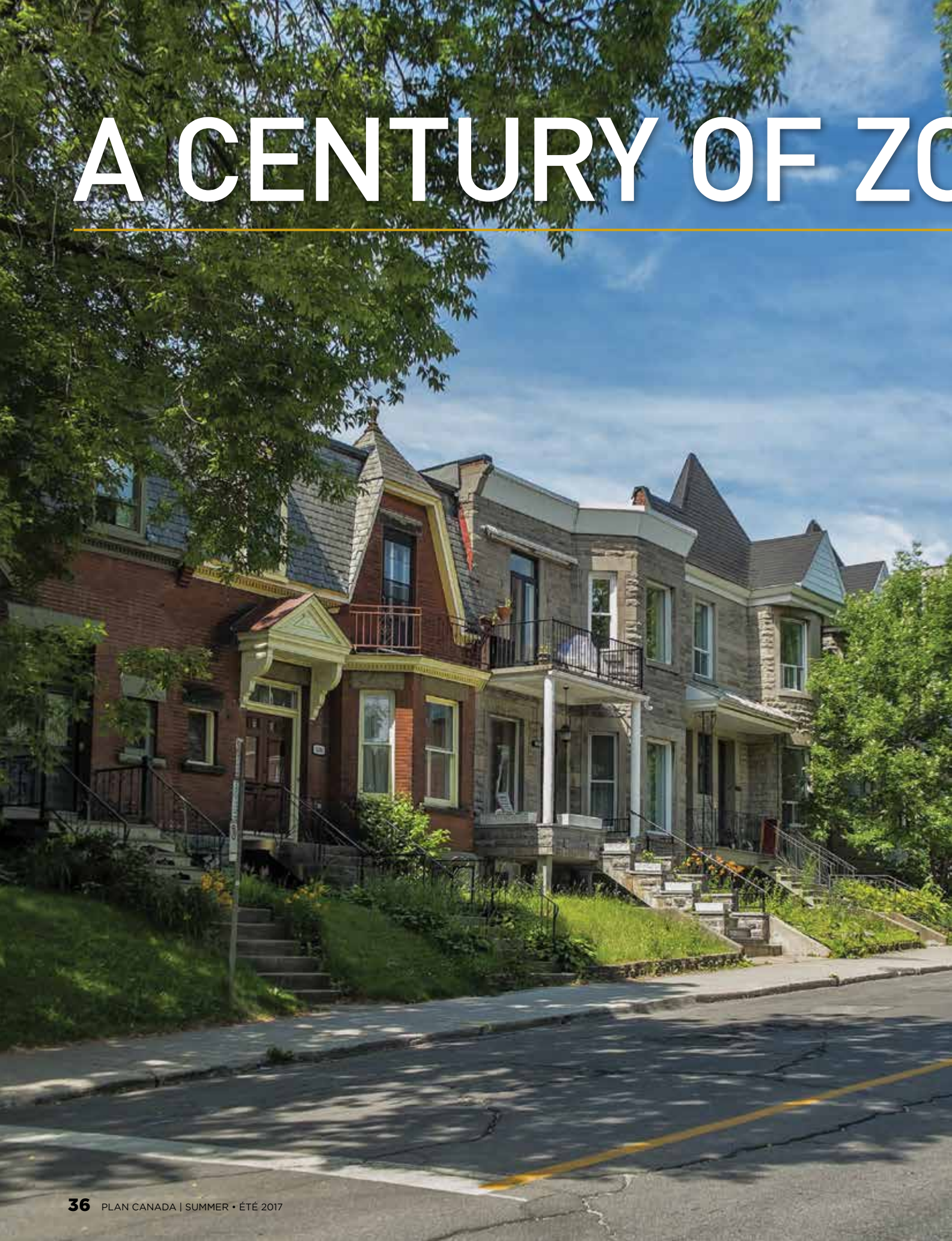


# A CENTURY OF ZC

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# ONING

By Raphaël Fischler

## THE PAST AND PRESENT OF PLANNING AS REAL-ESTATE REGULATION

### ABSTRACT

Zoning is (at least) a century old. Its history generally starts with the comprehensive zoning codes of Kitchener, for Canada, and of New York City, for the US. I try to remedy gaps in our historical understanding by looking at the earlier case of Westmount, Quebec, and by highlighting the political compromises of zoning pioneers. Historically, zoning was put before planning in the management of urban growth; politically, physical development was put ahead of social and economic development in addressing urban problems. We are still heirs to that legacy. But in the absence of adequate tools and policies, we have been using zoning creatively to address a variety of issues.

### SOMMAIRE

Le zonage remonte à un siècle (au moins). Son histoire commence généralement par les codes de zonage détaillés de Kitchener, pour le Canada, et de la ville de New York, pour les États-Unis. Je tente de remédier à toute lacune dans nos connaissances historiques en examinant le cas antérieur de Westmount, au Québec, et en faisant référence aux compromis politiques des pionniers du zonage. Sur le plan historique, le zonage a précédé la planification en ce qui a trait à la gestion de la croissance urbaine; sur le plan politique, c'est l'aménagement physique qui a devancé le développement social et économique, pour résoudre les problèmes urbains. Nous en sommes toujours les héritiers. Toutefois, en raison du manque d'outils et des politiques appropriés, nous utilisons le zonage de façon créative pour régler diverses questions.

### INTRODUCTION

I write these lines on July 25, 2016, a hundred years, to the day, after New York City adopted its famous "Building Zone Resolution" to control the use, height, and bulk of new buildings (**Figure 1**). The resolution was hailed as a breakthrough at the time and served as model to many other cities on the continent, large and small. Many therefore see July 25, 1916, as the birthday of zoning in North America.<sup>1</sup> In Canada, Kitchener is generally credited for being the first city to adopt a comprehensive zoning code. The final version of the Kitchener ordinance, after an appeal at the Ontario Municipal Board was passed on December 26, 1924.<sup>2</sup>

I would like to contribute to the centenary of zoning in two ways: by setting the historical record straight and by arguing that this anniversary should be an opportunity for a critical review and not just a cause for celebration. On the

one hand, we know a lot about specific cases of comprehensive zoning in the 1910s and 1920s, but too little about the very beginnings of zoning at the turn of the twentieth century.<sup>3</sup> On the other hand, despite the fact that, five decades ago, historian John Reys presented a "Requiem for Zoning" on account of its uselessness and harmfulness, we are still making a very intensive use of that controversial tool and are in fact inventing new uses for it all the time.<sup>4</sup>

### THE FIRST ZONING REGULATIONS IN NORTH AMERICA

My research shows that the first municipality in North America that had a *full* set of zoning regulations was a small suburb of Montreal, and not New York. That suburb is Westmount, a wealthy community located on the southern slope of one of three hills at the centre of Montreal Island.<sup>5</sup> Reading all of Westmount's bylaws from 1874 to 1909,



**Figure 1: Height District Map of the Borough of Manhattan (detail)**<sup>23</sup>

The map shows the number by which the width of the street had to be multiplied in order to obtain the maximum building height at the street line. \*Source: Commission on Building Districts and Restrictions, *Final Report* (City of New York, Board of Estimate and Apportionment, Committee on the City Plan, 1916), Fig. 128.

one witnesses the incremental construction of a regulatory apparatus to manage urban development. Innovative municipalities did not suddenly adopt, let alone invent, zoning; they built up their land-use controls in a piecemeal fashion, cobbling together older forms of control, inherited from fire codes, nuisance regulations and permitting systems, and innovations inspired by external precedents or by local needs.<sup>6</sup>

Westmount made planning history on January 4, 1909, when it adopted a "Building By-law" which, together in a number of separate bylaws, contained a complete set of development controls as we know them today.<sup>7</sup> The administration divided the municipal territory into a number of districts, assigned different land uses and housing types to each zone, and imposed variable standards as to setbacks, building height, land coverage and even project density.

Westmount started on the path to zoning in the 19th century, and even though it had a later start than many other cities (it was first incorporated as the Village of Côte-Saint-Antoine in 1874), it progressed very quickly on that path. It established a zone reserved for detached and semi-detached single-family homes as early as 1897 and resorted to the floor area ratio (FAR) to regulate apartment construction as early as 1899.<sup>8</sup> The city proved to be innovative not only in land-use regulation but also in a host of areas of municipal administration. Soon after adopting its zoning controls, it instituted a City Manager system (in 1913) and created a planning and design review board (in 1916), before any other city in Canada.<sup>9</sup>

The tripartite topography of Westmount and the town's self-identification as a well-managed bourgeois suburb made the municipality a "natural" for zoning. District 1, the southernmost part of Westmount, literally on the other side of the tracks, was open to all land uses and housing types, including manufacturing and apartments (Figure 2). District 2, the flat section north of the tracks and on the lower part of the slope, welcomed townhouses and other types of single-family homes and, on a small number of designated streets, also was open to commercial development. District 3, on the upper part of Westmount (the hill), was reserved for detached and semi-detached single-family homes.<sup>10</sup> Physical elevation corresponded to social standing; although some attractive, stone-face "terraces" were

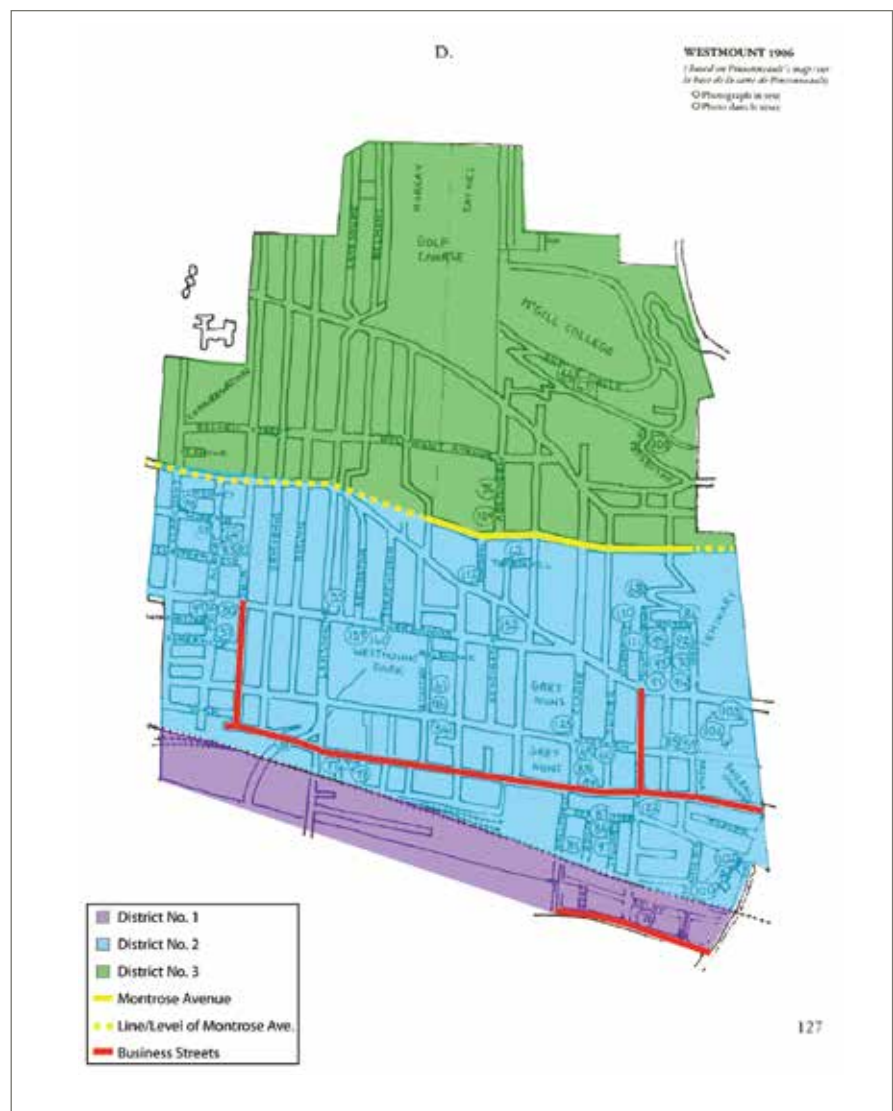
built in the lower-lying portion of Westmount, overall, as one went up from the escarpment overlooking working-class Saint-Henri and up to the summit, one went (and one still goes today) from a more urban and commercial environment in the south to a more suburban and exclusive one in the north.

In short, by 1909 Westmount had a coherent, spatially comprehensive set of regulations, with all the basic elements of a modern zoning code. But by way of a Master Plan, it only had a homologated plan of existing and projected streets.

### LEARNING FROM NEW YORK CITY

The case of New York City stands in sharp contrast to that of Westmount. The differences are obvious. When it adopted

its first zoning ordinance in 1916, New York City had a population of about five million people and a land area of nearly 800 square kilometres. At the time it passed its *Building By-law of 1909*, Westmount had about 13,000 residents, occupying an area of four square kilometres. New York City was a teeming metropolis and the main gateway for immigration into America, a primate city with a rapidly growing Central Business District, in which the invasion of the skyscraper and of the tenement caused headaches to property owners and public officials. Westmount was a residential suburb of the English-speaking bourgeoisie, a refuge from congested, corrupt Montreal. New York City was much older than Westmount, but it went from a diverse system of building codes,



**Figure 2: Zoning Map of the City of Westmount, 1909**

Source: base map from Aline Gubbay, *Montreal's Little Mountain: A Portrait of Westmount* (Montréal: Optimum Publishing International, 1985), p. 127; coloring and legend by Ellen Heshusius.



housing codes and private deed restrictions to a comprehensive zoning ordinance in only a few years, under the pressure of property owners in fashionable business districts.<sup>11</sup>

Despite all their differences, New York City and Westmount shared a desire to tame the forces of urban development and resorted to zoning to do so. Another similarity is noteworthy, too: both Westmount and New York City adopted zoning without adopting planning. Neither city drafted a Master Plan or instituted a Planning Commission before moving ahead with land-use regulation. As historian Mel Scott noted, although theory prescribes planning before zoning, historically, zoning preceded planning.<sup>12</sup>

Rather than being the expression of long-range planning and reformist policies, New York City's 1916 resolution was a working compromise between policy-makers and real-estate owners and developers; it gave modest planning powers to the former and imposed few constraints on the latter. American zoning was built on a deeply rooted belief among politicians and judges in the virtue of *laissez-faire* and in the sanctity of private property.<sup>13</sup> By controlling the location, type, and density of buildings, zoning gave officials a means to regulate real-estate development and prevent

negative externalities, but it was too weak a tool to make a real difference in urban living conditions. Although the planning agenda had been pushed forward by a coalition of radical and conservative progressives, the adoption of the 1916 zoning resolution signalled the parting of their ways, most planners choosing the conservative route, turning planning into the "mediation of territorial politics," and leaving pro-active government intervention, let alone social and economic reform, to others.<sup>14</sup> Westmount's 1909 ordinance was clearly conservative in intent, aiming primarily to shape the community according to bourgeois norms and to preserve property values.

#### **THE CREATIVE HISTORY OF ZONING**

Despite its origins in conservative real-estate regulation, zoning today is strongly on the minds of progressive planners. Like any tool, zoning can be used and indeed has been used in different ways by different people acting under different circumstances. Its history is evidence of planners' inventiveness.

As we saw, zoning has served to design the built environment, regulating the shape of structures and their relation to the public domain; it has served to protect property

values, preventing injurious development from intruding in established residential or commercial areas; and it has served to insulate families from "undesirable" neighbours, segregating the population by income and therefore also by race or ethnicity via regulations on building use, housing type and/or dwelling size.<sup>15</sup> But zoning has also been used to secure public health and safety by setting standards to guarantee access to light and air and reduce the risk of fire transmission. It has been applied to increase municipal revenue by allowing the construction of tax-generating floor area and to lower municipal expenditures by prohibiting or minimizing the settlement of activities or populations that require higher levels of services. Last but not least, zoning has helped to protect built and natural heritage by limiting or guiding change in sensitive areas.<sup>16</sup>

The diversity of purposes has grown further in recent years, as the political mandate of planners has broadened, especially in larger cities. An increasing number of municipalities make project approval conditional on the inclusion of affordable units and/or the payment of "linkage fees" to fund the production of such units by third parties.<sup>17</sup> Cities also impose all manners

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“If zoning is often perceived by the public as a boring topic and a heavy bureaucratic burden, it is in fact a practice in which planners display **resourcefulness** and **creativity** in the **pursuit of the public interest.**”

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of “exactions,” some obtained in exchange for density bonuses or other advantages, to compensate for their chronic inability to provide amenities and facilities such as green spaces and day-care centers.<sup>18</sup> They use zoning to improve economic competitiveness, in this case through permissive rather than restrictive regulations that speed up the conversion of obsolete urban areas.<sup>19</sup> Some US cities are even exploring the possibility of developing local employment and raising local incomes by turning provisions on union labour, local hiring, and living wages, which are generally part of voluntary community benefits agreements, into formal zoning requirements.<sup>20</sup> And of course, zoning experts are thinking of ways in which zoning can help save our cities from climate change.<sup>21</sup>

Addressing such varied a set of issues, which are political and economic in nature, and regional, national, or global in scope, is a tall order for local regulations on real-estate development. But in the face of fiscal constraints and a paucity of provincial and federal action on urban problems, municipal administrations are doing their best with the tools at hand. Excessive reliance on revenue from property taxes and growing inequality in access to housing and services force local officials to extract public benefits from private investments. If zoning is often perceived by the public as a boring topic and a heavy bureaucratic burden, it is in fact a practice in which planners display resourcefulness and creativity in the pursuit of the public interest.

The centrality of zoning in planning can be traced back to the beginning of the 20th century. For a century now, urban policy-setting has much too often been reduced to deal-making with developers.<sup>22</sup> Regional or metropolitan approaches, investments in the public realm, and provincial or federal mandates in growth management need to

receive a much more important place in our policy arsenal. There is movement in that direction. But for the foreseeable future, zoning will remain both the unpopular bread and butter of planning and, paradoxically, the expression of our profession’s idealism and ingenuity.

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#### NOTES

<sup>1</sup> The story of New York City’s 1916 zoning code was told by S. J. Makielski, Jr. in *The Politics of Zoning: The New York Experience* (New York: Columbia University Press, 1966) and by Seymour I. Toll in *Zoned American* (New York: Grossman Publishers, 1969).

<sup>2</sup> The early history of planning and zoning in Kitchener is presented by Elizabeth Bloomfield in “Reshaping the Urban Landscape? Town Planning Efforts in Kitchener-Waterloo, 1912-1925,” in Gilbert A. Stelter and Alan F. J. Artibise, eds., *Shaping the Urban Landscape: Aspects of the Canadian City-Building Process* (Ottawa: Carleton University Press, 1982), pp. 256-298. Bloomfield notes that calls for the adoption of zoning, based on the German precedent of districted building regulations, started in 1906.

<sup>3</sup> Scholarship on the emergence of zoning in Canada includes Richard Harris, “The Impact of Building Controls on Residential Development in Toronto, 1900-1940,” *Planning Perspectives* 6: 269-296, 1991; Peter W. Moore, “Zoning and Planning: The Toronto Experience, 1904-1970,” in

*The Usable Urban Past: Planning and Politics in the Modern Canadian City*, Alan F. J. Artibise and Gilbert A. Stelter, eds. (Toronto: Macmillan, 1979), pp. 316-342; Walter Van Nus, “Towards the City Efficient: Theory and Practice of Zoning, 1919-1939,” in *The Usable Urban Past*, pp. 226-246; and John C. Weaver, “The Property Industry and Land-Use Controls: The Vancouver Experience, 1910-45,” *Plan Canada* 19: 211-225, 1979. See also footnote 11.

<sup>4</sup> Reps, John W. “Requiem for Zoning,” *Planning 1964* (Chicago: American Society of Planning Officials, 1964), pp. 56-67.

<sup>5</sup> The other two hills are Mount Royal, with the city’s main public park, and the hill occupied by the Mount Royal and Côte-des-Neiges cemeteries. In what follows, I draw on the monographs of Aline Gubbay (*Montreal’s Little Mountain: A Portrait of Westmount* [Montréal: Optimum Publishing International, 1985] and *A Room of Their Own: The Story of Westmount* [Montreal: Price-Patterson Ltd., 1998]) and on the theses of Stephen Bryce (“The Making of Westmount, Quebec 1870-1929: A Study of Landscape and Community Construction,” Master’s thesis, Department of Geography, McGill University) and of Harold Bérubé (“Des banlieues qui se distinguent: Gouverner Westmount, Pointe-Claire et Mont-Royal (1880-1939),” PhD dissertation, Université du Québec, INRS – Urbanisation, culture et société, 2008).

<sup>6</sup> I have documented the step-by-step evolution of building and land-use regulation in Toronto and in Montreal in “Development Control in Toronto in the Nineteenth Century,” *Urban History Review/Revue d’histoire urbaine*, 36(1): 16-31, 2007 and in “Émergence du zonage à Montréal, 1840 – 1914,” in *La gouvernance montréalaise: de la ville-frontière à la métropole*, L. Robichaud, H. Bérubé & D. Fyson, eds. (Montréal: Éditions Multimonde, coll. Cahiers de l’Institut du Patrimoine, 2014), pp. 71-84.

<sup>7</sup> City of Westmount, Bylaw 190, “Building By-law of 1909, January 4, 1909 [City of Westmount Archives]. Left in separate ordinances were regulations on building lines (which were part of the homologated street plan) and on the bulk of apartment buildings (about which more to follow).

<sup>8</sup> Zoning by housing type was first enacted

in Bylaw no. 75 "Respecting the Erection of Buildings above the Level of Montrose Avenue and to Regulate the Class of Houses to be Erected in that Locality," March 1, 1897 [City of Westmount Archives]. Use of the floor area ratio started with the adoption of *By-law No. 103* "Concerning Building Areas and for Other Purposes," April 4, 1899 [City of Westmount Archives]. The idea of the F.A.R. was raised in New York City during discussions leading to the adoption of the 1916 zoning resolution, but it was not put on the books until 1961. See Raphaël Fischler, "The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance," *Journal of the American Planning Association*, 64(2): 170-188, 1998.

<sup>9</sup> A full list of innovations that the city claims to its credit as "firsts" in Québec, in Canada, or in the world can be found at <http://westmounthistorical.org/local-history>. One of the mayors of Westmount was William Dough Lighthall, who co-founded the Union of Canadian Municipalities (see Donald A. Wright, "W.D. Lighthall: Sometime Confederation Poet, Sometime Urban Reformer," Master's Thesis, Department of History, McGill University, 1991).

<sup>10</sup> This districting scheme was soon successfully contested by developers, who were given permission to erect apartment buildings on east-west thoroughfares such as Sherbrooke Street, along the base of the hill. Further densification was allowed in the 1960s and subsequent years, when high-rise condominiums and office buildings were put up in the southeast part of the municipality, near Montreal's downtown. Still, the exclusive nature of much of Westmount's urban environment has remained clear and unchallenged to this day, and so has Westmount very keen attention to the quality of individual buildings, public facilities, and urban amenities.

<sup>11</sup> For alternative interpretations of New York City's 1916 zoning history, see, on the one hand, Marc A. Weiss, "Density and Intervention: New York's Planning Tradition," in *The Landscape of Modernity: Essays on New York City, 1900-1940*, David Ward and Olivier Zunz, eds. (New York: Russell Sage Foundation, 1992), pp. 46-75, and "Skyscraper Zoning: New York's Pioneering Role," *Journal of*

*the American Planning Association* 58(2): 201-12, 1992, and, on the other hand, Raphaël Fischler, "The Metropolitan Dimension of Early Zoning."

- <sup>12</sup> Mel Scott, *American City Planning Since 1890* (Berkeley: University of California Press, 1971). Gerald Hodge and David Gordon make a similar point in their discussion of early zoning in Canada; see *Planning Canadian Communities*, 6th edition (Toronto: Nelson, 2014), 97-100.
- <sup>13</sup> The planners who gave New York City its first comprehensive zoning code were "ultra-conservative" in their approach to the rights of property owners and the powers of government (Frank Backus Williams, *The Law of City Planning and Zoning* [New York: The Macmillan Company, 1922], p. 274).
- <sup>14</sup> Shoukry Roweis, "Urban Planning as Professional Mediation of Territorial Politics," *Environment and Planning D: Society and Space* 1: 139-162, 1983. See also Peter Marcuse, "Housing Policy and City Planning: the Puzzling Split in the United States, 1893-1931," in *Shaping an Urban World*, Gordon E. Cherry, ed. (New York: St. Martin's Press, 1980), pp. 23-58.
- <sup>15</sup> The varied applications of zoning that are mentioned in this sentence and following ones can be traced back to the very beginning of land-use regulation. See Raphaël Fischler, "Development Control in Toronto in the Nineteenth Century," "Émergence du zonage à Montréal, 1840 - 1914," "The Metropolitan Dimension of Early Zoning," and also "Health, Safety, and the General Welfare: Markets, Politics and Social Science in Early Land-Use Regulation and Community Design," *Journal of Urban History*, 24(6): 675-719, 1998.
- <sup>16</sup> Zoning policies can of course help to pursue a variety of goals at the same time. See for example the new zoning regulations applied in Toronto in the 1990s to revitalise old areas where new development and historic preservation had to go hand-in-hand (Andrea Gabor and Frank Lewinberg, "New Urbanism! New Zoning!," *Plan Canada*, 38(4): 12-17, 1997).
- <sup>17</sup> Ontario municipalities were given the right to adopt inclusionary zoning regulations by the *Promoting Affordable Housing Act*, 2016; see <http://www.mah.gov.on.ca/Page13790.aspx>. Of course, some form of inclusionary housing policy has been in place for a while in Toronto and in other cities; see Julie Mah and Jason Hackworth,

"Local Politics and Inclusionary Housing in Three Large Canadian Cities," *Canadian Journal of Urban Research*; 20(1): 57-80, 2011. On linkage fees, see W. Dennis Keating, "Linking Downtown Development to Broader Community Goals: An Analysis of Linkage Policy in Three Cities," *Journal of the American Planning Association* 52(2): 133-141, 1986; see also the symposium on "Downtown Office Development and Housing Linkage Fees" in the *Journal of the American Planning Association* 54(2), 1988.

- <sup>18</sup> Vancouver, among others, has a well-developed system of density bonus zoning and of "Community Amenity Contributions" to be made in exchange for zoning changes. See <http://vancouver.ca/home-property-development/density-bonus-zoning.aspx> and <http://vancouver.ca/home-property-development/community-amenity-contributions.aspx> [accessed on March 14, 2017].
- <sup>19</sup> One way of facilitating redevelopment is to make land assembly easier. This can be done by "graduated density zoning," under which densities are raised as the size of the parcel increases. See Donald Shoup, "Graduated Density Zoning," *Journal of Planning Education and Research*, 28(2): 161-179, 2008.
- <sup>20</sup> Vicki Been has explored the difficult relationship between community benefits agreements, which are voluntary contracts between developers and community groups, and municipal zoning regulations in "Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?" *The University of Chicago Law Review* 77(1): 5-35, 2010.
- <sup>21</sup> Chris Duerksen, "Saving the World Through Zoning," *American Planning Association*, January 2008. Accessed at <http://www.planning.org/planning/member/2008jan/savingtheworld> on March 14, 2017.
- <sup>22</sup> In a recent OMB decision, board member Marc C. Denhez bemoans the prevalence of "Let's-Make-a-Deal Planning" in Ontario. See "Shoreline Towers Incorporated v. Toronto (City), 2016 CanLII 58081 [ON OMB], <http://canlii.ca/t/gt87p>, retrieved on February 24, 2017, par. 318.
- <sup>23</sup> The figures in the map indicate the maximum ratio between the height of a building at the building line and the width of the street. ■