SUBDIVISION AND DEVELOPMENT APPEAL BOARD

TRAINING MANUAL

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Scheffer Andrew Ltd.
Planners & Engineers

Alberta Municipal Affairs and Housing

Acknowledgements

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- ***Planning Law and Practice in Alberta*** (third edition), Dr. Frederick Laux, LLD Juriliber, 2002
- ***Subdivision and Development Appeal Board Issues***, Brownlee Fryett LLP, 2003
- ***How to Make Effective Presentations to Subdivision and Development Appeal Boards*** April 15, 2003 Presentation to Urban Development Institute, Miller Thomson LLP
- ***Orientation Program for Development Appeal Boards***, Alberta Municipal Affairs, 1986
- ***Critical Skills for Communication***, Alberta Municipal Affairs, 2000
- ***Council and Councillor Seminar - Roles and Responsibilities,*** Alberta Municipal Affairs, 2001
- ***Finding Agreement on Difficult Issues***, Alberta Municipal Affairs and Alberta Agriculture Food and Rural Development, 2000
- ***Decision Making at the SDAB and MPC Seminar for County of Forty Mile***, Jeanne Byron and Alberta Municipal Affairs, 2001
- ***Parkland County Subdivision and Development Appeal Board Manual***, 2001
- ***County of Lethbridge Subdivision and Development Appeal Board Manual***, 2001.

Workshop Materials Design

Scheffer Andrew Ltd.

- John Andrew MCIP ACP, Principal
- Sheryl Watt, Senior Planner
- Shelagh Kubish
- Jacqueline Mann, Planner

1 PREFACE

The Subdivision and Development Appeal Board (SDAB) hears appeals from municipal subdivision and development authorities. SDAB decisions shape the community and affect the lives of developers, neighbours, citizens and businesses. It is important that the public have confidence in the quality of these decisions and the decision-making process.

The recent "Report to the Minister of Municipal Affairs on Planning and Development Amendments," prepared by the Alberta Urban Municipalities Association, the Urban Development Institute and the Alberta Association of Municipal Districts and Counties, identified a need for SDAB training. The report urged the minister to initiate the development of easily accessed training for SDAB members. This manual is one result.

By its nature, the manual cannot cover all situations and differences in SDAB operations but can serve as a starting point for discussion.

This document is provided as a guide to assist SDAB members in the conduct of their affairs. The views expressed are not the legal opinion of Municipal Affairs. Users are encouraged to obtain appropriate legal advice where required.

Objectives

The purpose of this training manual is to provide information to SDAB members and personnel that will support an SDAB in:

- conducting effective hearings;
- writing effective decisions; and
- acting within the scope of its authority.

The manual is directed primarily at SDAB members and the staff who assist with the SDAB function. It also provides an understanding of the appeal process and responsibilities that should assist councillors, appellants, and applicants to better appreciate the appeal process. The manual addresses the formation, authority, responsibility, operation, and conduct of SDABs. Users of this manual will be able to assess their own participation in the appeal process as well as that of others.

2 SUBDIVISION AND DEVELOPMENT APPEAL BOARDS

Background

Subdivision and Development Appeal Boards replaced the functions of the Development Appeal Board with respect to development matters and the Alberta Planning Board with respect to subdivision matters. They were created with the coming into force on September 1, 1995, of Part 17 of the Municipal Government Act (referred to in this document as the MGA or the Act), and their function is to provide a mechanism for interested parties to:

MGA s. 685(1)

- challenge a decision on a development application;
- challenge a decision on a subdivision application that is not adjacent to a primary highway, a water body, a water or wastewater management facility, or in the Green Area; and
- challenge the issuance of a stop order.

MGA s. 678(2)

SDAB Bylaw

Section 627 of the Act states that municipal councils must, by bylaw, either establish an SDAB or authorize the municipality to enter into an agreement with one or more municipalities to establish an intermunicipal SDAB. The dual provision allows several communities to establish one SDAB for convenience and efficiency.

The bylaw may set out how members are appointed, set their term of office and remuneration, and prescribe the functions and duties of the SDAB. Generally, the bylaw will also discuss how the Chair and vice Chair are determined and who is to serve as the secretariat or support to the SDAB. Other aspects to be covered in a bylaw may include quorum, alternate members, use of per diems, use of counsel and experts, and other matters at the discretion of council.

Definition of an SDAB

An SDAB is a statutory body intended to perform an independent adjudicative function that hears complaints and functions like a court. It is an administrative board mandated by the MGA and created by a municipality to carry our appropriate functions and procedures.

When people believe that decisions on developments or subdivisions adversely affect them or that conditions attached to these decisions are inappropriate, they can appeal to the SDAB for a review of the case.

Membership

Council determines who is appointed to an SDAB subject to the limitations outlined in the Act. Councillors may not form the majority of the SDAB, or of the panel hearing the appeal, nor can an SDAB member be an employee of the municipality, member of the municipal planning commission, or a person who carries out subdivision and development functions on behalf of the municipality.

In the case of an intermunicipal SDAB, council members from any one municipality must not form the majority of the panel hearing an appeal.

MGA s. 627

Some SDABs consist solely of members of the public while others draw membership from council and the public. Councils generally appoint members to the SDAB at their annual organizational meeting held in the two weeks following the third Monday in October. The following are examples of desirable qualifications for SDAB members:

- demonstrated integrity; be perceived as fair and impartial;
- keen interest in development in the community;
- regard for the interests of property owners, developers and other parties most affected by development;
- involvement in community activities and/or knowledge in development-related areas such as architecture, engineering/construction, law or land use planning;
- knowledge about subdivision and development processes;
- understanding of the quasi-judicial function of a tribunal and of the principles of administrative law and natural justice;
- ability to understand, organize and apply complex plans, relevant legislation, statutory documents, and case law;
- good analytical and reasoning skills; and
- willingness to devote the necessary time to attend the hearings.

Each appeal must be handled within strict time limits and it is critical that members be available to meet these timelines.

SDAB members are often appointed for their knowledge and expertise on various planning- and development-related topics. Any SDAB members holding other positions in the community, including that of municipal council member, need to keep those positions separate from their role as an SDAB member. This it not to say that members cannot rely on their general knowledge of planning and development related matters. An SDAB member's expert knowledge can be used in the evaluation of evidence submitted but cannot be used as evidence in the case. This distinction will be discussed further in the section on hearing evidence at the appeal.

SDAB Powers

General

The Municipal Government Act establishes a framework for municipal planning and development that is supported by municipal statutory plans and bylaws. The SDAB evaluates each case with reference to this planning framework, plans, and bylaws. Hearings are scheduled so that both sides affected by a decision can be present. Presenting arguments in this type of forum allows all the arguments and evidence to be heard. The law also places limits on what an SDAB can do. An SDAB must:

- stay within the terms of the legislative job description, as set out by the Act and its regulations;
- act fairly and reasonably within the limits imposed by administrative law and the principles of natural justice;
- act in accordance with its enabling bylaw.

The courts, from time to time, interpret legislation while deciding cases. Where the courts have interpreted the provisions of the Act, the resulting case law also gives guidance to the SDAB.

Precedent

The SDAB is not bound to follow previous decisions except to ensure that the subdivision, development, or stop order decision is consistent with decisions made in similar cases. Consistency is an important aspect of fairness. A person in a similar situation is entitled to similar treatment. In the case of development and subdivision, it is important that the SDAB recognize whatever subtle differences may exist or are presented in a hearing among applications and then decide how to deal with it. However, if the SDAB decides to change past practices or approaches in relation to consideration of similar cases, the reasons for the change in approach must be clearly substantiated in the decision. This is above and beyond the reasons that must be given in all decisions.

Subdivision Appeals

In making a decision on a subdivision appeal, the SDAB:

- must have regard to any statutory plan;
- must conform with the uses of land referred to in a land use bylaw;
- must be consistent with the land use policies;
- must have regard to but is not bound by the subdivision and development regulations;
- may confirm or revoke or vary the approval or decision or any condition imposed by the subdivision authority or make or substitute an approval, decision or condition of its own;
- may in addition to the other powers it has, exercise the same power as a subdivision authority is permitted to exercise pursuant to this Part or the regulations or bylaws under this part.

Development Permit Appeals

In making a decision on a development appeal, the SDAB:

- must have regard to but is not bound by the subdivision and development regulations;
- may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;
- must comply with the land use policies, statutory plans and land use as described in the land use bylaw.
- may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion, the proposed development conforms with the use prescribed for that land or building in the land use bylaw and would not:

    - unduly interfere with the amenities of the neighbourhood, or
    - materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

MGA s. 687 (3)(d)

Stop Orders

For stop orders issued under section 645, the SDAB's powers are the same as for development permit appeals described in the previous sections.

What is Jurisdiction?

An SDAB's jurisdiction defines the matters and geographical area over which an SDAB has power to decide. Without jurisdiction, SDABs cannot make **binding** decisions.

The SDAB hears appeals of decisions on development and subdivision applications and stop orders, except for certain subdivision cases to be heard by the Municipal Government Board. In certain situations where a provincial interest may be affected, the Municipal Government Board (MGB) hears a subdivision appeal. The MGB convenes subdivision appeal hearings where the subdivision is located in the Green Area under the Public Lands Act or is adjacent to or within the prescribed distance of:

MGA s. 678(2)

- a provincial highway,
- a water body,
- a water treatment facility,
- a wastewater facility.

An SDAB has no involvement in amending land use bylaws or statutory plans. Amendments to statutory plans and bylaws require a separate process that also reflects administrative law and the rules of natural justice. Municipal councils carry out this role, including holding a public hearing for each amendment proposal.

There are other pieces of legislation that take precedence over the authority given municipalities under the Act. Sections 618 and 618.1 exempt roads, wells or batteries, pipelines, and confined feeding operations from the planning provisions. Section 619 provides that authorizations granted by the Natural Resources Conservation Board (NRCB), Energy Resources Conservation Board (ERCB), or Alberta Energy and Utilities Board (AEUB) prevail over municipal planning decisions that conflict with it. Section 620 indicates that a condition of a license, permit or authorization granted by the Lieutenant Governor in Council, a Minister or a Provincial agency prevails over any condition of a development permit that conflicts with it.

As well, some developments and subdivisions are undertaken under federal and provincial legislation that do not require municipal approvals. The most likely examples of this in developed areas are cellular telephone towers, or airports and related facilities, which are entirely under federal jurisdiction.

Establishing Jurisdiction (Hearing within a Hearing)

There are several situations where the SDAB may hold a hearing within a hearing to determine if they have the jurisdiction to hear the appeal. The following are some such situations:

- The application for appeal was received late and the appellant has requested the Board to hear the matter;
- The appeal was not complete;
- The development or subdivision is for an intensive livestock operation or other "exempted" uses;
- There is a question whether it is a matter that the Municipal Government Board should hear;
- The appellant or someone in the hearing objects to a member of the SDAB hearing the appeal;
- The appeal is for a development permit issued for a permitted use.

This is not an exhaustive list, and the SDAB should be prepared to discuss jurisdiction questions at the beginning of a hearing before any other evidence is heard.

Alberta Court of Appeal

There is a further avenue of appeal to the Alberta Court of Appeal, but only on aspects of law or jurisdiction.

Conclusion

Subdivision and Development Appeal Boards must keep in mind the requirements of the law that governs them, as set out in the Municipal Government Act and SDAB Bylaw, and be aware of their jurisdiction to hear and decide on appeals. As outlined in the preceding section, Board members are expected to be willing to contribute to their communities through their involvement on an SDAB and must understand the context of the decisions they make on appeals, with regard to law, statute, and jurisdiction.

3 PLANNING CONSIDERATIONS

In making the decision on an appeal case, the SDAB must consider the planning merits of any application. Therefore, the SDAB needs to be familiar with the wider planning considerations used in decision-making.

This section discusses the aims of land use planning to provide a context for decisions to be made by an SDAB. The first portion sets out the legislative framework for planning. The second portion of this section describes the types of planning documents prepared by municipalities. The third section describes how planning is implemented through the subdivision and development review and approval process.

Responsible planning has always been vital to the sustainability of safe, healthy, and secure urban and rural environments. The planning profession must regularly deal with such issues as conversion of land from one use to another, impact of development on a person's quality of life or livelihood, impact on the natural environment, and choices between competing interests.

Planners have to answer the question **"Can you?"** to fulfill the legislative requirements and **"Should you?"** to answer the planning considerations of a proposal.

Definition of Planning:

Planning is the scientific, aesthetic, and orderly disposition of land, resources, facilities, and services with a view to securing the physical, economic, and social efficiency, health, and well being of urban and rural communities.

Canadian Institute of Planners (CIP)

www.cip-icu.ca

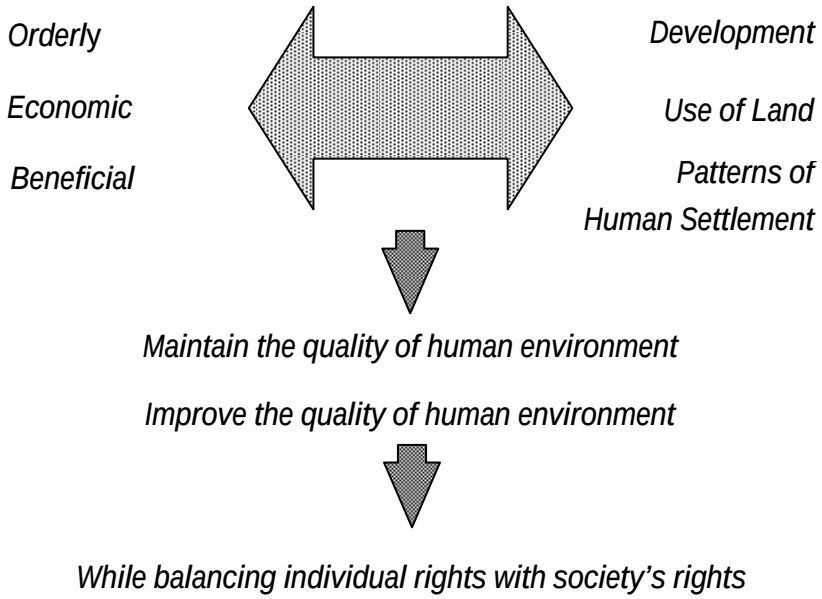
Legislative Authority for Planning

All levels of government in Canada are assigned their power by statute. The Constitution Act outlines federal and provincial powers. Part 17 of the Municipal Government Act (sections 616–697) contains most of the provisions relating to land use planning. Section 617 outlines the purpose for planning, whereby plans and related matters may be prepared and adopted:

(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
(b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

The table in the following page is a visual representation of how this section of the MGA is applied to planning.



The concepts to the left column can each be connected to those on the right column. Relating the concepts in this manner can be used as a tool in analyzing individual cases.

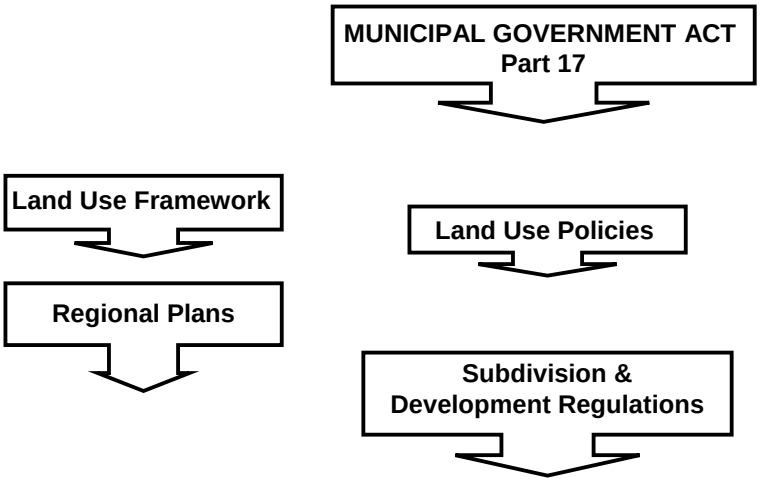
When evaluating an application or appeal, one should ask:

- How does this proposal contribute to the orderly, economic, and beneficial development, use of land or pattern of human settlement?
- Does the proposal maintain or improve the quality of the human environment?
- How does the proposal impact society's rights or individual rights? Which is more important in this case and why?

Provincial Land Use Policies

To provide general direction in the formulation of plans, Section 622 of the Act provides for the establishment of provincial land use policies. The current land use policies were adopted in 1996 to outline areas to be considered in municipal plans and bylaws. The policies should be read as a complete package to get a sense of the objectives of provincial departments relating to planning and development. In practice, statutory plans, land use bylaws and decisions must be consistent with the land use polices. The land use policies are also to be considered when planning decisions are made.

Copies of the Provincial Land Use Policies can be downloaded from the Municipal Affairs website at www.gov.ab.ca/ma



The Alberta Land-use Framework

The Land-use Framework is a comprehensive strategy to better manage public and private lands and natural resources to achieve Alberta's long-term economic, environmental and social goals. The framework provides a blueprint for land use management and decision-making that addresses Alberta's growth pressures.

In accordance with the Land-use Framework, the provincial government has established a goal of completing seven regional plans, which will cover the entire province, by the end of 2012. In the Edmonton and Calgary regions, Capital and Calgary regions, work has begun on the development of metropolitan plans. The provincial government expects that the metropolitan plans will reflect provincial interests and priorities.

The Land-use Framework and the regional plans leave local decision-making authority with the same officials who currently exercise it, but these decisions will have to be aligned with provincial policy set out in the regional plans.

Municipal Responsibility

The Municipal Government Act assigns responsibility for planning to municipalities in Part 17 of the Act. The Act establishes the authority of municipalities to develop, adopt, implement, and review a series of plans and bylaws that integrate the legislation, planning principles, and community views to guide subdivision and development authorities in making decisions on applications. The Act is not strictly prescriptive but is written in permissive language to allow municipalities to make community-specific decisions.

Subdivision and Development Regulation

In addition to the requirements of the Act, the subdivision and development regulation outlines the agencies that subdivision and development applications must be referred to, relevant considerations for approvals of applications, and conditions that may be imposed on development and subdivision.

Statutory Plans

Municipal Development Plans

MGA 639

Municipalities with a population over 3500 are required to adopt a municipal development plan (MDP) that reflects the provincial land use policies and the purpose section of the Act from a local perspective.

Whether a municipality does or does not have an MDP, the provincial land use policies and the objectives of section 617 must be incorporated into the decision making when considering applications or preparing a land use bylaw. The Act outlines the areas that must be included in a municipal development plan:

MGA 632(3)

- future land use in a municipality;
- manner of, and the proposals for, future development in the municipality;
- coordination of land use, future growth patterns and other infrastructure with adjacent municipalities, if there is no intermunicipal development plan with respect to those matters in those municipalities;
- provision of the required transportation systems either generally or specifically with the municipality and in relation to adjacent municipalities;
- provision of municipal services and facilities;
- policies compatible with the subdivision and development regulations to provide guidance on the type and location of land uses adjacent sour gas facilities;
- policies respecting the provision of municipal, municipal and school or school reserves, including but not limited to the need for amount of and the allocation of those reserves and the identification of school requirements in consultation with the affected school authorities; and
- policies respecting the protection of agricultural operations.

In addition, the plan may contain policies relating to:

- proposals for the financing and programming of municipal infrastructure;

- coordination of municipal programs relating to the physical, social, and economic development of the municipality;
- environmental matters within the municipality;
- financial resources for the municipality;
- economic development for the municipality;
- any other matter relating to the physical, social or economic development of the municipality; and
- the municipality's development constraints, including the results of any development studies and impact analysis, and goals targets, planning policies and corporate strategies.

You may have noticed that the required and optional contents in a municipal development plan repeat the concepts or objectives of section 617. This is not a coincidence—a municipal development plan adds community views and aspirations to the process.

Intermunicipal Development Plans

MGA s. 631

Two or more municipalities may prepare intermunicipal development plans to address the future development of a shared sub-region. Mandatory content is limited to developing a process to resolve disputes and providing for administering and changing the plan. Optional content may include future land use, future development, and any element of the social, economic, and physical environment that the municipalities wish to address.

Many municipalities use different documents to address some of the same issues as an intermunicipal development plan, including mutual agreements, sections in a municipal development plan, intermunicipal dispute resolution processes, or mutually adopted area structure plans.

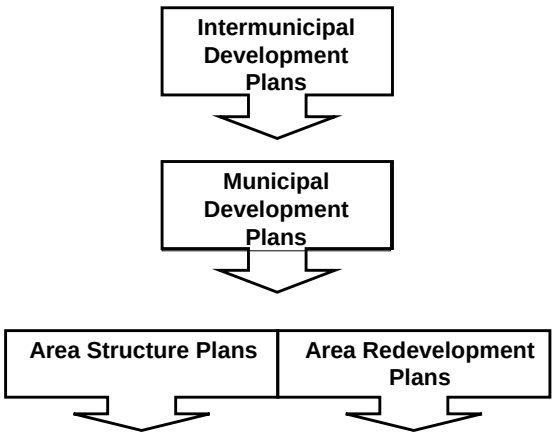
MGA s. 633 & 634

Area Structure Plans and Area Redevelopment Plans

These plans may be adopted by municipalities that wish to plan for areas in greater detail for future development (area structure plans) or for redevelopment (area redevelopment plans). They are used to address detailed development issues including infrastructure needs, types of development, development sequence, and density.

MGA s. 638

The MGA requires that all statutory plans be consistent with each other.



Land Use Bylaw

All municipalities are required to adopt a land use bylaw. While an MDP outlines the broader land use and policy framework, a land use bylaw (LUB) generally defines the specific land use categories or districts, the land uses within each district and the related development standards. It provides the details to evaluate a specific application for development or subdivision. In that sense it acts as the implementation document for the statutory plans.

The land use bylaw outlines council's specific requirements in accepting, considering, and deciding on applications. Land use bylaws must be consistent with the purpose section of the legislation.

Permitted Uses

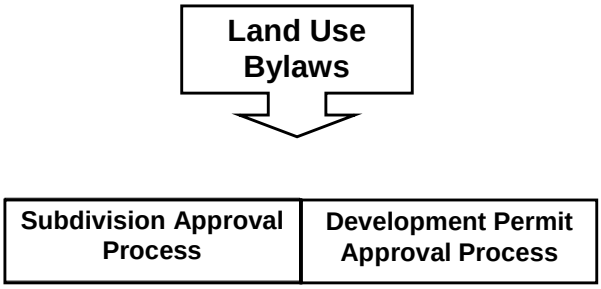
If an applicant applies for a development permit for a permitted use, and the proposal conforms in all respects to the land use bylaw, the development authority **must** issue the permit. The ability to appeal a permitted use permit is limited.

MGA s. 642(1)

Discretionary Uses

With discretionary use permits, the development authority must examine the site, the adjacent uses, and any additional requirements. This may involve exercising discretion to vary the general or district specific development standards.

MGA s. 685(3)



Policies, Procedures, and Standards

Periodically, municipalities will develop additional policies and procedures to provide more detail to policies of the municipality. Where these exist, the SDAB should be made aware of these documents and their contents to assist in the decision-making. These may include municipal policy manuals, lake management plans, outline plans, servicing standards and locations.

Beyond the Legislation: Other Planning Considerations

In addition to legislation and administrative procedures, planners use broad planning principles in developing plans, bylaws, land use studies, and in evaluating applications. Some of these principles are:

- the proposal's interconnectivity with existing development and the landscape,
- future considerations for the lands and those surrounding them, both in the short and long term,
- values in planning, which include separating incompatible uses, promoting a variety of uses to build a community, and providing for different forms of transportation in the community,
- cumulative impacts of different proposals,
- mitigating negative impacts of proposals, and
- assessments of the severity of impacts of applications.
- This is not an exhaustive list, but gives an indication of some of the analysis that forms part of a recommendation and decision on land use proposals.

Conclusion

The SDAB is just one of many planning mechanisms that is part of an overarching planning process. This process involves a combination of various agencies, the public, local authorities and planning documents that work together to guide the development of our built environment.

MGA s. 617

4 SUBDIVISION AND DEVELOPMENT APPLICATIONS

The first step in the subdivision or development process is to make an application. Depending on the nature of the proposal (complexity, location, potential impact on the community etc.), this can be an arduous task. The onus is on the applicant to provide enough information for the approving authority and referral agencies to determine whether the proposal is suitable for subdivision or development or not. Information that is often required includes: geotechnical, soils and hydrogeological analysis; environmental site assessment; historical resources impact assessment; and traffic impact assessment.

Subdivision

A subdivision occurs when a legal document, such as a plan of survey, describing one or more smaller units of land smaller than the units described in an existing certificate of title, is registered at the Land Titles Office. When the instrument is registered, the existing title is cancelled in whole or in part and new titles are issued describing each unit of land.

Generally, subdivision cannot be registered until it has received the approval of the municipality's subdivision authority.

Definition of Subdivision

Subdivision means the division of a parcel of land by an instrument, which results in the reconfiguration of property lines.

Development

Generally, all development requires the issuance of a development permit by the municipality's development authority. However, this definition includes nearly everything that can be done on land. For convenience, many land use bylaws do not require development permits for the most common and straightforward types of development (e.g., fences under a certain height, landscaping, small accessory buildings).

MGA s.616

Definition of Development

The MGA defines development as: an excavation or stockpile; the construction, placing, replacement or repair of a building or addition; a change of use of land or a building; and a change in intensity of use of land or building.

Stop Order

Stop orders can be issued by a development authority under section 645 of the MGA. Stop orders issued for a development authority are meant to ensure that the development complies with the land use bylaw, the development permit or the subdivision approval. A stop order on a development may require the demolition, removal, replacement or alteration of a building or structure or a cessation of use. A stop order could also be used to require compliance with the requirements of subdivision approval, which could include installation of servicing.

Development stop orders issued under section 645 are different from municipal stop orders issued under section 545 and 546. Stop orders issued under section 545 relate to illegal dumping, weeds, abandoned vehicles on a municipal street, etc.; and under section 546, unsightly or dangerous properties. Such stop orders can be appealed to Council, not to the SDAB.

Application

For convenience, many municipalities outline in their land use bylaw, or in the application package, what material must be provided for a complete development permit or subdivision approval application. The required materials may include the appropriate application form, the relevant fee, sketch plans and the appropriate reports to support the scale of development or subdivision proposed in the application.

Acceptance

When a municipality receives an application for subdivision or development, it may send out a written confirmation of receiving a complete application. This action is not required by the Act, but it provides a baseline for the time limits in the legislation. For subdivision, a copy of the application and notice is provided to adjacent property owners and referral agencies outlined in Section 5 of the subdivision and development regulation. The land use bylaw will outline what a complete application for development must include and the process for notification.

Analysis

After receiving either the development or subdivision application, municipal staff or contracted professionals will assess the application based on the municipal development plan, other statutory plans, and finally, the land use bylaw. Staff and professionals will examine the site, previous development activity in and around the site, the surrounding uses, the application, standards within that district, and any special considerations that need to be included in the application. Some staff and professionals use a form to outline legislative, plan and bylaw sections used to analyse the application, to make a recommendation or to formulate the decision.

Discretionary Authority

The information described above consists of tangible facts that can be attributed to the land, its use, the application, and municipal documents. In reviewing applications and arriving at decisions, subdivision or development authorities have the ability to exercise discretion within the bounds of legislation and bylaw provisions established by the municipality.

Municipal councils can set out in the land use bylaw the instances where the subdivision and/or development authorities can exercise discretion. The SDAB exercises its discretion within the context set out in the legislation and the statutory municipal plans and bylaws.

Exercising discretion does not include adding a permitted or discretionary use to a district by either the SDAB or the approving authorities. A municipal council is the only body that can approve an amendment to the land use bylaw.

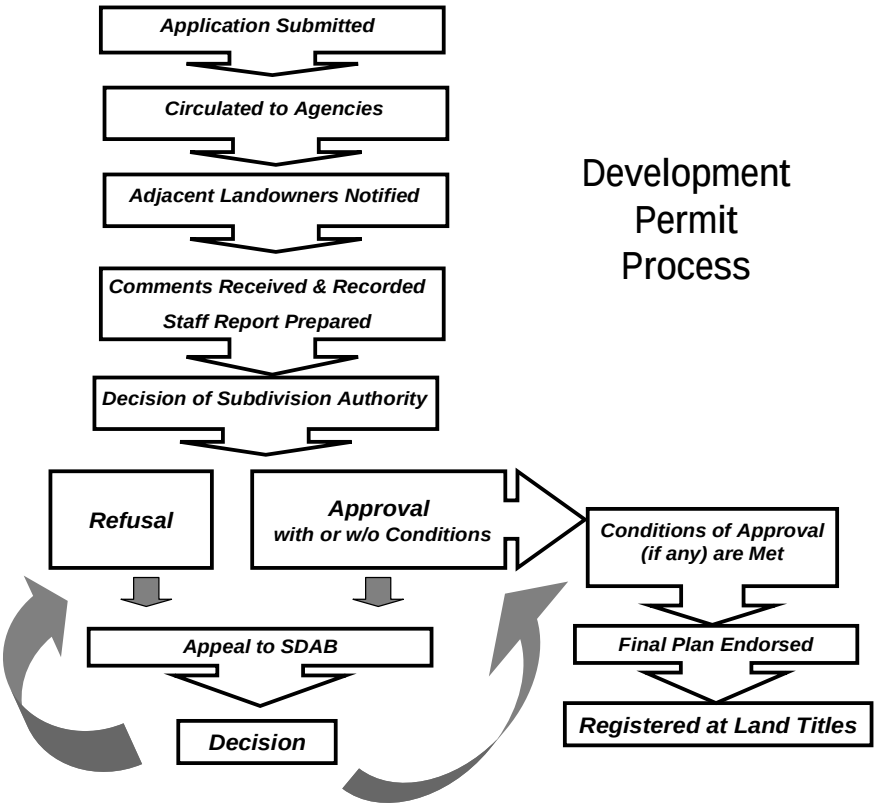
Decision

When making a decision, the subdivision or development authority must follow:

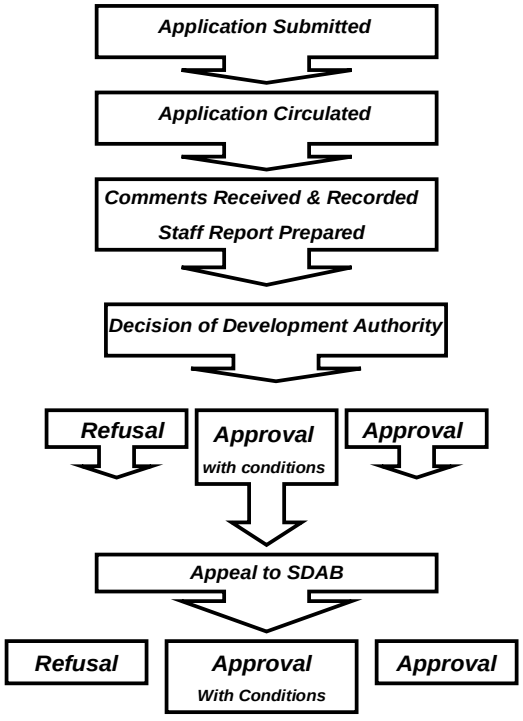
- The Municipal Government Act, the subdivision and development regulation, the provincial land use policies, and any other pieces of federal and provincial legislation that apply, *MGA s. 640(6)*
- The provisions of any statutory plan, and *MGA s.654 (2)*
- The provisions of the land use bylaw or at least the uses of land prescribed in the land use bylaws.

For subdivisions, the decision, whether it is an approval, an approval with conditions, or a refusal, must be given in writing to the applicant and other bodies defined in the legislation. The applicant must be advised of the appropriate appeal body and the appeal period. *MGA s. 656(1)*

With development permits, a copy of the decision must be given in writing to the applicant as per section 642, but many municipalities have included other affected parties (neighbouring property owners, neighbouring municipalities, etc.). *MGA s. 678(2)* *MGA s. 642*



Development Permit Process



Subdivision Process

5 APPEALS

This section discusses the nature of appeals against the different kinds of decisions that can be made by development and subdivision authorities.

What Can Be Appealed?

Subdivision Applications

The Act sets out the following grounds for an appeal of a decision of a subdivision application. An appeal may be launched:

- if a decision is not made within 60 days or an agreed-to extended date allowed under section 681(1)(b);
- if a decision on a subdivision under section 652(4) (lands titled before July 1, 1950) is not made within 21 days;
- if a decision (with or without conditions) is made by a subdivision authority;
- if the application was refused.

Development Permit Applications

The Act sets out the following grounds for an appeal of a decision of a development authority. An appeal may be launched:

- where a permit is not issued within the 40 days or an agreed-to extended date allowed under section 684;
- if a permit is issued with or without conditions;
- if a permit was refused;
- if a stop order is issued.

Permits for a use permitted in a land use bylaw can be appealed only if the bylaw was relaxed, varied, or misinterpreted in the issuance of the permit. This means that unless a variance or relaxation has occurred or the applicant or affected party can outline how the misinterpretation has occurred, no appeal is possible. This may require the SDAB to convene a hearing to hear from the appellant and then deduce from the evidence whether or not it has jurisdiction to hear the matter.

MGA ss 683-687

Stop Orders

The grounds for appeal of a stop order are not directly set out in the legislation but can be inferred from the process for issuing a stop order.

MGA ss 645, 685

The key decision for the SDAB is if the order was properly issued. In determining if the order was properly issued, the SDAB would consider if:

- an infraction of the land use bylaw has not been established;
- the section of the land use bylaw from which the stop order originated was misinterpreted;
- the time frame for complying with the stop order is onerous or unreasonable;
- the appellant is seeking a variance from some aspect of the issuance of the stop order.

Who Can Appeal?

It is important for an SDAB to know who can appeal development and subdivision applications.

Subdivision Applications

The following parties can lodge an appeal under 678(1):

- The applicant;
- Any government department to which the application was required to be referred under the Subdivision and Development Regulation, this does not include agencies that a municipality chooses to refer applications under Section 5(5)(n) of the Subdivision and Development Regulation;
- The Council of the municipality if the Council, a municipal planning commission, or a designated officer of the municipality is not the subdivision authority;
- A school authority regarding allocation of municipal and school reserve, the land, or money in place of the reserve.

Development Permit Applications

An appeal can be lodged by one of two parties:

- The person applying for the permit, or
- Any person who is affected by the permit or decision.

The SDAB must sometimes decide who qualifies as an "affected person." *MGA s. 645(2)*

Stop Orders

Four parties can lodge an appeal of a stop order:

- The registered owner of the property;
- The person responsible for the contraventions;

- The person in possession of the land or building; or
- Any person who is affected by the order (except that the Court of Appeal has held that neighbours cannot lodge a stop order appeal).

Filing an Appeal

For both subdivision and development cases and to assist people filing an appeal, many municipalities provide a form that can be used that prompts for the address and the reasons for the appeal. Many accept a letter as a notice of appeal.

Subdivision Appeals

In the case of the appeal of a subdivision decision, a notice of appeal must contain:

MGA s. 678(4)

- the legal description and municipal location, if applicable, of the land proposed to be subdivided, and
- the reasons for appeal including the issues in the decision or the conditions imposed in the approval that is the subject of the appeal.

Development Appeals

The Act requires that a person lodging an appeal file a notice of appeal that includes the reasons for the appeal.

MGA s. 686(1)

Timelines for Appeal

Subdivision Applications

With a subdivision application, an appeal must be lodged within 14 days from the time of notice of a decision. If a decision is sent by regular mail, section 678(3) allows five days for the notice to be delivered. The time period does not include the day the notice was sent.

Development Permits

With development permits, the appeal period is not as clear. Section 686 requires an appeal period of 14 days, which begins the day after the decision is provided to the applicant and adjacent owners.

The land use bylaw sets out how notice of development permits can be issued including notification in writing, by posting the site, by posting a notice in the municipal building, or by placing a notice in the newspaper. An appeal period ends 14 full days after the last date a notice of any description was given. If the notice is mailed, section 23 of the Interpretation Act states that the mail is deemed to be delivered 7 full days after it was placed in a

mailbox. For a development appeal, the total timeline may be as long as 21 days.

Many municipal bylaws require notice for discretionary use permits, but not for permitted use permits. Recent decisions have indicated that notice on all permits may be necessary to establish a time frame for appeals. It is advisable for a municipality to provide notice where a development permit is issued for a permitted use, to meet the provisions of administrative law.

Stop Orders

Timelines for appeal of a stop order are not specified in the Act. However, a stop order must specify a time within which compliance must occur. Given the varied nature and circumstances that provide the grounds for a stop order, the time given for compliance would have to be reasonable time having regard to the circumstances. Given the right of appeal, the time given for compliance may have to be sufficiently long to enable the filing of an appeal and its disposition by the SDAB, unless the contravention has created a dangerous situation.

6 LEGAL FACTORS AND ADMINISTRATIVE LAW

As was explained earlier, the powers of an SDAB are determined through the MGA. In addition to the legislation that SDABs must adhere to, members must also be aware of the principles of administrative law and natural justice. These principles govern not only the rules they must apply in making a decision on the appeal before them; it also governs the way they conduct themselves.

Quasi-Judicial Tribunal

Tribunals such as SDABs exercise what are called quasi-judicial functions. This means that they make findings of fact based on evidence and then apply legal rules, as found in the legislation and the planning instruments, to those findings. This process allows the SDAB to make a decision on a subdivision or a development matter after conducting a hearing fairly and in accordance with legislation, administrative law, and the principles of natural justice.

Hearing De Novo

An appeal to the SDAB is considered a hearing *de novo.* De novo is a legal term that means "to hear anew." An SDAB hears an application as if it were new, rather than evaluating the quality of the subdivision or development authorities' decision. In that sense they are "hearing anew" what the subdivision or development authority considered originally. Although the SDAB is required, under section 687, to hear from the development authority, it must come to its own conclusion and it must consider on its own whether the application has merit. The SDAB must hear the evidence anew and must allow the parties reasonable opportunity to produce all relevant evidence so that the SDAB can consider the issue from a fresh point of view.

Administrative Law

Administrative law is a body of rules or principles that govern how administrative or statutory bodies exercise their authority. Administrative law relates to the organization, powers, and duties of administrative authorities.

The purposes of administrative law are to ensure the proper exercise of power, and to protect citizens from abuse of power.

Administrative law applies to SDABs because the SDAB performs a duty and exercises a power that is regulatory and affects the rights of the public. Topics under administrative law are categorized as jurisdictional, judgmental, and procedural.

Jurisdictional

Jurisdictional questions relate to actions that may be unconstitutional or *ultra vires*. Jurisdiction is the authority granted to a tribunal to make certain legal decisions. An SDAB must retain its jurisdiction within the context of the Act, by ensuring the appeal was properly filed, the hearing was properly scheduled, and quorum for the hearing established.

Jurisdictional errors occur when an SDAB issues a decision that is outside its mandate, known as *ultra vires*. It means to go beyond or outside the authority given by statute or law. Examples of where an SDAB cannot issue a decision because it would be ultra vires include:

- hear an appeal that should be before the MGB, such as a subdivision within a prescribed distance of a water body;
- make a decision without a quorum;
- a development permit for a permitted use under the land use bylaw, unless variances or relaxations have been granted; or
- a condition for which a provincial agency or department has responsibility (e.g. confined feeding operations [s. 618.1])

An action that is successfully challenged through court and found to be ultra vires will be rendered invalid and treated as if it never occurred.

Judgmental

Judgmental errors occur when a tribunal takes actions during the course of the hearing that taint the outcome of the hearing. These include acting in bad faith, fettering discretion, considering irrelevant information, or not considering relevant information.

Acting In Bad Faith

This implies intent to deceive and not intending to meet obligations. Making a decision that would not reasonably be made from the information provided at the hearing might bear on a suspicion of the SDAB acting in bad faith.

Fettering Discretion

Fettering discretion relates to constraining or influencing the freedom to make a decision. When a quasi-judicial SDAB convenes, it has the same

powers as a development or subdivision authority. The SDAB should make a decision that reflects their judgement of the case and that reflects only the information provided in the hearing. An SDAB cannot decide how to treat certain types of complaints and then refuse to consider arguments outside that policy. The decision-makers must consider each case on its merits and not be bound by an inflexible policy. The decision-makers must exercise their own discretion to make a decision, on a case-by-case basis.

Considering Irrelevant Information

In the reasons for the decision, an SDAB has to outline what evidence was considered. The SDAB must also state if it determined the evidence relevant or not. Failing to do this could lead to a legal challenge.

Procedural

Procedural errors occur when the incorrect procedure for operating the hearing occur (e.g., not providing notice, not giving access to appeal application) or legislative requirements of the SDAB are not met, by not making a decision, imposing inappropriate conditions, or improper delegation.

Improper delegation may occur when a condition is placed on an approval that requires another body to issue a permit or make a decision that is fundamental to the right to approve. The general rule is that an authority may not sub delegate all or any of its authority unless there is express statutory authority to do so or unless it is necessarily implicit that it is able to do so. In essence, if the approval is dependent on acceptance by the third party, then the sub delegation is improper. On the other hand, it is acceptable if the third party has the legislated authority to make that decision.

An example is when an SDAB approved a subdivision subject to water supply test results "to be evaluated by Alberta Environment and the local health authority to determine the adequacy and quality of potable water supply." The decision was set-aside on appeal because the SDAB had wrongly assigned the task to others to make findings on matters, which the SDAB had to determine.

The following are additional examples of improper delegation of authority:

> A report prepared by a qualified geotechnical engineer to the satisfaction of the Engineering and Public Works Department. Report will outline suitability of areas for building sites, with Planning Department to determine final number of lots and configuration.

This is improper because it is the duty of the SDAB to determine suitability.

> Suitability of site for private sewage disposal to be determined by accredited private sewage disposal installer at the time of installation.

MGA s. 654(1) a

Similar to the previous example, this is improper delegation because it is the duty of the SDAB to determine suitability. The SDAB could delegate the method of installation once the suitability has been determined.

The following is an example of proper delegation:

> The Developer shall initiate a hydrogeological site investigation and the development of a ground water monitoring program to assess sewage disposal optimization and efficiency. The site investigation and monitoring program must be acceptable to Alberta Labour and Alberta Environmental Protection in consultation with the Calgary Region Health Authority. The ground water monitoring program must be implemented prior to operation of any wastewater systems.

This is proper delegation as the authorities responsible for the Water Act and the Private Sewage Disposal Systems Regulation, and the Public Health Act were approving programs within their jurisdiction.

Many aspects of procedure are covered by the rules of natural justice, requiring a fair and unbiased process be followed.

7 RULES OF NATURAL JUSTICE

In addition to statutory requirements, a series of practices were developed from administrative law, to ensure fairness in the conduct of hearings. These are referred to as the rules of natural justice. Failure to comply with the ten rules of natural justice will give grounds for further appeal. The rules of natural justice are essential points to remember when conducting a hearing.

The rules of natural justice are split into two parts, the duty to be fair and the rule against bias, which are described in the following sections.

Tandy Electronics Ltd and United Steel Workers of America et al (1979), 26 OR. (2d) 68

"The concept of natural justice is an elastic one that can and should defy precise definition. The application of the principle must vary with the circumstances. How much or how little is encompassed by the term will depend on many factors; to name a few, the nature of the hearing, the nature of the tribunal presiding, the scope and effect of the ruling made."

Duty to be Fair

Adequate Notice

Advance notice to parties in a hearing allows them to prepare. The Act stipulates who must be notified in the case of subdivision, development, and stop orders as well as the amount of notice required in scheduling a hearing. Natural justice deals with whether notification is sufficient. Where there is discretion as to who is notified, appropriate care should be taken that adequate notice is given.

The second aspect to notification is the right to be notified of the SDAB's decision.

Right to a Public Hearing

The SDAB must hold a public hearing if an appeal is filed. Only deliberations used to make a decision by the SDAB may be held in camera (Section 197(2.1)). Parties to the hearing have the right to make verbal arguments. Hearings convened for the SDAB to determine procedural or jurisdictional matters related to an appeal must be held in public. Procedural and jurisdictional matters may form part of any hearing (e.g. if the appeal was filed in time, was complete, or is able to be heard by the SDAB) and the SDAB must consider these in the hearing.

Right to Know the Cases Made Against Theirs

This element of natural justice basically means that the parties have had adequate disclosure of written materials that will be presented to the SDAB so that they may prepare effectively. For development appeals, the Act states what must be disclosed to parties in section 686(4). It states that the SDAB must make available for public inspection before the commencement of the hearing all relevant documents and materials respecting the appeal, including the application for the permit, the decision of the development

authority and the notice of appeal. Where a stop order was issued under section 645 of the Act both the order and the information under 686(4) must be made available.

In subdivision appeals, the Act combines the disclosure requirement with the notice requirement. This is a common way to give disclosure where there is a limited amount of information that needs to be conveyed to the parties. Section 678(4) states that a notice of appeal must contain the legal description and municipal location, if applicable, of the land proposed to be subdivided and the reasons for the appeal including the issues in the decision or the conditions imposed in the approval.

Right to Have the Opportunity to State Their Case

Parties must be given an opportunity to make written submissions, present argument and bring evidence to establish their case. Adequate time to make arguments must be provided to all parties. The SDAB should not unduly restrict parties presenting arguments and evidence.

Right to be Represented by Counsel or an Agent

The SDAB must allow any party in the hearing to be represented by legal counsel or an agent. It is important that the SDAB members recognize that another party's lawyer is present to represent the party and to provide evidence through documents and witnesses and not to provide advice to the SDAB on the operation of the hearing or to assist the SDAB.

It should be noted that this is not an absolute right but may depend on the circumstances. For example, if a party has waived their right to counsel and then tries to obtain an adjournment for counsel as a delay tactic may warrant against such an adjournment.

Innisfil (Township) v. Vespra (Township) [1981] 15 MPLR 250 (SCC)

In this case the Supreme Court stated that the Ontario Municipal Board should have recognized the right to cross-examine because the board hearings were court like. Consequently, if a hearing is court like or quasi-judicial with parties leading evidence then there is an obligation on the board to allow cross-examination.

Right to Question the Other Side and Their Witnesses

When the SDAB holds a hearing, all parties must be given the opportunity to call witnesses and challenge the opposing side's arguments and their witnesses. The questions should be directed through the SDAB Chair to allow for smooth flow of the hearing and to ensure that the questions are neither rude nor abusive of witnesses.

A party may question another participant. Case law has held that questioning may be necessary to allow a party a fair opportunity to correct or controvert any statement made that is contrary to his case. It is also proper to question the other party or their witnesses in order to challenge the credibility of a party's evidence and the weight to be given to it.

Murray v. Rockyview (Municipal District No. 44) (1980), 14 Alta. L.R. 86

In this case, the DAB did not meet the requirements of natural justice in its refusal to allow cross-examination. The limitation of cross examination was considered unfair in this case because there was new evidence gathered by the board in which the parties were not allowed to challenge through cross examination.

Right to Request an Adjournment/Postponement

Essentially, where a party requests a reasonable adjournment because he or she has not had the time to prepare sufficiently for the hearing due to time constraints, the SDAB should allow an adjournment. The key is that the request and the amount of time must be reasonable. The SDAB need not grant adjournments where a reasonably diligent party would have had time to prepare or where a party requests numerous adjournments.

In practice, the SDAB deals with requests for adjournment at the first part of the hearing. If an adjournment or postponement is granted, the SDAB must ensure that all parties in the hearing are aware of the new date and time for the hearing. Many achieve this by collecting the names and addresses of the parties in the hearing room before the meeting is convened. Notice must again be provided to all required parties under the Act, including those in attendance. This does not mean a general re-advertisement.

Siloch v. Canada (Minister of Employment and Immigration) [1993] F.C.J. No. 10 (FCA)

The Federal Court of Appeal stated the following:

"It is well settled that in the absence of specific rules laid down by statute or regulation, administrative tribunals control their own proceedings and that adjournment of their proceedings is very much in their discretion, subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. (Prassad v. Canada (M.E.I.), [1989] 1 S.C.R. 560 at 569 Sopinka J.)."

Rule Against Bias

The second set of rules of natural justice fall under the rule against bias, which describes the obligation of decision-makers to be objective, impartial, and independent.

There are actually three types of bias: actual, perceived and institutional. Institutional bias arises where the decision making process in the Board as a whole raises a reasonable apprehension of bias. Consequently, a Board should avoid conduct that would give the impression that the Board from an institutional perspective is biased.

Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District) (1993), 9 Alta. L.R. (3d) 1 (Alta. C.A.)

In this case, a Development Appeal Board denied a development permit. The municipality's solicitor and engineer attended the appeal. The solicitor also acted for the board and retired with the board for deliberations. This created a reasonable apprehension of bias and a new hearing was ordered.

Right to be Heard by an Unbiased, Independent and Impartial Decision Maker

When an SDAB hears a matter it must ensured that the SDAB members do not have an actual or perceived bias. A bias is where an SDAB member has an interest in the outcome or has already made up his or her mind before hearing the appeal. A bias also exists where a decision-maker is influenced in the outcome of a decision by a monetary interest, personal interest, or any other interest that would influence the decision-maker.

If a member has an actual bias they should not sit. If there is something that could be perceived to be a bias they should disclose the nature of the perceived bias and see if the parties have any objections.

Pecuniary Interest

Sections 169-170 of the Act deal with "pecuniary interest" in relation to members of council. If council were to hear a matter where a councillor or their family has an economic interest in the outcome of the decision, the councillor must declare the interest and must abstain from discussion or voting on the item.

The provisions in the Act apply only to councillors, but if they are appointed to the SDAB, under section 172 they must declare any pecuniary interest if an item appears before the SDAB that they may have an interest in. They may also have to abstain from any discussion of the matter and leave the room. Any declaration or action must be noted in the minutes.

A public member with a financial interest in the application should also declare this interest and exclude him/or herself from the hearing.

Apprehension of Bias

In addition to pecuniary interest, all SDAB members must consider perceived influence or perceived bias. To some extent this is a matter of individual choice, but if the member feels that their presence may limit deliberations on the application, or colour the outcome in any way, they may consider making a declaration and excluding themselves from further discussion. This should also be noted in the minutes. If a member is challenged by a person in the hearing and yet does not see the need to step down, the SDAB must deliberate and determine whether or not the member should step down.

A decision-maker must hear an appeal with an open mind and without being influenced by any external causes. A reasonable perception of bias is enough to disqualify a member. This exists where a reasonable observer, knowing the facts, would think the member might not act in an entirely impartial manner.

In a situation where councillors are also SDAB members, an apprehension of bias can sometimes be alleged due to prejudgement as a result of statements that a councillor may have made prior to the hearing as part of a redistricting process or possibly a position taken on an issue during an election.

A Board member must avoid creating a perception of bias. For example, a member should avoid circumstances that could give rise to an apprehension of bias such as talking with the parties, or having lunch with the parties while there is an ongoing hearing.

Committee for Justice and Liberty v. Canada (National Energy Board) [1978] 1 SCR 369

The Supreme Court of Canada stated that the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining the required information, the test of what would an informed person, viewing the matter realistically and practically - conclude? The grounds for the apprehension must be substantial.

Unicity Area Residents' Association v. Winnipeg (City) (1999), 139 Man. R. (2d) 20 (QB)

This case concerned a decision of the Winnipeg property and development committee (Appeals Committee) and the denial of natural justice concerning a hearing into rezoning by the committee. During the hearing a couple of the members left the room during various times while the hearing was in progress. The court made the following comments:

"If [the members] are to at least keep an open mind and to be prepared to be persuaded by any presentation, they have to listen to all of the presentations. ... This conduct, by members of a tribunal, elected officials or otherwise, is wrong and inconsistent with the fundamental rule of natural justice; that is, people have a right to be heard by the members of the tribunal that are going to make decisions affecting their rights. It is equally unfair (procedurally) for members of a tribunal to simply get up and walk out of the room when citizens are making representations to them. If an adjournment for any reason is required by any tribunal, it should be taken and the hearing should only proceed in the presence of all the members of the tribunal charged with the responsibility of conducting the hearing."

Right to Have the Decision Made by the Members Who Have Heard the Whole Case

The SDAB members who hear a case must make the decision on that case. The parties to the appeal have the right to have the decision made by subdivision and development SDAB members who heard the complaint. No one else can make their decision for them. The decision-makers must deliberate among themselves to reach a decision.

The SDAB members must be present throughout the hearing of a specific case. SDAB members must not be substituted for other members during the hearing. SDAB members should ensure that they do not leave the hearing room (e.g., for a break) while the hearing is ongoing. Any member who has to leave during a hearing may not return or participate in the decision in any way if the hearing has continued without the member.

In practice, the Chair of the SDAB can call a recess to allow members to rest after a long series of presentations or to settle down the meeting participants after a contentious presentation or if someone must be removed from the hearing. SDAB members should not discuss the hearing during these recesses.

Right to Have the Decision Based on the Consideration of Relevant Evidence

In making its decision, the SDAB should only consider relevant facts and evidence to the appeal. An SDAB should not base its decisions on irrelevant considerations, that is, evidence that has nothing to do with development, subdivision, or stop order.

The authority's original decision is based on the information that is presented in the applications, with the application, as well as the application of requirements under the legislation, statutory plans, and land use bylaw. An SDAB cannot consider evidence about an applicant's infractions of the noise bylaw or the streets bylaw as a reason for refusing an application to construct a deck on his land.

Other case law examples of overturned SDAB decisions include:

- Development approval cannot be granted on the condition that a developer confers a public benefit, except where such a condition is authorized by statute.
- Development approval may not be used to regulate business competition.
- The SDAB may not normally consider the applicants' moral character.

- The SDAB may not consider the great length to which the applicant has already gone to obtain approval.

Conclusion

SDAB decisions must meet the requirements of the law and be legally defensible. In addition, although any one of the parties involved in the hearing may not be happy with the decision, it is imperative that the parties feel that:

- their individual concerns have been heard,
- they have been dealt with in a respectful manner, and
- the decisions rendered are fair and just.

Please refer to the flow chart *How Legislation and Natural Justice Guide the Actions of the SDAB,* which has been provided in the Appendices.

8 THE APPEAL PROCESS

Once an appeal has been filed an SDAB must hear the appeal within 30 days. The appellant (the person who files the appeal) is expected to give a verbal presentation to the Board. Persons who have been notified of the appeal (affected persons) also have the right to present a verbal, written and/or visual presentation to the Board. As well, a representative from the approving authority (respondent) presents the application (e.g., where the site is located, the proposed development and the reasons for the decision).

The other participants in the appeal process are of course the Board members. When hearing an appeal, the SDAB **does not** consider precedent when making its decision. Each application is judged on its own merits. As well, the SDAB can only consider relevant planning matters when rendering its decision. Matters not related to planning include comments regarding a person's character and commercial competition. If persons stray from planning matters, the Chair will advise accordingly.

The following section will explore in detail the roles and responsibilities of participants in the appeal process.

Roles and Responsibilities of Affected Parties

Appellant

The appellant's role is to provide evidence and arguments that demonstrate that the decision or part thereof, is inappropriate or unreasonable and should be reversed or revised.

The appellant may or may not be familiar with the various rules or appeal processes and may rely on the description of the process provided by the Chair.

The appellant should review the application and the decision, and in the appeal letter must give reasons for the appeal. The appellant should also prepare to elaborate on the reasons at the hearing and possibly cite examples and use illustrations. Well thought out arguments to support the appeal will assist the SDAB in understanding why the application was appealed. The appellant may also want to review the legislation, relevant plans and bylaws to get a sense of what was taken into consideration with the decision.

Respondent

The respondent at the hearing is either the subdivision or the development authority of the municipality. A representative of the authority has the role of describing the steps that the authority followed to make their decision. The respondent's representative can be a planning officer or a development officer, or a lawyer. The respondent's case may also be made or supported by evidence presented in writing or by witness.

Following are some of the roles that a respondent (usually a planning officer or a Development Officer) can fulfill:

- state the basis for the original decision;
- provide reference and to explain in plain language the relevant aspects pertaining to the case of the legislation, provincial land use policies, statutory plans, land use bylaw and other relevant municipal documents (polices, engineering standards, long range projections);
- submit evidence on a decision made by the subdivision authority;
- refer to duties, time limits and authority to make a decision;
- outline requirements under the statutory plans and land use bylaw or limitations on approval to the SDAB;
- provide pictures, video or information gathered from a site visit; and
- describe bylaw relaxations.

Applicant

The applicant is the person whose application was considered and a decision rendered by the subdivision or the development authority. In the hearing, the applicant may be an appellant if:

- the respective authority refused his application; or
- the authority issued a decision with a condition that the applicant disagrees with.

Affected Persons

The Act does not define affected persons. In development and stop order cases, the SDAB determines who may be affected. If a person or party is considered affected, they may appeal and be heard.

MGA 685 ss (1), (2)

For subdivision purposes, there is no appeal role for affected persons, but the SDAB may choose to hear them. Adjacent landowners cannot appeal but they have the right to be heard. Land Use Bylaws (LUB) may identify land to be considered as adjacent for notification purposes.

MGA s. 680(1)

Affected persons include people who speak in favour or against the decision being appealed. Those individuals who have standing at the appeal will be provided the opportunity to speak in an appropriate order. If a member of the general public attends and wants to speak to the case, the SDAB will determine whether it will hear that person.

Agent

MGA 692(7a) (ii)

In some cases, an applicant, appellant, or an affected person will bring advisors or specialists to speak for them, or to assist in providing information to the SDAB. Agents might include lawyers, consultants (planner, engineer, architect, appraiser, surveyor or real estate agents), or other people who will provide different facts and information to the SDAB to represent the appellant's arguments and to expand on the reasons for the appeal.

Case Law "Carlin v. Registered Psychiatric Nurses Association (1996) 40 Alta L.R. (3rd) 206 (Alta QB) states that a board counsel is not a member of the tribunal and is therefore prohibited from participating in the hearing as would a member."

An agent or expert witness can also be requested by the SDAB to provide evidence or clarification, for example a lawyer on an aspect of law. It is also possible that the SDAB may suggest that the parties provide the evidence of an expert agent in writing or in person.

SDAB Counsel

The SDAB may wish to retain a lawyer to provide training or procedural advice to assist during involved and contentious hearings. An important consideration for the SDAB to remember is that the SDAB must conduct the hearing, not their legal counsel, although advice may be sought during a hearing if appropriate.

Counsel to the SDAB must not act in a way that will give rise to the appearance of bias or fettering of the SDAB's discretion. SDAB Counsel cannot be seen to be the decision-maker, nor can the SDAB abdicate its role in conducting the hearing to the SDAB counsel. The SDAB Counsel should not be seen to act as a member of the SDAB or Chair the hearing, under any circumstance.

Roles and Responsibilities of SDAB Members

Being an SDAB member is different from being a councillor. Councillors represent the community and are often asked to speak about issues and can respond to outside questions and influences. When councillors are members of SDABs, they are filling a quasi-judicial role and are limited to legislative and administrative law rules. This means that they must be careful not to speak out of turn and that they must make their decision based only on the evidence presented to the SDAB during the hearing. SDAB members who

are also councillors must "leave the councillor's hat at home" when dealing with an appeal.

Any SDAB member also needs to be aware of potential for or perception of conflict of interest and bias. If the impression is created that the member might benefit directly or indirectly from the ruling of the SDAB or that there has been a previous association with a party to the appeal, the member should not participate in the hearing.

The role of any SDAB member is to participate in the hearing process and to help ensure that decisions are made in a fair and timely manner. A list of members' responsibilities include:

Before the Hearing
SDAB members must:

- be informed about legislative and quasi-judicial responsibilities,
- be familiar with the relevant plans and bylaws (provincial land use policies, municipal development plan, area structure plans, area redevelopment plans, land use bylaw and the SDAB bylaw.),
- review the agenda package prior to the hearing and become familiar with and understand the case.

SDAB members must not:

- speak with the appellant or any other parties prior to the appeal. Refer people who contact you to attend the hearing and make their views known,
- discuss the item being appealed with anyone including SDAB members outside the hearing,
- conduct independent research including site visits. Members should hear the evidence, not become an expert witness,
- form a conclusion prior to attending the hearing.

SDAB members should refrain from discussing appeals with municipal staff except within the context of the hearing. Caution is also advised if municipal staff provides training to the SDAB as this may be perceived as bias. If staff provides training, they must do so in a professional and unbiased manner.

At the Hearing
SDAB members must yield the operation of the hearing to the SDAB Chair and may ask questions during the hearing only with the permission of the Chair.

Members' roles at the hearing are:

- To follow fair procedure and act in accordance with the rules of natural justice.
- To attend the entire hearing to make a decision.
- To determine if their sitting at a hearing is appropriate.
- To take notes to ensure that issues or evidence provided in the hearing is addressed in findings of fact, the reasons for the decision, or the decision.
- To hear from all parties in a hearing in a fair, open, and objective manner.
- To ask questions of the appellant, subdivision authority or other parties in the appeal to determine the findings of facts (those items to base the decision on) or to clarify information provided.
- To participate in the decision by concentrating on planning evidence presented, and on the rules of natural justice and administrative law principles.
- To base their decision on evidence provided in the hearing
- To contribute to the decision document and ensure that written reasons are provided.
- To support the decision made by the SDAB after it is made.
- To treat all participants, including other SDAB members, in a hearing with respect and fairness.
- To use plain language as the audience may not be familiar with planning and development, or hearings conducted by quasi-judicial SDABs.

Roles and Responsibilities of the Chair

The SDAB bylaw can set out how the Chair is designated and specify term of office. The Chair presides over the hearing, ensuring that the hearing is conducted fairly and in a business-like manner. The Chair has control over the hearing and can call for breaks during the hearing if necessary. Questions and requests are referred to the SDAB through the Chair. The correct way to make a request is to direct the question to Mr. or Madam Chair.

Before the Hearing

When the Chair opens the hearing, he or she should provide some direction to the people attending the hearing to help them understand the process and how their input may be recognized. Some municipalities have chosen to prepare a pamphlet explaining the SDAB process, how residents can gain information about decisions, and how to make a submission to the SDAB.

The Chair sets the tone of the hearing by ensuring the appropriate behaviour of people in the hearing and ensuring that the SDAB and persons appearing in the hearing ask relevant questions, and that irrelevant information is minimized.

Before the hearing the Chair may need to determine the appropriate hearing format and possibly interact with the secretary to establish the agenda for the hearing.

At the Hearing

The Chair's responsibilities at the hearing are to:

- set the tone of the hearing;
- describe the process to the parties involved;
- ensure that all parties in a hearing are given an opportunity to speak about the item being appealed,
- describe bias and apprehension of bias and asking if anyone present feels that the SDAB members may have an apprehension of bias.
- direct questions posed by appellants and other parties in the hearing to be answered by the appropriate party (appellant, subdivision and development authority, planner, development officer, other staff who are part of the hearing.),
- ensure that the other members of the SDAB have adequate facts to develop the reasons for their decisions and to formulate the decision,
- determine when irrelevant information is being presented, questioning the presenter on the relevance of the information and requesting to focus on relevant material,
- summarize the public hearing and explaining the method by which a decision will be made.

Some actions that may be necessary for a Chair to fulfill:

- call a recess to allow a participant or the SDAB to regain composure or remain focused on the facts presented in the hearing
- exclude disruptive people from the hearing
- intervene in matters of unprofessional conduct
- coach other SDAB members to ask relevant questions to gain adequate information to make a decision based on what is heard or presented in the hearing, and
- may be responsible for signing the written decisions of the SDAB.

9 HANDLING DIFFICULT SITUATIONS

Members will occasionally need to handle difficult situations. In the course of the hearings, individuals may become defensive, frustrated, or angry. By being aware of the changes in verbal or non-verbal behaviour, you can be alerted to the need to deal with the individual's feelings.

Be aware of changes in:

- Body language, e.g., red face, gesturing, leaving one's seat; or
- Voice, e.g., the raising of pitch or volume, abusive language or sarcasm.

By recognizing these symptoms in other people you can avoid being drawn into an emotional exchange. You do not want to become defensive, abusive, or return anger with anger.

Respond to upset behaviour with a professional manner:

- Acknowledge feelings: "I appreciate your perspective."
- Assist to focus request: "So you are asking that the SDAB allow the service road to be dedicated by caveat instead of by plan of survey?"
- Provide clarifying information regarding the SDAB's jurisdiction and procedures: "You will be given a chance to question representatives at the end of the presentation."

Occasionally, serious situations arise that threaten to disrupt the SDAB hearings. If such a situation should occur, the Chair should be guided by the following procedure:

- Advise the individual(s) that the disruptive behaviour must stop to allow the hearing to proceed in an orderly manner;
- If the situation continues, advise the individual(s) responsible for the disruption that they will be required to leave the hearing if the disruption does not stop immediately;
- If the situation continues, ask the individual(s) to leave the room;
- If the situation continues, contact the local police and request that the individual(s) be removed from the hearing room.

A Chair may choose to call a brief recess to allow for a "cooling down period" at any time. An intermediate solution is to adjourn the hearing to another date to allow parties or the SDAB time to cool down. As the Chair is responsible for maintaining orderly proceedings, he or she is encouraged to

take every precaution to prevent situations from escalating to the point that action as described above would be necessary.

10 HEARING EVIDENCE

The MGA directs the SDAB to accept any "… oral or written evidence that it considers proper, whether admissible in a court of law or not, and is not bound by the laws of evidence applicable to judicial proceedings." Although the Board has broad discretion in this area, the following section describes the limits concerning the nature and quality of the evidence it may receive.

MGA 629(a)

Fair Hearing

The elements of a fair hearing are contained in the structure and the way in which decisions are made in the hearings. Hearings are a means for an SDAB to gather information, enabling the members to weigh the evidence, determine the facts, develop their reasons, and make a decision. Generally, each party at an SDAB hearing must provide enough evidence to make it more probable than not that the decision should be in his or her favour.

Fair Procedure

In order to ensure a fair hearing the SDAB must also abide by fair procedure when conducting a hearing.

A hearing must be structured. The Chair directs and controls the hearing to allow parties to present their case. Each SDAB member must have a good understanding of:

- The function of the SDAB,
- The SDAB's governing legislation,
- Procedure,
- The underlying planning objectives, and
- The basic principles of administrative law and rules of natural justice.

Administrative Boards, like an SDAB, that do not follow fair procedures risk their decision being challenged over the matter. This may mean having the decision overturned by the courts and having to rehear the matter again in accordance with fair procedure.

Public Hearing

An SDAB is a committee of council. Under the Act, a committee of council must conduct open hearings. Five days notice of the time and location of the hearing, as well as a location where the information can be reviewed, must be made available to the public. Hearings must be held in public, including

MGA ss 230, 606

evidence gathering and presentation of arguments, since the parties are entitled to know the facts of the case. Everything that the SDAB has that is relevant to the case must be disclosed. However, deliberations of the SDAB can be conducted in camera.

Regarding participation by members of the public, the SDAB needs to determine who is entitled to be heard and who is affected enough to also be heard. As a general rule, and if time permits it, it is better for an SDAB to hear any person who wishes to speak and later determine whether their comments are relevant for consideration in the case.

MGA ss 680, 687

The appropriate action for the Chair would be to ask who wishes to speak, acknowledge their attendance at the hearing, and have their names recorded. In practice, the secretary of the SDAB will record the names and addresses of attendees in order to send the written decision.

The SDAB deliberates on the evidence provided and must determine which evidence is relevant to consider for their decision. Evidence provided at the hearing should be reflected in the written findings. This reflection could include outlining the evidence, what the SDAB considered and why the evidence was incorporated, or not incorporated into the decision.

An SDAB has a duty to the public when the public attends the hearing. Often, members of the public are unfamiliar with the workings of the SDAB or with quasi-judicial tribunals. Members of the public view the subdivision and development appeal Board as the "court of last resort" for planning and development matters.

The duty to members of the public extends to ensuring that a consistent method be developed for appeal hearings. This could include that each hearing follows a similar process and that stages of the hearing are described to all in attendance. The Chair's consistent handling of a hearing contributes to a sense of fairness. Some appeal Boards and community associations have information available to members of the public to assist in launching an appeal and in making presentations at appeal hearings. (Edmonton, Calgary, Edmonton Federation of Community Leagues [EFCL], Federation of Calgary Communities [FCC]). The Chair may need to prompt members of the public making presentations or asking questions to ensure that they are afforded an equal opportunity to make their case.

In addition to the copies of the agenda materials prepared for appeal Board members and other parties in the appeal, a copy of the materials could be made available to members of the public prior to and at the hearing. Access to the information would provide affected parties with all of the available

information about the appeal. If there are many members of the public in attendance at a hearing, the SDAB must also endeavour to allow adequate time to each speaker to make a presentation, and balance the presentations. For example, the SDAB should strive to provide equal opportunity to persons who are against the appeal if an agent for the person appealing the decision takes a great deal of time in making a presentation. This may not be practical in all circumstances, but efforts should be taken to balance the presentations.

In practice, many SDABs limit lengthy presentations, especially when repetitious or irrelevant. However, it is recommended that time limits not be set to ensure that the parties have had their say before the Board.

Sources of Evidence

A hearing by an SDAB is "de novo," where the SDAB hears any information that might have been considered as part of the initial application. This means that the appellant and other parties must present all of the relevant evidence about the item under appeal to the SDAB at the hearing to assist in the decision-making. The SDAB cannot fill in the blanks of the evidence provided in the hearing from its knowledge. Information to the SDAB is provided through:

- Presentations at the hearing
- Written submissions
- Technical information (reports supplied with application or at the hearing)
- Questions asked by SDAB members
- Questions asked by the appellant and other parties in the appeal.

Presentations

These will be a mix of opinions, evidence, facts, and statements. The SDAB must listen to each presentation to determine what is fact and what is opinion. A common statement in an appeal hearing is "This development will decrease the value of my property."

Information must be provided supports the contention that a decrease in the market value of the property will occur. Market value is based on a mixture of location, physical characteristics, amenities, repairs needed or environmental problems. Thinking this statement through, the person complaining that the value of his property would be affected would raise issues of insufficient parking, strong lighting, increased traffic, decreased sun exposure, or decreased privacy.

The statement should be supported by evidence or fact that would lead to this conclusion. For example, the development will result in my home being in the shade for most of the day could be supported by drawings or a model of the impact of the proposed development on the property.

Written submissions

The practice of some SDABs is to read shorter submissions aloud at the hearings, or the Chair acknowledges the written submissions and the SDAB reads the submissions while determining their findings. With some appeals there might be a number of lengthy written submissions; the SDAB must review these before their deliberations. It is possible that written summaries of the submissions can be requested by the Chair of the Subdivision and Development Appeal Board, but the members are still required to review the written submissions in their entirety before deliberating on the evidence and making a decision.

Technical information

Technical information provided to the SDAB creates a unique challenge. Unless the information is presented in its entirety in a manner that is understandable to the SDAB, the SDAB may require the services of an outside consultant or expert to provide a report to the SDAB. Alternatively, council could appoint an expert (for a specific case) to sit on the SDAB to hear a complex appeal to assist the SDAB in understanding the information. The SDAB must draw its own conclusion and make a decision.

If technical information that the SDAB needs to make a decision is not directly available, the SDAB could recess the hearing and request such information from a technical expert directly or request one of the parties to obtain it. Upon reconvening the hearing, the SDAB could then receive and review the report and/or have the technical expert present the evidence and be available for questions and interpretation.

As a tribunal, the SDAB is not bound by the formal rules of evidence. If technical evidence is presented in a report by one of the parties, but the author of the report is not present for questioning, this would provide an indication of the weight placed on the evidence. If the validity of the report is challenged, the SDAB may assess the evidentiary value of the report.

SDAB Member Questions

SDAB members should use their opportunity to question all parties in the appeal. Asking questions allows the SDAB to clarify points raised during presentations, to gather greater detail on information presented, to separate facts from opinion or to assess the impact of the application on the speaker.

Members should be careful in their questioning and not be seen as interrogating the parties. More discussion on questioning techniques will occur in the next section.

As a suggestion, SDAB members may find it useful to keep notes during the hearing to reference during deliberations. The notes can outline what the appeal is about, what the issues are, what evidence was presented. During deliberations, the SDAB members can think about each of these and reflect these in their findings, reasons, and decision, and also outline why some evidence or information was considered but not used in the decision. These notes may assist the SDAB in formulating reasons for a decision and the motion for the decision. The SDAB bylaw may require a policy regarding retention or destruction of these rough notes, and production of the official transcripts or record of the hearing.

Members should also be careful that through questioning they do not appear to be an advocate for a party.

Other Questions

The appellant and other parties in the appeal may also ask questions. Depending on the operations of the appeal SDAB, the parties in the appeal can ask questions of other parties in the hearing including the planner or development officer, parties speaking for the appeal and parties speaking against the appeal. The only exception is that other parties cannot directly question SDAB members. Any questions need to be addressed "through the Chair." The Chair of the SDAB needs to direct questions to the appropriate parties, and may need to ask the questioner to rephrase questions that are confrontational or accusatory in nature, or may have to intervene and ask the questioner to leave the appeal hearing if repeated warnings do not alter the questioning.

In Murray v. Rockyview, 1980 A.J. No. 649 No. 12565

The Court stated that:

Based on the fact that SDAB members, through their own investigations, effectively became witnesses in the case, the court was of the view that there is a patent apprehension of bias when tribunal members seek to be witnesses and judges in the same cause.

Site Visits

A site visit or inspection is normally carried out as part of the initial application. Photographs, videos, aerial photos or maps may be used to illustrate the topography of the site, adjacent uses and to give a sense of the land that is the subject of the application. The planning officer or the development officer may present site visit materials in the hearing as part of the information taken into account when the initial decision was made or a stop order issued. Appellants and other parties in the appeal may do the same to illustrate how the item under appeal affects them.

In an appeal, a site visit is periodically suggested as a method for the SDAB to gather information. The general advice is that site visits should be avoided to prevent the potential for challenge of the decision in the case. It is

preferable that SDAB members hear evidence about the site at the hearing, together with all participants. If a site visit is to occur, the SDAB should follow the following guidelines:

- The visit should be taken as part of the hearing so that the observations and evidence are part of the hearing.
- Either all parties to the appeal are present for the site visit, or only the appeal SDAB members.
- The SDAB members cannot discuss the item being appealed while on the site visit.
- The SDAB could choose to send a delegate, other than an SDAB member (often the planning officer), who could give a report of the site visit and be questioned or cross-examined by all parties to the appeal.

Conclusion

Since the SDAB is comprised of lay people it would be unreasonable to expect that it could control all the various types of evidence that are submitted at a hearing. However, the Board must ensure that the evidence it does consider is relevant and is sufficient enough to support its decision.

11 COMMUNICATION SKILLS

When it comes time to conduct a hearing and listen to different points of view, you will have to be aware of some basic communication skills. Using communication skills will increase all participants' perception of a fair hearing.

The SDAB must listen to each presentation to determine what is fact and what is opinion. A speaker making a statement must be able to support his/her conclusion with facts or evidence.

To avoid making judgments that could be a barrier to really understanding, be aware of the potential for assumptions to ensure a fair hearing, with limited bias.

SDAB members should be cautious about becoming indifferent. Even though in the course of the proceedings, members will hear similar presentations from many appellants and respondents, each case or matter should be treated as if it is their one experience with the Subdivision and Development Appeal Board. SDAB members are expected to listen attentively to each individual case and to understand the perspective presented. The atmosphere created may influence the parties' perception that a decision is fair and just.

Setting an Appropriate Tone

The following are suggested techniques and approaches to create an atmosphere where the parties feel they have been dealt with in a considerate and respectful manner:

- Maintain a degree of formality during the SDAB proceedings;
- Always address participants by Mr., Mrs., Ms., or other title;
- Pose questions through the Chair;
- Restrict conversation to the subject matter of the appeal;
- Avoid socializing with any of the parties to the hearing before, during, or immediately after the hearing period;
- Using appropriate body language and tone of voice to convey that you are interested and attentive:
- Face the person who is speaking – this says, "I am listening…"
- Smile or nod – this says, "I understand you…"
- Use eye contact – this says, "I care about what you are experiencing and I am paying attention…"

- Avoid any gestures, such as scowling, yawning, raising your eyebrows, that could suggest boredom, disagreement or lack of respect for the perspective being presented;
- Avoid sounding officious, sarcastic or condescending. Regardless of your personal reaction to what is being presented, a professional manner should prevail;
- An appropriate tone of voice will indicate attentiveness and respect.

Note: some of these skills are covered by other Municipal Affairs courses: "Finding Agreement on Difficult Issues" offered by Mediation Services; and "Effective Communications and Actions" offered by the Municipal Advisory Services. Any communication or effective listening course would also provide training in this area.

Asking Questions

The SDAB must ask questions to gather complete information. The responses to the SDAB's questions will normally be a crucial part of the evidence. Questioning the parties gives the SDAB the opportunity to discover the basis behind opinions (if any) and to better determine the relevance of specific portions of testimony.

Reasons for asking questions:

- To clarify the information presented.
- To assist in understanding the information presented.
- In some cases, asking questions to assist a party to the appeal to present evidence.
- To show that you were listening to the evidence presented.
- To move a party along in their presentation when too much detail is being provided or similar evidence that has previously been presented is being repeated.
- The SDAB's questioning of presenters can help establish what is fact and what is opinion.
- It is advisable not to ask questions that seek information of a non-planning nature because they confuse participants, give the appearance that irrelevant information is being considered, and prolong the hearing. Examples of questions of a non-planning nature would be personal information or business practices.

Open Questions

The best questions are neutral in tone and are open ended. If they are neutral and open ended, they may assist the presenter in providing facts and

evidence related to the appeal, rather than opinion or a view elicited from a leading question.
Some examples of open-ended questions include:

- *Objective* - to gain understanding about the facts: What happened? When did it happen? What can you tell me about...?
- *Subjective* - to gain understanding about thoughts, views, or perspectives: What is your view? What is your opinion of…?
- *Interpretive* - to gain understanding about how they interpret the effect and impact: How did that affect...? What is the impact on...?
- *Reflective* - to gain understanding of how the other party is feeling" What made you angry? What was it like…?
- *Decisive* - to understand how the other party thinks an issue can be resolved: "What do you think should happen?"

Reflecting Content

The purpose of reflecting content is to check for clarity of understanding. Paraphrase to clarify thought, summarize, and confirm understanding. Let the other person finish what they are saying. Listen accurately to another person and restate in your own words the content of what the speaker said.
The speaker should acknowledge that your paraphrase is accurate.
Be accurate and concise. When paraphrasing, do not:

- add extra information;
- diminish the value of the message;
- add your own opinions; or
- mimic word for word.

Paraphrasing sounds like this: "So, you're saying…" or "Do you mean…?"

Reflecting Feelings

The purpose of reflecting feelings is to recognize and acknowledge an emotion. Doing so can defuse the emotion and allow the speaker to move on to another topic.

In reflecting feelings, it is important to be tentative and allow time for the other person to correct your reflection if it is inaccurate.

Express in your own words the essential feelings stated or strongly implied by the other person. Listen to the tone of the speaker's voice; observe the speaker's body language. Imagine what the speaker is feeling.

In reflecting feelings, your response will include "you" phrases: "you feel…"; "you sound…"; "you look…"; or "I sense you're feeling…" This will help the other person recognize his or her feeling and represent his or her experience accurately. Tell the speaker what you understand his or her feeling to be. Listen for confirmation.

Conclusion

Good communication skills are essential to an effective appeal hearing- where all participants, whether they agree with the Board's decision or not, feel that they have been heard and the decision was fair. For some people these skills come naturally and for others practice is necessary. Regardless of one's natural ability to listen and to communicate, there are courses and many other sources of information on this topic available through Alberta Municipal Affairs, various private and public education centers, the library and the internet that could benefit every Board member.

12 MAKING DECISIONS

It is the duty of the Board to give reasons for its decision in all cases. The following section provides criteria to compare evidence against. A methodical evaluation of evidence is an important part of the process since it:

1. minimizes the chance of arbitrary decisions;
2. adds to the appearance of fairness; and
3. affords the opportunity for other parties to assess the question of appeal or judicial review.

Evaluating Evidence

SDAB has an obligation to limit itself to acting upon evidence relating to legitimate planning considerations.

An SDAB must not decline to receive relevant evidence nor may it consider irrelevant evidence.

Presentations will be a mix of opinions and facts. The SDAB must determine what is fact and what is opinion.

Factors to Consider

An SDAB must base its decision on the evidence presented, on relevant legislation, the provincial land use policies, any statutory plans, and the land use bylaw. The following is a list of many of the factors to be considered in arriving at a decision:

- authority of the SDAB
- land use policies
- statutory plans
- land use bylaw (particularly land use)
- subdivision and development regulation
- municipal policies, procedures, and standards
- suitability of land for proposed land use
- access
- services and utilities
- existing and future surrounding land uses
- environmental considerations

Consistency with Statutory Plans

The term "consistent with" is used in the Act to allow the SDAB some discretion in its decision-making. The discretion works both ways: the SDAB can uphold the original decision or make a new decision. After considering the evidence provided in the hearing in relation to the goals and objectives in each of the appropriate statutory plans, the SDAB must determine whether the application either meets the intent of the statutory plans and is therefore consistent with them. This means that the application needs to be generally compatible and in harmony with the objectives of the statutory plans and cannot be contradictory to them.

If it is a matter of degree of conformity, the test of reasonableness can be applied in context of balancing the rights of the individual with the overall greater public interest. In addition, the evidence in a case needs to demonstrate that there is good reason to deviate from the provisions of the statutory documents. This should be included in the SDAB's reasons for decision.

Organizing Information

There are a variety of ways that the SDAB can organize the evidence and information presented to it. It is suggested that the SDAB members keep notes during the appeal hearing to keep track of the information presented, to track or to formulate questions. This information can be used to develop the basis for the findings of the SDAB, the reasons for the decision, and the decision of the SDAB. The members may find the notes valuable in drawing up their decision.

The method of working through the findings, developing the reasons and then finally making the decision sets up a logical path for information in the hearing to be reflected in the reasons and into the final decision. It makes information both easy to understand for the SDAB members and easy to track when reviewing the written decision.

Guiding Principles

In making a decision, the SDAB must:

- identify the specific issue(s) giving rise to the appeal;
- determine the facts of the case before it; decide what provisions of the legislation and the planning documents are applicable;
- understand and evaluate the arguments presented by all parties; and
- render a decision accordingly.

During the hearing, the Chair should try to minimize irrelevant information. However, this may be difficult "on the fly." During its deliberations, the SDAB has a second opportunity to separate the relevant testimony and information from the irrelevant. Similarly, the SDAB has a second opportunity to distinguish between fact and opinion. Its decision should be based on fact, not opinion.

The two questions that must be answered when assessing an application for subdivision and development were stated as:

- **Can you?** Can this development or subdivision proceed at this location given the uses under the land use bylaw, the municipal development plan, and the legal and statutory framework?

- **Should you?** Is this an appropriate location for this proposed use or subdivision given the future goals for the area/municipality, the land uses, site characteristics, the aesthetics of the surrounding area, and the impact on the surrounding environment?

These questions form the basis for determining if an application is appropriate for the location it is being proposed.

In determining the facts of the appeal hearing, SDAB members must keep in mind that parties in the hearing will present both evidence and argument about the item under appeal. Evidence is the relevant facts, circumstances, or information given personally or drawn from a document etc., tending to prove a fact or proposition. Once all of the evidence is provided in an appeal hearing, the SDAB can hear all submissions on the arguments of the case; e.g., why the application is or is not appropriate at this location.

After hearing all parties, the SDAB faces a challenge in making a decision. It must base its decision on:

- evidence and arguments presented in the hearing;
- relevant legislation (Act, subdivision and development regulation);
- other provincial legislation and responsibilities;
- administrative law; and
- the rules of natural justice.

Merits of Development Permit Appeals

The requirements for the SDAB in considering development and stop order appeals are outlined in section 687. It is important to recognize that the SDAB is granted wider powers than the development authority. However, the SDAB's decision must still comply with the provincial land use policies

and with any of the municipality's statutory plans, and the use provisions in the land use bylaw. The SDAB may vary any requirements of the land use bylaw, other than the use, if it is of the opinion that the variance will not impact adversely the adjacent properties and amenities of the neighbourhood. The SDAB must also have regard for the subdivision and development regulations but is not bound by them.

This means that the SDAB can approve, with conditions, developments such as those where there is evidence that the approval would not affect the greater public good. For example, would the Board be justified in reducing the setback requirements from a wastewater treatment facility to allow development if there was a question that human health and safety could be compromised? The SDAB must be satisfied that granting the variance from a setback is for a compelling reason.

The SDAB must first decide whether the land use that is applied for is among those listed as a permitted or discretionary use for that district. The second stage is to determine whether the proposed development complies with the standards and regulations of that use and district. If the application does not comply with the standards and regulations the SDAB must either refuse to grant the permit or grant a variance of the regulations.

Merits of Stop Orders

Stop order appeals are slightly different, as the SDAB's first actions are to confirm that:

- The order was properly issued, and if it was properly issued,
- A breach of the land use bylaw or development permit has occurred.

If the order was not properly issued or if a breach occurred, the order should be revoked. If the breach is related to the use (e.g. use not allowed in that district) then the SDAB does not have the jurisdiction to vary or set aside the order. In the decision, the SDAB can suggest to the appellant to seek a land use bylaw amendment.

If the breach is related to a condition of a permit or a condition of an approval, the SDAB cannot amend the previous decision or reopen the initial approval, as this would be equivalent to a second hearing of the original case by the SDAB. The SDAB can vary the order to allow the appellant additional time to meet the conditions of the stop order, or based on the evidence submitted, to allow a new permit to be applied for to allow the development or subdivision to proceed under a new approval. The SDAB can in the decision advise the appellant to apply for a new approval from the appropriate approving authority.

The SDAB has to ensure that a decision does not result in granting or varying the original decision, as advertising and other requirements must be met. This would not be fair or equitable under the rules of administrative law and natural justice.

Merits of Subdivision Appeals

MGA s 680(2)

The SDAB is granted a wider set of powers to hear subdivision appeals than those for development or stop orders. The difference with a subdivision appeal is in the SDAB's ability to have regard for statutory plans and to be consistent with the land use policies rather than compliance with the land use bylaw and land use policies. Where the SDAB decides to make a decision that is consistent with statutory plans or with the land use policies, that should be outlined in the reasons for the decision and reflected in the decision.

One question that the SDAB must address when making a decision on a subdivision appeal is "Is the site suitable for this subdivision?" In making this determination, the SDAB must provide its reasons for finding the site suitable. After the determination of site suitability, conditions can be set.

Setting Conditions on a Decision

The SDAB has the same ability to set conditions as either the subdivision or development authority. The SDAB has to keep in mind that its conditions have to reflect the authority that the SDAB is given and not transfer the responsibility for the decision to another person or body for enforcement.

In setting conditions, the SDAB must ensure that the conditions are enforceable. For example, an inappropriate condition would be that the development must not generate unreasonable noise, dust, or light. This condition is too vague. Other potential problems with conditions include that they do not serve a planning purpose or they go beyond the authority of the SDAB.

The principle for the SDAB to consider is that its decision is viable and stands on its own and that any delegated authority only deals with standards or details within the purview of the other authority that need to be verified.

When an SDAB is discussing conditions and the appropriate information has not been presented in the hearing, they have one of two options:

- To require the preparation of the appropriate reports, recess the hearing and reconvene the hearing at a later date; or
- To determine that adequate information has been provided and evaluate the available information on its merits and arrive at a decision.

Special Cases

Direct Control Districts

Appeals within a direct control district are a special case for an SDAB. Direct control districts have the uses and standards set by council. Council issues subdivision and development approvals based on the uses and standards set out in this district. In some instances, council delegates the authority for issuing development permits to the development authority.

The SDAB can hear appeals of development permits issued by the development authority under the direct control district. The SDAB is limited to deciding whether the development authority followed council's direction in deciding on the development permit.

The SDAB cannot hear appeals of any decision made by council. It can hear decisions of development permits issued by the development authority.

Non Conforming Uses and Buildings

MGA s 643

Decisions on non-conforming uses are a special case for SDABs and must be made with a thorough understanding of Section 643. The SDAB has only the same amount of variance as the development authority. It cannot amend the land use bylaw to make the use, the building, or the lot conforming. Only council can amend the land use bylaw.

If a non-conforming use, building, or lot is appealed, the SDAB is limited to determining whether the development authority correctly interpreted the bylaw and whether the use, building, or lot is non-conforming. The SDAB can consider an appeal of non-conforming building if the proposed change would make the building comply, is minor in nature, or represents repair or maintenance, not replacement. The SDAB cannot expand the area of a non-conforming use.

Making a Motion

Making a motion at an appeal hearing is similar to what you might have heard at a council meeting. Decisions by the SDAB are phrased as a motion to allow members to vote on the question.

Formulating good motions is similar to asking good questions. They take practice. The direction that councillors are given is to formulate a motion based on the 5Ws and H:

- Who?
- What?
- When?
- Where?
- Why? and sometimes
- How?

A good way to formulate a motion for a vote is to start first with the facts that you considered in your decision and then end with the decision.

13 WRITING UP A DECISION

Each SDAB has a certain style for writing up a decision. A decision of the SDAB should include the following:

- The evidence that the SDAB considered, and that which it did not. Refer to the documents it considered in its assessment, e.g. statutory plan, land use bylaw, subdivision regulations.
- The reasons for the decision. Reasons should be adequate and should include addressing the nature of the issue, findings of fact, and discussion of statutory requirements and applicable planning documents as well as of issues and arguments raised by the parties.
- The decision of the authority (refuse, approve, or approve with conditions).

Some SDABs also include the following information as part of their decision package:

- The process for an appeal and the time limit to file the appeal.
- A contact person if there are any questions on the decision.

The SDAB's reasons should not be perceived as conclusions. For example, if the SDAB were to provide as its reason that the development would not "adversely affect the amenities of the neighbourhood," upon challenge, a court would probably find this to be a conclusion. The reason for this would be that the SDAB did not discuss why there was no adverse effect on the amenities of the neighbourhood.

The SDAB may also wish to provide other information of an advisory nature that the municipality feels is appropriate (e.g. telephone number for Alberta one call, contact information for accredited building, plumbing, electrical and gas permitting agencies).

14 OTHER ISSUES

Liaising/Explaining

In a general sense, it is the SDAB members' responsibility to understand and explain their duties whenever it is appropriate and they have the opportunity to convey the message to the public. To create greater awareness, they should explain the SDAB's function and area of jurisdiction. They can indicate that they are a member of the SDAB, e.g. a part of it, but not "the SDAB". They also need to be careful not to misrepresent what the SDAB may or may not do in a certain situation. They need to explain that the SDAB reviews every case on its own merits and in context of the requirements of legislation and prevailing municipal planning policies.

Members may also outline that decisions cannot consider personalities or moral issues. The SDAB needs to be able to justify any decision and provide clear reasons for it, in writing.

Dealing with the Community

Affected people in the community may question decisions of the SDAB and SDAB members may be approached individually to account for the decision. Sometimes these decisions are contentious and divisive and members may feel ostracized from their friends and even their family. This situation could be particularly difficult in smaller communities where most people know each other personally. The question therefore arises as to how members should handle any questions about SDAB decisions or their participation in them.

In answering any questions, the member will need to identify what their job and their role is on the SDAB. They will need to focus on the purpose of the SDAB and be mindful of the planning objectives. It should be made clear that the SDAB is not a court of clemency and it is not their job to stand up for "the little guy." SDAB members can indicate that they have an obligation to carry out their duties in context of the legislation requirements and the ground rules established in the municipal bylaws and the statutory documents. They may point out that they have to determine each case on its merits and will decide this to the best of their abilities. They may also want to point out that this is a volunteer job and they do this to the betterment of their community.

After conclusion of any hearing, SDAB members should also avoid expressing "personal" opinions/observations, but focus rather on the decision that the SDAB (as a whole) made.

What will help is a clear, well-defined process and adherence to the legislation and rules of natural justice. If parties feel that they have been treated fairly by the process, they may be able to agree to disagree when they do not agree with or like the decision.

Dealing with the Media

Similar to a situation with any member of the public, an SDAB member is not to discuss the item being appealed before or during the hearing with a member of the media, so as to not affect the objective hearing of the case. The only thing that may be acknowledged is that the case may be in progress.

SDABs should determine or agree on how to deal with the media. This could address who speaks for them and possibly indicate, in principle, the parameters for what may be discussed. Most SDABs select their Chair as their spokesperson. In this context, when somebody from the media asks a member about an appeal, that SDAB member should refer the questioner to the spokesperson.

It is important that the SDAB speaks with one voice and that there is a single consistent message. To this end it is critical that all members support the decision on an appeal after it was made. SDAB members should not make any statements that may undermine the credibility of the SDAB.

Recognizing that media persons often seek out controversial aspects of a situation, it is advisable for the member selected as spokesperson to be prepared and receive some training for how to deal with the media. A variety of organizations can provide such training.

Implementing the Decision

Once an SDAB has made a decision, it has no jurisdiction to deal further with the case. This also means that the SDAB's role does not include following up on any decision or ensuring that any of its potential conditions are implemented.

This also applies to reconsideration of a decision. Once an SDAB has rendered a decision, it is *functus officio* and any reconsideration is a nullity. It is done with it. There is nothing in the Act conferring power on an SDAB to reconsider a decision. This is different from the Municipal Government Board, which is allowed to reconsider decisions.

Ensuring compliance with decisions, or conditions thereof, is a responsibility of the municipality and their regulatory and enforcement personnel.

The SDAB should also not see itself as solving people's problems. They are not advocates and should not be perceived as such. This also applies to providing any advice that may relate to the issues of the case. For example, if the problem of the case could be resolved by rezoning the property, then suggestions to this effect would be better made by persons other than the SDAB members. Any advisory function could be handled by informed professionals that could possibly include the municipal staff. It is ultimately the municipal council that needs to deal with changes of this nature.

Liability

SDAB members generally will not be held personally liable for actions in the exercise of their functions, duties, or powers including for decisions they render in a hearing. This holds unless they act in bad faith or in a defamatory manner. They may not slander anyone.

MGA s 535(2)

15 CONCLUSION

Subdivision and Development Appeal Boards serve an important and vital function in communities throughout Alberta. The responsibilities of the SDAB are diverse, and Board members have to be aware of many different aspects of their tasks.

The Municipal Government Act sets out the parameters for the formation, membership and function of SDABs, and the Subdivision and Development Regulation and Land Use Bylaws outline other relevant considerations. In addition to knowledge of the broad legal and statutory requirements, members of a Board must be aware of planning considerations, and must also keep in mind the principles of administrative law and natural justice when making a decision on the appeal before them.

All these aspects of participation in an SDAB are explained in this manual. The information presented should prove beneficial to members of SDABs in understanding the context of their work and in preparing themselves for the important tasks of conducting or participating in SDAB hearings.

APPENDICES

1. Duties of the Secretary

A Board secretary must perform a variety of important functions that are not carried out by the Board members. The secretary is really more of an administrator or executive officer because many functions need to be carried out at just the right time and in the right way. The secretary has duties to perform before, during, and after the public hearing. The functions below are only meant to be a guide and may vary according to specific SDAB bylaw.

Before the Hearing

a) Ensure appeal properly filed (and within 14 days of decision or order)
b) Inform appropriate people—appellant, affected persons, etc.
c) Prepare a report to the Board for each appeal (copies of relevant material—zoning map, facts, application, notice of appeal, letters, report of development officer, surveyor's certificates, any other useful information)
d) Prepare an agenda for the hearing (e.g., simple items first)
e) Check to make sure all advertisements (such as in newspaper) and notices have been made (at least 5 days prior to hearing)
f) Ensure all relevant documents and materials are available for public inspection

At the Hearing

9. Pre-meeting: phone members to ensure quorum; set up any equipment/materials needed; supply copies of any late submissions or additional material
10. At meeting: announce appeal; record names of speakers; mark exhibits; take minutes; record motions; record attendance; record absences

After the Hearing

- Prepare Board decision and notification (in writing). Board decision can be in the form of an order or letter
- Send notification of decision to appropriate parties (persons at hearing, persons who sent a written submission, persons required by bylaw to be notified)
- Prepare new permit if required
- Prepare minutes (summary of evidence presented at hearing)
- Have Board's decision signed

2. Order of Presentation for SDAB Hearing Prepared by Brownlee (*For Reference Only)*

CALL THE HEARING TO ORDER

I call this meeting of the Subdivision and Development Appeal Board to Order.

CHAIR INTRODUCTION

My name is _____ and I will Chair this hearing. All questions and comments shall be directed through me.

BOARD INTRODUCTIONS

Will the Board members please introduce themselves?

SDAB ADMINISTRATIVE STAFF INTRODUCTIONS

Will our administrative staff please introduce themselves?

ADOPT AGENDA

Are there any additions/deletions/changes to the Agenda?

Can I have a motion to adopt the Agenda? All in favour?

CONFIRM RECORD OF PROCEEDINGS

Can I have a motion to confirm the record of proceedings for the meeting of? All in favour?

ASK THE SECRETARY TO READ THE FIRST APPEAL

Will the secretary please read the first appeal?

CALL FOR APPELLANT TO COME FORWARD

Will the Appellant please come forward to the presentation table and introduce him/her self?

OBJECTIONS TO BOARD?

To Appellant: *Do you object to any of the present Board members hearing this appeal?*

To Audience: *Does anyone in the audience affected by this appeal object to any of the present Board members hearing this appeal?*

OUTLINE THE HEARING PROCESS

The hearing process will be as follows:

1. *Administration will make a presentation first -*
    2. *there will be an opportunity for the Board to ask questions of clarification;*
3. *the Appellant will then make a presentation;*
    1. *there will be an opportunity for the Board to ask questions of clarification;*
4. *the Board will then hear from those affected persons in the audience:*
    2. *first, those in favour of the appeal,*
    3. *then those in the audience opposed to the appeal;*
5. *the Secretary will read into the record any written submissions received;*
6. *the hearing will recess for a few minutes (if deemed necessary by the Chair);*
7. *upon reconvening there will be an opportunity for the Board to ask questions of clarification;*
8. *any person who has presented will then be given an opportunity to ask questions for clarification, through the chair, of other persons who have presented*
9. *brief summaries or closing comments will follow:*
    1. *first, Administration will have an opportunity for closing comments;*
    2. *then the Appellant will have an opportunity for closing comments;*
    3. *then other parties will have an opportunity for closing comments.*
10. *I will provide closing direction and the Board's review and decision will be issued in writing within 15 days following the hearing. If you wish to receive a copy of the decision, it is important for you to enter your name and mailing address on the sign in sheet on the table at the entry to the hearing room.*
11. *[optional comments on decorum and purpose] The purpose of the appeal hearing is for the appellant and affected parties to provide the Board with information in relation to the appeal. The Board must base its decision on planning merits. Affected persons will be given an opportunity to speak. Please ensure that all comments are directed through the chair. We would ask that comments be of proper decorum and succinct; if another person has already made a point, simply state that you agree with the point.*

If any presenter is referring to a written document, including a map, photographs or a report, a copy of those documents must be left with the Board. If you are reading from a written statement, please leave a copy with the Board as this will assist the secretary in preparing the minutes, and the Board in making its decision.

CONFIRM THE HEARING PROCESS

Does the appellant have any concerns with the process I have outlined?

Does anyone in the audience have any concerns with the process as outlined?

DEVELOPMENT OFFICER OR PLANNER PRESENTATION

……, please proceed with your presentation.

To Board: *Does the Board have any questions for clarification?*

PRESENTATION OF POTENTIAL CONDITIONS

The potential conditions of approval should be placed on the overhead so that the audience may view.

APPELLANT PRESENTATION

The Appellant may now make his/her presentation.

To Board: *Does the Board have any questions for clarification?*

CALL FOR OTHERS TO SPEAK ON APPEAL

NOTE: NORMALLY, ALLOW PERSONS SUPPORTING THE APPEAL TO BE HEARD FIRST, FOLLOWED BY PERSONS OPPOSING THE APPEAL.

Is there anyone in the audience who wishes to speak in support of the appeal?

Would you please come forward and introduce yourself to the Board and outline how you are affected? You may now make your presentation.

Is there anyone in the audience who wishes to speak against the appeal?

Would you please come forward and introduce yourself to the Board and outline how you are affected? You may now make your presentation

READ INTO RECORD ADDITIONAL INFORMATION

(WHEN APPLICABLE)

The Board has received additional comments (or letters) not previously contained in the appeal package.

(WHEN APPLICABLE)

I will call on the secretary to read in for the record additional submissions in relation to the appeal. [The secretary may read this in word for word, or indicate that only a summary is being provided orally and that the parties may review the written submissions] *A letter (or phone call) from _____ in support / in opposition of the appeal.*

BRIEF RECESS

(WHEN APPLICABLE)

The hearing will recess for a few minutes.

[Direct the parties and the audience to the appropriate waiting area, or the Board can retire to another room.]

CALL THE HEARING BACK TO ORDER (WHEN APPLICABLE)

I call this meeting of the Subdivision and Development Appeal Board back to Order.

BOARD QUESTIONS

To Board:

Does the Board have any questions for clarification for Administration?

Does the Board have any questions for clarification for the Appellant?

Does the Board have Are there any questions for any other person?

OTHER QUESTIONS

To the audience:

Does any other person who has presented have any questions for clarification of any other presenter? If so, please direct the questions through the Chair.

SUMMARIES – following all submissions

DEVELOPMENT OFFICER OR PLANNER'S FINAL COMMENTS

Would the Development Officer (or Planner) please make any brief, final comments?

APPELLANT'S FINAL COMMENTS

Would the Appellant please make any brief, final comments?

POTENTIAL CONDITIONS OF APPROVAL

(WHEN APPLICABLE)

Ask the Appellant:

Have you reviewed the potential conditions of approval provided to you? Do you have any concerns or comments?

OTHER PERSON'S FINAL COMMENTS

Ask the other persons:

Would any other person who has made representations please make any brief, final comments.

FAIR HEARING?

Ask the persons who have made representations:

Do the persons who have made representations feel that you have had a fair hearing?

CONCLUDE AND GIVE CLOSING ADVICE TO APPELLANT AND OTHER PRESENTERS

This hearing is now concluded.

In accordance with Provincial legislation, the Board is required to hand down a decision within 15 days from the date of today's hearing. No decision is binding on the Board until it issues a written decision.

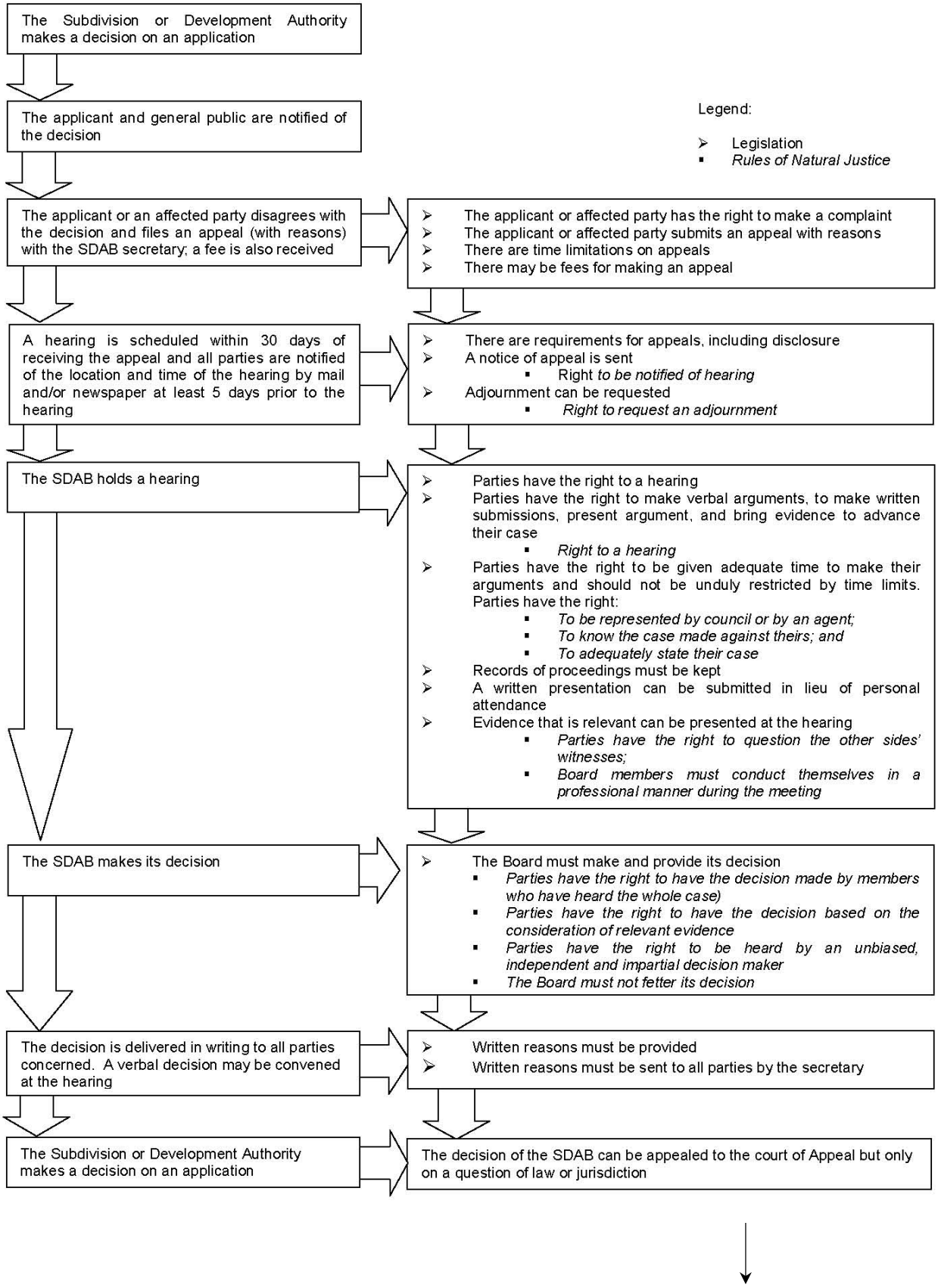
ASK THE SECRETARY TO READ NEXT APPEAL

Will the Secretary please read the next appeal?

GO BACK TO

(There is no need to repeat the hearing process if the parties for the second appeal were in attendance when the process was first announced.)

3. How Legislation and Natural Justice Guide the SDAB



4. Calculating Time by Alberta Municipal Affairs and Housing

There are frequent questions received by Municipal Affairs and Housing about how to calculate time for an application, length of an appeal period and for notice of a hearing. Time in the context of legislation is defined by two sections (s. 22 and s. 23) of the *Interpretation Act* as well as some specific sections of the *Municipal Government Act* as they pertain to subdivision and development. Please note: You are encouraged to verify time requirements with your legal counsel if you are not sure of your legal responsibilities are.

Municipal Affairs and Housing provide the advice on the basis of the amount of time that has lapsed since the party received notice of a development under section 23 of the *Interpretation Act*. Under Section 23, it is up to the addressee to prove when they received notice of the decision, or the date that a decision should have been made by. Important: if a date falls on a day the municipal office is closed or on a statutory holiday that the appeal can be filed (and accepted) the following day.

Time applied to development applications where the permit is issued, conditionally issued, refused or not issued and deemed refused.

Section 684 of the *Municipal Government Act* allows for a period of forty days for making a decision on a development permit. The time frame for 40 days starts the day after the application was received by the municipality. The *Municipal Government Act* does **not** refer to a complete development permit application so staff must begin calculating the time after they receive the application. Although not required in the legislation, it is reasonable for the municipality to advise applicants of the date that the municipality received the application and the deemed refused date. If not issued and the applicant does not agree to extend the time of the permit, then the development permit application is deemed refused after 40 days.

Appeal period is 14 calendar days from the date of receipt of the decision. This 14 day period does not start until the day **after** notice

was given. It's interesting to note that "when notice was given" is the wording in the legislation. Given the many ways that notice is given here are a few timelines:

- If you mail your decision to the applicant, the appeal period must also include 7 days for the deemed receipt of the notice under section 23 of the *Interpretation Act* and the 14 day appeal period. So, if your notice of decision is mailed, the appeal period is 21 days after the date on which you mail the notice.
- If you advertise your development permits in a local newspaper, be aware that you must consider the 14 day time limit as starting the day **after** the ad appeared in the local newspaper.
- If you post a notice on the property that the permit has been issued, you should ensure you record the date that the notice was displayed, and consider the 14 day time limit as starting the day after the notice was displayed.

  An Example (Using the 2008 calendar)

  If the date of mailing the decision and the date of advertising are different, then use the latest of the two dates. For example your notices were mailed on Friday January 4th, but your local weekly paper does not publish until Wednesday January 9th. The notice is deemed to have been received through the mail on the Saturday January 12th. Notice is deemed to have been received by way of the newspaper on the Thursday January 10th. The appeal period in this case would **begin** Sunday January 13th and continue until Sunday January 27th. Since the Municipal office is closed, then the appeal could also be filed on Monday January 28th.

Once an appeal is received, a hearing must be scheduled within 30 days. Again, under the *Interpretation Act*, this time period starts the day **after** the appeal is received. If you use an after hours drop box, the 30 day time period should start the day **after** the appeal notice is retrieved. Make sure that the person that empties the drop box records the date that the appeal was received on the appeal.

> **Example:** If the above appeal was filed on Monday January 28th, the earliest the appeal hearing could have to be held would be Monday February 4th and Wednesday February 27th.

When a date for the appeal hearing is chosen, "at least 5 days notice" must be given under section 606. Because the "at least five days" phrase is used, section 22(3) of the *Interpretation Act* comes into play. With this section both the day of the appeal hearing **and** the day that the notice was sent out or the advertising appeared are not included in the calculation of the five days. Again, if you notify by more than one method, the latest date is the one that you should use.

> **Example**: If the above appeal was scheduled for Tuesday February 26th, notice would need to be provided by Wednesday the 20th. If this notice was in the local weekly paper that also publishes on Wednesday, that would be at least 5 days notice.

If the board holds the hearing and recesses to another date, announce the new date and time to those attending the hearing and if not all parties to the appeal are present (or you had written submissions), provide 5 days notice (not including the day of the hearing and the day you sent out the material) of the date the hearing will continue.

> **Example**: if the Hearing was held on Tuesday February 26th and recessed to Thursday March 13th, you could announce the new date time and place at the hearing on February 26th, but you would also need to ensure that notice is provided in the newspaper on Wednesday March 5th and to each person that provide written comments) before Friday March 7th.

After the closure of the hearing, the Board must issue a written decision within 15 days. These 15 days are calculated to begin the day **after** the appeal hearing is closed. The legislation does not set out a time for the decision to be received, so Section 23 of the *Interpretation*

Act would indicate that if the decision is mailed, it is deemed received 7 days after the date it was mailed.

Subdivision Appeals

Subdivision applications follow a different schedule under the *Municipal Government Act* and the *Subdivision and Development Regulation*. Again, Section 22 and 23 of the *Interpretation Act* are used to define the timelines for application, decision and appeal.

A subdivision application must have a decision made upon it or an extension granted by the applicant within 60 days. This is the timeline followed in the majority of subdivision applications. There are subdivisions that are defined under section 652(4) and must have a decision made on it or an extension granted by the applicant within 21 days. Since section 652(4) subdivisions are rare, we'll use a regular subdivision as an example.

Again, since the time is expressed as "within 60 days", the date of the receipt of the application is **not** counted. Many subdivision authorities send out a notice to the applicant and owner of the actual date of the receipt of the application and the date when a decision must be made. Additionally some municipalities include a notice that the applicant should be aware that an extension of time may be required to refer, receive comments and make a decision on an application and provide instructions on how the applicant might apply to extend time.

> **Example:** The applicant submits an application on Friday February 1st. The municipality deems the application complete and circulates it on Tuesday, February 5th. The timeframe to make a decision lapses on Sunday April 6th. Since the municipal office would be closed on Sunday, the timeline would lapse on Monday the 7th.

Once a decision is made it must indicate the decision and the reasons for the decision, as well as indicate whether the appeal on the subdivision is with the local SDAB or it is with the Municipal Government Board. Regardless of which board will hear the appeal,

the appeal period for a subdivision is 19 days. The reason for the appeal period being different than that of a development application is that section 678(3) includes 5 days for the decision to be received if mailed. Since the period is expressed as 5 days, the date that the notice is mailed is not included in the calculation and the hearing date is included.

> **Example:** The subdivision is approved with conditions on Monday the 14th. The decision is mailed on Tuesday the 15th of April. The decision is deemed received on Monday the 21st. The appeal period lapses on Monday May 5th.

On receipt of the application for an appeal, the hearing must be scheduled within 30 days of the receipt of the application. The timeline for the 30 days does not include the day of the receipt of the appeal nor the date of the hearing.

The notice of the hearing is "at least 5 days". Because this phrase is used, you must consider that both the day that the notice is sent out and the date of the hearing are not included. In reality then, the notice must go out 6 days before the scheduled date of an appeal hearing.

> **Example**: If the appeal comes in by mail on Monday May 5th, the appeal hearing could be scheduled by the local SDAB between Sunday May 11th and Thursday June 5th. The date of Monday May 19th is chosen as the date of the appeal. Notice of the hearing must be then sent out before Tuesday May 13th.

There is no limitation in the Act for the length of an appeal hearing, or for the amount of time the hearing might be recessed.

If the appeal is filed with the Municipal Government Board and the appeal should be with the local subdivision and development appeal board, (or the reverse), the time for filing the appeal is deemed to be 14 days from the date that the notice of appeal is received from the other board. As this is expressed as clear days, the 14 days does not include the day the board determined it needed to be sent to another board nor does it include the date the appeal is filed.

A decision must be given by the subdivision and development appeal board in writing, 15 days from the date of the closure of the hearing. The time is calculated from the day after the hearing is closed, and must be given before the 15th day lapses. If it is mailed, the decision can be deemed to have been received 7 days after the date on which it was mailed.

The Municipal Government Board must hold an appeal hearing within 60 days after receiving the application. They must also give their written decision within 15 days after concluding the hearing. Again, the decision can be sent out the day after the hearing up to and including the 15th day.

Time Calculation Simplified

If the date is a clear date - do not include the date that the item was received.

If the date is "within" a number of days - do not include the day received.

If the date is "at least" – do not include the day the item was received, and do not include the date of the hearing.

5. Frequently Asked Questions by Brownlee LLP

- **What is the relationship between statutory plans and a land use bylaw? Which prevails in a conflict?**

Municipal Councils must be sure that their statutory plans are consistent with each other (MGA, s. 638). A statutory plan is, by nature, a broad planning instrument; some flexibility is generally built into a statutory plan. In the event of an inconsistency between a statutory plan and the Land Use Bylaw, Courts will "read down" the statutory plan to conform with the Bylaw. The Land Use Bylaw provisions will prevail over provisions to the contrary in a statutory plan.

- **What is the difference between a permitted and discretionary use?**

If the proposed development comes squarely within a permitted use provided under the Land Use Bylaw and complies with the Land Use Bylaw's standards, the Subdivision and Development Appeal Board must issue the permit. (Note - Decision in *274099 Alberta Ltd.* v. *Sturgeon Development Appeal Board* (1990 Alberta C.A.); *Burnco Rock Products Ltd.* v. *MD of Rocky View No. 44* (2000 Alta C.A.)

The development appeal jurisdiction of the Board has been limited in respect to development appeals involving "permitted uses". The MGA provides that the Board's appeal jurisdiction respecting "permitted uses" is limited to situations where:

(a) the land use bylaw standards have been relaxed or varied, or

(b) the land use bylaw has been misinterpreted.

If a proposed development comes squarely within a discretionary use provide under the Land Use Bylaw, the Subdivision and Development Appeal Board has the discretion whether or not to issue a development permit. Therefore, the Board will have far greater latitude in addressing a discretionary use and any conditions attached to the discretionary use.

- **What is the difference between a use and a standard (or regulation)?**

The MGA allows the Board to approve a development permit notwithstanding non-compliance with regulations in the Land Use Bylaw, where:

- the proposed development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring properties; and

- the proposed development conforms with the Land Use Bylaw's prescribed uses (Section 687(3)).

This variance power does not provide the Board with authority to approve development permits for uses not expressly listed under the land use bylaw as either discretionary or permitted. That is, the Board cannot vary land use requirements, only regulations or standards.

Accordingly, where a subdivision appeal is before the Subdivision and Development Appeal Board, the Subdivision and Development Appeal Board must consider whether or not the proposed subdivision or development conforms with the use provisions of the Municipality's Land Use Bylaw.

Whether a Land Use Bylaw provision is a development standard, or is concerned with use, is determined by having regard to its objective, the critical question being: "Is the provision in pith and substance directed at regulating the use of land?" If it is, the approving authority is bound. If not, the approving authority may waive the standard.

At times, uncertainty remains respecting how to properly distinguish between "uses" and "development standards". Some factors that the Court considers are as follows:

- Is the proposed use permitted or discretionary?

- Is there an express objective for the District which shows an intent to maintain land for a specific use other than the proposed use?

- Is the land use bylaw condition/requirement listed with the uses or under a different category, perhaps related to development?

- Is the condition/requirement arbitrary & technical or flexible and targeted at one use?

- **If the subdivision authority or the development authority has deemed the application complete, can the SDAB require the developer to supply additional information?**

An appeal hearing before the Subdivision and Development Appeal Board is a hearing *de novo*. In other words, the Board must hear all relevant issues and is not restricted to reviewing whether the development authority made a legally correct decision.

Generally speaking the Board has the same, and in some situations greater, jurisdiction over an application than did the original subdivision or development authority. Therefore, if the Board determines that it has insufficient factual information to determine the issues on appeal (e.g. site suitability), the Board may require the developer to supply additional information. Further, the Board's jurisdiction here may be limited by the nature of a development permit; if the application is for a permitted use that complies with the standards of the Land Use Bylaw, the Board cannot require information that goes outside the ambit of the Land Use Bylaw requirements and the specific conditions that could be attached.

- **If an issue arises respecting validity of the appeal, how should the Board and its staff address the issue?**

Determining the validity of an appeal is an issue for the Board, not its staff. While staff may caution an appellant on time frames, and requirements for the appeal, staff should not refuse to accept an appeal.

If an issue arises as to the validity of the appeal, the Board should convene. The Board then has two options as to the process for considering the issue of validity:

- hear submissions on validity of the appeal first and make a ruling on validity prior hearing the evidence of the merits of the appeal; or

- hear all submissions (including the validity of the appeal and the merits) then subsequently make a ruling on validity and if necessary merits.

Often, the first option will be the most appropriate; dealing with the validity of the appeal as a preliminary matter will often be the most expedient. If there is no valid appeal, there is no need to hear evidence and consider all of the merits.

However, sometimes, there is a large overlap between the validity of the appeal and the merits. For example, if there is an issue respecting whether the appellant is an "affected person" (in the event of a development permit appeal), this may have a large overlap in relation to the planning merits of whether the development permit ought to be issued.

The Board may with consider an adjournment to obtain the advice of legal counsel.

- **What are common examples of irrelevant considerations?**

An irrelevant consideration is an argument raised that does not go to the planning merits. Irrelevant considerations sometimes raised in the context of an SDAB hearing include the following:

1) the length to which the applicant has gone to seek approval;

2) the financial benefit that would accrue to the municipality through increased taxes;

3) whether the applicant is a long time member of the community, or alternately someone who does not reside in the community;

4) whether the development or subdivision is to assist the applicant's family member;

5) whether the applicant is of a poor moral character.

- **If an affected person before the SDAB objects to a member participating in the process, how does the SDAB address that objection?**

There are a number of steps that can be taken to address an objection. The impugned member, not the entire Board, decides whether the member continues with the proceedings; the member should be mindful, however, that if they stay involved in the proceedings and the Court of Appeal ultimately determines that there was a bias, the Board's decision will be deemed to be invalid. Therefore, it is sometimes best to "err on the side of caution" and excuse oneself, even if the allegation of bias is a weak allegation.

If the objection is raised, the Chair could ask for further information to clarify the nature of the concern. The Board member may wish to retire with the other Board members and seek their input *in camera*. The Board member may wish to respond and to clarify why the Board member feels that they could sit in the proceedings with an open mind. The Chair could ask whether, given the clarification provided by the Board member, the party raising the objection continues to have concerns respecting the Board member sitting.

- **Why is allowing questioning by one party of the other party important, and how can this be best achieved to ensure the hearing is efficient and orderly?**

Common law principles of natural justice and fairness require:

1. the SDAB to provide the affected parties' with a meaningful right to be heard and meaningful opportunity to know the case against them;

2. that the SDAB should only decide the case on the best evidence available to it.

Allowing submissions to the SDAB to be 'tested' by questioning and allowing the parties to ask questions of each other are effective means of meeting all of these requirements of the common law. Questioning is often most efficient if all parties are given an opportunity to present their case and then, towards the close of the hearing, questions of each other are allowed. If one party (the questioner) is required to ask questions of the other party prior to the questioner presenting their case, the questioner will often try to present their case rather than simply ask questions for clarification.

Further, questioning can be controlled and less argumentative if all questions are posed through the chair.

1. **What conditions should the SDAB impose in relation to municipal servicing issues?**

These types of conditions should be worded generally to allow municipal administration to resolve the detail of the servicing requirements in accordance with any unique site-specific engineering issues. While the SDAB may have the authority to address technical servicing issues (such as the width of a road or the nature of construction of a road), we recommend that these issues be left to be determined within the scope of a development

agreement. Municipalities will generally have standard servicing requirements; as the municipality will take over the servicing after construction by the developer, it should be for the municipality, and not the SDAB to determine these servicing standards. Further, specific servicing issues can be discussed and resolved "in the field"; difficulty can be created if the SDAB makes a decision on technical servicing issues and later, additional information becomes available that supports another alternative. We recommend the following conditions:

1) the Developer must construct or pay for improvements and services required to properly service the development (or subdivision) pursuant to a Development Agreement, on terms satisfactory to the Municipality, pursuant to the requirements of Section 650 (or s. 655) of the *Municipal Government Act;*

2) the Developer shall comply with the requirements of the Development Agreement.

2. What requirements should be met for the SDAB to approve a top of bank setback variance?

The Board should satisfy itself that the proposed development is suitable for the proposed site and that all of the preconditions in the Land Use Bylaw for approving a setback variance have been satisfied. Do not impose a condition that leaves suitability to be determined after the decision is made.

For example, if the Land Use Bylaw requires that the development authority shall not approve a variance of a top of bank setback without a geotechnical report evidencing that the proposed site is safe for the proposed development, then the Board must ensure that the required report has been submitted before approving the setback variance.

If the Board requires additional information that is central to its approval, the preferred approach is for the Board to adjourn the public hearing to allow the applicant an opportunity to obtain the information, and require that the information be presented when the public hearing is reconvened. The Board should not issue the approval subject to a condition that the applicant provides information satisfactory to another body/person.

3. **If the SDAB is considering varying a standard, what is the test for doing so and how should the decision be written?**

The test for varying a standard in relation to a development permit is set out in the MGA s. 687(3)(d). The Board should refer to the test, and indicate the rationale or justification for granting the variance. For example, if the Board is varying a front yard setback requirement, the Board could indicate that the variance is of a minor nature, and that there are other lots in the vicinity where the buildings within the front yard are constructed at or within the setback, thereby making the proposed development in keeping with the amenities of the surrounding area.

4. **What weight should an SDAB give to facts respecting the impact of a proposed development on economic impact respecting adjacent businesses?**

An SDAB must decide appeals on the basis of planning merit and planning issues. Generally, evidence relating to a concern of additional business competition is irrelevant to land use planning or planning merit and should not be given weight by the SDAB. The Board must consider impact on land use, and not simply financial impact.

However, the Board must consider issues relating to economical use of land (MGA s. 617). Therefore, there are Alberta cases where the courts have confirmed that Land Use Bylaws may properly impose spatial separation requirements for certain types of business, where the municipal Council is concerned that a particular area is saturated with a certain type of use (e.g. pawnshops).

5. **What should SDAB members do both inside the hearing and outside the hearing to ensure the appearance of impartiality?**

Board members should adhere to the following principles:

- **Prior determination** - No Board member should ever state, prior to rendering a written decision, that his or her mind is absolutely made up with respect to a particular application.

- **Disclosure of Evidence -** A Board member must rely on evidence presented at the Board hearing. If the Board member receives evidence prior to the Board hearing, those facts should be

disclosed at the Board hearing, and all parties should be given an opportunity to respond to those facts.

- **Municipal Land -** Generally municipal councillors may sit on hearings respecting land owned by the Municipality.
- **Pecuniary Interest -** A Board member should not have any involvement on a matter in which they have a pecuniary interest.
- **Municipal Position -** Under circumstances where the municipality is either supporting or opposing the development, the Board should distance itself from municipal employees or advisors who have had previous involvement with the development.
- **Board Practice -** The Board should, at the commencement of the hearing, ask whether the parties have an objection to any of the Board members sitting. If there is a potential issue that may not be known to all of the parties, it would be appropriate for the Board member to provide details.

6. Case Comments by Brownlee LLP

***Frank v. Valleyview (Town of)*(2006, Alberta Court of Appeal) - developer challenged SDAB decision denying a development permit application for a semi detached dwelling – breach of natural justice and bias - appeal denied.**

- **Breach of natural justice** - the developer alleged that the SDAB committed a breach of natural justice by allowing the Development Officer to remain in camera while it deliberated. This ground was rejected by the Court, given that the Development Officer had only provided background information at both the initial level before the Municipal Planning Commission and the SDAB.

- **Bias** - the developer also challenged the decision on grounds of reasonable apprehension of bias. The SDAB's Chair had made statements prior to the hearing that he was opposed to the development. Further the SDAB's Chair lived less than one block away from the development. The Court rejected this ground as well. At the opening of the proceedings the Chair had asked whether any party objected to members of the Board sitting. The developer had raised a concern respecting the Chair's dwelling being in close proximity to the subject lands, but had not raised any concern about the prior statements. Further, at the close of the public hearing, the Chair asked the parties whether they felt that they have received a fair hearing, and the parties indicated that they had. Based on the facts, the Court found that the developer had waived any right to challenge the decision for reasonable apprehension of bias. The Court also commented on the need to have local representatives on a SDAB, and stated that the proximity of the residence of the Chair to the proposed development was not surprising given the size of the municipality.

This case highlights the importance of procedural fairness, and the dramatic impact that procedures can have with respect to an SDAB's decision. In light of this case, SDABs should review their procedure:

7. The SDAB should ensure that at the close of the hearing, the parties are asked whether they feel they have received a fair hearing. If the parties indicate "yes" then they may have waived their right to raise procedural arguments in Court. Alternately, if they indicate concerns, then the SDAB may be in a position to address those concerns, before the decision is issued.

8. The SDAB should distance itself from Planning Staff. Ideally, all information conveyed by Planning Staff should be tabled at the public hearing. An SDAB member should not, either before or during a hearing, make statements that could leave the impression that they are predisposed one way or the other.

Other procedural pointers include the following:

- At the beginning of the hearing, the Chair should ask whether individuals have concerns about members sitting on the SDAB.
- If a Board member is challenged, the nature of the challenge should be disclosed.
- A Board member should not automatically step down if challenged, but should consider the nature of the challenge.
- The Board member may wish to receive input from fellow Board members, and if so, should retire in camera for there to be a discussion.
- If the Board member decides to participate in the process, the reasons for doing so should be outlined on the Record.

***Canada Lands Co. CLC v. Edmonton (City)*(2005, Alberta Court of Appeal) - subdivision approval conditional on provision of land for road widening greater than required for subdivision – condition upheld.**

Canada Lands Corporation was granted subdivision approval by the SDAB on the condition that the developer dedicate an amount of land for road widening that was greater than widening required for the specific subdivision. The Court of Appeal expressly rejected the developer's argument that the "user pay" principle should apply to require the land owner to dedicate only the amount of land that is reasonable necessary to serve the roadway and utility needs of the subdivision. The Court noted that the wording of s. 662 ("sufficient land") was more liberal than s. 655 ("roads required to give access to the subdivision") and determined that the Legislature intended to give the municipal authorities greater flexibility in determining the amount of land required under s. 662. The Court referred to the modern approach to the interpretation of municipal enabling legislation and stated:

Moreover, such an interpretation of s. 662 of the MGA accords with both the purpose of municipalities and with the purpose of Part 17 of

the Act. Both s. 666 and s. 662 indicate that the MGA includes a cost-spreading policy which must be balanced against the user pay principle. [emphasis added]

9. SDAB Writing Tips by Brownlee LLP

- **<u>Getting Started on a Well-Written Decision</u>**

Board decisions should be well-organized, concise and clear in thought and expression. Decisions are written to be read and understood. It is useful to:

- Stop and ask yourself, "Who is our audience?"
- Try to think the way the reader will think rather than to write as a writer.
- Keep in mind that a well-written board decision usually reduces the likelihood that firstly, a court challenge will commenced and secondly, if commenced, the challenge will be successful.

- **Outline sketch** – a good first step after the hearing is for the full board to sketch out the facts, issues, statutory considerations, relevant case law and policies and reports, the board's conclusions on each key issue, and the reasons for those conclusions.

- **First draft** – for complex decisions, it is usually best to focus on the process of getting all of the issues on paper and worry about finishing the product in the next draft. Often in the early stages of decision writing, it is best to work through the main issues first and sort out details later.

- **Review and set aside first draft** – have the full board review the first draft for the purpose of adding in anything that has been missed. Review should be made of notes, written exhibits, questions and motions for the purpose of ensuring nothing of significance has been missed. When all of the relevant material has been added, the process of organizing and rewriting begins. If time permits, we recommend setting the first draft aside and then reviewing it in a couple of days. This will allow for the process of reflection and second thought to weave its way into the decision.

- **Prepare revisions and final draft** – this is the time to focus on organization (see recommendations below) and fine tuning.

Elements of a Decision and Recommended Organization

A written decision must state more than the board's conclusion. Decisions are "what" the board has decided to do and reasons are "why" the board decided to do it. The "what" and "why" should be provided for each major issue raised before the board. The following discussion is a review of the key elements of a well-written decision. Each element below is discussed in the order that we recommend it be discussed within the written decision, in most cases.

- **Facts and assumptions** - a reader should know the context of the board's decision at the beginning and the assumptions upon which the board's decision rests. Accordingly, most decisions begin with a story, namely a series of factual statements which are meant to identify who the players are and what is being decided.

- **Organize facts** – to reduce the chances of missing key facts and to clearly identify relevant and preferred facts, it is useful to organize the hearing evidence by presenter or by issue. An example of organization by presenter is:

    - facts according to the appellant,

    - facts according to the respondent,

    - facts preferred by the board and why (where relevant facts conflict).

    - **Exclusion of facts** - a decision to exclude facts because of lack of relevancy is a decision that must be thoroughly considered by the board. Exclusion may leave a party feeling that his case has not been fully heard. However, listing or noting irrelevant facts (evidence) can be time-consuming and confusing and is generally not strictly necessary.

- **Issues -** an attempt should be made by the board to clearly define what it is that the board must decide. Issues are questions the board is trying to answer. It is not enough to state what the parties say the dispute is about, the board must make a determination as to what the issues are and state the issues.

Stating the issues of the appeal can be as simple as answering the question of, "What must the board decide in this appeal?" The issues should be a simple statement that focuses the writer's mind (in the decision making process) and the reader's mind (in the reading process).

- **Rules, Statutes, Cases, Policies, Reports** – a decision should include a statement of the rules, statutes, case law, council or board policies, and reports, relied upon by the board to address the issues of the appeal.

  In the context of an SDAB appeal, a written decision may include a statement of the specific portions of the following:

- the *MGA,* the *Subdivision and Development Regulations,* and the *Water Act*,
  - the Land Use Bylaw, the Municipal Development Plan, and relevant Area Structure Plan or concept plan;
- inter-municipal plans or agreements;
- Council or board policy documents;
- water, soils, or geotechnical reports.
- **Application, Analysis and Reasons** – a written decision and reasons should tell the reader how the facts, issues, and rules stated fit together, and, why the Board reached its conclusion instead of another.

  The application, analysis and reasons portion of a written decision should include:

  - discussion of which rules and principles:
    - were relied upon by the board,
- were most significant or persuasive to the board,
  - are the basis for the board's decision;
- examination of the relevant evidence in the light of the applied rules and principles;

- some comparison and weighing of alternative arguments or approaches and why these alternatives were rejected by the board; and

- (if the board is recommending changes to the appellant's proposal) discussion of the basis for the board recommendations, and, explanation of the improved results or reduced problems expected due to the board's recommendations.

Application, analysis and reasons should be as candid as possible. This section of the decision should clearly explain how the key elements of the hearing (the facts, issues, rules, principles, reports et al.) were combined and analyzed to lead to the board's conclusion. The reader should be able to identify what persuaded the board to come to its conclusion: e.g. acceptance or rejection of particular evidence, a previous line of case law, consideration of council or board policy. This is the core of the decision.

The key to this part of the written decision is to always keep in mind: "why?" Why was the appellant's evidence more relevant than the respondent's evidence? There must be a reason and if so what is it?

- **Conclusion(s) -** this is where the board states exactly what the consequences of its conclusions are: who gets what. The conclusion should provide an answer for each issue in the appeal.

- conditional approval – where the board's conclusions impose conditions intended to improve the appellant's proposal as presented, the following should clearly be identified by the board within its conditional conclusions:

- the steps the appellant must take to satisfy the condition(s);

- who can determine whether the condition(s) has been satisfied (e.g. a planner, a hydrologist, the board);

- what problem or issue is meant to be addressed by satisfaction of the condition(s); and

- time for compliance with the condition;

- **Right of Appeal -** the board may include a statement informing the appellant of his/her rights of appeal, but this is not a legal requirement.

- **Board Signature –** the final decision should be signed, and the SDAB Bylaw may indicate who has signing authority.

- **Role of Board Secretary**

The board has no authority to delegate the formation of its decision or reasons to a person who has not been appointed as a board member. However, board members may be assisted by the board secretary in styling and structuring the expression of the board's decision and reasons. Accordingly, the secretary may assist the SDAB in decision writing through the following:

- **Note Taking (and perhaps tape recording) During Hearing** – detailed hearing notes greatly assist in later discussion and writing of the decision;

- **List of major issues** – it is very useful for the secretary to compile a list of the major issues raised during the appeal. The list can be drafted initially by reviewing the appeal notice and written submissions; additional issues may be added to the list during the appeal hearing. This list will serve as a handy reference for both the board's deliberations and the drafting of the decision.

- **Grammatical Review of Decision** – the secretary should review the decision for clerical, spelling or grammatical errors or accidental omissions:

- slang, colloquialisms, and trendy jargon should be avoided (if used, they should appear in quotations);

- writing should be simple and clear, avoiding complex or unfamiliar words;

- **Substantive Review of Decision** – the secretary should review and comment on the framing of the decision and reasons. The detailed hearing notes will serve as a useful reference. Relevant input here includes:

- noting internal contradictions (in language and principles cited) within the decision and reasons;

- deleting erroneous references to the evidence;
- adding relevant references to the evidence; and
- editing out unnecessary paragraphs, sentences, words and thoughts;
- **Jurisdictional, Legal and Procedural Research** – the secretary should ensure the decision correctly references relevant provisions from legislation, statutory plans, the land use bylaw and any other planning documents, and sets out key principles;
- **Citations** – the secretary should confirm the correctness of any board references to statutory provisions, bylaws, policies, rules, or case law;
- **Organization** – the secretary should assist the Board in organizing the written decision and in checking for internal logic; and
- **Summary of Evidence and Presenters** – the secretary should ensure accurate record of evidence submitted to the Board and of presenters, and, should provide a summary of the evidence for inclusion in the written decision.

When the secretary has completed a draft decision, the draft decision should be reviewed by the board to consider and approve each change or suggestion made.

10. Useful Contacts

ALBERTA MUNICIPAL AFFAIRS AND HOUSING
17th fl Commerce Place
10155 - 102 Street
Edmonton, AB T5J 4L4
Phone: (780) 427-2225
Fax: (780) 420-1016

Cindy Miller Reade, Planning Advisor
Direct Line: (780) 422-8308
Email: cindy.millerreade@gov.ab.ca

Sandra Dohei, Municipal Advisor
Direct Line: (780) 422-8104
Email: sandra.dohei@gov.ab.ca

Niven Parliament, Municipal Advisors.
Direct Line: (780) 422-8111
Email: niven.parliament@gov.ab.ca

ALBERTA FOUNDATION OF ADMINISTRATIVE JUSTICE
3438-78 Avenue
Edmonton, AB T6B 2X9
Phone: (780) 466-0501
Fax: (780) 466-8015

George Pheasey
President, Foundation of Administrative Justice
Chief Appeals Commissioner, Appeals Commission for Alberta Workers' Compensation
info@foundationofadminjustice.ca

FACULTY OF EXTENSION APPLIED LAND USE PLANNING
Government Studies
Faculty of Extension
University Extension Centre NW
Edmonton, AB T6G 2T4

BROWNLEE LLP
Barristers & Solicitors

Edmonton Office
2200 Commerce Place
10155 – 102 Street
Edmonton, AB T5J 4G8
Phone: (780) 497-4800
Fax: (780) 424-3254
Website: www.brownleelaw.com

Calgary Office
2000 Watermark Tower
530 – 8th Avenue S.W.
Calgary, AB T2P 3S8
Phone: (403) 232-8300
Fax: (403) 232-8408

Municipal Helpline
Phone: 1-800-661-9069 (Edmonton)
Phone: 1-877-232-8303 (Calgary)

SCHEFFER ANDREW LTD.
Planners and Engineers
12204-145 Street NW
Edmonton, AB T5L 4V7
Phone: (780) 732-7800
Fax: (780) 732-7878

Olea Anderson, Operations Assistant
Phone: (780) 492-5048
Email: olea.anderson@ualberta.ca