LAND OWNERSHIP RIGHTS

LAW AND LAND: AN OVERVIEW

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F O R E W O R D

The Alberta Land Use Forum presents this Technical Report No. 9 as a background study in connection with Term of Reference number (9) "The extent, if any, to which the historical right of a land owner to determine the use and disposition of agricultural property ought to be restricted".

This material was prepared by Alvin A. J. Esau, under the auspices of the Institute of Law Research and Reform, and does not necessarily express the views of the Institute of Law Research and Reform nor the Land Use Forum. It is hoped that this and other related studies will be useful to the public in providing background information in connection with the public participation program and public hearings to be held on land use.

Authority for the establishment of a Land Use Forum was made during the 1973 spring session of the Legislature. The Forum was established in the fall of 1973 to consider various aspects of land use in Alberta. The terms of reference include, but need not be limited to, the following subjects:

(1) The family farm;
(2) Multi-use of agricultural land;
(3) The use of agricultural land for recreational purposes;
(4) Land use in and adjacent to urban areas as it affects the cost of housing;
(5) Future land needs of Alberta agriculture;
(6) Corporate farms, foreign ownership of land, absentee ownership and communal farming;
(7) The common ownership of land, agricultural processing and marketing facilities;
(8) Land use as it influences population distribution in Alberta;
(9) The extent, if any, to which the historical right of a land owner to determine the use and disposition of agricultural property ought to be restricted.

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OUTLINE

I

INTRODUCTION

It is clearly a myth that a man can use "his" land any way he pleases. Can he, for instance, grow marijuana in his backyard without fear? Can he legally draw up the bridge to his castle and exclude all the inspectors who have rights of entry? Can he legally begin building a structure without permission to do so from some authority? Can he let weeds choke his property or allow his land to degenerate? The answer is "no", and in countless other ways the person's land is regulated by governmental entities as well.

Law evolves to serve the needs of a changing society, and while the myth of "absolute property rights" in land continues to be held by some segments of our society, a large group of the public is recognizing that land is a resource which must be managed in the interests of all citizens; and is not simply a commodity to be bought and sold. Recognizably land is a resource that has been abused in the past when left solely to the free play of market forces.[1]

Urban sprawl, slums, scattering, overbuilding, inadequate open space, overcrowding, traffic congestion, and encroachment of industrial and commercial uses on residential districts, are obvious urban problems in land use that have been plaguing us for some time.[2] Of course, the non-urban environment is not without its own problems as well. For

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[1] See Gladwin Hill, "Land, a natural resource, not a commodity", Edmonton Journal, October 2, 1973.

[2] See Richard Yearwood. Land Subdivision Regulation, Praeger Publishers, (1971).

instance, the Calgary Regional Planning Commission's "County Residential Surveys" (1968), points out problems associated with accommodating people who desire a residence in the country such as "withdrawal from production and fragmentation of good arable land, groundwater shortages. municipal servicing costs, accessibility, lack of coherence, and the need for development patterns."[3] Furthermore, the urbanization of our lakes by private cottage developments gives rise to the general question of how our land can be conserved with orderly development for the recreational and psychic needs of Albertans.[4]

The concern for the conservation of our resources and environmental quality, and the preservation of landmark and historical sites, has led both citizens and governments to reconsider the possible equilibrium between private rights and social responsibilities. Within the voluminous literature on land-use planning we find the common theme that a modernized philosophy of property is necessary; a philosophy that recognizes both the rights and duties of the individual landowner.[5] At the same time we should recognize that "conflicts exist between the expressed goals of people for orderly development and conservation of natural resources and their willingness to accept property right restrictions on land."[6]

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[3] Gertler, Planning the Canadian Environment, Harvest House, (1968).

[4] See Proceedings: Symposium on the Lakes of Western Canada, U. of Alta. Press, (1973).

[5] See Philbrick, Changing Conceptions of Property in Law (1938) 86 U. Pa. L. Rev. 691.

[6] W. L. Gibson Jr. "Economics, Property, and Land Settlement Policy", Perspectives on Property, Institute for Research on Land and Water Resources (1972).

There may be a recognition of the problems, and a demand for decisive action and yet reform cannot take place because of powerful political limitations. Legal proposals which would place severe restrictions without compensation on private property rights for the better public good may well be impractical, precisely because the legal mechanisms must find justification and support from society and such restrictions may not mirror present societal convictions that private property ownership is still a very desirable value.

Yet the urgency of formulating land use policies in Alberta today is clear and people's views are evolving in the face of modern developments. Calgary has proposed a 125 square mile annexation; metropolitan planning commissions are being contentiously discussed; demands for private housing are rising coupled with inflationary pressures on land and housing costs; Alberta's Rocky Mountain slopes are being discussed as prospective development sites; the proposed Edmonton river valley park has raised questions of ecological import on the region; and even some discussion of control of speculative increases in land prices has arisen.

This report is an attempt to provide general material related to the specific issue "of the extent, if any, to which the historical right of a landowner to determine the use and disposition of agricultural property ought to be restricted."[7] The report does not concentrate exclusively on agricultural property, nor does it attempt to provide comprehensive recommendations. What it hopes to do is

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[7]A proposed term of reference for examination by the Alberta Land Use Forum

provide a legal background for the policy decision maker. Basic legal principles of land law will be discussed, and a historical outline of the changing role of private property in land from pre-Roman to modern times will be provided. The nature and extent of the "bundle of sticks" in land will be examined, including, for instance, rights related to airspace, support, and water. The common law restrictions on property such as nuisance, negligence, the principle of Rylands v. Fletcher, and trespass, will be examined; as well as the myriad statutes presently in force in Alberta which affect private rights in land. Finally, contemporary land use planning law in Alberta, and the trends in the United States and Britain will be examined. It is hoped that throughout the report the basic philosophical questions arising out of man's relationship with others, and with the land, will not be lost sight of.

II
THE "BUNDDE OF RIGHTS", AND BASIC DEFINITIONS

To understand how the law affects our use and disposition of land, we must be aware of the legal terms and concepts that are basic to land law, as such. A word may have a meaning in a legal context which is not necessarily the "common" meaning as understood by the layman. Basic terms such as "property", "rights", "land", "tenure", "estate", and "ownership" should be fleshed out at the start, and then other terms will be defined, if necessary, as they arise. First of all, however, let us examine a basic concept in land law that has become a standardized image.

A convenient conceptual framework for our examination of restrictions on the use and disposition of land is the

idea of an estate in land as a bundle of sticks representing rights over the land. Thus, we think in terms of how many sticks (rights) we can use and enjoy; how big our bundle of rights is, how many and which rights are held by someone else or by society, and what the extent of the rights are.

When we speak of "property" we do not mean the specific physical object but rather metaphysical rights; "property" being a mere conception of the mind.[8] Ely defines property in this way: "It must be borne in mind that, strictly speaking, property refers to rights only; not to a thing, but the rights which extend over a thing."[9] We will speak in other words of the metaphysical bundle of rights extending over the farm, or the city lot, not about the physical land and improvements. The bundle of rights in land with which land law is concerned includes "those rights which enable you to enjoy the land itself and those rights which place restriction on someone else's land in your favor."[10] As we shall see, the introduction of restrictions means that we actually hold a bundle of not only rights but duties as well.

Our use and enjoyment of a physical object, if translated into use and enjoyment protected by law, can be represented as our holding a bundle of rights and duties over

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[8]For a further explanation, see Bentham, Theory of Legislation (1840).

[9]Richard T. Ely. Property and Contract (1914) p. 108.

[10]P. J. Dalton Land Law, Ayez Publishing (1972), p. 1.

the object, not the object itself. However, the term "right" has been used in various ways and as Hohfeld points out,

> " . . . the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense, which always is correlated with a duty of non-interference resting on someone."[11]

Your neighbor may allow you to drive your equipment across a portion of his land or allow you to construct a drain which runs off on his land, but do you have any sticks in your bundle of rights related to these incidents? In the course of our discussion we must be aware of those activities related to the use and disposition of our land that are a subject of a property right; and those that are perhaps a mere privilege or immunity.

"Property" as a metaphysical conception, is a set of relationships, and is completely a work of law.[12] Adam, or Robinson Crusoe, may have established control over things, or possessed things, but they had no private property because "the essence of property is in the relations among men arising out of their relations to things."[13] In a Robinson Crusoe economy there is no one to receive any

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[11]Wesley Hohfeld, Some Fundamental Legal Conceptions As Applied to Judicial Reasoning (1913) 23 Yale Law J. 16.

[12]Cohen, Dialogue on Private Property (1954) 9 Rutgers Law Review 357.

[13]Ely, supra, n. 9 .

right and no one to intrude upon any right and thus no property.[14] When men agree to respect the possessions of their neighbors, or some custom relating to the division of goods is established, one sees the birth of law and property. Things can exist without law, but property and law are born together and die together.

When we speak of "land" we do not refer simply to earth, but we mean both corporeal hereditaments (earth, buildings and fixtures attached to the earth, air space, minerals, trees), and incorporeal hereditaments such as easements and profit a prendre, for instance. Thus one of the sticks in our bundle of rights may represent a right of way across our neighbor's soil (easement). This stick too is a property right in the bundle and is part of "land". A section of air space, furthermore, is "land" in the legal sense as is illustrated by our Condominium Property Act, R.S.A. 1970, c. 62. I can sell you a section of the sky over my land with the appropriate rights related to support from the surface. The extent of "land" will be looked at with greater detail when we examine the extent of the bundle or rights that a proprietor has over his land. While we often think of property as rights in land and chattels, we must remember that if property is defined as "rights", then all the rights we have protected by law are our property. Slaves were once property. Women were once property. If we have a right in free speech, in a copyright, or in a patent, or a right to welfare, a pension, or unemployment insurance, we have property in them all even if they are ideas rather than things, or deal with status rather than substance.[15]

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[14] See Marshall Harris, Origin of the Land Tenure System in the U.S. (1953)

[15] Reich, The New Property (1964) 73 Yale L.J. 733

We must remember then, that when we speak of property in this report we are referring to real property (land as we've defined it). Although what could be "property" is legally unlimited.

Very generally, the term "tenure" refers to the holding of land on certain terms and conditions, while the term "estate" refers to the duration of the interest in land. "Tenure" deals with how land is held, "estate" deals with how long it is held. While we will briefly touch upon the complicated history of tenures, tenure today is a far less important doctrine than that of estates, because generally everybody holds land in one form of tenure called "free and common socage". The various forms of estate remain relevant, the most important ones today being the fee simple, which the layman thinks of as ownership, the life estate, and the leasehold which simply includes all the various possible landlord-tenant situations. As in the concept of "property" we must distinguish the physical from the metaphysical when we talk about an "estate". We cannot own land, but can merely own an estate in it. Walsingham's Case (1579) 2 Plowd. 547, 75 E.R. 805, indicates this clearly:

> . . . the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more then diversities of time, for he who has a fee simple in land has a time in the land without end, or the land for time without end, and he who has land in tail has a time in the land or the land for time as long as he has issues of his body, and he who has an estate in land for life has no time in it longer than his own life, and so of him who has an estate in land for the life of another, or for years.

Thus, once again, we get back to the concept of a bundle of rights extending over the land and the bundle may have a variety of rights included in it and the bundle may be split up in a variety of ways.

Finally, when we speak of "ownership" we look at the fee simple estate which is usually evidenced by title. The person who "owns" land holds the whole bundle of sticks over the land to do with what he wants except for all the sticks which are reserved by society. If a person has a life estate or a leasehold he has never been granted the whole bundle and he does not "own" the property. Once the owner has his bundle of rights he may hand nearly all them out and still be the "owner", that is, if he retains the right of reversion. For the purposes of this report, we shall presume that we are dealing with owners of land.

III

HISTORICAL SURVEY: PRE-ROMAN TO TWENTIETH CENTURY

A. Introduction

Plenary jurisdiction with respect to property law and civil rights was given to the provinces under the B.N.A. Act s. 92(13). The North-West Territories Act, 1886 (Can.) c. 25, s. 11, established that the laws of England as the same existed on July 15, 1870, applied to the Territories. Finally, the Alberta Act, 1905 (Can.), c. 3, s. 10, shifted former territorial power to the province of Alberta, and so English law was formally received into our province.

An examination of the evolution of property law in England is directly relevant to an understanding of Alberta

law today. The brief historical outline which follows avoids detailed legal analysis of the evolving patterns of estate and tenures and focuses more generally on the emerging relationships of men to land.

Nearly all writers of property law texts begin their historical analysis with an explanation of the feudal system as it developed after the Norman Conquest of 1066. A more complete picture can be provided, however, by a brief account of pre-Roman, Roman, Old English, and the Norman developments in land law, followed by the rise of private property in the eighteenth and nineteenth centuries, and then, finally, the rise of twentieth century trends in social control over land.

B. Pre-Roman

Much of what is written about land tenure in primitive societies may well be conjecture. For instance, a dichotomy of thinking exists between historians who insist that primitive societies were based on communal ownership of land and those that insist that ownership was a matter of private property. Understandably, however, "where space is plentiful and the use of the soil limited to hunting, food-gathering, or shifting agriculture, land is a 'free' good like fresh air."[16] We know that the North American Indian regarded land as something to be used and enjoyed, not something to be owned individually or to be bought and sold in a commercial sense.[17] As one commentator puts it:

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[16]Bryant, Private Property: Public Control (1972), p. 20.

[17]See Clawson, The Land System in the United States (1968).

> The Indian had a respect bordering on awe for everything he could see, hear, or touch; the earth was the mother of life, and each animal, each tree, and each living thing was locked into an interrelated web of spiritual existence of which the individual was a small part. In trying to attune his everyday life to these concepts, the Indian inevitably established a deep feeling of oneness with the world of nature. Implicit in the feeling was what we now call a stewardship approach to the use of land . . . It was incomprehensible to the Indian that one person should have exclusive possession of parts of the earth. The warrior chief, Tecumseh, reacted with astonishment to the demands of white buyers: "Sell the country? Why not sell air, the clouds, the great sea?"[18]

We know furthermore, that the Inca system was a highly elaborate form of communal tenure, along with a set of statutory labour obligations.[19] As far as pre-Roman Britain was concerned, Denman believes that ultimate dominion over the land was vested in a powerful lord, probably a priestly lord during the Stonehenge era, and then later a secular lord during the hill-fort era.[20] Vinogradoff supports the view that the pre-Roman England of the celts was organized around a communalistic management of property.[21] Thus we see in primitive societies usufructory rights rather than ownership rights, and "mankind probably did not arrive at the conception of land as private property

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[18]"The Indians: First Americans, First Ecologists", The American Way, May 1, 1971.

[19]Thomas Ford, Man and Land in Peru, (1955).

[20]Denman, Origins of Ownership, George Allen, (1958).

[21]Vinogradoff, The Growth of the Manor, (1904).

until quite a later stage."[22] At any rate, whatever possible communalistic evaluation was taking place, the Roman intrusion in 55 B.C. brought forth an emphasis on private property and private appropriation of land.

C. Roman

Once society moves from nomadism to agriculture and evolves toward a more formal political structure, tenure in land solidifies. The Egyptians had highly developed ideas of ownership with appropriate instruments such as deeds, wills, and leases and a system of public recording of landownership. The Mesopotamians, Hebrews, Greeks and Romans all had highly developed ideas of ownership as well.[23]

The Roman law of property emphasized the importance of private ownership. Yet ownership is never unlimited; the bundle of sticks held by the proprietor never includes all possible rights over the land. Kipp points out that there never has been a system of completely unlimited ownership.[24] We shall return to this point and elaborate on it when we discuss the more recent theories of property. For now we can see the principle illustrated even in Roman Britain: "Some authority had the power to project chess-board streets across the interlacery of private boundaries and to design, erect, and finance the building of city

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[22]Ardrey. The Territorial Imperative, Athenium, New York (1966).

[23]Harris, supra, n. 14.

[24]Windscheid-Kipp, Lehrbuch, at 857.

walls."[25] Again, while we think of Roman law as geared to the safeguarding of the legal position of absolute property, we must keep in mind that along with privately owned land, there existed the ager publicus or public domain reserved for public purposes. Futhermore, the legislature did impose restrictions on private property of various kinds.

> Apart from the general principle that a man's rights over his property are limited by the rights of others, there were a number of specific rules, often local, limiting the heights of buildings, and the use of certain sites for building . . . and Roman law included a large number of special provisions regulating the relations between neighbours."[26]

For example, Rodger has recently examined the generally held theory that in Roman law, an owner had a right to construct a building to any height he wished even if the effect was to cut off all the light to his neighbor's land. Rodger concludes that in fact an owner, even in Roman law, has a right to a reasonable amount of land, and he concludes:

> The idea of Roman law individuality is a myth. Later scholars have shown that it was a law of ownership hedged about by restrictions which took into account the normal every day requirements of community living.[27]

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[25] Denman, supra, n. 20, p. 41.

[26] Buckland and McNair, Roman Law and Common Law, Cambridge U. Press, (1965).

[27] Rodger, Owners and Neighbors in Roman Law, Oxford, Clarendon Press, (1972) p. 3.

A phrase that is found in Roman law is "Dominium est jus utendi et abutendi re", which has been said to mean that the right of property carries with it the right to use or to abuse a thing. Ely argues, however, that "abutendi", "means to use up or consume, but not to abuse,"[28] and that one should not forget that added to the phrase "est jus utendi et abutendi re" was "quatenus juris ratio potitur"--(in so far as the reason of the law permits).

After the fall of the Roman Empire, the Angles, Jutes, Danes, and finally, the most important group, the Saxons invaded England and thus the Roman land law did not exert significant permanent influence on later developments.

D. Old-English

In England, the Saxons established the Germanic village community where according to Hecht, individual ownership was very strongly affirmed.[29] Vinogradoff, states more particularly, however, that it is not the individual who comes forward with his rights, but the family, and after the family comes the kindred.[30] The family holdings of land were called folcland, and the land was measured in "hides", a term related to "family". The open field system used in the old English agricultural community was indicative of the still powerful communalistic

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[28]Ely, supra, n. 9, p. 136.

[29]Hecht, From Seisin to Sit-In: Evolving Property Concepts (1964) 44 B.U.L. Rev. 435.

[30]Vinogradoff, supra, n. 21.

forces in the society. For instance Vinogradoff states:

> Decisions as to the quantity and quality of commonable beasts, the putting up of hedges and walls, the management of drainage, regulations as to the cutting of the grass, all had to be made by the community and had to be apportioned according to the shares held in it by its members.[31]

Thus, the basic picture is that of a township (tún) which is a combination of shareholders who hold a certain bundle of rights in land, but are also subjected to a set of duties in regard to the State (and to the Church) for the benefit of all.

The important point to be made, however, is that feudalism in England was not a new concept introduced by William the Conqueror in 1066. The Saxons had a reasonably well-developed feudal system already built-up by that time. This Saxon feudal structure with its hierarchy of powers evolved from the earlier community system because military and fiscal obligations led to gradual political reorganization around an aristocratic basis, particularly during the Danish wars. Vinogradoff concludes:

> On the whole we are, perhaps, warrented to conclude, firstly, that the manorial system arises at the end of the Old English period mainly in consequence of the subjection of a labouring population of free descent to a military and capitalistic class, and, secondly, that the personal authority of the lord of the manor is gradually gaining the mastery over a rural community of ancient and independent growth.[32]

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[31] Id. at 182.

[32] Id. at 235

Thus, the land system ultimately took shape with a powerful king at the apex, then Thegns and Earls as large property holders, and then geneatas, the geburs, and the kotsetlan, at the bottom of the social ladder.[33] The Geneatas held their land in "free" tenure; owing only certain specific duties to the lord, while geburs and kotsetlan were bound with onerous services to perform for their lord.

From folcland (folkland), then, the movement was toward bocland which is land granted by kings to powerful lords by the book, that is, the instrument setting forth the grant. Along with the granting of bocland came the practice of inheritability.[34] Bookland could be disposed of by its new owner at will, or sold, or given away.

In conclusion, during the old English period, while society was moving toward strict feudalism, it still retained conceptions of individual proprietorship. This conception was greatly altered by the 1066 Conquest.

E. Feudal

After the conquest of 1066, old English proprietory notions came to an end and from hence forth all land was owned by the king and everybody else merely held land on a number of conditions. The evolution of tenures and the development of estates is a complicated story that spans centuries of change and consolidation. We will only touch upon some of the main currents in the stream at this point.

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[33] see generally Denman, supra, n. 20.

[34] Harris, supra, n. 14.

All rights were derived from the king who held the whole bundle of rights over land and on certain services or terms gave a number of these rights to someone who then would divide the rights on certain conditions to others, and so forth, in a pyramid structure with the king at the apex. The conditions of the tenure, or the burdens placed on the land were called "incidents" and included fealty, homage, wardship, marriage, relief, primer seisin, aids, fines for alienation and escheat.[35] Various incidents and other services attached to different tenures of which there were the "free" tenures, namely military tenures, socage tenure, burgage tenure, gavelkind, and frankalmoign, and also the "unfree" tenures, called tenures in villeinage. Each of these tenures carried its own special obligations. For example, the villein "had no right to dispose of his goods or land save as the lord should let him,"[36] and "was at the mercy of the lord in everything short of life and limb."[37] On the other hand, socage tenure, the freeist and easiest of all English tenures, include the paying of a fixed sum of money for the right to hold land, not unlike what we would consider a rent payment today.

It must be remembered that this strict triangular feudalism did not completely saturate the country. Within the "borough" or medieval town there developed a form of

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[35]For a general overview see Sinclair, Introduction to Real Property Law, Butterworths, Toronto (1969).

[36]Denman, supra, n. 20, p. 121.

[37]Harris, supra, n. 14, p. 31.

money tenure similar to socage, but which also included the freedom to alienate and devise the property. Thus, "the establishment of boroughs by granting burghol privileges set up a system of proprietory interests that cut across the strict feudal proprietorship".[38]

The dominant influence on the common law of real property, however, was still the feudal system which left an indelible mark. For instance, today we still say that all land is owned by the Crown and that we hold the land in "free and common socage" tenure and we still use the terms "fee simple" to describe a certain type of estate, namely the greatest estate possible, and one now tantamount to complete ownership.

This feudal system and its onerous burdens gave way in the face of politico-socioeconomic forces leading to free "tenures" and more individual freedom in the use and disposition of property. Many theorists on property, however, look back at the feudal system and applaud a basic theory woven within it, namely, that land is held, that stewardship rather than ownership is basic, and that the holding of land is a reciprocal relationship of rights and duties.

F. Easing of Feudal Burdens

To begin with, the Magna Carta in 1215, arising out of the struggle between the nobles and the king, shifted the current by stablizing certain tenurial incidents and thus removing some of the flagrant abuses of the lord over his tenant, and also established the proposition that no free man should be deprived of his liberty and

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[38] Denman, supra, n. 20, p. 164.

property except upon the judgment of his equals or the law of the land. Moyer speaks of the Magna Carta in this way:

> This was the first significant step toward a democratic government, and a free land system. The Magna Carta took the making of land law out of the hands of local lawgivers and based it on interpretations of the national Council. Steps were taken that tended to stablize and regularize charges that were made on the land; made free transfer of land possible, and possessory rights in land determined by an established court system, and prohibited ownership of land by religious bodies whereby the land could be held in perpetuity.[39]

Quia Emptores which was enacted in 1290 prevented further subinfeudation which did much to prevent the bottom of the triangular social structure from expanding, and eventually led to the elimination of all the middle lords and their burdens on the soil. The Statute of Mortmain of 1279 supplemented the Magna Carta in checking the rapid flow of lands into the hands of ecclesiastical bodies.

Freedom of alienation did not generally exist in the feudal system where one had to have a license from the King before land could change hands. A move toward freedom was established in 1326 under Edward III when some groups could alienate freely on the payment of a fine to the lord. The increasing use of money and the efficiency of the payment of money to the lord rather than complicated services and burdens led to the gradual shifting toward free and common

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[39]D. David Moyer, Land Tenure in the United States, p. 2.

socage tenure and also to a market in land. Furthermore, the drop in population after the Black Death gave many villeins bargaining power and led to a redistribution of land.[40]

The culmination of these forces led to the Tenures Abolition Act of 1660 which left only one feudal tenure, namely socage. The onerous feudal incidents were thus eliminated, and while the state held quite a number of the sticks in the bundle of rights over the land, the individual who had a "fee simple" estate (time on the land without end) had complete freedom of use and enjoyment and alienation subject only to those restrictions enforced or demanded by the state for the benefit of the community, the neighbor, and the individual proprietor himself.

G. The Rise of Private Property

The feudal tenant was restricted quite severely in the number of rights he could bundle together over a particular piece of land. The ultimate revolt against this situation, like a pendulum, swung quite in the opposite direction and the extent of this swing has had a tremendous effect on the common law. The bundle of rights held privately was allowed to swell, reaching its zenith in the 19th century during the period of laissez-faire individualism. The private theory of absolute property rights or natural property rights was molded by the struggle in the 17th and 18th centuries against the old restrictions on individual enterprise.[41] From the writings of Grotius, Locke, Bentham, Kant, and Hegel came justification for private property

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[40] Denman, supra, n. 20 p. 15.

[41] M. R. Cohen, Property and Sovereignty (1927) 13 Cornel L.Q. 8.

protection and growth. Private property was not a creation of government according to Grotius, but preceded it, and the latter was bound by natural law to respect property. When one mixed his labour with things, the result was property, according to Locke, which was a natural right independent of human convention. Locke wrote:

> The great and chief end, therefore, of men uniting into Commonwealths, and putting themselves under government, is the preservation of property. . . . The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it own.[42]

The idea of an unrestricted use of property, furthermore, became popular after Adam Smith's Wealth of Nations was published. In France and Germany property was granted far reaching protection by legislation and adjudication.[43] Both the French Civil Code and the German Civil Law Code of the Empire stressed private property protection. In England, Blackstone's absolutistic thinking about private property influenced many:

> There is nothing which so generally strikes the imagination and engages the affection of mankind, as the right of property, or that

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[42]Locke, Of Civil Government, 2nd Treatise, Gateway Edition (1962) at 102.

[43]Gottfried Dietze, In Defence of Property, Henry Regnery Comp. (1963) p.171.

> sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[44]

Finally, a typical passage from Hegel's Philosophy of Right illustrates further the individualism of the age:

> A person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his. As it has no end in itself, it receives its meaning and soul from his will. Mankind has the absolute right of appropriation over all things.[45]

It must be remembered that some restrictions on property use and disposition did exist and always have existed as we mentioned earlier. For instance, we shall examine the common law torts of nuisance, negligence, trespass, and the principle of Rylands v. Fletcher which during this period served to restrict the use of private land. However, the idea that, the fewer the restrictions on property use the better, was the predominant one of that age. Professor Cribbet summarizes the mood:

> Property was an individual right to be protected, not regulated, by the state. Duties there might be but they were minimal and could be handled by the ad hoc processes of the common law. Translated to the use of land, this meant the individual could develop it as he pleased and the public welfare would be served by the collective results of the individual's freedom of action. Property

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[44] 2 Blackstone, Commentaries, 1-2.

[45] Hegel, Philosophy of Right, s. 44.

> could be controlled by laws, but legislative tampering must be viewed with suspicion since the individual's use of his own land was protected by the Constitution, the laws of God, and the writings of philosophers.[46]

This attitude influenced greatly the development of both colonial America and Canada.

H. The New World

While the seignorial system did exist in Quebec from 1626 to 1854, many immigrants to North America, often left Europe, precisely because they wanted to get away from restrictive feudal tenures. The abundance of land and the desire to develop the colony, led to the availability of land under the freest of English tenures. For instance, the Ruperts Land Charter of 1670 which included the area which is now Alberta, established that "free and common" socage was to be the tenure of the territory. In colonial America particular emphasis was placed on the development of a new land system that allowed maximum individual control. Charges upon the land were soon reduced to taxes only. The 1776 American revolution, furthermore, was in no small way a revolution emphasizing property rights.[47] The idea of the government as the protector rather than the regulator, was placed firmly into the United States Constitution. Amendment V states:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process

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[46]Cribbet, Changing Concept in Land Use (1965) 50 Iowa Law Review, p. 249.

[47]See Moyer, supra, n. 38.

> of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV states:

> S. 1 . . . No state shall make or enforce any law which shall abridge the privilege and
>
> nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws . . . .
>
> S. 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Rather than the conception of the Crown granting a bundle of rights to the individual, we see the social contract theory of individuals having the whole bundle and then granting a few sticks to the sovereign for the good of all citiziens. Due a great deal to Herbert Spencer the idea of laissez-faire exercised great influence upon the United States,[48] and generally the courts as well as the legislators protected property.

A typical opinion is that of Mr. Justice Paterson in Van Horne v. Dorrance, 2 Dall. 304 (1795):

> The right of acquiring and possessing property and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense ofproperty; property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in Society. No man would become a member of a community, in which he could not enjoy the fruits

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[48] Dietze, supra, n. 42 at 67.

> of his honest labor and industry. The preservation of property, then, is a primary object of the social compact.

The settlement of the U.S. west presents a case study of this individualism of the new world. Nearly all the land in the west became the property of the U.S. federal government whose policy was to convert it from public to private property as soon as possible. The feeling was that a nation of freeholders would be established whose self-interest would give rise to maximum production.

The principle of laissez-faire and caveat emptor applied and if a person ended up buying submarginal or even useless land he alone would be blamed for the result. On one side, John Quincy Adams and others struggled to secure compact settlement of the land and to make it a source of public benefit as well as private property. On the other side, Jefferson, Benton and Andrew Jackson urged the policy of rapid and extensive settlement, to build a nation of individual freeholders.[49] Throughout the nineteenth century disposal of the public domain was perhaps the most important factor in the political as well as the economic life of the United States.[50] The Northwest and Southwest Land Ordinances which formalized in general terms the tenures under which the unsettled areas of the West would be developed encouraged individual ownership of family-sized farms. Up to 1828, half the land disposed of, was literally given away and it was clear "that the government would not set out to conserve, protect, or develop the public domain."[51] The Pre-Emption Act

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[49]John Delafonse, Land Use Controls in the U.S., M.I.T. Press (1969), p. 17.

[50]Clawson, supra, n. 17, at p. 54.

[51]Bryant, supra, n. 16 at p. 70.

of 1841 legalized the "prescriptive" right of squatters to acquire land on which they had settled and the Homestead Act of 1862 offered a free 160 acres of public land in the West to those who settled and improved it. The basic problem was the speculation that accompanied these Acts and the lavish donations of lands to railroad companies in an era of "highly elastic business ethics and relatively weak governments"[52] Whatever the case, the American view of property as a natural right or as an absolute right, was strengthened more than ever by the colonial experience. Of course, when new land always seemed available on some frontier not much pressure to restrict land uses existed. By 1954, seventy per cent of the land area of the continental United States had passed into private ownership.[53]

The Canadian west also had a free homestead system and a period of railroad grants from 1871 to 1894. For instance the C.P.R. Charter provided for a grant of 25 million acres. Whether this great give-away was efficient or not, the ultimate result was to establish firmly individual private ownership of the soil, and the frontier psychology which accompanies it. This ideological conception of landholding is still a part of our social milieu today.

I. The New Theorists: The Socialization of Property

St. Thomas Aquinas once wrote that "the proper object of law is the well-being of the whole community."[54] During

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[52] Id. at 76.

[53] U.S. Bureau of the Census, (77 ed., 1956).

[54] Summa Theologica, Primo Secundo, qu 90, Article 2.

the period when the pendulum was moving toward a swollen bundle of rights held privately in land, Blackstone could write:

> So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it, no, not even for the general good of the whole community,[55]

The reaction against this tendency of placing private over public interests had however, already begun. While we would not say that the pendulum has swung completely in the opposite direction, we can say that the extent of its swing toward very well protected private interests in land has certainly been modified and controlled.

Law is a reflection of the society it serves and thus the rise of legal control over property was influenced to a large extent by new thought emanating from new theorists. However new according to the tenor of the age, however, their thinking was actually a looking back to previous truths, looking back to Aquinas, for example, just like Renaissance men looked back to the classical world for inspiration. In Germany, the influential Professor Rudolf von Jhering's thinking ran at cross-purposes with those who would argue that property rights are natural and ordained: "The 'principle of the inviolability of property means the delivery of society into the hands of ignorance, obstinacy and spite."[56] Leon Duguit in France was in the mainstream of this sociological perspective on property as well. Duguit wrote: "Property

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[55] 1 Blackstone Commentaries 139.

[56] Jhering, Law as a Means to An End, (1913), p. 389.

is no longer the subjective right of the proprietor, but the social function of the holder of wealth."[57] French jurisprudence, furthermore, developed the doctrine of "abuse of right" (abus de droit). Professor Friedmann has portrayed clearly the civil law's development from the conception of dominium to the functional concept of property as an economic power which must be controlled and directed.[58] Of course, Proudhon, Marx, William Godwin, Henry George, and left wing movements in general had great influence on the theory of property. Yet the men who perhaps actually directed the traffic were those who did not wish to overthrow private property in land at all, but wished to reinstate a more conservative view of what private property meant.

The looking back had to do with the realization that property had never been absolute, that the laissez-faire writers had often been misinterpreted. Benthan, for all his support of private property rights, recognized that there could be no absolute property rights. Such rights were at least subordinate to the needs of the state in maintaining security, and property was a creation of the law, not a natural right.[59]

In the United States economists such as Richard Ely Simon Patten, and John R. Commons questioned the doctrine of laissez-faire as related to the land market; and the "look back" in their cases involved to some extent a new appreciation of the old feudal system. Obviously feudalism had degenerated

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[57] Duguit, Transformations Du Droit Privé (1912) p. 158.

[58] Friedman, Law in a Changing Society (1959).

[59] Bentham, supra, n. 8 at 113.

into an onerous class system; but the point was made that a clear recognition of "duties" in holding land existed during the period. As Bryant puts it:

> Let it never be forgotten, in spite of the general notion of feudalism as something oppressive, that it was firmly based, in theory at least, on an excellent and logical balance. All land was, in theory at least, held of the king, as representing the community as a whole, in return for certain services and obligations. There was a neat balance between rights and obligations carefully set out.
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> . . .
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> This system fell apart, or rather was overtaken by the evolution of society. In the upheaval of change it was not difficult for men of substantial wealth and power to hold on to the rights, and forget about the obligations.[60]

The early twentieth century theorists realized again that the bundles of sticks were bundles of rights and duties, not just a bundle of rights. Richard T. Ely, for instance, was very influential in his time, in emphasizing that while private property should be kept as an institution, the bundle of sticks should be modified in its extensivity and intensivity.[61] Rather than looking at property purely on the conceptual level of rights, Ely concluded:

> The truth is, there are two sides to private property, the individual side and the social side. The social side is an essential part of

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[60] Bryant, supra, n. 16 at 349.

[61] Ely, supra, n. 9 at 79.

> the institution itself. It is just as much a part of private property, as it exists at the present time, as the individual side is a part of it. The two necessarily go together, so that if one perishes the other must perish. The social side limits the individual side, and as it is always present there is no such thing as absolute private property. An absolute right of property, as the great jurist, the late Professor von Thering says, would result in the dissolution of society. . . . because private property then becomes an impossibility, inasmuch as it would destroy social life. . . . Which is dominant? This question we must ask and it must be answered. Which side is to be dominant, the social or the individual side? One side or the other must be dominant, because in the very nature of things the two have to come into contact, and one side or the other must yield in case of conflict. We must face this question, and we therefore lay down this proposition, which constitutes the social theory of property, namely; Private property is established and maintained for social purposes.[62]

Finally, when we study nuisance law in a separate section later on, we will notice the idea that restrictions can be positive to property value rather than negative. The oft-quoted statement of Professor Cohen's illustrates the point:

> To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless.[63]

IV

TWENTIETH CENTURY: THE RESERVED RIGHT: EMINENT DOMAIN, POLICE POWER, ESCHEAT, AND TAX

Basically this looking back to the past and new re-orientation in thinking about private property recognized

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[62] Id. at 136.

[63] Cohen, Property and Sovereignty (1927) 13 Cornell L.Q. 8 at 21.

the landholder with his bundle of rights and duties and also recognized a society which always reserved at least four of the possible rights; namely, the right to police, that is the right to regulate the right to tax, the right of eminent domain, and the right of escheat. All property is bought, sold, and owned subject to the exercise of these powers. Let us look at each one very briefly as an introduction to the land use planning law that we shall deal with later.

If one dies intestate, without spouse or kin the ownership of his property will "escheat" (revert) to the state. In Alberta, we have for example, the Ultimate Heir Act, R.S.A. 1970, c. 376, as amended S.A. 1973, c. 58. Until the 1973 amendment, the Universities Commission was deemed to be the ultimate heir, but with the abolition of the Commission the "Crown in right of Alberta" is the ultimate heir again.

The right to tax is well-known by us all, and although we admit that afew people still consider all forms of taxation as robbery, it is difficult to envision how a community could begin to exist without such funds. Of course, if one believes in absolute property, it is difficult to find any justification for the right of taxation "which is a claim on the party of the general public grounded in the social side of private property."[64]

The police power has been with us long as civilization. Police comes from the Greek word Τροπτεία and it means "policy", public policy, or the welfare of the state. Blackstone defined police power as:

> . . . the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed

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[64]Ely, supra, n. 9 at 255.

> family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and unoffensive in their respective stations.[65]

The police power relates to the sovereign power of the government to limit personal liberties and property rights for the public health, morals, and safety. While in the United States the power is limited by the 14th Amendment of the federal constitution, quoted earlier, in Britain the legislature is supreme and theoretically the legislature could take away all property, rebundle it, and regrant it at will. Canada follows the British example in terms of the supremacy of Parliament and Canadian courts, based on positivistic jurisprudential theory, will not generally concern themselves with the wisdom, justice or fairness of legislation. The "realists" would add, of course; that the courts do so indirectly even if they don't admit it. At any rate, Canadian legislatures are limited to some extent in the exercise of their police power because of the division of powers between the federal and provincial governments giving rise to the possibility of legislation being declared ultra vires. We may be moving toward entrenched constitutionally protected rights as illustrated by R. v. Drybones, [1970] S.C.R. 282, but it is premature to assert a conclusion in the matter, particularly in the light of recent decisions.

The use and disposition of our bundle of rights can be regulated by the state under the state's police power, where necessary to protect and promote the public health, safety, morals, and general welfare. Speaking of the United States, Harris makes the point that:

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[65] Blackstone, Commentaries 162.

> Under the police power, minimum standards may be established, the maintenance of which is required of the individual. The very vagueness of the due process and the public welfare clauses leave the nature and magnitude of the police power difficult to assess.[66]

The attempt in the United States to find the limits of the police power is important because the proper exercise of the police power means that no compensation for such regulation need be paid to the landowner. The property owner may suffer a loss, but the regulation is not considered a "taking", but simply a limitation on the owner's use in the interest of the community.

Finally, the right of the sovereign to acquire private property for public use (with payment of compensation) through the power of eminent domain, has, like the police power been with us as a central part of civilization all along. Straub says:

> Eminent domain is an attribute of sovereignty which is as enduring and indistructible as the state itself. It exists independently of any constitution for no state can exist without it. As the term itself connotes, it is superior to all private rights and it is exercised by the sovereign for the common good and general welfare of all the people.[67]

Of course, in the United States the constitutional issue places its limitation on the power of eminent domain and property cannot be taken except through due process of law and for the general welfare. The taking of property or rights must be for the public purpose prescribed by legislative

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[66]Harris, supra, n. 14 at

[67]See Ely supra, n. 9 at 484.

statute, and, second, there must be just compensation made to the owner of the property taken (Boom Co. v. Patterson 98 U.S. 403 (1878)).

One problem that we will come across in our examination of land use planning law is that a fine line can exist between the police and eminent domain power. A fine line can exist between permissible regulation of property and unconstitutional taking of property rights. Ordinarily the police power operates on the use of private property in private ownership, as compared to the right of eminent domain which is the power of a sovereign state to take property for public use without the owner's consent. But,

> . . . the exercise of the police power may deprive an owner of his property and destroy his property right without actually condemning the property and in such cases the property is not taken in the strict sense of an eminent domain taking. Rather, the property is regulated for the purpose of promoting the health, safety, or welfare of the community, and no compensation need be given the owner.[68]

When the regulation actually becomes a "taking", however, is a recurring problem for the courts to decide.

"Due process" and the concept of "public welfare" are expansive concepts changing to serve societies' needs, and thus the use of both police power and eminent domain power evolved in the twentieth century. Canadian directions in legislative control of use and disposition of interests in land are not essentially dissimilar to the American movement despite the constitutional differences. A brief look at some historical directions would be helpful.

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[68]John M. Cartwright, Farm and Ranch Real Estate Law, p. 10.

V

RISE OF SOCIAL CONTROL

Social legislation has removed certain sticks and restricted a number of sticks in the bundle of ownership. Social legislation has had a long evolution since the abuses arising out of the industrial revolution began to be controlled by legislative measures. From the "cowboy" economy, in which the earth provided unlimited reservoirs of everything, we have evolved to the "spaceman" economy in which man tries to find his place in a cyclical ecological system.[69] From the concept of private ownership of space "down to the center of the earth and up to heaven" we have moved toward the fundamental assumption, "that the landowner holds his land for the public good."[70] In the words of one property writer:

> As one looks back along the historic road traversed by the law of the land in England and in America, one sees that a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position. which hesitatingly embodies an ingredient of stewardship, which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things.[71]

The forces behind this evolucion are varied. As the organization of cities grew more complex and crowded, and the shift from rural to urban land use took place, "the individual's personal property rights conflicted more and more

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[69] See Boulding, "The Economics of Coming Spaceship Earth", The Environmental Handbook (1970) p. 96.

[70] Jennings 49 Harvard L.R. 426.

[71] 5 Powell, Real Property (1962) at 494.

with the collective interest of the entire community."[72] We have mentioned some of the theorists who influenced the movement toward a sociological view of property, and government leaders fell into step as society began to mirror the new views. For instance, unlike those leaders who had participated in the give-away of the public domain, Theodore Roosevelt who became president in 1901, advocated conservation and rational development. A Reclamation Act was passed in 1902 and the National Forest Service was set up in 1905.

Changing judicial thought was an essential part of the evolution, as well. What was said by Mr. Justice Holmes in dissent in Lochner v. New York 198 U.S. 45 (1905) at 75, would soon become the majority opinion:

> This case is decided upon an economic theory [laissez faire] which a large part of the country does not entertain. . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.

Courts began to accept many regulations as reasonable exercises of the police power. The trend can be traced over a period of a few years. In 1889 a decision dealing

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[72]Bryant, supra, n. 16 at 2.

with a law banning spite fences or walls still maintained that "at common law, a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air." But Justice Holmes speaking on the same issue reflected the new concepts:

> It is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership. It is not a right for the sake of which property is recognized by the law. . . . We are of the opinion that the statute, thus concerned, is within the limits of the police power, and is constitutional.
> (Rideout v. Knox 19 N.E. 390 (1889))

While we shall see in our study of nuisance law, that restrictions on property rights for the benefit of others was long acceptable, the Supreme Court of the U.S. in 1906 rejected the view that the police power was merely negative in character. Not only could it be used to "suppress" but it could be used to "bring about" (C. and B. and O. R. R. Co. v. Drainage Co. 200 U.S. 561 (1906)).

The expansion of the police power included the power to regulate the use of privately owned land through zoning ordinances. While nuisance law had been utilized a great deal to keep certain undesirable property uses out of residential areas, zoning law soon replaced the greater part of the need for private nuisance litigation within the cities. Zoning prescribed how lands should be used and thus had a profound effect on the freedom of the individual "to do on his property what he wanted." Zoning probably got its start in Germany in a placed called Altona in about 1884, and the real father of zoning as we know

it today was a New York Attorney called Bassett.[73] Rudimentary ordinances regulating building height and land use appeared as early as 1909 in Boston and Los Angeles.

In the United States, the earliest zoning laws regulated against property uses causing noxious odors, or health hazards. Regulations of this nature were widely enacted and generally upheld by the courts. However, they were not comprehensive in nature, but aimed at specific problems like slaughter-houses and stables.[74] As things got more complicated the state of New York enacted the first zoning enabling act in 1914 and in 1916 the City of New York enacted the first comprehensive zoning ordinances, dividing the city into use districts. The twentieth century social control over land had begun. The state legislature then granted the City the power to "regulate and limit the height, bulk and location of buildings . . . the area of yards, courts and other open space, and the density of population in any given area. . . ."[75] This legislation was subsequently sustained in a state court a year later (Lincoln Trust Co. v. The William Building Co. 229 N.Y. 313, 128 N.E. 209 (1920)). As comprehensive zoning ordinances were passed across the United States, however, many other courts declared them unconstitutional as violations of the 5th Amendment--as appropriation of private property without compensation. Adverse decisions were rendered in Mississippi, New Jersey, Maryland and Georgia.[76]

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[73]See Municipal & Planning Law Materials, Continuing Legal Education, Banff 1971, p. 3.

[74]See Anderson, American Law of Zoning (1968).

[75]N.Y. Gen. City Laws s. 20(24) (McKinney 1968).

[76]Delafons, supra, n. at 26.

However, zoning, like nuisance law, while restricting uses of property, also can have the effect of protecting the value of property in a neighborhood, and thus zoning laws proliferated. It is not difficult to modify private property rights in return for higher property values.[77] As Cribbet puts it:

> These new zoning laws were justified on the basis of self-protection; they rearranged the rules for the protection of private property, but they did not materially alter the concept. The public interest, the planning function, the social welfare might all be involved, but the principal value to be conserved was the economic worth of the individual tract of land.[78]

In 1923, Wisconsin extended zoning to land areas outside of the corporate limits of municipalities and in 1929 it authorized rural zoning.[79] Nineteen states adopted the Standard State Zoning Enabling Act in 1925. This Act had been drafted by an Advisory Committee on Building Codes and Zoning appointed by Secretary of Commerce, Herbert Hoover.[80]

The most important event came in 1926 when the constitutionality of a zoning ordinance was tested by the Supreme Court. The landmark decision of Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926) opened the door and validated the comprehensive zoning plan declaring that

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[77] Id. at 23.

[78] Cribbet, supra, n. at

[79] Beuscher and Wright, Land Use (1969) at 324.

[80] Cribbet, supra, n. at 256.

the ordinance must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" before it can be declared unconstitutional (Id. at 395). Ambler Realty introduced evidence showing that some of its land which had been zoned residential was worth $10,000 per acre. The Realty Company obviously contended that this amounted to an unlawful confiscation of value without compensation, bearing no substantial relation to the health or safety needs of the community. The court felt otherwise, and after the Euclid decision,

> Courts have consistently held that where the property was not deprived of all profitable remaining use and where the regulation is rationally related to a comprehensive plan, the zoning ordinance will be upheld.[81]

The expansion of the "public welfare" and police power was clearly recognized by Justice Sutherland in the Euclid case:

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive . . . . [W]hile the meaning of constitutional

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[81] From Euclid to Romapo, (1973) 1 Hofstra Law Review, p. 59.

> guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
> (Id. at 386-87)

Subsequent to the Supreme Court's decision in Euclid, judicial opposition to the principle of comprehensive zoning virtually disappeared, and zoning spread across United States. Euclid hinged on the concept of how wide the police power was. The Supreme Court of the U.S. had previously given broad interpretation to the police power in Bacon v. Walker 204 U.S. 311, (1907), where the court said:

> . . . [t]hat power . . . embrances regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.

The police power evolved further and in Berman v. Parker 348 U.S. 26 (1954) Justice Douglas in the majority opinion stated a wide principle:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia

> decide that the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

We shall return to the problem of how wide the police power could or should be when we deal with land use planning law later on in the report.

British Control over land use began earlier and has been more comprehensive than the North American experience. Cheshire states that the

> . . . first planning statute was passed in 1909, though it only applied to "town" planning and planning on the fringes of existing towns at that. Planning control, which was still potential rather than actual, later came to be extended more generally over towns, and then over the countryside also. Finally, in 1943, the general extent of control became actual instead of potential and the modern planning era opened.[82]

Again we shall look at the British developments later on in the report.

Finally, at the start of the twentieth century, Alberta was living through a wildly speculative land boom which had to be controlled by the passage in 1913 of the Town Planning Act. Noel Dant has commented that:

> It included, among other things, provisions relating to the preparation of Town Planning Schemes. Subdivisions in excess of 25 lots had to be proven to meet a bonafide demand. The sale of unregistered parcels was a statutory offence. Reference was also made

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[82] Cheshire

> to traffic, sanitary conditions, general amenity and convenience.[83]

The Act was apparently not actually used very much and in 1922 the United Farmers Government introduced Town Planning Commissions for the first time, such commissions being responsible for "carrying out" Town Planning Schemes.[84] Another Act was passed in 1928 making provision for a Provincial Planning Board. Finally,

> In 1929, the 1922 and 1923 Acts were repealed and the title "The Town Planning Act" was re-introduced. This new Act partly consolidated provisions of the two earlier Acts and in a complete rewrite, the Act received a new format, being broken down into parts, with Part I repeating the 1928 Act, Part II was devoted to Town Planning Commissions, Regional Planning Commissions, official Town Plans and Schemes, Zoning by-laws and Appeals. Part III dealt with damages and enforcement and Part IV was devoted to the control of subdivisions. As a result, Edmonton, Calgary and thirty odd smaller urban municipalities adopted zoning by-laws.[85]

Thus, social control over private property use began in Alberta, and we shall examine it with more depth in our later study as well.

VI

THE NATURE AND EXTENT OF "THE BUNDLE OF RIGHTS"

A. Introduction

Let us presume that someone owns the whole bundle of rights possible over a piece of land except, of course, those

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[83] Noel Dant, "Planning Law", supra, n. 72 at 63.

[84] Id. at 64.

[85] Id. at 65.

rights that are reserved by society. Before we can discuss restriction on the ownership bundle we want to know the nature and extent of the bundle in the first place. A good way to start is with an examination of some of the sticks in the bundle relating to the surface area, the space above the surface, the space below the surface, and the neighboring soil supporting the surface. We want to know the extent or possible dimension of the container of space that the layman claims to "own".

B. Airspace

First of all, what interest does the surface owner have in the column of space that extends upwards over his land? Now, we are speaking about space, not air. Particular air molecules can move from place to place capable of being owned, if at all, only when captured. Our legal issue deals rather with the interest of the estate owner in the fixed column of space (area) above the surface of his land.

As we have mentioned, the Roman law tended toward absolute property ownership rights. The classical "dominium" of the Roman Law meant full and free use of all the area above the land and freedom from interference with the air above.[86] The Latin maxim, "Cujus est solum ejus usque ad coelum" probably originating from Jewish law,[87] expresses

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[86]Abramovitch, The Maxim "Cujus Est Solum ejus Usque ad Coelum" as Applied in Aviation (1961) 8 McGill L.J. 247.

[87]Id. at 248.

the idea that whoever owns the soil owns all that lies above it. This is part of the theory of the "infinite carrot" or ownership of all above to heaven and below to the center of the earth. It is only a fanciful maxim rather than a legal principle. Even in Roman Law it was fanciful. Professor Van Jhering came to the conclusion that the owner of the soil was also the owner of the airspace above, but only to the extent required to satisfy his practical needs, and that Roman jurists would not have accepted such an "abuse of logic" as ownership in space without limit.[88] Whatever the case, McNair suggests that the maxim in itself has no authority in English law,[89] although it is often quoted. What support the common law gives to ownership of airspace is a controversial question, particularly since the advent of the airplaine and the question of whether the airplane trespasses on your land when it flies over it. While no support exists for the idea of unlimited rights into the infinity of space over land,[90] some controversy exists between supporters of the theory that you actually own space up to some height of potential use, and those who insist that you don't "own" space at all, but incidental to the surface ownership you have the usufructory right to airspace which is merely part of the general right of the property owner to the uninterupted use and enjoyment of his land.[91] If one actually owned airspace

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[88]See Id. at 252.

[89]McNair, The Law of the Air (1953)

[90]Fleming, The Law of Torts at 43.

[91]Richardson, "Private Property Rights in Airspace in Common Law" (1953) 31 Can. B. Rev. 117.

and someone or something encroached into it, the surface owner could bring an action for trespass, while if he merely had a usufructory right, the action would be brought for nuisance. This is important because in the case of trespass the invasion of the property gives the plaintiff a right of action irrespective of any damage, whereas nuisance is an interference such as materially interferes with the ordinary comfort of human existence, and damages must be proven.[92]

The cujus est solum maxim, if not taken literally, nevertheless still exerted considerable influence on the common law. For example, Bury v. Pope (1586), 1 Cro. Eliz. 118 held that one neighbor could build as high as he wanted even if it cut off his neighbor's light; and the maxim cujus est solum was used for justification. In Pickering v. Rudd (1815), 4 Campb. 219, 171 E.R. 70, however, Lord Ellenborough rejected the literal cujus est solum rule and stated:

> Nay, if the board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass . . . at the suit of the occupier of every field over which his balloon passes in the course of his voyage. If any damage arises from the object which overhangs the close, the remedy is by an action on the case.
>
> (Today this would likely be an action in nuisance.)

After Kenyon v. Hart (1865), 112 E.R. 1188, however, the trend was back to the idea of ownership of airspace, and trespass was successfully claimed when a horse put his head into an adjoining field's airspace to bite another

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[92]See Abramovitch, supra, n. 85 at 257.

horse (Ellis v. Loftus Iron Co. (1874) L.R. 10 C.P. 10) or when a telephone wire was strung over an individual's private land (Wandsworth Board of Works v. United Telephone Co. [1884] L.R.B. Q.B.D. 904). In the fairly recent case of Kelsen v. Imperial Tobacco Company, [1957] 2 Q.B. 334, [1957] 2 All E.R. 343, it was decided that the invasion of the plaintiff's airspace by an overhanging sign was a trespass, not a mere nuisance.

Thus, we can say today that the permanent occupation of the airspace over the land of another without his consent, e.g., by telephone wires or signs is a trespass (as well as a nuisance).[93] Yet, while a direct invasion by an artificial projection can be a trespass, a protruding branch of a tree is treated as a nuisance (Lemmon v. Webb, [1894] 3 Ch. 1, [1895] A.C. 1, and Davey v. Harrow Corp., [1958] 1 Q.B. 60).

The problems raised by transitory or temporary invasions of airspace (bullets and planes) raise different legal considerations. The demands of society arising from air traffic would be effectively frustrated if the maxim cujus est solum was taken seriously, and every flight was considered a trespass. McNair and others doubt whether airspace can ever be owned. The courts, particularly, when dealing with air flights, tend toward this view, as they speak of the right of the landowner to the uninterrupted use and enjoyment of his property but also of the right of reasonable flight, and thus the use of the space above the land by someone other than the landowner, in circumstances not affecting the enjoyment of the subjacent soil, is most often not prohibited.[94] In the United States case of

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[93] Megarry's Manual at 584.

[94] Richardson, supra, n. 90.

Johnson v. Curtiss Northwest Airplane Co., [1928] U.S. Av. R. 44, the court expressed the view that the upper air was a natural heritage common to all and its reasonable use ought not to be hampered. The Supreme Court in U.S. v. Causby, [1946] U.S. Av. R. 235 rejected the theory of property rights in airspace to all altitudes, but gave redress to the landowner, because in that case the low flights so interfered with the landowner's use and enjoyment of the property that a "taking" of the property had taken place. (We shall discuss "taking" or inverse condemnation later on.) In Portsmouth v. U.S. (1922), 260 U.S. 327, the Supreme Court held that the repeated firing of guns across the plaintiff's land was a "taking" of property. Landowner's are not unprotected from airspace interference, but the courts are tending toward using the nuisance approach with its balancing of interests rather than the trespass approach which is heavily loaded in favor of the landowner. In Canada, our nuisance doctrine is somewhat different than the American approach, as we will see when we examine the doctrine. In Atkinson v. Bernard (1960), 355 P (2d) 229, Goodwin J. of the Supreme Court of Oregon, after examining the various American streams of aircraft-airspace litigation concluded at 232:

> At the point where "reasonableness" enters the judicial process we take leave of trespass and steer into the discretionary byways of nuisance. Each case then must be decided on its own peculiar facts balancing the interests before the court.

Similarly in the leading case in Canada (Lacroix v. The Queen, [1954] 4 D.L.R. 470), Fournier J. denied the claim by the plaintiff that the Crown had in effect "taken" or expropriated his airspace by establishing the Dorval airport

nearby with a flight path over his property. Fournier J. stated:

> It seems to me that the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. . . .
>
> The Crown could not expropriate that which is not susceptible of possession.. . . I need go only so far as to say that the owner of land is not and cannot be the owner of the unlimited air space over his land, because air and space fall in the category of <u>res omnium communis</u>. . . .

Finally, the federal Aeronautics Act, R.S.C. 1970, c. A-3, empowers the Minister of Transport to make regulations with respect to:

> s. 6(1)(j)
>
> . . . the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for purposes relating to navigation of aircraft and use and operation of airports, and including for such purposes, regulations restricting regulating or prohibiting the doing of anything or the suffering of anything to be done on any such lands, or the construction or use of any such building, structure or object.
>
> s. 6(10) establishes that:
>
> Every person whose property is injuriously affected by the operation of a zoning regulation is entitled to recover from Her Majesty, as compensation, the amount,

> if any, by which the property was decreased in value by the enactment of the regulation, minus the amount equal to any increase in the value of the property that occurred after the claimant became the owner thereof and is attributable to the airport.

When we talk about the difference between "regulation" (no compensation necessary) and "taking" (compensation necessary) we shall see that actually the Aeronautics Act goes extremely far in protecting private property by paying compensation for interferences to property rights that do not amount to a "taking". We will notice in our section on Alberta Land Use Planning that new provisions dealing with airport zoning are included.

In a case where zoning regulations have not been made around a particular air field, the landowner according to the Nova Scotia Supreme Court decision of Atlantic Aviation v. Nova Scotia Light and Power Co. (1965), 55 D.L.R. (2d) 554 has a right to erect structures on his land in the exercise of his use and enjoyment of the land, even if the obstructions interfere with the free passage of aircraft taking off and landing on an adjoining airfield. MacQuarrie J., while upholding flights over land at reasonable heights, stated that: "Before the aircraft company can succeed, it must show that it as a member of the public had a right to use the air space blocked by the defendant's transmission line, paramount to the right of the defendant to erect it." Because the erection and use of the tower and wire by the defendant was a lawful, reasonable, and necessary use of the defendant's air space, no injunction was granted and the towers were allowed to stand.

Although controversy remains over the law relating to rights in airspace, we can say generally in conclusion that

the air above the surface is subject to dominion in so far as the use of space is necessary for the proper enjoyment of the surface. In today's society, however, the maxim cujus est solum has no relation whatsoever with reality as societal needs increase and as "reasonable enjoyment" becomes defined in accordance with contemporary standards.

C. Subsurface: Minerals

The maxim "Cujus est solum ejus est usque" usually has "coelum et ad infernos" added on behind. In other words, the surface owner "owns up to heaven and down to hell, as well." We want to know in reality, however, what rights related to the subsurface are included in the landowner's bundle today.

While the idea of extensive private rights in air space has been whittled away by modern demands, the idea of extensive private ownership of the subsurface has not been attacked to the same degree. The old "infinite carrot" doctrine, spreading its roots down to the center of the earth, claimed that however inaccessible to use or possession, the surface owner still had the right to exclusive possession all the way down. Ordinarily, entry underneath the surface at any depth is a trespass. For instance, it is actionable to tunnel into adjoining land for the purpose of exploiting a coal-seam (Bulli Coal Mining Co. v. Osborne, [1899] A.C. 351) or to slant-drill into a neighboring oil zone.[95] Prosser is critical of the staying power of this "trespass at any level" doctrine and similar to the "reasonable use"

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[95]Fleming, supra, n. 89 at 42.

doctrine in air space litigation, Prosser would permit recovery in trespass only where some damage to the surface results from an underground intrusion, or where some interference is shown with the present or prospective use of the property.[96] In Edwards v. Sims (Ky 1929) 24 S.W. 2d 619, the plaintiff surface owner successfully recovered past profits for the intrusion of tourists, who passed through a cave 350 feet below his land surface. The tourists entered the neighboring defendant's land where the cave's natural opening was. Thus while the plaintiff could have no actual control, or access to the cave, he still recovered a windfall because of his technical "ownership" of all below.

While the idea of "owning" the subsurface is still with us, we must be aware of several limitations. Even at common law, treasure trove (gold and silver hidden in the land by someone) became the property of the Crown, rather than the landowner.[97] Furthermore, the water percolating through the subsurface is not "owned" until captured as we shall see when we study water law shortly.

We indicated earlier that sections of airspace could be sold, provided that the theory of "ownership" of airspace rather than merely "right of use", was the correct doctrine. The surface owner can sell subsurface strata (minerals, for instance) in situ as well, or reserve strata unto himself, while he sells the rest of the land (airspace, surface, etc.). When we deal with oil and gas rather than hard minerals we

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[96]Prosser, On Torts

[97]Sinclair, supra, n. 34 at 64.

enter a complex field of law. Briefly, a controversy has existed over whether the oil and gas like the hard minerals, can be owned and sold *in situ*, or whether one merely has as a surface owner, the right to attempt to capture the substance (*profit a prendre*) like one attempts to capture the water that percolates through his land (see *Berkheiser* v. *Berkheiser and Glaister* [1957] S.C.R. 387). One has a stick (right) in his bundle relating to subsurface oil and gas either way, but significant differences result if the right is an incorporeal interest rather than a corporeal one.[98]

Finally, the use and disposition of the subsurface materials by today's landowner is circumscribed by a number of provincial statutes. If public land is devised to a private owner, mines and minerals and the right to work the same remain with the Crown to begin with. Certain rights in the subsurface are not bundled over to the private individual at all (Public Lands Act, R.S.A. 1970, c. 297, s. 34). Unless expressly conveyed, gold and silver remains with the Crown when a disposition of public land is made (Mines and Minerals Act, R.S.A. 1970, c. 238, s. 19). If one does own the minerals, he still does not have an unlimited right to the use and enjoyment of his ownership. The Quarries Regulation Act, R.S.A. 1970, c. 305, for instance, empowers the Director of Mines to issue regulations prescribing the scope and details of a quarry operation. One has to have a permit before he can quarry and an inspector has a right of entry onto the property to police the operations of the quarry. Furthermore, the Oil and Gas Conservation Act, R.S.A. 1970, c. 267, sets up an Oil and Gas Conservation Board with wide-ranging power to make regulations policing details of oil and gas exploration and production and so forth.

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[98]See McIntyre, *The Development of Oil and Gas Ownership Theory in Canada* (1969) 4 U.B.C.L. Rev. 245.

If one person is owner of an estate in the land, while another (the Crown for instance) is the owner of an estate in the subsurface minerals, or owner of a leasehold estate in the oil and gas, conflicts between their respective interests may well occur. Thus, the Mineral Declaratory Act, R.S.A. 1970, c. 235, describes those substances that are to be considered minerals. Even if the surface owner has conveyed his minerals he has certain statutory rights in the subsurface left. Section 5 of the Act states:

> 5. A person who owns or has an interest in the surface of land but who does not own or have an interest in a substance named in the Schedule hereto, has the right
>
> (a) to excavate and otherwise disturb the substance for the purpose of constructing, maintaining or abandoning any building, water well, road, highway or other structure incidental to the use or occupancy of the surface of the land,
>
> (b) to disturb the substance in the course of any operations he is entitled to conduct at or on the surface of the land, and
>
> (c) to excavate or otherwise disturb the substance for the purpose of carrying on farming operations on the land,
>
> without permission from or compensation to any person.

The Sand and Gravel Act, R.S.A. 1970, c. 328, reserves sand and gravel to the surface, rather than the mineral owners:

> 3. The owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to sand

> and gravel on the surface of that land, and all sand and gravel obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operation.

Finally, the Clay and Marl Act, R.S.A. 1970, c. 50, has a similar provision reserving clay and marl to the surface owner rather than the mineral owner.

D. Support

In the bundle of rights held by a land "owner" (we remind ourselves that we "own" an estate in land, and not the land itself) we find a right at common law to have our land supported laterally by the land of the surrounding neighbors. "An owner's right to lateral support for his land in its natural state is . . . a right of property, a right incidental to ownership ex jura naturae" (Joss v. Uhryniuk and Stelmach (1957), 22 W.W.R. 12 (Man. Q.B.)). In other words, when someone excavates on his land and causes your land to subside because of loss of support, he is liable to you whether he was negligent in his work or not. Your right of support is absolute (Boyd v. Toronto (1911), 23 O.L.R. 421).

The complications in litigation arise because while you have a right of support for land you do not have such a right for buildings (unless you acquire it by an easement or license).[99] Where the subsidence of your soil following an excavation on the adjoining land is due to the weight of buildings on your land, you cannot recover (Metro Life Insurance Co. v. McQueen, [1924] 2 W.W.R. 981 (Alta. S.C.)).

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[99] See Cretney, Rights Appurtenant to Land, The New Law Journal, August 12, 1971, at 705.

In other words, while your land owes support to my land, it does not owe any to my buildings, and I cannot look to you for support of my building. If the reverse were true, then the fact of my building first would have prevented you from ever making use of your land.[100] If my land would subside in its natural state because of your excavation even if my buildings were not there, then you would be liable for both damage to the land and to the buildings, as building damage was caused directly by the loss of support which is an absolute right of my ownership (Gallant v. F. W. Woolworth Co. Ltd., [1971] 15 D.L.R. 3d 248 (Sask. C.A.)). If, however, the natural status quo of my land would not have changed because of your excavation but for the weight of my own buildings, I can recover from you, only if I have a cause of action against you in negligence.

We have already mentioned trespass to subsurface areas, but it should be noted that one has a right to subjacent support as well. (We have been talking about lateral support up to this point.) If by excavating, you tunnel into my property causing it to drop, or quick sand to escape, leaving no subjacent support, then you are liable to me (Trinidad Asphalt Co. v. Ambard, [1899] A.C. 594,) for instance, where pitch was allowed to be drawn out from the plaintiff's land causing subsidence).

As we have seen, rights in airspace, the subsurface, and the right of support, are all part of the land owner's bundle. Because rights in water are of such importance to the agricultural landholder, we shall examine them with greater detail.

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[100]Sinclair, supra, n. 34 at 66.

E. Water

(1) Introduction

The various rights held in the landowner's bundle which relate to water and watercourses are of obvious importance to all owners, and are of special significance to farmers who are often dependent for survival upon access to an abundant water supply.

First of all, we shall examine this very complex subject by considering some of the common law rules relating to both riparian waters and percolating waters. Secondly, we shall look at the growth of statutory law dealing with water and finally, however complex, some generalizations about the effect of statutes on the common law rules should be formulated. Putting statute and common law together, what rights remain in the landowner's bundle today?

We must keep in mind that the way rights are created, destroyed, distributed, and bundled in regard to water use, is an evolving process at the present time.

(2) Basic Concepts

For our purposes water law can be divided up into two separate sections. First of all, considerations of riparian rights arise when dealing with water in water courses, that is, flowing water in defined channels, both on the surface and below the surface. Then, separate considerations apply to percolating or ground water, that is "water not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground

soil in varying quantities and in uncertain directions" (Chasemore v. Richards (1859), 7 H.L.C. 350, 11 E.R. 140). Before these two areas are examined, however, a few general principles of interest to the landowner may be briefly summarized.

To begin with, one does not own the water in a proprietory sense as he owns rights in the land, airspace, or support. We shall see that at most, the rights in the bundle are usufructory rights. This was so even at common law.

> Although certain rights as regards to flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel, or percolating through the soil is not at common law the subject of property or capable of being granted to anybody.[101]

Thus, while we may be able to dig a well or drink from a stream on our land, we do not strictly speaking "own" water. The Water Resources Act, R.S.A. 1970, c. 388, s. 5, states that "the property in water in the Province . . . is hereby declared to be vested in the Province."

Secondly, if your land bordered the sea or ocean, at common law the boundary was fixed as a line set by the average high water mark. Below the mark, both the land and the bed of the sea or ocean was vested in the Crown (Scratton v. Brown (1825), 4 B & C 485). If a stream or river flowed through your land, at common law you did own the bed, provided the river was non-tidal (Bourt v. Layard, [1891] 2 Ch. 681), and with ownership of the bed came

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[101] 39 Hals. 506.

ownership of the fishing rights as well.[102] If the non-tidal stream or river flowed between your land and the neighbor's land, you owned the bed ad medium filum aquae (to the middle) (Tilbury v. Silva (1890), 45 Ch. D. 98 (C.A.)). Where the river was tidal, the bed belonged to the Crown (R. v. Trinity House (1662) 1 Sid. 86). One might have owned the bed and the fishing rights, but if the river was navigable the public had a right of passage to navigate (Fort George Lumber Co. v. Grand Trunk Pacific (1915), 24 D.L.R. 527 (B.C.S.C.)).

Most of this is now purely academic. As to the public rights of navigation and fishing, these may not be taken away by provincial legislation, but are rather a federal matter (A-G. for Canada v. A-G. for Quebec, [1921] 1 A.C. 413). As to bed ownership, however, Alberta has by retroactive legislation abolished all private bed ownership. The Public Lands Act, R.S.A. 1970, c. 297, s. 4 states that "the title to the beds and shores of all rivers, streams, watercourses, lakes and other bodies of water is hereby declared to be vested in the Crown in right of Alberta." Finally, in the recent case of Chuckry v. The Queen the issue of whether the common law of accretion and reliction still applied to Manitoba was raised (Chuckry v. The Queen (1972), 27 D.L.R. (3d) 164 reversed (1973) 35 D.L.R. (3d) 607 (S.C.C.)). Accretion refers to the gradual deposit of material along the shoreline by the action of the water, while reliction refers to the former submerged land uncovered by the imperceptible recession of the water. At common law, the riparian owner or seashore owner rather than the owner of the bed was entitled to all land created by accretion or reliction.[103] The Supreme Court of Canada over-

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[103]Cartwright, Farm and Ranch Real Estate Law at 395.

turning the Manitoba Court of Appeal decision, concluded that the common law of accretion did not cease to be part of the law of Manitoba by reason of either the Manitoba Act or the Water Rights Act, and Chuckry was entitled to compensation for the accreted land. Thus, this right is still a part of today's landowner's bundle.

(3) Riparian Rights

Not all landowners will have riparian rights in their bundle. One must own land abutting a watercourse. Riparian rights attach only to water flowing in a natural defined water course, and not to water which drains naturally over the earth's surface in an undefined course (Farnell v. Parks (1917), 13 Alta. L.R. 7 (App. Div.)), or to water which percolates through the ground (Mayor of Bradford v. Pickles [1895] A.C. 587), or generally to water in entirely artificial cuts.[104] The Alberta Supreme Court has defined a "water-course" as an accumulation of water from rains and snow flowing in a regular course through depressions in the land to an outlet (Townsend v. C.N.R. Co. (1922), 17 Alta. L.R. 289 (App. Div.)). The point when water ceases to be considered surface water and becomes legally classified as riparian water will be a question of fact in each case. However, the oft quoted American case of Keener v. Sharp 111 S.W. 2d 118 (Mo. 1937) may add some clarification:

> A water course is a stream or brook having a definite channel for the conveyance of water. It may be made up, more or less, from surface water from rains and melting

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[104]Elder, Environmental Protection Through the Common Law (1973), 12 Western Ontario Law Review at 107.

> snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water, and it is not essential that the water should continue to flow in such stream constantly the whole year around; it is sufficient if the water usually flows in such channel, though not continually. That is, to constitute a branch or stream there must be something more than a mere surface draining, swelled by freshets and melting snow, and running occasionally in hollows and ravines, which run in a definite bed or channel, though it need not flow continually the year round. But although the water from high lands and hills may unite and form a stream with a definite channel, yet if it afterward ceases to remain a channel, but spreads out over the surface of low lands, and runs in different directions in swags and flats without any definite channel, it ceases to be a stream or water course.

A further problem arises as to the extent of riparian land. Where marshy or boggy lands intervene the owner is not a riparian proprietor (Merritt v. City of Toronto (1913), 27 O.L.R. (Ont. C.A.) aff'd. (1913), 48 S.C.R. 1). If a riparian owner buys a new piece of land next to his existing riparian land, is it riparian as well? Sinclair states:

> When the piece added on to the original unquestioned riparian land is in fact outside the actual watershed area of the stream in question, it cannot be considered riparian. Still further narrowing has been accomplished by a study of the chain of title of the lands in question with the result that courts have held that all that can be considered riparian land is that smallest piece adjoining the river ever held by one owner.[105]

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[105]Sinclair, supra, n. 34.

Unfortunately, in the United States, several riparian rights states (as opposed to "prior appropriation" states) have never specifically adopted any test to determine what land is riparian in nature. Consequently irrigators in these states do not know how much of their land can be legally irrigated.[106]

We have already noted the introduction of the common law into the Alberta area as of July 15th, 1870, and this includes the common law of riparian rights. Briefly stated, if one has a natural watercourse running through or touching his land he has certain rights in his bundle that he owns, which do not depend on actual use of the water or ownership of the bed; but are rights that are "irreparably connected with, and inherent in the property in the land," as the Supreme Court of Canada phrased it in Leaky v. Sydney (1906), 37 S.C.R. 406. Basically, one has a right of having that watercourse continue to flow in its natural state, undiminished in quantity and quality. The rule has been phrased in numerous ways. For instance in the recent Nova Scotia Supreme Court case of George v. Floyd (1972) 26 D.L.R. (3d) 339, dealing with a conflict between an upper riparian owner who diverted a brook to create a reservoir for cattle and a firepond, and a lower riparian owner who retaliated by diverting water above that of the first owner, Jones J. quoted from 39 Hals, 3rd ed., pp. 516-17:

> A riparian owner has an incident to his property in the riparian land a natural and proprietory right . . . to have the water in any natural channel, which is known and defined on which land abuts or which passes through or under his land,

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[106] Levi, Agricultural Law at 193.

> flow to him in its natural state both as regards quantity and quality . . .

at pp. 520-1:

> The right of a riparian owner to the flow of water is subject to certain qualifications with respect to the quantity of water which he is entitled to receive since his right is subject to the similar rights of the other riparian owners on the same stream to the reasonable enjoyment thereof and each riparian owner has a right of action in respect of any unreasonable and therefore unauthorized use of the water by another riparian owner.
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> . . . A riparian owner's right to the reasonable enjoyment of the stream includes the right to take water therefrom for all ordinary or domestic purposes connected with the riparian tenement, such as, drinking and culinary purposes, cleaning and working, feeding and supplying the ordinary quantity of cattle on his land, and if the taking of water for these purposes exhausts the water in the stream altogether the lower riparian owner may not complain. A riparian owner who does not require to take water for domestic purposes, however, may be restrained from taking the quantity he could take for these purposes and using it for other purposes.
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> A riparian owner's right to the reasonable enjoyment of the stream also includes the right to take water therefrom for extraordinary purposes but the taking of water for such purposes is subject to certain restrictions, namely, the uses must be reasonable, the purposes for which the water is taken must be connected with the riparian tenement and the water taken must be returned substantially undiminished in volume and unaltered in character.

In other words, the riparian owner's right to the natural flow is not absolute, but qualified by the lawful uses of others, such as the use of water for ordinary domestic

purposes by the upper riparian owner (Brown v. Bathhurst Electric and Water Co. 3 N.B. Eq. 543 (1907)), or the reasonable use of it for extraordinary purposes (Dickson v. Carnegie 1 Ont. 110 (Ch. 1882)).

In Young & Co. v. Bankier Distilling Co., [1893] A.C. 691, Lord Macnaughten frames the right as one of flow without "sensible" alteration of quantity, character, or quality. In Swindon Waterworks Co. v. Wilts and Birks Canal Navigation Co. (1875), L.R. 7 H.L. 697, the doctrine that the riparian owner has the right of "reasonable use" is formulated. Thus, problems in litigation often center around whether "substantial" or "sensible alterations" or "material injury" or "unreasonable use" have taken place.

The conclusion of Jones J. in George v. Floyd (1972) 26 D.L.R. (3d) 339 (N.S.S.C.)) was to grant injunctions to both parties restraining the other from impeding the flow. Jones J. stated at 35:

> From the evidence, I am satisfied that the present use of the stream by both parties is unreasonable, particularly during the dry season. I accept the evidence of the plaintiff that the diversion of water from the stream of the Floyd property substantially reduced the flow of the stream. I also accept the evidence of Mr. Ban Gestil that the construction of the George pool had the same effect . . . Due to the fact that these are farm lands, I am satisfied that the stream is of sufficient importance to both properties, that it must be allowed to flow unobstructed across the properties, subject to such limited uses as the law allows.

In McKie v. K.V.P., [1948] 3 D.L.R. 201, affd. (with variation) [1949] 1 D.L.R. 39 (C.A.), and affd. [1949] S.C.R. 698 McRuer C.J.H.C. pointed out that the injury complained of was an injury to

a right, that is, one of the property rights held by the owner in his bundle. If we remember our earlier discussion of "rights" we will have in mind the concept that where there is a right, there is a duty as well. Thus, if a riparian proprietor's rights have been violated, it is not necessary to prove damage to his physical property to maintain his action, because there has been damage to his metaphysical right which is protected (and created) by law.

The doctrine that a riparian owner is entitled to have the stream come to his land in its natural flow applies to quality as well as to quantity. As we shall see when we discuss the contemporary position of water law, this quality factor, along with the absoluteness of the doctrine, has great ramifications in present water pollution problems.

Recently, Laskin J. in a Supreme Court of Canada decision (Epstein v. Reymes, (1973) 29 D.L.R. (3d) 1) affirmed the idea that in some cases riparian rights can apply to artificial watercourses rather than natural ones only. His position reflects a view of the law taken in American cases: "The weight of authority is that riparian rights exist in the flow of artificial streams where the artificial condition has permanency and lower riparian owners have relied upon its continuance."[107]

(4) Surface Water: Drainage

Along with riparian rights, the common law also evolved rules relating to both surface water draining onto or from the land, and diffused subsurface water percolating through the soil (that is, water not in watercourses).

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[107]Elder, supra, n. 103 at 130.

As to surface water, the common law approach is sometimes called the "common-enemy" doctrine as opposed to the civil law approach. If the water is surface water or water from natural drainage, it may at common law, be withheld by the upper proprietor without liability and the lower owner may erect a dam to protect his property. The civil law rule, however, is that the lower of two adjoining estates owes a servitude to the upper estate to receive the natural drainage.[108] The civil law approach, however, was rejected in the Ontario case of Williams v. Richards (1893), 23 O.R. 651 (D. Ct.).

Recently, Jones J. in Smith v. Autoport Ltd. (1973), 39 D.L.R. (3d) 248 (N.S.S. Ct.) concluded:

> A party is under no obligation with respect to the natural drainage of surface water in undefined channels. A person may change the surface on his property without liability for the incidental effect upon adjoining lands. A party cannot, however, by artificial means gather the water on his property and throw it upon his neighbour's land.

Furthermore, Molden v. Kirkeley and Keehn, [1918] 3 W.W.R. 1014 (S.C. of Alta.) established that where the natural flow of water across land is increased artificially by an adjoining proprietor, the latter is liable for the damage caused to his neighbor's land by such increased flow. Thus, one cannot simply play the "common enemy" game without any rules.

In another recent case, Johnson J. in Hayden v. C.N.R. Co. (1971), 16 D.L.R. (3d) 544 stated again that one proprietor

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[108] Elder, supra, n. 103 at 130.

of land had no right to cause a flow of the surface water from his own land over that of his neighbor, by collecting it into drains or culverts or artifical channels.

Aside from the qualification related to permitted methods of fighting the "common enemy" game, in the case of Wiebe v. Enns, [1971] 3 W.W.R. 469, where the defendant farmer stood with raised axe on guard over his barrier blocking the plaintiff's drainage, the court established that although one has the legal right to block surface water from draining onto ones land, the right to discharge surface water across the land of another may be the subject of a prescriptive easement. The result of the case in Alberta would have been differant, however, due to the Limitation Act which disallows prescriptive easements of this sort.

Finally, in the matter of surface waters, Elder points out that a distinction must be drawn between drainage flowing from one property to another and drainage flowing into a stream to the detriment of lower riparian proprietors.[109] The Ontario Court of Appeal in McGilliveray v. Township of Lochiel (1902) 8 O.L.R. 446 (C.A.) held that a riparian proprietor may increase the flow in a stream through the reasonable exercise of the right of drainage; "reasonable" was defined as "up to the natural capacity".

(5) Underground Percolating Water

Like a surface stream, underground water flowing in a defined channel is a subject of riparian rights. However, at common law water percolating through the soil rather than flowing in a defined channel could be totally appropriated

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[109] Id. at 130.

out of the soil, leaving the lower owner with none, and the motive of the party intercepting this water was immaterial. He had legally protected rights to do so (Mayor of Bradford v. Pickles, [1895] A.C. 587 (H.L.)).

The ownership of this percolating water rests in no one, until the owner of the surface reduces the water to possession. The result at common law was that "the owner of the surface well had the right to draw all the water he pleased from his well, even though it dried up the wells of his neighbors."[110] This was clearly established in the case of Acton v. Blundell (1843), 12 M. & W. 322, 152 E.R. 1223 where Tindal C.J. said at p. 351:

> But if the man who sinks the well in his own land can acquire by that act an absolute and indefinable right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. . . . Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle, whilst the adjoining land may be prevented from mining metals and minerals of inestimable value.

Furthermore, dealing with support of the surface by underground water, in Popplewell v. Hodkinson (1869), L.R. 4 Ex. 248, Cockburn C.J. said at 251:

> Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any

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[110] Cartwright, supra, n. 102 at 317.

> reason it becomes necessary or convenient for him to do so.

However, Donnelly J. in the 1970 Ontario High Court decision of Rade v. K. and E. Sand and Gravel (Sarnia) Ltd., [1970] 2 O.R. 188, 10 D.L.R. (3d) 318, accepted 3 classes of cases where one might have a right of support from water, and then disposed of the plaintiff's case because it did not come within any of the three cases. Whatever the result of the cases, judicial recognition was given to 3 cases outlined in Banks, Law of Support at p. 141:

> It is therefore submitted, that there are three cases in which a man may be liable for subsidence resulting from the withdrawal of water from his property, viz --
>
> (i) Where the subsided property is land in its natural state, and the water in question has up to the time of its withdrawal been performing the duties of its natural support.
>
> (ii) Where it is a building which has subsided by reason of the draining off of water artificially, i.e., designedly, stored, upon which, when the ownership of the building was severed from that of the water, the building was obviously dependent for support.
>
> (iii) Where the claim is for subsidence of a building which has for 20 years (under the conditions prescribed in Dalton v. Angus), enjoyed the support of the water.

Finally, in the Alberta Supreme Court case of Schneider v. Town of Olds, [1970] 71 W.W.R. 380, 8 D.L.R. (3d) 680 (leaving the statutory aspects of the decision aside for the moment), Milvain C.J.T.D. reaffirmed the common law, "biggest pump wins" doctrine in respect to percolating waters. Because of the drilling of a new Town of Olds well, the plaintiff farmer's well, from which for many years water flowed uninterrupted with satisfactory volume, dropped

drastically in water production. The farmer could not claim an infringement on a right, however, as Milvain C.J.T.D. said at page 381:

> If it should happen that because there being an increased number of wells drawing from the source, the static level of water falls no single landowner would have a right to complain because his well would cease to be deep enough, each has the right to enjoy the use of the water in the like extent to the other and if it becomes necessary to drill deeper or to set the pump deeper, I think then that each person engaging the right to extract the Province's water must do so at his own cost.

(6) Statutes Affecting Water Rights

Related to this field of study are complex constitutional questions as both federal and provincial governments are involved in the management and regulation of water quality and quantity.[111] For example, the Canada Water Act, provides for the creation of water quality management agencies not only for federal waters, but also for non-federal waters if the water quality management of those waters has become a matter of "urgent national concern" (s. 9(b)).[112] The provincial legislative management of water has a tendency to transcend provincial boundaries in its effects and federal involvement will undoubtedly grow. While federal involvement is important, the provinces still have the most sweeping law-making powers with respect to water resources. We shall

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[111] See Gibson, The Constitutional Context of Canadian Water Planning (1969) 7 Alta. L. Rev. 71.

[112] See C. G. Morley "Legal Developments in Canadian Water Management", (1972) 11 Western Ontario Law Review 1 at 139.

briefly look at the general direction of the Alberta statutes related to water use.

The Drainage District Act, R.S.A., 1970, c. 155, provides for the creation of drainage districts, initiated by a petition to the government, followed by a vote within the potential district. If the vote results in a favourable two-thirds majority, a Board of Trustees for the district is elected. The powers of this Board are outlined in s. 16:

> The board of a district formed hereunder or continued hereby
>
> (a) is a corporation capable of holding or alienating any property, real or personal, and
>
> (b) shall carry out the drainage work of the district in accordance with the plans of the works of the district that have been submitted to the Minister or any such plans as subsequently varied or altered in accordance with the Act, and for the purpose
>
> (i) may enter upon any land, and in so doing has all such powers as are conferred upon the Minister of Public Works in respect of entering upon land required for public works, and
>
> (ii) has all the powers necessary for the construction, maintenance or renewal of the drainage work necessary for the use of the district.

Supervising the various individual district boards is a provincially appointed drainage council. The boards make by-laws and regulations and levy drainage rates on parcels of land. Thus once a drainage district is set up, the owner of land will have certain rights and duties. For example:

> 73 (1) When a drainage work becomes obstructed by dams, bridges, fences, washouts or other obstructions caused by the owner or person in possession of the lands where the obstruction occurs, so that the free flow of water is impeded thereby, the person or persons owning or occupying the land upon reasonable notice in writing given by the board shall remove the obstruction.
>
> (2) If the obstructions are not removed within the time specified in the notice the board shall forthwith cause them to be removed. . . .

The Ground Water Control Act, R.S.A. 1970, c. 162, defines "ground water" as all waters that exist beneath the land surface (s. 2(d)), and provides for inspection and licensing of wells by the Director of Water Resources (s. 4, s. 5). Section 6(1) states:

> If at any time a flow of water from a well is not controlled, the Director or his agents or employees, with the approval of the Minister, may enter upon the lands from which the water is flowing and conduct such operations to control the flow of water as appear to the Director to be necessary or expedient in the public interest.

Wide ranging regulations as to the actual procedures of well drilling, and generally respecting the control and utilization of the flow of water from a well or other source of ground water, may be made by the Lieutenant Governor in Council.

Lastly, a 1971 amendment to the Water Resources Act, S.A. 1971, c. 113, requires that:

> 99. (1) Where a person owns a well for the supply of water used for any purpose other than domestic purposes and the ground water was put to use before the commencement of this section, that person shall on or before June 30, 1973 apply to the Director of Water

Resources to have the well registered.

The Irrigation Act, R.S.A. 1970, c. 192, provides for the appointment of a provincial Irrigation Council. To form an irrigation district, a petition is sent to this Council, which holds a hearing, and if necessary (because of objections) refers the matter to the Local Authorities Board. Once established, each irrigation district will have an appointed or elected Board of Directors with wide ranging powers and duties, including, inter alia:

> 44. (1) The board
>
> (a) is responsible for the operation, maintenance and administration of the irrigation works of the district, and has all powers as are necessary or incidental to the carrying out of that responsibility,
>
> (b) may construct and replace irrigation works and repair, extend, alter, modify, dismantle or abandon any irrigation works,
>
> . . . . .
>
> (j) may enter into any agreement or do any act in connection with or incidental to the performance or carrying out of its rights, responsibilities and obligations. . . .
>
> 45. (1) The board may generally carry on the functions of a supplier of water for irrigation purposes and is responsible for the supply and distribution of water to the water users of the district in accordance with the by-laws.
>
> (2) The board may make by-laws
>
> (a) regulating the supply and distribution of water to water users, and

(b) providing for the conditions under which the supply of water to any parcel may be stopped.

As well, the board may pass by-laws expropriating necessary lands to carry out its duties (s. 49). Water agreements between the board and the individual farmer may include the right to use water for domestic purposes as well as irrigation (s. 51). Of course, extra water charges in such situations will be levied on the land. The Act makes provision for the imposition of tariffs or water benefit charges on benefitted land (s. 53).

While claims for compensation by farmers can be made in respect to water damage from seepage, s. 171 states:

> Except as provided in this Part no person shall
>
> (a) bring any action or take any proceedings against a board, or
>
> (b) obtain any compensation from a board, or
>
> (c) have any rights against a board,
>
> in respect of the death of or injury to any person or loss of or damage to any property arising out of the escape, release or discharge of water from any irrigation works of the board or arising out of the ponding of any water by reason of the existence of any irrigation works of the board.

Finally, offenses and penalties in the Act, includes among other provisions:

> 184. A person who carelessly or wilfully or without authority
>
> (a) tampers with any irrigation works of a board, or

(b) takes or diverts water from any of the irrigation works of a board, or

(c) does anything that interferes or may interfere in any way with the flow of water in, into, through or from the irrigation works of a board,

is guilty of an offence and liable on summary conviction to a fine not exceeding $200 or to imprisonment for a term not exceeding one year or to both fine and imprisonment.

185. (1) A person who carelessly or wilfully

(a) obstructs or deposits any material in an irrigation work, or

(b) breaks, cuts or otherwise injures any irrigation work,

is guilty of an offence and liable on summary conviction to a fine not exceeding $100 and in default of payment to imprisonment for a term not exceeding 60 days.

(2) Where a person is convicted of an offence under this section the court may also order that person to repair forthwith any damage or remove any obstruction in or material deposited in the irrigation works.

186. A person who

(a) deposits or causes or allows to be deposited along the bank of any irrigation work of a board, or

(b) throws into any irrigation work of a board,

any filthy, impure or deleterious matter or substance of any kind is guilty of an offence and liable on summary conviction to a fine not exceeding $200 or to imprisonment for a term not exceeding two months or to both fine and imprisonment.

. . . . .

188. (1) Every person in actual occupation of lands to which water is delivered or made available by a board is under a duty to use the water with reasonable care and to prevent the water from causing injury or damage to any person or property.

(2) Every person who, being under a duty by virtue of subsection (1), fails without lawful excuse to perform that duty is guilty of an offence and liable on summary conviction to a fine not exceeding $200 or to imprisonment for a term not exceeding two months or to both fine and imprisonment.

The Water Resources Act, R.S.A. 1970, c. 388, as amended in S.A. 1971, c. 113, is a wide-ranging, long document, divided into four major parts dealing with diversion of water, water power provisions, powers of the Lieutenant-Governor in Council, and construction of works and undertakings by the Minister, respectively. Of greatest interest to the farmer is the first part, which greatly affects what he can do with any water on his land.

The use of water resources is subject to enormous regulatory governmental power. The Lieutenant Governor in Council has a long list of regulations he can make. A few examples are:

s. 76(1)(b)

(iii) governing the utilization and disposition of water by licensees,

(iv) governing the extent of diversions from rivers, streams, lakes or other waters, ...

(ix) governing the water rates that may be charged by licensees, and the publication of tariffs of rates,

(x) prescribing the form, terms and conditions of the contracts and agreements to be used by a licensee for the disposition of any water that he is entitled to divert,

(xi) prescribing the forms to be used in proceedings under this Act,

(xii) governing the manner in which water is to be supplied to persons entitled thereto, whether continuously or at stated intervals, or under both systems,

(xiii) defining "the duty of water",

(xiv) defining the part of the year during which water is to be supplied for irrigation,

(xv) for the storage, pondage, regulation, carriage or utilization of any water for power purposes and for the protection of any source of the water supply and for the regulation and control, in the interests of all water users, of the flow of water that, from time to time passes through, by or over any works, ...

(xxxii) governing the registration of wells under section 99, and

(xxxiii) for any other purpose considered necessary for carrying out the provisions of the Act.

Similarly, the power of the Minister in charge of water resources is wide:

77. (1) The Minister may direct or order the adoption of any such measures and proceedings for promoting the beneficial use of water and for controlling and regulating the diversion and application and use thereof as he finds necessary or expedient and as are consistent with the provisions of this Act, . . .

Water coming under the terms of the Act is defined as:

> S. 2(1) 21
>
> "water", when used in relation to any property therein or to any right in respect thereof or to the diversion or usage thereof, means any water in any river, stream, watercourse, lake, spring, ravine, canyon, lagoon, swamp, marsh or other body of water in the Province;

and in s. 2(2):

> (2) All reference in this Act to water in any river, stream, watercourse, lake, creek, spring, ravine, canyon, lagoon, swamp, marsh, or other body of water, applies to water under the surface of the ground, commonly referred to as ground water, but does not apply to water obtained incidentally as a result of drilling for oil or the operation of an oil well.

Finally, s. 7 of the Act, makes allowances for the possible inclusion of surface water in the Act, if necessary:

> Notwithstanding any other provisions of this Act, the Minister may declare any surface water in a specified area to be water for the purposes of this Act, and upon such declaration being made and published in one issue of The Alberta Gazette, the surface water shall be deemed to be water within the meaning of section 2, subsection (1), clause 21.

As we've mentioned earlier, the property in any water in the province is not vested in the private individual but is vested publicly in the province (s. 5.1). The essence of the Water Resources Act is that the use of water is strictly regulated under the Act by requiring a license for any diversion of it. "Diversion" is defined in s. 2(1)(b) as:

"divert" means

(i) to impound, store, take or remove water for any purpose, or

(ii) to do any act that has the effect of altering the flow of water or changing the location of water or the course of flow of water,

and "diversion" has a corresponding meaning;

The taking of water for domestic purposes, however, is still allowable without the need for application for a license:

5. (4) The provisions of this Act do not affect the right of a person owning or occupying any land that adjoins a river, stream, lake or other body of water upon provincial lands, to use such quantity of that water as he requires for domestic purposes on the land.

(5) A person in the exercise of the right referred to in section (4) may pump or otherwise convey water for domestic purposes to fill a tank, cistern, trough or a small dugout.

(6) Every person who acquires the legal right to take, use and develop ground water by virtue of this Act shall do so in accordance with such relevant regulations under The Ground Water Control Act as may from time to time be in force.

(7) Nothing in this Act or in The Ground Water Control Act or in the regulations under either of those Acts, restricts the right of a person owning or occupying land to use such quantity of ground water as he may require for domestic purposes on the land.

The important provisions regarding non-domestic water are as follows:

6. (1) No person shall

(a) divert or use any water, or

(b) construct or cause to be constructed any works for the diversion of water, or

(c) operate or use any works for the diversion of water, or

(d) lay, place, build or erect in, over, under, upon or adjacent to any water any structure, device, contrivance or thing, or any earth, sand, gravel or other material, which interferes with or is capable of interfering with the present or future development, conservation or management of water, or

(e) remove or disturb any earth, sand, gravel or other material forming part of the bed, shore or banks of any water, where such removal or disturbance interferes with or is capable of interfering with the present or future development, conservation or management of water,

except under the authority of this Act, the regulations or a licence, interim licence or permit issued under this Act.

(1.1) Any person who contravenes subsection (1) is guilty of an offence.

(1.2) Each day or portion thereof that a person contravenes subsection (1) shall be deemed to be a separate offence.

(2) The Director of Water Resources or any person authorized by him may, without incurring any legal liability therefor, enter upon any land and breach or destroy any dam or works, or any dam constructed by beaver or any natural obstruction whether formed by blown soil debris, vegetation or otherwise, that diverts or interferes with the flow of any water in the Province otherwise than under the provisions of this Act and the regulations. . . .

11. (1) Upon application being made therefor as provided in this Act and the regulations, a person may acquire, subject to any valid and subsisting rights,

(a) a licence to divert and use water for any or all of the following purposes:

(i) domestic purposes;

(ii) municipal purposes;

(iii) industrial purposes;

(iv) irrigation purposes;

(v) water power purposes;

(vi) other purposes;

(b) a licence to impound water for the purpose of water management, flood control, erosion control, flow regulation, conservation, recreati or the propagation of fish or wildlife or for any like purpose, or

(c) a licence to use water in its natural state for the purpose of conservation, recreation or the propagation of fish or wildlife or for any like purpose, or

(d) a licence to divert water, otherwise than by impoundment or storage, for the purpose of water management, flood control, drainage, erosion control or channel re-alignment or fc any like purpose, or

(e) a permit

(i) to lay, place, build or erect in, over, under, upon or adjacent to any water any structure, device, contrivance or thing, or any earth, sand, gravel or other material, which will interfere with or will be capable of interfering with the present or future development, conservation or management of that water, or

(ii) to remove or disturb any earth, sand, gravel or other material forming part of the bed, shore or banks of any

water, where the removal or disturbance will interfere with or will be capable of interfering with the present or future development, conservation or management of water.

. . . . .

11.(3) Where applications are filed on the same date they have precedence in the following order; first, domestic purposes; second, municipal purposes; third, industrial purposes; fourth, irrigation purposes; fifth, water-power purposes; and sixth, other purposes.

. . . . .

37.(1) Licensees have priority among themselves according to the number of their licences, so that each licensee is entitled to receive the whole of the supply to which his licence entitles him before any licensee, whose licence is of a higher number, has any claim to a supply.

(2) If a complaint is made to the Minister, or to an officer authorized by him to receive complaints, that a licensee is receiving water from a source of supply to which another licensee is entitled by virtue of priority of right, and that the licensee having priority of right is not receiving the supply to which he is entitled, some officer to be named by the Minister, or the officer to whom complaint is made, as the case may be, shall inquire into the circumstances of the case.

(3) If, upon such inquiry the officer finds that there is ground for the complaint, he shall cause the head-gates or other works of the licensee who is receiving the undue supply of water to be closed, or to take such other action as is necessary to ensure that the supply to which the other licensee is entitled passes and flows to his works.

. . . . .

65. Every person who commits an offence under this Act or the regulations for which no penalty is expressly provided is guilty of an offence and liable on summary conviction

(a) in the case of a natural person, to a fine of not more than $1,000, and in default of payment to a term of imprisonment not exceeding six months, or

(b) in the case of a corporation, to a fine of not more than $5,000.

In conclusion, various details are included in the Act dealing with the granting of interim licenses and permits, and the supervision and inspection of works and their construction. Furthermore, powers of expropriation are made available to holders of licenses which authorize certain works. Provision for the cancellation of licenses, handling of complaints by holders, and the levying of water charges, are also included. It should be remembered finally, that a license under the Act is an interest in property. It is a right in the bundle of rights applicable to that parcel:

21. (1) Every permit, interim licence and final licence issued pursuant to this Act shall specify therein the land or the undertaking to which the licence to divert water is to be appurtenant.

(2) Every permit, interim licence and final licence and all property and easements acquired pursuant thereto and all works constructed thereunder are appurtenant to the land or the undertaking specified in the licence and are inseparable therefrom and pass therewith upon any demise, devise, alienation, transfer or other disposition of the land or undertaking whether by operation of law or otherwise, unless the Lieutenant Governor in Council orders to the contrary in any case specified in the order.

The Clean Water Act, S.A. 1971, c. 17, as amended S. A. 1972, c. 20, enables the Minister of Environment to make regulations in regard to the levels of contaminants in watercourses as well as of maximum temperatures of watercourses (s. 3). One must receive a permit to construct certain manufacturing plants and municipal projects, and other works from the Director of Standards and Approvals, who is supposed to ensure that the particular plant or project will conform to environmental regulations, and can demand alterations as a condition precedent to the granting of a permit (s. 4). Once one has a permit to construct, he must then have a license to operate and again the Director of Standards and Approvals may demand whatever conditions are necessary to conform to the standards.

If the Director of Pollution control runs into a situation where water somewhere in the province contains contaminants or temperature problems, he may issue "water quality control orders", of various sorts (s. 6) or even "stop orders" (s. 7). Entry and inspection freedoms for officials are, of course included in the Act (s. 8).

Of some interest to farming property owners is the 1972 addition of provisions dealing with deleterious substances:

> 9.1 (1) Subject to subsection (2), no person shall deposit or permit the deposit of a deleterious substance of any type in a watercourse or in surface water or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any watercourse or any surface water.
>
> (2) Subsection (1) does not apply to the deposit of a deleterious substance of a type, in a quantity and under terms and conditions stated

(a) in an approval or certificate issued by the Provincial Board of Health pursuant to The Public Health Act or regulations thereunder, or

(b) in an approval issued by the Director of Pollution Control pursuant to this Act or regulations thereunder, or

(c) in a licence issued by the Director of Standards and Approvals pursuant to this Act or regulations thereunder, or

(d) in an approval permit or licence issued by the Energy Resources Conservation Board, or

(e) in a permit issued pursuant to The Agricultural Chemicals Act.

(3) Where an offence is committed under this section on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

. . . . .

(7) For the purposes of this section, "deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of the process of degradation or alteration of the quality of that water so that it is rendered deleterious to fish, wildlife livestock or domestic animals,

(b) any surface water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered deleteri to fish, wildlife, livestock or domestic animals, ...

Finally, the Act enables the Lieutenant Governor in Council to make regulations related to the control of water use in the province. Some of the regulatory powers include inter alia:

s. 10

6. authorizing the payment of compensation by the Crown to any person for loss or damage to that person as a result of the application to him of any provision of this Act or the regulations or as a result of an order directed to him under this Act, prescribing the cases in which the compensation shall be paid, and conferring jurisdiction on the Supreme Court of Alberta, a district court or the Public Utilities Board in connection with settlement of the compensation to be paid;

7. authorizing the Minister to expropriate on behalf of the Crown any estate or interest in land if he considers it necessary to do so for the purpose of enforcing or carrying out the provisions of this Act or the regulations;

8. for the control, restriction or prohibition of any use of land or any action in respect of land whereby any substance is deposited or discharged on or under any land

(i) adjacent to or underlying any watercourse, or

(ii) adjacent to or overlying an aquifer;

9. for the control, restriction or prohibition of any activities in, on or over surface water for the purpose of preventing, alleviating, controlling or stopping water pollution;

10. governing the design, construction, maintenance or operation of

(i) any type of water facility or part thereof, or

(ii) any equipment, device or apparatus used in connection with any type of water facility;

. . . . .

and of special interest to farmers:

> 13. controlling or regulating the quantity and purity of water to be applied to land for the purpose of irrigation or watering of any plant life, where the water so applied may be directly or indirectly harmful to human life, animal life, plant life or land;
>
> . . . . .
>
> 20. for controlling, restricting or prohibiting the drilling of test holes or the drilling or use of water wells, and prescribing the duties of drillers or owners of water wells;
>
> . . . . .
>
> 30. governing intensive livestock operations including
>
> (i) defining "intensive livestock operations" for the purposes of this clause and the regulations made pursuant to this clause,
>
> (ii) the control of intensive livestock operations, and
>
> (iii) the method of dealing with water contaminants produced as a result of intensive livestock operations;

We should note that in 1974 during the 3rd session, an amendment to the Act was brought forth. Bill 206 adds a new section after the present section 7:

> 7.1 (1) Where a water quality control order or a stop order issued under section 7 is made, and
>
> (a) it results in closure or cessation of operation of a plant, structure, thing or any industry connected therewith, and
>
> (b) the pollution relating to the water quality control order or stop order is confined within the municipality wherein the plant, structure, thing or industry is located,
>
> the Minister shall, within seven days of the closure of the plant, structure, thing or

industry, order a plebiscite to be taken within the municipality in question within 30 days requesting confirmation of the water quality control order or stop order.

(2) Where a majority of the voters do not vote in favour of the water quality control order or stop order, the Minister shall, within seven days of the plebiscite, issue an order rescinding the water quality control order or stop order and shall not issue or permit to be issued a new water quality control order or stop order duplicating in whole or in part the rescinded order or orders for a period of at least two years from the date of the plebiscite.

3. This Act comes into force on the day upon which it is assented to.

(7) Statutes and the Common Law

It has been argued that the British Columbia Water Act, which is not dissimilar to our Water Resources Act, has taken away all common law riparian rights and the only existing rights left in that province are those granted under the statute. [113] That previous absolute riparian rights are replaced by statutory rights, which can be given and taken at the whim of a government agency, is not the conclusion of others dealing with the same statute, however.[114] Furthermore, Fisher J., while dealing with the 1925 B.C. Water Act in Johnson v. Anderson, [1937] 1 W.W.R. 245 (B.C.S.C.) enunciated a basic principle:

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[113] See W. S. Armstrong, The B.C. Water Act, (1962) 1 U.B.C. L. Rev. 583.

[114] See A. R. Lucas, Water Pollution Law in B.C., (1969) 4 U.B.C.L. Rev. 56.

> Under the circumstances I would hold in view of the opinions expressed by the Judges, who have dealt with such matters in the cases hereinbefore referred to, that the riparian owner still has the right so to make use of such water and still has a remedy against a wholly wrongful and unauthorized diversion of the stream which deprives him of such right unless the legislation as it now stands, clearly takes away such right and remedy.

We have noted section 5(4) of our Water Resources Act which specifically recognizes the right of the possessor of riparian lands to such quantity of water as he needs for domestic purposes. Thompson and Wild state:

> . . . it must be concluded that common law rights of riparian owners are "applicable" in Alberta unless eliminated by statute. There is little doubt that the right to have undiminished flow maintained has been abrogated in Alberta by the Water Resources Act but considering the totality of legislation in Alberta, it is submitted that nowhere in the existing legislation is there found a "clear, unambiguous" enactment specifically eliminating the common law right to pure water. In the absence of such a statement and in view of the attitude of the courts toward any attempted abrogation of the common law rights of the individual, it must be concluded that the right of the riparian owner to pure water continues to exist in Alberta.[115]

Even with regard to quantity of flow, however, one could argue that common law riparian rights still exist, and that the statute and common law exist side by side. Philip Anisman, dealing with the Ontario Water Resources Act, which again is not dissimilar essentially from ours, suggests that

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[115]Note, Maintenance of Water Quality. Alberta's Legislative Scheme and the Common Law, (1972) 10 Alta. L. Rev. 354.

a riparian owner's rights are still in force because an upper owner cannot in many cases argue a defense of statutory authority, although his diversion of water or operation of water works has been approved by the Water Commission.[116] The doctrine of statutory authority generally involves the proposition that if the Legislature directs a thing to be done that would otherwise give rise to an action, the right of action is removed by the Legislature's direction (The Managers of the Metropolitan Asylum District v. Hill (1881), 6 App. Cas. 193). Elder states:

> The applicability of this defence, however, is limited by an important presumption that if the Act does not provide for compensation to parties injured by the acts authorized, it was the intention of the Legislature that the powers be exercised without injury to private rights.[117]

If the defence of statutory authority cannot be defeated by the presumption, one might successfully argue, particularly in pollution cases that another statute such as the Clean Water Act overrides certain licensed activities under the Water Resources Act, so that the claim of the riparian owner would succeed.

The famous riparian cases dealing with pollution (McKie v. K.V.P. Co., [1948] Ont. W.N. 386 aff'd. [1949] O.L.R. 39 (Ont.), [1949] Sup. Ct. 698; and Stephens v. Richmond Hill [1955] O.R. 806, aff'd. [1955] O.R. 88), raise serious

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[116]Anisman, Water Pollution Control in Ontario, Ottawa Law Review, (1971-72) 5 Ottawa Law Rev. 407.

[117]Elder, supra, n. 103 at 153.

questions as to the usefulness of the common law rights regarding water that we have discussed. While environmentalists may be thankful that these rights still exist; aside from the great expense incurred by a landowner in bringing a common law riparian rights action to stop pollution, problems arise with respect to the rigidness of the remedies. Most often, for instance, injunctions are not refused on the ground that the public might be inconvenienced if an injunction were granted (Imperial Gas Light and Coke Co. v. Broadbent (1859), 7 H.L.C. 600, 11 E.R. 239). In other words regardless of how many jobs the injunction destroys, or how essential the commodity that can no longer be produced or how unbalanced the injury to the private right as opposed to that of the general welfare, the remedy must be granted. In the K.V.P. case, in fact, the Ontario government passed a special Act overturning the court's decision, precisely because of the effects of such an injunction. Similarly, we mentioned the cases of Schneider v. Town of Olds and from the rigid conclusion of the case we can understand why in the United States the old common law doctrine of absolute rights to appropriate waters, has in most states been modified to that of appropriation for reasonable uses only. Cartwright comments:

> Before the correlative or reasonable use doctrines were applied to diffused percolating waters, it was generally held that the owner of a surface well had the right to draw all the water he pleased from such a well, even though it dried up the wells of his neighbors.[118]

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[118] Cartwright, supra, n. 102 at 117.

In other words, the United States' doctrine attempts to avoid the "biggest pump wins" mentality.

Finally, unlike the common enemy approach to drainage water, the United States courts have formulated reasonable use doctrines where each situation can be considered individually and a flexible weighing of competing claims can take place (Armstrong v. Francis Corporation, S.C. of New Jersey ¶1958] 20 N.J. 320). The philosophical question of what restrictions on private rights are appropriate in today's society, is clearly raised in the area of water rights. In many areas legislation has pre-empted the common law because of its lack of flexibility.

VII
THE TORT RESTRICTION

A. Introduction

We have looked at the nature and extent of our bundle of rights and now we must begin an examination of how far we can use this bundle as we please. It is sometimes said that we have a right to use our land in whatever manner we see fit. This is clearly not so, and was never the truth. We have generally examined the extent of the rights we could hold in our bundle at common law; but the picture is not complete until we see that along with the bundle of rights we have, if you like, a "bundle of duties" not to do things on our land which interfere with the bundle of rights held by our neighbors, who in turn have corresponding duties not to interfere with the enjoyment of our rights. Professor Cohen, as we have mentioned before, has articulated this necessity of legal control in an interdependent world:

"To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless."[119] We can understand then, that what we might call a restriction or a loss of freedom, may at times be the very opposite. In this section we wish to discuss the main common law torts which affect the development and use that we can make of our land. A landowner must not use his land so as to commit a tort against another person. The tortious action of trespass, nuisance, negligence, and the doctrine of Rylands v. Fletcher all are relevant to our discussion, but the main doctrine of importance in land use control is nuisance. Thus, before examining nuisance, let us briefly deal with the other three tort actions.

B. Trespass

Originally, when one had to fit his cause of action into a particular writ, there were primarily two groups of writs that developed--trespass and case. Trespass was used for all forcible, direct and immediate injury to persons, land or goods, while trespass on the case dealt with injury that was a consequence of an activity on, or condition of the defendant's land and not a direct incursion onto land by the defendant.[120] Furthermore, trespass was actionable per se whereas, in trespass on the case the plainti had to show damages.[121] Basically, the distinction is one between acts causing direct injury (I hit you with a log) and

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[119]Cohen, supra, n. 62.

[120]Fleming, On Torts at 16.

[121]Id. at 17.

those resulting in consequential injury. (I leave a log on the path; you fall over it). The result today is that generally what I do on my property, resulting in consequential damage to you is handled in nuisance or negligence, which evolved from the old "case" writ, and when I directly come onto or interfere with your property, the action is one of trespass. Halsbury's defines trespass to land as:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it or takes possession of it, or repels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the air-space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his land in to another's land.[122]

Trespass was originally associated with the maintenance of public order and this partly explains why "the plaintiff is not required to prove material loss, and that a mistaken belief by the defendant that the land was his, affords no excuse.:[123] We have already mentioned the concept of trespass over airspace, when a sign is placed within the area claimed by the landowner, or trespass to the subsurface by a mine shaft, or whatever. Beyond the existing common law trespass doctrine, we also have in Alberta the Petty Trespass Act R.S.A.

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[122] 38 Hals 3rd ed. at 739.

[123] Fleming, supra, n. 119 at 37.

1970, c. 273 which does not follow the common law, because the Act has a requirement for notice before a landowner can proceed under it.

2. (1) No person shall trespass upon

(a) privately owned land, or

(b) Crown land subject to any disposition granted under The Public Lands Act, except a grazing lease or a grazing permit, or

(c) a garden or lawn, with respect to which he has had notice by word of mouth, or in writing, or by posters or signboards, not to trespass

(2) For the purposes of subsection (1) a person shall be deemed to have had notice not to trespass when posters or signboards are visibly displayed

(a) at all places where normal access is obtained to the land, and

(b) at all fence corners or where there is no fence, at each corner of the land. [1962, c. 60, s. 2]

3. A person who contravences section 2 and whether or not any damage is occasioned thereby, is guilty of an offence and liable on summary conviction to a fine of not more than $100.

. . . . .

5. Any person found committing a trespass to which this Act applies may be apprehended without warrant by any peace officer, or by the owner or occupier of the land on which the trespass is committed, or the servant of, or any person authorized by the owner or occupier of the land, and may be forthwith taken before the nearest magistrate or justice of the peace to be dealt with according to law.

It should also be noted that an ever greater number of government officials have a right to enter upon your land. This will be seen clearly when we deal with Statutes in the next section. J. F. Garner has stated:

> It is still true that an Englishman's home is his castle; but it is now subject to the very important proviso that the castle must be opened to the King's men whenever Parliament has said so.[124]

C. Negligence

While negligent conduct is not required to establish liability in private nuisance or trespass, the tort of negligence is a dynamic area of the law that "has become so all embracing that it may swallow practically every other heading of liability, especially those concerned with the land."[125] Although negligence law cannot be reduced into a few words we can say superficially that it deals with conduct that falls below a standard regarded as reasonable, based on the foreseeability of harm by a reasonable man, resulting in material injury to the legally protected interests of the plaintiff.[126]

As nuisance and trespass are still regarded as the torts delimiting the restrictions placed on others for the protection of rights in land, we will not discuss this huge area of negligence law. However, we must at least be aware that negligent conduct interfering with rights in land

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[124]Garner, An Englishman's Home Is His Castle? (1966) University of Nottingham Press.

[125]W. A. West, The Private Control of Land Use, (1966) at 5.

[126]See Linden, Canadian Negligence Law.

causing damage can be actionable even if the conduct doesn't fit into a nominate tort category, such as trespass or nuisance.

D. Doctrine of Rylands v. Fletcher

The current doctrine of holding someone strictly liable for the escape of dangerous substances had its origins in the case of Rylands v. Fletcher (1866) L.R. 1 Ex. 265 (aff'd (1868) L.R. 3 H.L. 330) where Blackburn J. stated at 279 as follows:

> . . . the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

Rylands v. Fletcher involves liability for an isolated escape of dangerous things accumulated on land, while nuisance is normally thought of as involving an interference with enjoyment which has some degree of permanence.[127] Futhermore Rylands v. Fletcher involves the concept of non-natural use of your land,[128] and needless to say much judicial creativity and controversy exists as to what is natural as opposed to what is non-natural. Furthermore, as Viscount Haldane pointed out in A-G v. Cory Brothers [1921] 1 A.C. 521, a very fine line exists between the negligent use of land and use of land fallin

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[127] F. H. Newark, "The Boundaries of Nuisance" (1949) 65 L. Q. Review 480 at 489.

[128] See David W. Williams, Non-Natural Use of Land, [1973] Cambridge Law Journal, at 310.

into the principle of Rylands v. Fletcher.

While the result will depend on the facts of each case an example to illustrate the principle is that if you spray weedkiller on your land and your neighbor is growing sensitive crops on his, any drift of your spray onto his land may come within the strict liability Rylands v. Fletcher doctrine and you may be liable for damage however much care and diligence you used to prevent the drift of the spray. (Mihalchuk v. Ratke (1966) 57 DLR (2d) 269). Concepts of strict liability, of course, have been utilized a great deal when dangerous animals have caused injury.[129] A farmer then, however careful he may be, however faultless, must be aware of the possible consequences of his activities or use of materials considered "non-natural" for he may be held strictly liable for any damages caused to his neighbor.

E. Nuisance

The common law of nuisance is divided into two categories; public nuisance and private nuisance, and in today's world a third category of statutory nuisance has arisen, (certain declared nuisances in city by-laws, for instance). Interference with our bundle of rights directly by the invasion of people or things will mean we have a cause of action in trespass. Less tangible interferences such as noise, fumes, aesthetic blight, or vibrations may be handled under the law of nuisance. This distinction can be traced back to our earlier discussion of trespass and the action on the case. In Louden v. Vancouver (1934) 49 B.C.R. 328 Robertson, quoting Coulsen and Forbes, On Water, 6th ed.

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[129] Wright and Linden, On Torts, at 75

at 667 stated:

> Where the act complained of is a wrongful disturbance of another in the exclusive possession of property, it is a trespass; where the infringement of the right is the consequence of an act which is not in itself an invasion of property, the cause from which the injury flows is termed a nuisance.

By the twelfth century the assize of nuisance had evolved to protect landholders against damage to their property caused by neighboring land use.[130] The maxim sic utere tuo ut alienum non laedas (use your own property in such a manner as not to injure that of another) underlies the whole nuisance doctrine. In Commonwealth v. Fewksbury 11 Metcalf (Mass.) (1846) at 57, Chief Justice Lemuel Shaw expressed the view that:

> all property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community under the maxim of the common law, sic utere tuo ut alienum non laedas.

When one uses his property in such a manner as to interfere with the rights of a substantial number of people, this may be characterized as a public nuisance. If he interfere with the rights of a few, a private nuisance is present.[131] Although a fine line is often drawn between private and public

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[130] McRae, The Development of Nuisance in the Early Common Law (1948) 1 U. Fla. L. Rev. 27.

[131] Levi supra n. 105 at 107.

nuisance, the distinction is important because the Attorney-General, rather than the individual brings the action if it is a public nuisance, in which case the individual can only recover if he has suffered some special damage. (Williams Case 5 Co. Rep. 726 (1592) 77 E. K. 163). Speaking of public nuisance Blackstone framed the principle in this way:

> . . . no action lies for a public or common nuisance, but an indictment only, because the damage being common to all, no one can assign his particular portion of it, or if he could, it would be hard, if every subject could harass the offender with a separate action. This rule admits of a single exception, where a private person suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have private satisfaction by action.[132]

A public nuisance must affect the welfare of the Community, while a private nuisance must specifically affect the welfare of an individual (Hutson v. United Motor Service Ltd. [1936] O. R. 225). However, if an individual seeking an injunction or damages can show he has suffered some particular, direct and substantial damage over and above that sustained by the public at large, he may bring an action in public nuisance rather than the Attorney-General. (Clare v. Edmonton (1914) 5 WWR 1133; 15 DLR 514).

To give a practical example of a public nuisance situation, we can cite the case of Attorney-General for Ontario v. Orange Productions Ltd. et. al. (1972) 21 D.L.R. (3d) 257 when the question before the Ontario High Court was whether the proposed holding of a rock festival on the defendant's land should be enjoined by an interim injunction. Chief Justice Wells referred to the case of A-G v. PYA Quarries

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[132]Blackstone, Commentaries, at 610.

Ltd. [1957] 1 All E. R. 894, where Lord Justice Denning (as he then was) said at p. 908:

> A public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

Chief Justice Wells after weighing the evidence which included the report that an earlier festival sponsored by the defendants had attracted 25,000 to 40,000 persons, accompanied with nude bathing, public sexual intercourse, open consumption of alcohol and drugs, excessive noise and dust and traffic congestion and so forth, concluded at page 270:

> In my opinion, the whole festival with the weight of numbers and the noise and the dust, was a painful and troublesome experience for all those living in the neighbourhood and was, in fact, a social disaster to those who normally live there . . . I do not think the festival should take place . . . It is unfair to the neighbourhood . . . The pressure on the neighbourhood when these festivals are held is, in my opinion, grossly excessive and is something that should be restrained.

Moving now to private nuisance, we notice first of all that there has to be material injury to the property to constitute a nuisance. (Broder v. Saillard (1876) 2 Ch. D. 692), or infliction of personal discomfort. In terms of the latter category, it must be an inconvenience materially interfering with the ordinary physical comfort of human existence, not according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the Canadian people. (Bottom v. Ontario Leaf Tobacco Co. [1935] 2 DLR 699 (Ont. C.A.))

Unlike American courts, the Canadian courts do not

generally "weigh the equities" in deciding whether a nuisance exists or not. If what is done interferes with the plaintiff's enjoyment of his property, so as to constitute a nuisance, then it is immaterial whether the defendant is making a reasonable use of his lands, or whether the works carried on are of public benefit. The general rule is that once a plaintiff has established the existence of a right at law, and a violation of that right by the defendant, he is entitled as of course to an injunction to prevent the recurrence of that violation.

(Walter v. McKinnon Indust. Ltd. [1949] O. R. 549 aff'd [1950] O. W. N. 309 aff'd [1951] 3 DLR 577 (P.C.)). Where the damage is small, is capable of being estimated in money, can be adequately compensated by a money payment, and where the injunction would be particularly oppressive upon the defendant, damages may be awarded instead. (Shelfer v. City of London Electric Co. [1895] 1 Ch. 287, 316)

When property damage is in issue, the Court will refuse to consider the nature of the locality. But when the plaintiff complains of substantial interference with enjoyment - the type of neighbourhood will be looked to: what would be a nuisance in a quiet residential neighbourhood would not be so in a factory district.[133] Before the wide-spread era of zoning, nuisance law was the method land-owners often used to protect the value of their property. The use of nuisance law reached its height in the U.S. during the 1920's and 30's as land-owners invoked it to relieve actual or threatened noxious uses in their neighbourhoods, with the attempt to exclude funeral parlors generating the greatest volume of

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[133] See Elder supra n. 103.

cases.[134] Common Canadian examples are the granting of an injunction restraining the defendants from operating their caged hen-laying business because of smells and so forth, which were nuisances to the owners of private residences, (Atwell v. Knights [1967] 1 O.R. 419, 61 DLR 92d) 108,) or restraining a foundry because of noise and noxious fumes unreasonably disturbing the plaintiff's enjoyment of his home, (Smith v. Coutts Machinery Co. [1926] 3 WWR 326 (Alta.)), or the holding that building operations causing vibrations were nuisances. (Ackman v. Gcoge Mills & Co. [1934] O.R. 59 [1934] 4 D.L.R. 264 Futhermore, a plaintiff, who owned and operated a farm on which he raised crops of tomatoes and cucumbers, successfully sued a municipality which established a dump close to his farm where large amounts of garbage were dumped each weekday and reduced by slow burning in the open air, which caused offensive smells and smoke. (Plater v. Collingwood [1968] 1 O.R. 81, 65 DLR (2d) 492) Finally the private nuisance doctrine is well illustrated in the recent B.C. Supreme Court case of Newman et. al. v. Conair Aviation Ltd. and Savage [1973] 1 WWR 316 where the plaintiffs successfully sued a farmer who had his crops sprayed with a low-flying aircraft. The noise of the aircraft frightened and upset the plaintiffs and caused their horse to run wild. Wilson C.J.S.C. said at 321:

> It is no defence to an action for nuisance to show that the defendant's operation of his farm is a useful and necessary to the public interest or . . . or that it is carried on with all care and every effort is made to prevent it from being a nuisance . . . Lord Loreburn in Pwllbach Collery Co. Ltd. v. Woodman [1915] A.C. 634 at 638 said: Their duty to their neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all.

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[134] Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines, (1973) 40 U. of Chicago Law Review.

VIII

STATUTES REGULATING LAND USE AND DISPOSITION

A. Introduction

The use of your land is regulated by a number of provincial statutes, some of which have already been examined in respect to the subsurface, and in respect to water use. Undoubtedly a complete collection of every provision of a statute that affects land use would constitute a separate study. What we wish to do is simply examine a number of statutes to give the reader a firm understanding of the extent and nature of the regulation of property in land by the provincial government. We should keep in mind those statutes which do not include compensatory provisions as compared to those that do.

We should also keep in mind that certain bills have either been passed or are being examined in the current session of the legislature. Controversy surrounding Bill 55, the Northeast Alberta Regional Commission Act is well known. Furthermore, Bill 51, the Government Land Purchase Act is to establish a permanent fund for the purchase of land required by departments of the government; and Bill 41 is to be the new Expropriation Act. Finally, Bill 38 repeals the old Agricultural Pests Act.

B. The Agricultural Chemicals Act

The Agricultural Chemicals Act, R.S.A. 1970 c. 4 includes inter alia:

> 7. No person shall apply a pesticide in any open body of water unless he holds a permit to do so pursuant to the regulations under this act or The Public Health Act.

. . . . .

9. No person shall

(a) dispose of any pesticide or mixture containing a pesticide, or

(b) bury, decontaminate, burn or otherwise dispose of any container that has been used to hold a pesticide except at a site or in a manner, as the case may be, that is

(c) prescribed by the regulations, or

(d) in the absence of regulations, recommended by the manufacturer of the pesticide.

10. No person shall

(a) wash or submerge in any open body of water any apparatus, equipment or container used in the holding or application of a pesticide, or

(b) cause water from any open body of water to be drawn into any apparatus or equipment used for mixing or applying a pesticide unless such apparatus or equipment is equipped with a device which prevents back flow.

. . . . .

13. Where the Minister is of the opinion, based upon such evidence as he considers adequate, that any crop, food, feed, animal, plant, water, produce, product or other matter is contaminated by an agricultural chemical, the Minister may by order

(a) prohibit or restrict the sale, handling, use or distribution of the crop, food, feed, animal, plant, water, produce, product, or other matter permanently or for such length of time as he considers necessary or

(b) cause the crop, food, feed, animal, plant, water, produce, product or other matter to be destroyed or rendered harmless, and no person shall be entitled to compensation therefor.

. . . . .

> 15. Where an inspector is of the opinion, based upon such evidence as he considers adequate, that the use of or method of application of an agricultural chemical is or may be dangerous to the health of persons or any animal, or harmful to crops or other plant life, he may by order in writing suspend or terminate the use of or the method of application of the agricultural chemical. [1969, c. 3, s. 15]

The Agricultural Chemicals Act provides a clear example, then, of the same principle we discussed under the nuisance doctrine. What I can do on my land is often limited in the interest of the health and welfare of others.

C. The Agricultural Pests Act

Bill 38, The Agricultural Pests Act, 1974, third session, 17th legislature, 23 Elizabeth II allows the Lieutenant Governor in Council to declare certain animals, birds, insects, plants or diseases to be "pests" or "nuisances", (S2) and landowners or persons occupying land are authorized to destroy nuisances. (S3) A legal duty is placed on persons and councils to take active measures to destroy pests.

> 4. (1) Every person who owns, occupies or controls any land, premises or property shall take active measures to
>
> (a) destroy all pests on or in the land, premises or property,
>
> (b) destroy any crop, vegetation and other matter that contributes or may contribute to the maintenance or spread of any pest that is found upon the land, premises or property, and
>
> (c) prevent the establishment of all pests upon his land, premises or property.

(2) Every person who owns, controls or is in possession of livestock shall take active measures to

(a) destroy all pests on or in the livestock, and

(b) prevent the establishment of all pests on or in the livestock

(3) Every council shall take active measures to destroy all pests in the municipality.

(4) Any person or council destroying pests shall do so in accordance with

(a) this Act and the regulations,

(b) where applicable, The Wildlife Act and the regulations made thereunder, and

(c) where applicable, The Agricultural Chemicals Act and the regulations made thereunder.

Right of entry to inspecting officers is included (S5). Such officers may issue a notice to a landowner (S7) directing him to take certain measures against the "pest" or nuisance. The landowner may appeal within 10 days to a district court judge (S8). Futhermore:

13. For the purpose of controlling, destroying, preventing, or delaying the establishment of a pest or a nuisance and to prevent or reduce damage by a pest or nuisance, the Lieutenant Governor in Council may make regulations

(a) prohibiting and restricting the removal from any area or the movement therein of any crop, vegetation, livestock, animal or other matter;

(b) prohibiting or restricting the use of and governing the disposition or destruction of any crop, vegetation, livestock, animal or other matter that may contribute to the spread of a pest or nuisance;

(c) establishing all or any part of Alberta as an area to which all or any provisions of the regulations apply;

(d) concerning the method of treatment and method of procedure to be followed in any area for controlling, eradicating or preventing the establishment of a pest or nuisance;

(e) naming, approving and distributing or arranging for or approving the distribution of any poison, compound, equipment, vehicle or device for or incidental to the control of the pest or nuisance, with or without conditions;

(f) designating the area or areas in Alberta within which a poison, compound, control technique or device may be distributed or used;

(g) appointing persons to supervise the setting out and distribution of any poison, compound, device or equipment;

(h) defining "poison", "compound", "control technique" and "device" for the purpose of this Act and the regulations;

(i) governing, prohibiting or restricting the use of any poison, compound, device, vehicle, control technique or equipment used therewith and the manner in which it is to be handled, set out or applied.

Finally, part two of the Act includes special provisions for the control of bacterial ring rot and insect pests.

D. The Agricultural Development Act

The Agricultural Development Act SA 1972 c. 5, which creates and establishes the terms of reference for the Alberta Agricultural Development Corporation includes a provision allowing the Corporation to set up land banks.

19. (1) The Corporation may acquire hold or dispose of land for the purpose of:

(a) farm consolidation, or

(b) establishment of community pastures, or

(c) withdrawing land from agricultural use, or

(d) generally advancing in the opinion of the Corporation, the interests of agriculture

E. The Agricultural Service Board Act

Provisions in the Agricultural Service Board Act R.S.A. 1970 c. 7, which affect the landowner's bundle of rights are:

16. (1) Where a board finds, from investigation and inquiry, that land in a municipality included in the area with respect to which the board has been appointed

(a) is impoverished or in the process of becoming impoverished through

(1) weed infestation, or

(2) wind or water erosion, or

(3) any other cause that has seriously affected or that may seriously affect the productivity of the land or the welfare of the owner or occupant of the land, and

(b) may become a menace to the community, the board shall report its findings to the council or to the Minister of Municipal Affairs, as the case may be.

. . . . .

(2) Upon receipt of the report referred to in subsection (1) the council or the Minister of Municipal Affairs, as the case may be, may declare the land referred to in the report to be subject to supervision, rehabilitation or reclamation as hereinafter provided.

Before making a declaration under section 16, there must be a hearing (S17). If a plan for restoration cannot be agreed upon (S18 gives the details), the board may in fact take over the land, fix it up, and then revest it back to the "owner":

19. (1) Where the board

(a) is of the opinion that owing to the condition of the land a declaration that the land is subject to supervision under section 16 would be ineffective, or

(b) is satisfied that in any case where land has been declared subject to supervision under section 16

(1) the agricultural fieldman and the representative of the Department on the board were unable to work out a plan of proper farming practices that the owner or occupant would undertake to follow, or

(2) the owner or occupant has refused or neglected to follow a plan of proper farming practices worked out as aforesaid, or

(3) the owner or occupant has made default in or failed to comply with the provisions of any agreement entered into pursuant to section 18, subsection (2), or

(4) notwithstanding any plan determined or agreement entered into pursuant to section 18, the results have been unsatisfactory, it may be

recommended in writing to the council or Minister of Municipal Affairs, as the case may be, that the control of the land be taken from the owner and occupant and that an order of reclamation of the land be issued by the council or Minister of Municipal Affairs, as the case may be.

. . . . .

(3) After the passing of a by-law or the making of an order under subsection (2), the council or Minister of Municipal Affairs, as the case may be, shall forthwith forward to the Registrar of Land Titles for the land registration district in which the land is situated a notice in Form A in the Schedule.

. . . . .

(7) From the date of the passing of a by-law or the making of an order under subsection (2), the council or the Minister of Municipal Affairs, as the case may be, may enter into possession of the lands, and through their servants and agents or by agreement with the owner or occupant,

(a) cultivate the land and sow and harvest crops thereon,

(b) destroy weeds, and

(c) take such other steps as may be necessary or expedient for the purpose of reclaiming and rehabilitating the land, under the general supervision of the agricultural fieldman and with the advice of the board to the end that the land be reclaimed and rehabilitated and eventually restored to the possession of the person who but for the by-law or order would be entitled thereto.

In this situation rather than the landowner claiming compensation for the interference with his use of his property, provisions are set forth in the Act for the recovery of the

expense the board has incurred in improving the owner's land.

F. The Alberta Heritage Act

The Alberta Heritage Act SA 1973 c. 5 states:

> 4. (1) The Minister may
>
> (a) acquire by purchase, gift, bequest, devise, loan, lease or otherwise any heritage object, building or heritage site;
>
> (b) sell, lease, exchange or otherwise dispose of any heritage object, building or heritage site so acquired;
>
> (c) lend or lease any heritage objects or any other objects acquired under this Act; on such terms as he considers appropriate.
>
> (2) The Minister may acquire by gift, devise, bequest or loan, any building, site or other thing of historic, scientific or artistic interest whether or not having a bearing on the heritage of Alberta.

We notice that expropriation is not specifically mentioned, but one would think that the provision "or otherwise" could include it. Furthermore, a kind of expropriation procedure develops in the Act:

> 14. The Minister may
>
> . . . . .
>
> (d) carry out surveys, investigate, document and excavate any site in Alberta;
>
> . . . . .

17. (1) The Minister may, after consultation with the (Heritage Sites) Board, by order designate any heritage site whose preservation is in the public interest, together with such adjacent land as may be specified in the order, as a "Registered Heritage Site".

(2) The Minister shall register a certified copy of the order in the appropriate Land Titles Office against the title or titles to the land affected by the order.

(3) The designation as a Registered Heritage Site is effective upon the filing of the order.

(4) Upon the registration of an order under subsection (2), no person may, notwithstanding any other Act, destroy, alter, restore, repair, disturb or change any Registered Heritage Site or remove any heritage object from a Registered Heritage Site until the expiration of 14 days from the date of serving notice on the Minister of his proposed action, unless the Minister sooner consents to the proposed action.

18. (1) The Lieutenant Governor in Council may by order designate any heritage site whose preservation is in the public interest, together with such adjacent land as may be specified in the order, as a "Classified Heritage Site".

(2) The Minister shall

(a) serve notice of his intention to recommend the designation of any site as a Classified Heritage Site personally or by registered mail on the owner of the site as shown in the records of the Land Titles Office, and

(b) publish the notice of intention in the Alberta Gazette, at least 60 days prior to the date of making the recommendation.

(3) A notice under subsection (2) shall contain an adequate description of the site which is proposed to be designated so that it may be easily ascertainable and a statement

of the reasons for the proposed designation.

(4) Any interested person may, within 30 days of the publication of the notice in the Gazette, advise the Board that he wishes to make representations concerning the proposed designation.

(5) At the conclusion of the 30 day period the Board shall notify all persons who have advised the Board of their intention to make representations which shall be not less than 15 days prior to the date the Minister proposes making the recommendation and the Board may then confirm, reverse or vary its recommendation for the making of the order.

(6) If no representations are made or if the Board, after hearing any representations, confirms or varies its recommendation, the Minister may proceed to recommend to the Lieutenant Governor in Council that an order be made designating the area as a Classified Heritage Site and as soon as possible after the making of the order the Minister shall

(a) register a certified copy of the order in the appropriate Land Titles Office against the title or titles to the land affected by the designation, and

(b) cause a notice of the designation including an adequate description of the site to be published in the Alberta Gazette.

(7) The designation as a Classified Heritage Site is effective upon the registration of the order.

(8) Upon the registration of an order under subsection (6), no person may, notwithstanding any other Act, destroy, alter, restore, repair, disturb or change any Classified Heritage Site or remove any heritage object from a Classified Heritage Site without the written approval of the Minister.

(9) The Minister may, in his absolute discretion, refuse to grant an approval under subsection (8) or may make the approval subject to such conditions as he considers appropriate.

(10) The owner of any property comprising in whole or in part a Classified Heritage Site shall, at least 30 days before commencing any sale or other disposition of the property, serve notice of the proposed sale or other disposition upon the Minister and the owner may complete the sale after the 30 day period if the Minister has not within that period offered to purchase the property at its fair market price.

(11) In the event that the owner and the Minister cannot agree on the fair market price of any property under subsection (10), the matter shall be submitted to the Public Utilities Board for determination.

(12) Upon service of a notice of intention under subsection (2), the provisions of subsections (8) to (11) apply to the site as if an order had been made and registered, but such provisions shall cease to be applicable to the site at the expiration of 90 days unless the site is so designated by order of the Lieutenant Governor in Council within that period.

19. The Minister may

(a) make regulations governing standards or maintenance of Classified Heritage Sites, and

(b) by order require specific repairs or other measures to be made or taken to preserve any particular Classified Heritage Site.

20. (1) The Minister may issue archaeological research permits authorizing the person named therein to make excavations on a Registered Heritage Site or on a Classified Heritage Site or on any Crown land.

(2) No persons may make excavations on any lands in Alberta for the purpose of seeking

archaeological objects or remains without holding a valid and subsisting archaeological research permit.

. . . . .

22. (1) The Minister may authorize any person to enter, at any reasonable hour and after notice to the owner or occupant, upon

(a) any lands for the purpose of making surveys for or inspecting heritage sites which the Minister has reason to believe may qualify as a Registered Heritage Site or a Classified Heritage Site, or

(b) any Classified Heritage Site for the purpose of examining, surveying or recording the site or carrying out excavation and works required for the preservation or development of the site as a heritage resource.

(2) Where, in the opinion of the Minister, land contains or may contain heritage resources that are likely to be altered, damaged or destroyed by reason of any development or activity he may order a survey of heritage resources to be undertaken.

. . . . .

35. (1) Where the Minister is of the opinion that any person is engaged in an activity which he considers likely to result in damage or destruction to any site which could be designated as a Registered Heritage Site or as a Classified Heritage Site the Minister may issue an order (in this section called a "Temporary Stop Order") requiring that person to cease the activity or such portion thereof as the Minister may specify in the Temporary Stop Order for a period not exceeding 15 days.

(2) Where it appears that the site qualifies for designation as a Classified Heritage Site, the Lieutenant Governor in Council may, on the recommendation of the Minister, order suspension of the activity or any

part thereof for a further specified period in order to allow salvage, recording or excavation of the site and investigation of alternatives to its destruction including its designation as a Classified Heritage Site.

(3) Where any person feels himself aggrieved by an order issued pursuant to this section he may appeal to the Supreme Court by way of originating notice upon two days' notice and the judge hearing the application may confirm, vary or rescind the order appealed from.

36. The Minister may authorize the payment of compensation in accordance with the regulations to any person who has suffered loss as the result of the application of any provisions of this Act or the regulations.

37. (1) The Minister may make regulations exempting Classified Heritage Sites or Heritage Monuments from the application of any provision contained in any building code which would otherwise be applicable pursuant to any Act, regulation or municipal by-law where the enforcement of such provision would prevent or seriously hinder the preservation, restoration or use of all or any portion of the site or monument.

(2) A regulation under subsection (1) may be general or particular in application.

38. (1) Every person who contravenes any provision of this Act or the regulations, the conditions of any permit or any direction of the Minister under this Act is guilty of an offence and is liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months or to both fine and imprisonment.

(2) When a Classified Heritage Site is altered or destroyed in any way in contravention of any provision to this Act, the regulations or a direction of the Minister pursuant to this Act, the Minister may cause it to be restored and the Crown may recover the cost thereof from the person causing the alteration or

destruction by an action in debt.

(3) Where a Classified Heritage Site is altered or destroyed in contravention of any provision of this Act, the regulations or an order of the Minister pursuant to this Act in such manner that it is not possible to effect restoration the Crown may recover damages therefor from the person causing the alteration or destruction by action.

We have quoted at length from the Alberta Heritage Act because it is a very recent Act, (1973) and raises some questions that may become strong future issues as more legislation dealing with preservation of the enviroment, and greater control of land use arises. While authorization of payment of compensation is included in the Act (S36) and an appeal provision to the Alberta Supreme Court is included (S35(3)), we wonder what we would be able to recover if our property was in effect zoned as a Registered or a Classified Heritage Site. The use of our land is severely restricted, while we live on it but do not wish to sell. Is this a restriction that should be compensated or is it a fair use of the police power? We should compare this Act to the American Wetlands zoning cases dealt with later on.

G. The Department Of The Environment Act

Not unlike having your land zoned as a Registered or a Classified Heritage Site, under The Department of the Environment Act SA 1971 c.24 as amended SA 1972 c. 32 your land might be zoned as a "Restricted Development Area":

15. (1) The Lieutenant Governor in Council may by regulation establish any part or parts of Alberta as a "Restricted Development Area" (in this section called "the Area") upon the report of the Minister that the establishment of the Area is necessary in the public interest to coordinate and regulate

the development and use of the Area for the purpose of

(a) preventing, controlling, alleviating or stopping the destruction, damage or pollution of any natural resources in the Area, or

(b) protecting a watershed in the Area, or

(c) retaining the environment of the Area in a natural state or in a state suitable for recreation or the propagation of plant or animal life, or

(d) preventing the deterioration of the quality of the environment of the Area by reason of the development or use of land in the Area incompatible with the preservation of that environment

(2) Notwithstanding any other Act, where the Lieutenant Governor in Council establishes a Restricted Development Area, he may, in the same regulation or in any subsequent regulation, provide for

(a) the control, restriction or prohibition of any kind of use, development or occupation of land in the Area prescribed in the regulations;

. . . . .

(c) the removal of any buildings, improvements, materials or animals from the Area, and the payment of compensation by the Crown for any loss resulting therefrom;

(d) the control, restriction or prohibition of the dumping, deposit or emission within the Area of any substance specified in the regulations;

(e) the authorizing of the acquisition by purchase of expropriation by the Minister of any estate or interest in land in the Area;

. . . . .

(h) any other matter or thing necessary or incidental to the protection or improvement of the environment of the Area.

The Minister has the power to issue "stop orders" if one contravenes the Act (S16). Also, the Act enables the Lieutenant Governor in Council to make regulations with a wide-ranging potential affect on land use:

17. The Lieutenant Governor in Council may make regulations

(a) prohibiting, regulating or requiring the doing of any act for the purpose of preventing, alleviating or stopping soil erosion or anything detrimental to the protection or preservation of a watershed;

(b) requiring persons owing, possessing or having rights in respect of land to refrain from using that land in any manner detrimental to the environment of that land and other lands in the vicinity thereof;

(c) prescribing the duties of any person conducting sand or gravel removal operations, or any kind of operations that result in the destruction or disturbance of the surface of land, with respect to conservation of the soil and the reclamation of the surface of that land, and conferring powers on the Minister relating to such soil conservation and reclamation;

(d) controlling, restricting or prohibiting any actions of any person for the purpose of abating noise or controlling noise levels;

(e) authorizing the payment of compensation by the Crown to any person for loss or damage to that person as a result of the application of any regulation under this Act to him or an order under

this Act directed to him, prescribing the cases in which the compensation shall be paid and the loss or damage for which the compensation is to be paid, and conferring jurisdiction on the Supreme Court of Alberta, the district courts or the Public Utilities Board in connection with settlement of the compensation to be paid;

(f) authorizing the Minister to expropriate on behalf of the Crown any estate or interest in land if he considers it necessary to do so for the purpose of enforcing or carrying out the provisions of this Act or the regulations or an order under this Act;

. . . . .

Finally, the Act also makes provision for the abatement of nuisances:

10.1 (1) The Provincial Board may inquire into and hear and determine any complaint made by or on behalf of any person in respect of a nuisance.

(2) The Provincial Board may make a report upon such complaint and as to what remedial measures, if any, that it considers are required in respect of the nuisance complained of.

(3) Where the report of the Provincial Board recommends the removal of any thing causing a nuisance or the abatement of a nuisance, the Minister or the complainant may apply to the Supreme Court or to a district court by way of originating notice of motion for an order

(a) for the removal of the cause of the nuisance or abatement of the nuisance in terms of the report of the Provincial Board, and

(b) To restrain the persons from continuing the nuisance, or any other persons from continuing the acts complained of, until

the nuisance has been abated, or the cause of the nuisance removed to the satisfaction of the Provincial Board.

(4) The judge may, upon the report of the Provincial Board, or upon such further evidence as he thinks necessary, make such order and on such terms and conditions as he considers proper.

H. The Forest Reserves Act

One section of the Forest Reserves Act R.S.A. 1970, c. 146 as amended SA 1971 c. 37 states:

7. The Lieutenant Governor in Council may authorize the Minister

(a) to purchase, expropriate, or otherwise acquire lands within a forest reserve or adjoining a forest reserve,

(b) To exchange for land within or adjoining a forest reserve, any available public lands situated outside those boundaries of the forest reserve, and to pay compensation upon an exchange of land, and

(c) to prohibit or restrict the conduct of any business or commercial activity on any land situated within the boundaries of a forest reserve

I. The Line Fence Act

The Line Fence Act, R.S.A. 1970 c. 210 establishes that:

3. (1) Whenever two owners or occupiers of adjoining parcels of land desire to erect a line or boundary fence between

> the adjoining parcels for the common advantage of both of them they shall bear the expense of the erection, maintenance and repair of the fence in equal shares.
>
> (2) Whenever the owner or occupier of a parcel of land erects a line or boundary fence between the land and an adjoining parcel of land the owner or occupier of the adjoining parcel of land shall, as soon as he receives any benefit or advantage from the line or boundary fence by the enclosure of his land or any portion thereof or otherwise, pay to the first mentioned owner or occupier a just proportion of the then value of the line or boundary fence and thereafter the expense of maintaining and repairing the fence shall be borne by the adjoining owners or occupiers in equal shares. [R.S.A. 1955, c. 178, s. 3]

The settlement of disputes under the Act is provided for by an arbitration procedure (s.4).

J. The Litter Act

Generally speaking, under The Litter Act SA 1972 (6) no person shall dispose of litter on public land (S2) highways (S3) municipally owned land (S4) water or on ice (S6) and:

> S.5. No person shall dispose of litter on any land other than his own unless the owner or person in control of the other land agrees to its disposal.

Of most interest to the private owners of land is the provision in the Act dealing with unsightly property:

> S.8. In this part:
>
> . . . . .

(c) "unsightly property" means any property or part thereof upon which there is litter which causes the property or any part thereof to look unsightly."

9. (1) Subject to section 12, where an enforcement officer considers any property, when viewed from a highway, to be unsightly property, the enforcement officer may issue a clean up order.

(2) The clean up order shall be issued to

(a) the owner, or

(b) the person in control, of the property that is the subject of the clean up order.

(3) The clean up order may require the person to whom it is addressed, within a period of time which shall not be more than 60 days from the date of the making of the order,

(a) to remedy the condition of the property in a manner and to the extent directed in the order, or

(b) to demolish or remove any litter causing or contributing to the unsightliness of the property, or

(c) to construct any thing to prevent the property from being viewed from a highway, or

(d) to do any other thing to remedy the unsightliness of property, or

(e) to do all or any of the matters specified in clauses (a) to (d).

10. (1) The person to whom the clean up order is issued may, within 21 days of the date it is issued, request the Minister to review the order or any part thereof.

(2) Upon receiving a request for review, the Minister shall review the reasons for the clean up order.

(3) After conducting the review, the Minister may confirm, rescind or in any manner vary the clean up order.

11. (1) Where a person fails to comply with a clean up order, the Director may cause the condition of the premises to be remedied to the extent specified in the clean up order and charge the cost of the work done to the person to whom the clean up order was issued.

K. The Seed-Control Areas Act

Under the Seed-Control Areas Act, R.S.A. 1970 c. 335, after a group of occupiers of land have a meeting (S3) they may circulate a petition to send to the Lieutenant Governor in Council proposing the establishment of a seed-contr area (S4). The petition must be signed by 60% of the occupiers within the area (S5)(1). Futhermore:

5. (3) The Lieutenant Governor in Council by the order constituting the seed-control area, or by a subsequent order from time to time may

(a) prescribe any kind or variety of seed or crop as a seed or crop that may be grown within the seed-control area, or part thereof, and

(b) prohibit the growing of any designated kind or variety of seed or crop within the seed-control area, or part thereof.

. . . . .

9. (1) No person who is the occupier of land within a seed-control area shall grow or permit to grow on such land or any part thereof any kind or variety of seed or crop the growing of which is prohibited within that seed-control area by any order or regulation under section 5 or section 17.

Provisions for enforcement (S10-12), and appeal (S13-15) are included, and finally:

> 17. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent, the Lieutenant Governor in Council may make such regulations as he considers necessary or advisable.
>
> (2) Without limiting the generality of subsection (1), the Lieutenant Governor in Council may make regulations or orders
>
> (a) defining, redefining, reducing or extending the limits of a seed-control area,
>
> . . . . .
>
> (e) prohibiting the growing of a designated kind or variety of seed or crop within the seed-control area, or part thereof,
>
> (f) defining a variety area or areas within a seed-control area and prescribing the variety or varieties of seeds or crops that may be grown, or the growing of which is prohibited within a variety area so defined,
>
> . . . . .
>
> (i) requiring and compelling the occupiers of lands within a seed-control area to prevent the blossoming or maturing on the lands occupied by them of seed-bearing plants or crops that are injurious or that might become injurious to any seed grown in that area pursuant to this Act, . . .

L. The Special Areas Act

If an area is not part of a city, town, village, county, municipal district, or improvement district it may be formed into a "special" area under the Special Areas Act R.S.A. 70, c. 349. Included in the Minister of Municipal Affairs power is:

8. The Minister is hereby empowered in respect of special areas generally or in respect of any specified special area or any part thereof:

. . . . .

(5) to order and require any owner or occupant of lands to adopt such methods of farming or grazing, or farming and grazing, that he considers necessary to prevent soil drifting, water erosion, over-grazing, or any hazard that might jeopardize the economic security of residents of the special area;

. . . . .

Enforcement of an order and penalties for non-compliance are provided for in the Act (S9).

The power to enter any land within the area and construct necessary public facilities is potentially very wide under the Act:

11. (1) Any surveyors, engineers, agents and workmen employed by the Province may enter upon and occupy any land in a special area for the purpose of making examinations and surveys,

(a) to carry out any work or undertaking approved by the Lieutenant Governor in Council as a work or undertaking for the rehabilitation or betterment of the special area, and

(b) to construct thereon dams, ditches, weirs, spillways, roads and such other buildings, structures or erections as are necessary or incidental to the carrying out of any such work or undertaking or the maintenance thereof.

(2) Any land forming the site of any such work or undertaking, or that is used or occupied in connection therewith, shall be deemed to be the property of the Crown so long as it is required for the purpose of the work or undertaking.

(3) Where it is made to appear to the Minister that any right or property of any person has been detrimentally affected,

(a) by reason of any act or thing done pursuant to this section, or

(b) by the use or occupation of any land used or occupied in the exercise of any power conferred by this section, the Minister may, after making such inquiries as he deems necessary, allow the person such compensation that he in his discretion thinks proper, and any compensation so allowed shall be paid out of any moneys appropriated by the Legislature for the administration of this Act.

M. The Clean Air Act

Land use is regulated under the Clean Air Act SA 1971 c. 16 as amended 1972, c. 20, in a similar fashion as under the Clean Water Act. No person can commence construction of various kinds of industrial plants without submitting all plans and specifications to the Director of Standards and Approvals of the Department of Environment, who may demand necessary alterations to protect the environment, (S4). Once construction is complete, the landowner still needs a license to operate the plant (S4.1) and if at any time any alterations are made to it, he must again receive the blessing of the Director of Standards and Approvals. Like the Clean Water Act, provisions for control orders (S6) and stop orders (S7) are included in the Act as well as similar regulatory powers:

10. The Lieutenant Governor in Council may make regulations

. . . . .

(f) authorizing the payment of compensation by the Crown to any person for loss or

damage to that person as a result of the application to him of any provision of this Act or the regulations or as a result of an order directed to him under this Act, prescribing the cases in which the compensation shall be paid and the loss or damage for which the compensation is to be paid, and conferring jurisdiction on the Supreme Court of Alberta, a district court or the Public Utilities Board in connection with settlement of the compensation to be paid;

(g) authorizing the Minister to expropriate on behalf of the Crown any estate or interest in land if he considers it necessary to do so for the purpose of enforcing or carrying out the provisions of this Act or the regulations;

N. The Wilderness Areas Act

Because we will deal with the idea of a "new" philosophy of land at a later stage, it is important to include parts of the preamble to the Wilderness Areas Act SA 1971 c. 114, as an example of the kind of thinking used to justify the control of land use and development by government in the public interest:

> WHEREAS the continuing expansion of industrial development and settlement in Alberta will leave progressively fewer areas in their natural state of wilderness; and
>
> WHEREAS it is in the public interest that certain areas of Alberta be protected and managed for the purpose of preserving their natural beauty and primeval character and influence and safeguarding them from impairment and industrial development and from occupation by man other than as a visitor who does not remain; and
>
> WHEREAS to carry out those purposes it is desirable to establish and maintain

> certain areas as wilderness areas for the benefit and enjoyment of the present and future generations; . . .
>
> . . . . .

The Act establishes an "Advisory Committee on Wilderness Areas."

> 2. (7) The Advisory Committee shall accept requests from the public regarding wilderness areas and shall from time to time consider the requests and make recommendations to the Minister regarding
>
> (a) the establishment of a new wilderness area, or
>
> (b) the addition of lands to a wilderness area, or
>
> (c) withdrawing lands from a wilderness area, or
>
> (d) regulations for the management, operation and utilization of wilderness areas and controlled buffer zones.

The teeth of the Act, are the provisions for acquisition of land:

> 6. Where at the time any land is established as part of a wilderness area or is added to a wilderness area, a person other than the Crown holds any estate or interest in that land
>
> (a) the Minister shall acquire, or commence proceedings to expropriate, that estate or interest not later than one year after the date on which the land became part of the wilderness area, and
>
> (b) no person shall, within the wilderness area, construct an improvement or reconstruct or add to an improvement on

that land, or do any act that will alter or disturb the surface of that land, without the consent of the Minister.

The use of land within a wilderness area is, of course severely limited:

8. (1) No person shall

(a) travel in a wilderness area except on foot, or

(b) hunt or trap animals in a wilderness area, or

(c) fish in a wilderness area, or

(d) land an aircraft in a wilderness area, or

(e) deposit any litter, garbage or refuse in a wilderness area except in places provided and designated for that purpose, or

(f) unless authorized by the Lieutenant Governor in Council, remove any plant life or animal life (or bird eggs) or excavate or remove fossils or other objects of geological, ethnological, historical or scientific interest in a wilderness area, or

(g) take into or use in a wilderness area a horse or pack animal or any motorized vechile.

Finally, a 1972 amendment allows the Lieutenant Governor in Council to establish areas of land adjoining a wilderness area as a controlled buffer zone with similar restriction on development.

O. The Surface Rights Act

The Surface Rights Act SA 1972 c. 91 as amended

SA 1973 c. 34 establishes the Surface Rights Board (S3) which may inter alia:

> 8. (b) enter upon and inspect, or authorize any person to enter upon and inspect, any land, building, works or other property.

The Board deals with the granting of rights of entry in respect of the surface of land for mines, minerals, oil and gas, and other operations.

> 15. (1) Where the surface of any land required by an operator for any of the purposes mentioned in this Act is owned by the Crown or any other person, and the operator cannot acquire by agreement a right of entry upon the surface of the land required by him, the operator may make application to the Board for right of entry in respect of the surface of such land as may be necessary for the efficient and economical performance of his operations.

Provisions for a hearing (S17) and the granting of an immediate right of entry in certain situations (S18) are set forth. The jurisdiction of the Board generally includes:

> 19. The Board in a right of entry order
>
> (a) shall determine what portion of the surface of the land the operator requires for or incidental to the efficient and economical performance of the operations, and
>
> (b) may prescribe such other conditions as the Board considers necessary in connection with the granting of the order.

The rights conferred upon someone who has a right of entry order has a direct effect on the law dealing with the subsurface rights and support rights, which we dealt with

earlier.

20. (1) A right of entry order is deemed to vest in the operator,

(a) unless otherwise provided in the order, the exclusive right, title and interest in the surface of the land in respect of which the order is granted other than

(1) the right to a certificate of title issued pursuant to The Land Titles Act, and

(2) the right to carry away from the land any sand, gravel, clay or marl or any other substance forming part of the surface of the land, and

(b) to the extent necessary for his operations the right to excavate or otherwise disturb any minerals within, upon or under the land without permission from or compensation to the Crown or any other person with respect to such minerals.

(2) Where an operator in his application represents that subsidence of the surface of the land may result from the mining of coal, the order of the Board may grant the right to disturb or interfere with the surface of the land irrespective of whether or not the operator will enter upon the surface in conducting his operations.

Compensation orders to the landowner or occupiers are provided for:

23. (1) Where a right of entry order is granted, the Board shall also determine the amount of compensation payable and the person to whom the compensation is payable.

(2) The Board, in determining pursuant to subsection (1) the amount of compensation payable, may consider

(a) the value of the land,

(b) the loss of use by the owner or occupant of the area granted to the operator,

(c) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,

(d) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and

(e) such other factors as the Board considers proper under the circumstances.

(3) In making a compensation order, the Board may also determine the amount of compensation payable by the operator

(a) for damage caused by or arising out of the operations of the operator to any lands of the owner or occupant other than the area granted to the operator, if those operations were incidental to the operations of that operator on the area granted to him under the right of entry order

(b) for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the operator;

(c) for time spent or expense incurred by the owner or occupant in recovering any of his livestock which have strayed due to the act or omission of the operator; and shall direct the person to whom the compensation is payable.

Appeal procedures are included (S24) as well as provisions for the termination of right of entry orders (S25). Generally:

32. A person, who in the exercise of a right of entry, enters upon, uses or takes any of the surface of land in contravention of any of the provisions of this Act

(a) shall be deemed to have committed a trespass thereby, and

(b) is liable in damages or otherwise for the trespass to any person who is the owner or the occupant entitled to the possession of the surface of the land.

P. The Weed Control Act

The gist of the Weed Control Act SA 1972 c. 96, is that weed inspectors (S2,S5) are empowered to:

14. . . . , with or without warrant, enter at any reasonable hour upon any land or premises, other than a dwelling house, without the consent of the occupant or owner, and may inspect the land or premises or any crops, hay, grain, fodder, screenings, machine, grain elevator, crop processing plant or equipment thereon or therein.

15. (1) An inspector who finds any noxious weeds or weed seeds in or on any land, premises, vehicle, crop, hay, grain, fodder, machine, grain elevator, crop processing plant or equipment therein or thereon may give a notice in writing to the person who is under the duty imposed by this Act to destroy the noxious weeds or weed seeds and any crops containing the noxious weeds or weed seeds.

(2) Each notice shall specify when and by what method the weeds or weed seeds named are to be controlled or destroyed and such method may include such definite systems of tillage, cropping and management as in the inspector's judgment constitute good agricultural practice for the land and district concerned.

Futhermore:

19. Where a person fails to comply with any notice issued by an inspector, the inspector may cause the noxious weeds or weed seeds to be destroyed by any means consistent with good agricultural practice.

20. (1) Where an inspector finds noxious weeds or weed seeds on any land, he may, in order to effectively destroy the noxious weeds or weed seeds, issue a notice prohibiting the occupant or owner of any land from sowing a crop of any kind on the land.

(2) A notice issued under subsection (1) shall cease to have effect three years following date of issue, unless it is sooner rescinded by the inspector.

. . . . .

27. Every occupant of land, or, if the land is unoccupied, the owner thereof, shall destroy all noxious weeds and weed seeds growing or located thereon as often as may be necessary to prevent the spread, growth, ripening and scattering of noxious weeds or weed seeds.

. . . . .

Finally:

32. No person shall move or cause to be moved any machine or vechile if such movement is likely to cause the spread of noxious weeds or weed seeds.

33. No person shall deposit or permit to be deposited any weed seeds or material containing weed seeds in any place where they might grow or spread.

34. Every person who has in his possession screenings or other refuse containing weed seeds shall handle them in such manner as to prevent their being scattered by any means whatsoever and store them in bins or containers constructed in such

manner that they are securely confined therein.

35. Every person who has in his possession or under his control screenings or other refuse containing weed seeds that are not kept as required by section 34 shall destroy them or deposit them at a disposal site provided by the municipality.

Q. The Land Surface Conservation and Reclamation Act

A whole battery of surface operations are regulated in Part Two of the Land Surface Conservation and Reclamation Act SA 1973 c. 34, a section entitled "Approval for Regulated Surface Operations." However, farmers at the present time are not affected:

2. (3) Part 2 does not apply to any agricultural operation or activity and the Lieutenant Governor in Council has no power to designate any kind of agricultural operation or activity as a regulated surface operation pursuant to that Part.

The first part of the Act has several provisions of interest, however:

7. (1) The Minister may enter into an agreement on behalf of the Government with an owner of land to restrict the purposes to which that land may be used by that owner and his successors in title in consideration of the payment by the Government of the compensation specified in the agreement.

(2) An agreement under this section may be for a specified term or of indefinite duration.

(3) An agreement under this section may be registered under The Land Titles Act.

(4) Upon the expiration or termination of an agreement registered under The Land

Titles Act pursuant to subsection (3), the Registrar of Titles shall, upon being directed to do so by the Minister, cancel the registration of the agreement.

8. (1) Where any person proposes to undertake any operation or activity and, in the opinion of the Minister, the operation or activity will result or is likely to result in surface disturbance, the Minister may order that person to prepare and submit to the Minister within the time prescribed in the order, a report containing an assessment of the environmental impact of the proposed operation or activity where the Minister considers it in the public interest to do so.

(2) An order of the Minister under subsection (1) may require that the report contain an assessment of the impact of the proposed operation or activity on all or any of the following, namely,

(a) the conservation, management and utilization of natural resources;

(b) the prevention and control of pollution of natural resources;

(c) the prevention of noise and the control of noise levels resulting from the operation or activity in so far as they affect the environment in the vicinity of those operations or activities;

(d) economic factors that directly or indirectly affect the ability of the applicant to carry out measures that relate to the matters referred to in clauses (a), (b) and (c);

(e) the preservation of natural resources for their aesthetic value.

(3) An order of the Minister under subsection (1) may require that the report show any alternative means by which the proposed operation or activity could be carried out.

(4) A report under subsection (1) shall be prepared and submitted in accordance with

the regulations or, in the absence of regulations, in accordance with the directions of the Minister.

(5) This section applies whether or not the proposed operation or activity is the subject of an application for an approval under Part 2.

(6) Any person who fails to comply with an order of the Minister under this section is guilty of an offence.

Once again, we see provision for the issuance of "stop orders" (S(9)).

Part Three of the Act deals with reclamation orders and certificates issued to persons who hold a surface lease or right of entry order. (Remember the Surface Rights Act we noted earlier). Finally the Act regulates the activities of certain groups of people who have the use of land:

32. (1) . . . this Part applies to land that is being or has been used for or in connection with, or is being held or has been held incidental to or in connection with,

(a) the drilling, operation or abandonment of a well, or

(b) the construction, operation or abandonment of a pipe line, battery or transmission line, or

(c) the opening up, operation or abandonment of a mine or quarry, or

(d) the opening up, operation or abandonment of a pit or of a waste disposal site or land fill site, or

(e) the conduct of geophysical operations, or

(f) any other operation or activity designated as a regulated surface operation under Part 2, or

(g) the construction, operation or abandonment of an extra-territorial undertaking.

. . . . .

39. (1) Where the Council is authorized to make a reclamation order under this Part, the order may direct the performance of any work that is necessary in the operation of the Council to do any or all of the following in respect of the land that is the subject of the inquiry by the Council:

(a) subject to subsection (3), to condition, maintain or reclaim the land or any part thereof, and land adjacent thereto, or

(b) to destroy or prevent the growth of noxious weeds or weed seeds, or

(c) to remove or remedy any hazard to human life, domestic livestock or wildlife, or to the conduct of agricultural or other operations, or

(d) to install or repair any fence, gate, cattle guard, culvert or other thing.

. . . . .

49. (1) Notwithstanding anything in any other Act or in any surface lease or right of entry order

(a) no surrender of a surface lease is effective or binding on any person, and

(b) no expropriation board shall order the termination of a right of entry order, insofar as the surrender or termination relates to any interest of the owner until a reclamation certificate has been issued in respect of the land affected by the surrender or termination.

R. The Soil Conservation Act

The Soil Conservation Act R.S.A. 1970, c. 348 empowers the Minister of Agriculture or municipal districts themselves, that is, not only cities and towns but also counties, improvement districts and special areas and so forth, to appoint soil conservation officers (S3) with powe to issue "notices" to land owners or occupiers which require such persons to take action to prevent soil deterioration (S5). If the municipality has an Agricultura Services Board, then the matter will be referred to the Board for action. (we have dealt with the Agricultural Service Board Act earlier). Provisions for the appeal of a "notice" exists (S.7, S.8, S.9) but if the person does nc comply with a notice, "an officer or person duly authorized by him may enter upon the land affected and perform the required work," (S10) which will be charged against the landowner or occupier. Finally we notice:

> 11. A council, by by-law, or in the case of an improvement district or special area the Minister of Municipal Affairs, by order, may provide for all or any of the following:
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> (a) a system of permits controlling the removal of top soil from land;
>
> (b) a system of permits controlling the burning of stubble on land;
>
> (c) the terms and conditions under which a permit may be issued, suspended, reinstated or revoked;
>
> (d) the prohibition of the removal of top soil or the burning of stubble on land [1962, c. 84, s. 11]

S. The Fire Prevention Act

The Fire Prevention Act, R.S.A. 1970, c. 144 gives fire officials a right of entry to inspect premises (s. 19). After inspection an "order" may be made requiring the owner of the premises to do whatever is necessary to make the premises safe, including an "order" if necessary that the owner must remove or destroy the building or structure s.21(1)(a)(i). The fire officials themselves may carry out the order if the owner or occupier does not do so (s22(4)). Appeal provisions are included in the Act (s23,24).

IX

ALBERTA LAND USE PLANNING LAW

A. Introduction

The constitutional basis of land use planning law in Canada is centered largely around the provincial powers delineated in section 92 of the B.N.A. Act, such as subsections (8), municipal constitutions, (10) local works and undertakings, and (13), property and civil rights. The authority over property and civil rights has been held to carry with it the power to destroy or interfere with respect to property in the Province without the necessi of having to pay compensation. (Township of Sandwich East v. Union Natural Gas Co. (1924) 56 O.L.R. 399). Of course, we must keep in mind that a government is ultimately responsible to its people, however much theoretical power it has.

Any municipal land use planning power is exercised by way of delegation from the provincial government. A municipal corporation, being created by statute, has only such authority as is given by statute. (Swift Current v. Le [1920] 1 WWR 467 (C.A.)). Thus, we must look at the present Alberta Planning Act to find the broad outline of the kind of social control over property presently exercised here. A detailed look at the Expropriation Act will not be attempted and the reader is advised to consult the Alberta Law Institute of Research and Reform's "Expropriation Report."

B. The Alberta Planning Act

1. Introduction

We will recall from our historical outline that Alberta planning legislation began in 1913, and new acts were

passed in 1922 and 1928, with zoning beginning in 1929 when the "Town Planning Act" was passed. The crises of the 1930's led to rural land - use planning and during this period the Prairie Farm Rehabilitation Act was passed in 1935, the Special Areas Act of Alberta in 1938, and the Agricultural Service Board Act in 1945.[135] Numerous amendments to the "Town Planning Act" were made in the thirties until a major revision took place in 1942. The radical change, however, occurred in the amended Act of 1950, when interim development control, borrowed from Britain was introduced, as well as provisions for the formation of District Planning Commissions. Thus, a clear recognition was made that land use planning was not something that could be confined within a local municipality, but was rather interrelated with outside areas and developments. This change in philosophy in the Act was largely a response to the urban flood released by the development of our oil and gas resources.

The Planning Act was rewritten in 1953 and in 1956, with amendments in between those periods until the Planning Act was passed in 1963 from which our present Act has evolved.[136]

The Planning Act of Alberta is unique because it combines zoning powers with development control powers. Zoning, as we have indicated, creates a number of land use categories and then prescribes the uses and manners of uses permitted in each. Development control, however, deals with the examination of an individual proposal for development on its own particular merits within the framework of a general plan. Development control power can be flexible,

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[135] See Gertler, supra n. 3.

[136] See Noel Dant, supra n. 82.

efficient, and provide tighter control for a municipality. On the other hand, Makuch has pointed out that:

> the more detailed control of the form and nature of development harbours increasing dangers because it relies more on the technocrats and experts, and because the more important decisions are being made by experts in consultation with developers without public scrutiny or consideration.[13

To rely purely on zoning can be disastrous as we shall see wh we study the American situation. However, one advantage of zoning is supposedly the certainty that it provides for the landowner. The landowner can supposedly know what use he car make of his property. On the other hand, planning where some thing goes and is getting into the planning of the whole form or nature of development as well,[138] and the old zoning system has become very inadequate. So, in Alberta a hybrid system is set up under the Planning Act. Makuch concludes:

> It thus produces a sophisticated system where Euclidian zoning can be used for the preservation or protection of developed areas and where development control can be used in areas that are undergoing development that the city wishes to control.[13

We realize, of course, that a new Planning Act is being proposed and issues such as the desirability of regional gove nments, and metropolitan planning commissions controlled by the provincial government over and above local government power, and so forth, are being presently discussed by the pul

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[137] Stanley M. Makuch, Zoning: Avenue of Reform (1973) 1 Dalhousie Law Journal at 318

[138] Id. at 295

[139] Id. at 326

2. Authorities and Agencies

The Planning Act, R.S.A. 1970, c. 276 as amended SA 1971 c. 84, SA 1972 c. 76, c. 89, and SA 1973 c. 43, sets forth its own purpose in section three:

> 3. The purpose of this Act is to provide means whereby plans and related measures may be prepared and adopted to achieve the orderly and economical development of land within the Province without infringing on the rights of individuals except to the extent that is necessary for the greater public interest.

The Act is divided up into five parts, namely: "Authorities and Agencies" "Subdivision of Land", "Regional Planning", "Municipal Planning" and finally, a section dealing with miscellaneous matters.

The first authority established is the Provincial Planning Board (S.5(1)) headed by the Provincial Planning Director (S4) and a chairman and deputy chairman and other appointed members (S5(2)). Any order, direction, approval or other instrument that the Board is to make, can also be made individually by any member of the Board without calling a meeting (S5(b)). Besides a number of advisory, study, and information collection functions (S6(4)), the Board also hears, decides, and issues orders respecting appeals coming within its jurisdiction (S6(2)(a)). The Board is the highest and final appeal (6(3)(6)) outside of certain questions under section 146 which may be taken to the Appellate Division of the Supreme Court of Alberta. The Board may make inquiries, holding the powers of a commissioner under the Public Inquiries Act (57(2)) and is not bound by the rules of evidence (S7(4)). Dant states that a summary of judicial cases indicates that the Planning Board acts in

a quasi-judicial and not administrative capacity.[140]

The second authority established in the Act, is the Regional Planning Commission which may be established (not mandatory) by order of the Lieutenant Governor in Council (S8), who also appoints the members for the Commission (S9(1)) subject to limited municipal representati for organizational, annual, (S9(2)) and certain planning meetings. The setting up of these regional commissions is an acknowledgement that "effective planning cannot be carried on by local governmental units in isolation from each other."[141]

The regional planning commissions are funded by the Alberta Planning Fund to which the municipalities within the region contribute by mill rate assessment (S11).

We should get it straight from the beginning that while we might think of municipalities as simply towns or villages, a "municipality" in the Planning Act means a "city town, village, summer village, new town, municipal district, county, special area or improvement district." (S2(J1)). Th various municipal councils within the district may delegate planning or development supervision to the Commission if the supervision involves two or more municipalities (S13).

Basically, the functions of a particular commissio are to study the region, prepare a preliminary regional plan for purposes of development control while a regional plan is being prepared, and advise and assist municipalities with their planning, development control, and zoning powers; (S14(1)); but most importantly, a commission:

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[140]Dant supra n. 82.

[141]Frederick A Laux, The Zoning Game: Alberta Sty (1971) 9 Alberta Law Review. at 270.

14.2 (c) shall exercise such rights and powers and perform such duties relating to the planning and control of development that are

(1) vested in it by the Lieutenant Governor in Council, or

(2) assigned to it by order of the Board in connection with the administration of The Subdivision and Transfer Regulations made under this Act, or

(3) delegated to it by resolution of the council of a municipality represented on the commission,

As we mentioned earlier, these commissions were originally empowered to be established in 1950. There are seven separate such Regional Commissions as of today, covering roughly half of the province and 86.4% of Alberta's total population.[142]

The third group of authorities created under the Act, are the Municipal Planning Commissions which "may" (again, not mandatory) be established through a by-law of a municipal council (S15). Such a commission serves as a subdivision approving authority (15(2)(3)(a)) and performs development and zoning supervision if the municipality assigns such authority to it.

3. Subdivision of Land

The second part of the Act, dealing with subdivision of land, begins with a comprehensive statement which lays down the framework for the whole subject:

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[142] Dant supra n. 82 at 74.

16. Land shall not be subdivided unless

(a) the land, in the opinion of the approving authority is suited to the purpose for which the subdivision is intended and may reasonably be expected to be used for that purpose within a reasonable time after a plan or other instrument effecting the subdivision is registered,

(b) the proposed subdivision conforms to any existing general plan, preliminary regional plan, regional plan, replotting scheme, development scheme or uses of land prescribed in (a)

(c) the proposed subdivision conforms to any proposed general plan, preliminary regional plan, regional plan, replotting scheme, development scheme or zoning by-law which will affect the land or adjacent land or is in conformity with a logical extension thereof,

(d) the proposed subdivision complies in all respects with this Act and The Subdivision and Transfer Regulations, and is approved in the manner prescribed by those regulations,

(e) the person proposing the subdivision provides, if required by the municipalit for installation and construction at his own expense of all necessary public roadways, sidewalks, curbs, culverts, drainage ditches, utility systems, and other public facilities that may be required of him under The Subdivision and Transfer Regulations, and

(f) all outstanding property taxes on it have been paid to the municipality in which the land is situated or arrangemen satisfactory to the municipality have been made for the payment thereof.

The subdivision and transfer regulations mentioned in subsection (d) may be made by the Lieutenant Governor in

Council (17(1)) and would include procedural rules (17(2)(a)) and rules dealing with dimension of lots and width of streets, and so forth (17(2)). Of interest to farmers, perhaps, is the provision inter alia that the Act does not apply if the development or subdivision is effected solely for the purpose of providing for drainage ditches, irrigation ditches and irrigation canals (18(1)(b)). Other exceptions are contained in section 18 and it is noteworthy that the Peace River Task Committee on Regional Planning Effectiveness recommended that the section be deleted or revised so that planning could be more effective.[143]

Once a person decides to subdivide his land, he must apply for approval to the municipal planning commission of Edmonton or Calgary if the land lies within the corporate limits of either (19(2)(a)), to a regional planning commission if the Provincial Planning Board has so empowered it, (19(2)(b)) and in all other cases directly to the Provincial Planning Director. If an application is refused, a six month waiting period exists before one can reintroduce a similar application (S19(3)). A total of 765 applications to subdivide land situated outside the seven established regional planning areas were received in 1973, an increase of 17.25% over 1972. Significantly, only 4.6% of these applications were refused.[144] The applicant has a right to appeal to the Provincial Planning Board (S20(1)) which holds a hearing (20(3)). In a 1971 amendment, however, the scope of the right to appeal was narrowed to cases of conditional approvals and refusals for reasons other

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[143]See The Role of Regional Planning, Task Force on Urbanization and the Future, 1971.

[144]Alberta Municipal Affairs, Annual Report, 1973 at 36.

than nonconformity to existing zoning, or planning schemes (S20(1)(a)&(b)).

Thus if your development scheme falls through because it doesn't conform to the regional plan you cannot appeal to the Board. Provisions are made on appeal to hear from the Commissions, either municipal or regional, which refused the application. The Board is given a great deal of discretion:

> 20. (5) In determining an appeal, the Board is not bound by The Subdivision and Transfer Regulations, and
>
> (a) may confirm, reverse or vary the decision appealed from and may impose such conditions or limitations as it considers proper and desirable in the circumstances, . . .

Even the commissions themselves can waive a particular subdivision and transfer regulation for an applicant if they get approval from the Board (S21).

If approval is given, the applicant must submit a more formal subdivision plan within the year (S22(1)) and have it approved by the municipal or regional authority and the plan must in all cases be endorsed by the Provincial Director of Planning (S22(3)). If the Director is of the opinion that a plan of subdivision does not conform to the earlier approved application, he reports to the Board which after giving the applicant an opportunity to be heard, endorses or refuses to endorse, or defers the decision, or imposes any further alterations upon the application (S22(5) When one subdivides his land, he must provide without compensation public roadways and utility parcels (S25(1)(a)) and such reserved land as may be required (S25(1)(b)), but the reserved land can not be more than 10% of the land being subdivided (S25(2)) unless parts of the land in the opinion of the approving authority are unsuitable for building upon,

and these parts can be required as reserves regardless of the 10% stipulation (S25(3)). The proposals in the working paper on a new Planning Act would change the maximum to 15% instead of the 10% presently included in the Act.[145] A 1971 amendment includes the provision for public use of shoreland:

> 25. (4) Notwithstanding subsection (2), where land adjoining the bed and shore of a lake, river, stream or other body of water is to be subdivided, the owner shall provide from that land without compensation the following reserves in lieu of the reserves to be provided under subsection (2), namely,
>
> (a) a strip of land not less than 10 feet in width throughout lying between the boundary of the bed and shore and the boundary of the land that will be retained by the owner, and
>
> (b) a parcel fronting on the bed and shore and having an area equivalent to 10% of the area of land being subdivided.

A 1973 amendment, furthermore, makes provision for the acquisition of land by a municipality through purchase, lease, license, or expropriation within a proposed subdivision "for the purpose of public parks, school sites, public recreational areas . . . " (S25(5). The provision for reserves may be deferred (S26(1)(a) or waived in return for a monetary sum paid to the municipality (26(1)(b)) or wholely abandoned (S26(1)(c)). As for the use of a

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145 Towards a New Planning Act for Alberta, Alberta Municipal Affairs, 1973.

reserve:

> 26.1 (1) A reserve shall be used by a municipality only for the following purposes:
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> (a) a public park;
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> (b) a public recreation area;
>
> (c) a school site or part thereof . . .
>
> (d) a planted buffer strip separating an industrial area from a residential area.

Complicated provisions are included in the Act for disposal of a reserve if it is not going to be used for one of the above mentioned purposes (S26.2).

Other provisions in the second part of the Act include the following: removal of dwellings from unsubdivide non-agricultural land, replotting schemes, compulsory subdivisions, and zoning caveats.

Briefly, if one has land which is not used for agriculture, one cannot erect more than one dwelling house on it (S27(1)).

The purpose of replotting schemes is summarized in section 28:

> A council may authorize the preparation of a scheme to be known as a replotting scheme for the purposes
>
> (a) of cancelling an existing subdivision or a part thereof or consolidating any parcels of land in a subdivision into one area of land,
>
> (b) of making a new subdivision to be registered in place of the cancelled subdivision or the parcels consolidated, and
>
> (c) of redistributing the newly subdivided land among the owners of the lands affected by the scheme.

Costs of replotting are apportioned between the municipality and the owners of land affected (S29), and the schemes are controlled by regulations made by the Lieutenant Governor in Council. (S30-31) A scheme must have majority approval from a council and 60% approval from the owners of land concerned (S33). If one does not consent and the scheme goes through, provisions for compensation are included in the Act. A landowner may apply for and receive compensation as fixed by the Public Utilities Board (S38) after a hearing (S39) on the basis of:

> 40. (1) (a) loss of or damage to or the cost of moving buildings or improvements upon the former parcel,
>
> (b) loss of income from the use of buildings, or depreciation in the previous value or usefulness of any land, building or improvement caused by the carrying out of the replotting scheme, . . .

Section 43 states that "no person is entitled to compensation by reason only of the adoption and carrying out of a replotting scheme." The case of Coldbar Developments Ltd. v. Edmonton (1969) 7 DLR (3d) 629 (Alta. C.A.), however, established that a Council may not approve and adopt only a portion of the scheme, leaving for future consideration the question of whether it will approve and adopt the balance.

The subject of Compulsory Subdivision under the Act is summarized in section 53:

> 53. (1) Where an unsubdivided parcel of land is occupied by two or more occupiers of separate premises thereon, the council of the municipality within whose jurisdiction the parcel is situated may, subject to the approval of the Board, serve upon the registered owner of the parcel a notice in writing requiring him to apply under The Subdivision and Transfer Regulations for approval of a

subdivision of the parcel within such period of time of not less than one month, as may be specified in the notice and to register an approved plan of subdivision in the land titles office.

(2) The council shall file a certified copy of the notice in the land titles office and the Registrar shall endorse a memorandum thereof upon the certificate of title of the parcel to which the notice relates.

Failure to subdivide by the owner leads to subdivision by the council on his behalf (S55).

If subdivided lands are not within an area subject to zoning by-laws, the Provincial Director of Planning, subje to zoning caveat regulations made by the Lieutenant Governor in Council (S58) may "by means of a zoning caveat regulate the uses to be made of the lots and parcels within the subdivision" (S59).

4. Regional Planning

Part three of the Alberta Planning Act deals with regional planning. We have mentioned the constitution of a regional planning commission under the first part of the Act. If two-thirds of the municipalities represented on such a commission agree, a regional plan "may" (again notice, that it is not mandatory) agree to propose and adopt a regional plan. A regional plan is a complex document, with a host of land-use provisions:

69. A regional plan

(a) shall be prepared under the direction of qualified planning officers or qualified planning consultants who shall be appointed by and be responsible to the commission,

(b) shall be prepared on the basis of surveys and studies of land use,

population growth, the economic base of the regional planning area, its transportation and communication needs, public services, social services and such other factors as are relevant to the preparation of a regional plan,

(c) shall include

(1) a map showing the division of all or part of the land in the regional planning area into areas of permitted land use classes or permitted densities of population, or both as the commission considers necessary for the purposes of the regional plan,

(2) a schedule prescribing the uses of lands and buildings or population densities, or both to be permitted within each of those areas,

(3) proposals relating to the provision of highways, public roadways, services, public buildings, schools, parks and recreation areas and the reservation of land for these purposes,

(4) a schedule setting out the sequence in which specified areas of land may be developed or re-developed and in which the public services and facilities referred to in subclause (3) should be provided, and

(5) proposals relating to the financing and programming of public development projects and capital works to be undertaken by the municipalities or other public authorities having jurisdiction within the regional planning area, and

(d) may include

(1) proposals to facilitate the development of industrial enterprises especially adapted to the economic base and resources of the regional planning area, and

(2) such written statements, reports, charts and drawings as may be necessary to express and illustrate the proposals contained in the regional plan.

It is hoped that some regional plans will be completed in 1974.[146]

Development control and zoning powers may be exercised during the period while the plan is being prepared (S70) by the adoption of a preliminary regional plan (S71), consisting of:

72. (a) a map showing the regional area or part thereof divided into such areas of permitted land use classes or permitt densities of population, or both as the commission considers necessary for the purposes of the preliminary regional plan, and

(b) a schedule prescribing the uses of lands and buildings or population densities, or both, permitted within each area in the same manner as may be prescribed in a zoning by-law, and may include general proposals for the development and improvement of public roadways in the regional planning area.

People within a particular area must be given notice of the intended adoption of a plan (S5) and a public hearing must be held (S76). A regional plan or a preliminary regional plan comes into effect upon being approved by the Provincial Planning Board (S78).

Once a preliminary regional plan or a regional

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[146] Municipal Affairs, Supra n. 143.

plan comes into effect, municipalities within the region must by development contract and zoning by-laws give effect to the plan (S79). Section 91 states:

> 91. Any zoning by-law, development control by-law, development scheme, general plan, or replotting scheme prepared and adopted or confirmed, and any action taken or powers exercised by a council pursuant to Part 4 shall be in conformity with any preliminary regional plan or any regional plan that is being prepared or has been adopted under this Part and is subject to any conditions or restrictions imposed under this Part.

Planning is not a static process, and amendments to plans can take place;

> 82. (1) A council may submit to a commission a written request for an amendment to a regional plan or a preliminary regional plan, together with a statement of the particulars of the proposed amendment and the reason the amendment is requested.
>
> (2) A commission may of its own motion propose an amendment to a regional plan or preliminary regional plan.

and a complete review of the plan must be made every five years (S83). Those municipal Councils within a region which would obviously be greatly affected by the adoption of a preliminary regional plan or a regional plan have a right to appeal such adoptions to the Provincial Planning Board. Likewise when a Council has failed to carry out development control or zoning activity according to the regional or preliminary plan, the Regional Planning Commission may appeal to the Provincial Planning Board. Powers of the Board on such an appeal are laid out in section 89:

> The Board, in disposing of an appeal,

having regard to this Part, to the general scope and intent of the regional plan or preliminary regional plan, and to the merits and circumstances of the particular case, may

(a) settle the content of a preliminary regional plan or regional plan and of any by-law made in conformity therewith by a council,

(b) determine whether a by-law, action or public work of the public authority, as in effect or as proposed, conforms to a preliminary regional plan or a regional plan,

(c) determine whether a council is conforming to enforcing, or properly administering a preliminary regional plan or regional plan and the by-laws relevant thereto,

(d) require a commission to amend a prelimin regional plan or regional plan, and

(e) require a council to adopt, amend, enforce, or administer a by-law in a manner that will cause conformity with a preliminary regional plan or regional plan.

Finally, it is noteworthy that no person is entitled to compensation by reason of the adoption or the carrying out of a provision of a regional plan or a preliminary regional plan (S92).

While we have noted that regional plans may be completed in 1974, the Task Force on Urbanization and the Future noted in 1971 that preliminary regional plans would be completed by January 1, 1972.[147]

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[147]Task Force on Urbanization and the Future, Task Committee Reports, 1972, at 101.

An amendment to the Planning Act in 1973, included provisions for airport zoning. Thus, the Lieutenant Governor in Council may establish any part of Alberta as an "airport vicinity protection area" in the public interest for the protection of promoting the health, safety, and general welfare of users of land situated in the vicinity of an airport (S93.1). Regulations controlling, regulating or prohibiting any use and development of land within such a vicinity may be made (93.2(1)) and such orders take precedence over existing zoning or development controls or regional or general plans, and so forth (S93.3). Basically, a regulation may prescribe:

93.2 (2)

(a) areas or zones of land use, classes of such number, shape or size as is considered advisable;

(b) the uses of land and buildings that are permitted, conditionally permitted or prohibited in such areas or zones;

(c) the maximum heights, bulk, material and orientation of buildings and any other development that may be permitted in such areas or zones;

. . .

No provision for compensation is added.

5. Municipal Planning

The fourth part of The Planning Act deals with municipal planning. It is provided that a council may, (again, not "must") prepare a general plan describing the manner in which the future development or re-development of the municipality may best be organized and carried out, having regard to consideration of orderliness, economy and convenience. (94(1)) The general plan may include land out-

side of the immediate municipality (S94(2)) with conflicts between municipalities resolved by the Provincial Planning Board and the Minister of Municipal Affairs (S94(3)(4)(5)). The requisites of a general plan are similar to the provisions included earlier, on a regional plan (S69). The general plan must be prepared by qualified planners and municipalities can request that the plan be made by the Regional Planning Commission (95(a)). Proper preliminary studies must be made (S95(b)) and the general plan shall include inter alia:

> (c)
>
> (1) a map showing the division of all or part of the land that is to be included in the general plan into areas of permitted land use classes that the council considers necessary for the purposes of the general plan,
>
> (2) proposals as to the content of a development control by-law or a zoning by-law,
>
> (3) proposals relating to the provision of public roadways, services, public buildings, schools, parks and recreation areas and the reservation of land for these and other public and community purposes,
>
> (4) a schedule setting out the sequence in which specified areas of land may be developed or redeveloped and in which the public services and facilities referred to in subclause (3) should be provided in specified areas, . . .

The plan is adopted by by-law (S96) and the council must review the plan every five years, (S97). Once a general plan is adopted, the council may exercise development control or must pass a zoning by-law if development control is not

exercised (S98(1)). Futhermore, once the general plan is adopted, within a reasonable time, the council must bring its existing zoning by-law into conformity with the general plan. While the plan is being prepared, the council must apply to the Minister of Municipal Affairs "for an order authorizing the exercise of development control in the areas included or to be included in the general plan or parts thereof." (S100(1)). Basically, (S100(2):

> (2) Control shall be exercised over development on the basis of the merits of each individual application for permission to carry out development, having regard to the proposed development conforming with the general plan being prepared or as adopted.

Where the general plan spans more than one municipality, joint development control is exercised (S100(3)). To exercise development control council must receive a development control order from the Minister of Municipal Affairs made upon the report of the Provincial Planning Board (S102). The order authorizes the repeal of any zoning by-law within the area in question and the enactment of development control by-laws instead (S102).

> 104. (1) A development control by-law shall, subject to this section, provide for the control or development by means of a system of permits.
>
> (2) A development control by-law may provide that when an application for a development permit is refused, another application for a permit on the same parcel of land and for the same or similar use of land may not be made by the same or any other applicant until at least six months after the date of the refusal.
>
> (3) A development control by-law may provide that when a development permit is approved or conditionally approved, the permit may include conditions as to the construction of a public roadway required to give access to the development and installation of

> utilities and other necessary services that are necessitated by the development.

In dealing with applications a council may by resolution make rules respecting land use and development, but the rules have no effect until approved by the Provincial Planni: Board (S106). The by-law may provide for the establishment of a development appeal board (S108) to which a person affected by a development control decision of a development officer or a municipal planning commission may appeal (S110)

The Development Appeal Board has been called a purely administrative body in Dolison et. al. v. Edmonton City and Board of Trustees, Metropolitan United Church (1959 27 WWR 495. However, in Michie v. Municipal District of Rocky View No. 44 (1968) 64 WWR 178 (Alta. S.C.), Milvain J., as he then was, established that the appeal board was a judicial body and thus governed by the rules of natural justice. This is important because if it is a judicial body, certiorari will be available to review the exercise of such power. Professor Laux states:

> It is trite law that the prerogative writ of certiorari is available only against a tribunal which exercises a judicial or quasi-judicial function. (R.v. Electricity Commissions [1924] 1 K.B. 171 (C.A.))
>
> In deciding upon an application for a development permit the development officer has been held to exercise such a function and, therefore, his decision was held subject to review on certiorari (Re Pyrch and Company Ltd. and City of Edmonton (1962) 35 DLR (2d.) 732 (Alta. S.C.)) as has that of a municipal planning commission. (Michie v. M.D. of Rocky View (1968) 64 WWR 178 (Alta. S.C.)
>
> The decision of a development appeal board carrying out its functions under section 128 of the Act has also been held amenable to certiorari. (Re Herron's Appeal (1959) 28 WWR 364 (Alta. S.C.)

> Similarly, the Provincial Planning Board, on hearing an appeal pursuant to section 85 of the Planning Act from a decision of a regional planning commission concerning an amendment to a preliminary regional plan, must act judicially and if it fails to do so its decision can be quashed on notice of motion in the nature of certiorari. (County of Strathcona v. Provincial Planning Board (1970) (Alta. S.C. unreported)) [148]

The decisions concerning the categorization of the planning authorities are not always uniform. For instance, while Professor Laux mentions the Michie case on the function of a Municipal Planning Commission, in the case of Legare v. Calgary Municipal Planning Commission [1972] 5 WWR 609, the applicant sought by way of certiorari to quash a decision of the Calgary Municipal Planning Commission which had approved an application for a development permit for an agricultural market centre. Riley J. of the Alberta Supreme Court said that certiorari did not lie because the issuing by the Planning Commission of a development permit was not the result of a judicial or quasi-judicial act, but was simply the exercise of an administrative function; the fact that private rights were thereby modified or extinguished did not alter its character.

Alberta was the first Province to really make use of development control, an imported concept from the English Town and Country Planning Act of 1947, 10 and 11 Geo. 6, c. 51. When it was introducted into Alberta it was considered an interim measure to control land use until the general plan was completed and standard zoning by-laws were passed. Through various amendments, however, we see today that both development control and zoning can be used at the same time after a general

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[148] Laux, supra n. 140 at 306.

plan has been adopted.[149]

At the end of 1973, a total of 97 development control by-laws (up 6 from 1972) and 131 zoning by-laws (up 3 from 1972) were in force in 226 municipalities out of a total of 351 municipalities in Alberta.[150]

A council may by by-law adopt a development scheme to insure that the general plan or present planning will be carried out (S114(1)). The council by a development scheme, may:

> 114. (2) (a) provide for the acquisition, assembly, consolidation, subdivision and sale or lease by the municipality of such land and buildings as are necessary to carry out the development scheme,
>
> (b) reserve land for future acquisition as the site of location of any public roadway, service or building or for a school, park or other open space and make such agreements with the owners of the land as will permit its acquisition and use for those purposes,
>
> (c) specify the manner in which any particular area of land is to be used, subdivided, or developed, and regulate or prohibit the construction of buildings that would interfere with the carrying out of the development scheme, and
>
> (d) make available any land for agricultural, residential, commercial, industrial, or other uses of any class at any particular time.

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[149] See Laux, The Zoning Game - Alberta Style Part II: Development Control (1972) 10 Alberta Law Review 1, at 11.

[150] Municipal Report supra n. 143 at 37.

Regulations governing development schemes may be made by the Lieutenant Governor in Council (S115(1)). Of most importance to private owners of land is section 117 dealing with acquisition of land:

> 117. (1) When a development scheme comes into force, the council may acquire by expropriation or otherwise any lands or buildings the acquisition of which is essential to the carrying out of the scheme, together with lands
>
> (a) that are the remnants of parcels, portions of which are necessary for carrying out the scheme, or
>
> (b) that may be injuriously affected by the scheme.
>
> (2) Where land is acquired for the purposes of a development scheme, the owner of the land has the same right to compensation therefor as he would have if the land were acquired for public purposes by the municipality under the municipal Act by which it is governed.
>
> (3) A council may dispose of any lands acquired for the purpose of the development scheme without the approval of the proprietary electors, subject to any building or other restrictions that may be set out in the development scheme.

The general enabling section for the municipal power to zone is found in the 1973 amendment to the act:

> S119. A council may pass a zoning by-law to regulate the use and development of land within its municipal boundaries and for that purpose may divide the municipality into zones of such number, shape and size as it considers advisable."

The zoning by-law is to be based upon a general plan or a current land use survey, and is to prescribe for each zone

permitted uses and conditional uses. (S120(a)&(b)).

Furthermore, the landowner will find section 120(c great importance to him: A zoning by law

> (c) shall not establish a zone in which the land therein is used or is intended to be used only for parks, playgrounds, schools, recreation grounds or public buildings unless all the land in the zone
>
> (1) is owned by the municipality or by a public authority at the time the zone is established, or
>
> (2) is acquired by the municipality or by a public authority within six months from the date of the establishment of the zone.

Contained within a zoning by-law may be the following regulations, inter alia:

> 121. (1) 1. the minimum site area and dimensions of parcels required for particular uses of lands or of buildings;
>
> 2. the ground area, floor area, height and bulk of buildings;
>
> 3. the depth, dimensions and area of yards, courts and other open spaces to be provided around buildings;
>
> 4. the placement and arrangement of buildings on their sites and their relationship to other buildings and to streets and property lines;
>
> 5. the placement, height and maintenance of fences, walks, hedges, shrubs and trees and other objects where their regulation is necessary to maintain good visibility for the safe movement of persons and traffic;
>
> 6. maximum and minimum permissible densities of population which may be expressed in t

by-law as a ratio of habitable rooms per acre or as a number of dwelling units per site area or in a similar manner;

7. the design, character and appearance of buildings;

8. the outdoor storage of goods, machinery, vehicles, building materials, waste materials and other items and requiring outdoor storage sites to be screened by fences, hedges or buildings;

9. the location and amount of the access to sites from adjoining highways or public roadways, but allowing at least one place of access to a site from an adjoining public roadway

10. the facilities to be provided for off-street parking or the loading of vechiles for particular uses of land or buildings which may be expressed in the by-law in terms of the minimum number of parking or loading stalls or the minimum area for parking or loading on the site or on another site;

11. the placement, construction, height, size and character of signs and advertising devices or their prohibition;

12. the conditions under which dilapidated signs and advertisements may be required by resolution of council to be renovated or removed;

13. the erection of buildings

    (1) within a specified distance of any lake, river or watercourse,

    (2) within a specified distance from the boundaries of any air-field or airport,

    (3) on land that is subject to flooding or subsidence or is low-lying, marshy or unstable:

14. the placement, moving in, enlargement, alteration, repair, removal or demolitior of buildings or the prohibition thereof;

15. the excavation or filling in of land or the removal of topsoil from land or the prohibition thereof.

16. the removal of trees and shrubs from any land or the prohibition thereof.

Furthermore, 124(4) establishes that:

(4) A zoning by-law may prohibit the erection of a building on any site where it would otherwise be permitted under the by-law when, in the opinion of the development officer or the municipal planning comission, satisfactory arrangements have not been made by the developer for the supply to the building of water, electric power, sewerage and street access, or any of them, including payment of the costs of installing or constructing any such utility or facility by the developer.

Development or building permit systems shall be provided for in the by-law (S122), as well as the appointmer of a development officer (S123), who supervises the permit system. The amended 1973 (S123) states that a zoning by-lav

(c) shall require that the development officer or municipal planning commissior approve an application for a permitted use upon the application conforming to the provisions of the zoning by-law, and shall authorize the development officer or municipal planning commissior in his or its discretion, to approve permanently or for a limited period of time or refuse an application for a conditional use and, subject to clause (d) and to section 124, subsection (3), shall require the development officer or municipal planning commission to refuse the application for a use which is neitl a permitted use nor a conditional use;

(d) may authorize the development officer or the municipal planning commission to approve an application for a permitted use or a conditional use notwithstanding that the proposed use does not comply with the provisions of the by-law passed pursuant to section 121 if the non-compliance is minor and denial of the application for a development permit would cause the applicant unnecessary hardship because of circumstances peculiar to the use, character or situation of his land or building;

(e) may authorize the development officer or municipal planning commission to impose such conditions on approval of an application for a conditional use as, in the opinion of the development officer or municipal planning commission, are necessary to carry out the purpose and intent of the general plan, if any, and the zoning by-law.

Provisions for notice and applications for permits are included in the act (S124).

A traditional problem with zoning law is what to do about existing non-conforming uses. In the Act section 125 declares:

(1) Where a zoning by-law has been adopted, a non-conforming building shall not be enlarged, added to, rebuilt or structually altered except

(a) as may be required by statute or by-law, or

(b) as may be necessary to make it a conforming building, or

(c) as the council or an official or servant of the council designated by the zoning by-law may deem necessary for the routine maintenance of the building.

(2) If a non-conforming building is damaged or destroyed by fire or other causes to an extent of more than 75 per cent of the value of the building above its foundation, the building shall not be repaired or rebuilt except in conformity with the zoning by-law.

(3) A non-conforming lawful use of land or a building may be continued, but if that use is discontinued or changed, any future use shall conform to the provisions of the zoning by-law.

(4) A non-conforming use of part of a building may be extended throughout the building, but the building, whether or not it is a non-conforming building, shall not be enlarged or added to and no structural alteration shall be made therein.

(5) A non-conforming use of part of a parcel of land shall not be extended or transferred in whole or in part to any other part of the parcel and no additional building shall be erected upon the parcel while the non-conforming use continues.

(6) The use of land or a building is not affected by reason only of a change of ownership, tenancy or occupancy of the land or building.

Speaking about section 125, Professor Laux explains:

> On the one hand, the legislature has given effect to the claims of the private citizen by permitting a non-conforming use to continue; on the other, it has protected the public interest by severely restricting the enlargement, rebuilding or alteratior of non-conforming uses to the point where there is a reasonable expectation that they will, for the most part be eliminated reasonably quickly by the vagaries of the market place.[151]

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[151]Laux, supra n. 140 at 294.

Again, a zoning by-law, like a development control by-law, may provide for the establishment of a development appeal board (S127), to which a person may appeal. However, no appeal exists for those affected by an approval of a development which complies with the provisions of the by-law relating to permitted uses for that zone (S128(2)). The development appeal board shall

> consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan that is under preparation or is adopted and to the development control or zoning by-law which is in force, as the case may be, and
>
> shall not allow the permanent use of land or a building in a manner not permitted by the zoning by-law in the zone in which the building or land is situated.

The Board, may confirm, reverse or vary the decision appealed from or impose such conditions or limitations as it considers proper (S128(b)) and its decision is final and binding (S128(7)) subject to a provision for appeal on matters of law and jurisdiction to the Supreme Court of Alberta, set out in section 146.

Finally, we notice again that the act states:

> 135. (1) No person is entitled to compensation by reason only of
>
> (a) the making or passing of a zoning by-law or,
>
> (b) any provision contained in a zoning by-law or,
>
> (c) any lawful action taken under a zoning by-law.
>
> (2) No person is entitled to compensation by reason only of the passing or carrying out of a development control by-law if the provisions

> contained therein are such as may be contained in or enforceable by means of a zoning by-law.

C. Special Issues: Judicial Directions, and Compensation

The brief study we will make on American developmen in land use planning law, will illustrate an essential differ between the Canadian as compared to the American experience in this area. For instance, in the United States zoning by-laws must conform to the constitutional limits of the police power. These limits may be changing and undefinable but of importance, nevertheless, is the fact that judicial review of municipal decisions frequently takes place. In Canada, however, as we have mentioned earlier, parliamentary supremacy is said to exist, and within the scope of its delegated powers, "municipal authority is absolute and its exercise is, ideally, not subject to review by the Courts."[152] Middleton J.A. in Re: Howard and Toronto; Re: Sweet and Toronto 61 OLR 563, [1928] 1 DLR 952 (CA) expresse it this way:

> A municipal council is a legislative body having a very limited and delegated jurisdiction. Within the limits of the delegated jurisdiction, and subject to the term of the delegation, its power is plenary and absolute and in no way subject to criticism or investigation by the courts.

In Canada, the constitutionality of zoning as such has not b questioned. Stein concludes that:

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[152]Leslie A. Stein, The Municipal Power to Zone in Canada and the U.S. (1971) 49 Canadian Bar Review 542.

> the inhabitants of municipalities in the United States maintain a distinct advantage over our inhabitants of Canadian municipalities. The privilege of being able to question the reasonableness of the application of a zoning provision and the right to have each zoning provision justified within the aims of the police power constitute substantive and essential advantages that should accrue to any municipal inhabitant.[153]

The validity of this point of view, depends of course, on how strongly one feels about the protection of private property rights in land. In the United States, zoning by-laws must not violate the "due process" clause of the federal constitution or a similar clause of the particular state constitution but must come within the proper sphere of the police power. The Supreme Court of Illinois in La Salle National Bank v. Chicago 125 N.E. (2d.) 209 (1955) framed the principle this way:

> The police power . . . is that power required to be exercised in order to effectively discharge, within the scope of constitutional limitations, its paramount obligation to promote and protect the health, safety, morals, comfort and general welfare of the people . . . While a city may thus enact zoning ordinances imposing burdens and restrictions upon private property and its use, the governmental power so delegated to interfere with the general rights of property owners is not unlimited. An exercise of power is valid only when it bears a reasonable relation to the public health, safety, morals or general welfare . . .

The Canadian courts are not altogether uninvolved and they may decide whether a particular action is ultra vires the Alberta Planning Act, for instance. Controversy

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[153] Id. at 540.

exists, however, as to whether the Act should be liberally or strictly construed. There was once ample authority for the proposition that the power of a municipality to pass by-laws restricting common law rights was only to be found in language clear and distinct. (Watt v. Drysdale (1907) 6 WLR 234). However, the Alberta legislature has said that every enactment shall be deemed remedial and shall be given such large and liberal interpretation as best ensures the attainment of its objects. (The Interpretation Act 1958 S.A.C. 32 s. 11). In this sense, one might attempt to get something declared ultra vires because of non-conformity with the articulated purpose of the Act (S3), that we quoted earlier. In the recent case of Nichol v. County of Leduc No. 25 [1973] 2 WWR 85 (Alta. D.C.) a zoning by-law was quashed because it did not conform with the mandatory statutory requirements under the Planning Act.

The Planning Act attempts to reconcile the often conflicting interests of an owner of land and the interests of the general public (S3). A private owner of land should recognize, as well, that certain judicial trends make it clear that the courts in Canada recognize Ely's "social side" to private property. For instance, it is recognized that any zoning by-law in some way restricts the full and complete use of property. It was held in Regina Auto Court v. Regina (1958) 25 WWR 167 (Sask.) that where a city passed a zoning by-law which was to a certain extent confiscatory in nature, this did not affect the validity of the by-law. Of course, we have noted the sections in the Planning Act that make it clear that no compensation is provided by reason of the adoption of the regional or preliminary plan (S92) or a zoning by-law or a development control by-law (S135). However, if a person's property is zoned for use as public park, the property has no value for residential, commercial, or industrial development, and thus the owner is essentially deprived of his property and we

notice that section 120(c) does not allow such a zone to be established unless the municipality or other public authority owns the land or acquires it within 6 months after zoning it for such a public use. We also note, however, that no compensation for the required dedication of shoreline (S25(4)) or the restrictions on property by airport vicinity zoning (S93) is provided for in the Act.

A year after the Regina case, the Supreme Court of Canada in Township of Scarborough v. Bondi [1959] SCR 444 recognized that zoning is by its very nature arbitrary and there will always be an element of discrimination involved in the control of land use, which can not be used as an argument to declare it ultra vires. However, a principle exists that a zoning amendment must not be "discriminatory." This principle has been used successfully by aggrieved parties to have an amendment quashed. (Re: Rosling et. al. and City of Nelson (1967) 64 DLR (2d) 82 B.C.S.C.). Professor Laux states the use of the principle in this way:

> Aside from issues arising out of the procedures to be followed in passing a zoning amendment, the most frequently litigated point is whether or not an amending by-law is discriminatory and, therefore, ultra vires. The argument that an amendment is discriminatory arises naturally out of the fact in most instances that a small parcel of property has been rezoned at the request of the owner with a consequential benefit being conferred upon him. A classic example of a case in which a zoning amendment was successfully challenged on the ground of discrimination, or "spot zoning" as it is sometimes called, is that of Miller v. Rural Municipality of Charleswood in which an area of approximately seven hundred acres had been zoned so as to prohibit the establishment of fox and other fur farms. Upon the application of the owner, the by-law was amended to permit a mink farming operation on a ten acre parcel situated within the seven hundred acre site which had become residential properties. In quashing the amending by-law Dysart J. expressed the opinion that the enactment was for the private interest of the land owner and in disregard of the interests of

> the community as a whole as was evident from the fact that no public need to locate a mink farm in the midst of a residential district in which fur farming was otherwise prohibited was demonstrated by the applicant.[154]

Whether certiorari will lie in a zoning by-law situation will depend on the characterization of the municipal council's function. In Wiswell v. Metropolitan Corporation of Greater Winnipeg [1965] SCR 512, the function of a council amending a zoning by-law was considered quasi-judicial rather than legislative. However, in the case of McMartin v. City of Vancouver (1968) 65 WWR 385 (B.C.C.A.) a council's function when passing a zoning amendment by-law was considered purely a legislative act.

Zoning can have incredible effects on the value of one's property, either increasing or decreasing it radically. A new Alberta Planning Act is under study and the working paper entitled "Towards a New Planning Act for Alberta" suggests that a new "inverse condemnation" section should be included in the Act:

> If a person's land should remain undeveloped in the greater public good then the public should be prepared to buy the land . . . Section 75 . . . would provide that where an owner is denied a reasonably beneficial use of his land, he may initiate proceedings which would lead to the municipality concerned being compelled to buy him out at a price to be set by an independent board.[155]

This "reasonably beneficial use" is precisely the crux of the

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[154] Laux supra n. 140 at 303.

[155] supra n. 144 at 52.

dilemma, however, and the report goes on to say;

> This document stops short of proposing compensation be payable when land is zoned for agricultural purposes in order to protect the land from development . . . The B.C. Land Commission Act specifically deals with this problem and elects to pay no compensation."[156]

Furthermore, the Report states;

> The proposed section 76 . . . is designed to make it abundantly clear that except as otherwise expressly provided in The Act, no compensation would be payable by virtue of a planning dicision. Hence, the mere fact that an owner's property is zoned down from commercial to single-family dwelling gives no rise to compensation. Similarly, if a person is denied permission to subdivide on the ground of necessity of preserving good agricultural land, again he need not be compensated, as long as an agricultural use is still open to him. Also an application for development or subdivision could be denied with impunity where the application is premature, provided that a reasonable use is left to the owner . . .[157]

Our attitude toward when compensation should be paid will depend to a large extent on our attitude toward how much emphasis should be placed on the social side of property. Whatever the case, it is ironic that presently some zoning and development controls may in fact restrict your use of property without compensation, just as much as restriction requiring compensation. Fairness would demand that such a situation be

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[156] Id. at 49.

[157] Id. at 49.

remedied. For instance, a real issue can be made for compensation when your land is frozen for an uncertain period of time, until expropriation occurs sometime in the future. Again, however, essentially the issue boils down to the question of what philosophy of property is best attuned to the demands of today's world.

X

AMERICAN LAND USE PLANNING: THE "TAKING" ISSUE

In the United States, the fifth amendment to the Constitution provides that private property shall not be taken for public use without just compensation. Because of this provision, a recurring issue of when a regulation becomes so restrictive as to be a taking, hangs over American land use planning law.

For instance, we spoke about rights in airspace earlier, and some American decisions establish that a landowner might claim that his airspace rights have been taken without compensation. In U.S. v. Causby 328 U.S. 256 (1964) the plaintiff's chicken farm was seriously upset by low flying military aircraft. While the court rejected the concept embodied in the phrase cujus est solum ejus ad coelum, and while the farm had not been rendered completely useless, its value had been substantially reduced and therefore a "taking" of some property interest had occurred. The airspace rule has been articulated as follows:

> Rights above privately held land which reduce its market value "take" the lost value only if they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[158]

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[158] See Vincent J. Rossi Jr. "Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage." (1973) 24 Syracuse Law Review 793.

The criteria of when regulation ends and taking begins does not fit into any set formula as even the Supreme Court itself admitted in Goldblatt v. Town of Hempstead 369 U.S. 590 (1962). The difference between regulation and taking is of course derived from the distinction between the police power as compared to the power of eminent domain. As one commentator phrases it:

> When a governmental body "takes" private property for public use, it is exercising the power of eminent domain. The owner of the property must be compensated. When a governmental body regulates the use of private property, it is exercising the police power and regardless of the hardship borne by the owner, compensation need not be paid.[159]

To the private landowner, however, it is precisely the amount of this "hardship" which after a certain point seems to demand in fairness a classification as "taking" rather than "regulation." Rights left in the bundle, but unusable are not really rights at all, so to speak. On the other hand, to such a response, Mr. R. E. Megarry would counter:

> The right to use property in a particular way is not in itself property. The fee simple land remains the same fee simple as before. All that has happened is the fruits of ownership have become less sweet; but that is nothing new in land law.[160]

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[159] See Binder Taking Versus Reasonable Regulation: A Reappraisal in the Light of Regional Planning and Wetlands, (1972) 25 University of Florida Law Review 1.

[160] Megarry, supra n. 92 at 616

The distinction between eminent domain and the police power has been expressed in Candlestick Properties v. San Francisco Bay 11 Cal. App. (3d.) 557 (1970) in this way:

> Under the power of eminent domain property cannot be taken for public use without just compensation. However, under the police power, property is not taken for use by the public, its use by private persons is regulated or prohibited where necessary for the public welfare.

This assertion remains true to the classic case of Hadacheck v. Sebastion 239 U.S. 394 (1915) where it was established that given a valid public purpose, government could regulate a person's land without any compensation, even if the effect of the regulation almost totally destroyed the value of that person's land. In reality, however, when the value of the property drops below a certain level because of certain restrictions, the courts have more often invalidated such restrictions even if they technically are within the police power as defined above (Pennsylvania Coal Company v. Mahon 260 U.S. 393 (1922)). Rather than the "diminution in value" test, a "balancing" test has also been used: In Batton v. United States 306 f 2d. 580, (10th Cir. 1962) Chief Judge Murrah stated at 587:

> As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.

Of course, differences of judicial opinion result as to how weighty the "public" side of private property should be.

In Alberta, dedication of land is an integral part of the Planning Act. Yet in the Illinois case of

Pioneer Trust and Saving Bank v. Village of Mount Prospect 22 Ill. 2d. 375, 176 N.E. 2d. 799 (1961), the court held an ordinance void which required an owner to dedicate at least one-tenth of subdivided land for public purposes.[161]

As opposed to the Canadian system of parliamentary supremacy, this constitutional limitation in America poses great problems for state and local governments who are trying to implement environmentally oriented land regulatory systems. It is feared that regulation will be challenged in court as unconstitutional taking of property without compensation.[162] In the Wisconsin case of Just v. Marinette County 56 Wis 2d. 7, 201 N.W. 2d. 761 (1972), for instance, a zoning ordinance prohibiting the filling of wetlands was declared constitutional by the Wisconsin Supreme Court. The court stressed that swamps and wetlands serve a vital role in nature, as part of the balance of nature and are essential to the purity of water in lakes and streams and that an owner does not have an absolute right to use his land for a purpose unsuited to its natural state.[163] Before this, wetlands legislation had often been declared unconstitutional. In State v. Johnson 265 A 2d. 711 (Me. 1970) the Maine wetlands protection statute was declared invalid as it applied to the plaintiff's property. In Bartlett v. Zoning Commission of the Town of Old Lyme (61 Conn. 24, 282 A 2d. 707 (1971), a Connecticut court held that a

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[161] See note, "Mandatory Dedication of land by Land Developers" (1973) 26 University of Florida Law Review, 41.

[162] See Bosselman, The Taking Issue, Council of Environmental Quality (1973)

[163] Note, 86 Harvard Law Review 1586.

municipal zoning regulation enacted to control development in marshlands was so restrictive as to amount to a violatio of due process.[164] Again, in Dooley v. Town Plan and Zonin Commission 151 Conn. 304, 197 A. 2d. 770 (1964) the Connect Supreme Court struck down a flood-plan zoning ordinance. T wetlands cases are so important, because the value of the property as wetlands may be great for the public but the landowner is:

> left with a swamp worth perhaps $1,000 that would have been worth perhaps $30,000 if converted into commercially usable property[165]

With the importance of ecological concerns today, the trend may be moving toward recognizing such wetlands legislation as within a constitutionally expanding notion of the police power. For instance, in Turnpike Realty Co. Town of Dedham 284 N.E. 2d. 891 (Mass. 1972), the Massachus Supreme Court concluded about a flood plan zoning ordinance

> We realize that it is often extremely difficult to determine the precise line where regulation ends and confiscation begins. The result depends upon the "peculiar circumstances of the particular instance." . . . In the case at bar we are unable to conclude, even though the judge found that there was a substantial diminution in the value of petitioner's land, that the decrease was such as to render it an unconstitutional deprivation of property.

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[164] See Ausness, "Land Use Controls in Coastal Are (1973) 9 California Western Law Review. 391.

[165] "Land as Property - Changing Concepts", (1973) Wisconsin Law Review 1039 at 1049.

Finally, under the British Town and Country Planning Act, 1971, as amended and extended by the Land Compensation Act 1973, persons whose interest in any land depreciates in value as a result of planning proposals may call on the government department, local authority or statutory undertaking concerned to purchase the land. This is done by serving a document known as a blight notice.[166]

XI

AMERICAN ZONING DIRECTORS

After the U.S. Supreme Court decision in Village of Enclid v. Ambler Realty Co. 272 U.S. 365 (1926) the concept of zoning was firmly established as within the constitutional limits of the police power. However, state courts still struck down zoning ordinances as unconstitutional if their provisions were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. (Borough of Cresskill v. Borough of Dumont 100 A. (2d) 182 (1953)). The scope of the police power, of course, evolved with the needs of a changing age. While most states struck down zoning for aesthetic purposes alone, the U.S. Supreme Court in Berman v. Parker 348 U.S. 26 (1954) defined "general welfare" to include aesthetic considerations:

> The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should

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[166]See Robert McKown, Comprehensive Guide to Town Planning Law and Procedures (1973) at 131.

> be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Today, however, the scope of the police power may be moving back in a different direction again. In Mayor and City Council of Baltimore v. Mano Swartz 286 Md. 79 (1973), the cou invalidated an ordinance banning the erection of signs on the of any building and prohibiting signs which extended more than inches from the surface of any building.[167] Mano Swartz claimed that such an ordinance passed solely for aesthetic purposes does not promote the public health, safety, and welfare or morals, and thus, is not within the constitutional limits of the police power. The Maryland Court of Appeal agreed and the aesthetic zoning ordinance was struck down.

We have already looked at the possibility of a zoning restriction becoming a "taking" of property without compensation, and thus being declared unconstitutional. For instance:

> In Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E. 2d 587, 592 (1938) the court held that if an ordinance permanently restricts property, so that it cannot be put to any reasonable use, the ordinance is in effect a taking of property without due process.

In other words,

> a zoning ordinance which operates to destroy the greater portion of the value of a landowner's property may be invalid for that reason alone, even though it might promote the public health, safety or general welfare.[168]

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[167] See "Recent Developments," (1973) 3 University of Baltimore Law Review, 125.

[168] William P. Zuger, "Exclusionary Zoning," 50 North Dakota Law Review, 57.

For the moment, however, we wish to examine briefly some of the current questions in the United States relating specifically to the use of zoning as a method of land use control.

Zoning has come a long way since Village of Euclid, and a complex body of American legal writing has poured forth on the topics of "large lot zoning," "sequential zoning," "spot zoning," "float zoning," "aesthetic zoning," "noncumulative zoning," "transitional zoning" and so forth. Futhermore, zoning law in America includes a vast body of law related to various amendments and special exceptions which provide some flexibility to the zoning system. As the reader can appreciate, the topic is vast. Of particular interest at the present time, however, is the topic of "exclusionary" zoning and it is this subject which we wish to examine.

While zoning was once viewed, and still is viewed, as a valuable tool in land use planning, zoning is today increasingly being criticized. The fact that zoning law places tremendous power in the hands of local politicans, who have great freedom to ignore the extraterritorial effects of their decisions, totally ignoring regional needs, is one problem.[169]

Futhermore, as we have mentioned, zoning has incredible effects on land values and a continuing problem is that when a zoning decision increases the value of a parcel "the owner is generally not obliged to disgorge the increased value, or conversely, when a zoning action reduces property value, an owner is not compensated for any losses, (unless, of course, he can prove that an unconstitutional

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[169] See Schroeder, The Public Control of Private Land in Arizona. Office of Economic Planning and Development, (1973) at 50.

"taking" took place). As one commentator puts it:

> Zoning in not a perfectly balanced roulette wheel, randomly bestowing its wins and losses. In most communities the wheel is warped; friends of the house come out winners while others are losers.[170]

Most important, however, is that zoning often includes minimum lot size, lot frontage, and floor area requirements, and excludes more than one - family residences, mobile homes, and so forth, raising the problem of potential discrimination against low income groups. There is a conflict between the pressing need for adequate low-income housing and the desire to preserve pleasant, suburban living conditions and high real estate values.[171] Increasingly, the U.S. courts have been striking down such zoning ordinances In Molino v. Mayor of the Borough of Glassboro (116 N.J. Super. 195 (1971)), for example, the borough enacted a zoning ordinance designed to exclude children from the community in order to minimize the costs of education. In the Board of Supervisors of Fairfax County v. Carper (200 Va. 653, 107 SE (2d) 390 (1959)), the court struck down the zoning ordi as unconstitutional on account of its intentional and exclusionary purpose of preventing people in the low-income bracket from living in the area. Zuqer concludes that:

> The results of exclusionary zoning in the nation's

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[170] Ellickson supra n. 133 at 701.

[171] See "Modern Social Problems and Land Use Regulat (1973) 14 William and Mary Law Review at 732.

> urban areas are obvious. Under the guise of public welfare, the suburbs have erected walls around the cities. Those persons who are unable to afford a single family dwelling, a large lot and a large house are trapped in the central city, where noise, crowded housing and low tax base aggravate their condition. Clearly, the effect is to aggravate the problems of public health, safety and general welfare that zoning is intended to ameliorate.[172]

Exclusionary zoning is struck down on the basis that it violates the 14th amendment "equal protection" clause. (Appeal of Kit-Mar Builders 439 Pa. 466, 286 A (2d) 765 (1970)). In Vickers v. Township Committee of Gloucester 37 N.J. 232 (1962) the court did uphold a community-wide ban on mobile homes in a municipality despite a regional shortage of mobile home space; but a strong dissent by Justice Hall (id. at 181 A (2d) 137) was soon quoted and followed in subsequent cases. In National Land and Investment Co. v. Kohn 419 Pa. 504 (1966) the court struck down a portion of a zoning ordinance which established a minimum lot size of four acres; and in Appeal of Girsh 437 Pa. 237 (1970) the Pennsylvania Supreme Court invalidated a zoning ordinance which banned multi-family housing.

The question of discrimination of a zoning ordinance is often weighed against the public purpose for which the zoning ordinance was formulated in the first place. In Steel Hill Development v. Sanborton 4 E.R.C. 1746 (1st Cir. Nov. 24, 1972) the first Circuit Court of Appeal upheld a New Hampshire town's zoning amendment which imposed:

> a six-acre minimum lot requirement on fifty percent of the town's area in order to preserve

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[172] Zuger, supra n. 167 at 49.

> the rural nature of the town and to avoid environmental and growth problems threatened by proposed recreational home development.

On the other hand, in Boraas v. Village of Belle Terre 476 F. (2d) 806 (2nd Cir. 1973) the whole village in question was zoned exclusively for one-family residences. Six university students who lived communally in a residence, challenged the ordinance on the basis that it violated their constitutional rights of privacy and association. Judge Mansfield concluded:

> though local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens.

Thus, the zoning ordinance was struck down as unconstitutional

In conclusion, it must be admitted that in the U.S a period of critical reexamination of the zoning device is taking place. Some commentators go to the extreme of demanding a return to the free market:

> It is time we apply the clear and unmistakable lesson of the past fifty years: zoning has been a failure and should be eliminated! Governmental control over land use through zoning has been unworkable, inequitable and a serious impediment to the operation of the real estate market and the satisfaction of its consumers. And, as the experience of nonzoning in the City of Houston and elsewhere demonstrates, it is not even necessary for the maintenance of property values.[173]

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[173] Bernard Siegan, Land Use Without Zoning Lexingt Books (1972) at 149.

On the other hand, the demand for land and the necessity of conservation of resources, would suggest to many that far greater control over land use is necessary. Thus, the crux of the problem comes clearly to the surface.

XII

BRITISH PLANNING: THE PROBLEM OF "BETTERMENT"

Much could be written about the evolution of land use planning, particularly development control, in Britain. Of particular interest, however, is the British handling of the so-called "betterment" problem. If a person owns farmland, and after many years finds that the nearby community has grown to the extent that his farmland could be subdivided, the value of the land if zoned for development is increased several times over. Yet why should the owner of the land reap this windfall? The actual development value is created by the community and affected by the public zoning or development control system, not by the individual landowner who did very little in creating the tremendous value of his property. The community brought the development value to him. What about this unearned increment in land use planning law? "The inability of public bodies to appropriate such benefits directly, is in stark contrast to the requirement of payment of compensation for loss which constitute a 'taking of property'".[174]

The general growth of cities, rezoning from a less profitable to a more profitable use, and the public investment in highways, bridges, parks and the like, can cause a profound value increase in private property. If we say that someone

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[174]Gibson, Perspectives of Property (1972) at 5.

should be compensated because his land was zoned for a greenbelt, is it not fair to say that society should capture some of the values created by itself when the private land is increased, rather than decreased in value by zoning or development control? It would make a great deal of sense for the wrong of unearned detriment to be righted by recapturing unearned increments that would provide those funds necessary to pay more just compensation.

The Uthwatt Report of 1942,[175] led to the Town and Country Planning Act of 1947, 10 and 11 Geo. 6, C51 which was based on the assumption that the community was entitled to take the unearned increment in value by levying a "development charge" when development permission was granted to an owner.[176] In a sense, the British development control system "set out to nationalize rights to develop land, as distinct from nationalizing land ownership itself."[177]

When the Conservative party came to power in 1951, it set out to dismantle the financial provision of the Town and Country Planning Act of 1947. While the 1947 principles were clear, the actual provisions were complex and the scheme did not work smoothly.[178] Thus, the Conservative government abolished the development charge in 1954. However, the Labour government returned to power in 1964 and in 1965 a White Paper on the Land Commission led to the Land Commission Act which introduced a new "betterment levy"

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[175]Final Report of the Expert Committee on Compens. and Betterment (Cnd. 6386).

[176]for a text on British Planning see, Cullingworth Town and Country Planning in England and Wales (1971)

[177]Gardiner, supra n. 123 at 12.

[178]Cullingworth, supra n. 175 at 152.

on development value. Instead of taking all the development value, however, it took an initial 40 percent. The White Paper[179] began with the same basic assumption as the earlier Uthwatt report:

> 1. For centuries the claim of private landowners to develop their land unhindered and to enjoy the exclusive right to profit from socially created values when their land is developed has been questioned, especially when the land is sold to the community which itself has created the value realised. The view that control over development must be exercised by the community is not now seriously disputed and it is generally accepted that the value attached to land by the right to develop it is a value which has substantially been created by the community. A growing population, increasingly making their homes in great cities, has not only made effective public control over land indispensable; it has also made indefensible a system which allows landowners or land speculators wholly to appropriate the increases, often very large, in the value of urban land resulting either from government action, whether central or local, or from the growth of social wealth and population.

The control of speculation will, hopefully, become a matter of governmental attention in Canada, as well, and any real control of land use and development must tackle the financial problem of "betterment" due to community action, if it is to be effective at all.

XIII

NEW DIRECTIONS

The preservation, conservation, environmental movement will have a profound effect on the bundle of rights that we

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[179] Cmnd, 2771, Sept. 1965 at 3.

hold privately in land. The demand for greater and greater control of land use by more centralized governments is an acknowledgement that past practices have not been particularly successful.

Hawaii as early as 1961 adopted state zoning rather than local zoning and divided the whole state into four zones: urban, rural, agricultural and conservation. Since that time a general recognition has been made that local governments acting independantly of each other, and selfishly seeking to maximize their own tax basis and eliminate their own social problems, does not make for good land allocation or preservation. As Paulson states:

> In short, it has become apparent that some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land is essential. Local zoning ordinances, virtually the sole means of land use control in the United States for over half a century, have proved entirely inadequate to combat major state-wide social problems, environmental pollution problems, and problems of the destruction of vital ecological systems, all of which are problems that threaten our very existence. States, not local governments, are the only existing political entities capable of devising innovative techniques and governmental structures to solve these problems.[180]

The trend toward centralism in the U.S. includes inter alia: Vermont's Environmental Control Act, the San Francisco Bay Conservation and Development Commission, the Massachusetts Wetlands Protection Program, the Wisconsin Shoreline Protection Program, the Urban Environmental Management Act of Arizona, and finally, centralism has

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[180] Paulson, Land Use Control to Protect the Environment, (1973) 10 Idaho Law Review 92.

reached the federal level with the new U.S. National Land Use Policy.[181]

The Land Seminar Proceedings of the Canadian Council of Resource and Environment Minister in 1972 concluded that a Canadian National Co-ordinating group dealing with planning was needed.[182] It is recognized that the conflicts between levels of government and the conflicts between governmental agencies, and the overlapping effects of their independant action causes havoc with a system of land use and development planning.

While greater regulatory and centralistic trends in the control of land use and disposition are clearly being demanded by many, the old individualism is far from dead and a new emphasis on restrictive covenants, leasehold covenants and easements as private methods of planning is arising. Neutze, for instance, favours the least interference possible with free market forces and suggests that governmental land control policy might best be operated through a system of variable taxes and subsidies which would not exercise absolute control but would seek to influence private land use decisions.[183]

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[181] See Reilley, The Use of Land: A Citizen's Policy Guide to Urban Growth (1973). Whipple, "The Necessity of Zoning Variances" (1973) 57 Marquette Law Review at 25. Schroeder, The Public Control of Private Land in Arizona (1973) Office of Economic Planning. Lundberg, "Land Use Planning and the Montana Legislature" (1974) 35 Montana Law Review, p. 7.

[182] at 18.

[183] Neutze, The Suburban Apartment Boom: Case Study of a Land Use Problem, John Hopkins Press, (1968)

We have earlier mentioned Siegan's similar attitude.[184]

Whatever our philosophical approach to this political question, however, we must admit that regulation is not desirable for its own sake. Yet the objectives of regulation may be so immediately laudable that even greater restrictions on private property may occur. It is at bottom agreed that any government action which runs counter to the holder's expectation is not immediately a "taking" of property, and that the rights of eminent domain, police power, taxation and escheat are properly reserved for the public bundle, not the private one.

The demands for open space, green belts, and recreational areas insulated from development, are legitimate and raise the question of where the equilibrium between private rights and social responsibilities really is. Conservation easements, flood plain zoning, agricultural zoning and aesthetic zoning, and so forth, raise the same question.

Because planning without control can be, most often, idle dreaming, far greater public ownership of land is demanded by many as the expensive solution to many land use problems. A typical proposal, for instance made by one commentator is:

> The City, acting as a conduit, could acquire certain land in fee simple for the public purpose of redevelopment in the public interest and instead of keeping it in public ownership, reconvey or lease it to a developer, "subject to specified covenants, restrictions, conditions, or affirmative requirements designed to protect the public interest and to accomplish the [public]

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[184] Siegan, supra n. 172.

purposes of the special district.[185]

Similarly, E. F. Roberts suggests that "the answer is for governments (in our case, provincial governments) to acquire the land around suburbia, hold its value down to current levels, and release it only according to a statewide plan for pluralistic development."[186] Finally, a land trust system set up by a private community instead of a governmental institution is also being used to some extent in the U.S.[187]

Futhermore, it is being recognized that the official planning system, the tax system, the public works system, and the market system, all have immense effects on each other and must be interrelated and co-ordinated if planning is to be effective instead of the present situation where the various systems may work against each other.[188]

All of the suggestions and proposals, however, seem to hinge on precisely what philosophy of property can find legitimacy in the public eye. Will the idea of "stewardship" with respect to the land, a recognition of the social side of property, an understanding that property

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[185] See "From Euclid to Romapo", 1 Hofstra Law Review.

[186] *supra* n. 164.

[187] See The Community Land Trust: A Guide to a New Model for Land Tenure in America, Independence Institute (1972)

[188] See Williams Jr., The Three Systems of Land Use Control (1970) 25 Rutgers Law Review.

is a creation of law in the first place, and an awareness of the limitation of land as a resource in the face of steadily expanding human demands, tip the scale toward ev greater control of the use and disposition of land?[189]

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[189]See Donald Large, "This Land is Whose Land?" supra n. 64.