SUBDIVISION AND DEVELOPMENT APPEAL BOARD

TRAINING MANUAL

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Municipal Affairs

Acknowledgements

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- ***Planning Law and Practice in Alberta*** (third edition), Dr. Frederick Laux, LLD Jurilibre, 2002
- ***Subdivision and Development Appeal Board Issues***, Brownlee 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
- ***Lethbridge County Subdivision and Development Appeal Board Manual***, 2001.

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1. INTRODUCTION

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.

A need for SDAB training throughout the province has been identified. In an effort to meet this need, Municipal Affairs has developed this manual which is meant to be a guide to assist SDAB members. The manual provides general information in relation to the conduct of SDAB hearing but is not intended to be exhaustive or to provide any legal advice to the SDAB as a whole, its members or staff. Where appropriate, an SDAB should obtain independent legal advice.

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 is intended to provide a general understanding of the appeal process and responsibilities that should assist councillors, appellants, and applicants to better appreciate the SDAB 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.

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.

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. SDABs 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*), 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 located within the prescribed distance of a primary highway, a water or wastewater management facility; not located within the Green Area; or is not located adjacent to nor contain a water body; *MGA s. 678(2)*
- challenge the issuance of a stop order.

SDAB Bylaw

MGA s. 627

Section 627 of the *MGA* 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 council appoints members (i.e. how many members are appointed, how many councillors may be appointed, how many lay people are appointed,) set the members' 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 legal counsel and experts, and other matters at the discretion of council.

Membership

Council determines who is appointed to an SDAB subject to the limitations outlined in the *MGA*. Councillors may not form the majority of the SDAB, or of the panel hearing the appeal. An SDAB member cannot be an employee of the municipality, a person who carries out subdivision and development

functions on behalf of the municipality or a member of the municipal planning commission, or a person who carries out subdivision and development functions on behalf of the municipality.

MGA s. 627(3)(4)

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(3)(b)

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
- a willingness to devote the necessary time to prepare for, attend and participate in the hearings together with the additional time required to draft and review the decision.

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 is 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 *MGA* 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 *MGA* and its regulations;
- act fairly and reasonably within the limits imposed by administrative law and the principles of natural justice; and
- 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 *MGA*, the resulting case law also gives guidance to the SDAB.

Precedent

Precedent is a doctrine whereby a previously decided case (issued by a supervising court) is recognized as authority for the disposition of future cases.

The SDAB is not bound to follow its previous decisions, i.e. an SDAB decision in one hearing does not form a precedent which binds the SDAB in future hearings. However, fairness dictates that parties in similar situations should be treated similarly. The SDAB may want to consider, as part of its reasons for decision, outlining the facts in the particular situation which are unique or different from any previous decisions that are raised as part of the hearing so as to clearly establish why a different decision may result.

Subdivision Appeals

MGA s. 680

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

- must act in accordance with any applicable *ALSA* regional plan;
- 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

MGA s. 687

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

- must act in accordance with any applicable *ALSA* regional plan;
- 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 appeals from stop orders issued under section 645, the SDAB's powers are the same as for development permit appeals described in the previous sections.

MGA s. 645

What is Jurisdiction?

An SDAB must act within its "jurisdiction" when it makes a decision. This means the SDAB must:

a) adhere to the statutory requirements prescribed for SDABs in the *MGA*;
b) comply with the principles of natural justice; and
c) must only make decisions on matters which are properly before the Board.

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 from decisions on development and subdivision applications and stop orders. However, where Provincial interests may be affected, the Municipal Government Board ("MGB") hears certain subdivision appeals. The MGB hears subdivision appeals where the subject land is located in the Green Area, as classified under the *Public Lands Act* or if the subject land:

- is located within 0.8 Kilometres of the centre line a provincial highway where the speed limit is 80 km/hour or more;
- is located adjacent to or contains a water body;
- is located within 300 metres from the working area of a wastewater treatment facility;
- is located within 300 metres from a disposal area or 450 metres from the working area of a waste management facility

MGA s. 678(2) and Subdivision and Development Regulation AR 43/2002, as amended .

An SDAB has no involvement in amending land use bylaws or statutory plans. Amendments to statutory plans and bylaws follow a different process that incorporates principles of administrative law and the rules of natural justice, including the requirement for a public hearing for each amendment proposed. Only municipal councils have the ability to amend land use bylaws and statutory plans.

There are other pieces of legislation that take priority over the authority given municipalities under Part 17 of the *MGA*. Sections 618 and 618.1 exempt highways, roads, wells or batteries, pipelines, and confined feeding operations from the Part 17 provisions. Section 619(1) provides that

MGA s. 618 and 618.1

MGA s. 619

MGA s. 620

authorizations granted by the Natural Resources Conservation Board (NRCB), Energy Resources Conservation Board (ERCB), or Alberta Energy and Utilities Board (AEUB) or Alberta Utilities Commission (AUC) prevail over any statutory plan, land use bylaw, or municipal subdivision or planning decisions that conflict with it. In addition, section 619(2) provides that the municipality must approve any statutory plan amendment, land use bylaw amendment, subdivision approval, development permit or other authorization if such application is consistent with the NRCB, ERCB, AEUB or AUC issued license, permit, approval or other authorization. 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.

There is a major distinction between sections 618, 618.1 and 619, 620. Section 618 and 618.1 provides that Part 17 of the *MGA* does not apply to developments and subdivisions (in the case of 618) and developments (in the case of 618.1) if the development is listed in those sections. This means that no municipal planning or subdivision application or approval is required. Section 619 on the other hand recognizes that municipal approval may be required; however, the municipality does not have the authority to refuse the application if it is consistent with the NRCB, ERCB, AEUB or AUC approval. Section 620 also recognizes that municipal approval is required but limits the operation of any development permit conditions if the development permit conditions conflicts with the condition of any Provincial license, permit, approval or other authorization.

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

Establishing Jurisdiction (Hearing within a Hearing)

There are several situations where the SDAB needs to determine if it has 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 or the appeal fee was not paid;

- The development or subdivision is for an intensive livestock operation or other "exempted" use under Section 618 of the *MGA*;
- There is a question whether it is a matter that the Municipal Government Board should hear;
- There is a question if the appellant has standing before the SDAB;
- The appeal is for a development permit issued for a permitted use;
- A party is requesting an adjournment of the hearing.

This is not an exhaustive list. The SDAB should hear evidence on questions of jurisdiction at the beginning of a hearing on a preliminary basis and make a decision on jurisdiction before any other evidence is heard on the merits of the appeal. Likewise, the Board may wish to alert the parties to a potential jurisdictional issue before the public hearing so that the parties are prepared to make submissions on jurisdiction.

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.

MGA s. 688

Conclusion

As acting *ultra vires* or outside of its jurisdiction is a basis for an appeal to the Court of Appeal, Subdivision and Development Appeal Boards must be mindful of the requirements of the statutory law that governs them, as set out in the *Municipal Government Act*, *Alberta Land Stewardship Act*, regional plans 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. LEGISLATIVE AND PLANNING CONSIDERATIONS

In making the decision on an appeal case, the SDAB must consider the legislative framework 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 and in the context of an appeal.

SDAB members have to answer the question **"Can you?"** to fulfill the legislative requirements and **"Should you?"** to answer the planning considerations of a proposal. To assist the SDAB in setting out their reasons, **"Why"** should be the question that the board asks and answers for each of the main issues raised in the appeal. This will ensure that the board members consider and discuss the main issues before them and assist interested parties in understanding what the SDAB considered in reaching its decision. In other words, first the SDAB must determine its jurisdiction. Second, within that jurisdiction the SDAB may weigh the planning merits of the matter under appeal. Third, they must elaborate on the reasons for the decision made.

Legislative Authority for Planning

All levels of government in Canada are assigned their respective powers by statute. The Constitution Act outlines federal and provincial powers. Part 17 of the *MGA* (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:

MGA s. 616 -697

MGA s. 617

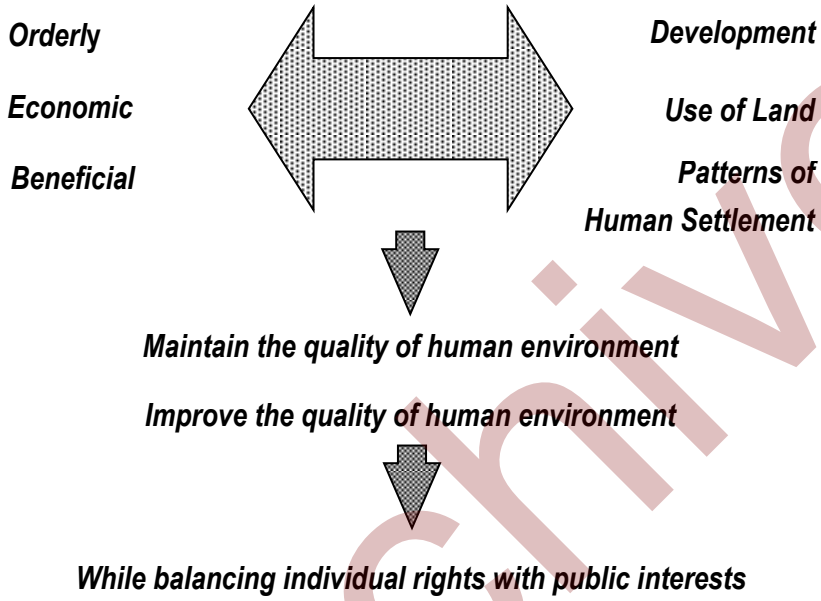
(a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and

(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.

MGA s. 617



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 the individual rights and the public interest? 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 *MGA* 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 whole 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.

Under the *Alberta Land Stewardship Act*, when a regional plan is adopted for each of the 7 watershed basins, the Land Use Policies will cease to apply to that basin (see *MGA* s. 622(4)).

The Alberta Land Stewardship Act

In 2009, the Provincial Government introduced Bill 36, which is now known as the *Alberta Land Stewardship Act* ("*ALSA*"). *ALSA* implements a Provincial policy document known as the "Alberta Land Use Framework". The Land Use Framework was released in December 2008 and set out seven "land – use regions" for the province as well as established key Provincial land use policies. In each land use region, an appointed board (a regional advisory council) will provide recommendations to Cabinet respecting a regional plan that will govern land use in that individual region.

ALSA requires that all regional plans correspond with the provincial plan and stipulates what must be included in each plan. Existing plans, and those in development, will likely be incorporated into the regional plans. Ultimately, *ALSA* provides the provincial government greater oversight into community planning. Whereas municipalities formally had autonomy in making planning decisions, all decisions will now need to correspond to both the regional plan and any additional plans that may be in effect.

The benefit to such plans is that regions will be able to grow more harmoniously, and intermunicipal conflict will ideally be minimized. Rather than unchecked development taking place throughout an area, development can focus on various growth nodes, where infrastructure and resources can be directed. Such plans will ideally help ensure that environmentally-sensitive areas are protected, and that municipalities can work together to plan their growth without negatively impacting their neighbours.

MGA s. 622

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

A recent example of an appeal where the Provincial Land Use Policies were examined was MGB 101/10 Davey Lake Development vs. County of Red Deer

In this appeal, the MGB had to determine if it had jurisdiction to hear the appeal as the subdivision authority's position was that the subdivision application was not complete

As *ALSA* is drafted, where a decision is inconsistent with an adopted regional plan under *ALSA*, the regional plan prevails. Currently there are no adopted regional plans. Plans developed by the Capital Regional Board were adopted based on protocols under the *MGA* and its regulations.

The timeline for adoption of the various regional plans as well as supporting documentation is available on the Land-use Framework website which is http://landuse.alberta.ca/AboutLanduseFramework/

ALSA imposes additional considerations and obligations on an SDAB when rendering a decision. The *MGA* has been amended to now require an SDAB to act in accordance with "any applicable *ALSA* Regional Plan" when rendering its decision on subdivision or development appeals. Where an SDAB fails to "act in accordance" with a Regional Plan, the SDAB has made an error of law or jurisdiction, and the decision could be appealed.

Municipal Responsibility

The *MGA* assigns responsibility for planning to municipalities in Part 17. The *MGA* 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 *MGA* is not prescriptive but is written in permissive language to allow municipalities to make community-specific decisions. Only municipal councils have the authority to pass or amend land use bylaws or statutory plans.

Subdivision and Development Regulation (Alta Reg. 43/2002, as amended)

In addition to the requirements of the *MGA*, the Subdivision and Development Regulation outlines information required for subdivision applications, the agencies that subdivision applications must be referred to, relevant considerations for approvals of subdivision applications, time limits for issuing a decision on a subdivision application as well as addresses matters such as additional reserves for subdivisions and security provisions for development permits.

The Regulation also prescribes setback distances to certain uses:

- Within 100 metres of gas and oil wells;

- Within 1.5 kilometres of sour gas wells and facilities. (this setback depends on the level of the sour gas facility and the intensity of the proposed use.);
- Within 300 metres of wastewater treatment plants; and
- Within 450 metres from the working area or 300 metres from the disposal area of a landfill.

Statutory Plans

Municipal Development Plans

A Municipal Development Plan (MDP) is a planning document, adopted by a bylaw passed by a municipal council which establishes a long term planning vision for the municipality as whole. 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 *MGA* from a local perspective.

The *MGA* outlines the areas that must be included in a municipal development plan:

MGA s.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 to 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 an intermunicipal development plan (IDP) to address the future development of a shared sub-region. "May" means that an IDP is optional (municipalities are not required to have IDP's). 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.

Area Structure Plans and Area Redevelopment Plans

MGA s. 633 & 634

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). These plans are used to address

detailed development issues including infrastructure needs, types of development, development sequence, and density.

The *MGA* requires that all statutory plans be consistent with each other. *MGA s. 638*

The *MGA* does not assign a hierarchy of statutory plans. Generally speaking, MDPs and IDPs will contain broad policies that will be further described in more elaborate detail in an Area Structure Plan or Area Redevelopment Plan which focuses on a smaller area.

Although not addressed in the *MGA*, case law has indicated that in the event of a conflict between a statutory plan and the land use bylaw, the land use bylaw will prevail.

Land Use Bylaw

All municipalities are required to adopt a land use bylaw. While a 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. *MGA s. 640*

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 to the standards in the LUB, the development authority **must** issue the permit. The ability to appeal a permitted use permit is limited to situations where the LUB is relaxed, varied or misinterpreted. The development authority may only impose those conditions expressly referred to in the LUB on a development permit. *MGA s. 642(1)* *MGA s. 685(3)*

Discretionary Uses

With discretionary use permits, the development authority must examine the site, the adjacent uses, any additional requirements, and the planning merits of the proposal. The development authority may refuse the application, approve the application or approve the application with

conditions. The development authority has far more flexibility to impose conditions over and above those expressly referred to in the LUB on application for a discretionary use, provided that the conditions achieve a legitimate planning and development objective. Approval of a discretionary use development permit may involve exercising discretion to vary the general or district specific development standards.

Special Cases

Direct Control Districts

Appeals within a direct control district are a special case for an SDAB. The SDAB cannot hear a development permit appeal for Direct Control District lands where Council is the decision making authority. However, where Council has delegated the decision making authority to a development authority, then there is a limited right of appeal to the SDAB on the question of whether the development authority followed the directions of council.

MGA s. 641

Non-Conforming Uses and Buildings

MGA s. 643

The issue of non-conforming uses and buildings most often arises in the context of a Section 645 stop order appeal.

A use is considered non-conforming where following issuance of a development permit, the land use bylaw changes to effectively prohibit that use in the district. A non-conforming use can be continued, but it generally speaking cannot be expanded.

In *Brooks (Town) v. Martin et al*, the developer carried on an intensive livestock operation in an urban fringe district within the County of Newell. The developer applied to the County for an expansion of the operation, to add six new cattle pens to the existing 12 pens. The subdivision and development appeal board ("SDAB") approved the development permit on grounds that the expansion is of a similar agricultural nature and will not significantly change the impact of the surrounding neighbourhood. The Court found that the SDAB had erred. The development was a nonconforming use; the intensive livestock operation was neither permitted nor discretionary, and an expansion was not authorized. A "similar use" provision cannot be used to allow an extension of a non-conforming use. The power of variance conferred by section 687(3)(d) does not entitle the Board to amend the land use bylaw by approving a development for a use that clearly is not a permitted or discretionary use.

As discussed earlier, when considering either a development appeal or a subdivision appeal, the SDAB only has jurisdiction to vary development standards under the municipality's land use bylaw and cannot vary the use provisions of the land use bylaw.

Policies, Procedures, and Standards

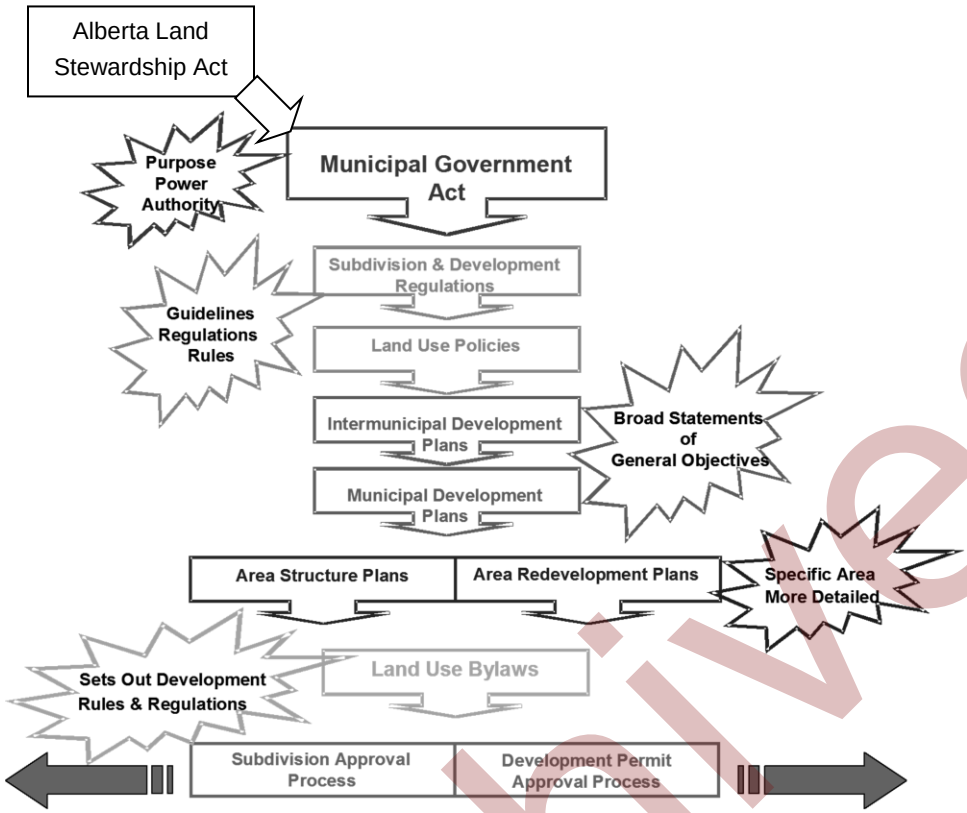
Periodically, municipalities will develop additional policies and procedures to provide more detail to policies of the municipality. Where these exist, the planning staff who is making a presentation to the SDAB should make the SDAB aware of these documents and their contents to assist in the decision-making. However, the SDAB must be mindful that it is not statutorily obligated to adhere to any such policies, procedures and standards if these provisions are not contained in a statutory plan or land use bylaw.

Beyond the Legislation: Other Planning Considerations

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

- the proposal's compatibility 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, servicing ramifications (appropriate types, appropriate levels, sufficiency of servicing analysis, impacts on local and off-site infrastructure, adequacy of cost recovery);
- 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 bodies that form 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.

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.

There are 3 types of appeals that an SDAB may consider: subdivision, development and stop order.

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.

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

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

MGA s.616 and s. 683

Development

Generally, all development requires the issuance of a development permit by the municipality's development authority. However, the definition of development in the *MGA* 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).

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 by 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. Stop orders issued under sections 545 and 546 can be appealed to Council, not to the SDAB.

MGA s. 645, 545 and 546

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 *MGA*, 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 analyze 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.

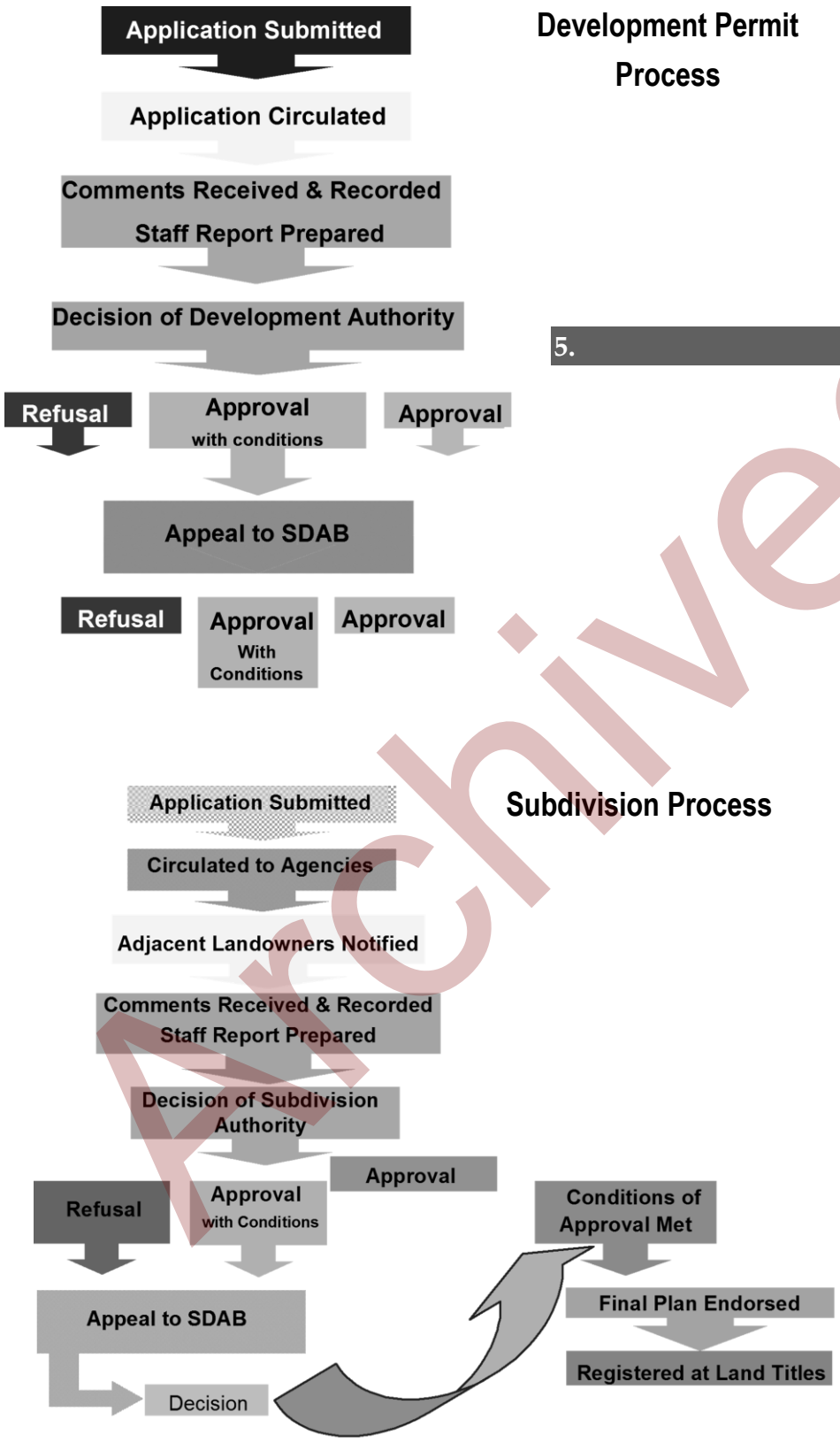
Decision

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

- The *MGA*, 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)* *MGA s. 678(2)*

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. 642*



Subdivision appeals are heard by the Municipal Government Board as set out in 678(2) and the Subdivision and Development Regulation

5. APPEALS TO THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

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

Quasi-Judicial Tribunal

Tribunals such as SDABs exercise what are called quasi-judicial functions. This means that they make finding 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 legality of the subdivision or development authorities' decision. In that sense the SDAB is "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.

MGA s. 687

What Can Be Appealed?

Subdivision Decisions

Deemed Refusal

Conditions of Approval

Application Refused

MGA s. 681(1)(b), s. 652 (4)

Subdivision Applications

The *MGA* 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 *MGA* 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.

Development permits for a permitted use can only be appealed if the land use 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 evidence and submissions on the question of whether or not the appeal is properly before the SDAB and then make a preliminary decision with respect to whether or not it has jurisdiction to hear the matter.

Stop Orders

MGA s 645, 685

The SDAB has authority to hear appeals from stop orders issued pursuant to Section 645 of the *MGA*. Section 645 stop orders are issued by the development authority where there is a breach of the municipality's land use bylaw, a development permit or subdivision approval.

Stop Order Decisions

Land Use Bylaw Misinterpreted

Land Use Bylaw Infraction not Established

Although the *MGA* states that the SDAB has the authority to vary or set aside the stop order, the SDAB's authority has been defined by case law. The Board should focus on the issue of whether or not the stop order was properly issued by the Development Authority in the first instance.

A decision cannot be retroactive. This legal principle limits the SDAB's jurisdiction in dealing with section 645 stop orders. As a result the SDAB cannot vary or waive the conditions of either the original development permit or subdivision approval on a stop order appeal.

Often, a stop order is issued where the landowner does not have a development permit for the use being made of the lands. Because the landowner does not have a development permit, the SDAB should not delve into whether or not the use is appropriate; the landowner should be required to obtain a development permit. Where a land use bylaw amendment would be required to change the land use designation or to add the use to the district, the landowner should be directed to go through the regular planning application process for the necessary LUB amendment to allow the use of the lands.

A stop order may also be issued where a landowner has not complied with the conditions of a development permit. The SDAB should not delve into whether the development permit condition should be modified. Instead the landowner should be instructed to go through the development permit process to vary the conditions of the original development permit or obtain a new development permit.

To determine whether or not the stop order has been properly issued, the SDAB must closely examine the relevant provisions of the development permit (if one has been issued) or subdivision approval, and its conditions together with the requirements of the land use bylaw and determine whether or not there has been a breach of the conditions. If no development permit was issued, the SDAB must consider if a development permit was required under the land use bylaw or if the Section 643 non-conforming use provisions of the *MGA* are relevant. Where the SDAB is satisfied that the

stop order was properly issued, the SDAB's jurisdiction is generally limited to upholding the stop order, but in some circumstances can vary the time for compliance.

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:

- 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.

MGA s. 678(4)

Development Appeals

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

MGA s. 686(1)

6. COMMON LAW SUBSTANTIVE LIMITATIONS (ADMINISTRATIVE LAW)

Substantive Limitations

An SDAB makes an error in jurisdiction when it acts outside its authority. Examples include the following:

Irrelevant Considerations

The Board must not take irrelevant considerations into account, but must take relevant considerations into account. Certain features, such as the impact of the development on adjacent lands and the surrounding area (traffic, noise, visual impact) are relevant considerations. Board decisions have been struck down for taking irrelevant considerations into account in the following situations:

1. Business Competition

   Ordinarily, business competition will not be a relevant planning consideration. There are some recent decisions where the Courts have accepted arguments that SDAB's may consider the proliferation of uses as a reason for their decision. In these SDAB decisions, if the land use bylaw indicates that there should be a spatial separation between certain types of uses to ensure that they do not cause a sterilizing or blighting effect in a certain area, the Courts seem more amenable to an SDAB considering the issue.

2. User vs. Use

   The character of the user is generally not a valid planning consideration. The landowner can sell the land the day after obtaining subdivision or development approval. Therefore, the SDAB should remember that a subdivision or a development permit is tied to the land and that the SDAB's decision should be based only on the planning merits of a proposal. Accordingly, the following considerations are irrelevant:

   i. whether the individual is a long standing member of the community;

ii. whether the applicant is applying to subdivide land to allow a family member to build on the newly created parcel; and
iii. whether the applicant is of poor moral character.

3. Applicant's Efforts

   It is also irrelevant that the applicant has gone to great lengths to obtain the approval being requested.

4. Public Benefit

   Development approval cannot be withheld because the approving authority considers that the land would best be used as parkland, where the municipality has not taken any steps to appropriate the land as such. Also, a planning authority cannot impose a condition that the applicant confer a public benefit, except where authorized by statute.

Fettering Discretion

An SDAB cannot fetter its discretion. Fettering discretion is constraining or influencing the freedom to make a decision. When a quasi-judicial board like the SDAB convenes, it has the same powers as a development or subdivision authority. The SDAB should make a decision that reflects their judgment 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.

Unauthorized Subdelegation

The SDAB must make a decision on the appeal before it and cannot delegate the decision to another party. For example, on an appeal relating to appropriate setbacks for a development, it would not be appropriate for the SDAB to state that the setback is to be to the "satisfaction of the development officer."

The leading case in this area relates to a subdivision appeal, where the appeal board purported to approve a subdivision. Water sufficiency was an issue raised by the neighbours, who were concerned that the proposed

subdivision would impact their underground water supply. The appeal board granted a subdivision approval, subject to the applicant providing information to the development authority that there was sufficient water; the appeal board also stated that the development authority could reduce the number of proposed lots to address any water sufficiency concerns. The Albert Court of Appeal held that the decision was an improper subdelegation of authority; the appeal board should have required additional information on sufficiency before it made its decision. ***(Rocky View (Municipal District No. 44) v. Herron (Estate), 2001 ABCA 63)***

Where additional information is required, and this information is central to the approval, the preferred approach is for the SDAB to adjourn the public hearing. The Board should allow the applicant an opportunity to obtain the information and require that the information be presented when the public hearing is reconvened. The SDAB should not issue an approval subject to the applicant providing information satisfactory to another body/person.

Jurisdictional Constraints

Jurisdictional questions relate to actions that may be *ultra vires* or outside the SDAB's authority. Jurisdiction is the authority granted to a tribunal to make certain legal decisions. An SDAB must retain its jurisdiction within the context of the *MGA*, 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:

- hearing 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 the LUB was relaxed, varied or misinterpreted; or
- dealing with a matter within a provincial agency or department's exclusive 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.

Who can Appeal

It is important for an SDAB to know who can appeal matters to the SDAB.

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."

Subdivision Applications

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

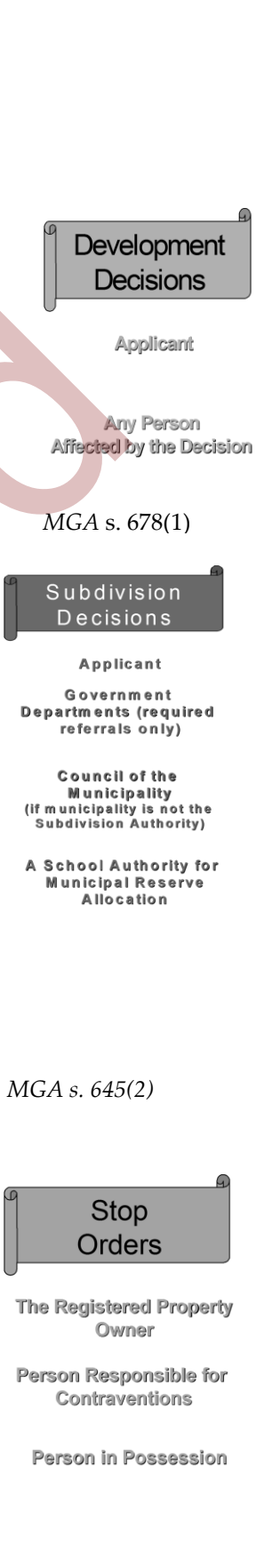
- The applicant;
- Any government department to which the application was required to be referred under the Subdivision and Development Regulation, this does not include agencies that a municipality chooses to refer applications under Section 5(5)(n) of the Subdivision and Development Regulation;
- Council of the municipality if 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.

Note that adjacent landowners do not have standing to appeal.

Stop Orders

Any person affected by the Section 645 stop order has standing to file an appeal. Typically, there are three categories of people who can file an appeal from a Section 645 stop order:

- The registered owner of the property;
- The person responsible for the contraventions; and
- The person in possession of the land or building.



Note that that the Court of Appeal has held that neighbours cannot lodge a stop order appeal. *Cross Country Homes Marketing (1993) Ltd. v. Grande Cache (Town of), 2000 ABCA 27*

Appeal Filing Times

Filing Times – Development Permits

Section 686 of the *MGA* provides that a notice of appeal, containing reasons, must be filed within 14 days after the date on which the applicant received notice of the decision or after the date of a deemed refusal or within 14 days of an affected person receiving notice of the decision in accordance with the land use bylaw.

MGA s. 686

The land use bylaw sets out how notice of development permits can be issued; often references are made to notification in writing, by posting at 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. A municipality may wish to provide notice where a development permit is issued for a permitted use to provide certainty for appeal timeframes.

Filing Times – Subdivision Applications

With a subdivision application, an appeal must be lodged within 14 days after receipt of the written decision of the subdivision authority or deemed refusal by the subdivision authority in accordance with section 681. If the decision is sent by regular mail, section 678(3) provides the date of receipt of the decision is deemed to be 5 days from the date the decision is mailed.

MGA s. 681

MGA s. 678(3)

Filing Times – Stop Orders

Section 685(1) of the *MGA* provides that a person affected by an order under section 645 may appeal to the SDAB. Section 686(1) goes on to provide that a

MGA s. 686

MGA s. 685

person making an appeal under section 685(1) must commence the appeal within 14 days of the date the person was notified of the order.

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 needs to be reasonable having regard to the circumstances. Given the right of appeal, the time given for compliance may need to be long enough to enable the filing of an appeal and its disposition by the SDAB, unless the contravention has created a dangerous situation. Alternatively, the SDAB may need to extend the time for compliance if it confirms issuance of the stop order.

Adequate Notice

Advance notice must be provided to parties in a hearing to allow them reasonable time to prepare. The *MGA* 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.

MGA s. 686(3)

7. PROCEDURAL CONSTRAINTS AND RULES OF NATURAL JUSTICE

As was explained earlier, the powers of an SDAB are determined through the *MGA*. In addition to the legislation that SDAB must adhere to, members must also be aware of the principles of procedural fairness 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.

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."

General Duty of Fairness

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.

Right to a Public Hearing

The SDAB must hold a public hearing if an appeal is filed. Hearings convened for the SDAB to determine procedural or jurisdictional matters related to an appeal must be held in public. Parties that are participating in the hearing have the right to make verbal arguments. 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. Only deliberations used to make a decision by the SDAB may be held in camera

MGA s. 197 (2.1)

Right to Know the Case to be Met

This principle 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 *MGA* 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 *MGA* both the order and the information under 686(4) must be made available.

MGA s. 686(4)

In subdivision appeals, the *MGA* 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.

MGA s. 678(4)

Right to Have Reasonable Opportunity to State Their Case

Parties must be given a reasonable 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.

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 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 of the hearing in order to obtain legal counsel as a delay tactic, the SDAB may be warranted to deny such an adjournment request. However, it would be imperative for the SDAB to clearly set out the basis for its refusal of the adjournment request.

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

In this case, the SDAB 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 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.

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 or unduly lengthy adjournments.

In practice, the SDAB should deal with requests for adjournment as a preliminary matter at the beginning 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 Boards achieve this by collecting the names and addresses of the parties in the hearing room before the meeting is convened. If the date and place of the adjourned date is announced at the hearing, notice (as prescribed under the *MGA* for convening the hearing in the first place) need not be provided to all required parties.

Rule Against Bias

Administrative law requires not only that justice be done but it must also be seen to be done. A decision maker must not have an actual or apprehended bias for or against the applicant. The Alberta Court of Appeal has divided "bias" into three different categories:

1. An opinion about the subject matter so strong so as to produce fixed and unalterable conclusions;

2. Any pecuniary bias, however slight;

3. Personal bias whether by association with a party or personal hostility to a party where the test is a real likelihood of bias and the appearance of justice is done.

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. (Prasad v. Canada (M.E.I.), [1989] 1 ."

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.

With respect to pecuniary interest, councillors should be aware that the Section 169 and 170 of the *MGA* apply to all boards to which the council appoints the Councillor, including the SDAB.

The SDAB must also ensure that it does not adopt procedures through which it aligns itself with or against one party, or appears to align itself with or against one party. The SDAB must treat the parties fairly, providing all parties with reasonable opportunity to present their respective case. The SDAB must be particularly careful where the Municipality itself either opposes or favours a development issue. Under such circumstances, the SDAB should distance itself from municipal employees or advisors who have had previous involvement with the particular development.

Therefore, the following principles should be followed:

1. Prior Determination

   No SDAB member should ever state, prior to rendering a written decision, that his/her mind is absolutely made up with respect to a particular application;

2. Disclosure of Evidence

   An SDAB member must rely on evidence presented at the SDAB hearing. If the SDAB member receives evidence prior to the SDAB hearing, those facts should be disclosed at the SDAB hearing, and all parties should be given an opportunity to respond to those facts;

3. Municipal Land

   Generally, municipal councillors may sit on hearings respecting land owned by the municipality.

4. Pecuniary Interest

   An SDAB member should not have any involvement on a matter in which he/she has a pecuniary interest.

5. Municipal Position

   Under circumstances where the municipality is either supporting or opposing the development, the SDAB should distance itself from municipal employees or advisors who have had previous involvement with the development.

6. Board Practice

   The SDAB should, at the commencement of the hearing, ask whether the parties have an objection to any of the SDAB members sitting. If there is a potential issue that may not be known to all of the parties, it would be appropriate for the SDAB member to provide details.

Pecuniary Interest

Sections 169-170 of the *MGA* 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 *MGA* 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.

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

The conflict of interest rules under the *MGA*, s. 172 and following (which apply to councillors) can be used as a guideline as to which is a financial interest.

Reasonable Apprehension of Bias

In addition to pecuniary interest, all SDAB members must consider perceived influence or perceived bias. If there is a reasonable argument on an objective basis that a member's 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.

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.

MGA s. 169-170

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.

An SDAB 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.

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 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.

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 presented in the appeal hearing or in the written documents submitted. 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 application, 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.

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."

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 flowchart "How Legislation and Natural Justice Guide the Action 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 is not bound by its prior decisions on similar matters. 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 may advise accordingly.

The Board is the master of its own procedure. Below is an order of presentation commonly used in appeals of this nature. The order of presentation may be set out in a procedure adopted by the Board.

- Development Officer or other planning staff
- Appellant
- Persons supporting Appellant
- Persons opposing Appellant
- Municipalities, School Authorities and Government Agencies (where subdivision appeal involved)
- Questions and Rebuttal from both sides
- Final questions from Board members
- Brief Summary from the parties

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 submissions and evidence that the decision should be reversed or varied because it is demonstrated that the decision, or part thereof, is outside the SDAB's jurisdiction or inappropriate or unreasonable from a planning standpoint.

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 includes 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 a 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 jurisdiction issues for the SDAB;
- provide pictures, video or information gathered from a site visit and a map of the area indicating the location of the lands and (if known) the lands of the affected persons; and
- describe land use bylaw standards and the test for relaxation.

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.

In the hearing, the applicant may be a respondent to the appeal if the appeal has been filed by another party against the subdivision or development permit approval.

Affected Persons

The *MGA* 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 file an appeal from a development authority decision and be heard by the SDAB.

MGA 685 s (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. Generally speaking, a flexible approach should be used to determine whether a party is "affected" in a planning and development sense.

MGA s. 680(1)

MGA 692(7)(a) (ii)

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 may wish to determine whether it will hear that person.

Agent

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. Often, these agents provide written submissions.

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.

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."

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. 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 includes:

Before the Hearing

SDAB members must:

- be informed about their 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.),
- if an agenda package is circulated before the hearing, review the same and become familiar with and understand the case.

SDAB members must not:

- speak with the appellant or any other parties prior to the appeal; instead, advise 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 terminology, or the process respecting 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 the term of office. The Chair usually:

- signs Board orders on behalf of the SDAB;
- runs the meetings;
- sets the tone of the hearing;
- restrains improper questions, behaviour, or irrelevant information;
- conducts hearings in a fair and 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 the Chair.

Before the Hearing

The Chair should be prepared for the hearing by reading all background information and reports and be familiar with the case as it may affect the nature and format of 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;
- make introductions;
- 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;
- ask is any Board members should be disqualified from hearing the case or if there is any objection to the membership of the Board
- 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.

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

- Ensure appeal properly filed (and within 14 days of decision or order)
- Inform appropriate people—appellant, affected persons, etc.
- Prepare a report 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)
- Prepare an agenda for the hearing (e.g., simple items first)
- Check to make sure all advertisements (such as in newspaper) and notices have been made (at least 5 days prior to hearing)
- Ensure all relevant documents and materials are available for public inspection

At the Hearing

- Pre-hearing: phone members to ensure quorum; set up any equipment/materials needed; supply copies of any late submissions or additional material
- At meeting: announce appeal; record names of speakers; mark exhibits; take notes or 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

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 provided by easement 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.

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 *MGA*, 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 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.

MGA s 230, 606

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 s 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 SDAB 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 try 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 to support 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. Just an allegation of decreased value is not sufficient—a statement should be supported by evidence or fact. An example could be: "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 may wish to review these before their deliberations. It is possible that written summaries of the submissions can be requested by the Chair, 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 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. 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. Generally, 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.

Site Visits

A site visit or inspection is normally carried out by the planning staff 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.

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.

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 relies on in its decision 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.

<u>Open Questions</u>

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 reasons for decision should answer the questions "Can You" to ensure jurisdictional issues are addressed, "Should You" to address the planning considerations and "Why" to describe the findings of fact and outline the reasons for each of the main issues raised. The following section provides criteria to compare evidence against. A methodical evaluation of evidence is an important part of the process since it:

- minimizes the chance of arbitrary decisions;
- adds to the appearance of fairness; and
- 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:

- a regional plan adopted under *ALSA*
- 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 *MGA* 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 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, and to distinguish between fact and opinion. Its decision should be based on fact, not opinion.

The three questions that must be answered when assessing an appeal to the SDAB are:

- **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?

- **Why?** Given the evidence before the SDAB, why did it make the conclusion it did on each of the major issues before it?

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 the 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 (*MGA*, subdivision and development regulation);
- other provincial legislation and responsibilities;
- federal legislation
- 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 MGA, other provincial and federal legislation, 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 has not 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

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.

MGA s 680(2)

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.

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 can be 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 must be more than just 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* (its function is officially over) and any reconsideration is a nullity. It is done with it. There is nothing in the *MGA* conferring power on An SDAB to reconsider a decision. This is different from the Municipal Government Board, which is allowed to reconsider decisions, but does based on a procedure guide.

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. RECENT CASE LAW

Case Summary – Bowes v. Edmonton

This case relates to the slope instability of three residences near the bank of the North Saskatchewan River. The incident attracted national media attention, as three executive style homes were destroyed in October, 1999.

Trial Decision, Court of Queen's Bench

In the Court of Queen's Bench decision, Justice (T. Clackson) found that the City of Edmonton could not be found liable for the claims brought by the property owners because of a limitations issue; that is, the claims were brought more than 10 years after issuance of the relevant City permits and approvals. Justice Clackson went on to note, however, that if the claims had not been barred by the limitations issue, he would have found the City to be liable for negligent issuance of the permits and approvals.

Prior to considering subdivision of lands in the area, the City had commissioned a geotechnical report in relation to road construction. This report (referred to in the decision as the "1977 Hardy report") indicated that the land between the road and the top of the bank was not developable, as the risk of subsidence was too great. This report was never disclosed to the developer or to the individuals who purchased the individual lots and built the homes. There were subsequent engineering reports that indicated that the land was developable, and that the risk of subsidence was not too great, provided that certain conditions were followed (vegetation must be retained, no underground sprinklers, no swimming pools).

At trial, the City argued that the 1977 Hardy report was not germane to the issue because the report (and its testing) focused on the risk of superficial subsidence, and not the risk of a deeper failure (Note: the experts agreed that the failure was deep seated, approximately 40 meters below the top of the bank).
Justice Clackson disagreed and stated:

- The City is not a guarantor of the safety or suitability of a proposed development and is not responsible for every potential latent defect.

- The City is obliged to conduct itself carefully in granting or refusing permits.
- The City should have reviewed the materials in its possession bearing on the landowners applications and should have disclosed the 1977 Hardy Report to the applicants. The report would have caused a careful municipality to require a more detailed geotechnical opinion which would justify ignoring the 1977 Hardy Report.
- The City should have disclosed any information in its possession which might bear on the risk of development.

Court of Appeal Decision

On December 28, 2007 the Alberta Court of Appeal filed its Reasons for Judgment in this matter. The decision addressed an appeal by certain landowners (the "Claimants") from the Court of Queen's Bench decision discussed above that the claims were brought outside the limitation period set out in the *Limitations Act*. The Court of Appeal decision also considered the City's cross appeal from the trial judge's findings that the City had been negligent, and would have been liable for damages to the Claimants had the limitation period not expired.

- As mentioned, the trial judge in the Court of Queen's Bench found that the City of Edmonton could not be found liable for the claims brought by the property owners because of a limitations issue; that is, the claims were brought more than 10 years after issuance of the relevant City permits and approvals. The trial judge went on to note, however, that if the claims had not been barred by the limitations issue, he would have found the City to be liable for negligent issuance of the permits and approvals. In his view, the City owed a duty of care to the Claimants and should have specifically considered and disclosed the 1977 report, should have ordered further geotechnical study before allowing construction, and should have disclosed any information in its possession that might bear on the risk of development.

- As in this case, Court of Appeal decisions are typically heard by a panel of three judges, and these judges do not always agree. Where they do not agree, the majority view governs on that particular point or issue. In this case all three judges agreed that the trial judge was correct to dismiss the claims on the basis of the

Limitations Act, and that while such legislation does sometimes work a hardship on claimants, it is necessary and reasonable for the legislators to create some temporal limitations on claims.

- However one of the three Court of Appeal judges strongly disagreed with the trial judge's finding that the City had been negligent and issued a lengthy judgment that was harshly critical of the trial judgment. In particular, he asserted that the trial judge had ignored important expert evidence about the intended scope of the 1977 report, and had put too much onus on the City to warn the Claimants, and not enough on the Claimants themselves, to investigate further the known risks of slope instability. He asserted that in finding the City negligent, the trial judge had made several errors some of which he characterized as being "palpable and overriding". As an example, he indicated that the trial judge did not appear to consider that the City was entitled to consider the cost of ordering further geotechnical work, and weigh that against other relevant costs, such as the cost of constructing the homes in question. He stated that as a matter of law, "precautions need not be taken which are more costly than the risk' and he stated that this was true regardless of whether the City could have insisted that the Claimants bear the cost of the further geotechnical work. He was also of the view that there was no evidence upon which the trial judge could validly conclude that the Claimants would not have built their homes had they seen the 1977 report (the "but for" test) and therefore causation had not been proven.

- On the other hand, the other two Court of Appeal judges concluded that the trial judge had not erred in finding the City negligent. They agreed that further geotechnical work should have been required and seemed to suggest that the City did not have to weigh the cost against the benefit because the Claimants, and not the City, would have had to bear the costs. The judges in the majority also agreed that it was not always necessary for a claimant to satisfy the "but for" test, and in certain cases where it was not possible to do so through no fault of the claimants, (as here where it is impossible to say what the Claimants would have done if a further geotechnical report had been ordered or done), claimants may need only to show that the defendant "materially contributed" to the loss.

- This decision is very important in that it illustrates the lengths that a municipality may have to go to show reasonable care in considering development on unstable ground or lands that may be otherwise unsuitable. Some pointers can be gleaned from this case and other similar cases dealing with approving development on or near environmentally sensitive lands.

    - Additional Testing – The municipality and landowners are well served if appropriate testing is required prior to planning and development approvals. The prudent municipality should err on the side of requiring expensive technical work to be performed by a would-be developer, rather than relying on what may be insufficient information, if there is a serious question as to the suitability of the land.

    - Parameters – the Municipality should, in its land use bylaw and other policy documents address appropriate requirements for developing on or near environmentally sensitive lands, such as lands with a high water table, flood plain areas, top of bank areas and contaminated lands. There are a variety of mechanisms to regulate sensitive lands that can be explored, depending on the nature of the lands, and the nature of development pressures.

    - Disclosure - Municipalities must be diligent in identifying and providing technical information in its possession. In this case, the 1977 report was not about the lands themselves, but about road construction in the vicinity of the lands. Nevertheless, because the 1977 report made comments about the future development of the lands, the majority in the Court of Appeal agreed with the trial judge that the report ought to have been considered and disclosed.

In light of this case, planning officials (including the SDAB) should remember the significance of requiring engineering reports prior to granting approvals in environmentally sensitive areas.

Case Summary – Canada Lands Co. CLC v. Edmonton

The Alberta Court of Appeal has given a broad interpretation of s. 662 of the *MGA*. This section allows a subdivision authority to require a land owner to

provide lands for roads, public utilities or both, up to 30% of the developable area of the lands to be subdivided. There is a qualifier, though, if the owner has provided sufficient land for road and public utility purposes (even though the maximum amount has not been provided), the subdivision authority may not require the owner to provide additional amounts.

The Court of Appeal considered the not uncommon scenario where the developer was being asked to dedicate road width beyond the roads strictly necessary to meet the needs of the subdivision, namely to allow for road widening from four to six lanes. The Court supported the subdivision authority's decision to require this additional dedication and noted that the additional dedication (2% of the parcel involved) was not "grossly disproportionate" to the size of the development.

16. CONCLUSION

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

The *MGA* sets out the parameters for the formation, membership and function of SDABs, and the Subdivision and Development Regulation and the municipality's land use bylaw 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 the SDAB in understanding the context of their work and in preparing themselves for the important tasks of conducting or participating in SDAB hearings.

How Legislation and Natural Justice Guide the Actions of the SDAB