

North-American Zoning: Real-Estate Regulation—Past, Present and Future

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Abstract In the United States and Canada, zoning is primarily a tool for the regulation of real-estate development and only secondarily an element of city planning. This is so historically speaking—zoning was adopted primarily as a means of controlling nuisances that could lessen property values—and it is so in contemporary planning practice. As a regulatory tool, zoning is necessarily a local affair; but as a planning tool, it must necessarily become a supra-municipal one. Historical and contemporary material from Canada and from the United States buttress a critical argument on the past, present and likely future of zoning in these countries.

Urban planning, as we once knew it, is over. The current urban revival happened with no master plan and no national urban policy framework, mostly through the “invisible hand” of market forces. An amalgam of development approvals, incentives, and exactions has arisen in the past several decades, largely in place of planning, to harness this private initiative to serve public policy goals. Imagine Boston and other recent urban plans acknowledge this change. These plans express an attitude toward growth, rather than fostering the illusion that cities can or should just decree what’s going to happen where. (Kiefer, 2017)

These words, written by a land-use attorney in 2017, are an apt description of planning in the United States and in Canada—not just of recent planning, but of planning since its inception in the early twentieth century. They highlight the gulf that exists between the practical management of urban development and the ideals of long-range city planning, a gulf that is neither recent nor accidental but is inscribed in the DNA of American and Canadian planning and zoning.

In this chapter, I argue that in the United States and in Canada, too much is being expected of zoning because too little is being expected of planning. In the absence of ambitious urban policies to create a more socially, economically and environmentally sustainable city, North-American planners resort to zoning not only to shape the built environment but also to make the city more equitable, lively and

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green.¹ Zoning is the most important tool in their arsenal, but it is a weak one, unequal to the task at hand. I base these argument on some 25 years of study of planning and zoning in the United States and Canada, from my dissertation research in the early 1990s to my recent consulting work with public and private parties, from my archival research on the history of zoning in U.S. and Canadian cities to my work, over some 15 years, as member of the planning and design review commission of one of those cities. The sum of my findings and observations, in a nutshell, is that zoning is not planning but real-estate regulation. In an environment where market processes dominate and government interventions are constrained—a situation that was prevalent a century ago, underwent some balancing half a century ago and is again closer to its original state today; in an environment, in other words, where the private sector holds most of the cards and the public sector must play with a weak hand—in such an environment, zoning represents at the same time the poverty of planning and its best hope “to harness [...] private initiative to serve public policy goals.”

1 The Origins of North-American Zoning

Although German cities were the first to adopt comprehensive zoning schemes to regulate private development and although American planning cited the German precedent approvingly in the 1910s (Mullin 1976), zoning in North-America is not a German import (Fischler, 2016; Kolnik, 1998). It is the product of local attempts to minimize externalities from urban development in the industrial era. In Germany, zoning was part and parcel of a large array of government policies to manage development and improve housing conditions (Ladd, 1990; Marsh, 1909; Sutcliffe, 1981). Across the Atlantic Ocean, where many of these policies were deemed beyond the political pale for the power they gave government over private actors, it had a more central and autonomous position. In a context of dominant *laissez-faire* ideology, proponents of strong state intervention were sidelined, while conservative reformers hammered out the pragmatic compromises with real-estate interest that would lead to a modicum of control over development (Boyer, 1983; Fogleson, 1986; Roweis, 1983). In fact, North-American zoning was the brainchild of real-estate developers and conservatives much more than of good-government reformers or radicals; its primary aim was to protect the property owner and the tax payer.

Contemporary zoning regulations have a very long and varied lineage. The “*Coutume de Paris*” (Parisian municipal regulations that were carried over into French Canada) and the Laws of the Indies (royal edicts concerning the establishment and design of cities in the Spanish colonies) helped to shape the earliest settlements in North America. Modern, comprehensive zoning in the United States

¹I use the expression “North America” to designate the United States and Canada even though Mexico, too, is part of this continental region. I do so simply to avoid having to name the two countries repeatedly. For the same reason, I use “American” to refer to the United States, even though the adjectives applies to the whole continent.

and Canada grew more directly out of a variety of attempts to control the quality of the material and social environment in growing industrial cities. Starting in the early nineteenth century (and often earlier), municipal regulations helped to perform four principal tasks, all of which, in turn, served a fifth imperative. The first objective was to control threats to health and safety: regulations on human activities and building techniques helped to lessen the threat of fire, exposure to pollution and disease (Fischler, 1998a, 2007, 2014). The second was to manage the quality of streets and other spaces: setbacks and height limits helped to maintain unimpeded circulation and access to sunlight (*ibid.*). The third aim was to consolidate social distinctions in physical space: restrictive covenants, at first, and zoning codes, later on, helped to keep those perceived as social inferiors out of areas where they presumably did not belong (Fischler, 1998b; Fogelson, 2007; Weiss, 1987). The fourth objective, which gained prominence in the Progressive Era, was to improve the efficiency and reliability of municipal government: regulations were designed to rationalize municipal service delivery, and to minimize official discretion and, hence, abuse of power (Fischler, 2000a; Hirt, 2014). All these aims, together, served a fifth one: to shield property owners, principally homeowners, from losses to the use and exchange values of their assets and from excessive fiscal burdens, that is, to keep property values high up and keep property taxes low (Fischel, 2015). That is the single most important historical rationale for zoning in North America. Where skyscrapers were the most important real-estate assets at stake, as in New York City, zoning was tailored in particular to protect high-rise construction (Weiss, 1992). Where the single-family home was the primary object of public concern, zoning was fashioned specifically to protect the exclusivity of single-family residential areas (Hirt, 2014). One of the most important results today of this approach to zoning—from the earliest days of zoning to today—is the deep and lasting segregation of North-American cities by class and, in the United States especially, by race (Fischler, 1998b; Rothstein, 2017).

2 From Suburb to Metropolis

Two cities exemplify the range of municipalities that contributed to the advent of modern zoning in the early years of the twentieth century. One is a small suburb in Canada, the other the largest American city, indeed the largest city on the continent. One represents the countless North-American municipalities whose officials aimed to protect high-end residential areas from undesirable people, activities and buildings; the other stands for the handful of cities whose leaders worked to manage the impacts of high-density development in congested urban areas. Westmount adopted a comprehensive zoning code in January 1909; New York City did so in July 1916.

By 1909, Westmount, a bourgeois suburb of Montréal, had adopted regulations pertaining to land use (residential, commercial, industrial), housing type (detached and semi-detached family homes, attached or row houses, multifamily buildings), building height, distance from the street line, lot coverage and even floor area ratio (a standard first adopted in Westmount in 1899, that is, some 62 years before it was

used in New York City).² The original founders of Westmount (the municipality was first incorporated as a village in 1879) and its early-20th-century leaders were captains of industry, upper-level managers and professionals, staunch defenders of the British Empire and vocal proponents of good-government reform who used land-use and building regulations to create and protect a model community on the southern slope of Westmount hill (Bérubé, 2014; Bryce, 1990; Gubbay 1985, 1998). The social geography of the community corresponded to its physical geography: near the summit of the hill stood detached and semi-detached homes; on the lower slope and flat area at the foot of the hill, row houses were allowed, together with commerce on three specific streets; in the area, nearest to the tracks of the Canadian Pacific railway company, industrial structures and apartment buildings were permitted. This socio-spatial structure was soon complicated by the spread of upper-class apartment buildings in the flat area at the foot of the hill in the 1910s and 1920s and by the arrival in the 1960s and 1970s of tall office buildings in that part of the flat area nearest to a subway station.³

Tall office buildings were at the center of debates on land-use regulation in New York City (Weiss, 1992). Their increasing height and, especially, their increasing bulk made property owners and developers fear that their investments in lower Manhattan would be jeopardized by the erection of taller, bulkier structures that radically diminished access to light and air in adjacent buildings. At the same time, merchants of fashionable stores on Fifth Avenue reacted with alarm to the erection of manufacturing lofts on nearby streets and to the growing presence on their own avenue of garment workers whose dress, manners, speech and politics clashed with those of their respectable patrons (Makielski, 1966; Toll, 1969). Other property owners, too, wanted to see the value of their assets protected. Finally, officials and reformers sought to regulate land-development to prevent the spread of tenement buildings from Manhattan to the outer boroughs, to protect single-family housing areas and to increase the efficiency of infrastructure services (Fischler, 1998a; Revell, 1992). These various actors, each concerned with the spatial distribution and built form of new development, found common cause in the adoption of zoning. The regulation that they generated in 1916 represented a political compromise between proponents and opponents of government intervention in the market, a compromise that favored the *laissez-faire* side but still affirmed the principle that private development ought to be regulated in the public interest: it gave land owners massive development rights in most of the city, gave a modicum of protection to better-off commercial and residential areas, and imposed volumetric guidelines on tall buildings that minimized their solar impact on their surroundings (and helped to shape the iconic Art-Deco skyscraper) (Scott, 1971).

²Town of Westmount, By-law no. 103 “Concerning Building Areas and for Other Purposes,” April 4, 1899. The floor area ratio of Westmount governed the size of multi-family projects, whose floor area had to be limited to the area of the lot. The measure was discussed in 1913–1916, when New York City planners were preparing the zoning code of 1916, but it was not adopted until the city revised its zoning regulations in 1961 (Fischler, 1998a).

³Of particular note is the Westmount Square complex, designed by Mies van der Rohe, which opened in 1967 and featured two residential towers and an office tower set on top of a commercial gallery and underground parking garage.

3 Zoning Before Planning

When Westmount and New York City adopted their zoning codes, in 1909 and in 1916, respectively, neither city had a master plan that spelled out its objectives or depicted its vision for the future. Such blueprints or goals were implicit in the zoning codes, not explicit, as planning theory dictates. And yet, as the City of Westmount makes clear in its current Master Plan, there is a hierarchical relationship between planning and zoning, between the Master Plan and the zoning regulation.

The Westmount Planning Programme sets the directions for the planning and the development of the municipality. The Plan, and the implementation tools that flow from it (such as the zoning, site planning and architectural integration programmes and other bylaws), set the framework for the conservation, and in a few cases, the redevelopment, of neighborhoods, streets, buildings and open spaces. (City of Westmount, 2016, p. ii)

Zoning is an “implementation tool” for the Plan, as are other regulations, investments in the public realm and fiscal measures. In theory, therefore, zoning should come after planning. In practice, historically speaking, zoning came before planning.

In the years leading up to the adoption of the 1909 zoning code in Westmount, the available archival evidence does not show much concern for plan-making.⁴ The vision of a “bourgeois utopia” (Fishman, 1989) is a matter of social consensus, but it is wholly embodied in restrictive regulations rather than in a positive plan. As a 1908 editorial from the *Westmount News* makes clear, the city’s leaders are familiar with developments in the nascent field of planning, but their priority is to regulate private activity:

The reason why Westmount is likely to fulfill its destiny as a model, residential, garden city, is, because it began as a small self-governing municipality, and, in accordance with the law of social evolution, passed through the town stage into the final stage of a city, having all the elements of permanency (1) an intelligent, cultured, well-to-do population, entrusted with the popular franchise; (2) property interests carefully safeguarded by charter, and (3) a universal desire among the citizens to make their municipality a City Beautiful.⁵

The comparison with the Garden City and with the City Beautiful are only superficial: of Ebenezer Howard’s scheme for an alternative to the industrial city, only the low density and abundant greenery are present in Westmount; of the grand proposals modeled after the World Columbian Exposition of 1893, only the beautification of public gardens and private front yards is applied (Howard, 1965 [1898]; Wilson, 1994). Planning in Westmount is subsumed in regulation and beautification, the imposition of constraints on private development and the provision of public amenities.

In Westmount’s far larger neighbor, Montreal, zoning grew incrementally from its humble beginnings as health and safety bylaws in the seventeenth and eighteenth

⁴During the three years preceding the adoption of the 1909 zoning code, the local newspaper, the *Westmount News*, provides no evidence of civic demand for planning, only of demand for control over land development and construction.

⁵“The City Beautiful,” *Westmount News*, Saturday, June 13, 1908, p. 1.

centuries to more complex building and land-use controls after municipal incorporation in the 1830s⁶ and to modern regulations in the twentieth century (Fischler, 2014). In the early part of the century, the city grew by amalgamating a large number of suburban municipalities (Linteau, 2013; Marsan, 1990). Among these municipalities was Notre-Dame-de-Grâce, which had developed regulations on residential districts quite similar to those of Westmount.⁷ When Notre-Dame-de-Grâce was annexed to Montreal, the central city acquired not only additional land area but also state-of-the-art development regulations on residential districts. It soon started to designate “residential streets” in older neighborhoods, where municipal protection was granted on demand. But the patchwork nature of territorial growth was mirrored in the patchwork nature of land-use regulation. Even as the city instituted new controls to manage new forms of urban development—for example, it instituted bonus zoning for skyscrapers in 1967, six years after New York City did so—it kept adding provisions to its code in a piecemeal fashion. Only in 1991 did Montreal produce a streamlined, comprehensive zoning code. And only in 1992 did the city adopt its first official Master Plan. Toronto, too, added regulation to regulation for over a century before considering comprehensive zoning (Fischler, 2007). But it acted with a little more celerity than its rival, and in the right order, adopting its first Official Plan in 1949 and producing a comprehensive zoning code in 1954 (Fischler, 2007; Moore, 1978).⁸

The precedence of zoning over planning is even more clear in the case of New York City. Following the amalgamation of distinct municipalities into a giant city with five boroughs in 1898, the American metropolis saw much agitation for city planning. In 1913, city council appointed a Commission on Building Districts and Restrictions and established a Committee on City Planning. The recommendations of the former body were headed fairly rapidly: in 1916, the city adopted its famous comprehensive zoning regulation. Under the regulation, New York’s municipal territory was divided into height, area and use districts, i.e., into zones differentiated according to building height (measured as a multiple of the width of the street on which a building stands),⁹ according to land coverage (ratio of the area of the lot that

⁶The City of Montreal was first incorporated in 1832 but this initial incorporation was cancelled and a new incorporation effected in 1840.

⁷Notre-Dame-de-Grâce was a neighbor of Westmount, a larger municipality from which Westmount had seceded when it was first incorporated as a village. Several suburbs, including Outremont, copied Westmount’s regulations in a more or less wholesale manner.

⁸Interestingly, both Montreal and Toronto produced metropolitan plans fairly early on. In 1950, French consultant Jacques Gréber prepared a plan entitled “Isle of Montreal, Comprehensive Plan, Proposed Layout,” a blueprint for the growing region that prefigured future plans in its emphasis on the consolidation of urbanized areas (as opposed to sprawl). The plan consisted only in one large image; it came without a written report or strategy for implementation (M’Bala, 2001). Toronto acted even earlier: its Planning Board issued a “Master Plan for the City of Toronto and Environs,” prepared by outside experts, in 1943 (White, 2016).

⁹Height maxima as multiples of the width of the street (the ratio varies from 1 to 2.5) apply to the structure at the street line. Higher floors had to be set back according to the angle given by the ratio, but towers could go up to any height if they did not cover more than 25% of the lot.

a building may cover) and according to use (residential, commercial, industrial or unspecified). On the other hand, the recommendations of the second committee, the Committee on City Planning, were not followed for a long time. They included the creation of a city planning agency to guide the growth of the city. Such an agency was first set up in 1930 but was given limited responsibilities and resources; it was abolished in 1933. A new agency, the City Planning Commission, was set up in 1936; it was finally given a staff, housed in a Department of City Planning, in 1938. The Commission and Department produced their first comprehensive “Plan for New York City” in 1969. The first step, the creation of the City Planning Commission, is described as follows on the city’s website:

The establishment of the City Planning Commission provided the structure for comprehensive planning in New York City, replacing a haphazard planning and zoning system that functioned principally through the interaction of interest groups and political forces. For the first time New York had a professional agency with a single purpose: to serve the people of New York by planning for the entire city. (City of New York, 2017)

Although it is a landmark ordinance, the 1916 zoning code does not mark the beginning of planning per se. Land-use regulation emerged as “a haphazard ... system” produced by “interest groups and political forces,” a form of regulation on demand that suited the needs of owners and developers and the ethos of free-market capitalism.

The temporal and institutional priority of zoning over planning is characteristic of the municipal politics of countless other cities. Only in a small number of cities did officials attempt to subordinate zoning to a master plan. With the 1909 Plan of Chicago, the Commercial Club of that city aimed “to anticipate the needs of the future as well as to provide for the necessities of the present: in short, to direct the development of the city towards an end that must seem ideal, but is practical” (Burnham & Bennett, 1909, p. 2). In a lengthy appendix entitled “Legal Aspects of the Plan,” its authors investigated the ways in which municipal authorities could use the police power, the power of eminent domain and the power to tax and spend to implement the plan, i.e., to build the necessary public improvements and to so regulate private development as to create greater harmony and beautify in the city.

In Canada, similar efforts were made in cities such as Ottawa and Kitchener. (The comprehensive zoning code of Kitchener, adopted in 1924, is generally seen as the first of its kind in Canada, disregarding the experience of suburban municipalities such as Westmount.) However, Gerald Hodge and David Gordon confirm the subordination of planning to zoning in the Ottawa and Kitchener plans as well: “in both of these historic documents ... the community plan’s role was seen as providing support for land use regulations” (Hodge & Gordon, 2014, p. 97). In fact, they note, the following years saw “the widespread adoption of zoning bylaws without corresponding community plans” throughout Canada. One noteworthy exception to this pattern of zoning without planning was the 1928 *Plan for the City of Vancouver*, prepared by U.S. consultant Harland Bartholomew, whose “land use proposals were furthered by a sophisticated zoning bylaw” (p. 89).

The norm of zoning before planning prevailed in the United States (Scott, 1971). In the 1920s, Secretary of Commerce Herbert Hoover appointed an Advisory Committee on Zoning as part of his policy to increase the efficiency of the American economy, in part by means of the standardization of practices and products in all branches of industry, including real estate and housing (Fischler, 1998c). The Committee, made up of some of the planning pioneers who had been instrumental in housing and planning reform in the 1900s and 1910s, issued “primers” to diffuse zoning and of planning throughout the United States. Here, too, zoning came before planning: the *Standard State Zoning Enabling Act* was issued in 1926; the *City Planning Primer* came out in 1928 (Advisory Committee on Zoning, 1926, 1928). The members of the Committee made it clear that zoning ought to be part of planning. After noting that zoning would help avoid “this stupid, wasteful jumble” of unregulated urban development, they add:

We must remember, however, that while zoning is a very important part of city planning, it should go hand in hand with planning streets and providing for parks and playgrounds and other essential features of a well-equipped city. Alone it is no universal panacea for all municipal ills, but as part of a larger program it pays the city and the citizens a quicker return than any other form of civic improvement. (Advisory Committee on Zoning, 1926, pp. 1–2)

Although zoning alone cannot improve American cities, it is a more efficient means of doing so than any other. Zoning became popular in large part because it did not cost much, certainly not in comparison with City Beautiful schemes whose costs doomed them to remain plans on paper in most cases, and because it could be a source of savings (Stelter, 2000; Van Nus, 1977, 1979; Wilson, 1994; Wolfe, 1982).

The fact that the exercise of the police power, contrary to the use of the power of eminent domain, did not require that compensation be given to owners for any losses incurred in the development potential of their property was a focal point of legal and political discussion in the advent of zoning and a major selling point in its adoption and diffusion (Fischler, 1998b). As industry and commerce grew increasingly mobile thanks to the advent of the truck and the car, demand for zoning spread as well (Fischel, 2015). “On January 1, 1926,” the Advisory Committee on Zoning reported, “48 of the 68 largest cities in the United States, having in 1920 a population of more than 100,000 each, had adopted zoning ordinances, while most of the others had zoning plans in progress”; nearly 380 smaller municipalities had passed zoning regulations as well (Advisory Committee on Zoning, 1926, pp. 6–7). By 1926, then, the majority of the urban population of the US enjoyed “the protection and other benefits of zoning” (ibid, p. 7).

Advocates of zoning in the early years of the twentieth century included both conservative reformers such as Edward Bassett and Lawrence Veiller and radical ones such as Benjamin Marsh. Whereas for Bassett and Veiller zoning was essential to making capitalism and free markets compatible with the needs of family life and to limiting the “creative destruction” that they inflicted on valuable city properties, zoning to Marsh was an important but modest part of “City Planning in Justice to the Working Population,” as he put it in the title of one of his articles (Marsh, 1908; Kantor 1983). Bassett and Veiller wanted to address the problems of the industrial

city with small-government and market-friendly policies; Marsh advocated stronger state interventions that curtailed private benefits for the sake of greater equity. Their opposition led to a split in the nascent planning professions (Marcuse, 1980), the conservatives winning the political battle for the mind of planners. In this manner as in others, the Progressive Era represented the “triumph of conservatism” over more radical forms of reform (Kolko, 1963).

4 Who Zones?

Although critics of land-use regulation bemoan government intervention in real-estate markets and blame it for shortages in the supply of land and of housing units (Cox, 2006; Glaeser, 2012), zoning was invented in large part by developers for developers. Advocates of zoning included not only reformers in the professions, in charitable or public-health organizations and in government, but also many members of the real-estate community. The debate over zoning in the first decades of the twentieth century pitted “better” developers and “responsible” owners, who took a long-term view of real-estate development, against speculative developers who cared only about one-time profits at the moment of sale.¹⁰ Marc Weiss has shown that “community builders,” i.e., the creators of large, upscale subdivisions, were instrumental in shifting the burden of protection from private covenants to public regulations (Weiss, 1987). In American and Canadian cities alike, zoning regulations to protect better residential areas from apartment buildings and other detrimental projects were a response to grassroots demand on the part of local owners. So, too, was zoning to protect industrial areas from encroachment by residential units whose owners would complain or even sue to protect themselves from nuisances, as was famously the case in Los Angeles, in the *Hadacheck* case (Kolnik, 2008).¹¹ And as we have seen, a very pro-business Secretary of Labor helped to diffuse zoning in order to rationalize land development and make it more efficient.

My own observations in Montreal between 1994 and 2016 match the historical findings of Marc Weiss in San Francisco from 1914 to 1928:

The real estate industry in most large American cities was both for and against the establishment of zoning laws to regulate the use of property and the height and bulk of buildings. One faction of large developers generally favoured zoning laws. Big residential subdividers, the ‘community builders’, wanted public restrictions to control land uses surrounding their high-income subdivisions. Large commercial developers also supported use-zoning, but frequently opposed height limitations. Many smaller property interests, ‘curbstoners’, did not favour zoning at first, but once established, set about to manipulate

¹⁰The distinction between “good” and “bad” developers still matters today. At a recent public discussion on housing issues in the San Francisco Bay Area, the mayor of Albany, a municipality in the East Bay, declared that “there have been developers who merely seek to maximize profit irrespective of the community’s needs,” but that there also have been “developers who wish to work with the community and build environmentally friendly projects” (Jin, 2017, p. 1).

¹¹*Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

the process to promote speculation as well as more intensive development. Most of the elite bankers, builders and brokers were hostile to urban 'machine' politicians and fought to keep the administration of zoning out of their hands. (Weiss, 1988, p. 311)

In Montreal, too, it is customary for developers to try and obtain variances to build at greater heights and higher densities. But the better-established developers have been strong proponents of clear regulations administered with fairness. In fact, when arbitrary decision-making threatened the public good, individual developers could be found among those who demanded respect for established rules. What developers expect, first and foremost, is predictability and efficiency, i.e., behavior on the part of municipal authorities that reduces risk and minimizes loss of time in the development process. Within limits, the contents of the rules matter less than the quality of their application.

Developers' activities in zoning are not limited to applications for development permits and requests for variances. They include, most importantly, contributions to the design of zoning regulations and the calibration of requirements. Developers and/or owners initiate zoning reform when change threatens their assets, as was the case in New York City in 1913–1916, and when new designs and technologies or new market demands require a relaxation or modification of existing requirements. Regulation in all industrial sectors, including that of real-estate development, involves consultation with producers in order to assess what or how much government can require without jeopardizing production by setting excessive technical demands or imposing prohibitive financial burdens. In his writings on housing reform, Lawrence Veiller advocated the use of regulation (as opposed to subsidies or public housing) to improve housing conditions for the poor, in particular the adoption of housing codes that would set thresholds of acceptable quality in new housing. But he also emphasized the need for patience in raising quality over time, without setting standards so high as to price new housing out of reach of working-class households (Veiller, 1910). Today, all major changes to zoning codes, especially the introduction of new regulations, involve intense consultations with representatives of the development industry and much lobbying on their part if consultations do not seem to yield the desired results.

When Montreal officials set out to design an inclusionary housing policy, they set up advisory committees with leaders of community organizations active in the housing sector, with local experts and with residential developers. On the basis of their meetings, the consensus they felt was politically feasible was a policy of targets rather than of requirements: for developments over 200 units in size, developers would be asked, not required, to dedicate 15% of the project to affordable units and another 15% to units of social housing (Ville de Montréal, 2006).¹² The request would be given weight by a "trick" used by many planning departments: keep zoning allowances in development density low, force developers to apply for variances to do projects that meet their density targets and use the request for a variance as

¹²Affordable units are typically small units whose sale price falls below a certain threshold. Social units are produced by a community-based housing organization on a parcel, within the site, donated by the developer.

leverage to get the developer to help implement the inclusionary housing policy. Here, too, developers have displayed different attitudes: some have played the game in earnest, taking the 15–15% targets as givens, and have worked with planning staff to create high-quality projects for all parties involved; others have been reluctant partners, at best, and have tried to do the least possible while still meeting their own objective in terms of floor area.

Although zoning represents government intervention in private real-estate markets, it is, historically speaking, a response of municipal corporations to requests from property owners and developers. In some cases, for instance in the protection of single-family residential areas, it is literally provided on demand. In other cases, for example in the promotion of affordable housing in new projects, it is still produced in a deliberative process that involves the producers of real estate as a major political force. Developers hate risk more than they hate rules; to the extent that rules reduce risk, they are welcome. That is why zoning was originally conceived as a mechanism to augment certainty in private development and in government intervention. Thus regulations had to be clear and had to minimize discretion on the part of municipal officials, especially where the public had little trust in the ability and/or probity of officials (Fischler, 2000a; Hirt, 2014). At the same time as they want certainty, though, developers want flexibility, the ability to respond creatively to the particular characteristics of their site or to changing circumstances. This need, which stands in direct contradiction to the need for predictability in the approval process and in the life of their assets, can be met in two ways: by allowing for exceptions to be made and by designing regulations that allow for greater discretion on the part of regulators. The first mechanism was made part and parcel of modern zoning from the start, as a judicial, political and functional “safety valve” to avoid penalizing some owners unduly and expose the municipality to lawsuits (Williamson, 1931). The second mechanism, though present in limited ways in early building and housing codes, became key to some forms of land-use regulation in the second half of the twentieth century, most evidently in the United Kingdom, but also in North America (Booth, 1996, 1999).

5 Qualitative Norms and Discretionary Controls

The diffusion of discretionary controls was fueled by the broadening of the scope of zoning. In 1916, commenting on the recent *Hadacheck* decision, in which the use of the police power to protect the residential character of neighborhood was deemed constitutional, Lawrence Veiller declared:

For the first time in American jurisprudence we have a statute of this kind sustained, not on the basis of public health nor public safety, but on that novel, broad and sweeping ground, “the general welfare.”

This opens a door, a crack, which may be opened very wide. How wide it may be opened few in United States can tell. (Veiller, 1910, p. 153)

When the prohibition of non-residential development in residential areas was legitimated as a measure benefiting the general welfare, and not just as a means of controlling nuisances, reformers and officials received a green light to try and expand the scope of municipal regulation to address what we would now call “quality of life” issues.

The shift from quantitative standards to qualitative norms after World War I and, even more so, after World War II, characterized public policy in general (Fischler, 2000b). As economic growth helped to raise living standards and standards of housing, planners started focusing less on questions of health and safety and more on what the British referred to as “amenity.” Here is how the British legislator explained the rationale for the Planning Act of 1909:

To secure proper sanitary conditions in the development of land has been, during recent years, the aim of numerous statutes, by-laws, regulations and local Acts, and a great improvement has no doubt been effected, but all such provisions are necessarily in-elastic in measure as they are general in their scope and application. Moreover, they are not concerned with amenity and convenience, except in so far as proper sanitary conditions may be considered to be implied by those terms. Town-planning schemes, on the other hand, will be prepared with special reference to the actual circumstances of each particular case, and amenity—the quality of pleasantness—will, in addition to adequate sanitary arrangements, be a conscious object of effort. [...] As a further development of, and indeed an important adjunct to, sanitation and convenience, it will now be remembered that a pleasant environment is an important factor in public health, and its provision a true economy. Every effort should be made when developing land for human habitation, not only to preserve to the utmost every object of natural beauty, but to so plan and guide the development itself as to produce a pleasing and harmonious result, a locality preserved, designed and built in accordance with the best conceptions of architectural and artistic beauty.¹³

As important as they may be, quantitative standards can only do so much to create proper living environments. Artful urban design is needed to respect the *genius loci* and/or provide a pleasant living environment. Such a plea had already been made by Camillo Sitte in the late-nineteenth century, when standardization and engineering were starting to gain predominance in the laying out of cities (Sitte, 1965 [1889]), and it was being echoed in North America by the proponents of the City Beautiful (Wilson, 1994). The balanced view expressed in the British Planning Act of 1909 was diffused in Canada and in the U.S. by Thomas Adams, who had been Secretary of the Garden City Association and first President of the Royal Town Planning Institute. Adams became a consultant to the Canadian government in 1914, helped to write planning legislation for several Canadian provinces and was the founding president of the Town Planning Institute of Canada. He moved to the United States in 1923 and was put in charge of the Regional Plan of New York and Its Environs a few years later (Simpson, 1985). The metropolitan plan he helped to draft drew inspiration from a review of the state of the art in planning in the late 1920s. One of the elements of the 1929 *Plan* was Clarence Perry’s monograph on

¹³ The Housing, Town Planning, Etc. Act 1909, 9 Edward 7 c.44, chapter 1. The Planning Act of 1909 became the basis for provincial planning acts in Canada in the 1910s. In fact, the language of Canadian acts mirrors the language of the British act closely (Hodge & Gordon, 2014).

the Neighborhood Unit, which Perry presented as a response to “The Rising Demand for Quality in Housing Environment” and a “new thirst for quality in every phase of life” (Perry, 1974 [1929], pp. 31, 33).

The inclusion of qualitative, and therefore subjective, aspects of urban development in the purview of municipal regulation started early in bourgeois suburbs, where aesthetics were deemed fundamental and the private practice of design control first arose through restrictive covenants (Fogelson, 2007). Westmount set up an Architecture Advisory Committee in 1916, made up of four architects (local residents), the City Clerk, the Building Inspector and the Mayor, in order to submit all building permit applications to design review and ensure that new homes and other structures would contribute to the aesthetic appeal of the municipality (Bryce, 1990).¹⁴ In the United States, the initial resistance of courts to approve uses of the police power for purposes of urban design was soon broken, and regulations that aimed to create an attractive urban environment were soon justified as means of contributing to the general welfare. Historic preservation, which became a topic of interest in the nineteenth century, was integrated in land-use regulation on a large scale in the 1950s and 1960s. Environmental protection, which had become an object of attention at the start of the twentieth century, became important in regulatory systems in the 1960s and 1970s; more recently, a concern with climate-change mitigation and adaptation further expanded the environmental mandate of land-use planning and regulation. Public health, which had been an important issue in housing and planning reform at the turn of the twentieth century, mostly in relation to contagious diseases such as tuberculosis, became important again at the turn of the twenty-first century, this time in relation to obesity and associated ailments.

Where possible, authorities rely on quantitative standards to control land development and construction—whether they are formulated as specification standards or as performance standards (Kendig, 1980)—because they increase certainty. This advantage has been duly noted by the proponents of one of the most recent innovations in land-use regulation, the form-based code. As land-use classifications inherited from the industrial era become less relevant, as mixed uses become more attractive from a functional, social and environmental point of view, as public concern grows with the quality of the public realm, and as planners and developers alike cherish certainty and speed in project evaluation, New Urbanists are calling again for non-discretionary controls that give shape to attractive built environments (Katz, 1994).¹⁵ However, as said, not all aspects of the built environment can be regulated by means of quantitative standards. Even where tradition lay in non-discretionary controls, as in the United States, the multiplication of public policy goals, together with the increasing scale of development projects, has pushed municipalities to

¹⁴Westmount’s efforts in land-use regulation and design control paid off: the residential portion of the city was designated a national Historic Site in 2016 for being “emblematic of the Victorian and post-Victorian suburb in Canada on account of its overall [architectural] diversity and [landscape] integrity” (Government of Canada, 2016).

¹⁵The principles of the New Urbanism and of development regulation by means of form-based codes can be found on the website of the Congress of the New Urbanism (www.cnu.org) and of the Form Based Code Institute (www.formbasedcode.org), respectively.

adopt discretionary controls under which various considerations, some of them hard to quantify, can be considered concurrently (Selmi, 2009).

The growth of discretionary controls was made possible by (and in turn has fostered) the professionalization of the planning workforce. Planned unit developments, development agreements and similar regulatory tools offer flexibility in the design of large projects but put an onus on professional planners, on their knowledge of spatial, function and economic aspects of land development and on their negotiation skills (Smith, 1988). Planners in charge of development control by means of discretionary tools cannot act or be seen as mere technicians who apply unambiguous rules; they must be able to apply wise judgment and be respected as partners in the design of projects. This change in professional ability and public perception, in turn, was made possible by the development of professional planning education and the consequent diffusion of planning knowledge from a small cadre of national experts in the early twentieth century to a growing community of professional planners after World War II.¹⁶

In large North-American cities, a multi-layered system of actors, using a multi-layered system of standards and norms, participates in the regulation of urban development. In Montreal, traditional zoning regulations control land use, development density, building height, land coverage, setbacks, courtyards, signage and parking; performance criteria on shade and wind impacts regulate the shape of tall buildings, while performance criteria on traffic impacts affect site plans; in specific districts, additional regulations pertain to facades (shape and area of windows, type of cornice, etc.) and/or to the architectural and urban-design integration of the project (which is evaluated by means of qualitative norms such as “compatibility”); and large projects are subject to development agreements in which the site plan is examined in detail. In short, planners and members of planning advisory bodies use an array of quantitative standards and qualitative norms of non-discretionary and discretionary tools to assess projects. Although the bulk of evaluation is done on the basis of explicit criteria, some of it is based on explicit criteria: members of planning advisory committees (the *comité consultatif d’urbanisme* in each borough and the Comité Jacques-Viger for the city as a whole) assess the quality of projects and the merit of requests for variances or changes in zoning regulations by considering all criteria they deem relevant (except for architectural taste) as architects, urban designers, urban planners and landscape architects. In meetings of advisory committees, developers and their professionals display a range of attitudes, from defiance of unwanted meddling in private development decisions to acceptance of the

¹⁶ The nascent field of planning was dominated by a small number of oligopolistic firms that drafted Master Plans and zoning regulations throughout North America (Fischler, 1993, Appendix A). Although professional planning institutes were created in the 1910s (in 1917 in the United States and in 1919 in Canada), it took several years for universities to establish professional programs in urban planning (starting in 1929 in the US, at Harvard University, and in 1947 in Canada, at McGill University).

need to balance public and private interests, from eagerness to jump through another administrative hoop without delay to sincere gratitude for constructive feedback that improves a project.¹⁷

6 Private Development and Public Benefits

In 1961, New York City rewrote its zoning code. It finally introduced the floor area ratio (FAR) as a regulatory standard, nearly 50 years after it was discussed among architects and planners in the city and over 60 years after it was adopted by officials in Westmount. More important, the new code borrowed a technique developed in Chicago a few years earlier to stimulate office construction in the loop: in exchange for providing a publicly accessible outdoor space in their projects, developers were given permission to build larger projects than normally allowed under current zoning rules (Morris, 2000). As in 1916, New York City regulators looked to best practices to create new norms: in the same way that the slender tower on a wider base, a form enshrined in the first zoning code, was becoming developers' response to the problem of land congestion in downtown Manhattan in the 1910s, so did the monolithic tower set on an open site appear as a new prototype of Modernist design in the late 1950s. The Seagram Building of 1958, among others, showed officials and planners that private development could yield public benefits, in this case a plaza that provided light and air in an otherwise increasingly congested Midtown. Under the new rules of 1961, allowable densities were lowered so that extra floor area became attractive to developers: they could make up for the "loss" of density by claiming extra floor area in exchange for a plaza or an arcade.¹⁸ Bonuses were soon granted for other amenities such as on-site access to the subway and through-block passages. In New York and other cities, incentive zoning also was applied to promote historic preservation (Costonis, 1974), in particular the preservation of old theatres, and, perhaps most significantly, to foster the development of affordable housing (Lassar, 1989; Morris, 2000). Cities such as Vancouver have developed system of density bonus zoning and of "Community Amenity Contributions" to be

¹⁷ These remarks are based on the author's personal observation as a member of the Comité Jacques-Viger from 2012 to 2017.

¹⁸ For every square foot of plaza and of arcade, developers could build up to an extra 10 sq. ft or an extra 3 sq. ft of office space, respectively (depending on the area). The bonus program proved very successful—at least for developers, who obtained nearly \$48 of additional property value for every \$1 spent on plazas (Kayden, 1978), but much less so for the public, which received much space of poor quality. Revisions in the bonus zoning program were necessary to ensure that the quid pro quo had a better outcome for the public (Whyte, 1988). In Montreal, where developers had started to provide plazas, too, at the foot of their monolithic office towers (Lortie, 2004), bonus zoning was not a success: existing density standards were too generous relative to market demand, making bonuses less attractive to developers and leaving them unused (Boyce, 2001).

made in exchange for zoning changes.¹⁹ Like Vancouver, many other cities where strong development pressure is putting housing out of reach of many households have adopted inclusionary housing programs, whereby developers build or pay for affordable housing (on-site or off-site), and in some cases also linkage fees programs, whereby the developers of commercial projects contribute to an affordable housing fund to compensate for the impact of their projects on local housing markets (Williams et al., 2016). Others, like Los Angeles, have adopted practices of community benefits agreements, voluntary contracts between developers and community groups that pertain to employment, job training and other socio-economic demands of marginalized communities (Been, 2010).

Where they can, municipal officials follow William Whyte's advice: what is truly important to the public good should be demanded of all projects, not traded for special advantages granted to specific ones (Whyte, 1988). Of course, economically speaking, the demands have to be such that they do not stifle development. In addition, legally speaking, they must be based on evidence of a direct causal link (or "rational nexus") between private project and public benefit, and their provisions must be calibrated on the basis of the likely impact of the project.²⁰ From 1916 to 2016, the name of the game has remained the same: to achieve the best possible deal with developers, both in writing new regulations and in assessing individual projects. Regulation must have a degree of flexibility in the face of complexity and change, and large projects must be subject to qualitative review; making project-specific deals therefore remains necessary. But the best possible deal in the writing of new regulations, one could argue, yields regulations that do not require making deals on individual projects.

7 From Conservative to Progressive Zoning

The idea that private development could be regulated to obtain public benefits is as old as building regulation itself: we have always demanded that builders or developers respect community interests, that they contribute to public health, safety and welfare, that they build in such a way as to make the urban environment more attractive, less costly to service and more supportive of economic development. What changed in the 1960s is not only the manner in which benefits are obtained—by means of incentives and not just by means of prohibitions or other strict demands—but also, more significantly, the benefits themselves and the political context in which they are sought.

¹⁹ See City of Vancouver, "Density Bonus Zoning" at <http://vancouver.ca/home-property-development/density-bonus-zoning.aspx> and "Community Amenity Contributions" at <http://vancouver.ca/home-property-development/community-amenity-contributions.aspx> (both last accessed on May 26, 2017).

²⁰ This double test of regulations is often referred to as the Nollan-Dolan test, after the two US Supreme Court decisions that established it in jurisprudence, *Nollan v. California Coastal Commission* (1987) No. 86-133, and *Dolan v. City of Tigard* (1994), No. 93-518. See also Kayden 1991.

For the first time in decades, if not in a century, during which zoning served the interests of property owners and developers and was applied to foster social segregation, zoning is being used for redistributive ends and for the purpose of social integration. The change is due to changes in municipal politics, most notably the success of progressive coalitions to elect progressive mayors (e.g., Tom Bradley in Los Angeles, Harold Washington in Chicago, Jean Doré in Montréal), and a growing belief in the value of long-term sustainability, even among some developers (Portland being the prime example of a city where a pro-planning consensus has developed [Abbott, 2001]). But the change is also due to economic and political shifts that undermine the Welfare State, increase social and economic needs in urban areas and force municipalities to attend to policy problems which they are, fiscally speaking, not equipped to address. Whereas most early planners insulated planning from the progressive politics of their day, letting housing reformers, social workers and others take care of social need, many planners in recent years have merged planning and progressive politics, working in parallel with non-governmental and community-based organizations to compensate for the effects of market processes and for the fraying of the social safety net. Lacking proper revenues, cities must tackle social problems and are looking for resources where they are, e.g., in real estate.

The great irony of contemporary zoning is that a tool adopted in American and Canadian cities to a large extent by conservatives for conservative purposes is being used by progressives to further progressive ends. Of course, there always was a progressive potential in government intervention in real-estate markets; but that potential was poorly used, to say the least. And now that some are trying to exploit it better, its limitations are becoming abundantly clear. There is only so much that inclusionary zoning regulations, linkage fee programs and community benefits agreements can contribute to addressing the challenges of the post-industrial city, much like there was only so much zoning codes could do to address the problems of the industrial city. Then as now, tinkering with zoning and other municipal bylaws, however useful they may be, is not good planning and certainly not good urban policy. John Reps already said so half a century ago, when he wrote a “Requiem for Zoning” (Reps, 1964). State/provincial (or national) policy is where the real action is, where progressive municipal policy is often being undone (Barton, 2012) and where, on the contrary, it can be fostered by means of legal planning mandates and land-use and infrastructure policies. Montreal has been able to limit the impact of growing economic inequality thanks to the persistence, despite their weakening, of provincial and federal social-welfare policies, thanks to rent-control bylaws that have not been undermined politically or judicially, as has been the case in California, for instance. Montreal has also been able to limit suburban sprawl in part thanks to Quebec’s intervention in municipal affairs, including the imposition of agricultural zoning (i.e., the shift of some zoning powers from municipal to provincial hands) and of

minimum thresholds of development density in local zoning ordinances (Fischler & Wolfe, 2012).²¹

Montreal's recent experience also shows that, whereas in theory planning ought to occur prior to zoning and, historically, zoning took place before planning, today, in practice, zoning and planning are done together. As we have just seen, long-range planning is done in part by the provincial government and is implemented by means of limitations or requirements imposed on municipal zoning. In addition, Montreal's Master Plan includes a land-use map and a map of maximum building densities. These maps show land uses and densities, respectively, in broad categories; zoning maps provide more specific information. Thus, proposed development projects must be assessed both against the Master Plan and the zoning code. If the administration wishes to approve the construction of a condominium building with an FAR that exceeds the maximum FAR set in the Master Plan (and in the zoning code), it must amend the Master Plan. In Montreal as elsewhere, development pressure from individual developers is often the impetus for planning. In other words, planners often plan in response to signals from the private market. A lack of human and financial resources and of political support (and perhaps a tendency to work in closed offices rather than in the field) hampers planners in the task of monitoring local conditions and updating plans wherever change is starting to occur. Thus, planning for change is often done, at least at first, by means of zoning.

The impact of zoning changes and variances on long-range planning has recently been highlighted in Los Angeles, where the Coalition to Preserve LA put an (unsuccessful) initiative on the ballot to ask that zoning be made subservient to planning:

The Coalition to Preserve LA is a citywide, grassroots movement that aims to reform L.A.'s broken, rigged and unfair planning and land-use system through the Neighborhood Integrity Initiative, which has been placed on the March 7, 2017, ballot.

For too long, deep-pocketed, politically connected developers have controlled City Hall by shelling out millions in campaign contributions to L.A. politicians, who, in return, grant "spot-zoning" approvals for mega-projects that are not normally allowed under city rules.

Ordinary people, who have little clout at City Hall, suffer the consequences—increased gridlock traffic, the destruction of neighborhood character and the displacement of long-time residents, including senior citizens on fixed budgets and lower-income Angelenos.

With the Neighborhood Integrity Initiative, the Coalition to Preserve L.A. aims to reform City Hall by winning reasonable controls back for all Angelenos.²²

To lessen the impact of individual zoning decisions on the city and on the planning system, the Neighborhood Integrity Initiative aimed to subject zoning to long-range planning again, i.e., to stop the practice of "spot zoning" and adopt a "timeout"

²¹ Agricultural zoning was adopted in 1978 (*Loi sur la protection du territoire agricole*) and metropolitan requirements on local development densities were imposed in 2011 (Plan métropolitain d'aménagement et de développement). Similar actions were taken in Ontario, where the provincial government issued the *Greenbelt Act, 2005* and the *Places to Grow Act, 2005* to establish growth boundaries and impose density requirements in the Greater Golden Horseshoe region of Toronto and Hamilton.

²² Preserve LA, <http://2preservela.org> (last accessed on May 27, 2017).

for all development that does not “adhere to zoning” while the City drafts “a rational citywide plan for Los Angeles, called a General Plan, with updated Community Plans tied directly to infrastructure limitations, true population figures and community desires.”²³ Although the initiative was driven by a strong NIMBY sentiment, it relied on good planning theory: survey before plan, zoning after plan.²⁴ In practice though, long-range planning and ad-hoc regulation always occur concurrently, in response to change on the ground. Officials react to trends in urban development which are first experienced on the front line of project approval; a significant project or an accumulation of projects calls for changes in plans and in regulations; the scale and scope of the adjustment vary from minor and local to major and city-wide. Officials also respond to policy imperatives (e.g., addressing a crisis of housing affordability, the loss of competitiveness, the treat of climate change); they do so with the tools at hand which, at the municipal level in North America, are primarily related to the management and taxation of land use (Peterson, 1981). Thus, the politics of zoning are at the same time the politics of real-estate regulation and the politics of social, economic and environmental sustainability. There is a schizophrenic quality to planning practice, caught as it is between technical control of real-estate projects and political action in the face of societal change.

8 Conclusion

From the preceding discussion of patterns and trends in zoning, there appear to be wide gaps between the theory of zoning, its historical record and its contemporary practice (Table 1).

In theory, zoning is a regulatory tool used to implement the community’s vision for its future. In practice, it is to a large extent deal-making with developers. It is not

Table 1 The theory, history and practice of zoning

Theory	History	Practice
Planning before zoning	Zoning before planning	Zoning and planning together
Zoning for health, safety & welfare	Zoning for social & economic capital	Zoning for taxes & public benefits
Fixed rules with exceptions	Growth of discretionary rules	Zoning as deal-making
The city zones, developers build	Developers zone and build	Many stakeholders zone

²³ Preserve LA, <http://2preservela.org/neighborhood-integrity-plain> (last accessed on May 27, 2017).

²⁴“Survey before plan” is the well-known expression of Patrick Geddes. It is the same point that members of the Comité Jacques-Viger made to Montreal planning staff on several occasions: a non-conforming project that is likely to have a significant impact on its surroundings should not be approved as an exception, thanks to a zoning variance or a local change in plans and regulations, but should be seen as a trigger for long-term planning for the future of the whole area.

surprising that the first U.S. president to come from the field of real-estate development (Donald Trump) is a president who wants to make deals, not policy. Of course, he will also make policy, and that policy is likely to leave cities to their own devices in the face of growing inequality and environmental threats, making them more reliant on real-estate development as a source of public income and benefits. A century after planners willingly or unwillingly gave planning a narrow mandate, contemporary planners must try to achieve important things with limited means. They are creatively using a tool of conservative urban policy to further progressive goals, responding to sometime unreasonable expectations on what zoning can deliver. The local problems they are attempting to remedy require responses from higher levels of government, including both policies that will empower municipalities to do more and policies that will constrain their abilities to do as they please.

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One Hundred Years of Zoning and the Future of Cities

Lehavi, A. (Ed.)

2018, XII, 223 p. 24 illus., 20 illus. in color., Hardcover

ISBN: 978-3-319-66868-0