The Evolution of Community Planning In New Brunswick: 1912-1980

Community planning legislation was first enacted in New Brunswick in 1912. The original statute was known as *An Act Relating to Town Planning.*[1] It concerned itself with the issues of the day: health and sanitation. Thus s. 1(1) states:

> A town planning scheme may be prepared in accordance with the provisions of this Act with respect to any land which is in the course of development or is likely to be used for building purposes with the general object of securing suitable provision for traffic, proper sanitary conditions, amenity and convenience in connection with the laying out of streets and use of the land and of any neighbouring lands for building or other purposes.

The Act also allowed for the preparation of a scheme to guide community development. It did not, however, allow for zoning or land use control in the contemporary sense. Zoning as the tool for controlling land use and implementing plans received legal recognition in North America only in the 1920's.[2] The Act was concerned primarily with the physical layout of streets, with the physical construction of buildings, with open spaces, both public and private, and with ensuring that there was proper provision of water, sewer and lighting for developments.

It is of interest to note that, although this was a very simple piece of legislation, certain principles were established which have become major building blocks in modern planning acts. There was, for example, concern for the preservation of objects of historical significance or natural beauty, a concept which later faded, only to re-emerge with the recent enactment of the *Municipal Heritage Preservation Act.*[3] As well, the Act recognized that planning should not be limited by artificial boundaries, such as those set up for a municipality; rather it should be considered as a totality. Thus it allowed planning schemes to encompass more than one jurisdiction. Finally, there was recognition that a planning scheme was not to be a straitjacket but one which would have to change with changing circumstances. Thus s. 1(2) provided:

> A town planning scheme may be varied or revoked by a subsequent scheme prepared or adopted by a local authority or a responsible authority and approved by the Government in accordance with the provisions of this Act.

Another interesting concept introduced in this original Act was the provision for a scheme whereby existing buildings were to be altered or

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[1] S.N.B. 1912, c. 19.

[2] *Ambler Realty Co.* v. *City of Euclid* (1924), 297 Fed. 307, at 311-12 (Ohio D.C.).

[3] S.N.B. 1978, c. M-21.1.

removed if they were incompatible with planned development in an area. Section 4(*a*) provided authority to:

> Remove, pull down, or alter any building or other work in the area included in the scheme, which is such as to contravene the scheme or in the erection or carrying out of which any provision of the scheme has not been complied with.

This was the introduction into the planning sphere of the right of the New Brunswick Government to interfere in private property for the general public good.

There was an appeal provision from this draconian right to demolish buildings, and the Act provided for compensation if the scheme affected existing buildings or land. Compensation was of two kinds: one for the owner if property were injuriously affected, and one for the Government if property gained in value. No compensation was to be paid once the scheme was under way.

How successful the 1912 Act was is difficult to say, but in 1917 Thomas Adams, Town Planning Advisor to the Commission of Conservation of the Dominion Government and the man responsible for making land use planning a profession in Canada, wrote in the magazine, *The Busy East of Canada,* that "In practical work, town planning has advanced further in the City of Saint John than in any other city in Canada". It was Adams' conclusion that:

> New Brunswick having started to recognize the importance of planning and developing the land as the means of laying the foundation for better social conditions will have the courage to apply these principles in a larger way to their whole provincial development. It will need courage because it will mean expenditure of money without any immediate return and without any immediate political advantage.[4]

The Provincial Government, having taken the first step by passing the Act, then allowed planning to take its course. No substantial changes in the legislation occurred for many years. Until 1927 the Act remained completely unchanged. In that year it was merely renamed *The Town Planning Act.*[5] Either the Act was so successful in its original form that amendments were not required, or it was simply disregarded and no planning was done. The lack of activity in the planning field during these years was no doubt due in part to the Great Depression.

In 1936, however, an entirely new act was introduced. *The New Brunswick Town Planning Act* contained many concepts found in the

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[4]Thomas Adams, "Planning and Development in New Brunswick," *The Busy East of Canada* (Sackville, N.B., Oct. 1917).

[5]R.S.N.B. 1927, c. 182.

present legislation.[6] This 1936 Act introduced the term "Official Town Plan", in contrast to the scheme plan concept of the 1912 Act. It also initiated the concept of a planning commission as an advisory body to municipal governments. The Planning Commission was to consist of not less than three and not more than fifteen members. No qualifications were stated, so it may be presumed that any citizen could have been appointed. The Act required that before a Town Plan was adopted or changed a public hearing be held. More important were the provisions for the adoption of zoning by-laws and appeals through municipal Zoning Appeal Boards. As well, the Act recognized that the Town Plan and the Zoning By-law were too important to be left completely to municipal authorities. Consequently, both types of legislation were required to meet Provincial Government approval before becoming law. Finally, the 1936 Act provided for compensation to landowners whose property was damaged as a result of the implementation of by-laws. However, the Act curtailed such compensation with a provision that "Property shall not be deemed to be injuriously affected by the reason of the passing of a zoning by-law under the authority of this Act".

The year 1936 was certainly a vintage year for planning in New Brunswick. Town Plans and Zoning By-laws were recognized and the concept of subdivision was introduced. As well, a Provincial Planning Board was established. Regulations governing subdivision required the mapping of tentative plans, procedures for municipal approval of tentative plans, and the draughting of final plans. The final plans were to depict areas to be rezoned for public purposes, indicate the width, gradation and location of streets, and regulate the size and shape of lots and blocks. The final plans were also to stipulate that no subdivision could be registered without municipal approval. Town Planning Commissions appointed under the Act were responsible for approving subdivisions. Thus the Act provided that:

> 32(1) In any municipality where the local authority has appointed a town planning commission, no sale, lease, mortgage or charge, and no agreement to sell, lease, mortgage or charge, and no other document or act which would, but for this section, affect the transfer of an interest in any small parcel of land which was not a separate parcel immediately prior to the execution of such document or completion of such act, shall be effectual to pass any interest in such parcel of land until the same has been approved as a separate parcel by such town planning commission.

The Act defined the terms "small parcel" and "separate parcel". It is of interest to note that leases for terms longer than three years were also subject to subdivision regulations. Town Planning Commissions were even given power to disapprove of the erection of certain types of dwelling houses.

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[6] S.N.B. 1936, c. 35.

The Provincial Planning Board established by the 1936 Act was to advise the provincial government and the municipal authorities on planning matters. The members were to be chosen from the Departments of Lands and Mines, Public Works, Health, the Board of Education and the University of New Brunswick. The Chairman of any Town Planning Commission or a member of such Commission were *ex officio* members. All members were to serve without remuneration. The Board was also charged with the responsibility of ensuring adequate housing with at least minimum standards. It was to co-operate with Town Planning Commissions on all housing matters. Finally, the Act provided that the provincial government could hire officials or employ consultants. With the advent of commissions, planners (though still not named as such), and consultants, planning was firmly entrenched in New Brunswick.

Few amendments were made to the 1936 Act until the post-war period, but once the war was over, they became numerous. This was doubtless the result of the great surge of development which took place during the immediate post-war years, particularly in the housing construction industry. This desire to raise the level of housing in the country was reflected in the establishment of such institutions as Central Mortgage and Housing Corporation and of housing commissions in most communities throughout the Dominion, and by the passing of legislation such as the *Veterans Land Act*[7] to assist veterans in obtaining adequate housing. In conjunction with intense housing development, planning was pulled along by its boot straps, although it was still considered largely the concern of the architect and the engineer.

In 1952 all previous amendments were consolidated in the Revised Statutes.[8] The Act, however, was still very much as it was in 1936. Planning Commissions were now charged with preparing plans and advising the Councils. They were also empowered to hire staff who were to be Town Planning Engineers or consultants. No longer was it required that the Governor-in-Council approve the official town plan or zoning by-law, but it was still possible to have an official plan or a zoning by-law separate from each other. The Provincial Planning Board had acquired other powers over and beyond that of an advisory body. The Board could now, with the approval of the Governor-in-Council, make local authorities conform to their by-law, order local authorities to adopt official plans or zoning by-laws, and even take over the power of the local authority. The conferring of such powers on the Provincial Planning Board (which hitherto were usually assigned to Ministers of the Crown) indicates the Legislature felt planning was an important function of government.

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[7]R.S.C. 1970, c. V-4.

[8]*Town Planning Act,* R.S.N.B. 1952, c. 233.

Under the 1952 Act several communities adopted zoning by-laws, although very few based them on an official plan. Planning was preserving the *status quo; i.e.* zoning land as it had been developed rather than preparing a plan for future development and using zoning as a tool for implementation. The Provincial Government had by this time established a Planning Branch, although it acted in only an advisory capacity. In fact, for a time, the planning director was also the chief plumbing inspector. The professional town planner was soon to appear.

The fifties saw little change in the Act though there were amendments in 1955 permitting county councils to adopt minimum regulations made by the Provincial Planning Board subject to the approval of the Lieutenant-Governor-in-Council. These regulations covered such things as building lines, size of building lots, subdivision of land, but did not include zoning. The following year saw further fine tuning, and the Act peacefully proceeded on its way into the sixties where in 1961, it received a thorough dusting off and underwent another name change.

Under the new *Community Planning Act*[9] planning was to be general in the Province and was not to be limited by geographic location. The philosophy of the Act is clearly enunciated at the outset. Section 2 provides:

> There shall be appointed a director of the Planning Branch of the Department of Municipal Affairs and such other officers and employees as may be required to administer this Act.

The 1960-61 Act provided that municipalities could establish planning commissions, which then had to be consulted. It should be noted that these commissions were the same as the present Advisory Committees, but the Act also allowed for the establishment of District Planning Commissions. It was also provided that a municipality could adopt a community plan and what such a plan should contain, although not in great detail. The Act still allowed zoning without planning and did not provide a suitable mechanism for integrating planning among municipalities. It did provide for the passing of a subdivision by-law by municipalities and controlled its effectiveness by stating that where a subdivision by-law or regulation was in effect, if its provisions were not followed, then the transaction was null and void. Unfortunately, all this did was to create a series of bad titles which the Legislature then had to rectify. Nor did the 1960-61 Act, nor any of its predecessors, provide for the registering of the by-law, a fact which is haunting lawyers and bureaucrats to the present day. Many a subdivision by-law was born to blush unseen amongst the pigeon holes of the clerk's desk, or the file of some provincial bureaucrat.

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[9]R.S.N.B. 1973, c. C-12.

The 1960-61 Act remained in force throughout the sixties, with major amendments in 1963 and, more particularly, in 1966, with the introduction of the programme of Equal Opportunity, which placed planning in the unincorporated areas in the lap of the Minister of Municipal Affairs.

By 1969, there was a realization that the 1960-61 Act was not going to meet the needs of the seventies. The most pressing problem was the time element in subdivision, where the applicant had to wait for the planning commission to meet. The lack of a system of co-ordinating planning among municipalities became very evident during the preparation of the plan for the Greater Moncton Area, where it was necessary to co-ordinate eight separate municipal plans to achieve one strategy. Finally, two other pressing problems were the lack of planning at the Provincial level or at least a legal mechanism for planning beyond the advisory function of the Provincial Planning Board, and the system of appeals from local decisions via the local zoning appeal board. The latter worked in the large communities but was found difficult to operate in the smaller ones where one had to hear the appeals of one's neighbours.

To resolve all these problems, the government in 1969 hired Professor Roderick Bryden, a solicitor who had done a review of the Saskatchewan and Nova Scotia Planning Acts, to examine and produce a new planning act for this Province. Bryden produced an unpublished report entitled "New Brunswick Planning Study" which outlined what a new planning act should contain. An interesting new concept in the report was that, because of the differences in size among New Brunswick municipalities, not all municipalities required a full municipal plan, and that a lesser version of a municipal plan — the Basic Planning Statement — should suffice.

Planning Legislation — 1973-79

The basic change in the 1973 Act was the fact that planning, as opposed to zoning, became the central theme of the Act. The new Act was built on the basic philosophy thatif an individual were to give up his basic right to use his land as he saw fit for the good of the community, then the community should tell him why. Zoning is only a tool for implementing the municipal plan by bureaucrats; it is not the end in itself. Accordingly, the new Act insists that before a zoning by-law or regulation can be passed there has to be either a Basic Planning Statement or a Municipal Plan. It is of interest to note that it was envisaged that where old zoning by-laws were in existence without a plan or basic planning statement and were not based upon a municipal plan or basic planning statement, they were to continue until a plan or basic planning statement was adopted. However,

in *Stocker* v. *City of Fredericton,*[10] Stevenson J. held that this was not the case. Zoning could not stand alone, and a zoning by-law or regulation without a plan or basic planning statement was invalid. Although the decision led to an administrative nightmare, it demonstrated the acceptance by the court of the basic philosophy that land rights should be interfered with only to effect a defined public good.

The problem of lack of planning at the Provincial level was overcome by introducing the concept of the Regional Plan. This divided New Brunswick into seven regions based upon the six cities and the Newcastle-Chatham urban complex. The regional plans were to be the Provincial policies for the Regions translated into land use terms. Where a regional plan exists, it prevails over a municipal plan, thus stimulating intermunicipal planning. The regional plan concept also aids the preparation of municipal plans by outlining provincial intentions within a municipality regarding such things as bridge and hospital location.

None of the previous Acts had dealt in detail with what a municipal plan should contain; the emphasis had always been on zoning rather than planning. The 1973 Act changed this by particularizing those things which must be considered in preparing a municipal plan. There is, however, a proviso that allows the Minister to shorten the list if he so desires. Both the Regional Plan and the Municipal Plan are unique in Canadian planning in that they bind both the municipal council and the Provincial Crown insofar as any definite proposals outlined in the plan.

Since planning affects the individual's rights in his land, all of New Brunswick's Planning Acts have had a requirement for public notice. Under the 1973 Act all planning by-laws, with the exception of building, subdivision and Advisory Committee by-laws, were to have public input prior to adoption. The reason for excepting the subdivision, building and the appointment of the Advisory Committee by-laws is that these three affect everyone equally and are basically standards adopted by the municipal council; zoning or planning by-laws, on the other hand, have different effects on different pieces of land.

The philosophy of the present Act is that the municipal council has the right to be wrong, so long as it hears the public prior to making a decision and carries out the adoption process laid down in the Act. Provincial supervision is restricted to ensuring that the legal process has been met and that any interference into the municipality's planning role is to be done through the regional planning process.

The problem of slow planning administration is overcome by placing all the administration under a development officer. This individual is given authority to administer all planning by-laws, thereby

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[10](1978), 21 N.B.R. (2d) 587 (N.B.Q.B.).

expediting the administrative process. The development officer has not been given judicial powers; these have been reserved to the Planning Advisory Committee, District Planning Commissions or Provincial Planning Appeal Board.

The old Acts had left the judicial function with the Zoning Appeal Board, but this had not worked well in smaller communities. The new Act gives the judicial function at the first instance to the Planning Advisory Committee or District Planning Commission, and at the second instance to the Provincial Planning Appeal Board. This Board is composed of two members appointed from each of the seven planning regions and a Chairman, who must be a barrister. When hearing a case, the Board consists of the two members for the affected region and the Chairman. This provides both local input and continuity and equity.

The Provincial Planning Appeal Board is empowered to hear two types of appeals: those based on grounds of hardship, and those alleging the misapplication of a by-law or regulation by a development officer. However, the Board does not have the power to legislate, *i.e.g,* to give relief from legislation, so that in judging hardship or misapplication caused by a by-law or regulation, the Board must confine itself to interpretation.

Planning Legislation — 1980

The 1973 *Community Planning Act* provided a practical tool for guiding the development which took place in the seventies, but as a new decade approaches, planning in New Brunswick must again be reviewed. To this end William Cooper, a barrister, was commissioned in 1977 to examine the existing Act, identify problems, and suggest changes.

During the spring of 1978 a survey of persons and officials involved in the planning process in New Brunswick indicated that problems, primarily of an evolutionary nature, had developed in the administration, philosophy and draughting of the *Community Planning Act.*

All provisions of the 1973 legislation had not come to fruition. In addition, there are some forty-nine acts of the Provincial Legislature which affect planning or land use, and many controls are buried in this legislation. During the period since 1973 an increased public awareness of planning and its policies has resulted in a greater questioning of planning legislation and increased pressures on municipal councils and the Provincial Legislature in respectof their planning choices.

The 1973 legislation placed great emphasis on planning as opposed to specified land use. This emphasis then tended to promote a greater public awareness of planning and encouraged a greater public participation, as evidenced by the formation of community organizations

such as merchants and neighbourhood groups. Bodies such as these have participated actively in the planning process of recent years. Their presence invariably indicates a strongly held opinion, whether intended to promote or to object to some planning cause or project. This public awareness and participation was not the norm a decade ago.

Recommendations as a result of the Cooper review are intended to achieve greater local autonomy in the planning process and to create an atmosphere whereby the provincial and local administrations afford greater public access to planning process. The recommendations affect those areas of the existing Act which have not been fully implemented as well as those areas where change is seen as beneficial. The review recommends that:

(1) Regional Planning be abolished;
(2) Statutory Planning Advisory Committees be abolished;
(3) Planning by district be mandatory for all cities and their surrounding areas;
(4) Single lot subdivisions be authorized without a plan of survey;
(5) Development officers be upgraded in planning skills and become agents for other departments of the provincial government involved in the planning process;
(6) The Provincial Act establish provincial priorities and delegate local issues to municipalities, including residual power; and
(7) In terms of draughting, the Provincial Act deal with incorporated and unincorporated areas separately.

The preparation of regional plans, as required in the 1973 Act, has not even yet been completed. Regional plans encompass the extremes of highly organized cities on the one hand and unincorporated and unpopulated areas on the other. This wide diversity tends to dilute planning energy and resources. Long range planning could better be effected by concentrating on smaller, more uniform, areas of the province. For this reason especially it has been recommended that district planning be emphasized, particularly in the area around each of the cities. It is hoped that this planning format will encourage cooperative planning by all jurisdictions within the district while allowing individual characteristics to prevail.

Criticisms of planning advisory committees and their place in the planning process indicates that they should be abolished in favour of placing their responsibilities directly in the hands of elected councils. This is intended to promote greater public knowledge of all decisions affecting planning. This is not to say that municipalities might not appoint planning advisory committees, but that these committees would have no legal status under provincial legislation.

Under the present regime a development officer is the first contact with the planning process for most developers. By legislation this officer

has executive powers to implement planning policies of councils. With the exception of those in incorporated areas, these officers have little formal planning training. Developers are also required to attend on other departments of government to obtain approval for any development. The upgrading of the development officer to the level of planning technician would ensure adequate planning skills were available to all areas of the province. In addition, the public would be more efficiently served if this official became an agent for all departments of the provincial government involved in the planning process.

Before these recommendations can become effective, the provincial authority must clearly enunciate its planning priorities. Provincial planning would then become simply a system of monitoring local jurisdictions to ensure that provincial interests are protected. The Provincial Planning Branch would continue to offer assistance to local jurisdictions in preparing their own planning policies.

These comments indicate in broad terms a summary of Cooper's report, presented to the Provincial Government in 1979, and, therefore, the present status of planning in New Brunswick. The government is also evaluating a study on Urban Sprawl. The direction which planning will take in the 1980's is expected to be an amalgam of the Planning Act Review, the Urban Sprawl Study, input from the public, and more particularly, from the professional societies concerned with planning in the province.

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