LAND USE CONTROL IN NEW BRUNSWICK
SOME OBSERVATIONS

BASIL D. STAPLETON*

The new Community Planning Act[1] and amendments to the Registry Act[2] have effected some important changes in the land use law of New Brunswick. The purpose of this article is to identify those changes which should be of most concern to the practicing lawyer.

While this purpose could be accomplished without a detailed analysis of the new legislation, it would be useful, nevertheless, to begin by describing in broad outline the regime of land use control under which we now operate.

I THE NEW REGIME

(a) Planning Regions and Districts

The new Act[3] has formalized the concept of regional planning in this province for the first time. Pursuant to the Act[4], New Brunswick has been divided into seven planning regions centered around the six cities and Chatham-Newcastle. These regions are believed to represent the most convenient units within which to attain co-ordinated provincial-municipal land use planning and control.

Each region is comprised of incorporated and unincorporated areas. Where two or more incorporated areas exist in close proximity within a region they may be combined together with contiguous unincorporated areas to form a planning district. A planning district does not have municipal status but exists purely for planning purposes.

(b) Regional Plans[5]

The introduction of regional planning represents a recognition of the need for co-ordinated planning both as among the

---

†The author is an Assistant Professor of Law at the University of New Brunswick Law School. He was formerly Director of Legal Services with the New Brunswick Department of Justice and was involved in developing and drafting the province's new community planning legislation.

1 S.N.B. 1972, c. 7.
2 S.N.B. 1972, c. 61.
3 References to the new Community Planning Act in the footnotes which follow will simply cite the relevant provisions without repeating the citation for the Act itself.
4 Section 5.
5 Section 17.

various departments of the provincial government and as between the provincial and municipal governments. The plan which the province will adopt for each region will disclose its programmes and policies both as a user of land and as a controller of land use within the region. This will provide a reasonably stable framework within which municipalities and private developers will be able to plan their activities.

(c) Municipal Plans

The authority to control land use within an incorporated area continues to be vested in the municipal government. The new Act does not purport to abridge that authority. It does seek, however, to ensure that such controls will not be implemented in an *ad hoc* fashion but rather in a co-ordinated, consistent manner within the context of a plan for the orderly development of the municipality as a whole. To this end, each municipality may be required to adopt a plan[6] respecting such matters as the development and use of land, transportation and control of traffic, reservation of land for municipal purposes and the providing of municipal services.

A municipal plan will constitute the framework within which by-laws will be enacted. The by-laws must be consistent with the municipal plan[7] which, in turn, must be consistent with the plan for the region in which the municipality is located.[8]

While there will be no overall plan adopted for a planning district, one of the main functions of the district planning commission will be the fostering of co-ordination and consistency among the plans adopted by the several municipalities comprising the district.

A plan comparable to a municipal plan may be adopted by the province for the orderly development of designated unincorporated areas[9]. Such an area plan must be consistent with the plan for the region in which the designated area is located and will form the framework within which regulations controlling specific aspects of land use will be made.

(d) Land Use Controls

---

6 Section 23. See also section 29 under which the smaller municipalities may adopt a more general and less sophisticated plan known as a "basic planning statement" in lieu of the detailed municipal plan.

7 Sections 34 (1), (2); 42 (2); 60 (3); and 64 (4).

8 Section 22.

9 Section 28. See also section 77 (l) (i) by which the province in effect is given the status of a municipal council within a designated unincorporated area.

The Act vests municipalities with authority to enact by-laws respecting zoning, subdivision, building, deferred widening of streets and controlled access to streets. In addition, municipalities may adopt development schemes to control the nature and timing of development of prescribed areas of land within the municipality and urban renewal schemes to govern the redevelopment of previously developed areas.

The province is given extensive powers to regulate the use of land in unincorporated areas. Such regulations may be made applicable to all unicorporated areas throughout the province or may be restricted in their application to designated areas[10]. Although a provincial regulation cannot be effective in a city or town it can apply in a village if the village does not have a comparable by-law in effect. However, before a provincial regulation can apply in a village that is not in a planning district one of two additional requirements must be satisfied, either the regulation must be in relation to sub-division or the village must have appointed the Provincial Planning Director to be its development officer.[11]

(c) Administration of Controls

For the most part, the administration of land use by-laws and regulations will be in the hands of development officers appointed by the municipalities, district planning commissions and the province. Building by-laws and regulations will continue to be administered by building inspectors.

A municipality that is not in a planning district must appoint a development officer if it has any by-law (other than a building by-law) in effect under the Act or has adopted a resolution to enact such a by-law.[12] With the approval of the Minister of Municipal Affairs a village that is not in a planning district may appoint the Provincial Planning Director to be its development officer.[13]

In the case of a planning district, the district commission must appoint a development officer[14] whose jurisdiction will extend throughout the district, including both the incorporated and unincorporated components.

The development officer for the province is the Provincial Planning Director who will administer provincial regulations wherever they apply, except within planning districts. Much of

---

10 Section 77 (2).
11 Section 77 (3).
12 Section 16 (1), (2).
13 Section 16 (3).
14 Section 7 (3).

the Director's administrative power will be delegated to subordinates located throughout the province.[15]

(f) Advisory Bodies

The Act provides for the creation of planning advisory bodies at the municipal, district and provincial levels.

A municipality that is not part of a planning district must establish a planning advisory committee[16] consisting, in the case of a village, of three members and, in the case of a city or town, of from five to fifteen members.

Where a planning district is established there will be a district planning commission whose members will be appointed by the member municipalities and by the province where the district includes unincorporated areas.[17]

By and large, the administrative functions which were performed by local and district commissions under the former Act[18] have been transferred to the development officers under the New Act. As a result, the service provided by the committees and commissions will be primarily advisory in nature. The most obvious example of this is the requirement that a council must request the written views of the advisory committee or commission on any by-law proposed for enactment under the Act.[19]

The advisory committees and commissions are vested with some powers which are not of a purely advisory nature. For the most part these relate to matters of zoning and sub-division control and involve the allowing or prohibiting of proposed uses of land, the changing of non-conforming uses and the granting of variances.[20]

The planning advisory body at the provincial level is the Provincial Planning Committee consisting of five members appointed by the Lieutenant-Governor in Council. It will not, in fact, play a very significant role as an advisory body. It will function most actively in relation to zoning and subdivision regulations, exercising powers comparable to those mentioned in the immediately preceding paragraph.[21]

---

15 Section 4.

16 Section 12.

17 Section 6.

18 S.N.B. 1960-67, c. 6.

19 Section 66.

20 Sections 7 and 13 contain comprehensive listings of the powers of district commissions and advisory committees, respectively.

21 Section 83.

II INNOVATIONS

Many of the changes effected by the new Act concern matters of procedure and administration. These are intended to produce a more efficient and less cumbersome system of land use control. Principal among such changes is the establishment of the province-wide network of development officers who will be able to handle most types of applications for approval of proposed developments without reference to any other official or body.

The purpose of this article, however, is to identify those features of the Act which are essentially substantive rather than procedural. That analysis follows.

(g) Development Control Generally

The ultimate objective of the legislation is to encourage and facilitate the most socially advantageous use of land. The means to this end are the controlling and directing of the ways in which land may be developed. In order to appreciate fully the scheme of the Act, therefore, one must first understand the concept of "development" which forms its nucleus.

The Act adopts a very broad definition of "development" which is intended to encompass virtually every type of beneficial use to which land may be put. The erecting, placing, relocating, removing, demolishing, altering, repairing or replacing of a building or structure, a change in the purpose for which any land, building or structure is used and the excavation and creation of land constitute "developments".[22] That is not to say, however, that any such activity will be subject necessarily to control. It will be only if the province or a municipality chooses to exercise the authority vested in it by the Act.

Needless to say, a purported control is only as valid and effective as the plan, by-law or regulation by which it is imposed. For the purpose of determining such validity and effectiveness it is not sufficient to consider those provisions of the Act dealing with the permitted content of plans, by-laws and regulations and the prescribed procedures for their adoption. One must also take account of those provisions by which certain limitations are placed on the controlling effect of plans, by-laws and regulations. For example, the province and municipalities cannot control private developments merely by setting forth statements of policy in their plans and schemes.[23] Similarly, a by-law or regulation which is adopted in accordance with the prescribed procedures and is apparently consistent in content with the relevant

---

22 Section 1 (g).

23 See sections 18 (7); 27; 28 (6); 31; 32 (4); and 33 (2), by which private developments are affected by "proposals" but not by "policies".

provisions of the Act may, nevertheless, be invalid in whole or in part because it is inconsistent with a regional, municipal or area plan.[24]

It should be noted, as well, that by-laws and regulations in effect on the coming into force of the Act have been continued in effect. This applies, however, only to the extent that such by-laws and regulations could have been enacted or made under the new Act.[25]

The effective date of a by-law enacted under the Act is the day on which it is filed in the registry office or such subsequent date as the by-law shall provide.[26] Regulations become effective upon publication in The Royal Gazette.[27] Where the regulation takes the form of a basic planning statement or a development or urban renewal scheme, or where it relates to zoning, it will not be necessary to publish the whole regulation but simply a notice of its making. While all regulations must be filed in the registry office such filing is not a condition precedent to the coming into force of the regulation.[28]

It is to be observed, however, that in certain cases development can be controlled even before a plan, scheme, by-law or regulation becomes effective. A municipality intending to adopt a municipal plan, basic planning statement or development or urban renewal scheme may adopt a resolution to publish a notice of its intention.[29] Adoption of the resolution can affect development for a period of six months.[30]

The same provisions apply with respect to the publishing by the Minister of a notice of intention to recommend adoption by the province of an area plan, basic planning statement or development or urban renewal scheme. The period of effectiveness of such notice is six months.

In the case of a proposed zoning, deferred widening or controlled access street by-law a municipality may adopt a resolution prohibiting development for a period of six months.[31] Such a resolution, however, will cease to have effect after fourteen days unless the first notice of intention to consider the passing of the by-law is published within that fourteen day period.[32]

---

24 See footnotes 7 and 8, *supra.*
25 Section 100 (1).
26 Section 67 (2).
27 Section 77 (12).
28 Section 77 (13).
29 Section 81 (1) (a).
30 Section 81 (2).
31 Section 71 (1).
32 Section 71 (2).

The controlling effect of a proposed zoning, deferred widening or controlled access street regulation will begin to run when the Minister publishes the first notice of intention to make such regulations.[33]

(h) Subdivision Control

The development of land through subdivision warrants separate treatment here because of the significantly different approach taken by the new Act to this matter. Two aspects of the new approach are particularly worthy of mention. In the first place, the Act has abolished the exemption from control of testamentary subdivisions.[34] *Inter vivos* and testamentary subdivisions are now subject to the same system of controls.

Secondly, a conveyance or devise that is contrary to a subdivision by-law or regulation will not be abortive as regards the transfer of title.[35] The grantee or devisee will acquire title to the land. However, he will not be permitted to develop the land until the contravention of the by-law or regulation has been removed.

Where a development officer has reason to believe that land has been subdivided in contravention of a by-law or regulation he is not permitted to approve a development in relation to such land unless he is satisfied that the person applying for the approval is either the registered owner of the land or the duly authorized agent of the registered owner.[36] The amendments to section 51 of the Registry Act[37] are designed and intended to prevent grantees and devisees of improperly subdivided land from registering their instruments. With certain exceptions, no instrument that transfers an interest in land affected by a subdivision by-law or regulation is registerable unless it has been certified for registration by a development officer. And development officers are prohibited from certifying any instrument by which land has been subdivided in contravention of a by-law or regulation.[38]

It is important to recognize that section 51 of the Registry Act may apply to an instrument of transfer even although the

---

33 Section 81 (1) (b) (ii).

34 The definition of "transaction" in the former Community Planning Act included only inter vivos conveyances or transactions. As a result, testamentary transfers were not subject to the Act.

35 Section 27 (1) of the former Community Planning Act has not been continued in the new Act.

36 Section 81 (5).

37 S.N.B. 1972, c. 61, s. 7.

38 Sections 47 (4) and 44 (1) (l) (ii).

transfer does not effect a subdivision. If the transfer does not effect a subdivision then the requirement for certification by a development officer can be avoided if the parcel of land involved appears on a filed subdivision plan or if the same parcel had been transferred previously by an instrument certified by a development officer. In either case, however, the relevant information must appear on the instrument.

It is important as well that wills be reviewed to determine whether any subdivision to be effected on the death of the testator would conform to existing subdivision controls. If it would not, then the will should be amended, otherwise it will not be registerable. This could affect adversly all devisees, not just those entitled to the subdivided land.

(i) Sanctions

The province and municipalities have available to them three general types of sanctions against contraventions of the Act, by-laws and regulations: (a) orders issuable by the Director or a council;[39] (b) orders issuable by a judge of the Supreme Court on the application of the Minister or council;[40] and (c) prosecution.[41]

The first of these may require the cessation or alteration of a development or the restoration of land to its former condition. If the owner of the land fails to comply with the order the Director or council may undertake the required work and recover the cost thereof from the owner. Such costs constitute a lien on the land until recovered. It is to be noted that this type of order may be directed to the person actually carrying out the development even though he is not the owner of the land.[42]

An order of a judge of the Supreme Court may be sought wherever a person contravenes the Act, a by-law or regulation, fails to comply with an order or demand made, or terms and conditions imposed, under the Act, a by-law or regulation or a decision of the Provincial Planning Appeal Board, or obstructs a person in the performance of his duties under the Act. The order may restrain continuation of the contravention, failure or obstruction. It may also direct the removal or destruction of offending developments and authorize the Minister or council to undertake such work at the expense of the owner.

A contravention, failure or obstruction for which an order may be sought is also an offence which may be prosecuted.

---

39 Section 93.

40 Section 94.

41 Section 95.

42 Section 93 (6).

These, however, are not alternative sanctions. An order may be sought even although the offending party has been prosecuted.[43] Furthermore, a conviction does not operate as a bar to further prosecution for continuation of an offence.[44]

Note should be taken of the fact that the limitations period for purposes of prosecution is six months from the discovery of the offence.[45] Under the former Act a prosecution had to be commenced within two years from the day the offence was committed.

These general sanctions are supported by other provisions which are designed to discourage unauthorized development. It has already been observed that the owner of improperly subdivided land will not be able to obtain approval to develop the land. Similarly, in certain cases a person who undertakes an unauthorized development will not be entitled to compensation with respect to the development if the land is expropriated.[46] This measure is aimed particularly against persons who might seek to inflate land values through unauthorized means in anticipation of an expected expropriation as disclosed by a plan, statement or scheme.

These various sanctions may be applied against a private developer even although the land being developed is owned by the Crown or a municipality.[47]

(j) Appeals

The system of local zoning appeal boards has been replaced by the Provincial Planning Appeal Board consisting of a Chairman and two members drawn from each of the seven planning regions. One of these fourteen members is to be designated as vice-chairman.[48] The Board has jurisdiction throughout the province. For the purpose of hearing an appeal it consists of the chairman or vice-chairman and the two members from the region in which the appeal is lodged.[49]

Virtually every decision of a development officer is appealable to the Board[50] and may be appealed either by the person who was refused approval or by a person adversly affected by the granting of approval to another. An appellant must allege mis-

---

43 Section 94 (1). See in particular the concluding words of the subsection.

44 Section 95 (2).

45 Section 95 (3).

46 Section 80 (1).

47 Section 96.

48 Section 84.

49 Section 85.

50 Section 86 (2) contains a comprehensive listing of the grounds on which an appeal may be taken.

application of the Act or a by-law or regulation under the Act, or special or unreasonable hardship.

An appeal may also be taken from a decision of a council in connection with the imposition of terms and conditions on non-conforming uses. Here the appellant must allege that the standards prescribed by the council are unnecessary for the protection of the best interests of the municipality or would cause him unreasonable hardship.

Generally, an appeal must be taken within sixty days after the development officer renders his decision. Where, however, the appeal relates to the granting of a development permit to someone other than the appellant, the time for lodging the appeal does not begin to run until the permit or notice thereof is posted on the property to be developed.[51] The appeal must be commenced within ten days of such posting. A ten day appeal period also applies in the case of an appeal from standards prescribed by a council.[52]

The Board may dispose of an appeal in a variety of ways depending, to some extent, upon the nature of the appeal. In general, it may allow or dismiss an appeal, allow it subject to terms and conditions imposed by the Board, or order the development officer to take such action as it considers appropriate.[53]

Finally, it should be noted that the Act does not contain a privative clause. There is no attempt to bar persons from access to the courts where they have sufficient grounds and status to institute legal proceedings.

---

51 Section 86 (3) (b). See also section 81 (3).
52 Section 86 (3) (c).
53 Section 87.