orderly development. Based on a study prepared for Edmonton in 1949, that city asked the Minister to permit the use of interim development control as the only means to cope with the situation. The appropriate amendment was made to the act, and in 1950 the city had the power to impose development control over areas for which planning was underway.[19]

As the plan progressed, zoning was implemented to assume control over those areas for which planning had been completed. "The principle of zoning was to set out in advance by public notice, for all to see and abide by, the standards applicable to and the uses to which a given portion of the city was to be subject."[20] All the regulations were set out in the bylaw so developers knew in advance what was acceptable and what was not, and any changes in the bylaw or developments differing from the standards had to pass through formally approved channels.

Zoning in Alberta derives its validity from the specified purpose of the Planning Act, as stated in Section 3 of the Act:

> "The purpose of this Act is to provide means whereby plans and related measures may be prepared and adopted to achieve the orderly and economical development of Land within the Province without infringing on the rights of individuals except to the extent that it is necessary for the greater public interest."21

This section of the legislation was very encompassing, leaving room for virtually any form of controls. Zoning, as the most widely used and accepted technique, could easily be accommodated within the stated parameters. Specific authorization for zoning is given in Section 119:

> "A council may pass a zoning bylaw to regulate the use and development of land within its municipal boundaries and for that purpose may divide the municipality into zones of such number, shape and size as it considers advisable."

This is illustrative of the Canadian practice which requires provincial approval of a zoning ordinance before it becomes law.

Zoning in Edmonton

The City of Edmonton has enacted a zoning bylaw

being Bylaw No. 2135, "A Bylaw to Zone parts of the City of Edmonton thereby regulating and controlling present and future developments therein".[22] As required of a zoning bylaw under Section 131 of the Planning Act, Section 3(7) of the bylaw states that both the zoning map and the District Schedules (schedule of permitted and conditional uses) as appended are a part of the bylaw. Because they are part of the bylaw, they are accorded legal status, and American technique which differs from the English development control practice whereunder a map, a land use classification guide and a schedule of uses may serve as instruments for the bylaw, but are not part of the bylaw itself.

Edmonton has expressed a heavy reliance on both the General Plan and Regional Plans. Section 3(8) of the bylaw states that no one is to commence any development which is not in accord with the Preliminary Regional Plan. If a developer seeks to change the zoning bylaw in a manner not in accord with the plan, according to Section 9(13)(b) of the bylaw he must first attempt to amend the Plan.

Any zoning bylaw has some inherent rigidity. However, due to changing tastes and circumstances, flexibility is required. Generally this is achieved through four instruments:[23] the conditional use, which is legislatively provided flexibility and is stated in the bylaw;

the non-conforming use, which is protection granted to existing uses which do not conform when the zoning classification of an area is changed; the variance, which provides administrative relief for circumstances requiring special consideration due to unusual hardship; and amendment, the exercise of the legislative process to change the bylaw so an existing or proposed use will conform.

The conditional use is a normally acceptable land use which may require special consideration given the physical constraints, the nature of existing development, or the planning objectives of a specific zone. A common application of the conditional use is for transitional or buffer zoning between two adjoining zones of different categories. The non-conforming use earns protection since it was a permitted use until the bylaw changed, through no fault of the user.

The variance technique of providing flexibility is an administrative tool which can sometimes appear as favouritism. Laux defines a variance as "an authorization for the establishment or continuance of a building, structure or use of land which is prohibited in the bylaw."[24] A variance is granted on the basis of uncommon hardship caused by the nature of one's land or building. Personal

problems are not a consideration. The situation must be uncommon, and granting the variance must not be "unduly adverse to the public interest"[25] - a highly discretionary factor. Section 123(d) of the Planning Act grants the local authority the power to grant a variance, but Section 128(4)(d) specifically denies an appeal body the same right. This appeal aspect is not a consideration in Edmonton, however, for the city has not granted the necessary power to the initial local approving authority.

The last of the common flexibility techniques is the power of amendment. A desire for amendment can indicate that the initial preparation of the zoning ordinance was imperfect, or that times have changed and new circumstances require new regulations. In Edmonton, any amendment must comply with existing plans (as stated in Section 9(13)(a) and (b) of the bylaw), or else steps must be taken to amend the plan prior to adoption of the amendment. The local council has been granted the power to amend the bylaw under Section 134(1) of the Planning Act.

A further political consideration of the amending process arises over the question of downzoning. When considering property values in relation to zoning, one must also consider the possibility of the local council, for whatever reason, downzoning a piece of property which may have just

been sold. Zoning implies and in many instances prescribes, a right to do certain things with a parcel of land. This right can be bought and sold as a commodity. Once a transaction in land has been completed, a subsequent downzoning (legislative reduction of intensity of use permitted) takes away that right, after it has been purchased. Political, economic, and moral factors all bear as much consideration as the planning aspect. A question of compensation may arise, but it is rarely paid under North American planning practices. In the United States such taking of property is permissible if it is in accord with a comprehensive zoning scheme. In Alberta, legislation specifically precludes compensation for losses suffered through land use controls. The Planning Act states:

Section 135 "(1) no person has a right to compensation by reason of action taken through a zoning bylaw.

(2) or through a development control bylaw if the same effects were obtained through a zoning bylaw."[26]

Administration of the Edmonton Zoning Bylaw

The Edmonton zoning bylaw uses common practice with respect to basic administrative procedure, following the authority granted in the Planning Act. Section 122(a) of the Act stipulates that a zoning bylaw shall "provide for a system of development permits or building permits, or both,

and the processes under which a permit may be issued, refused, suspended, reinstated and revoked....". The basic document in the development process is the development permit, without which no proposal can proceed. Technically (Section 2(f1) of the Act), the final development permit as issued to the developer includes plans and specifications of the development as well as the permit itself. Section 3(1) of the bylaw requires that no one undertake any development until the application has been approved and the permit has been issued (with the exception of certain lesser types of development which do not require approval). When a permit is approved for a permitted use, it will be issued and no public notification is required, since there is no appeal from approval of a permitted use. If a permit is approved for a conditional use, public notification is required as set out in Section 124(1)(a) of the Act - a notice posted on the property, or written notice mailed to all affected property owners, (described in the bylaw under Section 5(9) as owners of land wholly or partly within 200 feet of the site) or publication of the decision in a local newspaper. Public notification is required to permit time for affected owners to launch an appeal. However, if no such appeal is launched within fourteen days of notification, then the permit shall be issued. Edmonton has adopted the second requirement - mailing.

The Planning Act does not set an expiry limit on permits issued under zoning. (The time limit under development control is twelve months.) The Edmonton bylaw however, in Section 5(14)(a) stipulates that the permit shall expire after ninety days if work has not commenced on the approved development.

Administration of the permit procedure is handled by the Development Officer and his staff, to whom the tasks, but not the responsibility, may be delegated. The position in Edmonton is held by the Director of Planning according to Section 5(1)(a) of the bylaw. Section 123 of the Planning Act lists the duties of the development officer; part (c) requires "that the development officer or municipal planning commission approve an application for a permitted use upon the application conforming to the provisions of the zoning bylaw....", and gives him discretionary authority over acceptance, rejection or restriction of conditional uses, and the option of outright refusal over uses listed as neither permitted nor conditional. However, under Section 124(3) of the Planning Act, and Section 5(1)(d) of the bylaw, the Development Officer, acting on his own authority, may determine that a use not listed in the District Schedule as appended to the bylaw is similar in character and purpose to other permitted or conditional uses in that zone and may

approve it subject to the public notice requirements given for approval of a conditional use.

The aspect of requiring a permit to be issued for a permitted use is the backbone of zoning. Zoning is built around the idea of a sense of security in knowing how a piece of property may be developed. Zoning provides a specific right of use within each zone. Section 5(8) of the bylaw provides, as discussed above, that if an application for a permitted use complies with the bylaw and any discretionary requirements of the Development Officer such as those pertaining to aesthetics or utility requirements, then a permit shall be issued. No public notification is required, for Section 128(2) of the Planning Act states that no right of appeal derives from approval and issuance of a permit for a permitted use provided that use meets all the necessary specifications. The courts, through a writ of mandamus, can compel a Development Officer to issue a permit if all the requirements of the bylaw have been fulfilled.

Accompanying the administrative provisions of the Edmonton zoning bylaw is a list of Zoning Districts, giving the abbreviation and designation of each zoning classification, and lists of land use requirements, stated as General Regulations and Special Provisions. The District Schedules, containing information on permitted and conditional uses, and regulations

pertaining thereto, are given as an appendix to the bylaw (Appendix No. 1). The bylaw is made complete through the inclusion of a zoning map, or series of zone maps (Appendix No. 2), which specifically delineate the boundaries of each zone.

Administrative provisions are also involved in making the 'somewhat inflexible Zoning Bylaw control"[27] more flexible. The City of Edmonton uses three of the four previously mentioned techniques: conditional uses, non-conforming uses, and amendment. Variances are not permitted. These techniques are all given in and controlled through the zoning bylaw, which tends to minimize the discretionary element contained in them. Even conditional uses, which tend to open the door to much administrative discretion, are limited in each zone to a list of uses, stated in the bylaw, for which a permit may be issued.

The Edmonton bylaw also provides for administrative discretion, in a limited sense, in three separate sections. Section 3(4)(a) provides the Development Officer with absolute right of refusal over <u>any</u> use if in his opinion unsatisfactory arrangements exist for provision of necessary utilities. Section 5(1)(d) provides the Development Officer with broader discretionary power through the right of determination of "similar use". Such approval is subject

to the same appeal procedures as conditional uses.

Section 7(1) grants the Development Officer the right to refuse, stating reasons, any development "if in his opinion it is unsatisfactory by reason of design, character or appearance." He is advised by an Architectural Panel, but is not obliged to follow their advice. This is aesthetic discretion which is considered by some as an important means of protecting values.[28] This is rather uncommon in the rest of Canada, where people rely more heavily on the "rule of law" principle that a rigid zoning bylaw provides.[29]

Development control was also retained as a flexibility technique to maintain control over large unzoned tracts of land within the city, areas for which specific plans and policies had not been determined. Zoning could be used to handle this problem, through the use of very restrictive zones, but development control was administratively preferable in that the zoning bylaw would not have to be amended for each acceptable development proposal. The Edmonton zoning bylaw, Section 3(6), provides that any unzoned areas will remain under interim development control, and a Land Use Classification Guide was prepared to set out the specifics of the Development Control Resolution and Bylaw.

The introduction of development control raises the spectre of administrative discretion and abuses which could follow its exercise, but Edmonton has attempted to minimize the exercise of such discretion. The Land Use Classification Guide sets out seventeen classifications of land use to fall under development control. Eleven of the seventeen are also listed in the Zoning Bylaw, and the Guide states that "the Development Control Officer shall determine applications within such areas having regard to the purpose and intent of these Districts"[30] as stated in the Zoning Bylaw. In addition, each of the seventeen districts is "prefaced by a General Purpose clause which sets out the purpose and function of the particular district."[31] The 'General Purpose' is derived from the Regional and General Plans for Edmonton.

The Council Resolution concerning development control states in part that: "the Map entitled the Land Use Classification Guide, No. DCR-1 and the regulations entitled the Schedule of Permitted Land Uses and Regulations for areas not included under the Zoning Bylaw, both attached and forming part of this Resolution, shall govern the Development Control Officer in advising the general public and determining applications for development on all land not included in the Zoning Bylaw...".[32]

Clause 4 of the same resolution provides that:

> "In the event that there are ambiguities or conflicts of the permitted uses and regulations the Development Control Officer shall be bound by (the General Purpose clause for each district, the provisions of the Regional Plan, and) the general purpose and intent of the Zoning Bylaw."[33]

It is not clear, even to a spokesman for the Development Control Officer, what is intended by the phrase "ambiguities or conflicts".

Further attempts at restricting administrative discretion are provided in Bylaw 2624, the Development Control Bylaw. Section 4(1) of this bylaw provides that "permitted development" as listed in the Development Control Order does not require a development permit. Section 7(3)(b) of the Bylaw requires the Development Control Officer to be governed by the Resolution adopting a Land Use Classification Guide. Yet an Edmonton Senior Zoning Officer, speaking for the Development Control Officer and being involved with the administration of development control, intimated that administrative discretion under development control is wide-ranging, and the Development Control Officer is not concretely bound by any of the various restrictions. He felt that even a permitted use could be refused on the basis of poor design or poor planning - that is, if it did not fit

in with the amenities of the area.[34]

This position seems to conflict with the intent of both the Development Control Resolution and Bylaw, which require the administration to be bound by the Guide and Schedule. Calgary City Council makes no specific mention of the Guide or Schedule in their bylaw, so one may conceive that the Calgary Development Officer is not bound, according to provisions of Section 107 of the Planning Act. (A more detailed analysis of Section 106 and 107 and their relationship to development control will be made in the third chapter.) The Edmonton council has, however, included specific binding clauses, and since the Development Control Officer is considered an "officer or servant of the Council" (Section 5(2) of the Development Control Bylaw), one should be able to surmise that the intention was to bind the administrators.

Appeals arising from the processes of zoning are dealt with by a Development Appeal Board, established under Section 8 of the zoning bylaw as authorized by Section 127 and Section 108 of the Planning Act. The Board hears appeals on any decision except approval of a permitted use, from any person claiming to be affected by a decision of the Development Officer or the Planning Commission. The Edmonton Board is composed of a Chairman and six others,

appointed by Council for three year terms. At least one member of the Board, but not a majority, is to be a Council member. The Board has a Vice-Chairman appointed by other Board members. The bylaw states explicitly in Section 8(b) that any decision reached by the Board is in no way to be construed as establishment of a precedent, either to reassert the merits of each case, as stated in the Planning Act, or to legislatively restrict actions which may commence on these grounds. A schedule of fees is set out, related first to which party appeals, and second, to the value of the property if the owner appeals.

For areas under development control, appeals go first to the DAB, which is the same body as that under zoning, and can then be taken to Council. This appeal to Council is a provision one does not find in Calgary, and one which undermines much administrative discretion by placing the final decisions in a more accountable legislative format.

Summary

We have now surveyed some of the basic theoretical and practical aspects of zoning - as it is generally understood and as it is applied in Alberta. The Edmonton zoning practice is not a form of pure zoning due to the numerous

discretionary areas in the Bylaw, but the system is based on rights in land in appropriate areas and can be distinguished from development control through the prevalence of established zones where permitted uses predominate. Development control does co-exist with zoning in Edmonton, but council has attempted to keep a tight rein over any exercise of discretion thereunder by requiring adherence to the Guide and the Schedule which accompany it. The Development Control Officer, regardless of those stipulations, feels he exercises much discretion and could refuse an otherwise permitted use. Council retains the final word in any event, by acting as a second level of appeal after the Development Appeal Board.

FOOTNOTES

1. Laux, F.A. The Zoning Game: Alberta Style, in ALBERTA REVIEW, Vol. 9, 1971, p.300.

2. Babcock, R.F. THE ZONING GAME, Milwaukee: The University of Wisconsin Press, 1966; pp. 115-124. Information on the two theories is from these pages.

3. Ibid., p. 117

4. Ibid., p. 123

5. Esau, A.A.J. LAND OWNERSHIP RIGHTS. Law and Land: An Overview, The Alberta Land Use Forum, Summary Report No. 9, 1947, p. 6.

6. Hubbard, T.K., and Hubbard, H.V. OUR CITIES TODAY AND TOMORROW. A Survey of Planning and Zoning Progress in the United States, Cambridge: Harvard University Press, 1929; Reprint Edition 1974 by Arno Press Inc., p. 162.

7. The British North America Act, 1867; Cited in R.M. Dawson THE GOVERNMENT OF CANADA, Fifth Edition, Toronto: University of Toronto Press, 1970, pp. 521-525.

8. Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1956), cited in C.M. Haar LAND USE PLANNING, p. 188.

9. Province of Alberta, The Planning Act, R.S.A., 1970, ch. 276, Sec. 2(d1), and Sec. 2(m1).

10. Mandelker, D.R. THE ZONING DILEMMA. A Legal Strategy for Urban Change, Bobbs-Merrill Co. Inc., 1971, pp. 13-14.

11. Hubbard, T.K., and Hubbard, H.V. op. cit., p. 164.

12. Bettison, D.G., Kenward, J.K., Taylor, L. URBAN AFFAIRS IN ALBERTA, Edmonton: The University of Alberta Press, 1974, p. 181. See also the Calgary Herald, March 2, 1976 p.1.

13. Fritts v. City of Ashland, 348 South Western (2d) 712 (Kentucky, 1961), cited in N. Williams Jr. THE STRUCTURE OF URBAN ZONING, New York: Buttenheim Publishing Corp., 1966, p. 199.

14. Mandelker, D.R. op. cit., p. 57.

15. Eves v. Zoning Board of Adjustment of Lower Gwynedd Township 164 Atlantic (2d)7 (1960), cited in N. Williams Jr. op. cit., p. 37.

16. City of Calgary THE CALGARY PLAN, City Planning Department, 1973, p. 14.5.

17. Bair, F.J. Jr., Bartley, E.R. THE TEXT OF A MODEL ZONING ORDINANCE, Third Ed., Chicago: American Society of Planning Officials, 1966; pp. 11-85.

18. Bettison, D.G., et al, op. cit.; most of the historical data in this section derives from this source; pp. 58-95.

19. Ibid; pp. 94-95.

20. Ibid, p. 95.

21. Province of Alberta, op. cit.; further references to the Act will give the appropriate section and subsection but will not be footnoted.

22. City of Edmonton ZONING BYLAW NO. 2135. Office Consolidation Copy No. 6, Dec. 1973, p. 12. Further references to the Bylaw will give the appropriate section and subsection but will not be footnoted.

23. Laux, F.A. op. cit.; p. 290.

24. Ibid; p. 296.

25. Ibid.

26. Province of Alberta op. cit.

27. City of Edmonton LAND USE CLASSIFICATION GUIDE, p. 1.

28. See supra, p. 20, and also R.F. Babcock, op. cit., especially ch. 7.

29. Milner, J.B. op. cit.; pp. 36-37.

30. City of Edmonton op. cit.; also General Regulations, Sec. 2.

31. Ibid; p. 2.

32. Ibid; Development Control Resolution No. 1.

33. Ibid; Clause 4.

34. From a conversation with Mr. A. Steele, Sr. Zoning Officer in Edmonton, August 24, 1976. The Development Control Officer was asked for, and Mr. Steele said he would answer the questions in the absence of the Development Control Officer.

CHAPTER III

DEVELOPMENT CONTROL

ORIGINAL FORMS

Purpose

This chapter is intended to outline the background of development control and Alberta legislation relating thereto. The review commences by outlining the initiation of development control in Great Britain, and the legislation on which it is based. This is followed by a historical sketch of the technique as it was introduced and developed in Alberta, more or less as pure development control - including some restrictions, a major inconsistency, and the specific form of legislative authorization for its use. The chapter closes with a mention of the major criticisms of development control.

The British Form of Development Control

The earliest form of development control legislation is the Town and Country Planning Act of 1947, which initiated development control in Great Britain. This was a piece of post-war legislation designed to centralize land use control authority in order to minimize the unproductive use of land in a country where land is one of the scarcest resources. Section 12(1), Chapter 51, of the 1947 Statutes of England, provides that:

> "Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of the Act in respect of any development of land which is carried out after the appointed day."[1]

"Development" was then defined in Section 12(2) as "the carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."[2] The Act then goes on, as does most land use control legislation, to list a number of types of minor forms of development which are excepted from the procedures and which require no formal approval.

The basis of the British scheme of controls is general planning, as opposed to precise, comprehensive planning: for example, an area would be generally designated residential, as opposed to the more comprehensive single-family or multi-family residential classifications. Future demands, desires and land requirements would determine its ultimate allocation. Thus there were no specific requirements set up for densities, height, bulk, side yards, and so on, eliminating much of the technical and structural aspect of zoning legislation. In order to assure a rational basis for decision-making at the local level, each local authority was required to submit a local development plan to the Minister for approval. The plans were kept current through a requirement of renewal every five years, and were to be based on a survey of matters expected to affect the development of the local area, such

as physical and economic characteristics, population statistics, communications, transportation, any other matters which may have an effect, any matters which the Minister wished considered, and any changes expected in any of the foregoing, and effects those changes are likely to have.[3]

The Act states that "permission is required for the carrying out of any development of land."[4] If permission was refused to any developer or if conditions were attached which the developer felt were unjustified, which rendered the land unusable, the owner of the land could serve a notice (a "purchase notice") on the local council requiring that body to purchase his land. Such a notice is subject to ministerial approval, and the Minister may choose one of a number of options: he can approve the purchase notice outright; he can reverse the rejection or approval as given by the local council; he can remove any or all of the restrictive conditions, or change any of them as he desires to make the development more feasible; he can give approval for a different type of development on the condition that such an application is made; or he can have a different local authority purchase all or part of the land.[5] This ministerial control does not interfere with local political accountabilities for control of land use rests with the Minister.

Development control largely served the developer, especially in new developments. There were no specific requirements laid down, so one could plan his own development and then seek to have it approved, quite a different situation from zoning. The planning decisions and development approval procedures were administrative acts, and changes in land use regulations were also administrative, subject only to ministerial accountability, and not the concern of local councils. Hence the infusion of politics was minimized, so the process was much smoother to operate when anything innovative happened. This same flexibility could have served to the detriment of the developer, had the decision-making power been otherwise exercised. But in either case, the administration was utlimately accountable to the Minister, so there was an ever-present check on the exercise of the discretionary power.

This discretionary power was not, in any case, an entirely arbitrary matter as it is often considered to be. The local authorities did have to function with regard to their respective master plan, which inflicted some limitations. And further, the Town and Country Planning (Use Classes) Order, 1950, set up "eighteen classes of use, rather like zone classifications in North America, and a person whose land is used for a purpose mentioned in a class, may convert

to any other use in that class without permission".[6] This served, however, only to relax the administrative controls a little, not to loosen them extensively.

The idea that compensation is paid for land rendered unusable by development control action (as mentioned earlier in this discussion) differentiates the British technique from both American zoning, and development control as it is practised in Alberta. The British plan provides further compensation to landowners who suffer a relative loss in land value through development control practice, and also captures a portion of the betterment value from landowners who gain through the exercise of the control.[7] The American zoning technique provides for neither, provided the zoning ordinance is in the general interest of the public. Alberta legislation specifically denies the entitlement of compensation to any landowner by reason of the making or passing of, or any provision contained in, or any lawful action taken under either development control or zoning.[8]

Introduction and Growth of Development Control in Alberta

The British concept of development control was first introduced in Alberta in the 1950 revisions to the Town Planning Act as a means of providing municipalities with temporary control of land use while they were in the process of preparing

a general plan antecedent to enactment of a zoning bylaw.[9] It was referred to as "interim development control" in that it was to be applied only as a means of temporary administrative control. The 1953 version of the Town Planning Act, Section 69(2), provided that:

> "Control shall be exercised over the development within the municipality by the council on the basis of the merits of each individual application for permission to develop, having regard to the proposed development conforming with the general plan being prepared".[10]

Because a development control order was considered temporary in nature, it was not formally structured with a schedule of uses, land use classification guide, or map of districts. As the planning for each area of the city was completed, it would be included under a zoning bylaw and the jurisdiction of the development control order would recede accordingly.

The practice of development control was introduced in 1950, two years after the Minister of Municipal Affairs had found it necessary to bring supervision of land use control throughout the province under the immediate jurisdiction of his department. The cities had been losing control over development, especially in urban fringe areas, so the provincial government exercised its power to regain such control. The 1950 amendment providing for development control imposed limits on its use by prescribing specific powers and certain methods of administering the scheme,[11] but the powers necessarily

provided broader discretion than zoning. Negotiations over land use classifications for specific developments were not as formal or as public as under zoning since developers and administrators worked privately on details of proposals, and regulations for a specific development were published only after negotiations on the proposal were complete. The technique was primarily for "emerging, emergency, and unplanned situations," and was considered most applicable in the "rapidly expanding metropolitan centres,"[12] to which the practice was limited. It is interesting to speculate, as Bettison et al do, that the continuing expansion of the two major centres may be attributed to this policy of interim development control:

> "It is ironic, therefore, that the flexibility in handling rapid growth afforded a local authority by an interim order offered precisely the ideal conditions required for attracting further growth. Negotiation is more attractive to the management of privately organized capital in its problems of location than conforming to previously prescribed standards or engaging in a public ritual over bylaw amendment, and the metropolitan centres had a clear advantage over other smaller and less rapidly growing urban centres."[13]

The 1963 revisions to the Act continued the concept of temporary development control. When all or part of a general plan was adopted by the city, the zoning bylaw was to be amended accordingly, reducing the area under development control. Amendments made in 1967 provided for a municipality

to exclude from the zoning bylaw any areas of land covered by the general plan, and retain them under development control.[14] This amendment had been requested by the City of Calgary to allow implementation of the downtown development plan.[15]

When the 1970 version of the legislation, known as the Planning Act, came out, it apparently provided for a municipality to retain any area under development control, or to enact a zoning ordinance and later on return to development control. Section 98(a) provided that after adopting a general plan, a council "may, at any time thereafter, exercise or continue to exercise development control over all or part of the land included in the general plan.....".[16] This may have seemed too flexible in the eyes of the provincial authorities for, in 1972, the option of implementing zoning and returning to development control at any time was removed. Under the initial wording, an urban area which had been granted the right to exercise development control could plan and zone any area, only to revert to development control at a later date, thereby nullifying any certainty or security available under zoning. After amendments were made, the phrase was found in Section 98(1)(a) and was modified to read: "When a general plan is adopted, the council (a) may continue to exercise development control over all or part of the land included in the general plan..."[17] The option of changing back and forth to zoning had been removed.

Milner expresses the opinion that experience has shown that "no municipality that is satisfied with its interim development control powers is in any hurry to prepare a plan,"[18] implying that municipalities tend to favour the amount of power which they can exercise under development control. The concept of development control as only a temporary measure is presently defunct in Alberta. Provincial legislation provides that a municipality can exercise one or the other, or both, within its jurisdiction.

Legislative Restrictions

The type of development control which the Act authorizes is virtually a pure form of development control. One restrictive stipulation is found in Section 98, requiring the adoption of a general plan, and this idea of administering according to the plan is furthered in Section 100(2). F. A. Laux, in a descriptive rewording of this section, outlines as the principle of development control:

> "...that an application for development is to be dealt with on its particular merits having regard to a plan which is emerging or has been adopted, a plan which by its nature is general and expressed in broad terms."[19]

This planning device, if it has no other reason, must be to provide some form of constructive guidelines for the administrative decision-making process. Section 106 provides

that a council may pass a resolution concerning rules for the use of land by which planning authorities shall be governed, while Section 107 stipulates that other guides may be adopted but are not part of the bylaw in any case. There being no concrete restrictions applied to the practice of development control according to the Planning Act, the possible extent of the exercise of administrative discretion by planning administrators is virtually all-encompassing.

There appears to be legitimate cause for concern over possible confusion stemming from the terms of the Planning Act regarding development control. Section 106 provides that if rules respecting the use of land are enacted, they shall govern the actions of the planning authorities. Section 107 provides for the optional adoption of a land use classification guide and schedule of permitted uses "by a resolution of a council under section 106,....but such a guide or schedule is not part of the development control bylaw." One interpretation of the phrase "under section 106" implies that since the guide and the schedule, which are authorized under Section 107, are passed according to the terms of Section 106, they are also binding on the planning commission and the development control officer. This view is supported by F. A. Laux, Acting Dean of Law, University of Alberta, and by the courts in Figol vs Edmonton City Council: "...by section 106 of the Planning Act the development control officer is to be governed

by such guide in dealing with applications..."[20] and: "It is questionable in any event whether the (Development Appeal) board is bound to observe all the provisions of the Land Use Classification Guide, although this is binding on the development officer."[21]

If this position is taken to be correct, then it conflicts with Section 100(2): "Control shall be exercised over development on the basis of the merits of each individual application for permission to carry out development...". If this statement was applicable only to the appeal agencies, then there would be no major inconsistency, but it would seem more logical to assume that "control" as stated here refers to that granted under Section 105(b): "...authorize the development officer or a municipal planning commission to receive, consider and decide on applications...". If Section 100(2) is to be in accordance with the stated interpretation of Sections 106 and 107, then development control in Alberta can only exist at the appeal level, since the administrators are bound by the instruments, while the appeal agency is bound by the bylaw, of which, according to Section 107, the instruments are not a part. Hence the appeal agency has freedom to decide while administrators are bound, providing development control only at the appeal level. This is not the writer's impression of the intent of the provincial statutes.

Another interpretation of the terms of Sections 106 and 107 would conclude that the guide and schedule, when passed under the rules of 106, are to bind the development officer and planning commission, yet Section 107, in saying "but such a guide or schedule is not part of the development control bylaw" can be interpreted as releasing the administrators from that binding commitment. They are to be bound by the instruments, but since it would not be in violation of the bylaw to breach that stipulation, approval can be withheld from a permissible development. The developer's only recourse is to the Development Appeal Board, which is not restricted at all, and which leaves him no appeal to the courts on legal or jurisdictional grounds which may exist insofar as the Development Officer was concerned. This situation will be related to Calgary practices in the next chapter.

Legislative Authorization

The specific authorization for the exercise of development control in Alberta must come from the Minister, such an order being issued on the basis of a request from a municipality which intends to prepare a general plan, and such request conforming to the conditions listed in Section 101 of the Planning Act. The development control order serves to authorize the repeal of existing zoning ordinances and

enactment of development control; it gives the termination date of the old bylaws, and the new manners of administration and matters of consideration; and it provides for the control of development by means of a system of permits. (Sections 102, 103, and 104 of the Act). Section 111 stipulates further that the effective date is concurrent with passage and approval of a development control bylaw.

A development control bylaw contains a number of the same basic elements as a zoning bylaw - the definitions, the administrative structure, development permit application and issuance procedures, appeal rights and procedures, and enforcement provisions. Land use classification guides, schedules of permitted uses, and district maps may be included, but are optional and are not part of the actual bylaw. Section 106(1) and the Act gives a local council the option of providing rules respecting the use of land for developments in specific areas. If enacted, these rules will guide the actions of the municipal planning commission or development officer regarding technical specifications of developments when dealing with applications.

The development permit is again the basic instrument controlling development, and is defined in the Planning Act, Section 2(fl), as "a certificate or document permitting a development and includes a plan or drawing or set of plans

or drawings, specifications or other documents upon which the permit is issued...". Development control has no permitted uses per se, so a development permit issued in Calgary indicates that the proposal meets the requirements of Bylaw 8600 (The Development Control Bylaw), the Rules Respecting the Use of Land, the Land Use Classification Guide and A Schedule of Permitted Uses (which have been enacted in Calgary and are considered generally binding on planning administrators), the Calgary Planning Commission requirements, and has successfully passed through or not been subjected to the appeal procedure.

Since there are no permitted uses, any proposal is subject to appeal. The provisions for establishing a Development Appeal Board under development control are given in Section 108 of the Planning Act. The appeal board bases its decision on consideration of the facts of the case, the bylaw which is in force, and the general plan, but is not bound by any of these, or by any other instrument used to guide administrative decisions. Appeals from Development Appeal Board decisions in Calgary can be taken to the courts on questions of law or jurisdiction, but with development control, many decisions are based on discretionary authority. In such cases the court can only assess whether the discretionary power was abused, based on whether the power of discretion was stated as limited or absolute in the governing legislation.[22]

Major Criticisms

Under the theory of development control, there is no 'right' in property comparable to permitted uses under zoning. Every development proposal needs separate approval, which is not guaranteed in any case. There are no zones with permitted uses; instead there is a system of land classification districts which outline preferred uses, but which ensure nothing. This lack of certainty and stability is one of the two main criticisms of development control - zoning, in Canada at least, is regarded as a security blanket to protect the amenities of established areas, providing both certainty and stability. But as one observer pointed out,[23] any zoning category is only guaranteed until the next meeting of the local council, where the necessary steps can be taken to commence the amending process. The process may be difficult at times, and to initiate it change must be clearly beneficial to the area, or political muscle must be exercised, and though it may be more 'democratically' enacted, it produces change and hence necessarily attenuates one's sense of security.

The second major criticism directed at development control is the extent of the discretionary power which must lie in the hands of the administrators. These attacks foresee corrupt or isolated administrators seeking personal gain or distributing personal favours to self-seeking developers, or

pursuing a strict, efficient, administrative course at the expense of the wishes of the people, while overlooking the existing and potential checks on unduly arbitrary practices. The legislative authority has direct formal control over administrative practices in at least two areas - approval, rejection or modification of administrative decisions; and authority to hire and fire civic employees, given just cause. The existence of such formal controls does not necessarily imply that they are widely used. Council's annual superficial budgetary review is partly indicative of the absence of the proper use of the power of review. Aldermanic dependence on administrative information and support would seem to indicate a need to be supportive of administrative decisions.

Other techniques such as civic ombudsmen, or administrative review boards could be set up. Ontario has established the Ontario Municipal Board, a body with ministerial powers which can be exercised at the municipal level upon request of the Minister.[24] The powers of such a body could continue to be exercised under zoning or development control, although the question of provincial involvement in municipal matters, which is discussed in chapter six, must be considered.

The scope of authority of the DAB might also be considered as a point for criticism. A small body of appointees has the power to thwart the aims of planners, or developers

or both, from which decisions there is no appeal, provided the regulations, which are not binding, have been considered.

Summary

In this chapter we have reviewed the origins of development control in Great Britain, and the introduction and development of the technique as it is applied in Alberta legislation. This legislation provides few statutory restrictions on the exercise of administrative discretion, and creates some confusion concerning the role of the Land Use Classification Guide and Schedule of Permitted Uses in the administrative process. The specific authorization for the exercise of this technique is discussed, and the chapter concludes with a brief analysis of some major criticisms - insecurity, fear of administrative abuse, and the power of the Development Appeal Board.

FOOTNOTES

1. Government of the U.K., Town and Country Planning Act, 1947, England, Statutes, 1947, Ch.51; cited in Milner, J.B. COMMUNITY PLANNING, p. 762.

2. Ibid; p.762.

3. Government of the U.K., Town and Country Planning Act, 1968; cited in Haar, C.M. LAND USE PLANNING, p. 721.

4. Government of the U.K., Town and Country Planning Act, 1962; cited in Haar, C.M. op.cit.; p.197.

5. See supra, fn.#2, Ibid; p.764.

6. Milner, J.B. An Introduction to Zoning Enabling Legislation; in CANADIAN BAR REVIEW, vol. XL, 1962, p. 50. For details of the Order see Milner, COMMUNITY PLANNING, pp. 765-767.

7. For elaboration see Haar, C.M. op.cit.; pp. 548-560.

8. Province of Alberta, The Planning Act, R.S.A., 1970; Ch. 276, s.135.

9. The underlying reasons for the establishment of development control were discussed in the previous chapter, in relation to the failure of early attempts at zoning legislation.

10. Province of Alberta, Town Planning Act, 1953; cited in Laux, F.A. The Zoning Game - Alberta Style, PartII: Development Control; in ALBERTA LAW REVIEW, vol. X, 1971, p.8.

11. Bettison D.G., Kenward, J.K., Taylor, L. URBAN AFFAIRS IN ALBERTA: p.95.

12. Ibid; pp. 95-96.

13. Ibid; p.96. This hypothesis leads to a number of questions, two of which seem particularly interesting. If this is true, why did Edmonton revert to zoning and stay with it; and why have the growth rates of the two cities been so similar over the years? Development control became permanent in Calgary in the early seventies, so perhaps in a few more years, if the respective systems do not radically change, we will be able to see a change in growth patterns.

14. Laux, F.A. op.cit.; (fn.#10) p.10.

15. Bettison, D.G., et al, op.cit.; p.196.

16. Laux, R.A. op.cit.; p.10.

17. See supra, fn.#9, ibid; Ch.276, s.98.

18. Milner, J.B. op.cit.; p.52.

19. Laux, F.A. op.cit.,;p.17.

20. Figol v. Edmonton City Council; WESTERN WEEKLY REPORTS, vol. 71, 1970; p.321.

21. Ibid; pp. 340,341.

22. Laux, F.A. op. cit.; p.17.

23. Rondeau, P.B.H. Alternates to Zoning; in COMMUNITY PLANNING REVIEW, vol.25, no.8, Aug. 1975; p.5.

24. Milner, J.B. An Introduction to Master Plan Legislation; in CANADIAN BAR REVIEW, vol. XXXV, 1957; p.1150.

CHAPTER IV

DEVELOPMENT CONTROL

THE CALGARY HYBRID

Purpose

This chapter continues with the topic of development control, making specific reference to the technique as it is used in Calgary. It starts with a brief summary of the steps leading up to the present bylaw, including an analysis of the structure of that bylaw from a basically theoretical perspective. The discussion then turns to a consideration of how the system works in practice, including legislative interpretations and applications. The development process is then given limited coverage, followed by a rundown of the basic administrative procedures, both theoretical and practical.

Background

Following the 1948 exercise of ministerial power which saw a temporary situation of extreme centralization of land use controls in Alberta, Calgary and Edmonton undertook to use development control as a temporary means of restoring municipal control over urban development. The two cities had been granted authority to control matters within their own jurisdictions in order to convert uncontrolled urban growth into organized urban development.

Calgary was in a slightly different position than Edmonton in that it did not have major established urban centers on its periphery to impinge upon the form of control exercised by the municipal authorities. Calgary tended to concentrate development within its own jurisdiction, under a unitary city government, and it chose to continue following such a policy.[1] Both cities were faced with a problem of coping with urban expansion - growth rates created demands for increased facilities; new industries had to be attracted to provide new jobs and help pay for the facilities; major industries preferred to locate in large cities where facilities were provided, adding further impetus to growth and expanding the need for facilities even more. The interim development control order which was enacted in 1952 was intended as a means of temporary control to limit this growth cycle for as long as it took each of the cities to prepare a General Plan, upon the completion of which a zoning bylaw would be adopted providing permanent, stable control of land use.

The temporary measures were enacted in Calgary in 1952 as the Interim Development Bylaw (Bylaw 4271), which provided for "the interim control of development during the preparation of the General Plan for the development of the City.....",[2] and which repealed the Zoning Bylaw (Bylaw 2835), originally enacted in 1934, which was "a bylaw to regulate the location and use of

buildings and the use of land within the City of Calgary; to limit the height of buildings; to prescribe building lines and the size of yards and other open spaces; and for these purposes to divide the city into districts....."[3]. Bylaw 4271 provided for a Technical Planning Board to control development, giving planners enough power to ensure that development proposals conformed with the emerging General Plan. The essence of development control was present, in that each application was considered on its own merit.

Development control provided much easier regulation of land use districts, for a zone could be changed or established through administrative designation, hence avoiding the political amending procedure which zoning demanded. The technique provided flexibility and control, which the planners favoured, while introducing elements of uncertainty and speculation into the private sector. Local authorities did indicate a preference for the practice, in an indirect fashion, by exercising its controls until 1958, when jurisdictional objections were raised to the exercise of authority by the Technical Planning Board, and court action quashed the bylaw, which Council replaced by enacting a new zoning ordinance.[4]

This new bylaw had been under preparation according to the terms of the interim development control order of 1952. In 1958 the new zoning bylaw (Bylaw 4916) was enacted, and it

returned authority over zoning to Council, eliminated the period of uncertainty, provided for permitted use zones, and forced any changes into the amendment procedure. Hasty completion resulted in the omission of controls for a number of land uses which one might reasonably have expected to be included, for example apartment hotels and parking structures. Land in any zone could only be used for the permitted classifications, any other uses being considered illegal. Hence the omissions led to a constant stream of amendments, perhaps more than would be considered normal in the early life of the new bylaw.[5]

In large, undeveloped, unplanned areas, there was no guide for zoning authorities. In those areas, zoning did not guide development, it was the result of it. In such areas the zoning classification would be determined by the amendment made to the bylaw subsequent to an application for development being submitted. This essentially was a return to the conditions of the post-war construction boom in Alberta where developers effectively exercised control over land use in the province until the provincial government intervened in 1948. To recover from this breakdown in the system of controls, an amendment to the bylaw was passed in 1961 creating a new zoning category - the Direct Control district - to cover all areas not zoned, through omission, subsequent annexation, or any other reason.[6] Permitted uses in the new district were farms over twenty acres; all other

uses were conditional and subject to approval by the Planning Commission. This step marked a partial but indirect reintroduction of development control techniques in Calgary, which has employed the Direct Control district in its previous zoning bylaws as well as under its present scheme of development control.

City Council endeavoured to revise and consolidate the various amendments to Bylaw 4916, and incorporate the ideas in a new Zoning Bylaw (Bylaw 7500) in 1969. Later on the same year that bylaw was quashed by the courts on the grounds that no public hearings had been held, a procedural requirement under the provisions of the Planning Act.[7] What Council had intended as an attempt at administrative and legislative housecleaning was taken by the courts as a new bylaw, requiring all the procedures to be followed. A development control bylaw (Bylaw 7839) was enacted in 1970 to replace the defunct zoning bylaw, and was, again, supposed to last until a new zoning bylaw was prepared and the General Plan revised. But instead, after a challenge of its legality, Council enacted a new development control bylaw (Bylaw 8600) in 1972.[8] This bylaw is presently in use in Calgary.

Present Structure

Present land use control techniques in Calgary, though referred to as development control, are actually a hybrid of both development control and zoning. The Planning Act provides

for the establishment of rules respecting the use of land, a land use classification guide, and a schedule of permitted uses in areas employing development control, the preparation of such documents being considered optional. If they are prepared, land-use districts can be set up and rules laid down for each district, providing similar guidelines to those extant under zoning. According to the interpretation given in Chapter III, these guidelines are apparently meant to be binding on the Development Officer and Planning Commission. But under the Planning Act they cannot restrict decisions of the Development Appeal Board.

A municipal council can impose these and other restrictions on the administration of control techniques within its jurisdiction, as Calgary has chosen to do. The Rules Respecting the Use of Land have been made binding by Section 10(4) of the bylaw in guiding administrative decision-making, in accordance with the Planning Act, Section 106. The Land Use Classification Guide and Schedule of Permitted Uses, though authorized under Section 107, are passed under the rules of Section 106 and are also generally considered by administrators to be binding, even though this is not provided for in the bylaw. (Further implications of this consideration will be discussed at other places in this chapter.) Council has also imposed a restriction on amendments to the Land Use Classification Guide,

requiring a public hearing prior to a change, a procedure similar to that used for zoning bylaw amendments. The discretion of the local administrative planning authorities is retained *in toto* in Direct Control districts, and in other areas where specific uses require Planning Commission approval.

Operational Aspects

The operation of development control in Calgary is only partly based on administrative discretion. Acceptability of an application for development is based primarily on its relationship to the philosophy outlined in the General Plan, but this is not a rigid policy. Most applications are processed by the staff of the city planning department, subject to approval of the Development Officer, in accordance with policies and guidelines established by the Council. Decisions made at this level are no different than similar decisions made under zoning - the discretionary element is not a factor since the proposed developments and the concomitant decisions are very routine.

The Land Use Classification Guide (and the accompanying Land Use Classification Maps), Schedule of Permitted Uses, and the Rules Respecting the Use of Land guide administrative decisions at this level, unless problems arise. Then the Development Officer exercises his discretion, by approving the application, rejecting the application on his own authority, or referring it to the

Planning Commission. It is at this point in the process where theory and practice diverge.

If a development proposal accords with the Rules, the Guide, and the Permitted Uses, the Development Officer or Planning Commission is expected to approve the development, but may speak against it, for planning reasons, when and if the matter comes before the Development Appeal Board. But this expected approval is not necessarily forthcoming in all cases, according to the Development Officer.[9] If a proposed development is, in his opinion, poorly planned, either in its own right or in its relationship to the surrounding uses, then he will reject it on his own authority.

This exercise of power seems to be in opposition to the intent of Sections 106 and 107 of the Planning Act, to which we previously ascribed the power to bind planning administrators. Yet while Section 107 initially serves to bind the planner - "(instruments) may be prepared and adopted by a resolution of council under section 106 for the purposes of development control ....." - it goes on to remove this burden of responsibility by removing the possibility of legal sanctions for issuing such a refusal: "....but such a guide or schedule is not part of the development control by-law." Since the Development Officer is not violating the law by his refusal, and council has made no specific attempt statutorily to restrict his decision-making

powers, the developer's only recourse is to the DAB. He may not appeal the initial planning refusal to the courts on questions of law or jurisdiction. He can appeal the subsequent DAB decision to the courts on such grounds, but the DAB is not bound to abide by any of the instruments under development control.

The Development Officer reportedly uses this power rarely, and in general abides by the guidelines, so the exercise of real discretion is limited practically to areas under Direct Control, or to uses requiring specific approval. The power does exist however, and its existence, not its use, is sufficient reason to label the control system highly discretionary. The Development Control Officer in Edmonton feels he exercises the same amount of discretionary authority in areas of that city which are governed by the development control bylaw.[10]

On the other hand, where a development is considered desirable but is not permissible according to the instruments, the planning authorities will seek a reclassification. Most such reclassifications in Calgary are used to create Direct Control districts, which considerably enhance the discretionary control of administrators. Refusals in these areas can be based on purely technical or physical planning grounds, or on the opinion of the Development Officer that such development is "not necessarily in character with the neighbourhood."[11] Although not required by the bylaw, reasons are always given for development refusals, a practice which is required by bylaw in Edmonton.

Thus we see that in some ways the exercise of development control provides vast administrative discretion. Direct control districts and the central business district are two areas where this discretion is applied by the Calgary Planning Commission, which cannot legally make many demands on developers other than those set out in the various guidelines. Yet the administrative power of refusal makes negotiations productive, as indicated by "a significantly smaller number of appeals under development control in Calgary than under zoning in Edmonton."[12]

Section 9 of the Development Control Bylaw (Bylaw 8600) provides that the Development Officer or Municipal Planning Commission "may approve an application for a development permit subject to conditions to ensure the orderly and economic development of land within the City of Calgary having regard to the intent and objectives of the General Plan under preparation or adopted....".[13] First it says the agencies "may" approve an application, providing no compulsion whatsoever, which seems to overlook the restrictive interpretation of the various instruments. Second, it stipulates that they must have regard for the General Plan, but are not obliged to follow it. This seems to imply that if it is advantageous to disregard the plan, it is completely within the power of the approving authorities to refuse an "acceptable" development, or attempt to change the Land Use Classification Guide to admit a formerly unacceptable proposal.

Development control, as used in Calgary, could be responsible for development in all areas of the city. In fact, it is rarely used in districts which have acceptable uses as identified by the Schedule of Permitted Uses. Land use in these areas is determined by the administrative instruments appended to the bylaw: the Guide lists the classifications, the Schedule lists acceptable developments in each classification, and the Rules govern development specifications. Development control is used in transportation corridors, in areas where the introduction of new uses may cause friction with existing development, in areas undergoing growth or transition, in the downtown core, and is implemented in areas where the existing land use classification bears little resemblance to and is incompatible with existing uses.[14] The establishment of DC districts in former R-1 areas found to be in areas of unacceptable noise levels around the airport is illustrative of this.

The city planning department is currently working on the preparation of Design Briefs for most areas of the city, and intend that for the first three of the five types of areas just listed, development control is only to be exercised until the appropriate Design Briefs are prepared, when the areas will be regulated as though under zoning. The finished Design Brief should attempt, to as great an extent as possible, to be representative of public opinion and to be consistent with the General Plan for the area under review, but not all individual landowners are apt to be satisfied.

The Development Process

The Design Brief is a plan of an area, prepared by the city, which outlines types of land use and general locations of land use in that area. It is a relatively easy document to prepare in undeveloped areas. It serves as a development outline showing what developers and residents can reasonably expect when the area is completely developed. Complexities arise when preparing one for existing areas, where change may be occurring, and anomalies may be numerous. It is an attempt to impose a system of "ought", based on residents' and planners' perceptions of desired goals, over a present system of "is", and thus the preparation must involve politics: consultation with communities involved, elected representatives, and city planning officials. In one sense the finished Design Brief fits into the development control motif rather well - it has no legal status and does not bind council, who can change it as required. But a completed Design Brief, consistent with the General Plan, serves to guide administrative decisions. Changes to Design Briefs may be demanded by citizens, as well as by developers or administrators. If the latter two groups are seeking a change, council may require them to show good cause for enacting such a change. If the citizens demand changes, such as a truck route closure, then political pressures often lead to agreement by council to the demands.[15] In areas without Design Briefs, development control procedures continue to apply, based on provisions of the General Plan.

Development in new areas is subject to a specific process of control, the Design Brief being merely the first of five steps. The first step is carried out by the city (although in new areas, developers will prepare it subject to city approval), while the others are carried out by private developers and processed by the city, each of which provides another access point for exercise of administrative authority through the requirement of Planning Commission approval. Briefly described in sequence after the Design Brief, the steps are : 2) the Concept Plan, illustrating how the developer proposes to exercise his options, usually encompassing more area than is covered by the next step, the Outline Plan; 3) the Outline Plan plots detailed street, block, lane, and utility layouts as well as reserve areas and is often processed with or as part of the Concept Plan; 4) Land Use Classification approval must then be obtained from council prior to approval of the next step; 5) the Tentative Subdivision Plan and the Subdivision Plan (or legal plan) establishes lot sizes and so on by legal survey for registration in the Land Titles Office.[16]

Administrative Procedures

Prior to the actual commencement of work on any development, whether in a new area or on a project in any other location in the city, application must be made for a development permit. Most development applications require routine processing

by the Planning Department, but the Development Officer retains the authority to scrutinize all proposals. Section 6 of Bylaw 8600 provides the authorization for this position:

> "A member of the Planning Department of the City of Calgary shall be designated as a Development Officer who shall carry out the function hereafter in this By-law assigned to the Development Officer. The Development Officer shall for all purposes of Section 105 of the (Planning) Act be declared to be an Officer or servant of the Council."

There are four options available to the Development Officer in dealing with applications - unconditional approval, conditional approval, referral to the Calgary Planning Commission, or refusal of permission (Bylaw 8600, Section 10(1)). The Planning Commission is a decision-making body authorized by Section 15 of the Planning Act:

> (1)"A municipal council may, by by-law establish a municipal planning commission, but where the council is acting as the appeal body under section 128 no member of the council may be appointed to the commission."[17]

It is constituted in the City of Calgary pursuant to Bylaw 7114. The majority of the Planning Commission consists of appointed and elected civic officials - City Engineer, Director of Planning, Director of Parks and Recreation, Director of Transportation, Chief Commissioner, Commissioner of Planning and Transportation, the Mayor, and two Aldermen.[18] The roster is completed by three

citizens at large, presently an architect, a lawyer, and a businessman.[19] Besides contributing to work on the General Plan and Design Briefs, it is empowered to make decisions on applications for developments and subdivisions, and to make recommendations to council on changes in land use classifications. Due to the imposition of the previously mentioned restrictions, except in DC and certain special districts, it can approve only accepted uses as listed in the Schedule for any given area, but it can refuse any use proposals. If a nonconforming development is desired in a certain area, the Land Use Classification Guide must first be amended.

In DC or the Central Business District, any major development is subject to virtually complete administrative discretion. Minor developments can avoid such controls, but they would be uneconomical in such areas. Information on which decisions are based is obtained from any or all of the various city departments, and when a particular proposal is being considered by the Planning Commission, questions may be asked of the developer or others, if they are present, but these people otherwise have no right to address the Commission.

Development control and zoning are alike in that they require a valid development permit prior to undertaking any proposal. We have already presented the Planning Act definition of a development permit (Section 2 (f1) of the Planning Act)

which is duplicated in Section 2(9) of Bylaw 8600 as the city definition. Section 3 of the bylaw provides, with the usual exceptions, that

> "no development whatsoever shall be undertaken anywhere in the City of Calgary unless and until an application for a Development Permit has been approved by either the Development Officer or the Calgary Planning Commission and a Development Permit has been issued for such development pursuant to the sections of this By-law."

Section 9 of the bylaw provides for issuance of a development permit subject to conditions "to ensure the orderly and economic development of land within the City of Calgary," and empowers the issuing authorities to require the applicant and owner to enter into an agreement with the city to ensure compliance. The city can file a caveat against the land as a guarantee of performance. Prior to an application being considered, some uses require posting or a public notice on the development site to inform neighbouring property owners of the impending use. This is provided for in Section 11 of Bylaw 8600, which also gives the Development Officer or the Planning Commission the necessary power to require posting for <u>any</u> proposed use. Such notices must be posted for at least seven days, giving concerned people time to object if they so desire.

After a development permit is issued the Development Officer must publish a notice in a local newspaper stating the location of the land and the approved use. No development permit is valid until fourteen days from such publication, allowing

time for appeal actions to be launched. According to the terms of Section 13 of the bylaw, if a notice of appeal is served, the permit is not valid until the Development Appeal Board approves it, or the appeal is abandoned. If the appeal is successful, the permit becomes invalid; but if the appeal ruling merely applies conditions to the development, a new permit, incorporating the conditions, will be issued. This is the same as under zoning.

Provincial legislation for zoning specifically denies the right of appeal from approval of a permitted use, but development control has no such protected category of use so any decision can be appealed to the municipal appeal agency. After an application has been refused by the approving authorities, Section 8(5) of the bylaw states that no application for the same or similar use can be made by anyone for a period of six months. This avoids congesting the system with repetitious applications, and the six month period allows sufficient time so that subsequent re-application may succeed due to altered tastes, needs, or circumstances. Section 8(6) declares that authorized development must commence within twelve months of the date of issuance of the development permit, or it will be deemed to have expired; the developers must re-apply if it is then to proceed, there being no guarantee of success in the second attempt.

There is one significant difference between the zoning bylaw in Edmonton and the development control bylaw in Calgary regarding development permits. If a permit is refused in Edmonton, the bylaw states that reasons must be given, but, as was claimed earlier in this chapter, nowhere in Bylaw 8600 does it state that the Development Officer, the Calgary Planning Commission, or the Development Appeal Board must give any justification for refusal to issue a development permit. One possible reason for the omission of this clause is that there are no statutorily permitted uses under development control. Even though the planning administrators may be generally bound to approve an "acceptable" development, the Development Appeal Board under development control is not so bound, and <u>any</u> planning decision is subject to appeal thereto. Under zoning, approval of permitted uses is not subject to appeal, while refusal of such a use may be appealed to the local DAB. Refusal of a permitted use might be based on grounds which are not explicitly clear, such as aesthetic reasons, so these must be stated. But in any event, reasons for refusal are always given in Calgary, according to the Development Officer, who is not sure why such a clause was omitted.

Appended to, but not part of the Development Control Bylaw are the Rules Respecting the Use of Land, Land Use Classification Guide, and a Schedule of Permitted Uses. The first of these instruments is the only one to bear any necessary influence in decisions, according to the terms of the bylaw.

Section 10(4) of the bylaw requires that: "In making a decision on an application for a Development Permit the Development Officer and the Planning Commission shall be governed by the provisions of the Rules Respecting the Use of Land." This clause is in accordance with the provisions of the Planning Act, Section 106. This instrument provides physical requirements and limitations on any proposed development, stipulations which are regarded as a minimum in that the approving authorities can require extra conditions prior to issuance of a permit.[20] It is enacted as a resolution of Council and Council can make changes in it as they desire. It deals with specifications for use of land, but in no way is involved with types of land use.

The Guide and the Schedule are incorporated into one resolution of Council. We mentioned earlier that changes in this instrument required public hearing procedures, but this protection is tempered by the fact that Council made that restriction by resolution and has the unilateral right to remove it. The purpose of such an instrument is to provide guidelines for decisions of local authorities under development control. Provincial legislation makes their implementation optional, but apparently intends to make their governance compulsory on planning administrators once enacted. (The earlier discussion on Section 107 makes a definitive judgement on this matter highly improbable in this paper.) The bylaw does not impart any specific status to these instruments as it does to the Rules, which constitute a different

instrument, perhaps relying on the superior provincial legislation to give them authority. Planning administrators do not, in practice, feel compelled to abide by these instruments, so discretionary authority is extensive, and differences between Edmonton's zoning system (with development control) and Calgary's development control can be measured approximately by determining the extent of use of each of zoning and development control in Edmonton.

This again raises the problem of statutory difficulties in the Planning Act. In conversation, Mr. Laux suggested that all the instruments discussed above are binding on planning administrators,[21] but in his writings he suggests that provincial legislation regarding development control requires that each application be considered on its own merits. To require the decision-making authority to be confined by such instruments would not only negate the purpose of development control, but such a ruling would also be beyond the jurisdiction of the city council, the subordinate legislative body, in that it would be essentially countermanding the provincial legislative authority.[22] Yet support for such restrictions on administrators could be garnered by a city council from Sections 106 and 107 of the Planning Act, as Edmonton has attempted to do in Section 7(3)(b) of its development control bylaw. In this sense, we see the Planning Act countering its own intentions.

Appeal procedures are a significant aspect of any land use control scheme, but particularly development control, for any decision can be subject to appeal. Section 108 of the Planning Act authorizes a development control bylaw to establish a Development Appeal Board. Section 128 of the Planning Act provides the rules of appeal procedures. Section 19 of Bylaw 8600 outlines the structure and procedures to be followed by the appeal board in Calgary. A significant aspect of the structure of this body is the composition of the membership - this is primarily a citizen body, consisting of ten citizens and two aldermen. No civic employees or Planning Commission members are allowed, and council is represented, but a majority must not be council members. Some exercise of political control can be exercised over this body through the procedure of appointments, which are made annually by council.

This is a quasi-judical body whose decision is considered final. In making a decision, the Development Appeal Board (Section 128(4)(c), Planning Act):

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

The idea that each case is considered on its own merits removes the contention that decisions must be bound by precedent.

Having regard to the merits of the case, a relevant general plan, or the development control bylaw does not imply that the appeal board is bound by the administrative instruments enacted by council, so the board has total discretion over development decisions in Calgary. Decisions of the board are final and binding on all parties (Planning Act, Section 128(7)), subject only to appeals to the Appellate Division of the Supreme Court of Alberta on a question of law or jurisdiction (Planning Act, Section 146).

A notable difference exists between the extent of the powers of the Calgary and Edmonton appeal boards, based on the land use control bylaws in effect. This situation will be discussed in the next chapter.

Summary

This chapter attempts to state the actual as well as the theoretical aspects of the functioning of the system of controls used in Calgary. It also reviews the formal and informal control techniques in the development process, some of which are of questionable legality, but which are employed in negotiations between city officials and developers. The chapter concludes with a description of the administrative procedures, including restrictions on discretion, and review of the roles of the

administrative instruments such as Rules Respecting the Use of Land, the Land Use Classification Guide, and the Schedule of Permitted Uses. Appeal procedures are also briefly described, and may be understood in theory to be the only level where true development control is exercised, but the problematical provisions of Section 107 enable administrators to practise development control. The analysis in the next chapter should clarify the functioning of the Calgary and Edmonton systems, both individually and collectively.

FOOTNOTES

1. Calgary had four small municipalities on its fringes, all of which were subsequently annexed: Forest Lawn and Ogden in 1961, Montgomery in 1963, and Bowness in 1964. The existence of these communities could not be used to make a comparison with the Edmonton situation, since they were not considered, by the writer, to be "major established urban centers". City of Calgary MUNICIPAL MANUAL, 1975-76; p. 120.

2. City of Calgary Bylaws, Bylaw 4271 (1952).

3. Ibid; Bylaw 2835 (1934).

4. City of Calgary v. Reid and Vincent; Western Weekly Reports, vol. 27, 1958-1959, pp. 193-230; referred to in the City as the Hope Street case.

5. Harasym, D.G. The Planning of New Residential Areas in Calgary 1944-1973; unpublished M.A. Thesis, Department of Geography, University of Alberta, 1975; p. 108. Originally from: Minutes of the Technical Planning Board, August 1958.

6. City of Calgary Bylaw 4916 as amended by Bylaw 5876; December 1961.

7. City Abattoir (Calgary) Ltd. v. Council of the City of Calgary; Western Weekly Reports, vol. 70, 1969; pp.460-469.

8. Otto Bartel Homes Ltd. v. City of Calgary, Dominion Law Reports (3d), vol. 30, 1972, pp. 184-199. Bylaw 7839 was overturned at Trial Division, but was subsequently upheld on appeal by the City.

9. From a conversation with Mr. D. Collins, Development Officer, City of Calgary; August 20, 1976. Mr. Collins agreed that Sections 106 & 107 seemed to be attempting to make the instruments binding, but did not feel that they interfered with his right to refuse a poorly planned proposal.

10. From a conversation with Mr. Al Steele, Sr. Zoning Officer in Edmonton, who was speaking for the Development Control Officer in Edmonton; August 24, 1976. Mr. Steele claimed that the various attempts by Council to restrict this discretion did not, in his opinion, curtail it at all. This is discussed further in the next chapter.

11. From a discussion with Mr. D. Collins, Development Officer, City of Calgary; August 20, 1976.

12. Ibid. This matter is discussed further in the next chapter.

13. City of Calgary Bylaw 8600. Future references will not be noted.

14. City of Calgary CALGARY PLAN: Planning Department, 1973 p. 14.5.

15. From ideas expressed by Mayor Sykes in lectures given at the University of Calgary, January 21 and 28, 1976.

16. City of Calgary op. cit.; p. 14.2.

17. Province of Alberta The Planning Act, R.S.A., 1970; Ch. 276.

18. City of Calgary MUNICIPAL MANUAL: City Clerk, 1975; p. 21.

19. Rondeau, P.B.H. Alternates to Zoning; in COMMUNITY PLANNING REVIEW: vol. 25, no. 8, August 1975; p. 5.

20. Ibid; p. 5 The "extra conditions" referred to likely imply the inclusion of specific extra amenities considered desirable by the city, and obtained through the negotiation process with developers.

21. April 15, 1976, in his Law Faculty office, Professor Laux stated that their enactment was not compulsory, but once they were enacted, the provisions of the instruments were binding.

22. Laux, F.A. The Zoning Game - Alberta Style, Part II; Development Control, ALBERTA LAW REVIEW; vol. X, 1971; p. 20.

CHAPTER V

COMPARATIVE ASSESSMENT

Purpose

This chapter is intended to present an analysis of the major aspects of the two land use control systems with a view to discerning the relative degrees of rigidity and flexibility. The components to be reviewed for this analysis include the respective bylaws, the planning administrators (development officer and planning commission), instruments appended to the bylaw or included therein, and development appeal agencies. These are considered by the writer to be the basic elements in which varying degrees of rigidity and flexibility can be analyzed and measured. This may not be an all-inclusive listing, but the major elements are included and a brief account of each should provide a clear picture regarding the relative flexibility or rigidity of the systems.

The Bylaws

Edmonton and Calgary purport to employ two different land use control techniques, so the bylaws are quite dissimilar. They are similar in that certain statutory requirements must be adhered to in order to change or repeal them; and also similar in that each contains basic sections pertaining to operations, administration, appeal, and enforcement. But the

specific content of most of these sections is different. Basic administrative similarities exist in the areas of development procedures, processing applications, the role of development permits, and the existence of certain administrative roles, such as Development Officer and Planning Commission.

These superficial similarities belie the fundamental differences which exist between the two bylaws, based on the distinction between zoning and development control. The respective preambles to the bylaws help to illustrate this difference. Edmonton has enacted:

> "A Bylaw to Zone parts of the City of Edmonton thereby regulating and controlling present and future developments therein.
> WHEREAS the Municipal Council of the City of Edmonton has decided to zone parts of the City as shown upon the attached zoning map... as the initial portion of a comprehensive Zoning Bylaw for the whole City."[1]

Taking note of the rigid implications of a zoning bylaw as set out in Chapter II, we see an intent on the part of legislators in the City of Edmonton to set out relatively explicit development goals.

The control bylaw in Calgary is stated as:

> "Being a By-law of the City of Calgary to control development of land in the City of Calgary.
> WHEREAS the Planning Act ... authorize(s) the Council of a Municipality to enact a Development Control By-law to provide for control of development by means of a system of permits.
> NOW THEREFORE THE COUNCIL OF THE CITY OF CALGARY ENACTS AS FOLLOWS, NAMELY:..."The Development Control By-law".[2]

This is apparently a bylaw intended to provide some flexibility for the development process, allowing the administrators, who will control the system of permits, much influence over what takes place.

As befits a proper zoning bylaw, all the necessary instruments are part of the actual bylaw in Edmonton. These instruments establish permitted and conditional ('special') uses - acceptable proposals and how they are administered; it provides technical land use regulations; and it states the zoning designations, including a map outlining the boundaries of each zone. These instruments, as part of the actual bylaw. have legal status and can be used to formulate plans and proposals which the courts will support by mandamus if, permitted uses having been prepared in accordance with the bylaw, administrators choose to reject them. The situation in Calgary is quite different in that all the regulatory instruments are enacted by resolution of Council and are not part of the actual bylaw. Hence they have no legal status in the sense that they are not enforceable through the courts. (A council resolution can be changed or repealed at any time by unilateral council action.) The only stipulation made in the bylaw is that planning administrators abide by the Rules Respecting the Use of Land. Though adherence to the other instruments is common practice, the bylaw makes no

specific restrictions in that regard, and provincial legislation concerning the status of these instruments is at best confusing and perhaps even contradictory.

Changes can be made in the respective land use control bylaws with varying degrees of difficulty. As was mentioned previously, to change any part of a bylaw, rigid statutory procedures must be adhered to, thus ensuring compliance with legal requirements. The bylaw in Edmonton includes not only the administrative and operational aspects, but all the necessary instruments as well, so a proposed amendment of any nature must pass through the formal procedure. This necessitates at least the statutory minimum amount of public involvement intended to grant concerned citizens a voice in legislative matters which may affect them. A further restriction on amendments to land use control legislation in Edmonton is that all changes proposed by developers must accord with the Preliminary Regional Plan, otherwise the Plan must first be changed.[3]

The amending procedures in Calgary are much less complex, due to the structure of the municipal legislation. Changes in the actual bylaw must proceed through formal channels, but the bylaw itself contains none of the regulatory instruments which guide the decisions of planning administrators. These instruments have all been enacted as resolutions of Council,

according to the stipulations of the Planning Act, Sections 106 and 107. The bylaw requires public hearing procedures for proposed amendments to the Land Use Classification Guide, which provides some rigidity, but the Guide itself was created by resolution and could be unilaterally repealed. There is also no obligation in Calgary to make changes in accordance with a General Plan. Administrators are to 'have regard for' a plan, but are not obliged to follow it. This concept of 'having regard for' something extends as well into the area of public hearings. In both Edmonton and Calgary, whenever public hearings are held (statutorily or otherwise), there is no compulsion on the part of legislators or administrators to heed any information derived therefrom. The same also applies to DAB hearings.

The practice of public notification prior to development of a proposed use also varies significantly. The Edmonton bylaw does not require any notice for approval of a permitted use, since there is no appeal possible, but for approval of a conditional ("special") use, notice is to be mailed to all owners of property within two hundred feet of the proposed development. The Calgary bylaw provides for compulsory posting for certain uses, and optional posting for all others, at the discretion of the Development Officer or Planning Commission. This "posting" refers to the public

display of a notice on the development site, such notice being in the form prescribed by the Development Officer or Planning Commission, setting out details of the proposed use. No special notification is sent to anyone, presumably on the understanding that neighbouring landowners or tenants will see the notice and read it, or see the notice in the newspapers, thereby informing themselves of what lies ahead.

With respect to appeal procedures, the Edmonton bylaw provides very extensive information, compared to Calgary. Much more is included with regard to administration and procedures than is stated in the Calgary bylaw. The Calgary bylaw includes some clauses from the Planning Act regarding appeals, and some administrative points enacted by the city. The Edmonton bylaw incorporates all the applicable provisions from Sections 108, 109, and 128 of the Planning Act, as well as a number of procedural aspects enacted by the city.

The Edmonton bylaw has apparently exceeded its jurisdiction with respect to the time for mailing notices of appeal hearings to the appellant and assessed owners of land within 200 feet. Section 8(9)(i),(j) of the bylaw provide for mailing of notices not less than five days prior to the hearing, while the Planning Act, Section 128(4)(b), requires at least seven days, exclusive of weekends and holidays.

The Edmonton bylaw includes a schedule of fees for appeals, and specifically provides that no decision of the Board is to be considered a precedent. The Calgary bylaw makes no specific mention of it, but seems to follow the same lines with regard to precedent, apparently relying on Section 128(4)(c) of the Planning Act for justification: each case is considered on its own merits.

Another difference in the bylaws originates, as mentioned earlier, from refusal of permission to develop. Edmonton requires the administrators to provide reasons for refusal, while the Calgary bylaw makes no mention of such a provision. According to the Calgary Development Officer, reasons <u>are</u> given with every refusal, but he is unaware of the reasons for omitting such a stipulation from the bylaw.

Possibly the most significant difference in the two basic control techniques is the coincidental use of development control with zoning in Edmonton. A development control bylaw was passed, a Land Use Classification Guide enacted, districts established and guidelines enacted to administer the process, all except the bylaw being created by resolution of council under the terms of Sections 106, and 107 of the Planning Act.

If an uninitiated observer were to browse through the two bylaws in Edmonton and the development control bylaw in Calgary, he would have to come away with the impression that

Calgary has applied very few restrictions on the planning administrators. Their counterparts in Edmonton have discretionary authority over conditional uses and certain aesthetic flexibility under zoning, and some freedom under development control, which Council has attempted to curtail by stating that the Guide and Schedule are binding (Section 7(3)(b) of the bylaw, and in the preamble to the Development Control Resolution). The only restrictions which are openly stated in Calgary pertain to the Rules Respecting the Use of Land, and amendments to the Guide. In actual practice Calgary administrators do generally abide by the guidelines, as their opposites in Edmonton do, but administrators of development control in both cities claim to have extensive discretionary authority available to them if they feel compelled to use it. But in discussing the bylaws, we are comparing the contents of the bylaws, not the practical applications, which will come up later. On the face of the matter, the Calgary bylaw is much less rigid than the two bylaws in Edmonton. There are very few restrictions on the Development Officer in Calgary, leaving him free to exercise the discretion left open to him under Section 107. The Edmonton zoning bylaw is by nature more rigid, and the development control bylaw is intended to limit the discretion of the Development Control Officer, hence it too must be considered more rigid.

The Development Officer

The basic administrative position in the land use control schemes of both Calgary and Edmonton is the Development Officer. In Calgary this individual is empowered to make initial decisions on all development applications except those which specifically require Planning Commission approval. The Development Officer can approve, approve with conditions, reject, or refer an application to the Planning Commission. He is in most cases considered bound by the bylaw and the various regulatory instruments, but in practice he retains the authority, under Section 107 of the Planning Act, to refuse permission for any proposal. He is considered a servant of Council, but possesses much influence through his superior knowledge of information on which planning decisions are based. Extensive use of the Direct Control district marginally enhances the otherwise seldom-used exercise of total discretion under Section 107.

The Edmonton Development Officer is responsible for the administration of the zoning bylaw, and is empowered to decide on all applications except those in P-3 Residential (non-profit housing) districts, which are under the sole authority of the Planning Commission. This is the only case under the zoning bylaw where the Development Officer does not decide on his own. Except for the exercise of aesthetic discretion, control of some conditional uses, and regulation

of utility capacities, the Development Officer is bound to abide by the terms of the bylaw and all the regulatory instruments which are parts thereof. He must approve a permitted use which meets all requirements, but can exercise some discretion within the intent of the bylaw, in ruling on conditional uses. Edmonton does not use a discretionary zone similar in nature to Direct Control, so the Development Officer does not have broad discretion like that in Calgary.

Edmonton also has a Development Control Officer, who decides on development applications in areas under development control. Council has attempted to bind him to the development control instruments which are not part of the bylaw, but it is not clear, under the terms of Section 107 of the Planning Act, whether or not such attempts are a legitimate exercise of Council authority. In any event, the Development Control Officer in Edmonton is apparently, in practice, as unrestricted in his decisions as the Development Officer is in Calgary. The breadth of discretion is somewhat limited through the absence of a district comparable to the Direct Control district.

An analysis of the three positions (two in Edmonton, one in Calgary) demonstrates that the Development Officer in Calgary is in a less rigid environment than either of the two Edmonton officers. With the latent power of extensive discretion and increasing use of Direct Control districts,

his position is in theory, if not in practice, extremely flexible. The Development Officer in Edmonton is in a rigid position regarding the bylaw. He can exercise some discretion in the area of conditional uses, but this is circumscribed by the zoning bylaw. The Development Control Officer has considerable amounts of discretion, but lacks such unrestricted areas as Direct Control districts. It also remains to be seen whether this Officer, as a servant of Council, could be censured or dismissed by Council for exercising extreme discretion in violation of the obvious intent of Council to bind him to the regulatory instruments. Thus the positions in Edmonton must be considered, on an overall basis, much more rigid than that in Calgary.

The Planning Commission

Edmonton and Calgary each have a Municipal Planning Commission, but their roles and functions differ dramatically. The Calgary body is empowered to make initial decisions on development applications for a number of specific uses in most land use classification districts, and determines acceptability of proposals for all major applications in certain districts, such as the CM-1 and CM-2 (Central Business) districts. It also accepts, accepts with conditions, or rejects applications referred to it from the Development Officer. Section 10(4) of the bylaw requires both the Development Officer

and the Planning Commission to be governed by the Rules Respecting the Use of Land, but no provisions are made to make any other instrument binding, so it is anticipated that if Section 107 of the Planning Act provides broad discretion to the Development Officer, it is also provided for the Planning Commission. The structure of this body (reviewed in Chapter IV) provides it with enough expertise to also permit it to perform the tasks of Edmonton's Architectural Panel, a body established in the Zoning Bylaw to advise on design, structure, and signs.

The Planning Commission in Edmonton is established under the Zoning Bylaw. It is empowered to control development in P-3 Residential zones, to receive and make recommendations on proposed amendments to the bylaw, and to work in conjunction with Council in deciding on the suitability of proposals for CD-1 (comprehensively developed commercial and residential) zones (which are rarely used). The Development Officer handles all other development decisions under zoning, and the Development Control Officer deals with areas under development control.

Thus the Calgary Planning Commission is obviously in a much more flexible position than the Edmonton body. Discretionary authority over a large number of specific uses and over entire districts (DC) gives the Calgary body much flexibility. The CD-1 zone in Edmonton provides much discretion

of a similar nature, but its implementation is dependent on the developer's initiative, and most developers in Edmonton prefer to use conventional zones.[4] By comparison, Edmonton is in a much more rigid position with respect to the Planning Commissions.

The Instruments

The regulatory instruments have been mentioned on numerous occasions in this chapter. These instruments are of four basic types in Calgary and Edmonton, and though their names and status may differ in each application, their functions are basically the same. In Calgary these are referred to as: 1. Rules Respecting the Use of Land; 2. Land Use Classification Guide; 3. Schedule of Permitted Uses; 4. Land Use Classification Maps. Each of these is enacted by resolution of Council, and is not part of the bylaw. (The Rules are given recognition in the bylaw but are not part of it.)

In Edmonton they are: 1. General Regulations and Special Provisions; 2. Zoning Districts; 3. District Schedules; 4. Zoning Map. These respectively comprise Sections 12-13, Section 11, Appendix 1, and Appendix 2 of the zoning bylaw, and as such are part of the actual bylaw. Edmonton, under its development control bylaw, has also enacted by resolution the four development control instruments used in Calgary, but

refers to them as the Land Use Classification Guide; the map - Land Use Classification Guide No. DCR-1; and the Schedule of Uses and Regulations, which combines Calgary's Schedule and Rules.

Zoning administrators in Edmonton are bound by the bylaw provisions, which include all the instruments. Council also apparently intended the Development Control Officer to be governed by the development control instruments, but as we read in the previous section of this chapter, he may not feel obligated to abide by those terms. The Calgary bylaw (Section 10(4)) only requires administrators to abide by the Rules Respecting the Use of Land, making no mention of the other three instruments. Yet the others are generally taken by the administrators to be binding, presumably on the basis of provincial legislation, (Sections 106 and 107) which also provides the outlet for administrative discretion, when the administrators deem it necessary. Differences between the two cities with regard to the role of the instruments is considerable, when comparing development control and zoning, but minimal when comparing the two development control bylaws. Edmonton has attempted to bind the Development Control Officer, but a spokesman for that office perceives the possession of wide discretionary authority. His explanation of this perception was not very clear to the writer, but one might suspect it is based on Section 107 of the Planning Act.[5]

Edmonton's zoning instruments, as parts of the bylaw, can only be repealed or altered by going through the formal amendment procedure. Changes to the development control instruments of Edmonton and Calgary are more readily completed than similar changes under zoning, since the instruments were all enacted by Council resolution and are subject to change by Council without using formal amending procedures. The Calgary bylaw makes provision for a public hearing prior to any change in the Land Use Classification Guide, but the actual change is made by resolution. (For resolutions, three readings are not required, and public notification is not compulsory.) Neither the Resolution nor the bylaw in Edmonton make any reference to procedures for amending that Guide, other than that the Resolution no longer applies to areas which are included in amendments to the Zoning Bylaw.

As was mentioned earlier, any changes to the Edmonton Zoning Bylaw must be in accordance with the Preliminary Regional Plan which, though not considered one of the instruments for this discussion, is the basis for the entire Edmonton zoning scheme. The development control instruments are also intended to conform to such a plan, as the preamble to the Resolution states: "in the interest of orderly development." There is no need for changes to concur with the stipulations of a General Plan in Calgary - changes in the Guide are changes in the Plan.

The Land Use Classification Guide in each city raises some interesting points. In each case the Guide is an instrument of development control, though the Guide in Calgary fulfills the same role as Edmonton's Zoning Districts, listing the titular designations and providing such information as how to resolve exact boundary locations. The Guide outlines the land use classifications whose uses are given in the Schedule of Permitted Uses in Calgary, and the District Schedules in Edmonton. Although administrators in zoned areas in Edmonton are bound by the terms of these instruments, and development control administrators generally adhere to them, the Calgary Guide provides more flexibility through the provision of Direct Control districts, where acceptable uses are "as approved by the Planning Commission on the merits of each application".[6] The Edmonton Guide lists a number of development control district classifications, most of which are also contained in the Zoning Districts, but the development control bylaw has priority in those areas. Some flexibility exists in the development control areas, but the Development Control Officer is to have regard for (but not be governed by) the statement of purpose for each district, the provisions of the zoning bylaw, and the Preliminary Regional Plan (Section 4 of the Resolution).

The instruments under zoning in Edmonton are administered rigidly, as one might expect under zoning.

Discretion exists within those instruments for aesthetics and conditional uses, but the extent of this exercise of discretion is limited by the terms of the bylaw. The development control instruments of both Edmonton and Calgary do little, in practice, to restrict the exercise of discretion in either case, and since Edmonton is only partly under development control, we must conclude that the administrative instruments provide for more flexibility overall in Calgary than they do in Edmonton.

Appeal Procedures

Both Calgary and Edmonton have established Development Appeal Boards as authorized by the Planning Act, Calgary under Section 108, Edmonton under Sections 127 and 108. Each Board functions under the establishment and administration procedures set out in Sections 108, 109, and 128 of the Planning Act, although Edmonton has apparently attempted to override the provincial statutes with respect to time for mailing notices of appeal, which issue was discussed previously in this chapter, in the section on Bylaws. Apart from the basic similarities, statutory differences do exist between appeals under zoning and appeals under development control.

The most significant difference is the absence of right of appeal from approval of a permitted use under zoning. Since no such thing as a statutory "permitted use" exists

under development control, any use is subject to appeal. This would lead one to suspect that there should be many more appeals under development control, but according to Calgary's Development Officer, the opposite is true, which he attributes to the negotiability under development control.

Accepting Mr. Collins' facts concerning the number of appeals as true leads one to consider the reasons for such a circumstance. Perhaps negotiations between the city and developers also take into consideration the opinions of neighboring landowners or residents, resulting in compromises satisfactory to all concerned. Or, from a more cynical perspective, perhaps the negotiations lead to a compromise solution which receives the support of city planning authorities, and citizens might feel a sense of hopelessness in appealing against both the city and the developer.

Further speculation might lead one to consider that the planning authorities in Edmonton are rejecting what the developers feel are permitted use proposals; or conditional uses are being widely approved and appealed, or rejected and appealed on the basis of wrongly exercised discretion. Whatever the reasons behind this statistic, the most significant fact is that there are less appeals under a system where all decisions are subject to appeal than under a system which provides for uses as of right.

The DAB in Edmonton is obliged, in all appeals, to have regard for the merits of the case, the Preliminary Regional Plan, and for the appropriate bylaw. (The same Board hears appeals from both land use control bylaws in Edmonton.) Section 8(6) of the zoning bylaw makes reference to a relaxation of the bylaw by the DAB, but such relaxation must only be minor in nature, relating to specifications such as area or density, but not to use. This power is further restricted by the Planning Act, Section 128(4)(d), which specifically denies such a body the right to permit any use not permitted in that zone under the bylaw. This clause, in conjunction with the status of permitted uses under zoning, effectively restricts DAB decisions to following the bylaw, for which it must "have regard". Having regard can infer simply making reference to that which must be regarded, which is not a very strict limitation.

The Calgary Board is obliged to have regard for the merits of each case, the General Plan, and the Development Control Bylaw. This is, in practice, much less restrictive than the similar requirements in Edmonton, for in Calgary none of the regulatory instruments are actually part of the bylaw for which the Board must have regard. Thus there is very little restriction on the decision-making process of the Board which technically at least, is free to approve any use for any location, subject only to superior provincial or federal legislation, such as that concerning airports.

When comparing appeal procedures in Edmonton and Calgary, and the guidelines under which the respective Boards operate, it is clear that the process in Calgary is virtually unrestricted compared to that in Edmonton. Development control appeals in Edmonton are all eligible for a second appeal to Council after the DAB has made a ruling. This serves to take a considerable discretionary exercise out of the hands of that Board. Calgary's DAB is the final level of appeal in the municipality, and can exercise much discretion. Thus it becomes evident that the system in Calgary is much more flexible that that in Edmonton.

Summary

This analysis has made it clear that Calgary has a very flexible system in terms of administrative discretion, while the position of Edmonton is much more rigid. Elements of the Edmonton system vary from extremely rigid, in the case of the Planning Commission, to mildly rigid in the overall consideration of the regulatory instruments. Calgary practices are, in each point of the analysis, much more flexible than those in Edmonton.

FOOTNOTES

1. City of Edmonton Bylaw 2135, Preamble.

2. City of Calgary Bylaw 8600, Preamble.

3. City of Edmonton Bylaw 2135, Section 9(13).

4. From a conversation with Mr. Wes Candler, Director of Zoning, Edmonton; in Edmonton, August 24, 1976.

5. From a conversation with Mr. Al Steele, Senior Zoning Officer, Edmonton; August 24, 1976. See Chapter IV, fn. #7.

6. City of Calgary Land Use Classification Guide and A Schedule of Permitted Uses; Schedule 22.

CHAPTER VI

THE NEW PROVINCIAL PROPOSALS

Purpose

This chapter will attempt to present an analysis of the new provincial proposals with respect to changes in the Planning Act as they relate to the flexibility-rigidity analysis in the previous chapter. These changes represent a significantly different system for Calgary and somewhat different for Edmonton. The proposals will be introduced and identified, and then analyzed on the basis of the elements which were used for the other two systems in the previous chapter.

Background

The Alberta Department of Municipal Affairs, in January, 1974, released a document entitled Towards a New Planning Act for Alberta, outlining the latest provincial government intentions with regard to revisions of the Planning Act. The cities of Calgary and Edmonton each had separate and distinct land use control systems, and smaller municipalities and rural areas had other systems of controls (Regional Planning Commissions being the most widely used form of authority, while the province retained direct control in such areas as Improvement Districts). The terms of this document would create a uniform system of control for urban areas, and coordinate the control activities in rural areas.

The contents of the proposals left no doubt about their intention to centralize land use controls in the province, "A trend toward more planning at the provincial level...can be detected.... This trend is in the right direction and must be encouraged to continue...".[1] The reason given for this position is that land is becoming both more scarce and more important, thus planning must have more than just local interest in mind - it must consider the general provincial interest. For this reason, more provincial input is required, so some changes were considered in order.

Municipal Councils

No mention of municipal councils was made in the analysis given in the previous chapter, except insofar as the Edmonton council was involved in appeal proceedings. The difference between the two councils did not demonstrate any significant disparity when considered on a rigidity-flexibility basis. Since the new proposals would introduce a uniform system in the two cities, no noticeable differences would be created. Yet it is felt that a brief mention should be made at this point in the analysis, to indicate that the new proposals would, to a certain extent, attenuate the authority of the local councils with respect to planning matters by placing much of their current power in the sphere of provincial control.

The Bylaws

Each municipality would have a new zoning bylaw "to control the use and development of land within its boundaries"[2]. These bylaws would be referred to as zoning simply because the term is familiar, not because they are strictly constituted as zoning bylaws. The bylaw and any subsequent amendments would have to be in accordance with a general plan, the preparation and adoption of which would be compulsory for urban areas over 3,000 in population. Any new bylaw proposal or major amendment would have to go through the formal procedures for enactment or amendment of a bylaw, as well as proceeding through established channels for citizen involvement (which will be discussed shortly). Public notification is also required for any change, stating the purpose of the bylaw or amendment, the physical location of any change, and the time and place of the necessary public hearing.

The bylaw will provide administrative procedures for decision-making, development standards incidental to land use, and the establishment of zones, prescribing uses permitted as of right, and uses permitted on discretionary approval of the development officer. It will be permissible to have a zone with no uses as of right, which will allow extensive administrative discretion, as in development control.

With regard to providing notices about development decisions, the technique of mailing notices to affected persons, which Edmonton uses, and posting a notice on the site, which is done in Calgary, are both required. Tenants as well as owners are to be considered interested parties; and extra steps will be taken as needed to ensure notification of interested parties.

Administration

Very extensive alterations have been proposed to the administrative structure of land use controls. Perhaps the most significant and most controversial of the proposed changes is the establishment of Metropolitan Planning Commissions for the Calgary and Edmonton regions. Calgary has objected because it would introduce metropolitan problems into an area where none presently exist,[3] while Edmonton protests the intrusion of another level of government.[4] But perhaps the most striking feature of this new format is that the Metropolitan Planning Commissions have no role in the preparation of the municipal or metropolitan plan - this function is performed by the Alberta Planning Board, a provincial body. The Metropolitan Planning Commission is merely an approving, overseeing authority, comprised of elected council members with no support staff other than a secretary.

To administer the zoning bylaw enacted by council under the conditions imposed by the plan, a development officer would be appointed, as well as or in place of a Municipal Planning Committee (formerly the Municipal Planning Commission). The term "committee" was chosen to emphasize lower standing than "commission", which seems to imply policy formulating power, which is intended to be left to council. The Municipal Planning Committee can have certain statutory decision-making power if council agrees to delegate it.

The procedure for development permits would be virtually unchanged. Most zones will have lists of uses which are permitted, as well as lists of uses which are subject to discretionary approval. Acceptable applications for permitted uses must be approved, while approval of discretionary uses will depend on planning considerations. The development officer can attach extra conditions to a discretionary use, but such conditions shall not be inconsistent with the intent of the bylaw or the general plan.

The use of discretionary Direct Control zones, an embodiment of development control, is limited to the downtown core, to land adjacent to thoroughfares, and to areas of high density development. The DC zone is only to be used in unusual circumstances, and should "not be used to the exclusion of the new 'standard' zoning. That is to say, a city would not

be entitled to place the whole, or even a large part of its area, under this type of zone."[5] Some mention is made of the use of Special Development Units, or "contract zoning", but there appears to be little difference between that and some current DC reclassifications for specific developments in Calgary, or the use of CD-1 (Comprehensive Development) zoning in Edmonton. Contract zoning, which is considered by the province as having been beneficial, can thus be expressly provided for, whereas it is unacceptable by present legislation.

The Instruments

The regulatory instruments in Calgary and Edmonton will remain largely unchanged in structure and content. In our earlier review of these instruments we saw that they were basically the same in each city. The only major change will be the addition of discretionary Direct Control zones in Edmonton. There are presently some zoning classifications in Edmonton which provide certain powers of discretion to the Development Officer. The C-4 zone (Central Retail and Office District) allows flexibility in height and density regulations, but is restrictive in the nature of uses. The CD-1 zone (Comprehensive Development District) allows flexibility in the mix of residential and commercial uses, but again, limits the choice of uses.[6] There is no area of unlimited discretion such as the Direct Control districts currently in use in Calgary.

This situation is somewhat different with regard to the roles and status of the instruments in development control areas in Edmonton, and in Calgary. The basic zoning structure of the new proposals causes no change in role or status of the instruments in zoned areas, but in areas under development control, the instruments will no longer be outside the bylaw, and hence will be binding on administrators. The confusing provisions of Sections 106 and 107 will no longer be applicable, and the option of disregarding the instruments will be removed. This causes only slight changes in the Edmonton system which is based largely on zoning, but significantly increases the rigidity of the instruments in Calgary.

Appeal Procedures

In what appears to be an attempt to give everyone the right of appeal, all land use decisions, including approval of permitted uses, will be subject to appeal. Another major change would see the appeal board without aldermen as members. Council would formulate its policy and express its intention through the bylaw, which would govern decisions of the appeal board. Planning aspects would only be considered where the bylaw was not specific enough in dealing with a particular case. The important factor is that the appeal board would "in all cases be bound by the provisions of the zoning bylaw to the same extent as the development officer".[7] The board

could only reverse the decision of the Development Officer if he erred in applying the bylaw, or if it disagreed with his exercise of discretionary power. This appears more as a review function than an appeal function.

Changes are also planned in appeals beyond this level. A new provincial body, the Municipal Planning Appeal Board, ostensibly free of government control, would be created to handle appeals from municipal appeal agencies and appeals from decisions of the Alberta Planning Board, which is essentially the body that actually formulates plans for the metropolitan and regional planning bodies. The Municipal Planning Appeal Board, in hearing municipal appeals, would also be bound by the local zoning bylaw, and could only reverse a decision on errors or wrongly exercised discretionary authority, thus exercising provincial discretion over municipal matters. This board would not be empowered to interfere with political decisions.

The former channel of appeal to the courts on questions of law or jurisdiction would be removed. This procedure would be replaced by a notice of motion, on which a judge of the Trials Division of the Supreme Court of Alberta would make a ruling. There would be no appeal beyond this level.

Public Participation

Citizen involvement becomes a crucial apsect of land use control procedures under the terms of the new proposals. While public participation has previously existed and been provided for by statute, there was no assurance that information would be made available to the public, or that public input would be received since such an exchange was dependent on citizens coming forward with their views. Under the new proposals, "consultations have been made mandatory conditions precedent to the making of decisions, more time would be provided for citizen reaction to proposed planning action, and provision is made to make available to interested citizens information relative to the matters concerning them, information that, at present, is often withheld."[8] It will be interesting to see what results derive from compulsory public participation, if indeed it can be effectuated. Tactics such as town hall meetings are not practical means of conveying information or adequately understanding public opinions, and the aldermen have not enough time to get the opinions from their ward on all issues. Thus, specific bodies would be set up to function as conveyors and gatherers of information.

In large urban centers, at least three Area Planning Advisory Committees would be established, with sufficient funds

available to hire lawyers, planners, and other consultants. These committees would be comprised of people from the area who are appointed by council for three year terms (possibly leading to complaints and/or problems over political appointments). On a smaller scale, the community organizations, which are already statutorily recognized in the cities, would serve to elicit the opinions of their membership through carefully structured information gathering techniques.

How well these citizen participation techniques will work must ultimately depend on their acceptance by the people for whose benefit they are intended.

Analysis

A general perspective of the new proposals provides us with the impression that the new system would be relatively rigid, as is most zoning legislation. It would be somewhat more rigid than zoning as it currently exists in Edmonton, and much more rigid than the development control techniques which are used in Calgary. A considerable portion of its rigidity is inherent in its centralizing provisions, which intend to increase the power of provincial authorities in the area of municipal planning and land use control. These centralizing provisions are disruptive of municipal authority in a number of areas, particularly planning, administration, and appeal, three crucial areas in any scheme of land use controls.

In the planning area, the local planning commissions and the local councils will have lost power to the provincial planning authorities, the commission through lack of involvement, and the council through removal of authority to accept, amend, or reject proposed plans. The General Plan, the mandatory basis of the entire system, will have been prepared by provincial planners, subject only to local approval, a point which brought specific objection from Calgary:

> "It would result in a Provincial body, not directly responsible to the citizens of Calgary, being responsible for the planning of the area while the city itself would still have the responsibility for implementing a plan with which it may disagree."[9]

The system of administration put forth in the new proposals foretells the existence of metropolitan administration, which would be a total change from the unitary system now extant in Calgary, and for which even the metropolitan region around Edmonton has expressed a lack of desire. The role of the Development Officer as the principal administrator of the bylaw is largely the same, but the removal of the planning function will leave very little for the Planning Commission in Calgary to do. (The Edmonton Commission has very limited functions, as described above in Chapter V, and would not be affected.)

Final decisions on appeals have essentially been removed from the realm of the municipality. Very little freedom for municipal appeal agencies is left outside the terms of the bylaw, except to interpret discretionary decisions

of the Development Officer. Since the provincial appeal body is empowered to reverse or uphold any of these municipal opinions, the final say rests with the province, a direct incursion into municipal matters.

On the basis of the descriptions just given of the three areas of concern, one can safely conclude that from the municipal standpoint, the new provincial proposals could hardly be considered optimal. So let us impose a major qualification on the new proposals and attempt to analyze them as an optimum technique after having omitted or deleted the major centralizing provisions. Briefly stated, such a system would provide municipal control over a technique based on zoning with discretionary areas. The removal of the provincial dominance does not make the new system any less rigid in its effects on landowners. Instead, as described in the first Chapter, it allows for more meaningful analysis and comparison.

This non-centralized system would leave the authority and responsibility for municipal planning and land use control decisions in the hands of the elected Council, who under the other system would have to bear the responsibility without having the authority. Without the centralizing provisions, the Council would have flexibility in deciding upon the content and structure (within the parameters of the Planning Act) of the bylaw, the administration, and the Plan upon which the system would be based. The Plan could remain mandatory, but it would be drafted and executed by municipal authorities who would more likely be aware of vagaries within the planning

area than would provincial planners. From the municipal point of view, this makes the system more flexible than before because the final say on planning does not rest at the provincial level. Yet some rigidity is involved in the provincial requirement of having a Plan.

The proposed administrative structure would be virtually eliminated by removing the centralizing provisions. The Alberta Planning Board could continue to serve an advisory function in an attempt to coordinate land use planning, but would not dominate municipal planning. The Metropolitan Planning Commission, which was not desired by either of the two major cities, and which possessed no real power in any event, only served as an extra level of bureaucracy between administrators and Council, or between administrators and their provincial overseers, depending on what powers one had ascribed to Council. As such it would not be necessary.

The Municipal Planning Committee could be created, but was not to have any power unless Council granted it some. The Council had little enough power of its own under the centralizing provisions, so it would be interesting to conjecture what powers it would delegate to this Committee. Without the centralizing conditions, the Planning Committee could exercise some authority, as the Planning Commission now does, but it would remain subject to the provisions of the bylaw restricting its discretion.

Therefore, having removed much of the provincial authority, the administrative structure would be more rigid than flexible, but not as rigid as originally planned due to the change in emphasis from provincial to municipal authority. It would be considerably more rigid than the discretionary system in Calgary, but less rigid than the system in Edmonton. This lessened rigidity in Edmonton would be due to the content of the new administrative instruments which permit areas of complete discretionary authority.

The regulatory instruments contain zoning designations, lists of uses, and development specifications for the municipalities. As such, the problem of provincial control does not affect their position. The provision of discretionary uses in each zone and the establishment of a zone with no uses as of right injects considerable amounts of discretionary authority. The province can maintain some control over its exercise, without totally interfering in municipal matters, by requiring the appropriate areas to be designated on the Plan, to which adherence is compulsory. Yet the instruments will remain more rigid than flexible for the reason that rigidity will encompass areas of established uses, which are greater, in absolute terms, than "emerging, emergency, or unplanned areas".[10] Their position then, remains the same as in the earlier analysis - rather rigid.

Appeal procedures would be drastically changed upon removal of the centralizing provisions. Removal of a provincial level of appeal would leave the final decision in the hands of

the municipal authorities, a move which would decrease significantly the rigidity of the proposed structure. Requiring the municipal appeal bodies to adhere to the bylaw would retain an aspect of certainty in the procedures which would contribute much rigidity. Permitting one discretionary authority (the DAB) to rule on another (Development Officer) is a provision for flexibility. The change in court procedure does not relate to the discussion insofar as centralizing of power is concerned, but it does serve to make the overall appeal procedure somewhat more flexible, in that access to the courts will be available to more people. This non-centralized system would be located very close to the center of our spectrum, slightly on the rigid side. The dominance of rigidity is due to the compulsory adherence to the bylaw and its instruments.

Summary

This review of the provincial proposals has indicated a desire on the part of the province to lessen the authority and influence of municipal planners and legislators over urban land use. The changes are much more extreme for Calgary than for Edmonton, although the reduction of power would be the same for each. The centralization of power would ostensibly be for the good of all Albertans, present and future, for whom channels of public input would be created, whether desired,

or necessary, or neither. The element of discretion in municipal planning is largely attenuated, hence the position of the cities under the new proposals would be much more rigid than before.

By removing the centralizing provisions, as is proposed for our analysis, the position of the cities remains more rigid than under the existing legislation with respect to provincial control, yet still leaves them with some control over their own planning affairs. Security and stability of land use are improved through the increased use of zoning, the bylaw will be more rigidly adhered to through the reduction of DAB discretion, and flexibility is retained through the use of discretionary zones and the right to formulate their own General Plans.

FOOTNOTES

1. Province of Alberta, TOWARDS A NEW PLANNING ACT FOR ALBERTA; Edmonton - Department of Municipal Affairs, 1974; p.1.

2. Ibid; p. 23.

3. City of Calgary, Submission to the Alberta Land Use Forum by the City of Calgary; February, 1975.

4. From interviews with the Director of Zoning, the Intergovernmental Officer, and an Alderman, all of Edmonton.

5. Province of Alberta, op.cit.; p.25.

6. City of Edmonton Zoning Bylaw No. 2135. Office Consolidation Copy No. 6, December 1973; pp. 183-184. Also the City of Edmonton Land Use Classification Guide, January 1971, Section 6.

7. Ibid; p.59.

8. Ibid; p.14.

9. City of Calgary, Submission to the Alberta Land Use Forum by the City of Calgary; p.14.

10. Bettison, D. G., Kenward, J.K., Taylor, L. Urban Affairs in Alberta; pp. 95-96.

CHAPTER VII

CONCLUSION:

OPTIMUM FOR WHOM?

The Range of Choice

For the purpose of this analysis we have assumed a rigidity-flexibility spectrum. Pure zoning represents the extreme of rigidity, and pure development control represents the extreme of flexibility. Rigidity encompasses both positive and negative aspects. It provides protection and some certainty to homeowners and property owners desiring stability in neighboring land uses. It also eliminates or minimizes the ability of administrators to easily change the types of land uses in an area, and the ability of developers to increase the intensity of uses permitted on their land. Flexibility, by the same token, also has desirable and undesirable aspects, depending on one's point of view. In the extreme situation, there is no protection whatsoever for any type of use, as all use decisions must be approved by planning administrators. Flexibility does provide for ease of change in areas in transition, and can be used to provide social amenities in developments through negotiation with developers. Hence it is extremely favourable to planning administrators and to developers who are in a position to take advantage of the versatility provided. But it is less desirable to developers who fear the negative

or expensive potential of such bargaining discretion in the hands of the administration, and also to homeowners whose neighbourhoods have no legal protection from encroachment of incompatible land uses.

Neither of the extremes of rigidity or flexibility is acceptable as the best form of control. The need for protection of established uses in stable areas, and the provision of a certain amount of stability eliminates the extreme of flexibility. Furthermore, the need for accommodation of diversity, growth, and change in the burgeoning cities of Edmonton and Calgary removes the acceptability of the rigidity extreme. It may then be surmised that an optimal form of control must lie somewhere between the two extremes.

A Number of Optimums from the Process

If one could adopt a completely neutral stance in making such an assessment, an optimal position might be seen to be near the mid-point of the spectrum, where the elements of flexibility and rigidity are almost equal. A position near the center might be considered appropriate in Calgary and Edmonton because each city has substantial areas of rigidity, but each city is also experiencing tremendous

volumes of development activity, which is accommodated by flexibility. This flexibility permits developers to negotiate and adapt a proposed use to a particular location, rather than requiring them to find a location to fit the use. It also provides the planning administrators with enough discretionary authority to require the development to meet standards acceptable to the city. This latter element can be interpreted negatively or in a destructive sense by developers who must comply with imposed restrictions, but it would be a naive developer who attempted to proceed without first being aware of the existence of such circumstances.

Yet none of the participants in the land use control process can be considered neutral, so the determination of an optimum must be based on more than locational criteria on a spectrum. The needs and interests of the various participants must also be weighed to find an appropriate balance. The optimum to a homeowner would be an extremely rigid system designed to provide maximum protection for his home from what he feels are undesirable and incompatible intrusions into his neighbourhood which might tend to devalue his property. As mentioned in the second chapter, most Canadians seek this protection under the "rule of law" principle that a rigid zoning bylaw provides. Planning

administrators would seek a position which provided maximum flexibility, hence allowing extensive discretionary authority to planners over land use decisions. Any attempt at balancing the need of protection with provisions for flexibility must attenuate the power of the administration. The position of developers and speculators is less clear, in that they would desire a technique containing aspects of both rigidity and flexibility, to the extent that it would protect or enhance the values of their property. They would choose that system which provided protection from downzoning and the accompanying decline in property values, as well as providing enough flexibility to allow them to intensify the type of use permitted on their land, hence increasing its value. The optimum to each of the participants is clearly different, each choosing that position which most favourably serves his interests.

A further factor influencing the situation of an optimal position is the perception of the development process by the participants. Homeowners, developers, and speculators must depend on the process and use the existing procedures to accomplish any development objectives. The administration is a part of the process and hence has considerable direct effect on outcomes. This process includes all those elements outlined in earlier chapters of this

analysis - the bylaws, the development officer and planning commission, the regulatory instruments, the appeal procedures - and we will review them again later in this chapter.

The most favourable process for the homeowner would again provide protection and stability. He would look with trepidation upon a system which required him to be constantly on guard against an unwanted intrusion into his neighbourhood. Most desirable to him would be legal protections such as those which exist under zoning. Zoning regulations are subject to change, but are not as readily adaptable as some regulations under development control. Zoning changes must be made by the elected council in a public forum, while changes under development control can circumvent this public procedure through appeal of development refusals directly to the DAB. Council members can be held accountable by the electorate at election time, but there is only marginal accountability for actions taken by the DAB.

If we continue to accept that the position preferred by planning administrators is extreme flexibility, then the process most acceptable to them would be one incorporating minimal elements of protection and certainty. Changes in land uses would be determined through administrative procedures and council would have little if any involvement. This would be best for all, in the planners' view, for their

perceptions would provide optimum results in terms of aesthetic planning and cost efficiency. Political factors would have less effect than under other arrangements since the political elements would have minimal involvement. Planning factors would be the primary concerns.

The type of process most desirable to developers and speculators would be contingent upon a number of factors, such as the strength of the administration, the composition of council, the development climate in the municipality, public attitudes toward development, and so on. If the administration was strong, if council was not well-disposed toward development, and if the other factors were unfavourable for developers, then a rigid process would seem to be most desirable to the developers in order to provide some development rights to accompany ownership of property. If these factors were reversed, then a more flexible process would tend to permit development of land to the highest possible intensity of use. Under the rigidity of zoning, developers have rights of use which can be backed up in the courts, but these same rights also limit the available options in areas which may be slowly undergoing change in terms of desirable uses. In such circumstances changes must proceed through council, where acceptance or rejection is final.

Under the more flexible provisions of development control, a developer can circumvent council by accepting initial refusal and hoping DAB will provide a relaxation, or he can proceed to council with his proposed amendment. If he is successful there he must further receive development approval, and possibly, subsequent approval from DAB. This flexibility may allow him much leeway in terms of density and location of developments, but it may also lead to refusal of a project which could have been guaranteed under the more rigid terms of zoning.

The most advantageous arrangement for developers and speculators will vary amongst the different companies and individuals, depending on the nature and location of their lands and the type of projects with which they are concerned. Residential developers would be more concerned with stability, to protect their land value and the marketability of their product, while commercial developers would desire flexibility to increase height, bulk, and density in return for provision of amenities.

The elements in the process are the same for all participants, with the exception of the administration, which is not only concerned with the nature of the process, but also is a part of and administers much of the process. The controlling element in this anomalous situation is the city

council, which not only can determine the nature of the process, but also can set up the procedures which guide the actions of the administration. The following review of the elements used in the analysis is based solely on a rigidity-flexibility comparison of the Calgary, Edmonton, and proposed provincial techniques, as they have been set out in previous chapters. The relationship of this comparison, and the effects of the actual structure will be discussed later.

The Bylaws

The Calgary development control bylaw places very few restrictions on the exercise of discretion. It requires the Development Officer and Planning Commission to abide by the Rules Respecting the Use of Land, and calls for a public hearing prior to amending the Land Use Classification Guide, but otherwise the administrators exercise much discretion. Thus this bylaw should be located closer to the flexibility extreme than to the center of the spectrum where flexibility and rigidity theoretically exist in equal proportions.

The Edmonton bylaws provide varying amounts of flexibility and rigidity. The zoning bylaw is for the most part rigid, as befits standard zoning legislation, but incorporates flexibility through conditional uses and aesthetic discretion, both of which are exercised under

limitations imposed in the bylaw. This bylaw would be situated nearer to the rigidity extreme than to the center in that the flexibility provisions are not very extensive, encompassing such things as aesthetic discretion and limited control over conditional uses, and furthermore their exercise is circumscribed by the bylaw. Aesthetic discretion is limited to design and appearance and would be difficult to clearly interpret before a court, while conditional uses are set out in the bylaw.

The development control bylaw is more discretion-oriented, but Council has attempted to limit this discretion by requiring adherence to the regulatory instruments. The applicability of this provision (as discussed in Chapter II) is not at issue at this point in the discussion - the important thing is that such a clause exists. Whether the Development Control Officer chooses to abide by such a limitation or not is a separate question. For our purposes the assessment will be based on the fact that the Edmonton Council endeavoured to include such a statement. In view of this provision, the writer would choose to locate this bylaw slightly over the center line of our spectrum, in the flexibility end. There is more flexibility than rigidity in this bylaw, since some of the development control districts provide very low-intensity land use designations which

increase administrative authority, yet the development control bylaw can not be as flexible as that in Calgary due to the presence of various attempts at limiting the exercise of discretion, such as that mentioned above.

Taking the two bylaws together, the Edmonton system could be located in the rigidity end of the spectrum, slightly closer to the center than to the rigidity extreme. The zoning bylaw allows minimal flexibility, and hence is very rigid, while the development control bylaw is a little more flexible than rigid; but bearing in mind the preponderance of zoning over development control, and the restrictions theoretically built into the development control bylaw, the system cannot be considered as being very near to the center, though nearer than the extremely discretionary system used in Calgary. Zoning is the dominant element not only in terms of area of coverage, but also in terms of numbers of development permits and value of development. Development control is used in areas such as the downtown core where large projects are located, but the value of these projects is outweighed by other projects in zoned districts. So the rigidity aspect dominates.[1]

The bylaw which is set out in the new provincial proposals is based primarily on zoning, with some limited discretion in the form of aesthetic discretion and conditional uses, and a severely restricted amount of unlimited

discretion in some areas having no uses as of right. The use of zoning and limitations on discretion make it much more rigid than the existing discretionary technique used in Calgary, while the use of some unlimited discretion makes it more flexible than the zoning and limited discretionary practices used in Edmonton. Since the bylaw is principally zoning, with discretion permitted but curtailed, it must be located near the center of our spectrum, but on the rigidity side, being clearly situated between and nearer to the center than the bylaws currently in force in Calgary and Edmonton.

The Development Officer

The Development Officer in Calgary can exercise an enormous amount of discretion. He is bound by the Rules, but these have a minimal effect on determining the use of land, which is where his discretionary authority is situated. Given the absence of major restrictions, this position must be located just short of the flexibility extreme of our spectrum.

The Edmonton Development Officer exercises discretion only with regard to conditional uses, aesthetics, and determination of similar uses, which are all provided for in the bylaw. His position could be located slightly further away from the rigidity extreme than the same position in

Calgary is from the flexibility extreme.

The Development Control Officer in Edmonton is not in such an easily described position. His office claims to exercise wide discretion, even to the point of disregarding the regulatory instruments, regardless of the provisions of the bylaw. This would mean that he has slightly more discretion than the Development Officer in Calgary, for he also would not be bound by the Schedule of Permitted Land Uses and Regulations (which is the counterpart of Calgary's Rules Respecting the Use of Land). But his discretion is exercised over only a limited area of Edmonton, so is restricted in that regard. Thus this position would be located closer to the flexibility extreme than the Calgary position, but its relative weight in conjunction with the other Edmonton position (the Development Officer) is small,[2] so the combined Edmonton position could be located relatively close to the center, on the rigidity end of the spectrum, a much more centralized position than that of Calgary, which verges on the extremes of flexibility.

The new provincial proposals do little to alter the role of the Development Officer in Calgary or Edmonton but would eliminate the need for a separate Development Control Officer. The extent of discretionary authority of the Development Officer in Calgary would be restricted and clearly defined by requiring adherence to the regulatory

instruments, allowing unlimited discretion only in a few specified areas. The position in Edmonton, taken as a consolidation of the two current positions, would be largely unchanged, except for the legitimate exercise of unlimited discretion in certain areas. Through the curtailment of discretion in Calgary, and the marginal increment in flexibility as compared to the current Edmonton situation, we can locate this factor on the rigidity side of the spectrum slightly closer to the center than the present combined Edmonton position. It is in the rigidity end of the spectrum due to the predominance of specifically zoned areas, as described in the previous section on bylaws.

The Planning Commission

The Calgary Planning Commission is also in a very flexible position in that its functions are largely the same by nature as those of the Development Officer, and it functions under most of the same bylaw provisions and provincial statutes. It has complete control over developments in all Direct Control districts in Calgary. One could locate it in the same position as the Development Officer, very close to the extreme of flexibility.

The Edmonton Planning Commission is a very specialized body, performing a limited number of functions. These

are clearly stated in the zoning bylaw and leave little room for flexibility, except in the CD-1 zone where the Commission works in conjunction with Council, which has the final say. Its other functions, in non-profit housing areas and in proposed amendments to the zoning bylaw, are very restricted. This body could be located closer to the rigidity extreme than the same body in Calgary is to the flexibility extreme.

The roles of the respective Planning Commissions would be virtually unaffected by the new proposals (after removal of the centralizing clauses). The Calgary Planning Commission could compatibly coexist with the Development Officer as at present, although the exercise of discretion would be cut down through adherence to the regulatory instruments. The Calgary Planning Commission currently decides on land use proposals in Direct Control districts, and such a situation could easily be accommodated under the new proposals. Being bound by the bylaw and its accompanying instruments with regard to areas other than those of unlimited discretion would result in a considerable increase in the rigidity of its position.

The Edmonton Planning Commission currently partakes in relatively few development decisions, and there is no reason to presume that its role would be increased. Hence its position will be considered as remaining very rigid.

This means that the position of the new proposals, insofar as they affect Planning Commissioners, would be to considerably reduce the flexibility of the Calgary Planning Commission, and allow the possibility of more flexibility in the Edmonton body. Hence it would be located on the rigidity end of the spectrum, in approximately the same location as the Development Officer.

The Instruments

The regulatory instruments in Calgary vary in terms of flexibility and rigidity. The Rules Respecting the Use of Land exercise a governing influence as provided in Section 10(4) of the bylaw. All the other instruments are generally followed by the planning authorities, but under Section 107 of the Planning Act need not be considered as binding since they are not part of the bylaw. Thus the position of the instruments in Calgary must be considered as very flexible, being somewhat closer to the flexibility extreme than to the center.

The instruments under zoning in Edmonton are all part of the bylaw and hence are all binding. The District Scheudles provide for flexibility through conditional uses, but otherwise the instruments are rigid. These would be located quite near to the rigidity extreme. The instruments

under development control are intended by Council to be binding, but are not so considered by the Development Control Officer, so for our purposes they must be considered flexible, even more so than those in Calgary, since the Regulations are not binding. Hence these instruments must be considered much closer to the flexibility extreme than the same instruments in Calgary. The exercise of these instruments is limited to development control areas, so the combined Edmonton position would be similar to that of its Development Officer, relatively close to the center, on the rigidity end of the spectrum.

The regulatory instruments will all be part of the bylaw under the new proposals, and hence will all be binding on planning administrators. This will cause only slight changes in the Edmonton system which is based on zoning, but considerably enhances the rigidity of the instruments in Calgary. The extra rigidity introduced into development control areas in Edmonton will be counterbalanced by the introduction of zones of unlimited discretion, but the Calgary situation will change drastically. With the exception of the Rules Respecting the Use of Land, the instruments in Calgary had to be considered only as guidelines, but under the new proposals adherence to their terms would be

mandatory. Even conditional use decisions would be subject to guidelines.

In that the Calgary situation would be much less flexible, and the Edmonton situation would be marginally more flexible due to the existence of legislated authority to use zones of unlimited discretion, we can locate the new proposals slightly closer to the center than the Edmonton instruments, on the rigidity end of the spectrum.

Appeals

Appeal procedures in Calgary are based singularly on the Development Appeal Board. This body renders decisions which are considered final and binding. It is not bound by any of the regulatory instruments since they are not part of the bylaw. The exercise of discretion by this body can be extreme, so it must be located very near to the extreme of flexibility.

Edmonton has one Development Appeal Board which hears appeals from both bylaws. Zoning appeals are limited by permitted uses and by the absence of right to permit a variance, which in practice means the Board is virtually limited to following the bylaw or ruling on discretionary decisions. Appeals under development control allow the Board somewhat more flexibility since the instruments are not part of the bylaw, but any DAB decisions under development control

are subject to a further appeal to Council, which tends to minimize or negate any discretion exercised by the Board. This combination of restrictions tends to leave the Edmonton appeal proceedings in a relatively rigid position overall. One might conclude that the involvement of Council opens the door for much discretion of a slightly different nature, but again the extent of this is limited to the development control areas, so the system would still be considered rigid. It also seems unlikely that Council would exercise its discretion in a manner contrary to the provisions of the bylaw and Resolution which it enacted, so perhaps more rigidity could be inferred at this point. Thus the Edmonton system could be located on the rigidity end of the spectrum, slightly closer to the rigidity extreme than to the center, not nearly as extreme a position as the flexible Calgary system.

The structural changes in appeal procedures under the new proposals would make the Edmonton system more flexible, and the Calgary system more rigid. Allowing appeals from any decision on land use opens the way for appeals from approval of a permitted use, which is currently prohibited under Edmonton legislation. This creates a much more flexible situation, even though the instruments remain binding on DAB decisions.

The fact that the instruments are made binding in Calgary, where the DAB was largely unfettered in its decision-

making process, makes that system much less flexible than at present. Unlimited discretion will only remain over areas designated Direct Control - areas subject to discretionary authority of planners.

The proposed introduction of a further municipal appeal agency at the provincial level would have eliminated much of the effectiveness of decisions of the local appeal boards, making their position quite inflexible. But as one of the centralizing provisions being dropped according to earlier discussion, the local boards retain a certain amount of flexibility.

The idea of having appeals on legal questions decided only by a single judge will simplify this procedure and should make it less rigid. Who would benefit from such a change will not be known until or unless it is actually put into practice.

Hence the new appeal procedure proposals can be seen to be more rigid than the extremely flexible procedures used in Calgary, and less rigid than those used in Edmonton. Because discretionary areas will be generally fewer than zoned areas subject to restricted uses, it is felt that the new procedures could be located in the rigidity end of the spectrum, much closer to the center than to the rigidity extreme.

The Optimum as a Balancing of Interests

From the foregoing analysis it can be seen that in simple comparative terms, the system put forth in the new provincial proposals (without the centralizing provisions) is found closer to the center of our rigidity-flexibility spectrum than either of the systems in Calgary or Edmonton. The proposals are in this position because they strike a more viable balance of competing interests than either of the two extant systems. It remains however to demonstrate why this is so.

In terms of our earlier discussion of optimums, the new proposals will definitely disfavour the administration in Calgary be severely reducing the scope of its discretionary authority, and marginally increase that authority in the overall rigid Edmonton system. Such limitations on the exercise of administrative discretion in the development phase of the process can be considered a legitimate restriction. The administration, as not only a participant in but also a part of the process, has advantages over the other participants in the preparation of land use regulations. This advantage is countered by limiting the amount of flexibility available to the administration when the legislation is put into practice. If the instruments have been prepared in such a way as to create a reasonable

balance between interests of the various participants, then the administration may not exercise as much discretion as may be optimal to itself, but it will be able to exercise it in areas where flexibility is required - transitional areas, expanding or newly developing areas, and transportation corridors where close surveillance must be kept over locations and types of uses.

Assuming that municipal councils will retain the authority to enact land use legislation, then the conditions found in the new proposals should provide adequate protection for those desiring certainty and permanency for their neighbourhood. Again, if the planning has been adequately prepared, the ensuing legislation, with its balance between rigidity and flexibility, will ensure that stable, established use areas are protected under the rigid provisions of the bylaw. If the residents of any such area are fearful of insufficient protection, they have the right to individually or collectively voice their objections to their elected representative, or to the council as a whole in the public hearings which would be required for passage of the bylaw. The final decision must be made by the elected council, whose accountability is ultimately to the electorate, but whose interests and loyalties may be torn between voters and campaign backers. The role of politics is most apparent

at this stage, when strengths of competing interests will be demonstrated in the voting of each member of council.

The interests of developers and speculators are rather more obscure than the relatively clear-cut preferences of homeowners and administrators. As we mentioned previously, development interests can often be seen to be conflicting. Due to the diversity of development interests and varying interests and intentions of speculators, it would be exceedingly difficult to meet all the demands of the various participants in this category when preparing a plan. But these participants should be presumed to possess adequate expertise to be able to judge with some degree of accuracy what areas would be under rigid controls, what areas under flexible controls, and what areas would be borderline cases when the final steps in the planning and regulations process were completed.

Assuming that the preparation of plans would be undertaken with the intention of striking some point of balance between the interests of the participants, then interests of developers could be largely accommodated within the terms of the new proposals. Permitted uses are provided in rigidly zoned areas, as are slightly more flexible conditional uses, though each is subject to possible appeal. But grounds for appeals and appeal outcomes

are much more predictable in that appeal agencies are required to follow certain guidelines. The exception to this is in cases of discretionary decisions which, by virtue of the presence of an element of flexibility, can not be considered as certain in any event. In areas under flexible controls, negotiability and contract zoning are available, which can be used to enhance the value of property.

If this group of participants, the developers and speculators, feels abused in the preparation of the land use regulations, they also can approach council members individually or through public hearing, and they have the additional element of campaign financing to back their demands. This financial pressure is the weapon used by this type of interest group to influence decisions of council, and it provides a means of achieving some degree of balance against the sheer weight of numbers of votes used as pressure by organized segments of the electorate.

Summary

The Calgary system includes extremes of flexibility, allowing extensive administrative discretion and no uses as of right. Edmonton uses two separate bylaws, so citizens in different areas of the city are receiving different treatment according to whether their land is governed by zoning

or development control. This means that property owners are under either very rigid, inflexible zoning provisions, or under development control, which in practice appears to provide no protection or guarantees. The new provincial proposals, with a balance of flexibility and rigidity contained in a zoning bylaw which includes areas of unlimited discretion with no uses as of right, can easily accommodate the major interests of each of the participants. If the rigidity provisions are used to protect the neighbourhoods and other areas of established uses, then homeowners and a segment of the development interest will be provided with certain assurances which are not found under development control. If the flexibility provisions are situated to allow negotiability and diversity in areas of transition or new growth, and in special areas such as transportation corridors, then another segment of the development interest can be taken care of, as well as providing the administration with a legitimate arena for the exercise of discretionary authority. The overall exercise of discretion is severely curtailed under such a system, but there is little justification for unlimited flexibility in areas of established use which will be better served by stability and protection. In these terms it can be seen that the new provincial proposals, less the centralizing provisions, provide a

more evenly balanced system of land use controls than currently used in either Calgary or Edmonton.

FOOTNOTES

1. From a conversation with Andy Smith, Planning Assistant of the Zoning Department of the City of Edmonton; August 17, 1977. He felt that the restricted use of development control allowed for some very large, expensive projects, but their values and their numbers were surpassed in zoned areas. Evaluation of the effects of major developments in areas under development control as opposed to lesser developments under zoning is a rather specialized consideration which can not be adequately dealt with in this context.

2. It is considered necessary for purposes of evaluation to make an assessment of the Edmonton position on the basis of a combined weighting of the dual aspects which exist in practice in Edmonton. Since Edmonton employs two separate bylaws, two systems exist, but out of that one should be able to determine some sort of an average position for each of the elements in the analysis. As was mentioned in Footnote 1 of this Chapter, zoning is the dominant factor for purposes of analysis. Not only is development control limited in the area of coverage and restricted in a number of ways as set out on pp. 39-41 in Chapter Two, but it is also not preferred by developers over regular zoning. Footnote 4, Chapter V, makes reference to the preferred use of standard zoning over the CD-1 classification, but the same source also made reference to the downtown zone C-4, or Central Retail and Office District, which is a restrictive district controlled under development control which uses a system of bonuses to increase density of development. The difference is that in the downtown area developers do not have the same zoning options available that may be found to exist in potential CD-1 sites. For these further reasons development control is not weighted very heavily in determining the combined Edmonton position.

POSTSCRIPT

Most of the research and writing of this paper occurred prior to the tabling of Bill 15 in the 1977 Spring Session of the Alberta Legislature. Bill 15 is the formal document presented to the Legislature as the new Planning Act. Though still containing many contentious points concerning municipal-provincial authority over municipal matters, most of the centralizing provisions contained in the 1974 draft document, which were omitted for this analysis, have been omitted from Bill 15 as tabled in the Legislature.

Bill 15 is not expected to come before the House for final approval until the 1977 Fall Session, to permit interested parties time to prepare position papers concerning the Bill.

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6. INTERVIEWS

Mr. Marv Allen, City Solicitor's Office, City of Calgary.

Mr. Bill Brown, Sr. Planner - Downtown & Special Projects, City of Edmonton.

Mr. Wes Candler, Director of Zoning, City of Edmonton.

Mr. Dave Collins, Development Officer, City of Calgary.

Mr. Tom Forgrave, Intergovernmental Officer, City of Edmonton.

Professor F.A. Laux, Acting Dean of Law, University of Alberta.

Mr. David May, Planning Department, City of Calgary.

Mr. Ken Newman, Alderman, Past Chairman of D.A.B., Edmonton.

Mr. Paul Rondeau, Deputy City Solicitor, City of Calgary.

Mr. Andy Smith, Planning Assistant, Zoning Department, City of Edmonton.

Mr. Al Steele, Sr. Zoning Officer, City of Edmonton.