

A NEW ZONING WITH ALTERNATIVES
THE BONUS SYSTEM

Thesis for the Degree of M. U. P.
MICHIGAN STATE UNIVERSITY
SHARON A. BOND
1972

ABSTRACT

A NEW ZONING WITH ALTERNATIVES: THE BONUS SYSTEM

By

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A zoning ordinance is the single most important tool for the implementation of a community's comprehensive plan. However, this tool has become less effective recently because of changing concepts and techniques of land development. A combination of past, present, and future is needed to keep careful pace with the accelerated demands for change in land development patterns within urban areas. In this thesis, a new zoning method, a bonus system, is proposed as a way to control new development trends; and at the same time use the long history of legal, judicial, and administrative precedents found in zoning's background.

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A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER IN URBAN PLANNING

Department of Urban Planning and Landscape Architecture

1972

ACKNOWLEDGEMENTS

Special recognition is given to the following persons and organizations who provided information or were instrumental in helping with the development of this thesis:

National Endowment for the Arts of the National Council of the Arts, who granted the Graduate Thesis Fellowship from which this thesis was funded.

The City of Toronto Planning Board, who provided much of the data and information discussed in this thesis.

The City of East Lansing Planning Commission, who provided employment opportunity and the inspiration for this thesis.

Professor Keith Honey, Department of Urban Planning and Landscape Architecture, Michigan State University, whose guidance as a thesis advisor was invaluable.

William C. Bond, who offered suggestions, constructive criticism, and patient understanding during the development of this thesis.

A debt of gratitude is also extended to the many other individuals and agencies who provided data and background material for this thesis.

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INTRODUCTION

An analysis to determine an urban project's economic and technical feasibility and appropriate land uses for the site plan is an important preliminary step. In designing the street and block layout, numerous sketches will be made by the site planner before the ultimate site plan is finalized. In these preliminary designs, study of the physical characteristics of the site; what parts of the site favor one treatment over another; what controls are superimposed by peculiar circumstances of access, adjacent uses, comprehensive area plans, and zoning; what limitations and problems exist such as utility rights-of-way across the site; what density of family units and type of dwelling are to be accommodated, will determine the allocation of land use within the site. These determinations will adjust the area to be devoted to streets, residential sites, recreation, schools, shopping, and such similar elements within the development.¹

A basic premise of this thesis is that the concept of zoning regulations for the public health, safety, and

¹Community Builders Council, The Community Builders Handbook, (Washington, D.C., Urban Land Institute, 1968), pp. 127-133.

welfare, as carried out to date, has not been able to effectively deal with the full range of problems associated with the implementation of land use planning. Recognition that zoning regulations have not been fully effective is beginning to be more widespread as increasingly more new development concepts must be provided for by amendment to zoning ordinances, and administrative interpretation of these amendments is required. Increasingly these amendments and administrative interpretations involve individualized regulations with aesthetic considerations inherent, because of the emergent public values placed on environmental factors, open space, recreation facilities, historic preservation, the screening of parking, lower cost housing through multiple-family living, and a sense of community identity. This individualized zoning with aesthetic considerations is also becoming recognized by the judicial system through recent court decisions which yield more sympathetic opinions broadening the concept of the public welfare to incorporate these emergent values.

The problems of urban land use planning are beginning to be recognized for what they are - a complex spiral of social, economic, and physical factors. It is likewise being increasingly accepted that these problems must be comprehensively approached with more ammunition than merely the regulation of the physical relationship of a structure to a particular site. Rather the regulations of the

structure must be related to the block, the neighborhood, the surrounding environment. The exact form this comprehensive land use control should assume is the subject of much controversy among urban planners, architects, lawyers, economists, engineers, and sociologists alike. Therefore, it might be well to look at the legal basis for land use control, and the nature of the land use configurations emerging.

This thesis seeks to do just that. In general this thesis seeks to accomplish three things:

1. an examination of the legal basis for comprehensive land use control through zoning regulations;
2. a delineation of the land use configurations and considerations not accommodated by zoning regulations; and
3. a recommendation for the improvement of zoning regulations and the ramifications involved.

The first order of business, then, is to look at the structure of zoning and the roots it has in legal precedence and procedure. Chapter One deals with the early beginnings of zoning, its legal nature, its purposes, and its traditions and trends. Controversy over zoning's appropriateness is not new; its popular and judicial acceptance was slow in coming after the first comprehensive ordinance was adopted in New York City in 1916. However, if the basic system is to be improved upon today, the basis for zoning regulations must first be understood.

Next, the common form of zoning regulations is studied. Many of the inadequacies of zoning ordinances for today's land use planning concepts lie in the format and subject matter of the regulations aiming for generalized rules to cover all types of sites and parcels of land. Chapter Two concentrates on the stated objectives of zoning regulations, their format, and content. Typical kinds of regulations are: regulation of structures, height regulations, regulations of building bulk, lot area regulations, yard requirements, variances, and special exceptions.

A brief discussion commences in Chapter Three of the newer forms of zoning regulations to accommodate recent development patterns. Many of these forms are added by amendment to the original ordinances and require administrative control. This type of control is being utilized because many of these development patterns require individualized parameters, such as open space and the screening of parking. This chapter discusses the controversy this creates and the new concepts themselves, such as rural development, flood plain zoning, airport zoning, new towns, historic areas, cluster development, floating zones, planned unit development, recreation and open space zoning, off-street parking, and performance zoning.

Chapter Four delineates the problems zoning regulations encourage in dealing with these modern development concepts, as well as the environmental consequences they

may invite. Common ordinance deficiencies are often to blame for these problems rather than the intent behind the ordinances themselves. These common deficiencies are: defects in the original ordinance, administration and amendments which weaken the intent of the regulations, and failure to reflect new concepts in recent development patterns. The "new zoning" is then compared with its accelerated change and the reasons for its viability.

The next chapter begins the discussion of an alternative method of increasing zoning's efficiency. This proposal consists of a bonus system whereby the developer may increase his density or be relieved of some of the regulations promoting uniform street frontages, etc., if he makes other concessions such as increasing recreation and open space opportunities or parking ratios. This system is finding widespread acceptance in Toronto; hence, this model is used as a basis for discussion. Chapter Four deals with the history of the bonus system in Toronto, its objectives, implementation methods, zoning amendments required, and minimum concessions the developer must make in order to be allowed bonus features. These minimum requirements center around such development features as family-type units, additional landscaped open space, public use lease, building variety, large site areas, and site assembly.

Chapter Six points out the features of the zoning and bonusing system. The zoning controls needed for such

a system involve density, landscaped open space, setbacks and angular plane controls, parking and vehicular movement. The bonusing features that follow this control include: site area, landscaped open space, adjoining frontages, mixture of housing types, and parking. Bonusing conditions and limitations are also discussed. Finally the implications and possible ramifications of such a system for use in the United States are considered.

CHAPTER ONE

ZONING HISTORY AND PHILOSOPHY

Early Beginnings

Zoning ordinances comprise the most established form of control over the development of parcels of land in communities across the nation. In thumbing back through the pages of time it would probably be difficult to identify the precise point that zoning started. However, it is known that the beginnings of zoning were quite different from the modern, sometimes over involved, ordinances of today. It is also well established that the first zoning attempts were primarily for the purpose of preventing so-called objectionable uses from occurring in residential neighborhoods.

The first recorded court cases are California decisions dealing with a brick-yard and a hand laundry which were declared to be undesirable neighbors for homes. As the twentieth century got under way, additional experiences in the regulation of the use of structures began to appear in various parts of the country. Attraction to this field resulted in several lawyers becoming specialists in this form of legal regulation, foremost among whom was

Edward M. Bassett. "Many credit Mr. Bassett as being the father of zoning as we know it today."¹

It is usually accepted that the beginning of contemporary zoning was the adoption, in 1916, by the City of New York of a zoning ordinance which regulated the use and location of buildings throughout the city. Looking back on that pioneering effort, it is easy to see the great progress made since that rather cumbersome and crude document, which nonetheless represented monumental advance, since it was the first effective attempt at coordinated action to control land use by an American municipal government. It is accepted that the beginning of zoning commenced with the New York ordinance because the earlier California ordinance simply regulated the use of land and attempted to prevent nuisances. The New York ordinance went further.²

Conventional zoning by local government was regarded as radical when first proposed. It was heatedly attacked in the courts as an unconstitutional infringement of the property owner's right to use his property as he saw fit. The right of municipalities to zone was upheld, however, in the landmark case of the Village of Euclid v. Ambler Realty

¹Herbert H. Smith, The Citizen's Guide to Zoning, (West Trenton, New Jersey, Chandler-Davis Publishing Co., 1965), p. 10.

²Ibid., p. 14.

Company (272 U.S. 365), decided by the United States Supreme Court in 1926, as arising under the state's police power. Zoning legislation has been consistently sustained under the broad police power of the states to legislate in order to promote the health, safety, and welfare of their citizens.³

In the Euclid case, the Supreme Court dealt with a factual situation surprisingly similar to today's land use issues - industrial encroachment moving west from the City of Cleveland and threatening to overrun a suburban community. This language has precisely foreshadowed the problems faced today by many communities. This language explains the fact that following the Euclid case, municipal zoning rapidly evolved into the major land use weapon of recent decades. The problem with municipal zoning, however, is that there is no meaningful recourse available when an environmentally or inappropriate project is permitted by municipal zoning authorities.

Legal Nature

The lack of meaningful recourse for inappropriate land uses permitted by municipalities can be traced through a look at the legal basis for zoning. In the beginning,

³Philip Weinberg, "Regional Land Use Control: Prerequisite for Rational Planning," New York University Law Review, Vol. 46, No. 4, (Oct., 1971), p. 788.

zoning was classified by the courts as an exercise of the police power of the state, the power to adopt regulations to promote the public health, safety, and general welfare. For one thing, since the police power belongs to the state, it has been held in most jurisdictions that municipalities have no power to adopt zoning laws until the state legislature confers that power on them, or as is often said, delegates that power to them by a statute which is ordinarily known as an enabling act.

Zoning, then, is an exercise of the basic power of the state and its political subdivisions. This means that each regulation in the zoning ordinance must bear a reasonable and substantial relationship to the ends designated by the police power. If the zoning regulations do not meet these ends they will be found in violation of the "due process" clauses of state and federal constitutions. While the constitutionality of zoning has been upheld by a long series of court decisions, the courts will still examine the application of individual provisions to individual pieces of property to see whether the specific restrictions imposed meet constitutional requirements.⁴

The municipal power to zone, like other regulatory powers, must be obtained from the state legislature. Except

⁴Robert M. Leary, "Zoning," in Principles and Practice of Urban Planning, ed. by William I. Goodman and Eric C. Freud, (Washington, D.C., International City Managers' Association, 1968), p. 402.

for certain "home rule" cities, a municipality, therefore, must show that its zoning ordinance not only meets constitutional standards, but also meets the legislative requirements set forth in the state enabling act, related to substantive provisions and the procedures followed in this enactment and administration.

In general, the power to zone may be transferred by the state through enabling acts to either the local level, the county, or the regional level. Some states authorize all three types of zoning, while others restrict the power to the local level, depending on the nature of development within the state and the system of land use control that would appear to be appropriate.⁵ The usual enabling act, while permitting regulations to differ for different districts, requires that within a district the regulations must be uniform for each class and kind of building.

The characteristic feature of the zoning ordinance that distinguishes it from most other regulations is that it differs from district to district, rather than being uniform throughout the city. Thus, a given area might be restricted to single-family residential development with height regulations, minimum lot size requirements, and setback provisions appropriate for that kind of development. In other areas, commercial or industrial development might

⁵Ibid., p. 407

be permitted, and regulations for those areas would be enacted to control such development. Building code provisions or sanitary regulations, on the other hand, normally apply to all buildings in a certain category regardless of where they may be situated within the city.

The enactment of zoning legislation permitted by the state enabling act then becomes a matter for legal interpretation by the courts and for varied interpretation by many lawyers. In other words, zoning is the enactment of a law by public authority which controls and regulates private property. The basis for interpretation is whether or not regulation of a particular parcel of private property is under the police power of promoting the general health, safety, and welfare of the public; and whether the regulation places an unreasonable control over the owner of the parcel in question.

Another item of controversy in applying the police power concept relates to "confiscation without compensation". The question here deals with determining the point at which zoning regulations amount to private property confiscation for a publicly determined use without due compensation to the owner. Conversely, another related question centers around public condemnation of land. This form of police power control does allow reparation to the owner of condemned land and is often enacted in conformance with the land use policies of the municipality. Hence, confiscation and

condemnation can result in similar hardships for private property owners. However, the hardships involved in zoning regulations must be proven through the judicial system. Many courts and zoning boards of appeals are wrestling with this problem today.

Individual interpretations have been minimized somewhat through court cases setting precedents. The legislatures and the courts have insisted that there be a reasonable basis for classifying particular areas differently from others. They have insisted that an ordinance cover the entire jurisdictional area of the city, rather than singling out a small area for regulation and leaving the remainder of the city unrestricted. Further, the courts insist that the regulations be reasonable in their application to particular properties. Thus, it makes little sense to zone property for a use which it cannot physically accommodate.⁶

The municipality wishing to take advantage of state enabling legislation must initiate legal proceedings to carry out the zoning function. An elected governing body has the final decision as to whether or not a zoning ordinance shall be adopted. Before it can be adopted, however, certain legal proceedings must be followed and the final document itself must be put into proper legal form. When

⁶Ibid., p. 402.

the ordinance is prepared and ready for presentation, it is submitted to the public and subjected to a public hearing where, again, certain legal procedures must be followed.

The theory of the public hearing is that any person of interest shall be afforded the right to express an opinion before a group of people who are listening to his opinion with an open mind. Following this expression, and a thorough evaluation of all of the thoughts put forward by the citizenry, the governing body must then take the formal action of enacting the ordinance. Once the zoning map and the zoning ordinance text have been put into the form required by state and local laws, it is then a regulatory document of the municipality and carries with it enforcement procedures.⁷

Purposes

Over the past decade, zoning has become a much used word in the vocabulary of the average citizen. This does not mean, however, that the word has achieved a consensus of meaning nor that the average citizen has learned to distinguish between successful and unsuccessful zoning. Nor does it mean that everyone is in favor of zoning. It does mean that zoning is probably the single most commonly used legal device available for implementing the land use plan of a community. The course of events

⁷Smith, op. cit., p. 12.

has led to the legal tool called zoning to help control the phenomenal growth and the development which has taken place in this country.

The first comprehensive zoning ordinance adopted in this country was in the City of New York. The reason this was referred to as a comprehensive ordinance is that it was the first one which dealt with a number of factors other than just the use of land. Some enabling acts have used phrases such as "zoning shall be in accordance with a comprehensive plan."⁸ This implies that zoning, in order to be reasonable and properly done, must not deal with separate, isolated, and individual problems within the municipality, or individual parcels of land; but must make sense from a total view of the entire community. The residential areas must be related to the streets and roads; the streets and roads must be related to the industrial and commercial areas; the industrial and commercial areas should not crowd the residential areas, etc.

Zoning is the instrument for giving effect to that part of the comprehensive city plan or master plan which is concerned with the private uses of and the private developments on, privately owned land. The land use plan and zoning plan along with the regulations pertaining thereto are thus a part of the comprehensive plan. The enactment

⁸Smith, op. cit., p. 14.

of the zoning ordinance and its administration are the legislative and administrative acts or processes for giving effect to or carrying out this part of the comprehensive plan.

Zoning as a tool for implementing the comprehensive plan is a relatively recent interpretation of its purpose. The early intention of zoning was for the protection of property values by control over the placement of detrimental land uses, such as slaughterhouses, in residential neighborhoods. This negative approach separated land use districts into residential, commercial, and industrial zones. This method, called the cumulative approach, has continued until the breakdown of districts into sub-categories has become very fine. In the 1960's the mixing of land uses such as townhouses and apartments with shopping facilities became a desirable goal for many municipalities. Some of these basic and historic purposes then became in conflict with the idea of planned or controlled land use patterns. Hence the comprehensive plan has become a measure of a zoning ordinance's intention and reasonableness. Likewise, the zoning ordinance has become a tool for implementing the comprehensive plan of a municipality.

In each of the state enabling acts most of which are based upon the Standard Enabling Acts prepared by the United States Department of Commerce in the 1920's, a statement of purposes of zoning is set forth. The ones included most commonly are:

1. to lessen congestion in the streets;
 2. to secure safety from fire, panic, and other dangers;
 3. to promote health, morals, or general welfare;
 4. to provide adequate light and air;
 5. to prevent overcrowding of land and buildings;
- and
6. to avoid undue concentration of population.⁹

Other purposes have become commonly accepted as desirable goals for zoning. For example, zoning is used as a means of achieving a logical pattern of land use developments.

Today, in our modern complex society composed of complex urban organization, only through an orderly plan of development will the future land use pattern make sense. Only if the community is organized and planned will it be able to support and sustain itself economically. Over the years of zoning experience, there has been some change in basic thinking. From the negative nuisance regulation of the early ordinances, zoning has grown into a vital and positive tool for the guidance of community development. It is recognized as an adjunct to comprehensive community planning.

Being a legal tool, zoning must be carefully prepared and adopted to appropriate legal requirements. Through

⁹Smith, op. cit., p. 21.

a great deal of struggle, the rather clear-cut set of principles regarding zoning as a tool of municipal government are expressed in the enabling legislation. The primary constraint imposed by judicial interpretation is that zoning, in order to be proper, must be reasonable. It cannot be arbitrary, capricious, or discriminatory. Like areas must be treated alike and similar situations must be provided an opportunity to have equitable uses of land and property rights. The important thing to be aware of is that zoning is constantly changing. It should be constantly rethought and reevaluated.

Traditions and Trends

The New York City ordinance of 1916 was actually three ordinances. The first dealt with the use of land; the second dealt with the buildings on the land; and the third dealt with the density of population. Gradually these three have been woven together into nearly all zoning ordinances. Many of these later ordinances required litigation and court tests. Judicial reactions to these ordinances varied, but the legal acceptance of comprehensive zoning was firmly established with the Euclid case.

Traditional zoning is characterized by pre-set regulations, applicable to whole districts uniform within the districts, pursuant to the enabling acts. This type of zoning is called "Euclidean" zoning because it was this

type of zoning that was involved in the Village of Euclid v. Ambler Realty Company, the case in which the concept of municipal regulation of land use through zoning was found to be constitutional. Most zoning ordinances of today are similar to that approved in the Euclid case; most zoning today is Euclidean.

Typically, such zoning informs a property owner more or less precisely how he can use his land. It assumes that development will occur on a lot-by-lot scale, and regulates accordingly. Thus, the form of regulations covers setback, yard size, percentage of lot that may be occupied, and minimum lot area regulations applicable within entire districts. Anyone who can meet the specifications listed in the ordinance is entitled as a matter of right to a building permit. The simple and direct character of this type of zoning clearly informs the landowner as to what he can do with his property. Such an ordinance is very effective in regulating development activity to achieve a pattern of planned municipal growth. However, Euclidean zoning has been used with some very effective, but discriminatory, social ramifications. For example, "snob zoning" is a current subject of controversy in several communities. This exclusive zoning for single-family use or excessive lot requirements effectively freezes out of a community certain economic and minority groups. This kind of exclusionary regulations is increasingly being struck down by the courts.

The zoning ordinance is designed particularly to control private development, as distinguished from public improvements. All private property within the governmental unit's jurisdiction is usually subject to the terms. In addition, a number of state courts have held that property owned by a municipality or county for proprietary purposes, such as the water system, the electrical system, or the city market, rather than for governmental purposes is subject to the city's zoning ordinance.

Zoning is essentially a means of insuring that the land uses of a community are properly situated in relation to one another, providing adequate space for each type of development. It allows the control of development density in each area so that property can be adequately serviced by such governmental facilities as the street, school, recreation, and utility systems. This directs new growth into appropriate areas and protects existing property by requiring that development afford adequate light, air, and privacy for persons living and working in the municipality.

The decisions involved in composing a zoning ordinance are accurately expressed in the following passage.

Visualize, if you will, a hundred-acre tract of vacant land in your community. Possibly it is forested, or pasture land, or just plain wide open space. Perhaps it contains a building or a site of historical importance, or a particularly fine stand of oak. All well and good. But now let's look at the practical side - let's say that land is zoned for half acre lots. That means 200 houses with space taken up by roads and community facilities. The question is: is there a

conflict between 200 houses and that stand of oak or that wide open space? Can that hundred acres be developed in such a way as to preserve a large portion of it as open space and to conserve that historic building and those fine old oaks and still have the 200 houses?¹⁰

The answer is that with successful zoning, communities can preserve the open space and the other amenities and have the same amount of development as they would have without such preservation.

The successful zoning is achieved currently through individual looks at individual parcels of land with individual amenities in a community. Such painstaking looks found to be necessary at increasing rates in the last decade point out the most serious flaw in Euclidean zoning. There is an important element of certainty under a Euclidean ordinance concerning the use to which an owner may put his land, but the other side of the coin is marked inflexibility.

Recognizing that all situations are not equal, two devices have developed to handle circumstances requiring some flexibility: the variance and the special permit. Three other control devices are: cluster development, the floating zone, and the planned unit development. All are departures from traditional zoning regulations. They attempt to provide for imaginative development on other than a lot-by-lot basis, and they do so without having to

¹⁰New York State Office of Planning Services, Innovative Zoning, (Legal Memorandum Series, Albany, New York, Apr., 1971), p. 1.

weaken the zoning ordinance by constant exceptions. Rather, they are flexible devices for the implementation of a community's plans. This flexibility stems from the fact that the developer is given a choice as to how to develop his land, in the hope of getting a better development.

Several important advantages accrue to the community choosing to regulate development in this fashion. The density, and in some cases, even the uses may be mixed within a single development. Greater attention may be paid to good design, and to the preservation and imaginative use of open space. Opportunity is present for the preservation of environmental and historical amenity. The mixture of uses and the mixture of development intensity may be controlled as appropriate in light of the community's comprehensive plan. The appropriate regulations may be established in advance as a general framework, but flexible enough to allow the developer considerable leeway in his design. Developers, too, find advantages in the use of planned unit development and cluster techniques, since their costs of providing required services are generally much lower than is the case for conventional grid-type subdivisions. Frontages are shorter, the improvements are more concentrated, and the investments in streets, sewers, and utilities are less.

CHAPTER TWO

ZONING REGULATIONS

Objectives

The New York ordinance of 1916 not only dealt with the use of land, but it also considered that since buildings are located thereon they too should be regulated in order to guarantee the amenities of light and air. It went one step further and recognized that once land is developed and the buildings constructed, people are involved. It was then considered necessary to guide and direct the density of population, to prevent an overcrowding of land and buildings. Zoning, then, has become the modern response to the individual and collective needs of community life, the living together of unrelated, interdependent people, a society growing more complex as it expands.

Each parcel of ground upon which a structure is built is, in effect, a piece of the total municipal unit. As these pieces fit together, so will the total picture of the municipality be reflected. As these pieces are desirable and have characteristics that will permit a reasonable revenue to be derived from the taxes which can be levied thereon, so will the total tax picture of the municipality be reflected.

Ordinarily, zoning is only indirectly concerned with achieving aesthetic ends, although there has been an increasing tendency to include within zoning ordinances provisions which are mostly solidly based on "general welfare" concepts. Early zoning ordinances were chiefly designed to protect the "highest class" of residential properties.¹ This highest class was composed of single-family residences on extensive lots with large yards. These early zoning ordinances were structured on a cumulative principle, namely that every use permitted in a higher use district was also permitted in all the other districts lower on the scale. Thus, a single-family residence would be permitted not only in all categories of residential districts but also in a business district and in an industrial district. Industry was at the bottom of the scale and was restricted entirely to designated industrial areas within the community.

Recent ordinances have become more positive in their approach, designating the specific uses permitted in each district without making extensive cross-references to uses permitted in other districts. Residences have been banned from industrial districts and in some cases from business districts. Businesses themselves have been divided into

¹Robert M. Leary, "Zoning," in Principles and Practice of Urban Planning, ed. by William I. Goodman and Eric C. Freund, (Washington, D.C., International City Managers' Association, 1968), p. 423.

functional groups. This abandonment of the cumulative principle permits the planner to design a pattern of districts that is far more likely to be followed by actual land development.

The desire to regulate uses in each area of a community is a primary reason for adopting a zoning ordinance. The underlying purpose of segregating different types of uses is two-fold:

1. to prevent the mixing of incompatible uses which may have such deleterious effects on one another as to depreciate property values and desirable environmental features; and

2. to insure that uses requiring expensive public service facilities such as major utility lines and heavily paved streets are restricted to those areas where these facilities exist or are planned to be installed.²

The basic types of districts are residential, commercial, and industrial.

Trends have developed in some recent zoning ordinances, which appear to be at cross purposes with others.³ Some recent ordinances provide for many more types of districts than was formerly the practice, reflecting a desire to deal with as many specific situations as possible and to eliminate the necessity for widespread administrative discretion.

²Ibid., p. 424.

³Ibid., p. 423.

In some ordinances, the district concept is being abandoned and is being replaced by regulations aimed at permitting different classes of uses to exist side by side. For example, it is believed that if the undesirable effects of glare, smoke, dust, vibration, and noise are controlled, adequate off-street parking space is provided, plants are well landscaped with wide lawns, truck routes are controlled, and similar measures taken, then certain categories of industries might exist in the midst of residential areas without being incompatible.

Another trend is toward more consideration of particular proposals on a case-by-case basis. Instead of having specific districts in which permitted uses are listed and all others are barred, some ordinances classify a great number of uses as "special uses" permitted only after consideration by the planning commission or the zoning board of appeals. After this procedure, the special uses are then only subject to such conditions as the board may impose for the protection of the neighbors. This tendency toward the use of the special use technique is frowned upon by some courts. However, it does illustrate the growing tendency to utilize the site plan review and administrative judgment techniques of subdivision controls within the zoning context.

All of these recent trends and objectives have served to make most ordinances cumbersome and difficult

for the average citizen to understand. The zoning ordinance is frequently the longest and most complicated item in the municipal ordinance code. If not, it is generally second only to the building code.⁴

Format

To paraphrase the United States Department of Commerce 1924 Standard Zoning Enabling Act, on which most present day legislation is based, zoning may be defined as the division of a municipality or other governmental unit into districts. The regulation within these districts consists of:

1. the height and bulk of buildings and other structures;
2. the area of a lot which may be occupied and the size of required open spaces;
3. the density of populations; and
4. the use of buildings and land for trade, industry, residence, and other purposes.⁵

In other words zoning consists of dividing the community into districts or zones and regulating within such districts the use of land and the use, heights, and area of buildings

⁴Clan Crawford, Jr., Strategies and Tactics in Municipal Zoning, (Englewood Cliffs, New Jersey, Prentice-Hall, Inc., 1969), p. 20.

⁵Leary, op. cit., p. 401.

for the purpose of conserving and promoting the health, safety, morals, convenience, and general welfare of the people of the community.

The format of zoning ordinances frequently begins with several pages of definitions. Following the definitions there is frequently a statement of purposes. Following the statement of purposes, there is, characteristically, the heart of the whole business, the sections which provide for the division of the community into districts and specifying the land uses which may be conducted in each district. Either as a part of this division of the ordinance or following it, come numerous regulations which are auxiliary to the main purpose. In the simpler kinds of ordinances, these may be limited to setbacks and minimum lot sizes. In more sophisticated communities there may be long lists of regulations covering such items as off-street parking, landscaping, signs, and other matters.⁶

Following the regulations, there are usually provisions describing the application of the ordinance to nonconforming uses, establishing a zoning board of appeals and providing for the granting of variances, specifying amendment procedures, and providing penalties for violation.

⁶Crawford, op. cit., p. 21.

Content

Regulation of Structures

Regulations dealing with lot sizes, yard sizes, and the height and bulk of structures are aimed directly at the qualities that collectively contribute toward livability. They attempt to control the population density in various areas; to insure adequate light, air, and privacy; to afford safe play space for children and recreation space for older persons; to reduce fire hazards; and in general to maintain a healthful and safe environment. They have sometimes been called dimensional requirements, since they are generally shown as a series of measurements or relationships of one kind or another.

Height Regulations

Height regulations may be expressed in feet, stories, or with reference to the width of the street on which a building fronts, e.g., permitting a building height of "x" times the width of the street.

Regulation of Building Bulk

Bulk regulations are closely related to height regulations. Most ordinances achieve some control over building bulk through height limitations and yard requirements. Some rely heavily on provisions specifying the maximum percentage of the lot area that may be covered by buildings. Some

require increased side and rear yards when the building exceeds certain dimensions. Also, some require that residences must have specified minimum floor areas or minimum cubic content.

Lot Area Regulations

The most common method of regulating population density is through provisions prescribing the minimum lot areas that must be provided for each dwelling unit. Such requirements have additional importance as health measures in areas where sewage disposal is through septic tanks or water supply is by individual wells. Minimum lot size requirements are not usually imposed on business and industrial districts.

Yard Regulations

Yard regulations are usually divided into front, rear, and side-yard requirements. Most ordinances require front and side yards in residential districts only, or for residences situated in other districts, although a growing number of ordinances require front yards in certain classes of business and industrial districts.

Variances

A variance is a special permit to violate the law. This unusual feature of zoning laws has been incorporated into the enabling acts in recognition that zoning laws

differ from most other police power regulations in a very fundamental respect. A zoning ordinance has a tendency to affect property owners, or groups of property owners, in many different ways. Therefore, it has become possible to get permission to violate ordinances under certain circumstances.

The most usual and common standard specified by the enabling acts is that the zoning board of appeals make a determination that carrying out the strict letter of the ordinance would result in practical difficulties or unnecessary hardships. The variance, then, is essentially a form of administrative relief available from the pre-set regulations when they become too harsh. "It has a limited safety valve purpose, ideally to spare unnecessary hardship to people whose land is classified by the rigid, pre-set zoning district regulations in such a way that they cannot realize a reasonable return for it."⁷

One of the most common interpretations to evolve out of judicial tests of variance provisions in zoning ordinances has been frequently quoted from the decision of the New York Court of Appeals in *Otto v. Steinhilber*, 282 N.Y. 761, 24 N.E. 2d. 851, as follows:

⁷New York State Office of Planning Services, *Innovative Zoning*, (Legal Memorandum Series, Albany, New York, Apr., 1971), p. 1.

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that:

1. the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone;

2. that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and

3. that the use to be authorized by the variance will not alter the essential character of the locality.⁸

Special Exceptions

A special exception is a use permitted in a given zoning district only when certain circumstances, specified in the ordinance, exist. Frequently the ordinance provides that a special exception use shall not be commenced unless the zoning board of appeals finds that the specified conditions are met.

The special use permit device is used to allow certain types of uses only after administrative decision based on conditions is stated in the ordinance to insure that they will properly relate to the surrounding area. Uses for which special permits are required are generally different from surrounding uses and so need additional standards plus design review.

Whenever pre-set regulations are applied uniformly to a district, there are bound to be loose ends - hardships

⁸Crawford, op. cit., p. 29.

and problem uses. The purpose of variances and special use permits is simply to manage these. Their role is as extremely limited departures from the standard zoning ordinance. In actual practice, however, the special use permit is being drawn upon more and more in the newer ordinances, because it allows flexibility and judgment in applying zoning regulations.

CHAPTER THREE

CHANGING CONCEPTS IN ZONING

Aesthetic Zoning

Through the evolution of the zoning regulations as currently used, it can be seen that land use and development composes subject matter that demands controls which are capable of relating sensitively to the variables in each individual instance and which recognizes that the variables are themselves in the process of continuing change. In order to reflect this characteristic of the subject matter, local governments are increasingly requesting that they be authorized to employ the administrative function as widely as its nature demands. In this case the legislative function should be to state the rules with precision only where the subject matter is largely static, otherwise the degree of specificity should yield to the unique and changing nature of the subject matter and the legislative function should be to state as much in the way of rules and standards as is necessary to assume that the administrator will carry out the policy of the legislature and to guard against arbitrary and ill-considered action.

Many of the doubts that have been voiced about the validity of controls that offer rewards for amenity and good design are merely reflections of the fundamental philosophy and structure of the existing system of land use controls.¹ Indeed, the very idea of rewards suggests an assumption about the function of land use control which is supported only by the philosophy and structure of the existing system.

The reality is that land use controls in terms of zoning relate to development largely as a series of individual permissions, exceptions, and prohibitions. Most development is not occurring as a satisfaction of pre-established rules rather than by way of some modification in them. The existing system of land use control denies this. Its structure - the distribution of powers and functions - assumes that most, if not all, development will occur under the pre-established rules.

The legality of zoning restrictions and limitations is traditionally based upon the inherent power of a municipality referred to as the police power to protect the health, safety, and welfare of its inhabitants. Many of the devices for land use control which have evolved since

¹Jan Z. Krasnowiecki, "The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion," in The New Zoning: Legal, Administrative, and Economic Concepts, ed. by Norman Marcus and Marilyn W. Groves, (New York, Praeger Publishers, 1971), p. 3.

the advent of "Euclidean" zoning were conceived for more individual case consideration and to use the zoning format to encourage good site design. However, zoning for purely aesthetic reasons has not been looked upon by the courts with favor and has often been found to be constitutionally invalid. In recent years, however, aesthetics have become increasingly important in the development of zoning regulations, and the constitutional base for zoning ordinances seeking aesthetic objectives has been broadened by the courts.

An examination of cases where the courts have passed on zoning provisions which sought to impose some kind of aesthetic control reveals a very slow trend toward liberality. This is exhibited not as a specific acceptance of aesthetics as a sound basis for exercise of the police power, but rather by a liberalization of the definition of the public welfare. The rationale underlying the position of many courts that zoning for purely aesthetic objectives is invalid is based upon the premise that aesthetic standards vary widely and are determined by individual preferences and subjective judgments.

In general, it may be said that the prevailing view in the United States is still against aesthetic zoning on the face of it, but there is considerable sympathy under the surface. The trend toward aesthetic zoning was spurred by a decision of the United States Supreme Court in 1954

(Berman v. Parker) in which the Supreme Court indicated that the beauty of a community was a valid consideration in the exercise of legislative power. While no state court of appeal has upheld a provision in an ordinance directed solely at aesthetic ends, a number of decisions incorporate supporting data and several lower courts have taken this view.² It seems clear that aesthetics are not beyond the reach of police power protection and the degree of protection may well be expected to increase in the future as the reflection of a steadily mounting concern for protection of the environment.

However, the fact remains that as desirable as it may seem, it is extremely difficult for zoning to be utilized to assure control of aesthetics, land use allocations, urban form, and community design as a direct function. Design is an extremely difficult concept to define. What may be extremely attractive to one person can be totally obnoxious to another.

While zoning cannot dictate the terms that design patterns will follow, it can, by its very provisions, set forth an improved situation from the overall aesthetic outlook. Even the control of density patterns will, in

²Robert M. Leary, "Zoning," in Principles and Practice of Urban Planning, ed. by William I. Goodman and Eric C. Freund, (Washington, D.C., International City Manager's Association, 1968), p. 402.

fact, result in better design for the community. Many of the legislative measures and the courts are recognizing this fact and are permitting a general consideration of aesthetics in design to be a part of the basic purposes of zoning. Therefore, while it is not possible to directly set forth a discriminatory ruling on design character through zoning ordinances, it can be indicated that one of the purposes of the ordinance is to promote better design within the community and see that the standards which are set down are those that will do just that.

Many zoning regulations are primarily, if not wholly, aesthetic in nature, e.g., setback provisions. A corner lot may be able to justify a setback rule because of the improved visibility it affords motorists. However, the large front yards required by setback provisions in many residential districts exist only because many property owners like to live on streets with attractive lawns and gardens lining both sides.³ In Europe and Latin America, and even in a few of our larger cities, even the wealthiest people construct homes right on the public sidewalk and nobody seems to feel that the public health, safety, and welfare are adversely affected thereby. However, the rule is different in most American cities, and the difference

³Clan Crawford, Jr., Strategies and Tactics in Municipal Zoning, (Englewood Cliffs, New Jersey, Prentice-Hall, Inc., 1969), p. 93.

can only be justified by taking the view that enforcement of the prevailing public taste is necessary to the general welfare of the community.

New Concepts

Individualized zoning and the increasing concern for the environment and large-scale project site design have fostered the creation of new techniques to deal with modern zoning problems. A brief discussion of these techniques will illuminate the individuality of them.

Rural Development

Zoning has been applied to other problems besides the control of urban development. Over half of the states, notably Wisconsin, have authorized counties to zone rural areas. Under the Wisconsin act, counties may specify areas for agricultural development, forestry, and recreational use. Counties thus may prevent agricultural use of sub-marginal lands better suited to forestry, and they may prevent inappropriate settlement of isolated areas.⁴ In many other states rural zoning has been used largely as a means of regulating billboards and other forms of outdoor advertising.

⁴Leary, op. cit., p. 406.

Flood Plain Zoning

A few states have granted their counties authority to adopt "flood plain zoning" ordinances in order that citizens can receive the benefits of any federally backed floor insurance.

Airport Zoning

Most states also authorize airport zoning ordinances, by means of which the height of trees and structures in the vicinity of airports may be regulated, as well as noise and density.

New Towns

Another approach is to provide for special consideration by the planning commission and elected officials, e.g., city and/or county commissions of large-scale housing projects, shopping centers, or where applicable, new towns or planned communities in somewhat the same manner as consideration of a subdivision plat and with considerable latitude for negotiation on particular features.

Historic Areas

As the national concern for the preservation and restoration of historic sites and buildings has mounted, more states have enacted legislation empowering municipalities to pass zoning ordinances dealing with the designation and control of historic areas.

Cluster Development

Every standard zoning district has a pre-set density at which development will be permitted. For example, a standard district might require one acre lots for single-family dwellings. This density, then, is set forth in the text and on the map of the zoning ordinance, and may not be ignored. Cluster development is a means to permit, in conjunction with the approval of a subdivision plat, a transfer of this density, by grouping the development which is permitted under the standard zoning provisions within the tract of land. For example, if a given tract of land of a hundred acres is zoned in such a way that one hundred dwellings could be built on individual lots of one acre apiece, cluster development would permit these hundred dwellings to be grouped on, say, twenty acres, while the eighty acres remaining could be devoted to open space or recreational use.

Although the term that has been used is "cluster development" for the type of development just described, the proper term should perhaps be "average density development", since it is more general, and since cluster development is a fairly narrow term used by planners to describe a design technique. The reference to cluster development has come to mean that the density base is established and that while certain areas may be zoned in such a way that larger lots would be required on an individual basis than

would be reflected by this density base, the lot size requirements can be reduced in the case of a group housing development.

Cluster development is a highly desirable principle and one which can give a community a great deal of variety in its overall design. It makes sense from the standpoint of developers and land owners and enables them to build without as many headaches and problems as they would have under a routine program of development.⁵ It also provides a way in which subdividers can economically deal with land development costs. It will be an increasing trend in zoning.

Floating Zones

It is not unusual now for a district to be provided in the text of the ordinance without initially being shown on the map. When a property owner can meet certain specified conditions, the ordinance declares that the city council will rezone his property to this classification. This approach, which has been termed the floating zones, is particularly applicable to neighborhood shopping districts, garden apartment developments, and similar uses that might logically be located at any one of a number of locations,

⁵Herbert H. Smith, The Citizen's Guide to Zoning, (West Trenton, New Jersey, Chandler-David Publishing Co., 1965), p. 138.

among which the council does not want to make a choice until a developer is ready to move at one location. This indicates lack of ability to make an initial decision on the part of the governing body, and in some cases, has been held to be of doubtful legality.

Planned Unit Development

A planned unit development is a diversified development project which does not fit the standard zoning requirements of a municipality, and which is developed as an entity in such manner as to promote a municipality's comprehensive plan. It is truly planned as a unit. It does not fit the standard zoning regulations governing its district because it may provide for increased density and for uses not otherwise allowed in the district. For example, a single project might contain dwellings of several types: shopping facilities, office space, possibly even light industrial facilities, open areas, recreational areas. The possibilities are endless.

A planned unit development differs from the cluster development concept in that it is easily amenable to any mixture of uses and is not subject to any of the underlying zoning for the land involved. Frequently these projects involve the construction of a great number of rental units on a single tract of land and it is unreasonable to require the developer to subdivide the tract to provide lot lines

from which yards and other dimensional features can be measured.

The customary procedure for such projects requires the developer to submit his plans to the planning commission for its recommendations and to the governing body for approval. He is required to meet overall density requirements and open space requirements, but often regulations may be relaxed to varying degrees consistent with the protection of the public at large, the neighborhood properties, and the future residents of the project. Because approval of such plans is so closely related to amendment of the zoning ordinance and to approval of a subdivision plat, this procedure is preferable to turning the matter over to the zoning board of appeals.

The concept of planned unit development, if extended sufficiently, would embrace new towns, although it is flexible enough to be used in regulating development of any size parcel of land. Most planners feel that for a minimum level of effectiveness, a planned unit development technique should be utilized with tracts that are more than 25 to thirty acres in size.⁶

⁶New York State Office of Planning Services, Innovative Zoning, (Legal Memorandum Series, Albany, New York, Apr., 1971), p. 5.

Recreation and Open Space Zoning

Zoning can have a great influence upon the provision of open space. The density patterns established by the zoning ordinance will determine the amount of open space on each individual lot and between the various structures. Zoning can provide, through the use of techniques such as cluster development previously mentioned, the opportunity for the creation of open space resulting from the subdivision of land. Zoning can state the types of use that will be permitted in various areas and thus, by taking a restrictive approach to certain areas which are unsuitable for intensive development, can tend to open up the area of a community and provide a feeling of uncluttered openness. While zoning can be utilized to stimulate openness of character and perhaps to thus encourage the preservation of lands for recreational space, it cannot afford the danger of promoting confiscation without due process.

Off Street Parking

Many zoning ordinances contain provisions requiring land developers to provide off-street parking lots for motorists attracted to their developments. In apartment districts these are often specified in terms of so many parking spaces per apartment. In commercial and office districts, the number of spaces is often governed by the floor area of the building. Such spaces may or may not be

permitted to occupy required yard spaces. In general, the amount of space required depends on use of the property. This is not a satisfactory solution, since the use of a building may change from time to time, when it is no longer possible to secure additional space.

Land uses which generate traffic also usually cause parking problems. Many people object to having the streets in front of their homes in constant use as parking lots, both from the purely aesthetic standpoint, and for more practical reasons such as the inability of their own guests to find nearby parking, the difficulty of getting in and out of driveways, the narrowing of the roadway, the danger of children running out from between parked cars, and the hindrance of street cleaning and snow removal.⁷ The noise of car doors opening and closing and of engines starting up can also be an annoyance, and this is a problem connected with both curbside parking and off-street parking in lots serving commercial areas which abut residence zones.

Performance Zoning

Performance zoning is a recently evolved concept whereby the mixing of land uses has been permitted. The general philosophy behind such regulations is that if certain detrimental elements, such as glare, smoke, noise,

⁷Crawford, op. cit., p. 84.

dust, vibration etc., are controlled, that traditionally separated uses may exist side by side. An example of such land use mix is a light industrial use, perhaps an industrial park, allowed to be developed in a residential neighborhood if it meets certain performance standards derived for the protection of the character of the neighborhood. Performance standards have also been used in recreational and open space areas for measuring conformance of proposed land uses within these areas to insure protection of the environmental balance and natural features of the land such as wildlife.

CHAPTER FOUR

THE PROBLEMS WITH ZONING

Although a concept of comparatively recent origin, zoning has its roots in the basic societal necessities and pressures that from the very beginning of social life demand the accommodations of individual interests to the common good and welfare, for the alleviation of the intricacies and complication of living under the same environment by the dictates of natural law. By the power of natural law that cannot be other than it is, the primary duty of man to his neighbors is to contribute to the general well-being for the relief of compulsions and restraint of man-made circumstances.

The Effects of Zoning Regulations

Common Criticisms

Zoning is supposed to promote the orderly growth and development of the community. Its long range effect should be to increase property values in general. However, a zoning ordinance, by its very nature, treats different parcels of property in different ways. Furthermore, a zoning ordinance is inevitably a collection of generaliza-

tions, and, while these may have the desired effect on the city as a whole, there will always be certain parcels of property to which they apply in an unfavorable manner.¹

Zoning, as we know it today, has been with us for about fifty years and has grown into a very complex and sophisticated business. Its early critics denounced it as an unlawful and outrageous invasion of the right of an owner to do as he pleases with his property. Modern critics, although they rarely deny the need for public regulations of the use and development of private property, have had much to say about the way zoning works and have even suggested that it be replaced with completely different laws intended to achieve the same end.

Smoke, vibration, noise, radiation, odors, dust, litter, and similar factors are often very important today in litigation and in proceedings at city hall. Factors of this kind are used by owners of property seeking zoning changes on the grounds that existing zoning, usually residential, is incompatible with conditions in the neighborhood, and that because of these nuisance factors no sensible person would develop land for the purposes for which it is presently zoned.²

¹Clan Crawford, Jr., Strategies and Tactics in Municipal Zoning, (Englewood Cliffs, New Jersey, Prentice Hall, Inc., 1969), p. 23.

²Ibid., p. 75.

No longer do we find much negative thinking regarding the potential of zoning. Instead, it is readily accepted by those who adopt ordinances and those who interpret them that zoning can do more than simply prevent something. It can help implement the development policy of the community. A zoning ordinance which simply locks in place the mistakes of the past is inadequate. A zoning ordinance which looks to the future development is desirable.

Unless progress is made with new and positive techniques, development of zoning into a more effective tool for guiding a community's growth will not continue. Today, the idea of segregating land uses and preserving the identity of a predominant character of land use is well accepted. Further progressive thinking in terms of special exceptions and special types of use permits has developed over the past several years. This is an extremely tricky and difficult matter to handle and still stay within the framework of legality. It must be approached with a great deal of care.

Environmental Abuses

Vacant land has become scarce in or near metropolitan areas, and the cost of such land has greatly increased. In addition the size of the metropolitan areas themselves has mushroomed. Districts which were wholly rural only a few years ago are now overbuilt commutation zones connected

to their hub cities, by traffic-swollen highways and overburdened bus and rail lines. These massive population increases in the metropolitan areas have created an urban sprawl which has led to enormous strains on schools, transportation, water supply, and sanitation facilities. This urban sprawl together with the ever-increasing rate of industrial consumption of fuel and building materials, has rapidly eaten into our supplies of natural resources.

A recent New York zoning bill tries to head off the eating away of natural resources. It would require that the applicant prove the proposed zoning action he is requesting will not result in:

1. undue water or air pollution;
 2. unreasonable soil erosion or a reduction in the capacity of the land to hold water to a point where plant growth may be substantially impaired;
 3. unreasonable road congestion;
 4. an unreasonable burden on governmental services;
 5. undue noise; or
 6. an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or unique and irreplaceable natural areas.³
- This bill is a rare example of the growing movement for reexamination of zoning

³Philip Weinberg, "Regional Land Use Control: Prerequisite for Rational Planning," New York University Law Review, Vol. 46, No. 4, (Oct., 1971), p. 798.

regulation. The past has been consumed with enormity of the problems surrounding a comprehensive approach to land use and the welter of conflicting interests. Thus, a serious reexamination of land use regulations has been prevented.

Several other states have reexamined their land use controls and are initiating stronger regulations. Notable among these are Vermont, Colorado, Oregon, and Michigan. In Michigan the Governor appointed a land use study commission which recommended a comprehensive land management program. Briefly, the recommendations are:

1. the formulation of a state land use agency to review all state land use programs;
2. the creation of open space districts;
3. the adoption by counties of comprehensive land use plans;
4. the review by the state land use agency of all local programs for conformance with state land use programs;
5. the stronger enforcement of land use controls;
6. the revision of the property tax system to be based on a use-value tax rather than a potential-value tax;
7. a change in government revenue forms;
8. the strengthening of control over development in natural areas;
9. an inventory of mineral resources in the state;
10. the formulation of a solid waste management plan by the state;

11. the expansion of the powers of the Michigan State Housing Development Authority to include commercial, industrial, and new town development; and

12. the review of major land sales and development activity by the state land use agency.⁴

The pending implementation of any of these recommendations would have strong ramifications for zoning regulations throughout the state. This trend will probably be the subject of much controversy across the nation in the next decade.

If progression is to be made from the present rudimentary stage of land use planning, it must be recognized that land is a finite natural resource and that decisions as to its use which affect large numbers of people should be made with the true public interest in mind. This public interest can only be determined through a comprehensive understanding of the effects of zoning legislation on the complex network of environmental relationships. Vacant land, fresh water, forests, and wetlands are not assets of limitless capacity. With the recognition that these resources are finite and that their conservation and intelligently planned use are a prime responsibility of government, must come the adoption of legislation to achieve that

⁴Michigan State Land Use Commission, The Governor's Land Use Study Commission Report, (Lansing, Michigan, State of Michigan, 1972).

result. Only through comprehensive land use planning can urban sprawl be averted and the devastation of land and other natural resources which threaten to inundate us be ended. Zoning formulated fifty years ago does not reflect this new purpose of land use control.

Modern Development Patterns

The patterns of living have also greatly changed in the past fifty years. Apartment living and its related concepts such as cluster development and planned unit developments are becoming more and more important in quantity and quality within the metropolitan areas. The better multiple-family developments do not just happen. They are the result of cooperative endeavors between an enlightened builder or developer and good local leadership which adopts a firm but fair policy.

In the years ahead we can anticipate that the apartment boom will continue. There is certainly a need for this type of housing and this need will grow even greater as our population continues to mushroom. There is also a need for mature facing of these facts of life on the part of our communities and the preparation for meeting the future with sensible planning, careful thinking, and down-to-earth policies and principles.⁵

Some suggested guidelines advocated by Herbert H. Smith in The Citizen's Guide to Zoning, for multiple-family zoning follow:

⁵Herbert H. Smith, The Citizen's Guide to Zoning, (West Trenton, New Jersey, Chandler-Davis Publishing, Co., 1965), p. 129.

1. The first item is to have a carefully worked out plan for the future growth of the community which has dealt realistically with the question of multiple-family developments. This should include determination of appropriate areas for multiple-family developments and the general density of development which is to be allowed.

2. The plan should be backed by a carefully worked out zoning ordinance which spells out in detail how multiple-family developments are to be dealt with and the standards which must be met. This should include size, area, yards, open space, parking, height, lot coverage, general arrangement and site design. There should also be control over the number of one, two, and three-bedroom units so that a proper balance can be maintained. Provision should be made to study each application on an individual basis.

3. Beware of the proposition which is presented seeking to get quick action because the bulldozers are already running and be even more wary of the argument of the multiple-family advocate who talks big tax ratables and threatens to take his taxes elsewhere unless the standards are lowered.

4. Adequate policy in dealing with multiple-family developments calls for the avoidance of the zoning variance technique. This applies to both the variance for standards and requirements as well as that for allowing multiple-

family developments in zones where such use is not a permitted use.

5. Advance consideration should be given to the effect of any multiple-family development upon the public facilities of the community.

6. The standards which are set should be high enough to assure good quality and realism. It is a delusion to allow multiple-family developments and then set standards and regulations which are so stringent as to be totally impractical.

7. The development of a good multiple-family project is largely dependent upon the development of a good site plan and design. Insist that site plan review be a part of approval.⁶

These suggested guidelines indicate that modern development patterns require land use regulation principles employed in Euclidean zoning ordinances, such as height and yard regulations, plus some more progressive techniques centering around individual, aesthetic consideration. These extra considerations must include environmental resources, standards for large tracts of development, determination of current economic feasibility and marketability, the relationship between the developer and the zoning administrator, the public facilities, and site plan review.

⁶Ibid., p. 127.

Common Ordinance Deficiencies

Robert M. Leary has defined the following partial list of deficiencies frequently encountered in older zoning ordinances or their administration.⁷ In general, such deficiencies fall into three classifications:

1. defects in the ordinance as originally adopted;
2. problems created by the administration and amendment of that ordinance; or
3. failure of the ordinance to reflect modern zoning concepts and techniques.

Defects in the Original Ordinance

One of the most common defects found in zoning ordinances is that the ordinance is not based on a comprehensive plan, and its objectives have never been clearly defined. Consequently, the individual provisions work at cross-purposes and serve primarily as an erratic brake on development.

A second defect is that the ordinance is poorly organized and difficult to use. It has separate sets of height, use, and area districts. It is either poorly indexed, or not indexed at all. Finally, it is imprecise in

⁷Robert M. Leary, "Zoning," in Principles and Practice of Urban Planning, ed. by William I. Goodman and Eric C. Freund, (Washington, D.C., International City Managers' Association, 1968), p. 419.

dealing with specific situations, allowing undue latitude for interpretation by the enforcement officer and the board of appeals.

In many ordinances excessive areas or frontages are zoned for the more intensive uses such as multiple-family dwellings, businesses, and industries, in relation either to: the effective demand for such space, or to the capacity of the streets and utility system available to serve such districts. The result is either spotty development, much of it substandard, or undue congestion.

Another common defect in zoning ordinances is that extreme differences are apparent between adjoining districts, such as residential areas abutting heavy industrial areas, with no effective buffer zones to protect one from the other. Many examples of this defect are found in communities which zone opposite sides of the street in two different districts with conflicting purposes.

Often ordinances contain provisions authorizing particular uses only with the neighbors' consent. This system has questionable effectiveness and its legality is open to question.

A significant and serious mistake occurs when the ordinance authorizes the zoning administrator, or the zoning board of appeals to grant or deny permits in particular cases, with no written standards specified to guide the exercise of their discretion.

A seventh defect occurs when nonconforming uses are regulated in a manner that tends to perpetuate them rather than lead to their eventual elimination. This zoning problem is particularly tricky to deal with; hence, the composition of the ordinance should avoid the creation of nonconforming uses in its districting.

An opposite problem is found in ordinances which bar some uses from districts where similar uses are permitted, with no basis for such differentiation. Another related problem is the permission of certain commercial uses, such as gas stations or funeral homes, in residential districts. Many times there are also insufficient controls over home occupations, doctors' offices, clinics, and boarding or rooming houses in residential districts.

Many ordinances bar institutional uses such as hospitals, schools, and churches from residential districts where they are essential parts of neighborhood life, and place them in other districts which are often unsuitable for the activities they generate.

Most zoning ordinances contain regulations for commercial districts which are written so loosely as to permit the intrusion of incompatible types of industrial development. A corollary problem occurs when residences are permitted in business and industrial districts through the cumulative approach without being subjected to any lot area, yard, or other requirements designed to insure light,

air, and privacy for the occupants. On the same principle, it is often found that residences are permitted in industrial districts, and no vacant land is reserved for industrial development. Most industrial districts thereby become substandard residential areas, furnishing neither protection for the residents nor appropriate sites for industry.

Another common defect in zoning regulations is present when neighborhood business district regulations are not designed to minimize any adverse effects of business use, such as traffic noise, upon abutting residential areas.

Many times minimum lot area requirements for residences are unrealistically low or completely lacking in some or all districts. In other ordinances, minimum lot area requirements for residences may be unrealistically high in some districts as a means for limiting development to expensive homes. These problems occur when density controls are related to single-family development.

Another problem is related to height and building bulk. These allowances are often excessive, especially in the central business district, in terms of street and utility capacities. Also permitted lot coverage in residential districts may be too large, or yard or court requirements are too small.

Administration and Amendments

Among typical kinds of problems growing out of lax administration and improper amendments are the many spot zones comprising only one or two lots whose location is not in accordance with a comprehensive plan. A similar problem is seen when the board of appeals has granted too many variances, including use variances. Use variances are essentially legislative actions taken by the board of appeals when they permit a use not allowed in a district to be located therein.

Often times problems are created by the zoning enforcement officer. He may have issued permits for uses that do not meet ordinance requirements, or has failed to make use of occupancy permits to regulate changes in use. Other times he may have failed to carry out an active program to detect and prosecute zoning violations. Too often the enforcement officers and the zoning board of appeals have tended to rely on complaints or the consent of neighboring property owners as a basis for action.

Failure to Reflect New Concepts

Zoning ordinances may be lacking in several respects including the absence of requirements for off-street parking and loading areas. There may be no provision for large-scale developments under single ownership, such as planned unit developments, where the tract is not divided into

traditional building lots. Or the ordinance does not make use of new types of building bulk regulations that give greater architectural flexibility than is possible under traditional bulk control methods.

Another common error is that the ordinance follows the traditional districting approach rather than attempting to isolate the factors that make a particular use incompatible with its neighbors and to control those factors directly by means of performance standards. Or the ordinance does not require the elimination of nonconforming uses. Or the ordinance does not restrict development in flood plains and other unsuitable areas. Often times the ordinance does not limit development in the vicinity of airports or in approach lanes for aircraft. Finally the ordinance may not reflect the contemporary incidence of such developments as single-story manufacturing establishments, garden apartments, townhouses, shopping centers, and, where applicable, new towns.

The New Zoning

Accelerated Change

With the building boom of the 1960 decade still in full swing, the pace of development has accelerated to a point where fixed zoning regulations with their many dimensional requirements prescribing configurations through generalizations is being seriously questioned. Many experts

still think zoning standards can only be accomplished through generalized legislation. Change is suspect under this approach, and the consequence is that the zoning board of appeals must work overtime to consider all of the proposals seeking change. "Instead of creating realistic legislative avenues of change to bend development pressures to the will and need of the municipality, naive and nostalgic outrage is directed at boards of appeals' failure to abide by the rules under which they were created."⁸

What the zoning boards of appeals are responding to is simply enormous pressure for change. Rarely do zoning ordinances make allowance for changing concepts and techniques that may occur through the duration of their existence. With this absence of legislatively-directed process of change, metropolitan areas have experienced a scrambling by existing agencies, planning commissions, and boards of appeal, to assimilate the proposed changes. The petitioning of the board of appeals constitutes competitive underbidding for the question of regulation. The conflicts that result and the development that does not conform to existing zoning regulations which becomes a permanent fixture on the

⁸Norman Marcus, "Current Zoning Administration: Tinkers to Evers to Chance," in The New Zoning: Legal, Administrative, and Economic Concepts and Techniques, ed. by Norman Marcus and Marilyn W. Groves, (New York, Praeger Publishers, 1971), p. 98.

land often leave the public interest inadequately protected. Even worse, the more sophisticated goal of obtaining public amenities from certain classes of development as a condition for building permission is totally ignored.

Perhaps, then, the most succinct description of all of zoning's failures have been summed by the following astute author.

Its (zoning) first defect is that it is a gross device for handling delicate problems. In preventing gross abuses, it simultaneously obstructs major innovations. In pursuit of consistency it often becomes arbitrary and is tolerated only by the presence of a counterpoised board of appeals which facilitates violation. It stands in monumental intolerance of mixed land uses, and in attempting to control nuisance it equally prevents the surprise and delight of well-mannered variety. However accidentally, it promotes unmitigated uniformity and substitutes minimum standards for human conscience; and bare adequacy supplants human aspiration. Often enough it protects property values at the cost of more generous human values. Ironically, while some communities are still seeking to establish zoning others are attempting to surmount the constrictions of established zoning.⁹

The least that can be said for zoning is that it, like any governmental form is likely to be no better than the people who employ it. In an age of accelerated change it attempts to induce premature equilibrium, but it cannot so stand, for the patching of zoning ordinances continue to pace the ad hoc patching of the communities themselves.

⁹James E. Lee, "The Role of the Planner in the Present: A Problem in Identification," Journal of the American Institute of Planners, Vol. 24, No. 3, (1958), p. 155.

The Need

What emerges is the need for an integrated form of zoning administration. An equal concern with the form of institutions as with the substance of zoning regulation should become the primary focus. Whether the emergent institution is called a zoning administrator or functions within a planning agency, the legislative body, state or local, or the mayor's office will vary depending on local needs. The institution will, however, require the ability to guide and assimilate private pressures for change and development at an accelerated pace vital to the institutions creating activity within a city.

The new zoning institution should receive sufficient administrative discretion, to keep pace with these pressures for change and development, and, of course, possess the required professional expertise and judgment in areas of planning, economics, architecture, and law to perform these duties. With the increasing complexity and growing sophistication in the field, the advantages of informed administrative discretion as a substitute for the present rigidities of the legislative amendment route and subjective flexibilities of the board of appeals route become apparent.

This administrative flexibility and judgment, however, must be carefully based on legislated policy and guidelines. The danger with administrative control lies in arbitrary and capricious decisions. These decisions

must be eliminated by the guidelines established by an elected body of lawmakers and checked by informed self-limitation on the part of the informed administrator and judicial recourse when the administrator's decision places hardship on the property owner. Such precautionary implementations allow the carefully selected administrator to better keep pace with the need for new development pattern considerations and inform the legislators of new and emerging pressures demanding further policy delineations and decisions. "Above all, there must be only one municipal forum for responding to change, aside from the customary appellate avenue to the courts or possible local intermediate appeals for error which may be necessary in a particular municipality."¹⁰

¹⁰Marcus, op. cit., p. 98.

CHAPTER FIVE

INCENTIVE ZONING: A BONUS SYSTEM

As seems to be the case so often in the evolution of urban planning techniques, the suburbs are the location for the evolution and refinement of incentives in zoning. Suburbs began with the planned unit development which permitted the private developer to alter the strict regulations of the zoning ordinance and the subdivision ordinance in order to provide a more attractive community environment. Early incentives included smaller lots, less right-of-way for streets, and substantial savings in improvement costs through clustering. However, density tended to remain an absolute requirement.

Further extensions of the incentive technique have resulted in increases in residential density in exchange for the provision of public benefits. Increases have ranged up to fifty per cent of the basic density pattern established by the zoning ordinance, and public benefits have included the provision of open space, improvement of open space, and requirements for urban design and architectural control, as well as provision for public structures such as school, fire stations, or libraries. These improve-

ments, of course, vary with the size and complexity of the proposed development.

In one sense, it is not difficult to see that provision for these improvements is an extension of the requirements of the subdivision ordinance. In another sense, the private developer desires to improve the attractiveness of his community by providing community facilities instantly rather than by following the more usual practice of having many of these facilities and services provided by the community at a later date. This is an attempt by the developers to construct an environment for their homes.

San Francisco adopted a bonus system in the revision of its zoning ordinance in 1966. This bonus system, however, was only concerned with the immediate downtown area. Since a bonus system is also important to the residential areas of the city, the subject of bonusing will be discussed using the features of the system in Toronto as an example.

History of the Bonus System in Toronto

Observation of the working papers of the Toronto City Planning Board yields the fact that density bonuses were first proposed in 1963 for apartment building downtown. In the report entitled "Supplementary Report to the Plan for Downtown Toronto", December 1, 1963, the criteria for obtaining bonus density were listed to include: minimum site

area, minimum landscaped open space, and all underground parking. However, the bonus provisions were not included in Council's adoption of the parts of the "Downtown Plan", June 30, 1965.

The next step in the process was the "Report on a Residential Floor Space Bonus System" recommended by the Planning Board in August of 1964 and adopted by City Council on September 28, 1964. The report was initiated by a 1963 application for a landscaped open space bonus in a residential area. A bonus was considered to be an inducement to encourage specific types of development which are desirable for the general public good and the occupants of a given building or area.

The policy stated that since the public objectives in controlling residential development are served by these general conditions of the "Zoning-By-Law", bonusing should be aimed at providing benefits not at present obtained under the By-Law.¹ The following features were considered bonus-able: site area assembly, landscaped open space, adjoining frontages, a mixed form of residential development, sub-surface parking except for short-call use, and units of large floor area.

¹City of Toronto Planning Board, "Introduction and Part I. Historical Perspective," in Residential Bonus System Policy, (Toronto, City of Toronto Planning Board, Mar., 1970), p. 5.

In 1966 the Planning Board received a review of the bonus system. The Committee on Buildings and Development had requested the review after the use of the 1964 policy in twelve projects. The main proposals for their consideration were: city-wide application except for five areas, standardization of the bonus amounts and maximums on the basis of percentages, a clarification of previous criteria and applicability, and proposals for new bonus features for extra large sites.

The "Proposed Plan for Toronto" was adopted by the Planning Board on June 6, 1967. The summary of its policies which was recommended by the Committee on Buildings and Development on November 13, 1967, included: bonusing to the maximum densities of the 1966 review and applicable throughout the city, and the downtown bonus area was extended.

"The Official Plan for the City of Toronto Planning Area" was approved by the Minister on October 1, 1969. In this document it is stated in part that it is the policy of Council to encourage a high standard of development by passing by-laws to permit high density residential buildings with maximum gross floor areas to be based on a bonus system policy which will take into account, among other things, the area of landscaping or recreational space, the size of site, the number of streets on which the site abuts, or on other features which contribute to the quality of living

conditions in the buildings or on the sites. The effect on the surrounding areas of any building permitted by any such by-law shall also be taken into account.² A similar statement is made in the "Official Plan" for low density residence areas. The effect of these statements has been the passage of many site development by-laws granting bonus densities.

Objectives of the Bonus System

The "Official Plan" permits Council, in order to encourage a high standard of development, to pass by-laws increasing the permitted density of residential buildings within stated limits, in accordance with an adopted bonus system which takes into account among other things: the area of landscaping or recreational space, the size of site, the number of streets on which the site abuts, or other features which contribute to the quality of living conditions in the building, and takes into account the effect of the building on the surrounding area. The bonus system is subject also to other policies now continued in the "Official Plan" or which may in the future be added to it, such as locations for high density residential development, the availability of public facilities, needs for specific forms of housing accommodation, etc.

²Ibid., p. 7.

Based on the experience with the existing bonus system, in effect since 1964, and an evaluation of comments received and objectives otherwise identified, the more specific aims of the proposed system include:

1. for the benefit of the residents of the project
 - a. more facilities, including recreational space,
 - b. more useful open space,
 - c. a wider choice of housing unit types, and
 - d. a reduction in the necessity of higher rents due to improved project quality;
2. for the benefit of the wider neighborhood
 - a. more involvement in the site planning of and control of developments by the community,
 - b. better assimilation of projects with existing development, including
 - i. an avoidance of untoward height differentials,
 - ii. retention of existing usable and/or historic buildings,
 - iii. incentives for the development of small sites, and
 - iv. supplements to community facilities where these may be deficient; and

3. for the benefit of both the project residents and the wider community

- a. wider choice of housing accommodation,
- b. more varied forms of projects, and
- c. more opportunity for improved siting of buildings and broad neighborhood design.

Implementation Methods

The bonus system operates only within the framework established by the "Official Plan", Council policies and by-laws. The system offers density inducements to development for the incorporation of desirable but not necessarily essential features, which can be legally secured under the zoning powers incorporated in the Planning Act. Essential features, such as health or safety standards, are required by by-law without any choice as to their provision.

The Toronto Planning Board identified four major ways of putting the system into effect:³

1. Entire inclusion within the "Official Plan".
- As the bonus system would set specific rigid requirements and establish exact density increases, its incorporation into the "Official Plan" would place a considerable restraint upon Council's ability to alter the system as may

³City of Toronto Planning Board, "Memorandum: Revised Residential Bonus Systems Policy," (Toronto, City of Toronto Planning Board, Dec., 21, 1971), p. 5.

be found to be desirable from time to time in the future. Furthermore, the rigidity thus placed upon the bonus system would be at variance with the generalized nature of the objectives and policies stated in the "Official Plan".

2. Incorporation of the system into the "Zoning By-Law". This would mean that, once the bonusing requirements are met a building permit would have to be issued. It would probably be a time-saving device for a developer; however, this process would leave no opportunity for the city to review the project and to decide whether or not particular bonusing features are necessarily appropriate in the case of the particular project, or to require desirable changes to it.

3. District Plan statements in the "Official Plan" responding to local conditions, could include local area bonusing systems and policies.

4. Incorporation of a generalized policy, containing references to the objectives and features and procedures of bonusing, into the "Official Plan", leaving the exact requirements and bonuses to be outlined in a separately expressed policy of Council not included in the "Official Plan" and thus not subject to plan amendment for minor changes. Bonus objectives and features can be legally secured by a Site Plan By-Law which is passed. This system of implementation is the one which Toronto chose to adopt.

Zoning By-Law Amendments

In addition to the requested review of the definition of "gross floor area", the bonus system study and the submissions received pointed up the following "Zoning By-Law" modifications which could be adopted immediately to improve all multiple-family developments and secure the success of the bonus system.⁴

Gross Floor Area

Gross floor area is to exclude roof top mechanical and service penthouses as well as those recreational and social use areas above grade which are contained in one-story parts of the structure. This is to eliminate the existing deterrent to placing recreational uses above grade while guarding against the easy subsequent conversion of such areas into habitable floor space.

Landscaped Open Space

Landscaped open space is to include all non-vehicular, planted or landscaped areas open to the sky and located at an elevation below or at grade or up to 45 feet above grade. This would encourage the development of sheltered usable open areas on podium roofs, which would also be of visual benefit to higher buildings; the required separation

⁴Ibid., p. 6.

of building elements would continue to be secured by "Zoning By-Law" setback and angular plane requirements.

Below Grade Building Setback

A below grade building setback of twenty feet from any street shall be required for a multiple-family building on a site greater than 30,000 square feet in area. This is to allow space for the planting or retention of large trees along the streets; the site size limitation is to avoid placing unrealistic hardship on small developments.

Resident Parking

The full resident parking requirement is to be accommodated underground or in enclosed structures for apartment houses on a site greater than 30,000 square feet in area. This is to avoid excessive amounts of open surface car parking except in the case of small sites, where such requirement may cause hardship and where parking could be accommodated in yard spaces which may not have any practical landscaping or recreational value.

Visitor Parking

A minimum of fifty per cent of the visitor parking requirement shall be required to be provided at grade with its entrance well signposted and visible from the street. It has been found that the nonprovision of visible visitor parking at grade causes much on-street parking and congestion.

Ramps

Vehicular access ramps to projects containing more than 25 suites shall be a minimum of 100 feet distant from any signalized intersection.

Circular Driveways

The required circular driveway requirement shall be provided completely at grade. A tendency to provide the access drive below grade in order to achieve the full landscaped open space bonus has been noted. This defeats the purpose of the driveway as it cannot be seen from the street to be continuous.

Minimum Bonus Requirements

In selecting features for bonusing, over fifty ways in which existing multiple-family dwellings can be improved were considered. These were suggested in literature examined during the course of the study, in submissions, or during analysis of the existing system and were discussed in detail.

Most of these features had some degree of merit but had to be rejected because of non-enforceability, anticipated ineffectiveness, dependence on local conditions or government programs, or because they were more appropriate as general planning or zoning requirements. For example, conditions of residency are not enforceable in site plan

by-laws, low income housing cannot generally be privately provided, and appropriateness of location and adequacy of facilities are a planning prerequisite for any new high density development.

In evaluating increments of bonus density for each feature, its relative importance to other features, its likely attractiveness to the developer, its appropriateness for the particular density sector, and its numerical relationship with the maximum permissible sector density were considered. The high density sectors, together with their base and maximum densities, are established in the "Official Plan", together with the designation of Limited Bonus Density areas and the maximum bonus density in Low Density Residential areas.

A site of 25,000 square feet is the smallest in Low Density areas on which the bonusing benefits become significant. However, special cases could be reviewed on their merits, e.g., when all other lots in a block are fully developed.

For the purpose of calculating bonus density in connection with site plan by-laws the "site area" shall be taken to be the gross area of the site prior to any required dedications for highway purposes such as road widenings or required leases for parks, etc. The landscaped open space requirement and bonus shall, however, be based on the net site area after dedications for highway purposes in order

that physical permanence of the landscaping requirement shall be assured.

For the purposes of bonusing, the site may include existing residential buildings, or recognized historic buildings, provided such structures are in the applicant's ownership and their preservation can be satisfactorily achieved by the site plan by-law.

The remaining six features for bonusing follow.

Family Units⁵

In the submissions received this bonus feature was generally considered to be most important and to be further encouraged or even made mandatory in suitable locations. Family units will be encouraged in those areas most suitable for the raising of children. Simply bonusing large units, of three or more bedrooms, would be easier for the developer to fulfill, but such accommodation may be used entirely to house adult groups. The needs of families are for more than just additional bedrooms, and include public and private open and indoor play areas, additional facilities and effective separation from the adult part of a building. The demonstrated requirement of easy access to and supervision of children on ground level is fulfilled by the heights limitation of 45 feet above grade for family units.

⁵Ibid., pp. 9-10.

This limit will accommodate four storys; for example, stacked row houses, and a pitched roof.

Additional Landscaped Open Space.⁶

The reaction to this existing bonus feature was critical, reflecting concern about the usability of such space and the apparent waste of prime land; about its availability to the general public and its resulting effect on the heights of structures; and over the fact that it appears easier to provide and more rewarding to the developer in terms of earned bonus amounts than other socially more desirable features.

One primary objective of this bonus is to obtain garden and recreational space for project residents which is not unduly restricted by yard dimensions and at the same time is not open to the general public since public space would be secured by another proposed bonus feature. The landscaped open space areas which would qualify for the bonus would be required to be at least forty feet wide in their minimum dimension. These areas will be designated on the site plan by-law and their intended use secured therein.

A further primary objective of this bonus feature is to increase open space around buildings. While the "Zoning By-Law" provides minimum standards it is generally

⁶Ibid., pp. 10-11.

recognized that increased separation between buildings improves the general desirability of the environment, improves siting relationships, and is particularly necessary with higher densities.

A minimum bonusable open space requirement of seventy per cent is desirable in order to produce more open space areas and separation between buildings at high densities, particularly where they are adjacent to commercial buildings without setbacks, in contrast to residential areas where greater light and air is obtained from combined setbacks. Above grade landscaping may be of greater utility than that at grade, when adjoining busy streets, and the possibility for such elevated space is furthered by the probability of mixed use buildings in this sector.

Generally, on sites of less than about 50,000 square feet in area the setback requirements of the "Zoning By-Law" produce more than the fifty per cent landscaped open space requirement for multiple-family developments. Such situations should not be bonused, particularly as the landscaped areas are too small to be usable.

Public Use Lease⁷

This feature generally found favor in the submissions. The most frequent comment was a criticism of double

⁷Ibid., pp. 11-12.

bonusing if landscaped open space bonus was also applicable to such areas.

Aside from acquisition for which there are limited city resources, the most certain way to secure needed public facilities on private development sites is by way of a lease easement, or right-of-way agreement with the owner at the time of an application. This has already been done in several cases to obtain public park land, and the principle could be extended to produce recreation facilities, walkways, public parking facilities, etc., in areas of demonstrated need. It would however be inappropriate to award such bonus in return for road widenings, private streets or for reducing deficiencies in public facilities primarily caused by the project itself.

In addition to recognized need, award of the bonus is conditional upon the developer entering into a lease agreement with the city, the consideration in connection with which should be nominal and for the life of the project. A minimum leased area of 4,000 square feet would be required to secure the minimum public use bonus, which would be increased on a pro rata basis for areas involving between ten per cent and twenty per cent of the total site area. A minimum width of forty feet for a leased park is also a requirement.

Building Variety⁸

The objectives are to secure varied, visually interesting projects, an added opportunity for family units and a reduction in the height of the main building or in the number of high buildings by concentrating more volume close to the ground. These objectives were considered desirable in the submissions with the comment that the bonus was not likely to be substantially effective.

There appears to be no physical possibility of developing completely low buildings at the presently permitted high densities while maintaining at the same time the expected level of amenity both for the project residents (separation, landscaping, etc.) and for neighboring developments (separation, no immediate overlooking or overshadowing). However, lower heights can be achieved by allowing greater coverage or a mixture of higher and lower buildings, the latter elements consisting of such things as a podium, townhouses or rehabilitated existing housing, and this is one of the anticipated results of this bonus feature.

The prerequisite for earning the "variety of building forms" bonus, fifteen per cent coverage requirement is proposed for low buildings, i.e., those not over 45 feet in height; any higher requirement would result in increased

⁸Ibid., pp. 12-13.

confinement of the remaining density into a smaller area and thereby increasing its height.

This condition would be furthered by reducing the 45 foot height limitation of the low element. A decreased coverage requirement may fail to produce a low element of significant proportions. Existing buildings could be included in this bonus feature and would be expected to have some street frontage.

Large Site Areas⁹

A large site allows for freedom to design and locate structures in the best possible relationship to each other and to surrounding properties, including better opportunities for separation and buffering. A larger project population also helps support more and better facilities and improvements to the quality of the environment.

When considering assimilation of high density development projects into existing neighborhoods it should be remembered that bonuses are applicable only in those areas which are designated for high density in the "Official Plan". These are the areas where most of the expected residential growth of the city will be accommodated for the plan period. By means of bonusing, it is hoped to make these areas more attractive, varied and otherwise better than under minimum by-law development.

⁹Ibid., pp. 13-14.

The 50,000 square foot size area requirement for award of the site area bonus is generally the minimum for layout flexibility, exemplified by the possibility of locating two separated parts of one structure on this site area. The bonus would be awarded on a pro rata basis for site areas up to 200,000 square feet, beyond which community scale facilities are required and a substantial impact on the neighborhood structure is likely, requiring an area study of the implications.

Site widths of less than fifty feet do not add to, but further restrict the flexibility of the layout and should not be included for bonus. If two parts of a site are separated by a "neck" less than fifty feet wide each part will be treated separately for the same reasons.

The site area can include groups of approved rehabilitated existing dwellings or an historic structure if their sites are a component part of the same holding. The continued use of sound existing structures can thus be promoted, together with the possibilities of providing some low density housing for persons displaced by the development.

Site Assembly¹⁰

This existing bonus feature is based on the number of acceptable site frontages with the objective of encour-

¹⁰Ibid., p. 14.

aging completion of the site and not leaving out any areas which desirably should be included and which could be difficult to redevelop at a later date.

Frontages are required to be parallel or continuous, including corners or extending through a block, and to minimum specified lengths. The continuity of the frontage may be broken by properties of a 20,000 foot minimum area (large enough for appropriate future redevelopment) or of a compatible existing use, or by holdouts whose future inclusion into the project has been legally secured to the satisfaction of the city.

CHAPTER SIX

TORONTO'S EXISTING ZONING AND BONUSING FEATURES

The following description of Toronto's zoning and bonusing features will illuminate the implementation methods and some of the successes and failures of the system.

Zoning Controls

Density

Density is called "floor space index" (f.s.i.) and is measured by the following formula:

$$\frac{\text{the gross floor area of the building}}{\text{site area}}$$

Residential gross floor area excludes a janitor suite, car parking areas, and mechanical, recreational, or accessory use areas when below grade. The by-law density zones which were established relate to five basic types of residential areas:

1. Z.1 "suburban low density" (Maximum f.s.i. 0.35)
2. Z.2 "urban moderate density" (Maximum f.s.i. 0.6)
3. Z.3 "high density family districts"

(Maximum f.s.i. 1.0)

4. Z.4 "high density non-family districts"

(Maximum f.s.i. 2.0)

5. Z.5 "very high density, central"
(Maximum f.s.i. 2.5)¹

As thus established, density control was considered to be a factor in determining the character of each district. It was also considered to be a contributing factor to the stability and consistency of each district, and a basis for estimating major capital expenditures on facilities and services. A density measurement based on the floor space index was adopted because a population measurement was not considered as applicable as building bulk. The f.s.i. allowed freedom of design and site planning by substituting building bulk control for height limits. Further, is is not difficult to administer.

The 1969 "Official Plan" has now established and defined:

1. low density residence areas to a maximum density of 1.35 (corresponding to Z.1, Z.2, and Z.3 districts plus bonus);

2. high density residence areas:

a. in the General Sector to a maximum density of 2.0 to 2.5 with bonus (corresponds to Z.4);

b. in the Inner Sector to a maximum density of 2.5 to 3.125 with bonus (corresponds to Z.5); and

¹City of Toronto Planning Board, "Introduction and Part I. Historical Perspective," in Residential Bonus System Policy, (Toronto, City of Toronto Planning Board, Mar., 1970), p. 9.

c. in the Core to a maximum density of 3.0 to 4.375 with bonus (no separate corresponding zoning category).

Under the existing gross floor area definition above grade social, recreational, and accessory uses are included in the gross floor area, permitted under the by-law. In consequence, such facilities, when provided, have frequently been located underground. Floor space index control has been found to provide less variable total population control, a greater choice of unit type to the developer, an indication of the probable building bulk having regard to zoning and property patterns in the district, and the probable physical impact on adjoining properties. Other forms of density measurement and control such as units or persons per acre do not have all these attributes. Additionally with the f.s.i. system identical buildings can be built at different densities with varying site areas, landscaped open space ratios and setbacks. For example, the high rises in the suburbs are similar to those in the Core, but at lower densities.

Improvements to underground city services have generally kept ahead of the demand created by multiple-family projects. The deficiency in public park and recreational facilities has, however, been frequently intensified.²

²Ibid., p. 11.

Density measurement does not presently reflect the housing unit breakdown of sociological composition of the resident. However, in recent years there has been no multiple-family construction at Z.3 or lower densities, and few projects at Z.4 or Z.5 densities have not been subject to application for additional bonus density.

Landscaped Open Space

Landscaped open space is the area of open landscaping and recreation at grade excluding vehicular use areas. In certain cases above grade or roof landscaping has been permitted for inclusion in landscaped open space calculation by site plan by-laws. In 1957 landscaped open space replaced the coverage restriction in order to provide usable open space, a pleasing setting, and a relation with the building accommodations. The landscaped open space requirements of the "Zoning By-Law" are expressed as percentages of the site area. In 1966 the landscaped open space requirement for multiple-family dwellings was increased from 35 per cent to fifty per cent as fifty per cent was already being provided on smaller sites by the setback requirements. The change was also made to reduce surface parking lots and to make available larger areas of landscaped open space than those provided by the strips surrounding the building or parking areas.

Landscaped open space presently excludes landscaping above or below grade such as terraces, sunken courts or roof gardens, which can provide usable open space and be visually attractive. The "Zoning By-Law" requirement is not related to the accommodation or population of the building, nor its location in the city or the sufficiency of public parks in the area. There is no differentiation of objectives, uses, and desirable methods of providing landscaped open space in densely built areas, such as downtown and other intensive commercial districts, as distinct from areas of primarily residential use.

The definition of landscaped open space includes the areas at grade required by setback and angular plane controls. Any additional landscaped open space needed to fulfill the By-Law requirement is frequently provided by increased setbacks on all sides of the building and is not consolidated in a functional area, for active or passive outdoor use. Except in the largest projects, setback requirements do not leave sufficient landscaped open space to be usable and beneficial to the residents for outdoor recreational purposes. The on-grade landscaped open space and setback requirements result in a spreading out of buildings with landscaped space between them, and prohibit continuous street facades in downtown and commercial locations.³

³Ibid., pp. 12-13.

Setbacks and Angular Plane Controls

Existing "Zoning By-Law" requirements were established in 1957 to revise the ten-foot side yard requirement which had resulted in inadequate separation, particularly between high apartment buildings. Also the requirements were established to relate to the height of the building and space the buildings so as to ensure proper daylight, air circulation, and for view and privacy. A former "Building By-Law" requirement was for equal outside air space to be provided adjacent to habitable rooms; this was recently transferred to the "Zoning By-Law".

The existing requirements are:

1. a 25-foot minimum setback from all property lines except twenty feet from public streets;
2. a sixty-degree vertical, or alternatively eighty-degree horizontal angular control based on a desirable, for Toronto, separation of $1\frac{1}{4}$ to $1\frac{1}{2}$ times the height of building; and
3. a fifty-foot minimum separation, and minimum 65-degree overlap angle or forty-degree vertical angular plane for portions of one building on the same lot.

Generally the minimum setback and angular plane controls locate buildings so as to permit light penetration and air circulation over and around tall structures and ensure satisfactory views and privacy. With some site configurations and sizes it is still, however, possible to

erect a disproportionately long or overwhelming building. Setbacks and separation requirements are not related to orientation, shadowing effects or silhouette. The sixty-degree angular plane requirement tends to limit density in high density residence areas by restricting the height and therefore the alternative eighty-degree horizontal angles are more frequently used.

Minimum front yard residential setbacks in non-residential districts may conflict with the pattern established by the existing buildings. Such discrepancy can occur when setbacks for non-residential buildings are not required in areas of established continuous setback, or in lower density areas where the scale and character of the street should be considered. The minimum fifty-foot separation (2 x 25 feet) required between buildings has no regard for the continuity of a street facade, particularly at the lower levels. The required separation between buildings is not varied in relation to the uses in the facing walls. A different separation may be permissible between blank walls, than between living room windows.

Parking and Vehicular Movement

The requirements for parking have varied greatly:

1. By-Law required 100 per cent in 1952;
2. By-Law required fifty per cent in 1953;
3. By-Law required 125 per cent in 1957 (25 per cent for visitors);

4. By-Law now requires 100 per cent;

5. By-Law now requires, in multiple-family developments with more than 24 suites, one resident space per 1,100 square feet gross floor area plus one visitor space for each four suites.

The intent has been to provide adequately for residents and visitors, keep parked cars from congesting public roads, and provide for anticipated future needs.

Short term off-street vehicular access to the larger buildings was initiated by a by-law in 1957 with the circular driveway requirement for multiple-family development exceeding 30,000 square feet gross floor area. Site development by-laws normally control and restrict vehicular access points into an apartment site. A recent policy provides that downtown above grade parking may be excluded from gross floor area by reason of proven unsuitable soil conditions, thereby encouraging above grade parking levels under such conditions.

Previous parking requirements were criticized by the development industry as overgenerous, resulting in unused spaces and increased rents. Revised standards have recently been adopted but have yet to be used and analyzed. Other requirements, such as landscaped open space, have minimized the areas and widths of vehicular use areas and driveways on grade. Underground visitor parking areas are underutilized with surface or street parking being preferred,

especially by visitors. This also results from the use of surface visitor parking spaces by residents.⁴

Bonus Features

Site Area Bonus

Larger sites were the only bonus features considered to become important and useful and minimum site areas became a prerequisite for other bonuses. The site area criteria are:

1. 100,000 square-foot minimum to achieve a full range of bonuses in the Z.4 and Z.5 districts; this extent of assembly is encouraged in order to achieve useful landscaped open space areas, the redevelopment of substantial areas or blocks, and successful intermix of housing types;
2. 50,000 square-foot minimum to achieve a limited bonus in Z.3, Z.4, and Z.5 districts; this extent of assembly is encouraged in order to achieve benefit from increased landscaped open space areas only, inclusion of corner properties, and to ensure sufficient area for an imaginative development;
3. 400,000 square-foot minimum in Z.4 and Z.5 districts; this has been used, although not formally adopted as part of the system, to achieve comprehensive redevelopment

⁴Ibid., pp. 16-17.

ment, avoidance of overshadowing and conflict between high and low buildings, and rearrangement of existing street patterns; and

4. 1-1/2 acres has been used as a minimum bonus-able site size in the downtown area.

The minimum site area requirement was not directed to maintaining the existing scale and character of neighborhoods in which multiple-family buildings are constructed. The disparity in scale is expected, however, to reduce over time as designated high density areas are completely redeveloped. The 50,000, 100,000, and 400,000 square feet site area requirements qualifying for additional bonus density appear arbitrary and have little supporting argument. Bonuses could have been directly proportionate to site areas.

Except in Z.3 districts, other bonusing features cannot be meaningfully provided except on sites of substantial area, e.g., a bonusable amount of landscaped open space is provided on small sites by the setback requirement alone. The bonus requirements are generally directed towards obtaining comprehensive redevelopment and do not provide incentives for infilling or smaller land assemblies. Some objectives of this bonus can be attained directly, e.g., a bonus for comprehensive projects, usable open space,

or street pattern improvements.⁵

Landscaped Open Space Bonus

The 1964 landscaped open space bonus was proportionate to the increase over the by-law requirement of fifty per cent up to a maximum bonus at seventy per cent open space. The bonus applied to sites over 50,000 square feet in area and in Z.3, Z.4, and Z.5 districts. The prime objective of the 1964 bonus was improved appearance, but it was also intended to reduce surface parking and increase usable landscaped open space.

Sixty-five per cent landscaped open space was one of the requirements of the 1963 "Downtown Bonus Plan". Additional landscaped open space was bonusable at the rate of 0.04 f.s.i. for each additional one per cent landscaped open space to a maximum density, established in 1966, or 4.375. The apparent objective of the downtown landscaped open space bonus was to obtain recreational space.

The stated objectives of increasing the "Zoning By-Law" landscaped open space requirements and bonusing for additional landscaped open space are similar: improved appearance, reduced surface parking, and increase in usable open space. These objectives of providing additional landscaped open space downtown and generally throughout the

⁵Ibid., pp. 18-19.

city are different, however. The emphasis downtown is on improved appearances.

The incentives for developers to provide more landscaped open space have led to reductions in normal surface uses in favor of the landscaped open space addition. For example, driveway widths, delivery, and parking provisions have been reduced. Increased requirements for landscaped open space increase the height of the building. This is particularly significant with very high landscaped open space provisions as with a one per cent landscaping increase above eighty per cent which results in a five story height increase.⁶

Adjoining Frontages Bonus

The 1964 policy made bonus density available for two, three, or four continuous and adjoining street frontages (or alternatively park, school, church, or stable commercial frontages) in Z.4 and Z.5 districts for sites over 100,000 square feet in area. The intention was:

1. to ensure that reasonably proportioned sites were developed;
2. to make attractive the assembly of the ends of blocks where lots are often smaller;

⁶Ibid., p. 20.

3. to encourage the development of complete street blocks for complete redevelopment; and

4. to eliminate small residual pockets of low density housing and to provide a regular area for imaginative site layouts.

The 1966 review proposed a minimum length of frontage of 200 feet, to exclude cemeteries and commercial districts as alternative frontages and to allow church and school sites to be considered as frontages only if satisfactorily related to the site.

The adjoining frontages feature does not presently apply to sites smaller than 100,000 square feet, paralleling frontages, the downtown district, or to encourage vehicular access to be secured from a rear street where such might be advantageous from a traffic standpoint. The objective of obtaining complete sites, i.e., those which do not leave properties which cannot be redeveloped for similar uses and densities, can be achieved more directly than by reference to numbers and lengths of frontages. The available bonus density may not be adequate to induce inclusion of obsolete commercial frontages.⁷

Mixture of Housing Types Bonus

The 1964 policy offers a small bonus density for the inclusion of a variety of housing types in projects of

⁷Ibid., p. 21.

over 100,000 square feet in site area. Although the principle advantage was expected to be the variation in the physical form of the development, the provision of larger units, e.g. townhouses, was also expected. The 1966 review proposed to specify that a minimum of six per cent of the project units be in buildings not over three stories in height.

In Z.3 districts a bonus condition requires that floor space in excess of 0.9 floor space index be in units averaging not less than 1,000 square feet and located in buildings not over three stories in height in projects exceeding 50,000 square-foot site area. The stated policy objective is that it is desirable to encourage a wider range of accommodation here, for only in moderate density districts can various types be intermingled without excessive loss of scale or privacy.

The prime objective of the mixture of housing types bonus is aesthetic, but it also reflects the increasing need for family sized units in low structures. The bonus is not related to income groups; and there is no bonus for apartments designed for families, nor for the preservation of sound older homes on the project site where their integration might be successfully achieved. The housing stock was depleted by some 624 dwellings in 1969 through demolition. These units are not being replaced in the city in any significant amount.

The townhouse developments are stated by developers to be disproportionately expensive to construct and manage and are consequently not being provided. This bonus is counteracted by the loss of landscaped open space due to the additional building coverage resulting from low rise units. This feature, consequently, has not been used since the earliest bonus applications.⁸

Parking Bonus

A prerequisite for bonus density downtown is no surface parking. This was intended to improve appearance and increase recreational space by eliminating cars on grade. A Z.3 bonus feature requires underground car parking except for five surface spaces for deliveries and short calls. The bonus is not available for enclosed, above grade parking structures or surface visitor spaces in the downtown. There is no Z.4 or Z.5 bonus directly involving car parking provision or location.⁹

Bonus Conditions and Limitations

Maximum Bonus Density

The 1964 policy stated that if granting a bonus results in appreciably different scales of development

⁸Ibid., pp. 22-23.

⁹Ibid., p. 24.

than the By-Law allows, its purpose is defeated and planning and servicing an area becomes impossible. A bonus should provide for no more than variation on the general form of the development proposed in the area. The policy went on to establish a maximum bonus density increase of twenty per cent in Z.4 and Z.5 districts and 35 per cent for Z.3 districts.

The 1966 report recommended a maximum increase of 25 per cent for the extra large sites (400,000 square feet) and applied the 25 per cent maximum to the basic downtown bonus density of 3.5 giving a maximum density of 4.375. The "Official Plan" now states that the maximum density with bonus shall be 2.5 f.s.i. in the General Sector, 3.125 f.s.i. in the Inner Sector, and 4.375 f.s.i. in the Core Sector. Recent years have shown increasing and, now, almost general use of bonusing, to obtain the maximum density possible and only a minimum number of projects have been constructed within the By-Law density limits. This situation is probably due to increasing difficulties and cost in the acquisition of land and financing and to resident demands.

There have been no applications for Z.3 bonus density. Maximum bonus density can be earned only by fulfilling all of the bonus requirements and in the maximum site area range, greater than 400,000 square feet. No alternative ways of reaching the maximum permissible bonus

are available. However, variation of the methods in which maximum bonus density has been earned have been permitted by the Committee on Buildings and Development and subsequently by City Council.¹⁰

Areas Suitable for Bonus

The 1964 bonus policy was considered applicable in only five Z.4 areas. The 1966 review recommended general city wide applicability in designated high density residence areas except for specified areas where the limited lot depths made limitations on density increase desirable. Additionally the "Official Plan" indicates the applicability of the bonus policy for high density residential buildings where permitted in the city and in low density residential districts for sites in industrial or nonconforming commercial use, or in improvement study areas where covered by a redevelopment plan.¹¹

Existing Status of the Bonus System

Residential Bonus in Z.4 and Z.5 Districts

These bonuses are cumulative and independent of each other, but the maximum shall not exceed 0.4 in Z.4

¹⁰Ibid., pp. 25-26.

¹¹Ibid., p. 26

areas and 0.5 in Z.5 areas, the bonus density being added to the maximum density permissible for each zone under the "Zoning By-Law". For developments with landscaped open space between fifty and seventy per cent, the landscaping bonus is granted on a proportionate basis.

For landscaped open space in excess of fifty per cent:

	Zone 4 Bonus 50% to 70% L.O.S. L.O.S		Zone 5 Bonus 50% to 70% L.O.S. L.O.S.	
Sites of not less than 50,000 square feet	0.0	to 0.175	0.0	to 0.2
Sites of not less than 100,000 square feet	0.0	to 0.225	0.0	to 0.25

and in addition for sites of not less than 100,000 square feet where appropriate and where the landscaped open space is in excess of fifty per cent.

For a mixed form of development:

Zone 4 Bonus	Zone 5 Bonus
0.05	0.05

For adjoining frontages:

	Zone 4 Bonus	Zone 5 Bonus
Two frontages	0.05	0.075
Three frontages	0.01	0.135
Four frontages	0.15	0.2

Bonus for sites exceeding 400,000 square feet in area, with four adjoining frontages, with a minimum of fifty per cent landscaped open space and providing a mixed

form of development (six per cent of the total units to be in buildings not higher than three stories) the maximum density, including bonus, is 2.5 in Z.4 areas and 3.125 in Z.5 areas. These maximum residential densities are so specified in the "Official Plan" for the General (Z.4) and Inner (Z.5) Sectors.

Downtown Residential Bonus

Where an apartment house is erected on a lot which is not less than one and one-half acres in size, where the area of landscaped open space is not less than 65 per cent of the lot area, and where no portion of the surface of the lot is used for vehicular parking, the apartment house may be erected with a floor space not exceeding 3.5 times the area of the lot. If the area of landscaped open space is increased beyond 65 per cent, the floor space in the apartment house may be increased by 0.04 times the area of the lot for each one per cent of the lot area that is landscaped above 65 per cent. Subsequently the area of application was enlarged and now corresponds with the Core Sector as shown in the "Official Plan", with a maximum density of 4.375.¹²

¹²Ibid., pp. 27-28.

Residential Bonus in Z.3 Districts

A site of not less than 50,000 square feet and where landscaped open space is not less than fifty per cent of the lot area with no surface parking other than no more than five spaces for deliveries a 0.1 floor area ratio is permitted, or with no surface parking, other than no more than five spaces for deliveries and where any floor space exceeding 0.9 floor area ratio is in units averaging not less than 1,000 square feet in area and located in buildings not over three stories in height a 0.35 floor area ratio is permitted.¹³

¹³Ibid., p. 28.

SUMMARY AND CONCLUSIONS

Traditional zoning is characterized by pre-set regulations which govern whole districts and which are uniform within those districts. It assumes that development will occur on a lot-by-lot basis. Anyone meeting the specifications spelled out in the zoning ordinance and building code for a parcel of land is entitled to a building permit as a matter of right. Such an ordinance is clearly effective in implementing a municipality's land use plan. However, recently the assumption of lot-by-lot development has not held true. Recent development patterns on large tracts of land are increasingly apparent. Hence, painstaking, individual looks at individual parcels have been necessary to interpret the ordinance to determine its intention for such parcels. Such deviations from its regulations have caused the weakening of its effectiveness. Many experts believe that the solution to this problem may call for revision of the state enabling acts themselves.

Zoning has become the modern response to the individual and collective needs of community life, the living together of unrelated, interdependent people, a society growing more complex as it expands. Each parcel or tract of land is a piece of the total land use picture in a

municipality as this positive approach would indicate. The regulation of all parcels of land by a common tool such as zoning insures stability and security for the individual property owner. This stability and security is achieved by the primary purposes of zoning which are to prevent the mixing of incompatible land uses and to insure that uses requiring public service facilities are located where such facilities are available.

Recent trends, however, have tended to achieve the same purposes by a broader interpretation of the ordinances. Such trends include allowing certain different classes of uses to exist side by side when they are not incompatible and case-by-case consideration to monitor incompatibility in districts through special use permits. The end result of these trends thus far has been to make the ordinances themselves cumbersome and difficult to understand.

The regulation of land uses within zoning districts consists of the height and bulk of structures; the lot area which may be occupied and the size of required open space; the density of population; and the use of buildings for trade, industry, residence, and other purposes. The format of the ordinance usually begins with several pages of definitions, followed by a statement of purposes. Next come the sections which delineate the division of the municipality into districts and specify the land uses which may be utilized in each district. Following the regulations,

there are provisions for nonconforming uses, the zoning board of appeals, amendment procedures, variances, and penalties.

The contents of zoning ordinances lay down specific regulations which the private property owner must abide by in order to attain his building and occupancy permits. Regulations dealing with the lot sizes, yard sizes, and the height and bulk of structures are aimed directly at the qualities that collectively contribute toward livability. They attempt to control the population density in various districts; to insure adequate light, air, and privacy; to allow safe play areas for children, and adequate recreation space for adults; to reduce fire hazards; and to maintain a healthful and safe environment. However, whenever there are pre-set regulations in a district there are bound to be hardships. Variances and special use permits are utilized to allow case-by-case considerations for new development patterns which are not adequately covered by the regulations in the zoning ordinances. Both the variance and special use permit are presently limited in scope. However, the special use permit is being increasingly used in newer ordinances, with defined sets of standards and criteria, as an administrative device to obtain site plan review.

Hence, through the evolution of the zoning regulations as currently used, it can be seen that land use and

development composes subject matter that demands controls which are capable of relating sensitively to the variables in each individual instance and which recognizes that the variables are themselves in the process of continuing change. In order to reflect this change, local governments are increasingly requesting that they be allowed to implement stronger administrative controls over land development, and at the same time broaden the definition of the police power to include their concern for the environment through considerations for safety, security, and aesthetics.

Unfortunately, the courts have been sporadic in their interpretations yielding such powers. The emphasis on amenity and good design is a difficult thing to clearly define since it is so entrenched in cultural values and education. Further the intended rigidity of zoning regulations have solidly determined the philosophy and structure of the existing system of land use controls. This philosophy of what ought to occur in land development, however, is widely divergent from what is occurring in today's land use decisions. The reality is that land use controls are relating to development largely as individual permissions. Most development is not occurring in conformance with pre-established regulations, but rather as modifications of them.

It is not difficult to understand, then, that when the courts have handed down favorable decisions for aesthetic and administrative control, they have merely broadened

the definition of the police power, rather than voicing a specific acceptance of aesthetics by the dictate of law. Many zoning regulations are primarily, if not wholly, aesthetic anyway; but these aesthetic regulations, such as front yard setbacks, have been accepted through legal precedence. Modern development patterns, likewise may become part of legal precedence accepting amenity considerations. Unfortunately, many of these development patterns are already becoming part of the landscape, probably without enough careful consideration of what impact they will have on the environment. Hence, a mechanism must be established and legislated whereby such development patterns can be monitored.

Most of these new development techniques incorporating concern for the environment and large-scale project site design have fostered techniques for dealing with zoning problems. Such techniques include rural development, flood plain zoning, airport zoning, new towns, historic areas, cluster development, floating zones, planned unit development, recreation and open space zoning, off-street parking, and performance zoning. Certainly the one factor that all of these have in common is their individualized nature. The second factor is their careful consideration of the environment. Thirdly, they all provide amenities which their market area dictates. The clues for the needed mechanism to be incorporated in zoning regulations are thus amply available.

The case-by-case basis for consideration of new development pattern proposals leans heavily on the intentions behind the regulations in existing zoning ordinances. Zoning by its very nature, treats different parcels of land differently. Hence, the foundation for broader administrative, aesthetic controls is already laid. No longer do we find much negative thinking about the potential of zoning. What must be strengthened is the relationship between zoning and the land use plan of a municipality.

Since concern is increasing over the preservation of the environment, both natural and manmade, and since municipalities are finding their jurisdictions consumed with urban sprawl at ever-increasing development rates, other factors besides dimensional requirements must be accounted for. Such factors should include water and air pollution; soil erosion and water holding capacity reduction; road congestion; burdened governmental services; noise; and adverse effects on scenic areas, amenities, historic sites, and natural areas. If land use planning is to progress from the rudimentary stage of structure relationships, it must be recognized that land is a finite resource and that once a structure is placed on the land it has an irrevocable impact on environmental relationships. Hence, zoning legislation must be understood by its effects on the complex relationships existing in the environment, and how man determines his livability in that environment.

Most of the zoning regulations employed today do not recognize these relationships. Zoning, itself, has not become refined enough to eliminate its defects for carrying out its stated purposes. This complicates the attempt to broaden the purposes. Such complication indicates the need for a new mechanism which may stand alone to interpret complex environmental relationships, and at the same time complement the principle intentions already utilized in zoning regulations. With the increasing complexity and growing sophistication in understanding the relationships between environmental factors and zoning controls, the advantages of informed administrative discretion as a substitute for the present rigidities of the legislative amendment route and subjective flexibilities of the zoning board of appeals route become apparent.

The mechanism which is proposed in this thesis to strengthen zoning's purposes and at the same time monitor new development patterns for their environmental impact and the provision of amenities is a bonus system. Such a system has been utilized in special districts in several areas, such as San Francisco's central business district. However, Toronto utilizes bonusing throughout its jurisdiction; and therefore is used as a model for indicating how such a system works.

The "Official Plan" for Toronto permits the City Council in order to encourage a high standard of development,

to pass by-laws increasing the permitted density of residential buildings within stated limits, in accordance with an adopted bonus system which takes into account among other things: the area of landscaping or recreational space, the size of site, the number of streets on which the site abuts, or other features which contribute to the quality of living conditions in the building, and takes into account the effect of the building on the surrounding areas. The bonus system is also subject to other policies such as locations for high density development, the availability of public facilities, and needs for specific types of land uses.

The bonus system operates only within the framework established by the "Official Plan", and City Council by-laws and policies. The system offers density inducements to developers for the incorporation of desirable but not necessarily essential features. The public health, safety, and welfare is required by the "Zoning By-Law" without any choice as to its provision. Such a mechanism allows the implementation of the best purposes of zoning, as well as offering encouragement to the developer to consider the environmental impact of his development and the amenities demanded by the market for his project.

In order for such a system to be utilized in most municipalities today, certain zoning ordinance amendments may be in order depending on the structure of the ordinance. Typically, such dimensions that may need reconsideration

are gross floor area, landscaped open space, below grade building setback, resident parking, visitor parking, ramps, and driveways to insure that the permitted bonuses do not jeopardize the stated purposes of the ordinance. Of course, the extent of reconsiderations necessary will depend on the extent of sophistication of the existing ordinance.

The bonus features that may be used to allow density increments then may include the types of units to be encouraged, additional landscaped open space, public use lease, building variety, large site areas, and site assembly. Coupled with these features, bonus conditions and limitations must be carefully spelled out. Areas of special conditions and limitations must include maximum bonus density and areas suitable for bonusing.

Such a system insures that the necessary police power considerations such as health, safety, convenience, and the general welfare will be guarded. These purposes behind zoning must be preserved and strengthened. At the same time the bonus system encourages consideration of other factors such as historic preservation, landscaping, the screening of parking, environmental impact, and the amenities to be gained in new development patterns. However, it is not possible to borrow the bonus system from another municipality. Rather the example must be applied to the needs of individual communities. A myriad of benefits has been discussed which can accrue to the municipality

desiring to broaden its zoning philosophy beyond the rigidity of generalized regulations found in existing ordinances.

This myriad of benefits will accrue, however, only after a thorough statement by the municipality of its objectives and goals of the regulations it imposes and the bonuses it offers. Further, the choice of an administrator of the bonus requirements and allotments is crucial. He must be knowledgeable of the rationale behind the zoning regulations and the bonus requirements, as well as trained and skilled in interpreting these and applying them to the parcel for his review and decision.

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