SOME INTERESTING ASPECTS OF THE ALBERTA PLANNING ACT, 1977*

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This article is the second part of a consideration of the Alberta Planning Act, 1977, the first part having been published at 17 Alta. L. Rev. *434. The editors recommend reading the first part as precedent to this article, as this article is a conclusion to the first part, rather than an elaboration, and the discussion of development control, development agreements, reserve lands, and interpretation of the Act necessarily follows from the general outline of the Act given in the first article.*

I. INTRODUCTION

On April 1, 1978 The Planning Act, 1977[1] of Alberta came into force.[2] Its enactment was preceded by about five years' study and public debate, and the authors of the original public working paper were told that "the new Planning Act was to be the best in North America".[3]

In this note, I shall discuss the use of development control under the old and new statutes, and then compare the old and new provisions regarding development agreements. The new regime may reduce the power of approving authorities to require developers to finance infrastructure.

The new provisions on reserve lands shall be examined, and again developers can benefit from the changes. Although critics have suggested that the new Act will increase the complexity and hence the length of the approval process, I have concluded that these fears are largely unfounded. Some amendments on this score, however, are desirable.

The note concludes with some general interpretive points.

A. Can Development Control Continue?

1. Having (Due) Regard

The former Act contained many contradictions and drafting ambiguities[4] but some of the thorniest ones were in the development control provisions. For example, section 100(2) required that control was to be exercised *"having regard to* the proposed development conforming with the general plan . . . ." (emphasis supplied). Did this mean that the Development Officer had to ensure conformance? It would certainly be reasonable for the General Plan to bind the Development Officer. The same phrase appeared in section 89, which gave powers to the Provincial Planning Board, in disposing of appeals, *"having regard to* this Part, to

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* On January 1, 1980, Bill 66, the Planning Act Amendment Act, S.A. 1979 c. 61, was proclaimed. While most of its provisions do not affect the substantive points of Professor Elder's article, there are some changes, and the editors have made note of those changes after the relevant footnotes.

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1. S.A. 1977, c. 89. Unless otherwise indicated, all sections referred to are from this Act.
2. Alberta Gazette, Part 1, Vol. 74, No. 6 (March 31, 1978).
3. *Towards a New Plannig Act for Alberta,* Alberta Department of Municipal Affairs, December, 1973, at 1.
4. F. Laux, "The Zoning Game: Alberta Style" (1971) 9 *Alta. L. Rev.* 268; and, "The Zoning Game—Alberta Style Part II: Development Control" (1971) 10 *Alta. L. Rev.* 1.

the general scope and intent of the regional plan and to the merits and circumstances of the particular case . . . ." (emphasis supplied). It might seem almost inconceivable that the Board would not be bound by a part of its enabling statute, and the other matters to be considered are sufficiently broad in scope that being bound by them amounts to a duty to decide on the weight of the evidence. Therefore, this provision gives some credence to the interpretation that "having regard to" means "to be bound by".

The phrase recurred, however, in section 128(4)(c), which required the Development Appeal Board to "consider each appeal *having due regard* to . . . (*inter alia*) the development control or zoning by-law . . . ." (emphasis and words in brackets supplied).

The D.A.B. was clearly not bound by the Guide and Schedule[5] and the same reasoning applies to the Rules. But one dictum suggested that it was not bound by the by-law either: "having due regard" meant "they are to give to each such weight or significance as appropriate in relation to the whole."[6] It could, of course, be argued that it is always appropriate to give a by-law binding "weight" or "significance", but that the other factors mentioned would merit less such.

The Privy Council in *Ishak* v. *Thowfeek*[7] dealt with the obligation to have regard.

> The requirement that the board shall "have regard" to certain matters tends in itself to show that the board's duty . . . is limited to having regard to them. They must take them into account and consider them and give due weight to them, but they have an ultimate discretion. . . .

Another point is that the section, having provided that the D.A.B. is to have "due regard" to a zoning by-law, goes on to forbid the D.A.B. to allow "the permanent use of land or a building in a manner not permitted by the zoning by-law".[8] Surely this subsection would be redundant if the D.A.B. were already bound by its obligation to have "due regard".

Thus the argument seems stronger that "having regard" did not mean "being bound by", although "having due regard" may imply a somewhat higher standard.[9] This is of no more than historical interest, for existing development by-laws will continue for up to two years (more if the Minister extends the time) from April 1, 1978, although councils can pass a new land use by-law before this time.[10] If "having (due) regard" did not bind the relevant approving authority, the position under the former Planning Act appears to be this. The Development Officer was not bound by the General Plan (although he was by the Regional Plan), but was bound by the Development Control By-Law, the Rules Respecting the Use of Land, and possibly the Guide and Schedule of Permitted Land Use (to be discussed momentarily). The D.A.B. was bound only by the Act.

2. *Calgary's Use of Development Control*

Other ambiguities occurred in the former Act's provisions on development control. Before exploring them, let us see how the City of

5. *Pacific Developments Ltd.* v. *Council of City of Calgary* [1973] 6 W.W.R. 406 (Alta. S.C., App. Div.).
6. *Actus Management Ltd.* v. *Council of City of Calgary* [1975] 6 W.W.R. 739 at 745 (*per* Clement J.A.).
7. [1968] 1 W.L.R. 1718 at 1725.
8. Old Act, s. 128(4)(d).
9. *Re Hemsworth Grammar School* (1887) 12 App. Cas. 444 (P.C.).
10. S. 150.

Calgary, the main Alberta city which used development control exclusively, implemented the scheme. Although no contents were specified by the former Act for the Rules, Guide, or Schedule referred to above, Calgary proceeded as follows. The rather brief Development Control By-Law (By-Law 8600) with numerous exceptions, including all single family dwellings, and duplexes in lower density land use classification areas, prohibited development without a permit, specified the material to be submitted with an application, and authorized the Development Officer, or in some cases the Municipal Planning Commission, to decide on applications. Approval could be with conditions "having regard to the general plan, design brief, or other policy guidelines . . . .".

Calgary's Rules Respecting the Use of Land, the contents of which were not laid down in the former Act, but which required approval by the Provincial Planning Board,[11] contained detailed provisions equivalent to the specifications in a typical zoning by-law for setbacks, parking, minimum site and yard areas, height and bulk controls, and so forth. Separate provisions (including bonuses) were made for downtown. Minor variance power was given to the approving official. Because these detailed Rules bound the Development Officer, and because the Guide and Maps were also usually conformed with, Calgary's system was only a weak version of the British development control.

The Land Use Classification Guide and Schedule of Permitted Land Uses divided the city into districts, with reference to Land Use Classification Maps, and specified the "permitted" uses for each district. Direct Control districts could be created, with uses approved by the Planning Commission "on the merits of each individual application having regard to" conformity with the plan, existing uses of neighbouring lands, or previous zoning or policy on annexed land. In other words, real development control within these districts.

3. Were the Guide and Schedule Binding?

The interesting question is whether the Development Officer was bound by the Guide and Schedule of Permitted Land Uses. Their only specifically mentioned legal consequence was that the Rules varied from district to district as created by the Guide, Schedule and Maps mentioned therein. But what legal relevance did the list of "permitted uses" have?

There are at least two aspects to being bound. The Development Officer could be bound to issue a permit for an application which met all the criteria in all the binding documents, or he could be prevented from issuing a permit which did not. In other words, if the Development Officer were bound (and he clearly was, by at least the Act, By-Law and Rules) was compliance with all of these a sufficient condition (permit mandatory) or a necessary condition (permit discretionary)? If the Development Officer were not bound, could he issue a permit for a development which was not authorized in the Schedule or Guide as long as it conformed with the By-Law and Rules? If the Development Officer were to be bound by all these documents, so that conformance was both a necessary and sufficient condition for a permit, development control would be identical to zoning, "which in turn would tend to frustrate the whole intent and purpose of the development control provision of the

11. *Id.*, s. 106(2).

Act", unless an appeal were launched to the D.A.B.[12] After a careful analysis of dicta to the contrary,[13] which I find unconvincing, and of the complex and perhaps tautologous relationship between sections 106 and 107 of the former Act, I have concluded that the Guide and Schedule were not binding. A literal reading of these clumsily drafted sections, giving meaning to every phrase would make the Development Officer a mere zoning technician who would have to approve every conforming application. If the "merits of each individual development"[14] were to be the basis of control, the lockstep approach of a traditional detailed zoning by-law clearly could not achieve it.

It would be preferable by far for the courts to apply the liberal rule of statutory interpretation, as expressed in section 11 of the Interpretation Act:[15]

> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

This kind of interpretation of sections 106 and 107 would preserve development control and leave the Development Officer free to reject a development which met the formal criteria in the documents, but which lacked sufficient merit, or failed to "ensure the orderly and economical development of the land".[16] At the time of writing, this question was in litigation.

Even if the Development Officer was not bound by the Guide and Schedule, how much discretion did he have? The Rules still bound him, so he had to comply with their requirements on minimum area, yards, setbacks, height, bulk provisions and so forth. Under the Rules, these specific requirements vary, depending on the districts created in the Guide and the Maps referred to therein, and to that extent the Guide is incorporated into the Rules. But the list of permitted uses was not incorporated, and therefore if the Guide and Schedule were not binding, the Development Officer could approve a development for any appropriate *uses*, although the *structures* would have to conform to the requirements in the Rules.

Although, in practice, considerable negotiation preceded a decision on a development permit application, the system as administered usually complied with all of these documents. It looked like zoning, except in the Direct Control districts. Even there, genuine development control was usually diluted by the attachment of "guidelines" such as R-3, with the application of the attendant provisions from the Schedule and Rules.

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12. F. Laux, "The Zoning Game—Alberta Style, Part II: Development Control", *supra* n. 4 at 20.
13. In *Pacific Developments Limited* v. *Council of City of Calgary* [1973] 6 W.W.R. 406 at 410-11, Clement J.A. stated:

    > It is open to Council to require its Development Officer and Planning Commission to give effect to the land use classification guide which it has resolved upon . . . . If an application for development is for a use permitted by the guide, the permit must be granted by the officials; if it is not for a permitted use, it must be refused.

    In *Figol* v. *Edmonton City Council* (1969) 71 W.W.R. 321 at 322 (Alta. S.C., App. Div.), Allen J.A. agreed with the concession by counsel that s. 106 of the former Planning Act made the Guide binding on the Development Officer.
    In *Campeau Corporation* v. *City of Calgary*, (1978) 7 Alta. L.R. 293 at 297, Lieberman J.A. stated that the Development Officer is bound by the Guide because of s. 10(4) of By-Law 8600. With respect, this is incorrect.
14. Old Act, s. 100(2).
15. R.S.A. 1970, c. 189. Laskin, C.J.C., in *Soo Mill and Lumber Co.* v. *Sault Ste. Marie* [1975] 2 S.C.R. 78, adopted the position that planning policies should be liberally rather than strictly construed.
16. Old Act, s. 3.

Under the former Act, the flexible nature of Calgary's approval process stemmed more from the appeal process. "An aggrieved person"[17] could appeal a decision of the Development Officer to the Development Appeal Board, which was not bound by the Rules, Guide or Schedule. The D.A.B. was to[18]

> consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan . . . and to the development control . . . by-law. . . .

Regardless of the meaning of "due regard", the D.A.B. had a considerable amount of discretion—so much so that many developers and some politicians had been pressing for a return to zoning. Of course, this discretion had to be exercised quasi-judicially[19] but the D.A.B.'s decision was final, subject to appeal to the Appellate Division of the Supreme Court of Alberta on a question of law or jurisdiction.[20]

II. DEVELOPMENT AGREEMENTS UNDER THE OLD AND NEW ACTS

The new Act's mandate on development agreements in sections 75 and 89 seems narrower than the former Act's, and this could interfere with the range of items which could legally be negotiated with developers. Nevertheless, other authority for the agreements will be suggested below.

Let us first examine the sources of authority under the former Act, starting with the subdivision approval process. Section 16(e) of that Act prohibited the subdivision of land unless the applicant provided[21]

> if required by the *municipality*, for the installation and construction at his own expense of *all necessary* public roadways, sidewalks, curbs, and other public facilities that may be required of him under the Subdivision and Transfer Regulations. . . .

Let us note the question whether the clause "that may be required" modified only "other public facilities", or whether it modified each of the items enumerated. If the latter, any roadways, etc., had both to be "necessary" and "required" in the Regulations described hereafter. We would than have to look exclusively to the former Subdivision and Transfer Regulations, which implicitly assumed this interpretation,[22] for authority regarding the requirements a municipality might impose. Section 17 of the Regulations left it up to the subdivision approving authority to decide, "upon the written request of council", whether to impose a condition that "all or any" facilities of a list longer and more specific than that just quoted be provided at the applicant's expense. If the authority so decided, the applicant than had to enter into a written agreement with the council on standards, respective obligations, time limits and the like.[23]

Whether section 16(e) of the former Act or 17 of the Regulations provided the primary authority for on-site levies, the point to remember is that the applicant could be required to agree to construct all the necessary

17. *Id.*, s. 128(1) as am. S.A. 1973, c. 43.
18. *Id.*, s. 128(4)(c).
19. *Actus Management Ltd.* v. *Council of City of Calgary, supra* n. 6 at 745.
20. Old Act, s. 146(1).
21. Emphasis supplied. It should be noted that generally the municipality was not the subdivision approval authority and this power gave it real leverage.
22. Alta. Reg. 292/75, s. 11, amending Alta. Reg. 215/67, s. 17.
23. *Id.*, s. 17(2).

facilities in a rather comprehensive list, perhaps even if the facilities were outside the subdivision's area. It is not so now.

Section 242.1(2) of the Municipal Government Act[24] formerly allowed councils by by-law to impose an "off-site cost levy" on undeveloped land which was to be developed, and to authorize the municipality to enter into agreements "for the provision of municipal service (sic) . . . and for the payment of the off-site cost levy . . . .". The latter power seems to overlap the provisions just discussed, except that authorizing this agreement is quite different from authorizing the council to require any "municipal services", which were defined as works which might be undertaken as a local improvement pursuant to The Municipal Taxation Act,[25] to be provided at the owner's expense. Subsection 242.1(3) did, however, require the agreement to contain the "terms and conditions of development" and this seems to be an open-ended authority to impose such requirements, at least so far as the provision of municipal services was concerned.

At the development approval stage, the authorization under the former Act was section 143, which allowed a council to enter into an agreement with respect to the observance of requirements or limitations which it, an appeal board, or approving authorities could impose under the Act. Presumably council could not, however, force either approving authorities to impose terms, or owners of land to agree to terms not imposed by the relevant body.

The former Act allowed conditions to be imposed at the development permit stage, both under development control[26] or zoning.[27] Under development control, section 104(3) allowed a permit to

> include conditions as to the construction of a public roadway required to give access to the development and the installation of utilities and other necessary services that are necessitated by the development.

In Calgary, very detailed agreements have been evolved for housing subdivisions, shopping centres and large scale commercial buildings. The standard residential agreement was signed after subdivision approval, but before construction of infrastructure had commenced, and it required the City Engineer's written approval before any construction began on these items.

If the City rested its authority to exact this agreement on section 104(3), there would be serious doubts that some of the terms were *intra vires*. For example, clause 12 of the 1977-78 agreement provided for an acreage assessment of $410.00 per acre to help pay for expressways and freeways—presumably off-site. As well, clause 50 required the developer to construct at his expense "all streets and avenues" in the subdivision. It seems doubtful that these roads come within the phrase "a public roadway required to give access *to the development*", (emphasis supplied) and more doubtful that they could be included under "utilities and other necessary services".

These requirements, however, do come within the combined effect of sections 16(e) of the former Act, 17 of the former Subdivision and Transfer

24. R.S.A. 1970, c. 246 as am. S.A. 1973, c. 40, s. 23 and now struck out by new Act, s. 164(g).

25. R.S.A. 1970, c. 25, s. 145 as am.

26. Old Act, s. 104(3).

27. Ss. 123(e) and 124(4). In the latter case the approving authority had to be satisfied with the supply "to the building" of various services. As I read these sections, an approving authority, under both development control and zoning, could not be overridden by council on a specific development. Instead, the by-law had to be amended.

Regulations (it is assumed that subdivision was approved subject to the execution of this agreement, and, of course, that the actual subdivision does not occur until registration) and the now repealed section 242.1 of the Municipal Government Act. So it seems that the provisions of the standard development agreement in Calgary, at least, were *intra vires* under the Act.

Municipalities under zoning used section 124(4) as their authority for development agreements. Under it, the zoning by-law could prohibit the erection of otherwise permitted buildings, unless satisfactory arrangements had been made by the developer:

> . . . for the supply to the building of water, electric power, sewerage and street access . . . including payment of the costs of . . . constructing any such utility or facility by the developer.

This authority to require street access, *inter alia*, "to the building" was apparently far wider than development control's requirement "to the development".

Section 89(1) of the new Act permits a subdivision approving authority, at the request of a council, to require an applicant to enter into an agreement with council for the construction of certain roads and infrastructure at the developer's expense. Since section 75 allows a council to require agreement on the same items at the development stage (the only difference between the provisions being the words "subdivision" and "development"), a discussion of section 75 is adequate for our purposes.

The new provisions on off-site levies should, however, first be mentioned. The new section 74 allows such a levy on undeveloped land, either at the subdivision or development approval stage to help pay for new or expanded facilities or land for water supply, sanitary sewage treatment, and storm drainage. As before,[28] an agreement can be entered into in respect of the payment of the levy,[29] but the former provision for the agreement to "contain" the terms and conditions of development no longer exists.[30]

The breadth of development agreements authorized in section 75 and 89 is narrower than under the former Act. The former power to require "all necessary public roadways", etc.[31] or "all or any . . . public roadways", etc. at the subdivision stage[32] to be built at the applicant's expense has been changed to the roadway "required to give access to the development". At the permit stage, the former Act's authority for the requirement of "the installation of utilities and other necessary services" under development control[33] and for "the supply *to the building* of water, electric power, sewerage . . ." under zoning[34] has been changed to "installation of utilities . . . necessary to serve the development . . . .".[35]

The breadth of these new provisions is somewhat unclear. For instance, the roadway which can be required to be included in the development agreement is that "required to give access to the develop-

28. Municipal Government Act, R.S.A. 1970, c. 246, as am. S.A. 1973, c. 40, s. 23.
29. S. 74(1)(b).
30. Municipal Government Act, *infra* n. 78, s. 242.1(3).
31. Old Act, s. 16(e).
32. Former Subdivision and Transfer Regulation, *supra* n. 22, s. 17(1).
33. S. 104(3).
34. *Id.*, s. 124(4).
35. Ss. 75(b) and 89(b). [The amended Act includes a new definition of "utilities" (s. 1.45), and adds provisions for pedestrian walkways under ss. 75(b)(i.l) and 89(b)(i.l)—Editors.]

ment". This is the only authority in the Act for the requirement of the provision of roadways by a developer, and is obviously ambiguous. Access can be argued to have been provided to a subdivision by a roadway which gives access to the subdivision as a whole rather than to each lot, which was the effect of the combined requirements under the old Act.

As well, the agreement may require "utilities necessary to serve the development". The slightly different wording for utilities is clearer. No utility can "serve" a development without leading to each lot, and the authority continues, therefore, for requiring developers to pay for and install complete utility networks.

It is to be hoped that the courts will interpret these powers regarding development agreements broadly.[36]

Subject to these ambiguities, development agreements are clearly authorized with reference to infrastructure. Under section 67(3), councils may also provide for "the amount of land . . . around or between buildings" (clause 3); "the landscaping of land or buildings" (clause 4); "the design, character and appearance of buildings" (clause 7); "ensuring that there is at least one means of access from each lot to a public roadway" (clause 8—this refers to design, rather than to the question of who must provide the money for the roadway construction), and "the density of population in any district or part thereof" (clause 15). The question is whether these may be required as terms in a development agreement. Since a limited number of subjects for such an agreement is authorized in section 75, the ordinary implication is that no others can be required.[37] Clause 17 of section 67(3), however, authorizes a land use by-law to provide for "the establishment of such agreements, forms, fees and procedural matters as the Council considers necessary". Although the other items in this list are of a more modest scale and the *ejusdem generis* rule could be invoked, the "agreements" authorized must have some scope and could strongly be argued to include agreements between the city and private developers, at least in respect of the matters itemized in the same subsection.

The new Act also requires a land use by-law to provide for the conditions and restrictions that may be attached to a development permit, and for the discretion the Development Officer can exercise.[38] No specific authority is given there for development agreements to be entered into on these points, but clause 17 of section 67(3) may be sufficient here.

Finally, section 68 should be noted. A council which has adopted a general municipal plan may designate a direct control district if it desires to exercise particular control over development. In such a district, council may "regulate and control the use of development of land or buildings . . . in such manner as it considers necessary.". Such a broad

36. Another less pressing interpretive quandary arises from the power to require the construction of, or payment for, "off-street or other parking areas", which the development agreement may require. Other than "off-street" must mean "on-street". Do we therefore conclude that the cost of any percentage of street area on which parking will be allowed can be levied against a developer?

37. A developer cannot be required to enter into a development agreement without statutory authority (Rogers, *Canadian Law of Planning and Zoning* (1973), as am. Release No. 6, August 1978).

38. S. 67(2)(d)(iv) and (vi). [The amended Act has altered the discretion somewhat—the new s. 67(2)(d)(iv) reads "(conditions) that are to be attached, or that the development officer is empowered to attach. . . ."—Eds.]

mandate should cover the use of development agreements. (Again the power in section 67(3) might suffice.)

III. THE PROVISION OF RESERVE LAND

Section 92 of the new Act requires the registered owner of a proposed subdivision to provide, without compensation, to the Crown in right of Alberta or a municipal corporation, land for public roadways, public utilities, environmental reserve, and municipal reserve and/or school reserve.[39]

In comparing the old and new provisions on this subject, I have concluded that, as a general rule, the developer will retain more land for development. This could result in somewhat higher population densities and lower housing prices if these savings are passed on to the consumer.

Section 19(2) of the former Subdivision and Transfer Regulations,[40] although badly drafted, seems to limit the total amount of reserve (excluding environmental reserve) and roadway dedication to forty per cent of the total gross area of the parcel to be subdivided. This maximum, in some municipalities, has been treated as an automatic requirement.

In comparison, section 93 of the new Act specifies that not more than thirty per cent of the land remaining, after deducting land taken as environmental reserve, can be required for public roadways or utilities. However, the real maximum is expressed in section 93(3):

> If
>
> a) the registered owner has provided sufficient land for the purposes referred to in subsection (1), but
>
> b) the area of land so provided is less than the maximum amount authorized by subsection (2),
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> the subdivision approving authority shall not require the owner to provide any more land for these purposes.

This clearly offers an incentive for efficient layout of a subdivision.

Section 96(2) provides that the amount of municipal and/or school reserve cannot exceed ten per cent of the area after deducting environmental reserve.

These are two obvious differences between the old and new provisions for roadways, utilities and reserves. First, a maximum of forty per cent of the gross subdivision area could formerly be required, whereas the new requirement is for a maximum of forty per cent of the net area remaining after subtraction of environmental reserve. Second, efficient subdivision layout can reduce this total, if "sufficient land" is provided for public roadways and utilities.

Before looking at some calculations which illustrate the differences between the old and new Acts, something should be said about environmental reserves. The new section 95 allows an approving authority to require as environmental reserve all or any swamp, gully, ravine, *coulee*, natural drainage course *or creekbed*, land *subject to flooding or unstable*, and land unsuitable *in its natural state* for

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39. Land required for roadways and public utilities is not "reserve land", but it is convenient to discuss these categories together. It should also be noted that money in lieu of municipal or school reserve may be accepted (s. 96), but this is not discussed herein.

40. Alta. Reg. 215/67 as am. Alta. Reg. 292/75. The authority for these requirements was found in former s. 25(1).

development.[41] Whereas the owner formerly was required to provide a ten foot strip along a body of water, as well as a parcel fronting on the shore, having an area equivalent to ten per cent of the area being subdivided (in lieu of the normal ten per cent reserve),[42] the new Act seems to have somewhat relaxed this provision. Now, the approving authority *may* require only a twenty foot strip, for only two purposes, to prevent pollution or to provide public access.[43]

The standard ten per cent reserve provision continues.

The new Act provides that environmental reserve may be used as a public park, but if it is not, it must be left in its natural state.[44] Environmental reserve cannot be "sold, leased or otherwise disposed of".[45]

We should also note that there was never a maximum to the land in these environmental categories that could be required. Therefore, the difference between the gross and net calculations in the old and new Acts could again be significant.

One more change has been made by the new Act. Where a proposed subdivision is to result in a density of twelve dwellings or more per acre of developable land, an additional reserve may be required, of three per cent for densities between twelve and twenty-two units per acre, or five per cent more for densities exceeding twenty-two units per acre.[46]

Gummo, in an excellent paper[47] has compared three different reserve land calculations under the old and new Acts:[48]

Case A

—100 gross acre parcel. No bodies of water. 15 per cent unsuitable for development due to steep gully slopes. Proposed density of 11 dwelling units per acre of developable land.

The Planning Act, 1970

100	Gross Acres
- 10	(10% general reserve)
90	
- 30	(Maximum roadway/utility requirement)
60	
- 15	(Environmental Reserve)
45	Acres available for development

41. The italicized categories are additions to the list in the former s. 25(3).
42. Old s. 25(4).
43. S. 95(d). [Under the amended Act, an applicant has an opportunity to show that the s. 95 land "can be suitable for development," and, of course, "20 feet" has become "6 metres"—Eds.]
44. S. 107(1).
45. S. 115.
46. S. 98.
47. Ken Gummo, "Roadway and Reserve Land Dedications: A Comparative Analysis of Regulations and Requirements Under The (Alberta) Planning Act, 1970 and The Planning Act, 1977" (Unpublished, 1978).
48. Although the amounts of environmental reserve required are at the discretion of the subdivision approving authority, Gummo has assumed the discretion is applied evenly to both sides. He also assumed maximum allowable roadway/utility dedications in all cases.

The Planning Act, 1977

100	Gross Acres
- 15	(Environmental reserve)
85	
- 25.5	(30% of envir. net land)
59.5	
- 8.5	(10% general)
51	Acres for development

Case B

—100 gross acre parcel. No bodies of water. 20 per cent undevelopable due to steep escarpment. Developer proposes 28 per cent of "environmental net" land be used for roadways and utilities (and satisfies roadway width requirements, etc.). Proposed density of 10 dwelling units per acre of developable land.

The Planning Act, 1970

100	Gross Acres
- 10	(10% general reserve)
90	
- 30	(Maximum roadway/utility requirement)
60	
- 20	(Environmental reserve)
40	Acres available for development

The Planning Act, 1977

100	Gross Acres
- 20	(Environmental reserve)
80	
- 22	(Max. roadway/utility dedic.)
58	
- 8	(10% General)
50	Acres for development

Case C

—100 gross acre parcel. Stream running along one edge of the parcel (2,000 ft.). 5 acres undevelopable due to a high water table problem. Proposed density of 24 dwelling units per acre of developable land. Developer proposes 25% of "environmental net" land for roadway and utility dedication (and satisfies all roadway width requirements, etc.).

The Planning Act, 1970

100	Gross Acres
- 10	(Parcel fronting on river edge 25(4))
90	
- 0.5	(10 ft. strip along riverbank)
89.5	
- 30.0	(Max. roadway/utility dedication)
59.5	
- 5.0	(Environmental reserve)
54.5	Acres available for development

The Planning Act, 1977

100	Gross Acres
- 6	(Total Env. Res. including 20 ft. strip along riverbank)
94	
- 9.4	(10% of environmental net)
84.6	
- 23.5	(Max. roadway/utility dedicat.)
61.1	
- 3.0	("High-density" reserve)
58.1	Acres for development

Summary

Given these examples, it is clear that under The Planning Act, 1977 land subdividers will, in most cases, have significantly greater amounts of land available for private development after the required dedications to the municipality or province have been made. This is particularly true where the developer is able to supply adequate roadway/utility land totalling less than 30 per cent of the gross parcel area (as was the case in examples B and C). The second major factor in reducing dedication requirements under the new Act is the fact that the 10 per cent municipal reserve calculation is now made after the environmental reserves have been deducted. This is particularly important where large amounts of environmental reserve are taken, such as in Case B. Even in a case such as C where additional "high density" reserve is required by the new Act, more land is still available for development than under the old Act.

IV. THE SPEED OF THE DEVELOPMENT APPROVAL PROCESS

The evidence is equivocal whether the new Act simplifies or complicates the already lengthy development approval process, but some improvements could still be made.[49]

Some streamlining of the approval process has been achieved, particularly at the provincial level. These changes include allowing the Alberta Planning Board to meet in panels which can decide on the Board's behalf, so that more than one hearing can be held at a time,[50] thus ending the involvement of the Provincial Planning Director and potentially the Provincial Planning Board in non-appealed subdivision approvals.[51] As well, the need has been abolished to obtain ministerial permission to implement development control[52] or Board approval of the by-laws and resolutions doing so.[53]

An additional step, however, has been added: the Minister must approve a Regional Plan, after the Board has already examined it.[54]

At the regional level, a noteworthy change is that the Regional Plan "may regulate and control the use and development of land in the planning region".[55] Presumably, this does not imply an additional approval process—this would be a serious mistake. It seems mainly to emphasize other sections of the Act[56] which make the Regional Plan binding on the subdivision and development approval processes.

At the local level, the new power of the Minister to allow other municipalities than Calgary and Edmonton to approve subdivisions could speed things up.[57] As well, the authorized municipalities may not only subdelegate approval power to the Municipal Planning Commission, but it can, if Council permits, subdelegate further to one or more members.[58] Thus, consideration of subdivision applications could be expedited where M.P.C. meetings were a bottleneck.

Council in its land use by-law can now specify without limitation the time which must elapse, after a development permit is refused, before an application for a similar use on the same lot can be submitted. Formerly, the Act specified that a by-law which covered the point should require a wait of six months.[59] Although community groups would no doubt object, this period could be shortened (or lengthened, for that matter).

Some features of the Act, however, could cause delay at both provincial and municipal levels. Reasons for refusal of subdivision approval or development approval must be given,[60] as they must for decisions by the Development Appeal Board.[61] Why the need to put in writing the presumably rational reasons for a refusal should cause more than a short

49. I am conscious of my lack of operational experience in this area and this section must be read with this in mind.
50. S. 15.
51. Old Act, s. 22(3)-(5).
52. Old Act, s. 102.
53. *Id.*, ss. 107 and 111.
54. S. 51.
55. S. 46(b).
56. Ss. 53 and 88(1)(b).
57. S. 32.
58. *Id.*
59. Old Act, ss. 104(2) and 124(2).
60. S. 90(2). [S. 90(3)(a.1) of the amended Act requires reasons to be given also to the owner of adjacent (defined: s. 90(4)) land.—Eds.]
61. S. 83(2)(b).

delay is not clear. But in any event, the requirement should focus the approving authority's attention upon the contents of the law, and thus improve the quality of the assessment of the application. It also gives, at first instance, an indication whether an appeal is worthwhile. It should go without saying that this increases the likelihood that justice will "manifestly be seen to be done". Any reasonable delay caused by this requirement, therefore, is eminently worthwhile.

Replot procedures now involve two public hearings,[62] where none existed before. Inexplicably, these would seem to be necessary even if one hundred per cent of the affected owners approved the replot. Further, for any replot, the former requirement of consent by sixty per cent of the owners having sixty per cent of the assessed value[63] has been increased by the new Act to ninety per cent,[64] which might take somewhat longer to acquire, even if the more stringent requirement seems fairer. These potential delays should be dealt with by amending the Act.

The Subdivision Regulation creates a lengthy list of local authorities and persons who, depending on the location of the land, are to be sent copies of a subdivision application.[65] Each of these recipients has a legitimate interest, but money and time could be saved if minor subdivisions were exempted from at least parts of this complex circulation, or if municipalities who can approve subdivisions were authorized to make the decision on behalf of some of these bodies.

The provisions for reserves upon subdivision could create considerable delay. Without rehearsing the relative claims of school boards and municipalities to reserve lands (a joint use agreement was expected under the former Act and the practice will probably continue), there is no reason why an allocation of reserve land between the two authorities should be required before a subdivision is approved.[66] Should these authorities disagree, or simply lack the necessary information to decide on the amounts, the subdivision approving authority is to make the decision somehow. Surely a developer (and hence the future house buyers) should not be put to delay and expense by a bureaucratic wrangle. This should be changed.

Although the provision for deferment of the reserve[67] may be thought to be sufficient, at least two problems exist. The first is that the particular subdivided area will not have reserve, since the deferred reserve caveat[68] is to be filed against "other land" of the applicant. If this other land is not in the vicinity, the original subdivision goes without. The only remedy in these circumstances is to require money in lieu of reserve. Unfortunately, the amount is calculated "on the basis the land is an unsubdivided state",[69] whereas obviously the land bought for reserve in the vicinity will be sold at a much higher price on the basis that it is subdivided. Thus, the achievement of the already meagre amount of reserve land will be very costly. This problem also arises where there is more than one developer

62. Ss. 120 and 127.
63. Old Act, s. 90(2).
64. S. 127(2).
65. Alta. Reg. 132/78.
66. S. 101(4).
67. S. 99.
68. S. 99(2). [S. 99(2) has been amended so that the caveat (of a direction for deferment regarding municipal and school reserve) is filed "against the title of the land to which the direction relates."—Eds.]
69. S. 97(1)(c).

and the reserve is being placed with reference to the entire community being planned.

There are many other complexities in the provisions relating to subdivisions, but a short discussion will suffice.

Obviously, the development process should be coherent. Provisions for reserve lands, and various monies to be provided by a developer, should be consistent and capable of arrangement at one time. To a large degree, the new Act does this. At the subdivision stage, reserves for roadways and utilities, environmental reserve, and municipal and school reserves (or money in lieu thereof) are provided.[70] Also at this stage an off-site levy for necessary water sewage and drainage facilities can be exacted,[71] and a development agreement can be required for construction of roadways and utilities at the developer's expense.[72] For land previously subdivided without the exaction of reserve, a redevelopment levy may be imposed within areas covered by Area Redevelopment Plans, for land for schools, parks and recreation facilities.[73] If the land has previously been developed, no off-site levy can be made. As well, a development agreement identical to that authorized at the subdivision stage can be required at the development permit stage.[74] The difficulty has been in the past that no development permit was required by most municipalities for single family dwellings or duplexes even if a whole subdivision of them were being built (a wholly inappropriate omission, in my opinion). The development agreement was at the subdivision stage.

Let us suppose a situation where an application for a development of many single family or duplex homes is being made for land which had been subdivided without an off-site levy or infrastructure construction agreement having been required. If the municipality is to have a chance to impose these at the development approval stage (these can, however, be levied only once in relation to any parcel of land), it will either have to require development agreements for groups of single family homes being built be one contractor, or limit the development agreement requirement to multiple family developments. Certainly it would be mad to exact a development agreement in respect of each individual house. If this situation can arise often, amendment of the Act is necessary.

It might be claimed that a municipality should be able to exact redevelopment levies whether or not the land is covered by an Area Redevelopment Plan. But if the development is not part of a significant shift in the neighbourhood, why should a levy be permitted, or if it is, how could the money be used without an overall plan? If the area is under heavy redevelopment pressure, the fact that a redevelopment plan is a prerequisite to such levies is a powerful inducement to undertake neighbourhood planning.

The new Act does not seem to impose as much additional complication as it has been popular to claim. Much has been simplified, and amendments suggested herein would take care of some of the new delays. It seems to me that municipalities which can identify and which seriously wish to eliminate delays and complexities in the approval process have it

70. Ss. 92-101.
71. S. 74.
72. S. 89.
73. S. 73.
74. S. 75.

largely within their power to do so, certainly as much as under the former Act which was relatively satisfactory to people who administered it.

V. SOME GENERAL INTERPRETIVE POINTS

Some interpretive points should be mentioned. For example, a building is defined so loosely as to include "anything . . . placed on . . . land,"[75] without any reference to permanence. Admittedly, a building is a hard thing to describe, but the Alice in Wonderland possibilities of literal interpretation conjure up arguments over baseball bats and bicycles. Surely the definition in the National Building Code would suffice: "Building means any structure used or intended for supporting or sheltering any use or occupancy".[76] The definition's breadth is important, for the fundamental concept of "development" naturally includes building, as well as a "change of use of land".[77]

The new definition of "development" more clearly seems to cover demolitions, a welcome change. Too often meritorious structures have been torn down without any public input, or any governmental consideration of the replacement plans, since the demolition permits, at least in Calgary, were granted as of right. The City turned a deaf ear to the writer's argument that under the former Act's definition of development, a demolition constituted "operations . . . on . . . land" or alternatively "any change in the use or intensity of use of any lands, buildings or premises".[78] Although the argument seemed clear under the old Act, the new definition refers to "an act done in relation to land or a building that . . . is likely to result in a change in the use of the land or building", or one "likely to result in a change in the intensity of use" thereof.[79] Surely demolition, which is so obviously part of the development process, comes now unquestionably into the development approval process.

Another interesting definition is "public roadway", which is relevant to the provision of reserves during subdivision. It now includes "a public right of way on which no motor vehicle . . . is permitted to operate".[80] This definition would cover rights of way for pedestrian walkways and exclusive public transit rights of way, either for buses or rail vehicles.

Before discussing plan making and development approvals, it should be noted that generally the new Act does not give much recognition to the differences between problems in rural and urban areas. In seeking omnibus provisions, the Act occasionally gets skewed. For example, there was an uproar in rural areas about the draft bill's provisions, allowing a right of entry on land for inspection and enforcement officials. Although most of the provisions had existed in statutes for many years[81] and although in the urban context they were highly desirable, the province backed off. Now, if the property is vacant, an expensive and time consuming application must be made to the District Court* for an order

75. S. 1(3).
76. National Building Code 1970, s. 2.1.1.2.
77. S. 1(5).
78. Old Act, s. 2(f).
79. S. 1(5)(iii) and (iv).
80. S. 1(30).
81. *See* the old Act, ss. 7(6) and 137. The number of officials who have such power has, however, been increased.

* Application is now made to the Court of Queen's Bench of Alberta.

authorizing entry.[82] Under both old and new Acts, if permission to enter is refused, the same application must be made.[83]

Of course, perhaps urban Albertans also saw the beginnings of a police state in the former provisions, and there may be better examples. But the City of Calgary review of Bill 15 made the same point:[84]

> The proposed New (*sic*) Planning Act makes no recognition whatsoever of the different requirements of the major cities and tries to have an omnibus clause which is applicable to all situations.

The preparation of Regional and General Municipal Plans is obligatory, but the Provincial Planning Board can no longer order a council to pass the necessary by-laws to conform to a Regional Plan.[85] Nor is there provision for a council to refer actions of any other municipality it fears will have a detrimental effect within its own boundaries to an R.P.C, whether or not a Regional Plan covers the point. Under the former section 93, an R.P.C. could make a binding decision, subject to appeal to the Board, on any such reference. Presumably these issues are now to be left to the courts.

Penalties for offences under the Act and regulations (as well as municipal by-laws) remain too weak. Judges have had an unfortunate tendency to treat this sort of offence very lightly and section 115(1)(a) of the Municipal Government Act sets a low maximum fine of $500 for the breach of municipal by-laws. On the other hand, the section allows Council by by-law to set a minimum fine for an offence, and to provide a minimum daily fine for offences continuing "after conviction". Unfortunately, there is no provision for daily fines for offences occurring "before conviction".

Vigorous enforcement powers remain, without the need to resort to the courts. Development officers have now been given directly council's former power to order the cessation of work, of an improper use of land or a building, or even demolition of a non-complying structure.[86] In addition, they can order the development replaced. If these orders are ignored, council may have the necessary work done at the owner's expense.[87]

Comments have been made elsewhere about the subdivision approval process,[88] but it may be mentioned that a proposed subdivision has to conform more closely to plan and by-law provisions.[89] Another point is that section 123(5) of the former Act, which was added in 1973, permitted a municipality to acquire, by expropriation if necessary, land within a proposed subdivision for parks, schools and recreation areas, in addition to the resources stipulated. Presumably this section added some power to section 127 of the Municipal Government Act[90] which permits the expropriation of land "for any municipal purpose", but it has no counterpart in the new Act.

The legal effect of General Municipal Plans and Area Structure or

82. S. 43.
83. New Act, s. 43(2); old Act, s. 137(2).
84. City of Calgary, Planning and Law Departments, April 11, 1977 at 5.
85. This was authorized by s. 89(e) of the old Act.
86. Old Act, s. 126(1), new Act, s. 79.
87. S. 80.
88. *See supra* Section V.
89. *Cf.*, old Act, s. 16(c) and new Act, s. 88(1)(6).
90. R.S.A. 1970, c. 246, as am.

Redevelopment Plans was mentioned in a previous article.[91] All must conform with the Regional Plan but none must conform with each other. The Area Redevelopment Plan must conform with the land use by-law, which need not conform with any plan but the Regional Plan. The Development Appeal Board is, however, bound by all statutory plans and by the land use by-law.[92]

A problem is presented by plans which are not "statutory plans" but have been approved by Councils. For instance, Calgary passed "design briefs" under the former Act, and such plans as the Inner City and Downtown Plan under the new Act. These plans, however, do not purport to be "Area Redevelopment Plans" and they were passed by resolution instead of by by-law as required under the new Act.[93] Therefore, although council presumably meant these documents to guide the approval process, at present they have no binding effect. Under By-law 8600, the approving authority has the duty only to "have regard" to them.[94]

VI. CONCLUSION

The points covered herein certainly do not exhaust the interesting features of The Planning Act, 1977. Many more general remarks have been made elsewhere,[95] including an assessment of the extent of centralized control imposed by the Act, and the adequacy of its provisions concerning public participation and environmental concerns.

Overall, my conclusion is that if the new Act is "the best in North America", the competition is not very stiff. It is adequate, even good in some ways. But it is not superb, and for five years' work it should have been.

91. 17 *Alta. L. Rev.* 434 (1979) at 436 and 448.
92. S. 83(3)(a).
93. Ss. 63, 135-6.
94. Development Control By-Law Number 8600, s. 9.
95. *See* P. S. Elder, "The New Alberta Planning Act", *17 Alta. L. Rev.* 434 (1979).