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THE LAND USE CONTRACT:
ITS VALIDITY AS A MEANS OF USE AND DEVELOPMENT CONTROL

by

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ABSTRACT

Since the introduction in early 1971 of the Land Use Contract - S. 702A of the B.C. Municipal Act - few, if any, studies have been devoted to its practical applications. This paper therefore attempts both a survey and analysis of the use and implications of S. 702A.

Questionnaires were used to collect data from all Regional Districts and some fifteen larger municipalities. Although results indicated a wide and varied usage, there was little evidence of a strongly demonstrated need for a new form of land control. Both the planners and administrators to whom the questionnaires were directed, and by their evidence the general public, misunderstood and are confused by the new provisions. However, fewer problems than anticipated were apparantly encountered in the use of S. 702A, and initial reluctance to utilize the legislation is dissipating.

By reference to American zoning and British development control methods, it was determined that the Land Use Contract is a form of development control, similar to Ontario practices and not unlike the British example. It can be used to considerable advantage in the planning process, particularly where flexibility and innovation are desired, so long as it is used, as with all development control, in accordance with a comprehensive plan.

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CHAPTER I

THE LAND USE CONTRACT: ITS VALIDITY AS A MEANS OF USE AND DEVELOPMENT CONTROL.

INTRODUCTION

In April of 1971 a new means of securing land use and development control was made available to municipal councils and regional district boards in British Columbia. The land use contract was a comparatively innovative attempt to provide a new and flexible alternative to zoning, and like all new techniques is challenging traditional concepts of land tenure, use and control.

It became apparent however that many planners, administrators and municipal solicitors were at first somewhat loathe to utilize S.702, and that a survey and analysis of general use would be of benefit and assistance to their professions. Consequently, analysis of the land use contract proceeded from an administrative point of view and tended to concentrate on the practice and use of S. 702A rather than the terms of the legislation. Questionnaires were forwarded to some fifty planners and administrators in regional districts and municipalities throughout the province.

Because there was relatively little indication or understanding of the origin and rationale of the land use contract legislation, it was determined that a better awareness of its intent and use could

be obtained through a study of existing zoning methods and their relative degree of success or failure in land development and use control. Canadian and American practices were analyzed, with particular attention to the increasing use of contract or conditional zoning in the United States.

It was apparent that S.702A bore many similarities to British Development Control legislation, and the practice there together with other Canadian examples of development control, was studied in its own right and in comparison with zoning. The land use contract was analyzed as a similar form of development control, and a number of conclusions were drawn, and some problems were aired, and attempts were made to determine the genre and scope of the new legislation.

While S. 702A has obvious relevance for the planners and administrators in their province, it also has a wider public impact as a means of controlling land, and for its effect on theories of land tenure. As E.T. Rashleigh, former director of the Community Plannering Association of Canada, B.C. Branch, has observed:

> "Private land ownership is so sacrosanct in public opinion and law, that it can question the propriety of planning proposals and defeat legitimate community objectives."
>
> Rashleigh, 1968, 203.

Legislation purporting to exercise constraint over the use of private land thus has particular relevance to the general public. Allen Leal, Dean of Osgoode Hall's Law School, has characterized this situation:

> "In no other area of the law do public interest groups and private rights come to grips so strikingly as they do in the area of zoning legislation."
>
> Leal, 1960.

Land use contract legislation, by its nature, appears to have an especially significant effect on these rights and the importance of understanding those effects cannot be understated.

Nonetheless, as radical or innovative as S.702A might seem, it should not be considered in a vacuum. There is evidence, for instance, of a clearly evolving trend in the United States towards use of control methods akin to the British legislation. Heyman sees an increasing American preference for individualized regulation of proposed developments, the shifting of public costs to the developer who creates them, and the public stimulation of developments which reflects better amenities and a relationship between different uses. (Heyman, 1970, 25)

Similar achievements appear to be attainable through use of the land use contract, making the B.C. legislation a front-runner amongst innovative and flexible development and land use control techniques.

CHAPTER II

REVIEW OF LAND USE AND DEVELOPMENT CONTROL

THE BEGINNINGS OF LAND USE CONTROL

The control and use of land had for centuries been considered as a purely private concern of the land-owner, and few national governments dared to consider otherwise. Before conditions changed to finally permit the introduction of zoning and development controls-statutory instruments deriving their authority from national or state and provincial legislation, use conflicts were determined by rights of private action.

The law of nuisance, for instance, with its common-law roots in Britain, saw early application in North American situations and, without the necessity of legislative authority, permitted a suit in negligence for damage occasioned by such things as noxious fumes and dust emanating from neighbouring properties. In determining the rights of the parties in the suit, the courts would regard the reasonableness of the offensive undertaking as well as the nature of extent of the harm and the social value of the type of use involved (Pooley, 1961, 40), and frequently felt disposed to grant injunctions restraining the use complained of.(Milner, 1963, 5-9)

The first introduction of any form of state or national intervention came with legislation conferring authority on cities to declare certain types of land uses as "public nuisances", even though they might not be so per se (Pooley, 1961, 40) and in Britain, other public health ordinances. Ontario, for example, had by 1877 determined that "slaughter houses, gas works, tanneries, distilleries...cattle and swine" might constitute nuisances (RSO, 1877, C. 174, S. 466), and similar legislation permitting

local municipalities to pass by-laws prohibiting such "Nuisances" still exists in most states and provinces.(see B.C. Municipal Act, S.870)

While however common-law rights to injunctions and damages from nuisance only succeeded after the fact, private deed restrictions were instituted as group attempts to introduce land use control by private arrangements. Instances were restrictive covenants were used to assure common objects and insure insularity from undesirable uses and social groups are legion (see generally, Milner, 1963, 348-460), but represent another means of securing a form of use control without the necessity of direct legislative authority.

These early rubrics of nuisance and restrictive covenant were, however, as Milner explains, basically unsatisfactory as effective land use controls.(Milner, 1962, 46) Because they relied essentially on private and unilateral initiative they were neither uniform in application nor consistently exercised. Zoning and development controls, on the other hand, transferred this initiative to the local councils and, while early ordinances were often apparently regarded as little more than state substitutes for building schemes, they assumedly did secure a form of universal and consistent application.

While therefore both the law of nuisance and private deed restrictions remain possible and are still being utilized as means of securing use control, their general application in North America and Britain has been more or less replaced by the prevailing modes of zoning and development control.

AMERICAN ZONING

1. Origins and Development

Although many American planners and zoning officials have maintained their own country as the natural birthplace of zoning, it appears that the germ of modern zoning received first nurture not in the U.S., but in Germany. There, during the 1870's, one Herr Baumeister allegedly became the first active advocate of zoning, and the cities of Altona in 1884 and Frankfort-On-the-Main in 1891 became the first European centres to actually implement any form of "zoning" controls.(Lewis, 1949, 256) These early land use ordinances were not unlike present North American zoning enactments and were concerned with the separation or isolation of factory districts from residential use areas, lot coverage, street use and the heights, location and use of buildings. Other cities in Europe, most notably in Germany and the British Isles, were also utilizing restrictions on the height of buildings, but none attempted the use separation and control on the scale of Altona and Frankfort.(Lewis, 1949, 256)

American cities did not rush to implement this new German creation designed to control use, and the first steps into the field were cautious and hesitant. A number of cities had already employed some form of control over building height, and Boston had received judicial approval for its basic two-zone system when, in 1909, the city of Los Angeles became the first to attempt the more extensive of control which heralded modern zoning. (Pooley, 1961, 44) Devised primarily to provide some protection to residential areas from the encroachment and effects of less desirable uses, this new means of use segregation, called "districting" by its proponents, saw adoption in the period 1910-1915 by the States of Massachusetts, New

York, Minnesota and Wisconsin and a number of North American cities including Seattle, Milwaukee and Toronto.(Lewis, 1949, 259)

By 1912 some degree of public control and supervision of land use seems to have been an accepted fact in a number of American cities, and it was not therefore unusual for the City of New York, even by this time the personification of urban problems, to initiate a search for a new and more effective means of controlling and directing urban growth and development. Activated by current and much-evident problems of over-crowding, incompatibilities of use and attendant nuisance issues, and apparently spurred on by the demands of a "bullish market for office development" (Mandelker, 1970, 15) New York's Board of Estimate and Appointment was commissioned in 1913 to find a solution.

Under the Chairmanship of E.M. Basset, a prominent New York attorney, a committee was struck with the task of investigating and devising new means of grappling with these emergent urban problems, and was directed specifically to examine and compare the practice and experience U.S. cities with those abroad.(Lewis, 1949, 259) It held a number of public hearings and statistical forays, and in 1913 delivered its report. Although the committee had at first considered a form of expropriation as the solution, this proposal was abandoned as being too costly (Makielski, 1967, 12) and the report instead gave strong and uniquivocable support to the need and reasonableness of establishing districts for the purpose of regulating not only use, but also height, coverage, and the provision of open space. The rationale was "greater safety and security to investment secured by definite restrictions."(Lewis, 1949, 260)

As a direct and propitious result of the report's primary recommendations, the New York State Legislature, through delegation of the state police power, authorized New York City to establish districts and to impose height, area and use limits for each district so constructed. Another Committee was struck, again with Bassett as Chairman and including most of the original members representing both private and public sectors, and was instructed to recommend the boundaries and regulations. After intense preparation and much public pulse-taking, albeit assisted by the enthusiastic real-estate interests who preceived certain benefits to their own profession (Lewis, 1949, 261), the Committee submitted its tentative report, and with its final approval in July of 1916, zoning arrived in North America.

The decade or so that followed the introduction of New York's legislation has been characterized as "The Golden Age of Zoning" (Makielski, 1967, 8) and while its accomplishments may not necessarily have been on an "Elizabethan" scale, zoning did receive considerable professional attention and undoubted public acceptance. Although it is claimed that the subtleties of zoning were, never correctly understood by the general public, (Makielski, 1967, 6) its popularity zoomed during the 1920's.

Recognizing this early popularity, acceptance, and general effectiveness of zoning, the U.S. Federal Government chose to invest substantially in this new means of land use control. The Secretary of Commerce Herbert Hoover, as he then was, created an Advisory Committee on Zoning in an attempt, it is claimed, to encourage municipal adoption of zoning plans. It was expected that the results would encourage and

attract the real estate development of secure and protected residential districts, thereby relieving the current housing shortage.(Lewis, 1949, 262)

This committee lost no time in grasping the initiative and by 1922 had prepared their Standard Zoning Enabling Act, designed as a model for easy application by all American municipalities. The act, finally published in 1926, has in fact proven to be remarkably durable, and still remains the basis of the majority of present municipal zoning statutes. (Cunningham, 1969, 369) By 1930, four years after its publication, some twenty-nine American states had adopted the Act (Plager, 1968, 34) and by 1946 over 1,500 zoning ordinances authorized in all forty-eight states were in full effect.(Lewis, 1949, 262) In 1971 the American Law Institute in their draft of the Proposed Model Land Development Code, the first major effort to modernize the premise of the original act, noted "The Standard State Zoning Enabling Act of 1922...reflects with remarkable accuracy the existing law in almost all of the fifty states".(ALI, 1971, xi)

There was very little alteration in the structure or practice of American zoning during the 1930's. Nonetheless, while the depression and inter-war building slump contributed importantly to this relative inertia, it has been noted that even where the circumstances dictated major urban renewal programs and legislation, no real attempts were ever made to devise alternate or complementary planning devices to meet this demand, and zoning held the field completely and inalterably.(Makielski, 1967, 8) Not only had zoning achieved general popular acceptance by this time, but it had also obtained, for a variety of reasons, appreciable political espousal.

With therefore both politicians and the public alike lauding the glories of zoning, change became unlikely. Zoning flourished everywhere though, as one author caustically comments, "with always enough hold-outs to preserve the tantalizing image that total revolution still had not been achieved."(Makielski, 1967, 8)

Nonetheless and despite this evidence of enduring popularity, zoning in the 1940's began to atrophy and show signs of the lingering malaise which continues today to be variously and divergently diagnosed. While the politicians, sustained in their belief by apparent evidence of public support, (Bryden, 1967, 287) entertained and initiated precious few ideas for either the improvement or up-grading of zoning, or its replacement by more effective means of land use control, (Makielski, 1967,) the planners and zoners began to recognize the symptoms of weakness and inefficiency in the system. Some saw clear indications that "zoning is degenerating" (Blucher, 1955, 96) and is "seriously ill" (Reps, 1964, 1), and a number of attempts were made either to invest new life into the zoning tool or attempt to circumvent its use completely. Special Use Districts, a type of specialized but strict controls for theatre districts, arts centers and various historic attractions, although mainly limited in application to New York City,(Smith, 1969, 44) were attempts to acquire greater zoning control. Generally however most such proposals remained uninstituted, stymied by the particular attitudes and function of zoning.

2. An Analysis of Function

While the present function of zoning may vary somewhat from Bassett's original delineations, which were primarily aimed at nuisance

abatement, the basic form and definition has remained generally intact. In its barest descriptive form zoning derives its structure from a local orinance or by-law passed under the authority of the state (or province) and primarily designed to accomplish both a classification of use groups, and a description of standards for uses within each classification. The regulation in this form is generally permissive and establishes regulations in advance of the intended use, hence "permitting" the uses or uses elaborated for the particular zone classification. It is thus a form of 'pre-regulation', or sometimes, 'pre-zoning', though the latter phrase is now more commonly used to describe the creation of 'agricultural' or other "lower-use" holding zones.

In the United States, the municipal power or authority to zone is derived only through specific state enabling legislation, authorization by the state constitution, or in a few instances such as the case of Philadelphia, via state legislation granting 'home rule' and independence from state zoning legislation to specific and enumerated municipalities.(Stein, 1971, 536) This authority is moreover both limited by and dependent upon the "police power" of the U.S. Constitution, that litigeous and much misunderstood phrase imparting "a meaning and origin to say the least, vague and indefinite."(Milner, 1956, 130) Having no exact equivalent in Anglo-Canadian law (Milner, 1956, 130) the police power represents a form of residual state power effective in the absence of enumerated federal powers and requiring only that regulations conform to the definition of this power as currently judicially defined. Leslie Stein, a student of the municipal power to zone encastulates the American law thusly: "The general proposition exists that a zoning ordinance to be valid must be reasonable

in application, and have a substantial relation to the public health, safety, morals, comfort and general welfare of the people."(Stein, 1971, 537)

While the initial purpose of the New York legislation was to provide solutions for problems of nuisance and the incompatibilities of uses, and to alleviate the intolerably crowded conditions of many residential areas, those responsible for the new legislation were also careful to characterize its potential ability to institute some form of stability and predictability in the urban form.(Lewis, 1949, 262) Undoubtedly this ability to stabilize community areas and achieve..."greater safety and security to investment secured by definite restrictions" (Committee Report in Lewis, 1949, 260) was largely responsible for early public acceptance of zoning. In this regard the object of zoning remains unaltered today, for in 1960 the Urban Land Institute was to proclaim:

> "The Council is strongly in favour of planning and zoning as beneficial instruments in protecting residential neighborhoods against adverse use and in stabilizing community development and land values" (ULI, 1960, 61)

Most critics of zoning are fully prepared to acknowledge this achievement of zoning, and recognize the obvious existence of both a public and official desire for some degree of uniformity in standards and a certain minimum of use regulations (Delafons, 1969,), and for the predictability and stare decisis nature of zoning administration. They will admit that zoning, at the least, has been able to establish itself with a certain amount of legality and respectability and has found general and major acceptance by the general public.(Makielski, 1967, 3) In the respect then that zoning has been characterized as the "preserver and encourager of things

the community finds desirable, "it has continued the original aspirations of its creators and is," as Milner notes, "history sustained".(Milner Lecture, April 5, 1968)

Nonetheless and despite these well-tuned phrases, there is some suspicion that the public popularity of zoning is largely due to a particular and specified reliance on the preservation aspect and categorization of zoning. Because the principle of distinguishing use classifications and the creations of physical zones to contain them has tended to place major importance on the inter-face and inter-relations between the categories, the initial purpose however of protecting residential areas from "less desirable" industrial or commercial use or, somewhat more elegantly, "to prevent the undesirably results of the proximate location of various disharmonious land activities" (Davidoffs, 1971, 515), was easily extended to exclude non-desirable residential uses as well. Thus, by zoning a neighbourhood in such a manner so as to preserve its "essential character", certain segments of society could assumedly be enjoined from establishing in that locale.

Unfavourably described as exclusionary zoning (Brooks, 1970 and Gibson, 1971) this practice flourished from the formative stages of zoning and, sustained with the blessings of the politicians and real-estate interests, probably served as a plausible explanation for the public acceptance of zoning. Nonetheless, the use of zoning to conserve, stabilize and enhance property values came under attack as early as 1926 by Charles Stein, creator of the Greenbelt Concept, (Weaver, 1965, 726) and the "social propensity to form tight little islands of residential exclusivity" (Sager, 1969, 791) has received renewed severe and telling criticism within the last

ten years. Yet, the public recognition of the ability of zoning to preserve neighbourhood and property value appears to have received widespread support as a valid function of the zoning process.

An equally effective but perhaps less obvious explanation for the tenacity of zoning is its particular popularity and association with the political elements. One of the most notable distinctions between British land use control methods and the American experience is the latter's inherent and entrenched distrust of administrative descretion. One theory explains that early civic administrations were somewhat less than circumspect and tended to either use zoning as a tool to further their own ambitions or those of the politican (Reps, 1964, 4) or permitted the business community to use it for the creation of their own personal geographic oligopolies.(Makielski, 1967, 7) Assisted by the conviction that "American local administration simply could not handle such responsibility" (Williams, 1971, 108), zoning gradually left the preserve of the administration and became a more public, and hence political, method of control.

Good arguments have been advanced for the politicising of zoning. Makielski noted that because zoning is so critical to the economic livelihood and social aspirations of so many people, it is in a sense a logical outgrowth of and dependent upon the legal theory and institutional structure of local government (Makielski, 1967, 20), and Heeter maintains that despite the "pessimistic view" which planners and zoners have of the political process, it is clear that the formulation and implementation of plans for a community's development is a basic political decision and can only be successfully carried out "if brought directly into the political

process".(Heeter, 1969, 68)

There is concern however that the evolution of zoning to a more political function has meant that the planners have become, as one commentator described, "weak voices shunted to the peripheries of policy making".(Makielski, 1967, 8) Certainly the planning profession is no longer able to claim zoning as its own preserve and assumedly the function and relationship of planning and zoning has changed considerably from this analysis of the situation during the 1930's:

> "...for the almost still-born planning profession it was a lease on life. At last planners had a legal tool with which they could bludgeon their sworn enemies, the real-estate profession. No longer restricted to planning boulevards and public works projects, the planner was equipped for the enormous expansion of the police power into the realm of physical and social planning by focusing on the total environment created by both public and private development". (Makielski, 1967, 7)

However this role may have changed, the relationship of zoning and planning remains a vital function of the zoning process and will continue to have a determining effect on the evolution of land use and development control.

BRITISH DEVELOPMENT CONTROL

1. Legislative History

Development and land use in the United Kingdom is controlled by a body of planning and ancilliary legislation collectively known as Development Control. The product of a long and sometimes tortious evolution, development control essentially requires that all use change and development of land in England, Wales and Scotland proceed only by way of permission from local government sources. There is no inherent right to

develop land in whatever fashion the owner might wish, and each application for permission to develop land or change its use is regarded on its own individual merits.

Prior to the inception of any form of town planning or development controls in Britain, the traditional concepts of the common law permitted an owner to develop his own land in any way he desired, so long as he did not infringe upon the rights of others. Free and untrammelled enterprise was felt "necessary for national prosperity" and any extension of government activity beyond what was considered its proper sphere would have been looked upon as "an encroachment on personal liberty and likely to handicap initiative."(U.K., 1968, 1) The direct consequence however of this absence of any policy for the orderly and controlled development of land was congestion in the towns and eventually, suburban sprawl.

A need for some form of control was presumably perceived and in 1909 the Housing, Town Planning Act (9 Edw. 7, C. 44) was introduced in an attempt to somehow curtail this total freedom of use. Under the terms of this legislation, and as subsequently modified and extended by successive acts,[1] local authorities, being the councils of counties, county boroughs, non-county boroughs, urban districts and rural districts (as opposed to local planning authorities which included the first two only)(Heap, 1964, 87), were empowered to prepare town planning schemes affecting land either in the course of development or appearing likely to be used for building purposes.(Heap, 1969, 5) Armed with some power for general enforcement (Megarry & Wade, 1959, 1018), the local authorities were to indicate

[1] 1932 Town and Country Planning Act, 22 & 23 Geo. 5, c. 48 and 1944 Town and Country Planning Act, 7 & 8 Geo. 6, c. 47.

what development would be permitted in each part of the land affected, with the express objects to secure:

> a) proper sanitary conditions, and
> b) amenity and convenience in connection with the layout and use of the land and of any neighbouring lands. (Heap, 1969, 5)

Legislation in 1932 extended their control to include the planning of built-up areas and land not necessarily likely to be developed.(Heap, 1969, 7)

The housing boom of the 1930's applied considerable pressure to the effectiveness of the legislation and served to emphasize its two basic flaws: the act was optional, and only a handfull of schemes were made operative by the local authorities (Barr, 1964, 163) and an extremely long period usually elapsed between the decision of the local authority to prepare a scheme and its final approval (Megarry & Wade, 1959, 1019). This period between consideration of the scheme and its final adoption was supposedly subject to a form of "interim development control", and a developer who wished to build could obtain permission from the local authorities which would hold him inviolable even though his project might not be in agreement with the scheme as finally published. Nonetheless, because of the significant time lag prior to the scheme's final approval and the fact that there were no enforcement provisions available within this interim period, many developers apparently proceeded without interim permission, gambling that when the scheme was finally approved they would have long gone with their profits.(Megarry & Wade, 1959, 1019) While the project could be subject to razing if it did not accord with the final

scheme and had not been granted interim development permission, there were apparently very few instances where enforcement followed.(Barr, 1964, 163) Generally, the 1909 Act and successive amendments to 1932 was considered "timid and relatively ineffective".(Megarry, 1964, 218)

In attempts therefore to close this loop-hole and otherwise extend the legislation, Parliament approved the 1943 Town & Country Planning (Interim Development) Act, which authorized action against all development which proceeded at any time without this interim development permission. Also, since by this time only approximately 74% of the country had as yet either authorized schemes (70%) or instituted interim development control (4%) (Megarry & Wade, 1959, 1019), compulsory interim development control was imposed on the balance. Local authorities were now empowered to either penalize unauthorized uses or demolish unauthorized buildings (S.5), thus achieving a system of total control and available enforcement provisions against any development proceeding without permission.

Despite this apparent extension of the power to control use and development, there appeared to be a basic and prevalent dissatisfaction with the theory of land use control in effect. Many felt that the compulsory powers were not only inadequate but fraught with compensation liabilities (U.K., 1968a, 2), and alternatives were carefully considered. A number of reports therefore emanated from special commissions meeting during the war years, notably the Scott Report of 1942 (The Committee on Land Utilization in Rural Areas) and the 1940 Barlow Report (The Royal Commission on the Distribution of the Industrial Population), and these attempted to grapple with the basic principles of major land tenure

and sustained planning problems. The most consequential suggestions however, dependent on a "radical and fundamental modification of property rights" (Delafons, 1969, Introduction), came from the Final Report by the Expert Committee on Compensation and Betterment, 1942, better known by the name of its Chairman, Mr. Justice Uthwatt.

The 1947 Town and Country Planning Act (10 & 11 Geo. 6, c. 51) and similar legislation promulgated simultaneously for Scotland has been referred to as "radical and comprehensive" (U.K. 1968a, 2) It directly incorporated the philosophy of the Uthwatt Report, viz: Ownership of land involves duties to the community as well as the rights of the individual owner, and any increment in the value of land resulting from an alternate use, referred to as the "development value", should accrue directly to the public with compensation to the owner. By nationalizing the development values of all land, the act effectively permitted the owner only his existing use and the value derived thereby, and prevented the profit from any significant increase in land value by circumstances not caused directly by that owner. Before carrying out any development for which planning permission was required, the developer would now be required to remit to the government's agency, the Central Land Board, a "development charge" equal to the increase in the value of the land caused by the planning permission in question.(Megarry & Wade, 1959, 1024)

Not surprisingly, the imposition of development charges was extremely unpopular with the English developer who balked at the high charges imposed on land normally subject to wide fluctuation in assessed value (Megarry & Wade, 1959, 1027). The government itself apparently

came to regret the inflationary tendencies encouraged by the legislation and the fact that the public viewed the charge as a simple form of indirect taxation.(U.K., 1968a, 10) Thus in 1953, ostensibly in the fear that further retention of the development charges might act as a brake on development once the severe building restrictions of World War II were lifted (U.K., 1968a, 10) the development charge legislation was repealed.[1]

Notwithstanding the demise of the development charge, the more basic planning concepts of the 1947 legislation, more or less compendium of preceeding acts, remained intact through successive legislative changes. The prime tenet remained that, with but a few exceptions, no development could proceed without obtaining the requisite permission from authorized local government sources. The 1947 act replaced the "development scheme" of earlier legislation and whereas the "scheme" had formerly been optional, each local authority was now required to institute a "plan" by no later than the first of July, 1951.(S.5)

The Development Plan, with control over the "carrying out of building... or the making of any material change in the use of any building or...land" (S.12(2)) did not appear to be regarded as a hard and fast guideline on planning permissions but was rather to "form a prophesy of the permissions likely to be granted and those likely to be refused".(Megarry & Wade, 1959, 1022) Instead of directing the decision of local planning authorities, it was to guide their deliberations on planning permissions, and so remained "prophetic" and "somewhat imprecise".(Laux, 1972, 4) Comprehensiveness at the national level was to be achieved by providing the

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[1] Town and Country Planning Act, 1 & 2 Eliz. 2, c. 16.

Minister of Housing with the right to veto or disallow any application where incompatibility with surrounding uses was perceived, a recognition, it is claimed, of some early form of regional planning.(Laux, 1972, 6)

Attempts were made in the new legislation to provide for a more adequate enforcement procedure: unauthorized development could now be served notice to take certain steps, the failure of which would activate legal action consisting either of liability to fine or prosecution, or the remedies of injunction or specific performance.(S. 23 (1-4)) Nonetheless, the time-consuming nature of these legal processes together with an existing legal right of appeal from the notices apparently militated against effective use of the proceedings, and critics noted that "the law governing enforcement notices is so technical and cumbersome as to be relatively ineffective".(Megarry & Wade, 1959, 1023)

Concern with the rather cumbersome procedures of the 1947 legislation led to the creation of the Planning Advisory Group, struck in 1964 specifically to review the planning system, with special reference to "the delays it incurs and the quality of its results."(U.K., 1965, iii) While their report commended the 1947 legislation of Lord Silkin as "the most advanced and complete system of land use planning in the world" (Heap, 1969, 20), it went on to note that its centralized procedures had caused not only long delays in reaching decisions, but the inability of individual citizens to play a sufficient part in the planning process, and the emphasis of a negative control of undesirable development rather than positive planning for the creation of a pleasant environment. The report concluded by recommending that the system of preparing and approving development plans be radically altered and that general changes be introduced in the methods of administering development control.(U.K., 1968a, 6)

2. The Present Act

The Report of this Planning Advisory Group and the resultant 1967 White Paper lead to the introduction of a new Town and Country Planning Act (16/17 Eliz. 2, c. 72) intended, however, not as a replacement but rather as a supplement to the 1962 legislation (10 & 11 Eliz. 2, C. 38), itself but a consolidation of the 1947 Act and subsequent amendments. The Act envisioned a new form of development plan which was to be introduced gradually into areas with appropriate and adequate resources, such as a planning staff, to oversee their implementation. Plans already authorized under the 1962 legislation would be retained and only gradually replaced, and the present British practice therefore consists of a combination of both forms.(U.K., 1968a, 6)

The basic tenet of preceding British legislation, that permission is an absolute prerequisite to development, remained of course as the spine of the new planning law, although "development" received a somewhat broader definition in the 1968 legislation. All building operations, the use of a single-family house for purposes other than a dwelling, and the making of any material change in the use of any building or land now came under the control of the new legislation.(Part 7) (Heap, 1969, 90)

The Development Plan, while remaining the main framework of development control (U.K., 1969a, 8), underwent a considerable change in structure. The plan authorized by the earlier 1962 legislation was to consist of a group of maps and documents which, while not legally binding, had to be referred to whenever consideration is given to the granting of permission to build or develop. The plan was to be submitted for approval to the

minister, with the provision for a public inquiry[1] and then became a public document indicating the areas allocated for the various used, and for possible development under a comprehensive scheme or for limited use. In essence then, the plan, compulsory as it was, had to show not only the existing and proposed uses for the area, but also indicate the general manner of development and its staging.

A major criticism however of the 1962 legislation was that it inadequately provided for public and local input (Anon., 1969, 676) and therefore the 1968 Act attempted to provide for increased flexibility and a significantly greater input and control by local concerns through the institution of a two-staged development plan. Overall control and broad, comprehensive planning was to be achieved via a structural plan, primarily a written statement broadly and diagrammatically describing the general plans for development. The object of this plan was to "sketch out trends and tendencies, lay down general lines and show broadly and without detail how development is going to shape up within the area of the structural plan" (Heap, 1969, 47), and in addition to the required formulation of planning policy and proposals for development and use, the plan was to indicate certain "Action Areas" selected for comprehensive treatment in accordance with a local plan.(Heap, 1969, 40)

The local plan, as the second level, was designed to provide the flexible and area-centered plan of action on the local scale, and it was to be "a statement of further and better particulars demonstrating a more detailed working out of some particular aspect of town planning... (Heap,

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[1] See Town and Country Planning (Development Plans) Direction, 1965.

1969, 53). A wide range of possibilities was to be left available with the local plan, the Minister reponsible for its administration noting that, in some instances, it may be more advantageous to leave scope and freedom to the imagination and initiative of the private developer and his architect. (Heap, 1969, 55) Thus, the Act specifies that an area generally has the option of preparing a local plan, without the requirements of time or ministerial approval. Where however, an area is declared an "Action Area" in the structural plan, preparation of a local plan is compulsory.(Heap, 1969, 51)

Centralized control and comprehensiveness is attained through the requirement for the structural plan to state the relationship of proposals for development and use to other such proposals in the neighbouring area. Although the Local Planning Authority now approves the plan, the Minister has the "last say in the form and content of a structural plan".(Heap, 1969 38 & 47) The formal exposition of planning policy for general guidance is furthermore achieved by the Ministry through periodic regulations and circulars issued several times a year to provide the local officials with some guidance in deciding specific applications.(Mandelker, 1962, 46)

Basic planning and actual decisions however continue to emanate from the local level where the county and county borough councils are the local planning authorities responsible at the community level.(Heap, 1969, 87) An even more local body in the hierarchy of British municipal government however, the local district council, actually receives the initial application for development permission and provides the first inspection and acceptance of the summary-form application presented. Once their approval is secured, a more detailed proposal is then submitted to the "local

planning authority" for their more authoratative acceptance.

One effect of this promotion of direct and first-hand involvement at the purely local level has been the involvement of the professional planner from the very early or beginning stages. In most instances he is employed as a sort of liaison between the political factors of local district councils and county councils, and in such an ideal situation, it has been noted, his judgement on individual applications transmitted to the county councils - the local planning authorities is often most controlling.(Mandelker, 1962, 87)

The direct power to dispose of an application remains the primary function of the local planning authority, and in their deliberations on an individual application they must refer to the development scheme (either the 1962 or 1968 plan) and certain "other material considerations". As no legislative definition exists for these considerations, considerable scope theoretically is available, but the various directives and guidelines published by the Government have served to somewhat circumscribe this apparent discretion. Officially, the discretion of the local planning authority does not admit much in the way of personal and individual circumstances,which seldom are sufficient to outweigh the general planning considerations.(U.K., 1969a, 16) There is however some evidence to the contrary that attention to personal circumstances "pervades the administration of the Act" and that hardship is a prime consideration, albeit on an erratic basis.(Mandelker, 1962, 123)

Once the local planning authority has completed deliberation on the application, they must select within two months from the available options

of unconditional approval, refusal or acceptance of the development proposal subject either to general or specific conditions. In a certain number of enumerated instances[1] such as recreation uses and general repairs (see Heap, 1969, 90) permission is automatic, while in others it can be given subject to the planning authority's subsequent approval of siting, design and other matters.(U.K., 1969a, 7) The permission under the terms of the 1962 legislation was, without prejudice to any modification or revocation, to enure for the benefit of the land and of any person having an interest in the land, unless otherwise provided. The 1968 Act however, established a five-year term on the permission, with the possibility of waiver or renewal if conditions warrant.(Heap, 1969, 109-113)

One of the objects of the new legislation was to provide for increased local and public input. Public hearings can be directed by the Minister in certain instances, and he has the general power to review any other matter.(S.15, 1947 Act) Nonetheless, it appears that his review power is seldom exercised as the general and specific guidelines provided to local planning authorities have tended to be religiously followed.(Mandelker, 1962, 47) While any departure from an approved development plan is cause enough to activate his intervention, in practice the Minister will not, apparently, intervene.(U.K., 1969a, 12)

The legislation also provides for a statutory right of appeal, a public inquiry available to any applicant who feels "aggrieved" by a decision of the local planning authority.(S. 23 1962 Act) The procedure however makes no provision for an appeal by interested or affected third parties (Mandelker, 1962, 84), and does not tend to resemble a judicial

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[1]General Development Order, 1963, Stat. Inst. No. 709.

appeal. Appeal decisions, for instance, are not generally published (Mandelker, 1962, 44) and the appellant is therefore without the benefit of a body of precedents to assist in establishing his position. Mandelker reports that staff from the Ministry of Housing and Local Government who adjudicate on appeals are unfavourably disposed towards precedence because it leads to "undesirable rigidities in administration"(Mandelker, 1962, 117), but these inspectors and advisory personnel do not, in any event, possess the requisite legal training or experience to adequately function in a system based on precedents.(Mandelker, 1962, 115)

Appeals from a decision on planning permission are thus considered on a purely ad hoc basis, generally lacking the benefits or guidance either from a body of established planning law or from the very "generally worded" government circulars.(Mandelker, 1962, 46) Of some 8, 495 appeals against decisions of the local authorities launched in 1967, 6, 521 were dismissed (U.K., 1969, 10), and appellants in any event are reminded that the Minister has the power to change even those conditions not appealed against, or to impose new and additional ones.(S. 23(4), 1962 Act) Nonetheless, the 1965 Report of the Planning Advisory Group recommended that the public appeal procedure be carefully retained as "essential to the maintenance of public confidence in the system".(U.K., 1965, 29)

3. Conditions of Planning Permission

The source of true planning discretion and the key to the flexibility of the British legislation is undoubtedly found in the provisions enabling the local planning authority, in disposing of applications for planning permission, to either unconditionally accept, reject or, most

importantly, grant acceptance subject to certain conditions. Section 14 (2)(a) of the grandfather 1947 legislation authorized the imposition of conditions to regulate "the development or use of land...so far as appears to be expedient for the...development authorized", while the 1962 consolidated legislation permitted the authority to impose such conditions "as they think fit" with specific power to include the impostion of time limits on this condition and to extend it to other lands of the applicant not covered by his application.(S. 17 & 18) Read either together or by themselves, these sections appear sufficient to vest the local planning authorities with considerable discretion. Such has not however been the case, for a number of administrative directives, together with pronouncements of several courts and administrative tribunals, have served to somewhat confine and delineate the conditional power of planning permissions.

The courts, for instance, in referring to this seemingly broad power to attach conditions to a planning permission have imposed certain general limitations. Local authorities have been advised that this wide power "must serve some genuine planning purpose in relation to the development permitted" (U.K., 1969a, 6), and that the conditions themselves must be "reasonably certain and intelligently and sensibly related to the planning scheme and proposals for the area".(Fawcett Properties Ltd. v. Buckingham County Council, in Heap, 1969, 119)

The Government had heeded the Courts' rulings and has not only issued circulars warning planning authorities to be prepared always to justify the imposition of conditions but has provided them with a number of tests to be considered whenever planning conditions are contemplated. (U.K., 1968b, 1) The conditions, for instances, must first be necessary

and relevant to the planning function and the development being permitted, while a second test should determine whether they can in fact be effective. Conditions which can only be worded as a positive requirement, the circular warns, are not sufficiently restrictive and will, as a general rule, be difficult to enforce.(U.K. 1968b, 5) Finally, to reduce the possibility both of misinterpretation and non-compliance by developers and third parties and of possible judicial intervention, conditions should be kept precise and reasonable.(U.K. 1968b, 5)

Of more practical concern however are a number of restrictions and limits on the actual type of conditions which the authority can impose. Although its jurisdiction appears sufficiently broad in terms to include, for instance, conditions requiring road construction, the donation of open space for public purposes, and a fee to provide for servicing the lots being created, Mandelker maintains that these amenities are normally secured instead through a process of bargaining with the developer, usually permitting a higher density in return.(Mandelker, 1962, 63)

There would, however, appear to be other reasons for this apparent reticence to demand such items as a conditions of planning permission. It has been judicially determined, for instance, that the granting of a public right-of-way without compensation, which the owner should by common law be entitled to, is clearly invalid (Hall & Co. v. Shoreham, in Heap, 1969, 118), and a similar condition requiring completion of development within a certain time period has equally been held unenforceable.(U.K., 1968b, 5) A condition stipulating payment of an annual sum to the planning authority as security for the final fulfillment of a number of conditions to the planning

permission has been held by the Minister, sitting on appeal, as improper and beyond planning powers, the rule apparently being that money can only be demanded on distinct authority laid down by statute.(Case III/ 16 in Heap, 1969, 115) Suggestions for a "lot fee" condition, on the other hand, have apparently been received cooly because of the earlier failure of the development charge provisions of the 1947 Act, although road construction requirements are normally secured even in the light of dubious legislative authority, in the apparent hopes that they will not be challenged. (Mandelker, 1962, 63) Finally, there is the suggestion that many local authorities feel that their insistence on donations and similar conditions represents a sale of planning permission to the highest bidder.(Mandelker, 1962, 63)

In addition however to these principles that unreasonable, imprecise or unenforceable conditions will not be sustained, there has been some consideration of the effect that a nullified condition might have on the status of the planning permission itself. Earlier judicial opinion appeared to hold that an improper or invalid condition would taint the whole planning permission (Pyx Granite, in Heap, 1969, 118), but recent opinion appears to be evolving somewhat away from this position. It now seems, albeit by way of an acknowledged obiter[1] and not without some difference of opinion, that the effect of an invalid condition on the planning permission is to be decided purely as a matter of common sense, having regard to whether that condition is fundamental or merely incidental to the permission.(Heap, 1969, 120)

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[1] "Obiter dictum - An observation by a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision. It is therefore not binding as a precedent." P.G. Osborne, A Concise Law Dictionary, 5th Ed. London, 1964.

A COMPARISON OF AMERICAN AND BRITISH LAND USE AND DEVELOPMENT POLICY

It now seems apparent that as means of planning and land use control, British and American legislation and practice have taken on decidely divergent characteristics, each representing a distinct and separate national approach to the problems of use and development. There is however an apparently wide range of opinion as to the magnitude of the hiatus between the two jurisdictions, and DelaFons has observed that "the distinctions between a formal system of regulatory controls...and control as a discretionary power ... are more apparent than real".(Delafons, 1969, 112)

There is some difference in the basic theory and attitude of planning and use controls in both countries, as characterized by their origins and prevailing practice. Almost since the inception of any form of British planning control, it has been intimately identified as a constituent "Town and Country Planning" concern, with the emphasis on development instead of use, and encompassing the tenet that all development be subject to some form of state or unified control. Consequently, broad administrative control and attendant discretion have been a hallmark of the British practice. American planning legislation, on the other hand, where "prezoning" requires the determination of projected use prior to the fact, tends to emphasize use instead of development.

While zoning may have been derived from principles of use control and the law of nuisance, it is now distilled from a variety of acts and regulations, including sub-division and building regulations and the sometimes determinative guidance from Master Plans, urban renewal schemes and official street maps. This plethora of constituent legislation, each

developing from distinct but different planes, purposes and points of view has undoubtedly served to confuse somewhat the direction and scope of American planning legislation. Comprehensive planning, for instance, appears far less attainable with the variety of American statutes than with the singular and purpose-oriented British development control legislation, where the development plan provides continuity and assures comprehensiveness.

Administrative discretion has not of course characterized planning legislation in the United States, and the oft-cited fear of administration discretion has tended to underscore the distinctions in this area. Americans have, for example, censured the British legislation as "the image of autocratic decision making" (Anon., 1969, 76) and for its dirth of policy principles, sometimes rendering, it is claimed, predictability exceedingly difficult.(Mandelker, 1962, 129)

It has also been popular to distinguish British and American attempts at use and development control on issues of public versus private enterprize. Mandelker's study of the two planning systems points out that the English legislation was primarily designed to regulate public building, and hence does not contain the supervisory powers which in America link the planning authority with the private builder.(Mandelker, 1962, 62) Frederick Laux, a Canadian law professor, characterizes the results of this polarity as the... "somewhat anamolous situation that a socialist type government devised and implemented a land use regulatory scheme which both recognized and gave considerable initiative in land use planning... while American Euclidean zoning, which was devised and kept

current by a political system committed to the principle of free enterprise, by its very nature, drastically limits...the role of the private developer in formulating and implementing the community plan."(Laux, 1972, 5)

This political factor of American zoning and a prevalent distrust of administrative discretion is also reflected in distinctions in appeal procedures. British appeal practice normally consists of a trial de novo, a complete re-hearing of the original application for planning permission, which is routinely handled by Inspectors, administrative officials delegated this power by the Minister. Although the form of such hearings allegedly remains judicial (Mandelker, 1962, 89), the Inspectors tend to possess neither legal training or planning experience.(Mandelker, 1962, 21,95, 114) There is no similar provision for such administrative discretion in the American system, and appeals generally proceed strictly in accordance with judicial principles. This method is claimed to afford considerable more emphasis to the rights of individual citizens, the planners' role becoming rather more advisory.(Counts, 1966, 2) Nonetheless, there is apparently not the opportunity for the second-look approach that is available in British appeal procedure, for the American courts have tended to give the original zoning decision a prima facie acceptance. (Mandelker, 1962, 19) American critics however feel that their methods provide greater advantages for public participation in land use controls (Makielski, 1967), and avoids the dangers of influence by private pressure groups in a development control system.(Anon., 1969, 677)

A prime remaining distinction between these two theories of land

use and development control lies in the attitudes of land tenure. Although few Americans argue with the thesis that ... "Zoning results from a realization that the value and usefulness of each parcel, not only to the owner but to the community, is vitally affected by the use made of the adjoining parcel" (Landels, 165), there has been less appreciation of the extension as championed by Henry George: "The value of land ... is not in any case the creation of the individual who owns the land; it is created by the community". (Milner, 1963, 88)[1] The concept of the "development value" of land was, of course, incorporated into the Uthwatt Report of 1942 and saw implementation with the nationalization of the development value of land in Britain's 1947 Town and Country Planning Act. While subsequent legislation has somewhat modified the intent of this 1947 ordinance, the obvious proclivity of the British to this form of land tenure stands in contrast to the traditional American views.

A number of Americans have recognized certain advantages in English development control: "The English development plan contains substantive and procedural strengths not possessed by the American Master Plan and zoning ordinance".(Mandelker, 1962, 13) The most recent recommendations of the American Law Institute's Model Land Development Code (ALI Draft, 1971, 3) clearly envision a form of development control closely allied to the British model, but are also based on suggestions from American planning and zoning specialists.

A number of these reform suggestions, noting that even now "local

[1] See however: Stickel, 1969, 423; Rawson, Marion; "Property Taxation and Zoning"; 1967 Planning 278; "Property Taxation and Urban Development" in Milner, 1963, 142.)

governments are turning away from Euclidean zoning ... to a system in which the central feature is a request by an owner for permission to develop" (Smith, 1969, 44), have advocated a permit system instead of traditional zoning procedure. By providing some means of general regulation, it is argued, the need for administrative flexibility, which assumedly cannot be accommodated in standard zoning, would thereby be available. (Kras., 1965, 10) Daniel Mandelker in his study of English development control has criticized suggestions for a permit system as merely providing exposure of some of the more complex problems of control and co-ordination which are otherwise hidden or compromised by conventional zoning, and he argues that either full English-style development control must be adopted, or the search continued elsewhere in attempts to accommodate public and private interests.(Mandelker, 1962, 21)

Some recommendations for the full institution of development control in the place and stead of zoning have been made. Most, such as Dalbelle's 1962 plan for a two-step control procedure encompassing both preliminary and final plans with policy guidelines and "development plans" tailored specifically for local area planning (Dalbelle, 1968) have been noted for their remarkable resemblance to the current English legislation.(Counts, 1966, 8)

The practical majority of suggested reforms have, however, concentrated on establishing working inter-relationships between existing zoning and recommended development control regulations. Heeter's survey of major U.S. Government reports on urban problems in the 1960's digests a "guidance system" incorporating a variety of new tools to guide the tempo,

priority, location, type and quality of use and development that would co-exist with zoning, which would itself be retained specifically to guard against incompatible changes - "its original purpose."(Heeter,1969, 66) Somewhat similar is Rep's system of "Development Regulations" requiring a compulsory development plan but allowing broad discretionary power to local administrators to grant permits, albeit circumscribed by narrowly defined development rights and well-defined performance standards.(Reps,1964, 6-9) Such combined controls have of course been operating with general success in Canadian provinces and would be able to provide considerable guidance wherever such methodology is contemplated. Interestingly then, American experience and direction seem now to be approaching Canadian examples in their search for innovative and flexible tools to combat zoning rigidity.

LAND USE AND DEVELOPMENT CONTROL IN CANADA

1) Factors

The evolution of Canadian land use and development control legislation has tended to roughly parallel that of the United States and has traditionally eschewed the establishment of a closer affinity with British methods of land use control, with the result that until recently zoning has been the primary control mechanism in this country. There is evidence however of an increasing trend to experimentation with British-style control methods and the present situation in Canada is composed of both elements.

Although Canadian zoning practice does bear close resemblance to its American counterpart and remains an "essentially U.S. type control" (Milner, 1962b, 32), there is some difference of opinion as to both the

rationale and extent of the American influence. Milner, for instance, maintains that in spite of the prima facie similarities, American planners have relatively little influence in Canada (Milner, 1962b, 45), although others complain of continued and unnecessary dependence on the American practice.(Clark, 1958, 6) Aykroyd, in his comparative study of British and American land controls, is probably more accurate in his proposition that while there is undoubtedly some American influence here, it is merely in the procedure and technology and does not go to the basic nature of our planning legislation, which remains rooted in British tradition.(Aykroyd, 1969, 15)

There is, in any event, considerable criticism of the way in which the American theory of zoning has been applied in the Canadian context. Milner maintains that the direct adoption of the legislative rationale for zoning, complying with the "police power" of the American constitution, is absolutely without constitutional necessity or validity in this country, and was probably done without any clear understanding of the origin of the phrases and wording in the authorizing legislation, (Milner, 1956, 131) and Adler questions the adoption of American solutions which do not apply to the less constrained Canadian system.(Adler, 1968, 163) In addition, although both countries share common growth and development patterns and have, because of history and geographic proximity, experienced similar growth problems, there are certain fundamental distinctions in the constitutional arrangement of federal and state or provincial governments, in the socio-legal fabric and in our common-law traditions. Finally, differing attitudes towards rural-urban problems and in concern for the retention of local rights all militate against assimilitude in land control policies. (Merrifield, 1963, 3)

The influence of the U.K. system of development control is perhaps more difficult to discern in traditional Canadian land use control, but is becoming increasingly more apparent in the new and flexible approaches being advocated. The distinctly Canadian requirement of provincial approval of most zoning by-laws (Milner, 1962b, 32) probably derives from British tradition, and similar state supervision of zoning is at present minimal in the United States, where and even planning assistance in land use controls is present in less than half of the states.(Cunningham, 1965,380) Requirements similar to ours however, are presently being considered and recommended for institution in American land use legislation.(ALI Draft 3, 1971)

The greatest impact and influence of English tradition is probably felt in that most substantial and important distinction betwen American and British land use practice - in the degree of discretion. American land use adminstration has been singularly noted for its distrust of administrative discretion and characterized by attempts to keep discretion low and well within limits capable of full and constant legislative or political review. Canada, on the other hand, with a background of British tradition and experience and enjoying a correspondingly different socio-political development from that of the United States, has experienced neither this distrust nor adverse reaction against the vasting of discretionary power in its administrative officials. Some form of administrative discretion is presently available in Canadian sub-division and zoning controls, and the increasing use of development control is widening the horizon for discretion, except wherever the maintenance of suitable political control is paramount.(Milner, Lecture, March 28, 1968)

2) Status

Zoning now provides the primary means of land use control in all but two or three of the Canadian provinces. Although Manitoba and Prince Edward Island do not refer to their legislation as zoning, it apparently functions in much the same manner, (Milner, 1962a, 145), while several of the other provinces including Alberta and Ontario operate with traditional zoning controls augmented by recent introductions of development control. Zoning is not however generally compulsory in Canada (Aykroyd, 15), except in new legislation for individual Ontario Regional Districts and in Alberta where legislation requires that zoning regulations shall "proceed" once a plan has been put into effect.(Milner, 1962b, 27)

Most provincial zoning ordinances bear close resemblance to the American product and have been derived in similar fashion from those roots. (RAIC, 1965, 7) Ontario, for instance, had a fairly well established urban population by the beginning of the Twentieth Century and by 1904 was, like other major urban centres in Europe and the Eastern United States, operating with not only a set of building regulations to control inter alia, frontage and set-backs, but with by-laws to "prevent, regulate and control the location, erection and use of ... (certain specified trades).(Milner, 1963, 606) No attempts however to institute "districting" or any classification of use were made until 1921 when legislation authorizing the prohibition of "the use of land or the erection or use of buildings within any defined area or areas ... for any other purpose than that of a detached private residence" (1921, S.O.C. 63, S. 10) heralded the first zoning

enabling statute, at least in terms now familiar to modern zoning by-laws.

Whatever may have been the intentions for this early zoning by-law, most Ontario municipalities apparently regarded it as little more than a state substitute for a building scheme.(Milner, 1962b, 46) From 1921 to 1952, when Toronto finally revised its original zoning procedure, some 400 by-laws had been passed. During that time however, the initiative for defining the area within which the by-law would be used was left up to the local residents themselves so that a number of these "defined areas" were little more than local streets, the product of somewhat over-effusive parochial interests.(Milner, 1962b, 46)

If the development and use of zoning legislation reflects a purely American tradition, the introduction of administrative discretion and development control into Canadian land use legislation represents "the first real and major departure from U.S. practice".(Clark, 1958, 9) Now available in at least seven provinces[1] development control appears to be gaining widespread use and acceptance amongst both planners and developers (RAIC, 1965, 22), although the provinces generally have not appeared too eager to experiment with discretionary land use controls at the expense of the proven methods of zoning.

The Province of Alberta has however, for at least twenty years, been utilizing a form of development control. The first development control legislation, closely modelled on the 1947 British Act, was introduced into Alberta in 1950 allegedly on the initiative of the City of Edmonton (Stevenson, 1961, 435) and undoubtedly suggested, sustained and

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[1] B.C., Alberta, Saskatchewan, Manitoba, Ontario, P.E.I. and Newfoundland.

promoted by that provinces "great majority of English born or educated planners".(Milner, 1962b, 45) This legislation was apparently seen as no more than an interim measure when first introduced, intended to be used only between the resolution to prepare a general plan and its final implementation (Laux, 1972, 9) Nonetheless, the advantages of development control appear to have been quickly appreciated by both Edmonton and Calgary for, by simply not implementing the plan both cities have been operating with "interim" development control more or less continuously since 1950.(Stevenson, 1961, 435) The anomalous "interim designation was therefore deleted from the act and all references in 1963 (RAIC, 1965, 22), in essence vitiating Milner's prediction that "the real danger of interim control is that it soon becomes control and loses its interim quality". (Stevenson, 1961, 435)

Alberta's planning legislation now therefore permits the municipal councils either to regulate by the traditional means of a zoning bylaw (R.S.A. 1970, C. 276, S. 119) or, even after a general plan has been adopted, to obtain authorization from the Minister to continue the exercise of development control.(S.100) That part of the act concerned with Development Control bears strong resemblance to the English legislation. To ensure that the proposals of the general plan will be carried out, the legislation also provides for the enactment of development schemes, generally designed to facilitate the designation, assembly or purchase of school and park, sites, roadways and other specified uses.(S.114) Actual control of development is achieved through a system of permits, conditional or otherwise, while each application is to be considered on its own merits - "having regard to the proposed development conforming with the general

plan being prepared or adopted."(S. 100 (2))

To this point the legislation bears a strong, and probably intentional, resemblance to English Development Control. Nonetheless, a further and somewhat dis-similar section of the Alberta Act provides for a "land use classification guide", ostensibly to assist in the exercise of development control but appearing, for all intents and purposes, virtually identical to the standard form zoning by-law though absent its general sections on applications, appeals and enforcement.(Laux, 1972, 18) Both Edmonton and Calgary (Calgary ByLaw 7839, S. 11-I) require that the development control officer to whom the responsibility of administering development control has been delegated shall be governed by this land use classification guide, and concern has been expressed that should the law in fact so require that he be governed by this guide, the distinction between development control and zoning would be effectively negated and the intent and purpose of the legislation frustrated.(Laux, 1972, 20) In fact, recent judicial set-backs to the status of the Calgary Development Control By-Law have tended to confirm this fear,[1] and the status of both zoning and development control in Alberta is "to say the least, uncertain". (Laux, 1972, 12)

The practice in the Province of Ontario may however be even more uncertain, for there development control is practiced without any specific legislative authorization. Ontario's "restricted area" by-laws, similar to zoning ordinances but considered to be somewhat more negative (Cumming,

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[1] See Calgary Herald, March 11, 1972.

1950, n.p.), have apparently been utilized in the main for only single-family use, and municipalities have instead been insisting on the enactment of specific by-laws for each other individual use(OLRC, 1971, 11) While most of Ontario's urban centres have long had the practice of using formal documents executed with the developer as a prime control instrument (Aykroyd, 1969, 18), this method has taken on some sophistication and is now widely used in both Hamilton and Toronto and is the major control mechanism for the City of London.(Adler, 1971, 97)

The practice there is to generally retain the existing zoning and thus require any developer who desires a more economical or desirable use to apply for the change. Instead of rezoning the property, an individual by-law is passed to restrict development to that proposed or permitted by the municipality and covered by an ancilliary contract.(Sandler, 1964) The Ontario Municipal Board, the approving authority for all municipal zoning by-laws, official plans and subdivisions, has however characterized such a practice as "spot zoning" and has indicated that "On general principles this Board is opposed to spot zoning and site plan controls..."(Re Pickering By-law 3718, cited in Adler, 1971, 102). The Ontario Court of Appeal however in a 1960 decision (Re North York By-law 14067, 1960 24 DLR 12) appears to have vitiated the practice of spot zoning (Milner, Lecture, March 28, 1968), and the O.M.B. appears ready to observe the precedent, so long as there is evidence of planning research in the general area or that the use change is in compliance with the spirit and intent of an existing official plan. (Adler, 1971, 95) Milner thus feels that the Board has tacitly approved the London procedure, and that the Ontario form of development control in practice thus closely approximates Alberta development control legislation. (Milner, 1962b, 53)

The City of Vancouver, operating with its own charter[1] independently of the Municipal Act, has been able to utilize somewhat more flexible means of land use control than other provincial municipalities. Since 1956 the city has been operating with a Development Permit system, later amended to allow the attachment of conditions, while a 1962 amendment[2] permitted the designation of certain zones without uniform regulations but for which development required council approval. Although there would appear to be extensive discretionary powers given to the Technical Planning Board under these Comprehensive Development Zones, city planning officials have indicated that because each zone is normally established with a specific purpose or development in mind, and because council actually sets the policies for each zone, little actual discretion is available.(Gerecke, 1971, 15)

Because however the remainder of the province's municipalities are within the jurisdicton of the Municipal Act, which until recently made no provision for any form of conditional use, Vancouver's system was generally considered preferable.(South, Interview.) Other provinces did however permit special conditions of use[3], and B.C.'s recently introduced S. 702A provides for "such terms and conditions for the use and development of the land as may be mutually agreed upon...".(S.702A,(3)).

3. Evaluation

Recognizing and to some extent encapsulating the American trend to replace or rejuvenate the creaking and sometimes ineffective machinery of zoning with new and flexible techniques approximating British development

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[1]Chapter 55, R.S.B.C., 1960.

[2]By-law 4031, amending the Zoning and Development By-law 3575.

[3]eg. Saskatchewan, Community Planning Act, R.S.S.C. 172, S. 46(b), and Ontario, Planning Act, R.S.O. C. 276, S. 123(c).

control, Canadian zoning has undergone similar evaluation by administrators, writers and politicians. Meanwhile, the development control legislation and relatively recent experience of Alberta, Ontario and other Canadian provinces has also been under some scrutiny, with particular regard to its feasibility as an alternative or replacement for zoning.

One particularly notable factor of Canadian development control, as distinct from both the British practice and initial American attempts, is its concurrent operation with existing zoning regulations. In many provinces development control legislation or its tacitly approved practice either serves as a direct replacement for zoning or co-exists and is utilized in company with it. The original intent of the Alberta legislation, for instance, was to utilize "interim" development control following a resolution to prepare a general plan and only up to and until the institution of zoning regulations. Nonetheless, and in apparent recognition of the preferential advantages of development control, later legislation authorized the Minister to suspend the zoning regulations of any particular area and permit the use of "interim" development control, and both development control and zoning can now be used as a means of regulating land use at one and the same time after a general plan has been adopted.(Laux, 1972, 10) The Minister's power to suspend zoning has been judicially extended to allow a municipality to take land currently under the zoning by-law and place it under development control, although the reverse does not yet appear possible.[1]

In British Columbia, S.702A, which authorizes the creation of development areas and use of a "land use contract", is found within

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[1]See Bohey v. City of Edmonton, 1971, S.C.

"Division (3) - Zoning", and expressly allows a landowner to develop under existing zoning regulations should he not wish to contract with the municipality. (S. 702A (8) Municipal Act R.S.B.C. 1960 C. 255, as amended). Similar recognition of the commutability of zoning and development control is implied in the Ontario practice without, of course, legislative authorization. The Ontario Municipal Board however apparently feels that the use of development control should be strictly "interim" and as an area becomes more urbanized development control should be replaced by the less flexible but traditional zoning controls: Re Inglewood Park, London By-law CP 1590196 (1965). (cited in Adler, 1971, 102)

Similar recognition that both zoning and development control should be available and utilized for full and effective development of land resources has been advanced by a special committee report of the Royal Architectural Institute of Canada. Noting little or no objection to the operation of development control in Alberta, the committee maintains that effective use of conditional zones and discretionary powers in traditional zoning administration would narrow the gap between zoning and development control, and it strongly advises that both forms be available for use by municipal and regional authorities.(RAIC, 1965, 25) The Ontario Law Reform Commission however, is somewhat less convinced and has expressed concern with the particular requirements and the time consumed by public bodies and private developers in processing the three levels of zoning, the official plan, and development control.(OLRC, 1971, 12)

A second major characteristic of Canadian development control legislation is the retention of supervisory control by the

provincial government. At least four provinces now provide for a form of provincial administrative tribunal to enforce local procedures and standards, and in three more ministerial approval of control by-laws is required. (Adler, 1968, 162) Centralized control seems to be an inherent factor of development control and the British practice of exercising control from the national government down to local councils appears to have had influence on Canadian procedure. Interestingly, the American Law Institute's Model Land Development Code suggestions for the imposition of certain state controls in concert with a development control procedure is remarkable akin to the British model.(ALI Draft 3, 1971)

Critical evaluation of American zoning procedures can generally be applied, mutatis mutandis, to Canadian methods as well, although some critics have injected a particularly Canadian flavour. Haar's concern with the lack of comprehensive planning in American zoning legislation[1], for instance, has been amplified in this country by Milner. He notes that because of the frequency of amendment made necessary by the zoning by-law's inflexibility, comprehensiveness is well nigh impossible, (Milner, 1962b, 49) and that few provinces have preceeded their introduction of zoning by-laws with any concept of a comprehensive plan.(RAIC, 1965, 7) Cumming, however, has noted a trend in Canadian zoning practice towards greater attempts at comprehensiveness, (Cumming, 1955, 122) encouraged, it might be supposed, by the increasing use of development control techniques.

Reps and Makielski have commented that zoning in the United States is becoming increasingly alien to the planner, although supported by the political forces,(Makielski, 1967, 17), and McNairney makes similar

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[1] Charles Haar, "In Accordance With A Basic Plan", 68 Harvard Law Review, 1154. (1954)

conclusions in the Canadian context. While the people are enthusiastic about zoning, he notes, "the professionals hope it gets lost."(McNairney, 1961, 121) Milner however, feels that the task of a zoning draughtsman is made impossible by a lack of legislative direction (Milner, 1962b, 49), and his committee report amplifies this lack of faith by the planners in the rigid standards of the zoning by-law.(RAIC, 1965, 7)

Although the advantages of development control are now receiving considerable concern and favourable recommendation by the American Law Institute in their Model Land Development Code, these positive factors have been implicit in Canadian planning for some time. In 1957, Earl Levin suggested that Canadian land use practice was moving towards a form if development control (Levin, 1957), and the report of the Royal Architectural Institute of Canada borrowed heavily from Alberta's legislation and Ontario's practice for their recommendations for the implementation of development control in Canada.(RAIC, 1965)

Analysis of the Ontario use, particularly in the City of London[1], enabled Adler to conclude that development control offers advantages of flexibility, use of available land, and coordination of the interests of planners and developers superior to zoning, while its predictability is at least equal to that of more traditional methods.(Adler, 1971, 103) Milner however maintains that development control is less predictable than zoning, at least for the developer, because the political values involved in all land use controls are more readily apparent in property already zoned for development than in areas without this prior indication.(Milner Lecture, March 28, 1968)

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[1] See also, Guard, "The Implementation of Development Controls in London". Unpublished Conference paper. n.d.

Certain problems have of course also arisen with the use of development control. The City of Edmonton, for instance, has been criticized for its "unnecessarily broad definition of development", amounting, it is claimed to expropriation without compensation (Stevenson, 1962, 438), and the permissive aspect of the Calgary legislation has apparently involved that city in a number of court actions.(Martin, 1962 and Calgary Herald, March 11, 1972) In Vancouver, on the other hand, developers have apparently expressed grievance with too strict an administrative policy in the processing of development permit applications (Geronazzo, 1964, 6), while in Ontario the major problem is seen to be the requirement of a "large...educated" (Adler, 1971, 103) and "superior" staff to deal with development control methods. (RAIC, 1965, 23)

Particular Canadian attitudes and the available use of both zoning and development controls have offered considerable scope to land use control legislation in this country. Many of the inflexibilities and jurisdictional problems that have been encountered in American zoning have not appeared to pose a problem in the Canadian context, where the influence of British tradition and experience has permitted planners a greater degree of discretion in the administration of zoning by-laws and has facilitated the implementation of development control.

LAND USE AND DEVELOPMENT CONTROL AND THE COMPREHENSIVE PLAN

Questions concerning the co-relation of zoning and development control with the concept of comprehensive planning have seemingly been a major component in any study of land use and development control, and their tortuous relationship and failure to practically and complementally co-exist gives some understandings of the workings and failings of land use control and zoning as a whole.

The Standard State Zoning Enabling Act, expanding on Bassett's original thesis, introduced the concept of comprehensiveness in 1926. Section 3 of that act decreed that all ordinances "shall be drawn in accordance with a comprehensive plan", failing which the zoning would be liable to be rendered ultra vires. While Bassett undoubtedly intended that the "comprehensive plan" should be a set of planning principles, legislatures implementing the act provided no further meaning or substance to the term, and the courts in their attempts to induce meaning have tended to define it rather differently. Thus, although the "comprehensive plan" is theoretically open to mean either "well considered" or "geographically complete" (Stevens, 1969, 265), judicial preference tends towards the latter and the courts have apparently been able to direct nothing more than that the zoning ordinances should be "comprehensive, i.e. uniform and broad in scope of coverage".(Haar, 1955, 1157) As Reps concludes, whatever we think state legislation says about the necessity to ground zoning in a well-considered or comprehensive plan, the courts by and large have interpreted such a plan to be the zoning map itself".(Reps, 1964, 5) The land-mark Euclid decision[1] established this geographic definition (Pooley, 1961, 45),

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[1]Euclid v. Ambler Realty Co. 1926, 272, U.S. 365.

and this meaning has apparently similar acceptance in the Canadian context. (Milner, 1962b, 48)

Because of this early distortion and confusion in meaning, and without legislative encouragement, it appears that little inter-relation between zoning and comprehensive planning ever existed in North American municipalities, and that few communities can actually claim their zoning regulations stem from any comprehensive plan.(Reps, 1955, 5) A survey undertaken in 1965 revealed that American municipalities seldom identify the "master plan" with the "comprehensive plan" requirement of the state enabling statutes, and that only about half of those areas with comprehensive planning have in fact adopted a master plan.(Cunningham, 1965, 383) Similar indications are available for Canada and although the use of the comprehensive plan is apparently on the increase (Cummings, 122), it has been noted that even in Ontario, where legislation requires referral to the official plan, few communities have as yet drafted effective community plans. By 1966 only 17% of local Ontario municipalities, though admittedly representing the bulk of that province's urban population, had any official plan at all.(Adler, 1971, 11)

A major exception of course is wherever development control has been introduced. In Alberta's legislation, control is to be exercised on the basis of the merits of each individual application, "having regard to the proposed development conforming with the general plan prepared or as adopted".[1] Ontario's Planning Act[2] similarly contemplates the preparation and approval of official plans prior to enactment of restricted area, or zoning, by-laws (OLRC, 1971, 9), and only in British Columbia is the

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[1] S.100 (2), Alberta Planning Act, Chapter 276, 1970 R.S.A.

[2] R.S.O, 1970, C.349

exercise of development control, via the land use contract, now possible without the preparation of a community plan or evidence of some other form of comprehensive planning.

Canadian critics are certain however in their recommendations that development control not be exercised without the presence of a comprehensive plan. Milner has stated that "development control without master planning is as weak as piece-meal zoning" (Milner, 1962b, 54), and the Royal Architectural Institute's study is more emphatic: "Without this background of a plan properly prepared and published so as to be readily available, we recommend unequivocally that no municipality should engage in any form of development control, whether by traditional zoning by-laws or otherwise". RAIC, 1965, 22)

The American Law Institute in the monumental Model Development Code has apparently rejected the overall requirement of a written plan for future land development which requires official adoption, and has instead elaborated certain controls and power which cannot be used by local governments until they have provided "written evidence of forethought" or, in some few instances, an official plan.(ALI Draft 2, Article 3) Even then, some American critics are disturbed that this attitude reflects legal intentions to totally eliminate the scope for arbitrary decisions, and may not be the most suitable planning solution.(Delafons, 1969, 137)

What is interesting however is that these attempts to co-ordinate development and use controls with comprehensive planning are of such a late date.

One plausible explanation, advanced by Haar, records the relatively late introduction and development of the planning profession, reaching an active energy level somewhat later than the early institution of zoning and assumedly never able to actively impress planning ideals on the already established land use control mechanism.(Haar, 1955, 1157) Planning therefore tended to be a later introduction to local area administration and in many instances failed to provide active co-ordination with existing zoning. The situation in Canada is similar and Rogers has observed: "Community planning is a relatively new form of municipal activity and is at the same time a concomitant and an outgrowth of the powers of local authorities to regulate land use by means of zoning regulations".(Rogers, 1959, V. 2, 754) In any event, as another commentator notes, most of the "master plans" that were adopted for municipal use originated in the 1910-1940 "City Beautiful" period and were never intended as guides to the exercise of control over land use. Consequently, zoning developed its own philosophy and tended to emphasize the differences between land uses rather than the relationships that tie them together.(Cunningham, 1965, 383)

Makielski, on the other hand believes that the administrative and political structures offer no encouragement for comprehensiveness, and that while the legal theory of use controls envisions a relatively coherent, open system of comprehensible and practical standards applied to the community as a whole, "the political system demands nearly the opposite".(Makielski, 1967, 19) This political antipathy towards comprehensiveness is heightened, he claims, by the geographic nature of pressure groups that don't look beyond their own community of interests.(Makielski, 1967, 19)

Even in Canada, there is surprisingly little encouragement to the

use of comprehensive planning in land use controls. Milner's committee notes that no Canadian province, with the exception of British Columbia, provides any legislative purpose or rationale for the carrying out of a development plan or the securing of its benefits, and that general provincial encouragement in this regard is lacking.(RAIC, 1965, 7) Adler's study of the Ontario Municipal Board reveals that the Board makes very few references to official plans and that "detailed consideration of the plan is the exception and not the rule".(Adler, 1968, 109) Generally, the Board is more attentive to the individual development proposal itself than to the official plan for the area, yielding, so Adler claims, to the impression that the proposal dictates the plan and not the converse.(Adler, 1965, 112)

Another explanation advanced for the inability of comprehensive planning and zoning to functionally coincide is that the general public is basically unaware of the relevance of the comprehensive plan and the potential of its relationship with zoning. The Ontario Law Reform Commission, for instance, has complained that public opposition is being voiced at hearings into individual development proposals, when it should instead arise at hearings on the comprehensive plan (OLRC, 1971, 10), and the Municipal Board appears to suggest that the weakness of development control lies not in the technique but in the failure of the public and involved parties to inspect the official plan.(Adler, 1968, 103)

Adler identifies three reasons for this lack of public knowledge:

1) the enabling legislation directs itself at the policy-makers and <u>their</u> relationship to the plan, without mention of the average citizen's involvement;
2) the act does not require a public hearing prior to the adoption of an official plan, as it does with a rezoning; and
3) the jargon used in the enabling act and the ordinance somewhat obfuscates the effect of the plan on the citizen.(Adler, 1971, 110)

The Ontario Law Reform Commission has added a fourth:

> 4) the plan's staging is badly misunderstood by the citizens who visualize the long-range plans so preferred by planners as having instead immediate and short-range implementation. (OLRC, 1971, 9)

Nonetheless, planners and other professionals concerned with land control almost universally agree that certain very significant advantages accrue wherever zoning controls are used in conjunction with a comprehensive plan. The comprehensive plan provides considerable guidance for the exercise of zoning and other planning controls, and thus helps guard against "arbitrary discrimination and irrationality".(Heyman, 1970, 41) In addition to calming this particular American fear, it furnishes the public with a realization of their expectations and a yardstick against which zoning and development control progress can be measured (Laux, 1972, 36), and provides a sounder legal basis for the zoning ordinance. Where the comprehensive plan is not employed, a number of adverse effects have been both noted and predicted, including a tendency for development to be frozen to its existing pattern, the production of a host of unexpected and frequently undesirable results, and a total loss of comprehensiveness in the development pattern.(Goodman & Freund, 1968, 405) As Laux notes, what remains is a "planners' nightmare of an inconsistent and varied patchwork of land uses".(Laux, 1971, 4)

While however there is widespread belief that use the development controls should not be exercised without the existence of some form of comprehensive plan or guide to development, there is some variation in thinking concerning the nature of its extent. Many commentators have proposed that

the master or comprehensive plan should be nothing short of mandatory, either immediately upon the undertaking of use or development controls (Reps, 1964, 7), or after a period of grace (Williams, 1966, 8), but in any event prior to the exercise of zoning. Others however feel that only the more discretionary controls should be with-held from a community or local authority until it has a master plan or has at least shown itself capable of adequately dealing with current development problems.(Smith, 1969) The American Law Institute maintains that this approach represents a compromise between the extremes of a static master plan controlling all development and the granting of wide discretionary powers to local officials to use as they may.(ALI, Draft 3, xvii)

Similar attempts to restrict the use of certain conditional zoning powers in Ontario to communities with an adopted official plan have received the praise of that province's Law Reform Commission (OLRC, 1971, 13), although British Columbia's legislation restricting the use of S. 702A to communities with a plan has now been repealed. In Alberta, Ministerial approval is required before the exercise of development control in the first instance, and Laux suspects that this requirement is tied in with whether or not the municipality in question is capable of properly administering such a highly discretionary system of land use control.(Laux, 1971, 11)

CHAPTER III

AN ANALYSIS OF THE ZONING PROCESS

ZONING: ITS PRACTICAL FAILURES AND THEORETICAL DEFICIENCIES

> "Zoning is seriously ill and its physicians-the planners-are mainly to blame. We have unnecessarily prolonged the existence of a land use control device conceived in another era when the true and frightening complexity of urban life was barely appreciated. We have, through heroic efforts and with massive doses of legislative remedies, managed to preserve what was once a lusty infant not only past the retirement age but well into senility. What is called for is legal euthanasia, a respectful requiem, and a search for a new legislative substitute sturdy enough to survive in the modern urban world." (John Reps, 1964, 1)

> "The zoning process is basically an exercise in myth-making, an invitation to corruption in local government, an instrument of the real estate interests, and an involved and time-consuming technical activity that rarely produces concrete results in urban planning terms." (Makielski, 1967,1)

> "Most development is now occuring by way of modification in pre-established rules and not as a satisfaction of them... The present system is both theoretically and mechanically incapable of handling a flexible response to development." (Krasnowiecki, 1970,3, and Marcus, 1970, 193)

> "It is now clear that conventional zoning and subdivision regulations are not appropriate devices for regulating most of our future urban development." (American Society of Planning Officials, 1968, 43)

While the prevalent zoning theory and procedure appears to have secured a substantial degree of public and political acceptance, (Bryden, 1967, 287) it is being regarded with considerably less enthusiasm

by those most concerned with its practical functioning. Zoning is increasingly under attack as a form of unnecessairly rigid regulation "rooted in outmoded tradition and inhibiting desirable change and experimentation", (Bair & Bartley, 1966, 2) and is criticised by an increasing number of planners, lawyers and urban specialists for its notable failure in combatting emerging woes. Such criticism has been generally constructive, although analysis of the problems have proven somewhat difficult. As one urban critic notes, "Planning law has blundered into a whole series of intellectural deadends because our substantive planning concepts are incompletely thought through."(Williams, 1964, 94) In addition, the remarkable tenacity of the zoning process to resist change, public and political complacency, and some judicial hostility have proved to be major impediments to reform of the process, and many recommendations have remained largely academic.

1. Theoretical Deficiencies

One of the most basic criticisms of traditional zoning theory is that it remains an essentially negative form of control, and runs counter to both the classical social and political philosophy and the prevailing or contemporary political theory which believes that a set of positive actions can improve the status of mankind.(Makielski, 1967, 13). The American Law Institute has predicted that the prohibitive nature of zoning will likely render it eventually ineffective (ALI Draft 3, p.xi) but it is exactly its negative aspect and ease of understanding that apparently underly the popular support of zoning. As Makielski emphasizes in his treatise on zoning and politics, when applied to the political and administrative arena, it is really theoretically and practicably more feasible to anticipate future

difficulty by a process of negation than one of causation.(Makielski, 1967, 14)

A related criticism is that zoning is aimed primarily at the existing "use" of land and, ignores its "development" aspect.(Makielski, 1967, 10) It is claimed that zoning requires pre-designation and therefore can only adequately deal with already developed areas or, at the least, those with the probabilities of development (Heeter, 1969, 59), so that decisions relating to the "development aspect" must be made prior to any rational basis for so doing. By thus concentrating on existing or probable use and failing to provide significant development guidance, zoning ultimately slights developing properties and loses validity in the face of changing market-economic and social conditions.(Heeter, 1969, 59)

This inability to sensatively relate to the changing social structure represents another zoning deficiency. Because it is essentially negative in expression, zoning appears to foster certain inequalities. Not only has considerable criticism been directed at the imposition of minimum standards for some residential classifications and the resulting encouragement of distinct forms of undesirable social and economic discrimination[1] but it is claimed that even current zoning theory fails to recognize the relationship between different uses, an increasingly important factor in modern large-scale or multiple-use projects.(Heeter, 1969, 63) Makielski feels that a public interest is incapable of definition in traditional zoning, and therefore the process has become prey to all description of

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[1]See generally, Pooley, 1961, Sussna, 1969 and Davidoff, 1971.

political and pressure group persuasion, with the likelihood of a "common good" or "public interest" emerging being slight indeed.(Makielski, 1967, 16)

Extending the admission that zoning has certain obvious political and economic advantages and that the public interest might not be adequately protected by the process, Marion Clawson has suggested that zoning be sold, much like a mineral lease, to the highest bidder.(Clawson, 1966, 9) This proposition has however received short shrift from critics and has drawn the ire of the Municipal Law Officers Association who note, "We cannot imagine a worse method of exercising a municipalities power to control land use for the benefit of the public as a whole. Can you imagine the chance for skull-duggery?"(Stickle, 1968, 423)

2. Practical Failures

Deficiencies in the theory have also resulted in significant practical difficulties encountered in the enforcement of traditional zoning regulations.

Makielski's thesis on politics and the zoning process maintains that the politicians have detached themselves from the public arena and so have forfeited control over land use and development, to competing public interest groups.(Makielski, 1967, 17) The real public interest or general welfare of the individual, he argues, as a "single theoretical unit", has been overlooked and has lost its meaning.(Makielski, 1967, 19) According therefore to this line of reasoning, any improvement and land use control process must make adequate provision for the direct and personal involvement of the general public in a manner to ensure their contribution.

The planners too have been accused of abrogating their responsibility in the zoning process, and because neither they or the elected councils, seem prepared to make clear decisions, that function has been passed on to the courts.(Makielski, 1967, 17) While there is some contention that the planners were, in any event, inadequately educated(Blucher, 1955, 96), there is greater concern that the courts, because they do not possess the requisite expertise to determine issues of increasing technicality and complexity, are not the proper bodies to be so involved in the zoning process.(Reps, 1964, 6) Williams however feels that the courts have been generally unsatisfactory only because they are faced by a distinct lack of planning guidance (Williams, 1964, 95), and this undoubtedly reflects in the past judicial tradition to allow the original legislative judgment on zoning matters to stand.(Pooley, 1961, 83)

The primary reason for this general absence of directions and standards from the zoning process (Blucher, 1955, 96) likely lies with the failure of zoning to coincide with the concept of the comprehensive plan. Bearing no required relation to over-all development plans, zoning has been described as both "blunt and imprecise" (Pooley, 1961, 71), and has been characterized as..."essentially a set of Marquis of Queensbury rules for real-estate speculators rather than a comprehensive development guide." (Barnett, 1970, 126)

The most telling practical criticism of zoning, and certainly the most oft-cited, is its relative rigidity and lack of flexibility. As Makielski notes, what was in theory a radical idea has now become severely limited by restrictive practices.(Makielski, 1967, 14) Formerly, the strictness of land use ordinances were mitigated through legislative

permission to consenting land-owners to breach certain regulations (Pooley, 1961, 49), now the Boards of Variance and Appeal provide some relief to zoning rigidity. Indeed, the use of appeal proceedings is an interesting indictment of the zoning process, for as one author notes, "If a system can be judged by the frequency of the departures from it, zoning fails spectacularly".(Anon., 1969, 673) Milner laments this necessity for the relaxation of overly rigid zoning ordinances with an appeal process (Milner, 1962b, 49), although Aykroyd supports the appeal practice as a "good thing" and notes that it "saves the mistakes of the Council and the approving authorities from being perpetuated".(Aykroyd, 1969, 31)

The inflexibility of zoning perhaps has its biggest impact on form. Architects maintain that zoning serves to restrain rather than encourage design initiative (Cramer, 1960, 90), and others characterize it as hopeless in attempts to integrate large-scale developments.(Heeter, 1969, 63) John Reps, one of the more vigorous opponents of zoning practice, notes that by attempting to provide detailed standards for all conceivable situations, zoning has only served to segregate the functional portions of cities rather than integrate them: "We have Balkanized our cities into districts with precise and rigid zoning".(Reps, 1964, 5) A large proportion of the suggestions for reform now stress the attainment of zoning flexibility through due recognition of the variables in each situation and their sensative integration.(Krasnowiecki, 1970, 7)

The impact however of zoning has been perceived everywhere on the urban and rural landscape and has caused many professional planners to "regard zoning more of a hindrance than a help in city planning".(Cunningham, 1965, 383) Understandably then, a number of solutions to the problems of

zoning have been advanced over the past two decades which, while they vary considerably in their terms and implications, deserve some further consideration.

SOLUTION NO. 1: THE ELIMINATION OF ZONING AND PRIVATE LAND USE CONTROLS

There have been occasional suggestions that zoning be completely replaced by some alternate, but private, means of land use control. The best practical example of securing such control on a large scale is that of Houston, Texas. Operating without any form of zoning or similar public land use control, a practice referred to by it's opponents as "The Houston Heresy" (Delafons, 1969, 132), use control is achieved through extensive use of private deed restrictions sustained and supported via the market mechanism.(Welch, 1967, 257) Since 1929 when proposals to institute zoning controls were first defeated by public referendum, private deed controls have continued to achieve preference over zoning, and its supporters claim that Houston has successfully grown without zone limits while experiencing, in any event, no greater problems than with any other city operating under traditional zoning regulations.(Welch, 1967, 257)

Functionally, the use, imposition and enforcement of restrictive covenants is initially encouraged through the activities of civic clubs, which operate much like any neighbourhood community organization but can, if necessary, request assistance from the city to enforce deeds insofar as they may affect the use of property.(Delafons, 1969, 132) This municipal power of enforcement, long a practice, has finally been legalized[1] as a

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[1] 1965 Texas State Ordinance, Article 974a-1

"lawful and logical adjunct to the police power".(Olson, 1967, 269) Covenants which violate the U.S. or State Constitution cannot, of course, be enforced by either the city or parties to the deeds.

Despite the apparent relative success Houston has had with restrictive covenants ... Officials there admit however that it is not even a good alternative to zoning, but the only tool the city has (Olson, 1967, 267) .. there has been no evidence of other appreciable North American attempts at such exclusive control by private means. The American Law Institute has admittedly given some consideration to suggestions that the local government be empowered to control or eliminate covenants restricting land use, and which frequently thwart governmental guidance to location of use, but they ultimately concluded that control and interference by local councils would only serve to further complicate the process.(ALI Draft 3, 23) Similar sentiments reflect the Canadian position, and Milner notes that Ontario planning legislation is chiefly concerned with a system of controls that would be self-executing, and not with the benefits and burdens of covenants as they relate to adjacent land-owners.(Milner, 1965, 81)

Restrictive covenants remain however as a valid and legal means of securing some form of land control. They are particularly useful, Leal notes, when used to order the amenities of a community at the point where the zoning by-law leaves off.(Leal, 1960, 182) Nonetheless, their use has never been widespread, chiefly, it is claimed, because North American land values have not stabilized, and because municipalities are recognizing their obligations to provide services and are instituting more effective controls. (Owens, 1967, 582) In British Columbia restrictive covenants apparently are considered a "minor planning tool" and receive little use.(Merrifield,

1963, 12)

Traditionally, restrictive covenants are enforceable at common law by property owners benefiting from the covenant, but Bailey complains that because a previously existing financial interest may have dissapated, there is often no longer a motive for prompt enforcement.(Bailey, 1965, 910)

A municipality may therefore have to contend with covenants that are not only difficult to enforce but, where there are changed conditions, are unduly restrictive and undesirable, but difficult to remove.(Dallstream & Hunt, 1954, 238)

Few restrictive covenants however contain time-limiting provisions. Nevertheless, it would appear that judicial termination can be secured where there is merger, that is to say, where all restricted areas come under common ownership, (Owens, 1967, 584) or where conditions have so changed that the purpose of the agreement is no longer served by its continued enforcement.(Trager, 1963, 141) Although there are also some state legislative provisions to invalidate such covenants, Owens feels that increased American legislation is required to clarify the inadequate and unclear grounds to declaring covenants unenforceable.(Owens, 1967, 587)

Where restrictive covenants exist in company with zoning legislation and there is a conflict, American law appears to presume that the covenant prevails only if it restricts the land to a greater degree than the zoning ordinance. Zoning is superior if it makes the use restricted by the covenant illegal.(Stair, 1964, 361) In Britain, on the other hand, the 1947 Town and Country Planning Act allows the local authority to impose

restrictions on existing restrictive covenants or discharge them, thus ensuring that the official plan is paramount. Similar provisions prevail in Alberta wherever there is conflict with an official plan, planning scheme or zoning by-law.(Merrifield, 1963, 2 & 9)

Most authorities acknowledge that a clearing statute is needed to terminate a restrictive covenant that has no stated term of existance and is generally undesirable.(Ascher, 1953, 262) It now appears however that wherever there is a policy of using covenants, time limits and termination provisions are routinely specified.(Owens, 1967, 585)

SOLUTION NO. 2: THE INTRODUCTION OF FLEXIBLE TECHNIQUES TO MODIFY ZONING

> "Flexible and discretionary techniques ... are shaking the very foundations of American zoning practice."
>
> (Mandelker, 1962, 156)

With increasing fervor, planners, lawyers and administrators have been turning to a variety of newly developing techniques in attempts to update and sustain traditional zoning practices. Recognizing that greater flexibility in the control mechanism, and the increased ability to deal with proposed development on an individual basis, could substantially reform and enervate the inadequacy of traditional zoning practice, attempts were made to evolve and devise techniques that would accomplish these ends without however unduly disrupting the zoning fabric. A number of new planning controls resulted.

Despite encouraging progress in the development of new techniques, the judiciary continued to be indifferent and even suspicious of the ad hoc

nature of these new flexible planning standards.(Counts, 1966, 6) The Courts, realizing that such methods were considerably less able to comprehend and satisfactorily deal with the discretionary techniques than traditional zoning, (Anon., 1969, 683) have found review time-consuming and frustrating, and it has been suggested that the courts have failed to adjust their views to the changing times, and that the barriers to judicial appeal that were experienced have been no legal accident.(Anon., 1969, 684)

The development of new control mechanisms in attempts to solve the inadequacies of zoning has therefore been somewhat difficult: The courts have apparently declined to judicially distinguish between the various new methods,(Williams, 1964, 93) and the resulting mystique created by a confusion in terminology has assumedly led many developers and protestors to claim that "zoning is manipulated by a small group of insiders at their expense."(ALI Draft 2, 24) Nonetheless, four distinct attempts to obviate zoning flexibility have been developed with some success in meeting their purpose.

1. Spot Zoning

The practice of individually zoning small parcels, generally described as "spot zoning", has been utilized in some form since the inception of zoning and can probably be characterized as the first of the techniques purporting to induce flexibility to zoning. Defined as a "provision in a zoning ordinance or a modification thereof which affects the use of a particular piece of property or a small group of properties and it not related to the general plan of the community" (Wood, 1961, 238), spot zoning has been hard hit for its most damning characteristic - lack of inclusion in a comprehensive plan.

Nevertheless, the practice of individual attention to small parcels in a large and otherwise homogeneous use category has always been perceived as one means to avoid zoning rigidity and, as Milner points out, all spot zoning has not been bad and some is even necessary.(Milner, 1962b, 47 and 1956, 129 & 131) Yet wherever the forces of traditional zoning remain firmly ensconced, especially in the U.S., spot zoning has tended to be regarded with marked judicial hostility.(Cunningham, 1965, 397) The practice of individually treating small parcels within a larger unit without accord to a pre-designated plan has in fact become so opprobrious there that the term "spot zoning" has apparently been considered a general perjorative label for any new and suspicious discretionary scheme.(Anon., 1969, 682)

Judicial and administrative reception of spot zoning in Canada has tended to be more receptive and liberal, and Milner feels that at least the Ontario Bench is well aware that some bias necessarily exists, and that all parcels cannot be treated equally.(Milner Lecture, April 11, 1968) The Supreme Court of Canada decision in Scarborough V. Bondi[1] appears to recognize that it is sometimes necessary to treat land differently, and the precedential effect of this decision has tended to facilitate the use and reception of spot zoning here.

There is however some indication that the American courts are also becoming increasingly receptive to such techniques as spot zoning and, so long as an individualized zoning is "related to something broader and beyond itself", it assumedly has a good chance of judicial approval.(Anon., 1969, 670) Described otherwise, there must be evidence of both "rationality" defined as the indication that certain planning activities in the form of

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[1] 1959, 18D.L.R. (2d.) 161.

land use analysis and policy formulation have been carried out in the area, and "equality", generally linked to the "in accordance with a comprehensive plan" requirement.(Heyman, 1970, 25)

Nonetheless, without legislative definition and with hedging judicial approval, spot zoning has tended to be utilized somewhat infrequently and, apparently because it is not generally in accordance with a comprehensive plan and tends therefore to result in unanticipated and uneven development patterns, local councils and planners are somewhat loathe to recommend its use.(Milner, 1962b, 47)

2. The Variance

Because it has legislative definition, variation of the terms of the zoning ordinance, either in its regulations or, and somewhat less likely, the use itself, apparently represents the "first means of amelioration" in a practical sense.(Stevens, 1959, 259) The majority of zoning enabling statutes specifically provide that exception or a variation of the zoning by-law may be permitted wherever "unusual" or "undue hardship" occurs to the applicant.[1] The term is however seldom defined further by legislation, although judicial rulings have determined that mere inconvenience is not sufficient. At least in American jurisdictions, it must be shown both that the variance won't alter the essential character of the neighborhood or won't result in an unreasonable return to the applicant, (Stevens, 1969, 259) and that the applicant's circumstances are unique and uncommon to the neighborhood and not simply of a financial nature.(Anon., 1969, 671)

Notwithstanding this judicial definition, the variance has been

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[1]See for eg. B.C. Municipal Act, S. 709(1) (c)

referred to as the "bete noire of the zoning experts" and there is apparently some clamour for its complete abolition.(Dallstream & Hunt, 1954, 231) Much of this criticism is levelled at the too frequent use of the variance, and apparent practice of appeal boards and councils ignoring standards or precedents in granting the variance at least in the few instances where such precedents are available.(Heyman, 1970, 33) One commentator notes, "Its creators expected that a system of judge-made rules would emerge to eliminate much of the vagueness",(Anon., 1969, 671) but such has apparently not been the case.

In any event, most variance or zoning review boards seem to be generally staffed either by laymen, so that judicial review is only a real issue in an apparently small proportion of cases, and then only on the narrow grounds of an illegal granting or obvious favoritism.(Heyman, 1970, 33) Insofar as these amateur tribunals should be bound by precedent, Milner's attitude is relevant: "An amateur tribunal surely should not be the victim of its own mistakes through some Nineteenth Century fetish for precedent and supposed predictability".(Milner, 1962b, 44) There is however general opinion that some set of very general ground rules is required wherever flexibility is being considered and discretion involved,(Anon., 1969, 671) and Milner maintains that zoning should not be too impermanent.(Milner, 1962b, 33)

Similar to criticism of other flexible techniques, a major complaint is that too much discretion lies with the variance and appeal boards.(Dallstream & Hunt, 1954, 227) One study contends that at least half of the appeal board rulings in the United States cannot be justified and probably represent illegal usurptions of power, (Blucher, 1955, 100)

and a recent survey substantiates this claim with figures showing that only 12 of 47 use and bulk variances granted by the Kentucky appeal boards could be deemed justifiable.(Anon., Note #27, 672) As Marcus in his treatise on zoning administration notes, "The legal literature is replete with studies of local boards of appeals that make significant departures from their relatively circumscribed legislatively delegated areas of authority."(Marcus, 1970, 97)

There is, nonetheless, considerable support for the continued use of the variance procedure, and Bryden notes its resiliency and persistence despite the introduction of more sophisticated methods of achieving flexibility.(Bryden, 1967, 228) It would appear that the use of variances will continue to provide at least one means of ameliorating the rigidity of zoning.

3. The Exception

The use of exceptions, generally in the form of special use permits, also became a popular means of securing some flexibility with the zoning ordinance. Although employable in a variety of ways and circumstances, they are standardly defined in the zoning by-law as the "may" uses that are not permitted as of right, but, being specifically enumerated, may be permitted only by approval of proper authorities upon application.(Delafons, 1969, 50)

Exceptions or "special use permits" were developed in the period following World War II as a control for nuisance and other "difficult" uses which did not conform to the traditional zones and configurations.(Stevens, 1969, 260) They were however apparently appreciated as an easy means of

postponing decisions on unpopular activities (Babcock, 1966, 7), and their use, for whatever reason, so flourished that by 1962 they had received generally wide and popular utilization in the U.S.(ALI, Draft 2,6).

The exceptions have however been critisized for their non-specificity and because they represent an increase in discretionary power. Stevens argues that the power to grant an exception is an administrative one, and as such would require a clear indication of the standards to be followed in the exercise or granting of development permission.(Stevens, 1969, 260) Others however have maintained that there is no cause for alarm concerning this discretionary power because only developments clearly singled-out beforehand for such treatment can be controlled, and because the criteria for permission is standard and well-defined in the ordinance.(Heyman, 1970, 34) Canadian critics, on the other hand, apparently feel that the resultant tendency of exception to set precedent effectively works against the attainment of flexibility.(Aykroyd, 1969, 48 & Laux, 1972, 35), and similar realizations in the United States led to the investigation of further means to obviate the rigidity of zoning.

4. The Floating Zone

The search for a new development tool that would not only be more flexible than prior methods but that could attain some greater degree of public and judicial favour led to the formulation of the floating zone concept, alledgedly derived from a combination of the special use permits and special use districts.(Delafons, 1969, 53) The "floating zone" is however a decidedly "more sophisticated concept" (Babcock, 1966, 8) for, operating much like Britain's Green Belt legislation, it reconciles a set of vague but described standards with an individual treatment of each development

proposal on its own merits.

Allied to zoning to the degree only that a district with its own standards and regulations is instituted in the by-law as a classification category, the floating zone has no geographically defined boundaries or locale and, like the "floating charge" of commercial law, descends to a definite location only upon application and permission by the relevant officials. As one commentator describes the process: "...with a 'right' proposal and develop...the textual reference would descend from the firmament and settle on the lucky owner's land -- but only after extensive bargaining between the applicant and the municipal legislature".(Babcock, 1966, 8) Thus, the boundaries of the floating zone would be determined individually and at the time of application, and would not be delineated by earlier pre-zoning decisions. Essentially, private enterprize would have the initiative on location.

Although there has been some judicial concern that use of the floating zone bears uncomfortable resemblance to "spot zoning" and hence is suspect, the technique has been generally favourably received (Heyman, 1970, 38). The first judicial ruling found "nothing unusual or improper in the method".(Rodgers V. Village of Tarrytown),[1] It now appears that if the use of the floating zone clearly exhibits a relationship to public objectives which are identified in the planning process, the device will be favourably regarded by the courts.(Heyman, 1970, 39)

Yet despite apparent judicial support, the floating zone has not seen that much utilization in the American context. Explanations range from claims that the conditions are too stringent for flexible use

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[1] N.Y. 1951, 96 N.E. 2d. 731.

(Stevens, 1969, 260), to opposed arguments that the technique allows too much discretion, fails to give adequate public notice, represents an unauthorized delegation of zoning powers without adequate standards, and by not according with a comprehensive plan and enuring to the benefits of individuals, constitutes spot zoning.(Johnson, 1970, 403)

Thus it seems that even though the floating zone might be able to sustain itself on the traditional and judicially defined ground-rules of zoning controls, it has failed to find sufficient public use and acceptance and official credibility. Doubtless the fact of its inappropriateness for the more traditional uses of zoning and control of nuisance contributed somewhat to its lack of favour (Stevens, 1969, 260), but its demise has served to provide fresh impetus to the formulation of new and different techniques geared to control of both traditional and developing uses and achieving maximum flexibility within discretionary limits.

A PROGNOSIS

It appears then that flexible zoning controls designed to breach zoning rigidity while conforming to traditional zoning behavior have failed to provide significant means of controlling emergent uses and development. William's resume and catalogue of their demise is as conclusive as any:

> 1. Massive confusion in their administration created misunderstandings and doubts as to their use and efficacy;
> 2. Vital public support did not materialize;
> 3. They were used too frequently for purely parochial advantage;
> 4. Widely used without a sufficient planning background, they were no longer topical or pertinent tools for the changing development patterns; and
> 5. They were overly idealistic and tended to represent "pervassive unrealism".
>
> (Williams, 1964, 89)

Clearly then, any new means hoping to provide solutions to continuing development problems would have to avoid the deficiencies of the existant flexible techniques and yet still accomplish significantly more than had traditional zoning procedure. Increased discretion and individualized attention seemed to provide some promise, even though it might only be accomplished outside the confines of traditional zoning.

CHAPTER IV

CONDITIONAL OR CONTRACT ZONING

The past two decades of American land use control have been distinguished by the energetic search for an ultimately successful and flexible means of development control. While feasible and practical results were already being acceptably obtained through variances and exceptions, another line of investigation was advancing concepts which had the potential for increased but individualized control with ample flexibility to accommodate emerging development techniques. Described variously as contract zoning, conditional zoning, site-plan control or planned unit development, each method represented a significant departure from traditional zoning theory while displaying certain affinity with British-influenced development controls. They tended to avoid the rigidity of zoning categories by instead being tailored for individual application to a particular piece of property, achieving control not through universal and pre-determined regulations but by way of individually directed permits, agreements, conditions or controlling site plan. Nevertheless, the history of contract zoning has been replete with definitional confusion, numerous practical problems and considerable judicial intolerance.

CONTRACT ZONING DEFINE

1. Contract Zoning

As a preliminary caution it must be pointed out that there is considerable confusion surrounding the correct designation for these new modes of land use control. A number of terms are encountered but as "contract zoning" was the first to be applied generically, though perhaps inaccurately,

it will be applied in this paper wherever general designation of the common technique is desired. In a number of instances however, different forms have been compared to "contract zoning" and in those cases the term is generally reserved for control forms invalidated by earlier judicial rulings.

Bassett's admonition that "contracts have no place in a zoning plan" (Bassett, 1936, 184) was instrumental not only in first designating the practice of obtaining agreements between developer and municipal authority but in casting the first ambiguous mold of legal invalidity. At the time however his remarks were specifically aimed at the then prevailing municipal practices of securing a donation of land or money prior to any consideration of the re-zoning application (see for eg. Shapiro, 1968, 283 & Beuscher, 1964 169), and then agreeing not to later rezone the property. The form and practice of conditional zoning has changes significantly since that time, and the contract zoning being increasingly approved by today's courts should not be mistaken for its earlier opprobrious form.

As it is both the common generic designation and a latterly more specific form description, contract zoning has been variously defined. One source describes it as a re-zoning conditioned by a "transaction where both owner and municipality undertake reciprocal obligations" (Shapiro, 1968, 269), and another as a re-zoning in which the municipality agrees not to change the zoning for a set period of time.(Schaffer, 1965, 43) Both however appear dated, and a more current judicial definition represents it more accurately as a "reclassification of land use in which the landowner agrees to perform conditions not imposed on other land in the same classification".(Scrutton v. Sacremento, in Curtin, 1970, 465) Because however of the difficulty in accurately circumscribing a technique of such varied forms and practices,

a "rezoning with concomitant conditions" might well serve to best describe the contract zoning practice of individually controlling defined parcels.

Despite the variety of control being exercised, certain common problems attach to each, and because they apply to individual parcels all contract or conditional zoning types have been castigated as illegal spot-zoning and for providing different regulations for the same type of use in creating individual "one-use" districts.(Shapiro, 1968, 280) In addition, the courts remain suspicious of an illegal bargaining away of legislative power by contract, and are apparently ready to invalidate an ordinance as soon as they encounter the word 'condition'.(Strine, 1963, 119) An adequate understanding however of these criticisms and of the form and nature of contract zoning can be best derived only by an independent consideration of each of the other forms.

2. Conditional Zoning

Conditional zoning is little different from contract zoning except that it appears to be somewhat less illegal. Functionally and by definition the two share a number of characteristics, and both permit rezoning subject to the carrying out of a number of stated conditions as agreed between the parties. As a result, the U.S. Courts have generally tended to interweave contract zoning with conditional zoning (Curtin, 1970, 463), and subsequent attempts to distinguish the two have been confusing and inconclusive.

Distilling common ground from the variety of definitions, it would seem that conditional zoning best describes the municipal practice of granting rezoning subject to conditions as agreed between the parties. As the major distinction from contract zoning however, there is no appearance

of reciprocal or bilateral promises which might be taken to characterize a "contract". The municipality appears to remain free to further rezone at any time, or to revoke the permitted zoning should conditions not be met. (Schaffer, 1965, 48) The position does not of course facilitate the developer who may, notwithstanding his own performance, be unable to enforce action by the municipality (Rettig, 1968, 204) but at least in this way, no fetter on the power to zone is permitted, and the castigations of illegal contract zoning are therefore obviated.(Schaffer, 1965, 47)

Opinion as to the legal efficacy of conditional zoning, as here defined, varies between approval (Schaffer, 1965, 49) and hints of doubtful validity (Shapiro, 1968, 271), the cause for such disparity apparently lying with the aforementioned inability to conclusively identify the distinctions between contract zoning and conditional zoning. A more liberal legal interpretation however appears to offer some hope for the clarification of this confusion (below p. 93), but wherever either term is encountered it is still advisable to pay particular attention to the substance of the technique rather than its description.

3. Re-Zoning With Concomitant Agreement

Unquestioned legislative and judicial approval appears to have been reserved for a third form of "contract zoning", a rezoning accompanied by concomitant or ancilliary agreement. Differing from conditional zoning only to the extent that the agreement upon which the zoning is conditioned does not commonly receive mention in either the zoning ordinance or the rezoning by-law,[1] rezoning with conditions sub silentio apparently vitiates the zoning change. Judicial approval appears to be

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[1] See contra. Myhre v. Spokane in Rettig, 1968, 198.

available so long at least as there is no official or formal indication that the municipal authority has received assurances of conditions or behavior from applicants for the change.(Shapiro, 1968, 275)

Observing Bassett's caution that "counsel will do well when presenting a zoning case to the court to omit all reference to contracts between parties and contractual restrictions running with the land" (Bassett, 1936, 185) municipalities thus generally prepare rezoning ordinances in the standard form, while bargaining with land-owners on the side. While the American courts are no doubt cognizant of this extra-ordinance manoeuvring, and have apparently been tacitly approving these rezonings(Rettig, 1968), the American Law Institute has objected to the refusal of the law to recognize reality thusly: "The real objection is that an activity which ought to be carried on at the public control level has been driven underground."(ALI, 1970, 193)

Rezoning with conditions sub silentio seems to have taken a variety of forms. The earliest was developed for use in Chicago's Cook County, where since the early '50's a procedure of voluntary alienation has achieved conditional control without running the risk of invalidation as "contract zoning". At the suggestion of the County Board of Zoning Appeals an applicant with a favourable rezoning request would voluntarily alienate his property to a third party, later re-acquiring it subject to a covenant running with the land, the terms of which enured to the benefit of and were enforceable by all inhabitants of the county. Objectionable uses would be prohibited by the covenant, which itself receives no reference in the rezoning ordinance.(Dallstream & Hunt, 1954, 236) This technique has

been frequently used instead of a use variance (Beuscher, 1954, viii, 52), and has been given some attention by other jurisdictions contemplating similar excursions.

Interest has also been shown in a slightly different application which would involve a prior commitment by the owner to either encumber his land or provide those physical alterations he expects the municipal authority to require before favourably considering his application. Similar to voluntary alienation, such action would seem to be the direct result of clear implications from the rezoning authorities, but the courts have apparently accepted the possibility of a purely voluntary action and have not therefore invalidated this procedure.(Shapiro, 1968, 274) In any event, suggestions for such alienation, encumbrancing or physical alteration generally arise from Advisory Planning Commissions, Planning Boards or Appeal Boards and are not directly traceable to the municipal legislative body which would authorize the zoning change. As such, they do not seem to risk the charge of "illegal contract zoning".

4. Planned Unit Development

Planned Unit Development methods, PUDs, are presently receiving considerable attention in the U.S. as a possible answer to the zoning inflexibility that has particularly plagued the larger and more complex development projects. Considered "contract zoning with sophistication" (Babcock, 1966, 11), the PUD is in fact an interesting hybrid of zoning, sub-division, condominium and design controls, which resembles rezoning with concomitant agreement but comes closest to representing an American form of development control.

Unlike individual techniques such as the floating zone, the PUD

concept employs a positive control function to create a parcel of either of an individual residential use or a mixture of uses, and while in operation it somewhat resembles conditional zoning (Bair, 1969, 4), it apparently achieves control with a minimum of pre-set regulations. Eschewing regular zoning by-laws, the municipal legislature determines only the percentage of space to be devoted to each contemplated use, and by waiving compliance with lot size, housing type, set-back and use restrictions, leaves the bulk of the control function to be mutually determined by the planners, administrators and developers.(Johnston, 1970, 405)

A number of procedural guide-lines and regulations are available for use with the PUD technique. For instance, most ordinances require that all involved land be under unified control with the application involving a single or serial development program.(Bair, 1969, 3) Minimum size varies and although one author suggests forty (40) acres (Wolffe, 1968, 10), the San Francisco ordinance requires only three (3) acres or a land parcel either bounded on all sides by streets, zoning or jurisdictional boundary lines, or park space, or inclusion within a Redevelopment project.(Delafons, 1969, 172) A set of comprehensive plans including elevations, site plans etc. must provide for the maintenance and operation of all facilities which will be of common use.(Bair, 1969, 3)

The first procedural step is application for a re-zoning, and while a preliminary plan in generalized form is the only formal requirement, indication that other pre-requisites have been met together with agreements to comply with regulations, to complete development and to bind successors must be submitted. The applicants' proposal must "meet the public purpose of the regulations to a degree at least equal to what would be accomplished

if the controls were enforced strictly as written (i.e. the original zoning)(Bair, 1969, 8), best accomplished, it is suggested, by a public hearing.(Wolffe, 1968, 10) Once approval is granted by the requisite authority, the plan as submitted and subsequently augmented to a comprehensive level becomes "set" and rigid, allowing only minor alterations as staging progresses.(Bair, 1969, 8)

Planned Unit Developments have proved efficient in the staged development of large multi-use tracts and in their ability to both handle increases in density without sacrificing aesthetics or amenities and to provide maximum use with efficiency and preservation of open land.(Wolffe, 1968, 11)

There have been complaints however that the standards employed are so vague that the bargaining process might be open to abuse (Babcock, 1966, 11), and that the technique allows the use of regulations to harass, delay or totally frustrate developers.(Lawrence 54) While this contention can be rebutted by an explanation of the relative novelty of the procedure (Wolffe, 1968, 9), a more real criticism centers on the rigidness imposed by the locking in of certain structures according to the submitted Plan. (Wolffe, 1968, 10)

Yet, it is apparent that the Planned Unit Development procedure achieves a significant degree of flexibility and freedom from zoning regulations and an increased discretionary input, all the while retaining the required degree of predictability and stability for public acceptance.(Wolffe, 1968, 11) Its flexibility and quick responsiveness to market needs have made it attractive to developers, and the American Society of Planning

Officials have called it the "regulatory device that will control land use in developed areas in the future". (ASPO, 1968, 43)

5. Canadian Site Plan Control

> "Site plan control is the application of the regulatory process to the use of particular parcel of land expressed in the form of detailed plans which have been determined by negotiation between the municipality and the developer, taking into consideration the nature of the use proposed and its probably effect on the neighbouring lands."
>
> Adler, 1971, 97.

Contained in Adler's thorough analysis of Ontario administrative procedure, this definition succinctly describes the uniquely Canadian solution to the problems of introducing flexibility where traditional zoning procedure has proven ineffective or insufficient. Called site plan control after the Ontario practice of requiring submission of site plans with the request for re-zoning (Milner Lecture, April 14, 1968), the procedure has both obvious affinity with the American PUD practice and a distinctly Canadian emphasis.

Similar to Planned Unit Development practice, site plan control achieves primary control through positive means, i.e. the encouragement of individual development proposals with flexible and discretionary controls, and thus differs significantly from restrictive covenants, use restrictions and conditions and voluntary alienation, all of which tend to be negative in scope and effect.

The manner in which Ontario administers site plan control -- Adler characterizes it as development control (Adler, 1971, 97) -- would seem to enable somewhat more control than is available with the PUD: The American

method is available only after the developer has voluntarily applied for a PUD rezoning, while Ontario municipalities, by pre-restricting the zoning of land to either the present use or 'agricultural', are able to force most developers to apply for a zoning change and thereby submit to the local jurisdiction.[1] Freezing of all development prior to the undertaking of an agreement by the developer completes this control process.(Adler, 1971, 97)

It would appear however that use of Ontario's site plan controls varies somewhat within the province. The use of 'associated development agreements', undoubtedly common in a number of Canadian municipalities, has been particularly followed in the Toronto area communities of North York, Etobicoke, Oakville and Hamilton (Milner Lecture, April 4, 1968) and "spasmodically" in other Metropolitan Toronto municipalities (Adler, 1971, 97), whereas site plan control, incorporating the conditions and design control of the plan with the rezoning amendment, appears somewhat less common. However, in London combined with the development agreements it is "the rule rather than the exception".(Adler, 1971, 95)

The London procedure requires the developer to submit a plan containing elevations, access, use and location specifications prior to the actual rezoning request, and to execute the associated development agreement encompassing site improvements, municipal services and access control before final approval of the more permissive general zoning by the local council.(OLRR, 1970, 7) Considerable negotiation normally precedes approval -- causing Milner to describe the procedure as "unauthorized development control" (Milner Lecture March 29, 1968) -- and assuming no objection is hereto-

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[1] See Standard Oil v. Kamloops [1972] 5 W.W.R. 660 and In Re District of North Vancouver Zoning By-Law 4277, (Unreported) 1973.

before raised, the by-law is submitted to the O.M.B. for their approval. (London, 1969). While London procedure publications make no apparent provision for a public hearing, Adler has indicated that planning board consideration is normally done at a public meeting. The site plans and actual elevations of proposed structures are then incorporated into the locally legislated by-law, and once OMB approval is obtained the development agreement is deemed a covenant to run with the land.(Adler, 1971, 97)

Nonetheless and despite widespread practice in London and other Ontario communities, the status of Ontario site plan control remains uncertain. In 1968 six Ontario municipalities petitioned the legislature for special legislation permitting the exercise of the fairly stringent controls over development being followed in London. All however were requested to withhold their requests until the study of planning and development control legislation had been completed by the Ontario Law Reform Commission. Their report, released in later 1971 recommended major changes to Ontario's Planning Act. Under the terms of the proposed legislation, the municipality may, in those areas designated by the Minister for application of the provisions, enter into agreements with developers concerning such things as highway dedication, access, off-street parking, landscaping and general building design. By-laws with particular application to the specified lands can then be passed, and the agreements registered against the land subject to the provisions of The Registry Act.(OLRC, 1971, Appendix B) The similarity to B.C.'s S. 702A - Land Use Contract legislation is striking.

Until final legislative approval however, the Ontario practice of site plan control remains at the forebearance of the courts and the Ontario

Municipal Board. The situation is not altogether satisfactory for there is doubt whether the municipalities have present authority to impose as a condition of rezoning that services be provided.(OLRC, 1971, 7 & Adler, 1971, 97) The Ontario Municipal Board, despite judicial advice to the contrary,[1] has oft-times requested that these conditions and development agreements be submitted along with the request for approval of the rezoning by-law.(Adler, 1971, 98) Although no serious consequences have yet flowed from this practice, there is concern that the Board has no guidelines to follow in discharging its functions, has no planning expertise, and generally "in planning matters, flies by the seat of its pants."(Greer, 1972)[2] Nonetheless, its implied or tacit approval of site plan control has probably served to sustain and encourage Ontario development control.

THE STATUS OF CONTRACT ZONING

1. Statutory Authorization

Although it is difficult to determine where contract zoning first initiated or the extent of its use, it seems fair to assume from Bassett's early condemnation that it has been of long consideration as a possible means of achieving development control or a degree of flexibility. By 1956 the practice of attaching conditions to rezoning was evidently widespread in the State of New York (per dicta, Church v. Islip, in Strine, 1963, 124), and there is little reason not to believe that other jurisdictions also engaged in the rezoning of property conditioned on the execution of agreements. Full scale employment does however seem rather uneven across the United States, for by 1968 contract zoning was still in an "embryonic stage"

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[1] See below, p.

[2] See also, Baker, 1972.

in the State of Washington.(Rettig, 1968, 218)

Nonetheless, by 1965 no state had yet expressly authorized the use of conditional or contract rezonings.(Bailey, 1965, 897). Admittedly, the New York State Legislature had introduced and approved a 1956 bill permitting the use by local council of "requirements, agreement or conditions", but it was promptly vetoed by order of the Governor, who gave the reason that it "would upset the orderly progress for zoning regulation". (Strine, 1963, 127) As a result, development contracts in that state were only legislatively permitted when the project concerned public housing.(Regional Plan Assoc., 1955, 166)

A variety of explanations have been advanced for this apparent reluctance by the U.S. state legislatures to authorize contract zoning. Bailey suggests that there is concern that to allow rezoning with conditions would require a complete and total revision of the official concepts of municipal land use (Bailey, 1965, 915), and the short life-span of the Model Land Development Code proposals to permit contract zoning,(ALI Draft 1) omitted in the subsequent major theoretical revisions of Draft 3, lends some support to his contention. The assumption is that there is unanimous agreement that contract zoning remain an unofficial and informal device. (Bailey, 1965, 915)

2. The Case Law

Perhaps the most significant American case that dealt with contract zoning was Church v. The Town of Islip (below, p93), in which the New York court, apparently disregarding the veto implication that contract zoning was illegal, found an implied authority for the municipality to impose conditions in rezoning instances. The Regional Plan Association, who had

originally urged the Governor to exercise his veto (Strine, 1963, 127), came out in strong opposition to the decision, arguing that without express grant by the legislature there could be no authority to enter into agreements with owners and developers.(RPA, 1955, 166)

The decision was however generally hailed by the majority of critics, who were quick to observe that not only was there no language in the act which might negate the implication that conditions could be imposed (Strine, 1963, 116). Others maintain that as the courts had previously been prepared to imply the power to impose conditions for variances and sub-division regulations, there was ample authority for such an implication in zoning, particularly where it favours the well being of land-owners, promoted general development and serves the general welfare. In any event, they argue, the exercise of zoning powers actually comes within the "police power"[1] of the state constitution and is not under the authority of the State planning acts, and the implication need not therefore be impaired by statutory silence. (Curtin, 1970, 464)

3. Legal Implications of Contract Zoning

a) The Contract. Prior to Church v. Islip attempts to introduce the flexibility of contract zoning into traditional land control practice were generally frustrated by contrary judicial rulings, on the nature of the contract. Faithfully heeding Bassett's dictum that contracts had no place in zoning, the American courts tended, as one critic notes, "to take a negative attitude about zoning changes which can be shown to have been made in return for a valuable consideration", and they seemed most anxious to avoid condoning the bargain and sale concept forseen in early contract zoning (Crawford, 1969, 151) Trager however feels that the suspicious and illiberal attitudes

of the courts were occasioned because they were unable either to determine what actions by council and developer had preceded the rezoning by-law and subsequent appeal, or to articulate exact standards for administrative conduct. (Trager, 1963, 147) Concern over administrative procedure often foreshadowed any question of by-law form, and the following characterization by Charles Haar is a good depiction of the result:

> If the court to which the question is eventually taken believes the governmental action to be arbitrary and improper, that action is branded as spot-zoning. If not, it is called a planned readjustment."
>
> (Haar, 1955, 1167.)

The importance of Bassett's early condemnation cannot be overstated with regard to the slow progress in the credibility and judicial acceptance of contract zoning. While Strine doubts the exact meaning and reasoning of Bassett's remarks, he has distilled them to three points:

> 1) there is no consideration for a contract since the municipality cannot promise to perform an act it is already under an obligation to do;
> 2) contract zoning represents an improper delegation by council of its legislative authority and hence is invalid; and
> 3) the power to impose conditions is ultra vires the authority of the municipal legislative council.
>
> (Strine, 1963, 119.)

Since the history of contract zoning has been distinguished by considerable manoeuvring by planners, lawyers, legislators and the courts to vitiate this type of rezoning without becoming ensnared by Bassett's enunciated illegalities, it might serve to consider these points more fully.

Bassett's first proposition - that the performance of an act that one is already under obligation to do cannot suffice as consideration for a contract - is a generally valid point of law, and no longer is contentious.

In such circumstances no contract would exist and as one case put it, "The phrase 'contract zoning' has no legal significance and simply refers to a reclassification of land use in which the landowner agrees to perform conditions not imposed on other land in the same classification." (Scrutton v. California, in Curtin, 1970, 465)

Bilateral agreements involving municipal obligations may not therefore represent legal contracts, and there have been frequent examples of deliberate avoidance of the mention of terms or conditions which could be interpreted as consideration for the rezoning. The practice of rezoning without official indication of conditions is perhaps a partial attempt to avoid such inference, as borne out by the Ontario Court of Appeal in Re North York Township By-Law 14067, 1960 (24 DLR 12) which directed the Ontario Municipal Board not to consider concomitant agreements when passing on a rezoning. Adler, however, claims that the Court has "unwittingly and unnecesarily fettered itself" by this decision (Adler, 1971, 98), and there is considerable opinion that the imposition of conditions has absolutely no effect on the legality of contract zoning, with particular reference to the apparently valid attachment of conditions to variances.(Strine, 1963, 127 & Curtin, 1970, 464)

The second limb of Bassett's tripartite logic argues that if a municipal council by agreement surrenders up its right to later change a zoning, it would constitute an improper and illegal delegation of legislative authority.[1] As the Regional Plan Association emphatically declares:

"A municipality has no power to make any agreement or deal

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[1]City of Vancouver vs. Registrar of Vancouver, L.R. District. 15 W.W.R. 35T @ 356.

> which will in any way control or embarass its legislative powers and duties." Neither the police power of the state itself not that delegated by it to a municipality is subject to limitation by private contract; nor is the exercise of such power to be alienated, surrendered or limited by any agreement or device."
>
> (Regional Plan Association 1955.)

In a nut-shell, the zoning of property within a municipalities borders must be kept mutable.(Shapiro, 1968, 270)

Anderson's American Law of Zoning however takes issue with the theory on this point, and concludes that not only would any municipal agreement be but an implied or moral assurance, but also that the alleged suspension of police power is only theoretical and not real.(in Curtin, 1970, 465) Moreover, fears of such alienation by those who disfavour the grant of increased discretionary power to administrative officials would seem baseless. Trager, for instance, was unable to document a single case of any agreement by the city which would prevent it from subsequently exercising the power to again rezone against the property.(Trager, 1963, 132)

Bassett's final point, that contract zoning is in fact ultra vires the local governmental authority, might in the light of an already observed absence of state and provincial enabling legislation have borne a priori concern. The alleged existence of an implied power to attach conditions to a rezoning has already been noted however, and the widespread popularity of this position has reduced somewhat the imperiousness of this last of Bassett's arguments.

Yet in the Canadian context both Milner (Milner Lecture, March 29, 1968) and Adler (Adler, 1971, 98) have expressed some doubts as to the validity of the Ontario practice of development control. Wherever

legislative authority is absent, there may be room for not only theoretical but real concern for the legal efficacy of contract zoning.

b) The Conditions. Although most attention since Bassett's direction had been to the form and substance of contract zoning the 1968 decision of Church v. Islip dramatically altered the nature of American judicial consideration from its previous formalistic approach to a realistic analysis of the essential nature and rationale of contract zoning. Because of the importance of the case to American planning law and its possible relevance in the Canadian context further attention seems warranted.

The Town of Islip had permitted the rezoning of previously 'Residential' property to a 'Commercial' classification, and by by-law specified that the rezoning was to be conditioned upon compliance with six conditions and upon the execution and recording of restrictive covenants concerning density, floor area ratio and landscaping. There was however no indication of an express contract. (Wood, 1961, 241)

The original Supreme Court referee who first heard the case invalidated the rezoning, ruling that the amendment constituted spot zoning while the imposition of conditions involved illegal contract zoning.(160 N.Y.S.S. 2d. 45, 1956, in Strine, 1963, 123). On appeal the referee's decision was reversed, and the court, noting that the practice of imposing conditions was widespread, concluded that the practice was not "contrary to the spirit of the zoning ordinances [or] beyond the statutory powers of local legislative bodies".(8 N.Y. 2d. 254, in Strine, 1963, 124) This ruling was subsequently upheld by the State Court of Appeals.(203 N.Y.S. 2d. 866)

The case accomplished two significant feats. Firstly, the court apparently was prepared to imply the power to impose conditions on the part of the local authorities. As a result, as one author notes, so long as there is no express contract in the terms of offer and acceptance, the affixing of conditions to a zoning amendment no longer constitutes illegal contract zoning.(Wood, 1961, 242) Secondly, by suggesting that the imposition of conditions represents not a bargaining away of discretion but an attempt to protect the interests of neighboring landowners, the court appears to have heralded a new approach to the legality of contract zoning and represents, as Strine notes, "the first attempt by a court to avoid the 'no-contract-zoning' doctrine while giving weight to the considerations underlying it."(Strine, 1963, 126) The emphasis was now to be on policies rather than superficialities.(Shapiro, 1968, 277)

With the change in emphasis, the conditions themselves, which had previously received next to no consideration from the courts, came within the scope of legal consideration, and the new legal situation thus appears to be this: in questions of contract zoning, there is a rebuttable presumption that the conditions do not render the zoning change illegal, and conditions should only be invalidated if the proper criteria for a rezoning does not otherwise exist or the conditions are arbitrary, capricious or discriminatory.(Shapiro, 1968, 277) The test of reasonableness, traditionally used to guage the validity of administrative action seems, together with the 'police power' requirements of public health, safety, morals and general welfare, thus becomes the primary test of the conditions in American contract zoning.(Strine, 1963, 128) From the reasoning of Church v. Islip and subsequent decisions, conditions will generally only be judged unreason-

able and hence invalid if they constitute a person licence, are founded primarily on aesthetic consideration, or are a disguised exercise either in land acquisition by expropriation or taxation.(Rettig, 1968, 210)

Notwithstanding this guidance in assessing the reasonableness of conditions, some practical problems have been encountered. There is, for instance, some suggestion in the Church v Islip decision that neither the applicants nor the neighbouring landowners could challenge the conditions involved ostensibly because they had "accepted" the conditions and accruing benefits.(Strine, 1963, 125) One critic calls this approach "artificial" and suggests that neighboring landowners should be allowed every available argument to contest conditions and protect the value of their property. (Strine, 1963, 126) However, an individual who might wish to attack the conditions of a contract zoning is faced with opposing suggestions as to procedure. One practitioner advises that not the conditions but the actual by-law itself be attacked in efforts to set aside the rezoning, for to proceed otherwise might result in retention of the offending by-law without the ameliorating conditions.(Bailey, 1965, 901) On the other hand, at least in the State of Washington, if the owner-petitioner wishes to invalidate the conditions and yet retain the rezoning, he must launch attack on the conditions themselves, but only subsequent to approval of the amending by-law.(Rettig, 1968, 213)

ANALYSIS OF USE

Contract zoning has experienced a slow and sometimes painful progression up to and through its several forms. Reception by the courts has been erratic and confusing, although earlier suspicion and hostility now appear

to be yielding to judicial tolerance and acceptibility.(Schaffer, 1965, 52)

Contract zoning appears to be on the verge of receiving wide acceptance over North America and is now being highly recommended wherever a community desires to ease the burden of traditional zoning and introduce flexibility to its control function.(Shapiro, 1968, 287) Its positive aura and ability to achieve significantly greater levels of control than previously possible, have proven so popular with local authorities and administrators that the right to use a contract zoning in the United States is frequently offered as a 'carrot' to encourage municipalities to adopt a land development plan (Bosselman, 1968, 12), and until recently the American Law Institute had included it, after careful consideration, as one of the suggested development tools in its Model Land Development Code.(ALI Draft 2)

There are also indications of a broader public willingness to accept this new means of land use control principally, it is claimed, for its capacity to ameliorate or minimize the otherwise adverse effects which a rezoning might have on adjacent and neighboring properties.(Bailey, 1965, 899) Density and use mixes, provisions for access and parking, buffer zones, and noise and design standards are also commonly possible with contract zoning, (Trager, 1963, 125) as are a number of factors and amenities not considered attainable with traditional zoning, including the health and safety factors of drainage, traffic, open space, set-backs and municipal services, and other more generally flexible standards commensurate with the new development patterns.(Bailey, 1965, 907) There is also evidence of contract zoning being utilized to obtain monies for the provision of municipal services in lieu of the more traditional bonding, although this extension

has apparently been unfavourably received by the O.M.B.(Adler, 1971, 100) and has been invalidated by some U.S. courts.(Shapiro, 1968, 283)

General relations between the planning administrators and the public have also been enhanced through the use of contract zoning, allegedly because use of contracts avoids the necessity of confusing legal statutes, thus making the parties more aware of their respective position, and because it enables a more co-operative approach involving the owner, municipality and neighbours and allowing them full expression of their needs and desires.(Bailey, 1965, 907 & 914)

While it would appear that ample opportunity exists to successfully utilize contract zoning, there are obviously a variety of other pre-existing techniques available which might provide somewhat similar solutions. Accordingly, it has been suggested that contract zoning be used only wherever the problem cannot be adequately solved by a previously proposed statutory scheme.(Trager, 1963, 126)

Variances and special exceptions, for instance, have traditionally been used in situations now purportedly soluble by contract zoning. Considered the "closest acceptable alternative to contract zoning that exists under present zoning schemes" (Bailey, 1965, 912), variances can be used to permit certain non-conforming uses and to relieve individual hardship. Accompanied by conditions, of which the power to affix has been considered inherent in the jurisdictions of variance boards (Wood, 1961, 233), they are able to secure substantially more control over the alloted use, and yet are considered of limited application because of the difficulty in demonstrating the "particular and unnecessary hardship" required for their invocation. (Shapiro, 1968, 281)

Similarly, special (or administrative) exceptions find little use in circumstances where contract zoning might be utilized, for although they are considered good for special problems, the statutes demand that each situation be unique thus eliminating recurrent or frequent use of this technique.(Trager, 1963, 146)

Conditional uses, sometimes called statutory exceptions, would seem to err on the opposite side, for being prepared in advance to facilitate certain uses as part of a general scheme, they fail to provide for the unique problems of individuals affected by the rezoning proposal.(Trager, 1963, 144) In addition, should the circumstances fit the criteria elaborated, the conditional use must normally be awarded, and the technique therefore does not offer the preferred discretion available with contract zoning.(Trager, 1963, 129)

The use of existing techniques can of course be avoided altogether either by a rezoning without conditions or the creation of a new zone for each particular situation. The first would however seem politically unacceptable for reasons already elaborated, and the creation of individual zones has been considered invalid for the complex and confusing plethora of illegal "one-use" zones that would likely result.(Bailey, 1965, 912 & Trager, 1963, 143)

It appears then that contract zoning satisfies the requirements of a satisfactory solution to the problems of zoning and is superior in use to the other flexible techniques. Nonetheless, contract zoning has come under some criticism.

The contention that contract zoning is discriminatory and liable

to invalidation as illegal spot zoning has been referred to by Trager as its "most substantial and severest criticism"(Trager, 1963, 135) primarily because:

> 1) the discrimination of contract zoning promotes inconsistency in policy regarding neighboring properties; and
> 2) contract zoning fails to accord with a comprehensive plan.
>
> (Rettig, 1968, 216.)

Rather than contradict the criticism, even the supporters of contract zoning will readily admit to the presence of discrimination,(Adler, 1971, 102) and agree that it does aim directly at a particular individual or property without necessarily considering the general welfare.(Trager, 1963, 136) In any event, Rettig notes that most contract or conditional zonings could be accomplished validly without the imposition of conditions, and hence the mere presence of conditions cannot provide substance for the claims of illegal spot zoning.(Rettig, 1968, 216)

The second branch of this claim against contract zoning argues that because it is ad hoc it fails either to accord with a general plan or to take into account the impact of development on the area as a whole, (ALI Draft 1, S. 3-106, p.72), and if there is validity to this contention, the points made earlier concerning the comprehensive plan (p.55) have equal application here. As Adler frequently emphasizes any reasonable effort at background research prior to the contract rezoning provides a suitable basis for measuring the "public welfare" aspect of the zoning change, (Adler, 1971, 95) although he warns that "unless there are external guidelines to constrain municipal activity, there may perhaps be a tendency to impose whatever conditions the traffic will bear."(Adler, 1971, 100)

In dealing with the allied argument that reclassification without a comprehensive plan tends to destroy the expectations of property owners (Trager, 1963, 140), Adler notes that the Ontario Municipal Board has shown concern for this problem by indicating a clear preference for development controls only until development stabilizes when it is to be replaced by conventional zoning.(Adler, 1971, 102) He argues however that the zoning map, since it fails to show future use, is no better a predictive agent than development control.(Adler, 1971, 103) A fortiori, Trager's treatise on contract zoning admits that all rezonings are generally contrary to expectations and, in any event, the courts have long held that zoning creats no vested rights in property owners.(Trager, 1963,140)

A related criticism is that contract zoning fails to provide an adequate public record or, as the American Law Institute explains, the indirectness of the process results in a situation in which the zoning map and regulations do not reflect the special treatment.(ALI Draft 1, S. 3-106, p.73) As a result, there apparently is fear that contract zoning will impose conditions upon the use of property that are unstated and "not in accordance with traditions and distinctly contrary to accepted legal principles." (Blucher, 1955, 99) Refuting arguments however note that private covenants as used in traditional zoning do not appear on any maps, and in any event, the actual rezoning procedure gives sufficient notice of potential undesirable use to excite further inquiry.(Bailey, 905)

CONTRACT ZONING AND THE RESTRICTIVE COVENANT

The conditions in contract zoning are thus frequently utilized as a form of restrictive covenant (Bailey, 1965, 909) accompanied by the

specification that they "shall run with the land ... and be binding on successors and assignees".(Rettig, 1968, 206) Many municipalities however, when they seek to enforce such covenants, experience some difficulty.

Traditionally, only the parties to the covenant may enforce it and wherever this principle is strictly construed, the municipality seeking to enforce the covenant would have to retain a portion of land which could benefit from it.(Bailey, 1965, 909) The Ontario Court of Appeal appears to have similarly ruled that restrictive covenants may be unenforceable against all but the original covenators, unless the municipality retains some land capable of being benefited, and even although the covenant expressly "runs with the land". (125 Varsity Road v. York, in Adler, 1971, 100). Although the case dealt with a sub-division, Adler maintains that it equally applies in respect to zoning by-law agreements.(Adler, 1971, 101)

Thus, the use of restrictive covenants can have a deleterious effect on the practical enforcement of conditional zonings, and Bailey warns that while subjecting the zoning to compliance with a restrictive covenant is often the simplest means of enforcement, it is the least advisable (Bailey, 1965, 907) If the municipality can obtain agreement to conditions from a developer Asher, for one, believes that the latter are easier to enforce than a restrictive covenant and far less troublesome.(Ascher, 1953, 262)

CHAPTER V

THE LAND USE CONTRACT

THE INTRODUCTION OF S.702A

It had been apparent for some time prior to 1968 that traditional zoning controls as permitted in this province were no longer adequate to cope with the problems and exigencies of Municipal land use control. A number of local governments, faced with increasing development pressures but insufficient resources to provide the necessary services for new urban establishment, were resorting to the practice of exacting both funds and a variety of development and amenity conditions from prospective developers, a policy seemingly ultra vires the Municipal Act. Most of these same municipalities were at the same time applying pressure on the Provincial Government to either legalize their activities or provide some alternate but superior means of controlling and securing orderly and economic land use, growth and development.

The Department of Municipal Affairs was no doubt aware of the problem, and early in 1968 began to consider more adequate means of controlling land development than available with existing sub-division and zoning enabling legislation. Considerable interest was at this time shown in the type of development controls exercised in the City of Vancouver, where the possibility of more innovative zoning with conditional or special uses existed. Vancouver's Comprehensive Development Zone received scrutiny, as did the Interim Development Control permitted in Alberta's land control

legislation.(South - Interview)

What was really desired however was a "more certain way of controlling land use", perhaps incorporating some of Vancouver's controls but without its Technical Planning Board, and permissive in the same manner as conditional uses.(South - Interview) In essence, the new legislation had to both correct existing abuses and lend validity to some prevailing municipal practices, and also provide an essentially new and innovative form of land use control.

THE DEVELOPMENT PERMIT

In 1968 then the new legislation was introduced as Section 702A. Clearly and admittedly modelled on a combination of commercial contract and land permit (South - Interview), the new 702A instituted the development permit, to be granted by the Municipal Council to the owner of land situated with a " Development Area" and providing both for the substitution of existing zoning by-laws by "other terms and conditions" and for the posting of bonds and security to ensure due performance by the developer, viz:

1) Where a Council has adopted an official community plan, the Council may, in a by-law under section 702, designate areas of land within a zone or zones as development areas.
2) Upon the application of an owner of land within the development area or his agent, the Council may, by the issuance of a development permit, waive the provisions of the by-law as they apply to that land and substitute therefor other terms and conditions which shall have the effect of a by-law adopted under section 702.
3) If the holder of a development permit does not commence the development described therein within two years of the date of issue of the permit, the permit shall lapse unless extended by the Council.
4) The Council may require that the owner or developer shall provide a performance bond or other security in the amount and form prescribed in the development permit.

5) The Council may prescribe the procedure for the issue of a development permit and the form thereof.
6) The Council shall not issue a development permit until it has held a public hearing thereon, notice of which as been published in the manner prescribed in subsection (1) of section 703. The notice shall identify the lands with respect to which the proposed development permit is to be issued, state in general terms the intent of the provisions of the proposed development permit, and state where and the days and hours during which a copy of the proposed development permit may be inspected.
7) Nothing in this section shall restrict the right of an owner to develop his land in accordance with the regulations of the municipality apply to the zone in which the land is situate. 1968, c. 33, s.166.

It should be noted that not only was the provision for the public hearing carefully carried over to the new legislation but, by permitting the owner to proceed either under 702A or the prevailing zoning regulations pertaining to his land, the existing zoning legislation was re-emphasized and preserved. Thus, the new legislation was apparently to be but an alternative to the existing S. 702. Nonetheless, the development permit and subsequent land use contract legislation was, for some reason best understood by its drafters, retained within the existing Division (3) - "Zoning", an anomoly which somewhat belies its status as an alternative and may well have served to considerably confuse municipalities who otherwise regard 702A as a clear-cut and dichotomous alternative to zoning.

In any event, the development permit legislation was doomed to an early grave. Despite alleged intentions to obviate existing municipal difficulties and to provide for more innovative municipal land use and development controls, the concept failed to gain the active interest of but a few B.C. municipalities. It quickly had become apparent that the prerequisite of an adopted official community plan was militating against the use of 702A for, despite the fact that "several municipalities ...

realizing the opportunity of ultimate control on key locations by development permit, rushed into efficient community plans" (Wilson, 1971, p.49), only a few B.C. communities, amongst them Surrey and Prince George, had an adopted plan sufficient to satisfy the requirements. In addition, the regional districts had apparently been unwittingly deprived of the use of 702A by government interpretation.

For instance, although the establishment of the regional districts predated the development permit legislation, S. 702A (1) specifically referred only to the adoption of an official plan by a council, thus apparently making no provision for plan adoption by the Regional Board, a function otherwise authorized by S. 796 of the Municipal Act. In the case however of at least one regional district, a distinct use was seen for the Development Permit procedure and the Board, having regard to S. 798(1)

> "With respect to that area of the regional district not contained within a city, district, town, or village, the Regional Board may exercise any of the powers conferred by or under Divisions (1), (3) Zoning, and (4) of Part XXI exercisable thereunder by a Council, and the provisions of those Divisions, except section 704, apply mutatis mutandis"

and concluding that their own adopted regional plan came within the definition of the "official community plan" of S. 702A, proceeded to institute the development permit procedure. The Department of Municipal Affairs apparently did not, however, agree with the District's interpretation of the legislation and was not prepared to acceed to their submissions. (Personal Correspondence)

Not surprisingly then, in 1970 the requirements of an adopted plan were deleted (1970, C. 29. S. 21) and the Development Permit legislation

became available to all B.C. municipalities or regional districts, with or without an official plan.

Despite however this greatly increased accessibility to S. 702A - the Development Permit legislation, "historic resistance continued" (South - Letter) and relatively few boards or councils saw fit to utilize the section. Only two regional districts[1] and seven municipalities[2] constituting but eighteen percent of the total forty-nine replies received, reported any experience at all with the Development Permit. The Government was well aware that 702A was not receiving the extent of use they had envisioned and admitted that there "was some confusion and doubt as to what a development permit was" (South - Letter) Municipal authorities felt that the permit procedure lacked clarity, was "cumbersome and unwieldy" and accomplished little that could not already be done simpler with other means. Recognizing that the municipalities were "acting the same and nothing new was being accomplished with the development permit" (South - Letter), the Government rescinded the legislation in April of 1971 and replaced it with the Land Use Contract.(1971, C. 38, S. 52)

THE LAND USE CONTRACT

1) In exercising the provisions of this section, the Council shall have due regard to the following considerations in addition to those referred to in subsection (2) of section 702:-
   a) The development of areas to promote greater efficiency and quality:
   b) The impact of development on present and future public costs:
   c) The betterment of the environment:
   d) The fulfillment of community goals: and
   e) The provision of necessary public space.
2) The Council may, by by-law, amend the zoning by-law to designate areas of land within a zone as development areas, but a public hearing under sections 703 and 704 is not required.

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[1] Bulkley-Nechako and Nanaimo.

[2] Port Coquitlam, Richmond, Maple Ridge, Victoria, Prince George, Terrace, and Mission.

3) Upon the application of an owner of land within the development area, or his agent, the Council may, notwithstanding any by-law of the municipality, or section 712 or 713, enter into a land use contract containing such terms and conditions for the use and development of the land as may be mutually agreed upon, and thereafter the use and development of the land shall, notwithstanding any by-law of the municipality, or section 712 or 713, be in accordance with the land use contract.

4) A contract entered into under subsection (3) shall have the force and effect of a restrictive covenant running with the land and shall be registered in the Land Registry Office by the municipality.

5) The Council may, by by-law, prescribe the procedure by which the municipality may enter into a land use contract and the form and consideration of the contract.

6) The Council shall not enter into a land use contract until it has held a public hearing, notice of which has been published in the manner prescribed in subsection (1) of section 703, and except upon the affirmative vote of two-thirds of all the members of council.

7) The provisions of section 703 apply, with the necessary changes and so far as are applicable, to a hearing under this section.

8) Nothing in this section restricts the right of an owner to develop his land in accordance with the regulation of the municipality applying to the zone in which the land is situate who does not enter into a land use contract with the Council.

9) A land use contract is deemed to be a zoning by-law for the purposes of the Controlled Access Highways Act.

(Amended by 1971, C. 38, S. 52)

The new legislation introduced to the house in spring of 1971 as Bill 100, varied considerably from the Development Permit in a number of instances worth noting. Probably the most significant change dealt with the manner of securing effective development control, for although the procedure for declaring a development area remained the same, the use of the permit to waive conditions of the zoning and sub-division by-laws was replaced by authority for council to enter into land use contracts containing "such terms and conditions ... as may be mutually agreed upon". At the same time, to broaden the power basis and rationale for the exercise of this

new authority, five additional considerations specified for "due regard" by Council joined the six of the original zoning section. Requirements for a two year permit duration (S.3) and optional requirements for bonding and security were deleted, persumably to be covered by the "terms and conditions" of the new contract procedure, while a tightening of procedural regulations now specified that procedure, form and consideration, as well as subsequent declaration of the development area, should proceed by by-law. (S. 3 & 5) A final and important addition to the legislation provided that the contract have the force and effect of a restrictive covenant running with the land.(S.4)

UNDERSTANDING THE LAND USE CONTRACT

The introduction of S. 702A - the Land Use Contract - was acclaimed by government forces and, it is alleged, the opposite side of the house. (South - Interview) Because the initial concept and much of the early drafting of the new legislation apparently arose basically from within the Department of Municipal Affairs, the land use contract was considered unique and individual.(South - Interview) The Minister himself hailed his new legislation as "revolutionary", (The Province, March 26, 1971) and was obviously enthusiastic about the technique,. (Personal Communication - Various sources)

Nonetheless, some critics entertained misgivings, particularly concerning the extent to which the concepts introduced by 702A were understood both by the government and by the general public. It was claimed that the legislation had been introduced without a clear understanding of either its intent, philosophy or reasoning. As a result, one planner

notes, "there is an aura of mysticism about 702A." Similar criticism appeared in the newsletter of the Planning Institute of B.C. and bemoaned the government's abuse of public opinion by hoisting 702A "up the flagpole to see who salutes". "A few positive guidelines", the comment continues, "as how new legislation should be used would be an indication that the use of such legislation has been thoroughly thought out". (Stallard, 1971, p.3)

Others have perceived what they consider to be a conflict in the theory of the 702A legislation. While government press releases and public statements have been interpreted as encouraging the use of the land use contract to achieve results not attainable with traditional zoning, other sources have cautioned that the land use contract "should not replace the normal zoning system" but should instead be standardly available as an alternative to zoning (South - Letter) Therein lies the conflict, for as one municipal study of 702A concluded, "How can the legislation on the one hand decree that a land use contract should not be used to circumvent normal zoning and on the other hand allow the issuance of a land use contract which permits a development which ordinarily would be in contravention of existing land use controls and regulations?" (Surrey, Draft Report on S. 702A, January 2, 1972)

Despite some attempts by the Department of Municipal Affairs to justify its "alternative" position on the use of 702A, it now appears that the Department has reiterated its stand that the land use contract not be used to the exclusion of zoning. S. 702A represents "refined zoning" for many municipalities, one official claims (South - Interview)

and there is warning that any use of 702A to obviate zoning might well be sufficient justification for intervention by the Minister.(South-Letter) There is indication however that at least some districts and municipalities have already initiated policy which could well involve the use of S. 702A to exclude or eliminate the need for traditional zoning controls.[1]

While the Government felt that there was a major need for some more adequate means to control the large multiple-use and community development schemes being contemplated in a number of lower mainland communities (The Province, March 26, 1971), it might be questionable whether in fact there was any real need at all for the type of use and development control contemplated by the land use contract. The Minister of Municipal Affairs may have felt that "zoning is a crude weapon for regulating development" (The Vancouver Sun, April 28, 1971, p.44) but some planners and administrators actually reported that rezonings were somewhat simpler and far quicker, and in some instances a much preferable means of control. A number of regional districts and municipalities have not as yet utilized S. 702A and at least seven of these[2] including four G.V.R.D. members, indicated that they were presently satisfied with the existing rezoning procedures.

It was expected that some use of S 702A would be the result of prompting by the Government, and in light of the allegedly enthusiastic and personal interest of the Minister in the new legislation, an attempt was made to establish the extent or degree of government encouragement to the use of S. 702A.

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[1] eg. Municipal District of Surrey, where by council policy all rezoning applications are to proceed via S. 702A.

[2] E. Kootenay, Sunshine Coast, New Westminster, Port Moody, Burnaby, North Vancouver District and Central Saanich.

Queries were directed only to those jurisdictions with actual Land Use Contract experience (Q. 13)[1], but only four of the seven regional districts and a surprisingly small two of fourteen municipal replies, constituting but 28%, reported any D.M.A. encouragement. In contrast, three regional districts and twelve municipalities reported "no encouragement". Correlated data on form and procedure tended to sustain this low figure, for only two regional districts and two municipalities, 24% of total replies, indicated that the idea or origin of the contract was derived from the Department of Municipal Affairs.(Q. 12)

Just how effective was the communication between municipal and government officials might be guaged by comparing the following data and media report. In reply to criticisms that the legislative amendment changing the requirements for by-law approval from a 2/3 to a simple majority had not been preceded by consultation with the municipalities, the Minister of Municipal Affairs had retorted that the "U.B.C.M. was consulted at the executive level". (The Sun, April 28, 1972, p.44) None of the sixteen replies from municipalities and regional districts reported the origin or encouragement of S. 702A from this same Union of British Columbia Municipalities.

It would appear then that the government enthusiasm for the use of 702A has not necessarily been picked up by the planners and administrators at the local level. Many seem cautious in their approach to the new legislation and some entertain definite misgivings as to its use. Nonetheless, nearly 43% of the general comments on 702A, ten replies from the twenty-three administrators and planners responding to an invitation

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[1] See Appendix A.

for general remarks,(Q.18) provided comments of a generally positive nature and noted the Land Use Contract as a "useful" and "valuable" tool, "destined to be the way of the future". The remainder of the total provided either qualified expressions of agreement (4), or remarks of a generally cautious nature mentioning areas of specific or general concern. 702A procedure was criticized as lengthy and cumbersome in four instances, while the remainder noted the confusing and unclear intent of the legislation, the danger of spot zoning and the need for comprehensive planning, and certain other problems inherent in the restrictive covenant aspect of S. 702A.

Although no attempt was made to directly ascertain the degree of acceptance and understanding by the owners or developers being party to the land use contract or the general public, sufficient information was obtained from the questionnaire replies to permit at least some slight indication of their position. Asked to indicate whether developers or landowners appeared to prefer 702A procedure to the old rezoning, 43% of the replies (9 of 21) reported that the new legislation was more favourably received than the old, as opposed to equal blocks of 28% each who were indifferent one way or the other or regarded the new technique less favourably.

While occasional comments on 702A have emanated from government sources, there have been almost no significant judicial or public observations on the new legislation and it has proven difficult to guage the extent of public awareness and understanding. Nevertheless, scrutiny of the data relating to the public hearing does provide some indication, albeit of a hearsay nature, of public reception of 702A. For instance,

ten of twenty-one replies, some 48% reported general public agreement at the 702A hearing required by subsection (6), while 15% indicated that public reception was "neutral". The remaining 38% of the replies reported opposition to the contract at the public hearing. In one municipality where all residential zones had been declared development areas, public opposition became of such magnitude and proportion that rezoning to multiple-family residential use had to be retained instead.

While it is neither possible nor correct to ascribe such opposition to the use of the land use contract per se, as opposed to traditional rezoning procedure, there does appear to be some confusion in the public mind. As one Regional District planner notes, "People in general are very confused on Land Use Contracts... they are more used to the security of zoning." Public opposition is however more likely centered about particular aspects of the proposed development than the mode for facilitating it. Nonetheless, one administrator has reported that because of the considerable negotiation which is apt to precede land use contract hearings, public reception and opinion has tended to coalesce about either approval or blanket opposition, resulting in easy acceptance or immediate and outright rejection.

The data does not however seem sufficient to either conclusively support or refute the proposition. It does not appear, for instance, that any more public interest than normal has been generated through the use of land use contracts, for 50% of nineteen replies reported attendance at hearings as average in comparison with a rezoning hearing, four showing below average and five above average attendance. One might conclude

however that those in attendance were somewhat more aware and articulate than usual, because only one reply of the eight indicating opposition felt that is was below the average for a rezoning public hearing. Four replies noted that the opposition where present, was average and three reported above average opposition. Nonetheless, only three of sixteen replies, 19%, advised that any deviation from the proposed contract had resulted from public hearing reception, the balance reporting in the negative.

Although solid comparative data is not available for rezoning hearings, the data seems to indicate that while there is little difference in attendance or the general mood at contract hearings, those in attendance are more responsively aware. This, together with the small proportion of instances where changes were incurred by reason of public reception, might lend some small support to the proposition that because of the pre-negotiation inherent in 702A procedure the opposition is less fragmented, better informed and less likely to reject the proposed contract.

While it is true that if the Land Use Contract is used exclusively then public hearings would be held for all proposed developments, in contradistinction to those developments which, because they conform to existing zoning, may not require rezoning hearings, it is nevertheless difficult to draw conclusions as to whether the public interest is being better served with the land use contract procedures. The Minister of Municipal Affairs had advised Municipal officers to always present proposals to the public before drafting any by-laws regarding development plans (The Vancouver Sun, May 13, 1972), but in at least a few instances, the

public hearing has already been criticized as but a rubber stamp. Generally however, it would appear that the public interest is being served at least as well with 702A as by the standard rezoning procedure, and perhaps even better. The declaration of a Development Area, for instance, advertises an intent to entertain contract applications and could be providing sufficient pre-warning to interested public parties, while the negotiations prior to contract execution or public hearing can also involve segments of the public.

Analysis of the overall data however, seems to indicate that neither the planners nor the public are any too clear on what S. 702A really represents. Although its short-term effects - a change in land use - seem little different from that effected by a rezoning, there is still confusion in the public mind and uncertainty by the administrators as to the long-range and theoretic implications of the new legislation. While clearly articulated government statements could go far in dispelling this confusion, it seems that the theory of S. 702A is not yet even fully understood by its creators.

THE USE OF THE LAND USE CONTRACT

Relatively little information concerning the scope and theory of S. 702A has yet emanated from government sources and attempts to otherwise ascertain such information have not been too successful. Nevertheless, some press statements are available and these together with impressions and material obtained from interviewed personnel provide at least some indication of the government position. Considerable data, on the other hand, was obtained from the questionnaires[1] and permitted

[1] See Appendix A

analysis of the ways in which the land use contract has so far been employed. Comparison of these uses with the goals and objects of 702A as expressed by the Department of Municipal Affairs produced some interesting results.

For the purposes of this exercise the government's position on anticipated uses of 702A was derived from the following:

1. In introducing Bill 100 - the first appearance of 702A in its present guise - the Minister of Municipal Affairs outlined the purpose and primary object of the new legislation thusly: "The Development Area amendment was designed to simplify procedure for major development projects and ... to provide for large-scale comprehensive development without a rash of zoning by-laws"; (The Province, March 26, 1971.)

2. Later clarification was provided in correspondence received from the Department's Director of Regional Planning who explained that 702A is to be used "whenever zoning is inadequate," particularly in instances involving large-sub-division development where services and open space are required, and in redevelopment of downtown cores and similar complexities, (South - Letter.)

3. The Minister provided further scope in February of 1972, almost a year after the introduction of Bill 100, when he noted that the legislation was intended to keep costs down, provide for parks and recreation lands, and ensure that public housing needs are met. (Vancouver Sun, February 9, 1972) He is also reported at this time to have advised individual planners to utilize the land use contract for all large five or ten acre developments. (Personal Correspondence, June 27, 1972.)

While there has also been some suggestion by the Minister that the land use contract be used to "freeze the resale price of land" (The Vancouver Sun, February 9,1972), none have so far ventured to employ the contract in concert with a land freeze, and the idea does not appear, in any

event, to have received further airing by the government.

Having thus determined, so far as possible, the government's deliniation of instances and uses where the land use contract should be employed, a comparison could be made with the actual uses to which 702A has so far been put. The following table categorizes some 59 out of a total 91 known uses of 702A, plus seven applications under the old permit legislation, and encompass all stages of progress for which reliable data is available.

TABLE I

USES OF S. 702A - THE LAND USE CONTRACT

A.	Residential			B.	Industrial	1 (2)
	1. Apartment	12	(14)	C.	Large Scale Commercial	6
	2. Condominium	2	2	D.	Standard Commercial	3
	3. Sr. Citizen High-Rise	3	(4)	E.	Large Scale Recreational	2
	4. Other Specialized Res.	2	(4)	F.	Architectural Control	1
	SUB	19	(24)	G.	Combined Uses	2 (3)
	5. Sub-Division	3		H.	Use Conflicts	1
	6. Recreational Sub-Div.	4		I.	"All Development"	2
	SUB	7				18 20
	7. Mobile Home -Trailer Park	5			GRAND TOTAL	59 (66)
	8. Motel	1				
	9. Camp Ground	2				
	RES. TOTAL	41	(46)			

* The figures in brackets represent the combined total of both land use contract and development permit applications.

From the derivation of the types of uses which appear to have received government encouragement or sanction, summarized as:

1) large-scale or comprehensive commercial or industrial developments;
2) multiple-use developments;
3) major subdivisions requiring amenity or servicing provisions; and
4) special development problems and other complexities not easily soluble with traditional zoning;

it can be seen at least prima facie, that the only items from Table I that fit comfortably within the officially sanctioned uses are A(5) or (6), B,C,E and G, while A - (2), (3) and (4) might also have potential application here. At the least 18 and at the most 25 of the total number of contract applications, thus come within these terms of reference. The balance, representing about 50% of the total, would seem therefore beyond the pale of sanctioned legislative competence.

To further investigate this comparison, a more intensive inquiry was made using data on the factors cited by the planners and administrators as their reasons for utilizing S. 702A. The following table lists actual uses, or where the land use contract has not yet been employed, contemplated uses, as grouped by those factors:

TABLE II

FACTORS FOR THE USE OF 702A.

702-A - R E A S O N S F O R U S E.	Q.4 ACTUAL	Q.C 2 CONTEMPLATED	TOTAL
1. Design Control	5	2	7
2. Landscaping	4	2	6
3. Flexibility			
a. less stringent regulations	3	1	
b. more stringent regulations	6		
c. public works control	1	1	12
4. Complicated Project	3		3
5. Major Development		4	4
6. Mixed Uses	4		4
7. Staging	1	1	2
8. Sub-Division	5	1	6
9. Acquisitionary			
a. parks or recreational land	2		
b. roadway dedication	1		
c. servicing charges	2	1	6
10. Use Variations			
a. instrusion uses or incompatibility	7	2	
b. permit specific but not general use	2	1	
c. permit use not specifically provided for in zoning by-laws	4	3	19
11. Special Problems			
a. emergency traffic control	1		
b. Strata Titles Act - condominium	1		
c. soil and sanitation	1		3
12. General Flexibility	2		2
13. "All Types"	1	2	3
TOTALS	56	21	77

Rather than attempting an analysis of this table in the terms of reference cited earlier and as used above, regard was had to the often encountered axiom that S. 702A - the Land Use Contract - should not be used in instances where traditional zoning methods would suffice.[1] It was therefore anticipated that subtracting from the above factors those which could assumedly have been adequately handled by zoning would leave a remainder which by themselves would be likely subjects for 702A.

At first glance for instance, the "Use Variations" of #10 seem to be attainable either through an increase in the number of zoning categories or a relaxation of controls by a Board of Variance. Prevailing liberal attitudes towards spot zoning by some Canadian courts[2] might permit intrusionary uses not generally allowable in other jurisdiction, although a recent Kamloops case[3] has underlain the necessity for avoiding discrimination in zoning by-laws. Minister of Municipal Affairs has himself expressly cautioned that S. 702A cannot be used as a device for spot zoning. (The Province, March 26, 1971, p.6)

It also seems possible to remove the "Flexibility" uses of #3 from those remaining for consideration by 702A, on the basis that it appears that these ends could be accomplished by a more effective use of both existing controls and new means of less magnitude than the land use contract. Comprehensive Development zones, for instance, or the use of concepts similar to the Planned Unit Development[4]

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[1] See above, p. 109.

[2] See above, p. 68.

[3] Standard Oil of B.C. Ltd. & A.R. Metcalfe Construction Ltd. v. The Corporation of the City of Kamloops. 1972, 5 WWR 660

[4] See above, p. 81.

would likely provide satisfactory solutions for not only the factors and problems of attaining flexibility, but also the "Major Development" issues and the "Mixed Uses". The Municipality of Burnaby for example, which encompasses a large area of both development and re-development potential, reports that its existing zoning and development procedure is satisfactory to handle submitted projects to date and that it therefore has no present need for the land use contract. Similar explanations have also come from several other lower mainland municipalities who have not yet actually used 702A[1], and of the twenty-nine reasons advanced for not using the land use contract or development area procedure, Question C - 1, almost 25% indicated "present satisfaction with existing zoning procedures".

Summing together therefore the factors of "Flexibility", and the allied "General Flexibility" of #12, "Major Developments", "Mixed Uses" and "Use Variations" produces a total of forty-one instances where the desired ends might seem to be more generally available with the existing or amplified zoning controls. Subtracting this figure from the total, corrected to seventy-three by the deletion of the three replies for "All Types", leaves an aggregate of some thirty-two factors, considerably less than half, which would appear to warrant land use contract consideration.

Extracting these remaining factors from Table II produces the following:

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[1]North Vancouver District, and New Westminster.

TABLE III

Subjects for 702A Consideration	Total Uses
A. Design & Landscaping	13
B. Acquisition	6
C. Complicated Projects	3
D. Staging	2
E. Sub-Division	6
F. Special Problems	3

Before however accepting the above as valid objects for 702A it might be possible to take one further step and to subject them to scrutiny in terms of the "considerations" legislatively required by both 702A and 702 - the standard zoning authority. The Municipal Act provides that the land use contract provisions can only be exercised so long as the Municipal Council, or Regional Board, has regard not only to the considerations of 702A but also those referred to in Section 702:

> "702 (2) In making regulations under this section, the Council shall have due regard to the following considerations:-
> (a) The promotion of health, safety, convenience, and welfare of the public:
> (b) The prevention of the overcrowding of land, and the preservation of the amenities peculiar to any zone:
> (c) The securing of adequate light, air and access:
> (d) The value of the land and the nature of its present and prospective use and occupancy:
> (e) The character of each zone, the character of the buildings already erected, and the peculiar suitability of the zone for particular use; and
> (f) The conservation of property values."

The land use contract provisions read:

> "702A (1) In exercising the provisions of this section, the Council shall have due regard to the following considerations in addition to those referred to in subsection (2)

of section 702:-
(a) The development of areas to promote greater efficiency and quality:
(b) The impact of development on present and future public costs:
(c) The betterment of the environment:
(d) The fulfillment of community goals: and
(e) The provision of necessary public space."

Just how important these "considerations" are remains somewhat of a moot point. The recent decision in the North Vancouver Neptune Terminals case[1] did however contain a strong admonition to pay special attention to these reasons whenever applying the zoning sections, and the Prince George solicitor who helped prepare the draft contract and procedural guidelines now being observed in a large proportion of the districts and municipalities similarly warns municipal officers to pay particular heed to these considerations.(Wilson, 1971, 50) Unfortunately, no judicial or legislative assistance can be derived from other Canadian provinces for it would appear that only British Columbia has included these types of provisions in authorizing the Municipalities and Districts to exercise zoning and development controls.(RAIC, 1965 7)

In likely response to these recommendations, and on the advice of solicitors, a majority of contracting local authorities have made specific reference to the considerations of 702(2) and 702(1). Six[2] of the eleven contract forms examined contain such a reference, while another[3] refers to these considerations in the authorizing by-law. Only those contracts which do not appear to follow the model form prepared

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[1] Nov.18, 1970 Supreme Court of B.C. (Unreported).

[2] Okanagan-Similkameen, Fraser-Fort George, Surrey, Delta, Richmond and Prince George.

[3] Port Coquitlam.

by Mr. Wilson make no reference whatsoever to the sections.

Whether or not in fact the Councils and Boards actually do attend to these considerations in authorizing a land use contract is obviously difficult to determine, but those considerations do seem sufficiently broad to provide at least some vestigal authority for including all six of the above subject groups as potentially valid objects of S. 702A. A more personal or subjective analysis might possibly assign more specific considerations to each of the subjects listed, but the results would vary according to each individual's applications, and without the benefit of further judicial guidance or consideration this exercise would serve no useful purpose at this point.

THE PRACTICAL CONSIDERATIONS

1. Status

The questionnaire served a dual purpose: Not only was it designed to ascertain the degree and extent to which the S. 702A provisions were perceived and understood, but it also provided both a tally of the number of development areas and land use contract applications thus far encountered and, where authorizing by-laws or contracts had actually been prepared, an indication of form and content. While the types of uses and their rationale had greater implications for analytical purposes, the catalogue of contracts did at least provide a relative indication of progress in the general use of 702A.

By the late spring of 1972, almost a year following the introduction of the new legislation, exactly half of the regional districts and at least twenty B.C. municipalities had had some experience with

S. 702A, as indicated by the following table:

TABLE IV

	Regional Districts	Municipalities	Total
Development Area Declaration only	4	3	7[a]
Land Use Contract Applications			
a) 1 - 3	4	9	13[b]
b) 3 - 5	3	7	10[c]
c) More than 6	3	3	6[d]
TOTAL	14	22	36

- June 1972

a - Comox Strathcona, East Kootenay, Alberni-Clayoquot, Thompson-Nicola R.D.s: New Westminster, N. Saanich, Delta.

b - G.V.R.D., Bulkley-Nechako, N. Okanagan, Peace River-Liard, R.D.s: Port Coquitlam, Maple Ridge, Oak Bay, Sydney, Esquimalt, Mission, Matsqui*, Sumas*, McKenzie*

c - Squamish-Lillooet, Okanagan-Similkameen, Fraser-Fort George R.D.s: West Vancouver, North Vancouver City, Coquitlam, Richmond, White Rock, Victoria, Saanich

d - Cariboo, Central Okanagan, Nanaimo, R.D.s: Langley City, Prince George, Surrey.

Note * - indicates no substantiating data received either for reason of no reply to the questionnaire or because information was received too late for inclusion.

Thus, only eight communities have had what might be considered as "major" experience with the terms of S. 702A although at least another twenty-three have had at least some dealings with land use contract applications. Roughly half of the regional districts and an obviously large but unascertained and somewhat meaningless number of municipalities

have had as yet no experience with S. 702A. A number of these districts and municipalities[1] have however reported that although they had not utilized the actual procedure, active consideration was being given to its implementation, including the examination of possible development areas and, in some instances, the preparation of draft contracts in anticipation of 702A applications.

Wherever an application for a land use contract indicated that S. 702A was in active process, the local authority was asked to provide information on the status of the application and the form and procedure being observed and the following table provides an approximate indication of the status of some thirty-one regional district and sixty municipal land use contracts. Information on a further twenty or so applications is not included in this table for the following reasons:

a) insufficient indication on status of individual contracts was available, as in the case of Prince George and the Cariboo,
b) information was received too late for compilation, eg. Nanaimo City and McKenzie District,
c) no reply to the questionnaire was received, eg. Matsqui, and Chilliwack, and
d) the task of examining each of a large number of contract applications, as in Surrey where each rezoning application is, by council policy, to be processed under S. 702A, proved beyond the scope of this project.

TABLE V

Status of Contract Applications June ' 72	Regional Districts	Municipalities	Total
A. Rejected or Dropped	12	7	19
B. Completed and Filed	3	21	24

[1] Terrace, Port Moody, North Vancouver District, Central Saanich.

TABLE V CONTINUED

Status of Contract Applications June ' 72	Regional Districts	Municipalities	Total
C. Completed, not yet filed		9	9
D. Approved, but awaiting execution		2	2
E. Awaiting Public Hearing Prior to Approval		7	7
F. Being Drafted	10	9	19
G. "Pending"	6	5	11
TOTAL	31	60	91

Translating these statistics into percentages, as of Summer 1972 some 21% of the 702A applications have been dropped, 26% have been processed to their completion and the remaining 53% remain in some stage of the proceedings. While it would perhaps have been useful to compare this data with the disposition of standard rezoning applications, the figures by themselves do not appear unreasonable, and indications elsewhere tend to substantiate certain procedural similarities.

2. Form

Further data on completed land use contracts or the master contract forms themselves were submitted by fourteen regional districts and municipalities, and these were studied both from the point of view of their own content and in the light of other questionnaire data. The most pronounced indication was that the majority of these contracts seemed to spring from or align with one particular form, subsequently discovered to have been prepared by J. Galt Wilson, a Prince George

solicitor with an early and particular interest in S. 702A. At least five of the contracts examined, for instance, follow the Wilson format exactly[1] while an additional three adhere somewhat to this formula but with the addition of a number of additional, and in some instances modifying, provisions.[2] The remaining five contracts, representing about 46% of the total, appear significantly distinct to stand on their own, and suggest origins entirely independent of the Wilson model.[3]

Inquiries as to contract form were also included in the questionnaire and twenty replies were received. The great majority, over 75% of the total, reported that their land use contract forms were devised and prepared by a combination of lawyer and planning staff. Only three municipalities indicated that contract preparation had been through the exclusive services of a lawyer, while two others appeared to use the services of either the planner or administrator without any legal assistance whatsoever.

Nonetheless, some degree of legal input was therefore present in eighteen of the replies, an 85% coverage. Yet, in reply to a question on the origin of the contract form, only half appeared to feel that form initiated with the solicitor, the remainder noting either the Municipal Act or Regional District meetings as responsible.

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[1] Terrace, Fraser-Fort George, Prince George, Mission and Delta.

[2] Okanagan-Similkameen, Richmond and Surrey.

[3] Esquimalt, Port Coquitlam, Coquitlam, West Vancouver and White Rock.

There was however a significantly low response to this question, only ten replies, and this probably reflects confusion over the ambiguity of the question.

In any event, it seems that the legal profession has had a significantly major involvement in the preparation of land use contracts, and while this might diminish as forms and procedure become more standardized, there remains the likelihood of some degree of continued consultation and assistance. Municipal Affairs had indicated that it does not favour the preparation of land use contracts by planners alone as it "tends to let the courts do the interpretation" (South - Interview) but the indication to this point is that contract preparation has been and will likely continue to be co-ordinated effort between planning staff and lawyer.

3. Procedure

Although it might be expected that the preparation of procedural form, because of its administrative nature, would lie well within the planners' jurisdiction, such has not been the case to date. Although there is no direct indication of procedural origins, more than half (5 of 9) of those districts and municipalities supplying information on procedure have elected to observe the guidelines prepared by Wilson to accompany his contract form.[1] Two others share a common procedure different from and somewhat more detailed than the Wilson format,[2] while the remaining three[3] exhibit certain independence

[1] Fraser -Fort George, Prince George, Mission, Terrace, & Delta.

[2] Cariboo, Squamish-Lillooet.

[3] Central Okanagan, Bulkley-Nechako & West Vancouver

in the development of procedural guidelines. The greatest distinctions seem to lie in the designation and number of approving authorities however, and generally similar patterns characterize all procedure outlines submitted to the point of adhering to Wilson's guidelines or to the fairly specific procedural requirements of the legislation.

The other distinctions are worth noting. For instance, although most local councils now require only preliminary sketch plans to accompany the initial land use application with full design and working drawings to be submitted only after public and council approval has been indicated, a few communities have procedural standards requiring a more comprehensive design submission at the time of application[1]. Of somewhat more significance however, is the determination of the status of the applicant. It appears that the practice in some municipalities is to declare the Development Area of 702A (2) after the application for a land use contract, subsection (3), has been received. (viz. Surrey, Central Okanagan) There is, however, considerable support for the opinion that the development area declaration must preceed any contract application.[2] and a careful reading of the legislation seems to substantiate this position. At least one procedural guide-line received has however clarified and re-stated this requirement. (Quadra Planning Study, Development Area Guidelines for Quadra Island - January, 1972)

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[1] Eg. North Vancouver City.

[2] Eg. T. Carlow, New Westminster Land Registrar, Personal Interview.

A number of procedural difficulties and misunderstandings have been encountered in the initial processing of land use contracts. Several administrators, for instance, complained that S. 702A procedure was both "cumbersome" and "time-consuming", while others preferred the relative "simplicity" of zoning.

The procedural sequence and timing for nineteen land use contracts which have been processed more or less to completion tends however to contradict such impressions. Eleven of these contracts, accounting for 58% of the total, required a minimum of from four to six months for completion, while a further four applications had a duration of from six to twelve months. The remaining four applications, including one still "pending" at the time of inquiry, took from one to two years to completely process. This can be compared with estimates of up to six months for normal rezonings in Vancouver (Geronazzo, 1964, 2) and both Surrey and Coquitlam (Personal Correspondence). The fact that almost 60% of the land use contract applications fall within this range tends to indicate that inordinate delays in processing the remaining applications might be occasioned by circumstances not necessarily connected with the general procedure.

What is perhaps the last step in most land use contract procedures was expected to cause the most concern for local government officials. Although S. 702A (4) is clear that the land use contract "shall have the force and effect of a restrictive covenant running with the land" and "shall be registered in the Land Registry Office", there were only a few cautious statements expressed as to its effects and longterm implications. Several administrators

anticipated problems in enforcing the positive nature of the land use contract, as distinct from the generally negative form of most restrictive covenants, while others have reservations concerning the problems of amending executed and registered contracts. Only one municipality to date has yet attempted to create a reversionary restrictive covenant to be released by consent from the Land Registry once construction is complete according to the terms of the contract, although a few other contracts contain termination clauses and local officials have expressed similar interest in devising means for terminating or releasing the covenant.[1]

A number of potentially interesting legal questions seemed implicit in this statutory creation of a restrictive covenant, and it had been reported that certain Land Registrar had initial doubts as to the registerability of land use contracts. It was expected therefore that a large number of planners and administrators would attest to encountering at least some problems with the restrictive covenant aspect of the land use contract. Nonetheless, only three replies from a total of fifteen received to this inquiry (Q.16) reported any problems, the balance indicating that no problems had been encountered concerning registration of the contract as a restrictive covenant. Accordingly, an initial intent to study this area somewhat more intensively was de-emphasized.

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[1] See for instance, Ascher, 1953, 262, or generally Owens, 1967 or Snyder, 1966.

THE LAND USE CONTRACT AS DEVELOPMENT CONTROL.

Even a casual familiarity with the land use contract legislation reveals a significant degree of similarity between British Columbia's S. 702A and English Development Control. Some assimilitude might be expected however, considering that the precedent Development Permit legislation borrowed heavily from Alberta's Interim Development Control, itself a copy of much of the English legislation. The existing sections authorizing declaration of a development area and subsequent use of the land use contract to waive provisions of the zoning or "any by-law of the municipality" -- in effect determining land use and development in terms entirely extraneous to the by-laws -- does permit a discretionary form of control far more common to English development control than American-developed zoning. Nonetheless, zoning continues to be a primary land control form in B.C., and while the land use contract procedure might seem to have the potential for application in a similar manner as Development Control, certain practical and procedural disconformities appear to have led to different results.

The effective utilization of English-style development control appears to rely on the continued existence of two factors:-

1) the presence of strong and well articulated government policy on questions of development and land use; and
2) the preparation and observation of an official community plan to guide and determine local land use decisions.

Both these factors seem possible within the provincial context, and the policies of the B.C. Government towards land use and planning were examined in comprehensive planning terms and to attempt an analysis

of the strength of the government position and implementation at the local administrative level. The findings indicate something less than a serious or firm position on either point.

All municipal and district zoning by-laws, as well as ordinances establishing procedure, declaring development areas or authorizing the land use contract must draw their authority directly from the Municipal Act, delineating as it does the scope and extent of Provincial control over land use and development. Yet traditionally, even although municipal and local governments are in a sense merely "legatees" of the basic provincial authority, they do retain an appreciable degree of independence in such matters within their own jurisdiction, providing of course that they remain strictly within the terms of the Act. A number of recent provisions do however serve to substantially enhance and increase the direct involvement of the provincial government in the local land control process.

Whatever the reasons for the establishment of the Regional Districts legislation -- some say they were instituted in response to a need for increased local autonomy -- the extent of direct provincial control over their operations has served to broaden the scope for involvement by that senior level in matters and land use and development control. S. 798 (A) (2), for instance, requires Cabinet approval for any and all by-laws, be they zoning, sub-division or otherwise, which affect territory within the regional district but not included within the confines of a town, village, district or city. This measure has caused particular concern to those districts who exercise control over the Unorganized Territories and the section has been criticized by one planner

as an apparent reflection of a lack of confidence by the province in the competence of the Regional District Boards.

Subsection (6) of S. 798(A) appears however to extend this provincial control even further with its necessity for Ministerial, as distinct from Cabinet, approval before a land use contract can be approved anywhere within the Regional District[1], or in the flood plain of a municipality. In subsection (7) the Minister of Municipal Affairs is given the power to grant an appeal to parties whose application for a land use contract has been rejected by the Regional District. He can, "if he is of the opinion that the proposal of the owner for development is reasonable, direct that the lands be designated a development area and a land use contract entered into..." While this section is notable as authority for the recent Gabriola Island hearings, which ultimately served to substantiate the Board's original rejection of the development proposal, it also seems to have been given a somewhat different interpretation by the Minister. In a public statement deploring the actions of certain "bureaucrats" who were opposing a proposed Lower Mainland development, the Minister warned local governments to read with caution that section of the act permitting him to allow development if he decides that it is in the public interest.[2]

The provision of what might be considered central direction in the administration of land use contracts does however seem more concerned with the consolidation of direct and final power in the hands of the

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[1]This provisions was repealed by the fall 1972 session of the newly elected legislature.

[2](emphasis mine) The Vancouver Sun, January 28, 1972, 6.

Provincial Government than in providing a series of common and well-conceived policy guidelines for general application throughout the province. Legislation requiring ultimate provincial approval of municipal and district contracts, and talks of provincial land development freeze to accompany and facilitate implementation of the new legislation (Vancouver Sun, Feb. 9, 1972) to not appear effective as central government guidance, supervision, and assistance to its junior governments.

Attempts to successfully integrate zoning with comprehensive planning have long posed a problem to both the senior levels of government and administrators and planners at the local level. Although true English development control should obviate any such accommodation, attempts to institute similar control methods on this continent seem to require either some justification for a continued co-existence or some other satisfactory means of relating the two procedures and concepts.

The experience with S. 702A in this province has been somewhat of an about-face: The original development permit legislation specifically required the existence of an "official community plan", but this requirement was dropped by the 1970 amendments and 702A became universally available. Few explanations are available however to explain this policy change, and government officials have merely pointed out that few municipalities had in fact adopted official plans, and the scope for the new legislation was thus severly limited.(Personal Interview - Department of Municipal Affairs) The fact is however that the provincial authorities did apparently very little to in any way encourage the use of the development permit within the natural framework of an official or

comprehensive plan. When, for instance, the Bulkley-Nechako Regional District attempted to utilize the new legislation, they were advised by Department of Municipal Affairs officials that the "Official community plan" did not encompass the District's own adopted Regional Plan. (Personal Correspondence - Director of Planning, Bulkley-Nechako Regional District) Considering the seemingly broad definitional range inherent in the "community plan", the attitude of the government appears unnecessarily rigid, and the absence of the community plan requirement has been sharply criticized by municipal officials.(The Vancouver Sun, April 28, 1972, p.44).

However, deletion of the requirements of the official community plan, did make the new 702A provisions universally available to all municipalities and regional districts and assumedly gave some expression to the sentiments of the government of zoning, development control and comprehensive planning. Although a recent newspaper account reports the Minister as advising councils that, before using zoning controls, they should "...first underscore community goals and values and ... express them in an official plan." (The Vancouver Sun, April 28, 1972, p.44) there have been few indications of present government philosophy to substantiate this position.

With attention focused on the problems of inter-relating zoning and comprehensive planning by this somewhat nebulas attitude, one of the major objectives of the questionnaire inquiry was to ascertain the extent such correlation by both local and senior governments and administrative staff. Data and material pertaining both to the adoption or observation of an official "community" plan and the

presence or absence of some form of professional planning staff, considered to be a general though not exclusive indicator of comprehensive planning activity, was collected and evaluated in terms of experience with S. 702A. The results were not unexpected and generally inconclusive but do at least provide somewhat of an inventory.

The following tables are drawn from questions A 1, 2 and 3, and B 2 of the questionnaire and give some indication of the degree and extent of comprehensive planning in the surveyed communities.

TABLE VI

	Comprehensive Plan	Plan in Prep. or Observed	No Plan	Total	Planning Staff	Consultant Planning	No Planners	Total
Regional Districts	8	12	4	24	18	-	8	26
Municipalities	16	6	2	24	10	6	8	24
TOTALS	24	18	6	48	28	6	16	50

* The Regional Planning Division of the Department of Municipal Affairs does however make certain planning services available to those regional districts without a planning staff or access to consultants.

Of course, not all of the communities included in these tables have yet had the occasion to employ the Land Use Contract provisions but of those who did, all but two municipalities, Esquimalt and Oak Bay, and two Regional Districts, Central Okanagan and Comox-Strathcona, had either an officially sanctioned plan or at least one in general observation.

However, the two municipalities are old and well-established urban areas within the confines of Greater Victoria, while both regional districts operate with some form of planning staff.

A significantly higher proportion of communities using 702A had a plan but lacked planning staff - two of twelve regional districts and thirteen of twenty municipalities, for a grand total of fifteen out of twenty-two communities with 702A experience. Only the two regional districts of Central Okanagan and Comox-Strathcona operate with some form of planning staff but without the benefit of a comprehensive plan. Interestingly, four of the remaining local authorities who reported no use as yet of 702A volunteered the opinion that such lack of activity was directly occasioned by the absence of either policy guidelines or a professional planning staff. An additional four replies generally commented that 702A should not be used without basic guidelines or comprehensive planning .

From this generally consistent attempt to incorporate comprehensive planning, it seems reasonable to conclude that comprehensiveness in land use control remains an active concern within the professional planning staff. The provisions of 702A have not so far been utilized anywhere in the province without at least consideration by planning staff or adherence to a comprehensive plan, and it seems unlikely that the land use contract will be used on any large scale basis without sufficient planning consideration to insure against irresponsible use of the legislation in the future.

The attitude and policies of the provincial government, on the other hand, particularly as thus far implemented, seem somewhat inconclusive and in need of clarification. While successful employment of English development control requires the preparation and observation of community development plans, few B.C. municipalities or regional districts have yet produced such comprehensive plans, and the Province has made no efforts to encourage the exercise ... Except for a few addresses to conferences and meetings of local officials and planners, Provincial Government staff has been loathe to provide much assistance in the way of interpreting the new legislation, much to the consternation of a number of municipal and area administrators.

Without such guidelines, there has been some confusion and temerity in the use of 702A by these local officials and there could be some serious question here as to the sufficiency of the planning process which precedes implementation of the provisions. Indeed, continuing confusion on the part of planners and administrators seems to have now extended well past the normal "introduction period" for legislation of this sort and probably exemplifies not only the vagueness of the Provincial Government policy but also an incomplete understanding by local communities, both in terms of the legislation itself and its relation to the overall planning scheme for their area.

CHAPTER VI

CONCLUSIONS

Section 702A is development control. It appears however that there is less than a full awareness or understanding of the method: neither the planners, the general public or even the Provincial Government seem to know why the legislation was introduced or how it is to be used, and are unaware of its full implications.

Development control is best characterized by the British legislation, serving as it does as a template for similar enactments and proposals in other common-law jurisdictions. It differs significantly from zoning by treating each application for development or a change in use on its own merits, and the permit to proceed with such development can be specifically conditioned to that use. There are no general preconceived regulations which apply to a class or description of uses, nor is there any attempt to delineate beforehand the specific types of uses permitted in an area.

The fundamental provisions of S. 702A approximate the British legislation for they provide for a bilaterial agreement pertaining to a particular piece of property, and containing conditions which are not only unique to that application but are capable or enforcement notwithstanding any other by-law of the municipality, including the zoning ordinance. The agreement is, of course a contract and so subject to all the principles, rights and remedies of the common law of

contracts. Both the English and Alberta legislation, on the other hand, provides control in the form of a permit issued by the requisite local authority.

Development control deals with the merits of each application by reference to a plan. While earlier B.C. legislation specified that the land use contract provisions could be exercised only where there was a community plan, the later deletion of this requirement represents a major and potentially serious departure from traditional development control techniques. Nonetheless, the survey results indicate that virtually all communities so far actively utilizing the land use contract procedure have either now adopted an official plan or are at least in the process or preparing or observing some form of comprehensive plan, and most employed a professional planning staff. It is assumed that these factors, together with the necessity of declaring a development area prior to the receipt of land use contract applications, serve to encourage a comprehensive and planned use of the land use contract legislation.

A further feature of British development control is its relatively high degree of central government control and supervision. Although this provincial government has achieved some consolidation of the control function through certain review procedures, requirements of government approval in other areas pertinent to the control of land (eg. The Controlled Access Highway Act, and flood-plain control), and regional district legislation, the land use contract remains not an administrative permit to proceed but a contract executed between a developer and the municipal council. As such it would probably seem

less amenable to direct administrative supervision and control.

While the land use contract is not a carbon copy of British development control, neither does it resemble American zoning. Contract or conditional zoning does have some application and similarity to the land use contract, but because of a decidedly different legal basis such application is somewhat limited. Even contract zoning, when used in concert with a comprehensive plan, closely approximates development control. S. 702A, though perhaps a progeny of both development control and zoning, bears the most striking resemblance to the English side of the family.

Why then has development control been introduced to British Columbia in this fashion? Municipal Affairs personnel maintain that there was a real necessity for some new form of land use control based on municipal demands for change. A number of planners and district officials admit that there was some need for a more flexible control form, and that there was some agitation for legislation which would enable a more equitable contribution from developers to offset rising municipal servicing costs. Most of these officials maintain however that what they really wanted was a form of conditional zoning, similar to the flexibility introduced in 1957 to the Vancouver charter, together with the right to charge development fees as currently permitted in Ontario. Most were surprised at the form of S. 702A and its attendant introduction of development control.

The initial idea for the land use contract appears to have

come from within the Department of Municipal Affairs, independent of significant outside suggestions. Few, if any, studies appear to have been conducted on the feasibility or effects of this new control form, for at least none have been indicated or made available, and the legislation seems to have been conceived and introduced without any prior consultation with municipal and district planner and administrators. Analysis of data obtained from the questionnaire tends to underline certain misunderstandings and considerable confusion in the use and purpose of a land use contract. Most planners reported that their understanding of S. 702A theory and procedure did not come from provincial government sources but had to be derived elsewhere, and that they in fact received very little or no encouragement to employ the land use contract from the government. Although Department of Municipal Affairs officials indicated that they had hoped that the municipalities would discuss problems inherent in the new legislation prior to any use (South - Interview), planners agree that the government's real intention was to take a "wait-and-see" stance.(Stallard, 1972, 4)

There were also indications that the general public was particularly confused by the new legislation, and recent personal experience clearly substantiates this observation. Certainly the precedent Development Permit was not well received by either the developer or the community and even with the land use contract there is some evidence of a public reluctance to give up the security of zoning for the uncertainties of S. 702A development control.

It seems reasonable to conclude that Section 702A has been

introduced entirely without sufficient preliminary investigation and understanding of its theory and practical effects, and that the government has not only failed to properly prepare and inform municipal officials but has been seriously remiss in keeping the general public informed of significant and major changes in land use and development control. Had there been proper consultation it is conceivable that the implementation of legislation effecting such a change in the traditional control patterns might not have been necessary. Although the introduction of S. 702A reflects an increasing trend towards use of development control legislation in North America, its introduction into this province may have been somewhat premature.

Nevertheless, S. 702A is now in active use in B.C. and it perhaps germain to inquire into the relative effectiveness of the land use contract in combatting the problems it was apparently designed to solve. Most of the planners and administrators surveyed agree that the most serious complaint against zoning, its relative lack of flexibility, has been successfully countered by the new legislation. Developers as well are reported to prefer the more flexible terms possible with S. 702A, and a significant proportion of the projects proceeding via the land use contract would have been difficult to achieve with existing zoning legislation.

However, the criticism that zoning has failed to adequately co-incide with the planning function can equally be levied at the land use contract, particularly as there is now no necessity for general or comprehensive plan. In all other instances where development control

has been discussed or instituted, major emphasis has been placed on the necessity of proceeding in accordance with a comprehensive plan, and the failure of this province to so legislate can be considered the most telling and potentially troublesome deficiency of S. 702A

A third major criticism of zoning is that it fails to adequately involve the public and to protect the community interest with sufficient review procedures. Section 702A, like the existing zoning legislation, does provide for a public hearing before the Council can authorize entry into a land use contract, and in this way the legislation is perhaps somewhat superior to the limited rights of hearing permitted in the British legislation. The act of executing a contract is however a political action somewhat different from the administrative act of granting a permit, and it may be that traditional rights of judicial review do not have the same application to this council decision.

There are further problems in the application of S. 702A which may not yet be clearly understood. Neither the government or the planners, for instance, anticipated any problems with the statutory restrictive covenant aspect of the legislation. A number of municipal lawyers however indicated concern because such covenants are traditionally negative or prohibitionary in their aspect, while land use contracts generally require, rather than prohibit, action by the parties. Another procedural problem with potential impact on the continued use of S. 702A concerns its present pre-occupation with zoning matters. The land use contract provisions are contained within the Zoning section of Municipal Act, allegedly because it represents "refined zoning for many communities" (South - Interview), and there is some opinion that S. 702A

be restricted in application to what would traditionally be considered as zoning concerns. As a result there have been relatively few instances where the section has been used for sub-division, this despite claims by the Department of Municipal Affairs that S. 702A is intended to be used for such purposes. As well, some municipalities have been utilizing S. 702A as a matter of course in all rezonings, apparently to obtain development charges from the applicants, but of course this procedure would only be available where development is occuring on land not zoned for the contemplated use.

In general, these and other particular uses of S. 702A have been proceeding without the benefit of judicial authority or guidance. A very recent Supreme Court ruling on Vancouver Island (Re. By-law 1480, N. Cowichan, February 1973, Unreported) considered the nature of the contract being considered at the public hearing, and this case might be interpreted as establishing that no amendments subsequent to that hearing would be permitted. If such is the case, the flexibility of permitting minor amendments and the submission of completed architectural and engineering design drawings subsequent to some assurance of being permitted to proceed will be lost. Although S. 702A has been the subject of very few other legal issues to date, it is apparent that much of the existing procedure could be substantially affected by future judicial considerations. If the provincial government had more carefully addressed itself to the practical problems and procedures of the land use contract, municipalities could now be proceeding with considerably more assurance and confidence. The provision of government policy and procedural guidelines would be a decided asset to communities in their use of S. 702A.

As it is, British Columbia communities, while at first somewhat cautious in their use of S. 702A, are now increasingly using the legislation in a variety of ways. Many of these were not intended by the government, some might be considered legally dubious, and a large proportion could probably have been achieved with traditional zoning methods. Nonetheless, there would seem to be evidence of a clear trend towards use of the land use contract despite the nature of its practical problems and procedural uncertainties. It appears to be fulfilling the needs for greater flexibility and control in municipal and district land use and development policies. Its unique contractual stance seemingly avoids the problems of contract zoning and it might, with sympathetic legal support, achieve solutions for the problems as perceived by the province and experienced by the communities.

Are however B.C. communities mature enough to handle the land use contract? Both the political involvement of Council and the administrative capabilities of municipal staff are more involved in the use of S. 702A than previously. The risk in utilizing the land use contract as development control without the attendant comprehensive plan is large, but at least to date development areas are generally being declared in concert with suitable planning studies and the land use contract is being considered in accordance with comprehensive planning principles. Nonetheless, it may be that the province should give consideration to ensuring that only those communities that can provide assurance of some form of comprehensive planning should be given clear access to the land use contract legislation.

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APPENDIX A

THE QUESTIONNAIRE

On the basis of preliminary discussions with faculty advisors and others conversant with S. 702A, it was decided that a questionnaire should be devised to collect information both on the use of the land use contract and to test its validity as a land use and development control. Several lower mainland planner with known familiarity with S. 702A were approached with the preliminary form, and their comments occasioned some amendments. The final questionnaire was forwarded during January and February of 1972 to all Regional Districts, and because early replies indicated that a larger survey sample might be desirable, additional questionnaires were sent out to municipalities with suspected S. 702A experience.

Replies were generally prompt, although a number of Regional Districts did require one or more reminder letters. A number of telephone interviews and eight personal interviews were used to support, amplify and substantiate data received. Additional correspondence was directed to the Ontario and British Columbia Departments of Municipal Affairs, the Ontario Law Reform Commission, the City of London Planning Department, the British Ministry of Housing and Local Government, and J. Galt Wilson, a Prince George Barrister and Solicitor with extensive experience with S. 702A. Finally, personal interviews were held with the Registrar, New Westminister Land Registry, and the Director of

Regional Planning, B.C. Department of Municipal Affairs.

The response rate was favourable: twenty-five of the twenty-seven regional districts and thirteen of the fifteen municipalities replied by mail. An additional two regional districts and eleven municipalities were contacted by telephone or interviewed, for a grand total reply of fifty-one (51). Twenty-nine of those replies were from staff planners and eight from consultant planners, while fourteen replies were received from administrators in communities lacking a planning staff.

It was anticipated that a number of the regional districts would as yet have had no experience with S. 702A, and section C was therefore included in the questionnaire to assay opinions on its prospective use or elicit reasons why it hadn't yet been employed. It transpired that thirteen districts and seventeen municipalities, for a total of thirty (30), have had some experience with the land use contract procedure, and the remaining twenty-one were therefore directed to this latter portion of the information form. Their replies did not however prove substantially different from the others, and therefore did not merit separate analysis.

Accompanying the questionnaire was a request for supporting material, such as draft land use contracts or authorizing by-laws. Eleven procedural by-laws or guidelines were received, together with fourteen individual or blank form land use contracts, and these were studied with reference to their content and form.

Although the questionnaire was generally effective in accomplishing its purposes, and a number of planners replied at some length in

elaboration or amplification of their views, several dificiencies were noted in the course of analyzing returns:

1. A request to indicate the actual number of contract applications received was not made sufficiently clear. However, the covering letter did request this information and total could, in most cases, be inferred where not provided.

2. Only those without S. 702A experience and replying to the latter portion of the questionnaire were polled on the degree of existing satisfaction with zoning procedures and methods, and this information would have had greater validity if obtained from all questionnaires returned.

3. Even although a number volunteered opinions, planners were not asked for their reaction to the early deletion of the community plan requirement of S. 702A. This information would have been a valuable addition.

4. A typographic error in Q.15, relating to the form of bonding required for a land use contract, prevented accurate replies to this section. However, few contracts had actually reached this point and the information could, in any event, be obtained directly from the contracts submitted.

Other errors or misconceptions likely did occur in the questionnaire, but they did not appear to have had any substantial effect on the quantity or quality of the data received.

THE LAND USE CONTRACT

S. 702A Municipal Act

Information Sheet P.1 of 4

Please return to Brian J Porter
School of Community and Regional Planning
University of British Columbia,
Vancouver 8, British Columbia

GENERAL INFORMATION Please answer the following wherever applicable.

1. Your Name and Position

2. Name of Municipality or Regional District

3. Is there an official regional or district plan enacted for your area?
Yes _____ No_____

If "no" is there a comprehensive or overall plan of development in preparation or generally observed?
Yes_____ Not yet_____

What proportion, if any, of your Region or District is presently covered by a zoning by-law?

_____

4. Has the old Development Permit procedure, previously authorized by S. 702A ever been utilized in your district or region?
Yes_____ No_____

If "Yes" please indicate generally the number of times and types of situations in which it was employed.

THE LAND USE CONTRACT

Has the "land use contract" as authorized by the new S. 702A of the Municipal Act been prepared, used, or drafted for use anywhere in your district or region?

Yes _____ No_____ If answer is "no" please disregard this section and proceed to part C.

Please provide information on each contract, or if more than two land use contracts have been prepared, used, or drafted for use, please provide information on the first and most recent contracts only.

1. Who was the contracting authority?
   a. Municipal Council ____ | ____
   b. Regional District Council ____ | ____
   c. Other(please specify ____ | ____

2. Who prepared the contract? If more than one answer please indicate approximate proportions eg. ½, ¼ or 1/3.

a. Planning Dept. or Staff	____	____
b. Consultant Planner(s)		
i. on general contract with Region or District	____	____
ii. for purposes of land use contract only	____	____
c. Legal Dept. - Staff	____	____
d. Consultant Lawyer(s)		
i. on general contract with Region or District	____	____
ii. for purposes of land use contract only	____	____
e. Owner/Developer (or his lawyers, architects etc	____	____
f. Other Regional or Public Officer. Specify	____	____
g. Other (Please specify)	____	____

3. Please indicate the type of development covered by this contract. (Eg. town-house, comprehensive development, condominium etc)

4. What, if any, particular aspects of these developments warranted use of the land use contract?

THE LAND USE CONTRACT

5. Please indicate the staging, either with specific or approximate dates where appropriate, and/or by indicating the approximate time in months for the completion of each phase. (Note - If the contract was abandoned or the process defeated at any stage please indicate at the appropriate place with *)

Time #1	Time #n		Date #1	Date #n
		a. Owner/developer informally submits development plans to district or regional authorities.		
		b. Consideration by staff or consultants		
		c. Owner applies for declaration of "development area"		
		d. Declaration of "Development Area"		
		e. Application for "Land Use Contract"		
		f. Preliminary drafting and negotiation of contract		
		g. First, second and third readings by Council of by-law authorizing the land use contract or resolution for the public hearing on proposed Land use Contract.		
		h. Public Hearing held		
		i. Final reading of by-law or resolution authorizing entry into land use contract.		
		j. Contract executed by both parties		
		k. Contract deposited with L.R.O. for registration		
		l. Registration completed		

6. Has the building permit been issued? Yes ____ Dates ____ + No ____

PUBLIC HEARING

7. Approximately how many people attended the public hearing? ____

8. Compared to attendance at normal public hearings, was this
   i. average ____
   ii. below average ____
   iii. above average ____

9. a. What was the general mood of the meeting relating to the use of the contract?
   Agreement ____
   Neutral or indeterminate ____
   Opposition ____

   b. If "opposition", compared to a normal rezoning public hearing, was it,
   i. average ____
   ii. below average ____
   iii. above average ____

10. Did any significant alterations result from the public hearing?
   Yes ____ No ____
   If "yes" please indicate generally the nature of these changes.

   c. How would you best describe the basis of this opposition:
   i. aesthetic grounds ____
   ii. social grounds ____
   iii. physical grounds ____
   iv. "axe to grind" ____

11. Please indicate any general comments you may have on the applicability of the public hearing procedure to the land use contract - or any other general comments.

12. Which one or more of the following were motivating ideas for the use (indicate with ✓) and the form (indicate with ✗) of the "land use contract"?

a. The Municipal Act, as amended in 1971 _____

b. The Department of Municipal Affairs, Victoria _____

c. Discussions, forms or drafts presented at conferences or meetings:

eg. Municipal Officers Association _____
Union of British Columbia Municipalities _____
Regional District Meetings _____
Law or Planning Conferences _____
Others(please specify) _____

13. Has there been any overt encouragement from the Dept. of Municipal Affairs, or any official therefrom, to use the land use contract? Yes_____ No_____

14. Compared to the standard rezoning procedure, if any, how has the land use contract and its procedure been regarded by the owner/developer, and/or his lawyers, architects or planners?

i. similarly received _____
ii more favourably received _____
iii less favourably received _____
Comments?

15. Please indicate which of the following are generally included in the land use contract(s) as required performance by the owner/developer, and which of those items are covered by performance bonds or other forms of security (✓✓)

a. on-site public works and utilities, ownership of which to remain with municipality _____
b. off-site public works and utilities, ownership of which to remain with municipality _____
c. landscaping and screening for purposes of general public _____
d. generally, the whole project _____

If any of the above are not included in the land use contract but controlled by other means or methods please describe.

16. Have any technical problems been raised by the Land Registry Office or others concerning the restrictive covenant aspect of all or any portion of the land use contract? Yes_____ No_____
If "Yes", please specify.

17. Please indicate the nature of the plans or drawings which must accompany the application for land use contract and/or must be submitted before final execution. (eg. full scale arch. and engineering plans; exterior design, siting and colour only etc.)

18. Please provide any general remarks or comments you may have concerning the theory and/or procedure of the land use contract and development area which may not have been canvassed thusfar.

Thank you for your cooperation
and participation.

Information Sheet P.4

Part C - To be completed only where no land use contract has yet been prepared.

1. If no "land use contract" has yet been prepared, used or drafted for use in your region or district, which of the following reasons, if any, best apply:

   a. Lack of development projects or areas suitable for application of land use contract

   b. Present satisfaction with zoning and development procedures

   c. lack of familiarity with practical or procedural aspects of the land use contract and/or uncertainty as to potential effects

   d. Other (please specify)

2. Assuming that none of the above limitations would apply, in what instances would you contemplate the use of a "land use contract" in your district or region?

3. Please provide any general comments you may havegenerally on zoning, development control and the land use contract.

Thank you for your cooperation and assistance.