§10.4 SUBDIVISION AND DEVELOPMENT APPEAL BOARD PROCEDURES

§10.4(1) Some General Principles — The Duty Of Fairness

In hearing a development appeal, the principal task of an appeal board is to determine the facts of the case before it, to decide what relevant provisions of the Act, the Land Use Policies, the regulations, a statutory plan, or the land use bylaw are applicable, and to render a decision accordingly. In a given case a board may have a considerable amount of discretion in making a decision, such as where a discretionary use application is in issue or where the board is asked to exercise its variance power.[134] Nevertheless, the discretion is not unfettered. In deciding whether to permit a discretionary use, the board is governed by the policies set out in the governing plans and bylaws previously adopted by planning bodies, and by unwritten planning principles. It must restrict itself to considering only relevant planning criteria, and generally must avoid taking on the role of *arbiter* of social policy. In exercising its variance power, the principles that a board must look to, and by which it is governed, are set out in the *Municipal Government Act*. Moreover, in deciding a development appeal, a board usually adjudicates a dispute between clearly defined parties: the applicant and his neighbours or the applicant and planning administrators. These duties describe a tribunal exercising a quasi-judicial function. Thus, it is not surprising that the courts have characterized a subdivision and development appeal board as being quasi-judicial, a characterization reinforced by the relatively stringent procedural rules set out in the Act.[135]

Although it is not required to conduct itself as though it were a court of law, a subdivision and development appeal board nevertheless is placed solidly, to use the words of Dickson J., at "the judicial end of the spectrum" and, consequently, must afford "substantial procedural safeguards" to interested parties.[136] The procedural requirements imposed by the common law on municipal councils exercising redistricting powers have already been canvassed.[137] As has been noted, those obligations are relatively flexible and undemanding because a council, although there is a judicial component in its decision regarding a redistricting application, is first and foremost a political

134 See the discussion in §10.7(2) dealing with a subdivision and development appeal board's power to grant a development permit for a project that does not comply with the governing land use bylaw.

135 *Re Herron's Appeal* (1959), 28 W.W.R. 364 (Alta. T.D.); *Michie v. Rocky View (Municipal District)* (1968), 64 W.W.R. 178 (Alta. T.D.); *Murray v. Rocky View (Municipal District No. 44)* (1980), 12 Alta. L.R. (2d) 342, 12 M.P.L.R. 161, 110 D.L.R. (3d) 641, 21 A.R. 512 (C.A.); and *Kemaldean v. Edmonton (City)* (1984), 52 A.R. 97 (Q.B.).

136 *Martineau v. Matsqui Institution*, [1980] 1 S.C.R 602, 13 C.R. (3d) 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385 at 410, 30 N.R. 119 [Fed.]. For a somewhat more detailed discussion of the characterization of function and the consequence of a quasi-judicial characterization on the procedural obligations of a tribunal see discussion in §7.2.

137 See §7.2.

body whose prime concern is with establishing policy. A subdivision and development appeal board is not a political body *per se*, though it may have elected persons among its members. It is primarily an adjudicative body, and as such must follow the rules, at the very least, of "fair play in action" imposed on a council in a redistricting matter. Indeed, the standard of fair procedure required of an appeal board is substantially higher than that of a council exercising a redistricting function.[138] In addition to common law procedures, a board must follow those procedures prescribed for it in its enabling legislation.[139]

§10.4(2) The Hearing Date

Section 686(2) of the Act provides that the subdivision and development appeal board "must hold an appeal hearing within 30 days of receipt of a notice of appeal".[140] In the case of multiple notices of appeal all filed at different times, common sense dictates that the appeals should be heard together, although separate hearings could be held for each. The 30-day time-limit for each hearing runs from the date of filing of each notice if separate hearings are to be held. If the appeals are consolidated, the 30 days would run from the date on which the first notice of appeal is filed.

On the face of it, the subsection seems to require that the public hearing be conducted and concluded within the 30-day time period. This suggests that any adjournments must be to a date within the 30 days. But, it is common practice for boards to adjourn proceedings beyond the 30-day period to accommodate one or other of the parties. In fact, in many instances a board may commence a public hearing within the 30-day time limit for the sole purpose of adjourning to a date beyond the time limit. Clearly, there can be instances in which it would be patently unfair to one or more of the parties to require that the public hearing be conducted to its conclusion within the original 30-day period. It can be assumed that the Legislature never intended that the time limit should work an undue hardship and that it has thus, by implication, conferred the right on a board to adjourn a hearing beyond the 30 days.[141] Provided the public hearing is commenced[142] within the time expressed in the Act, a board

138 E.g., *Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)* (1993), 9 Alta. L.R. (3d) 1, 14 Admin. L.R. (2d) 186, 135 A.R. 304, 33 W.A.C. 304 (C.A.).

139 The statutory procedural requirements for the subdivision and development appeal board vary, depending on whether the appeal before it pertains to a subdivision or a development. For a discussion of the subdivision appeal procedures see Chapter 13.

140 All time-limits imposed on a development appeal board for doing something are presumably subject to extension by the minister under s. 605(2) of the Act.

141 Indeed, failure on the part of a board to adjourn a hearing to give interested parties a fair opportunity to prepare a case is itself, in some circumstances, a ground for setting aside a board decision: *Murray v. Rocky View (Municipal District No. 44)* (1980), 12 Alta. L.R. (2d) 342, 12 M.P.L.R. 161, 110 D.L.R. (3d) 641, 21 A.R. 512 (C.A.).

law of fair hearing dictates that greater opportunities for notice and hearing should be afforded to those affected persons not mentioned.[77]

§13.5(2) The Hearing

The Act says little about the procedures to be followed by an appeal board in conducting a hearing.[78] It does say that a board "is not required to hear from any person other than" such person or entity as was notified of the hearing as required by s. 679(1) and an adjacent land owner as defined in s. 653, or their representative.[79] A board is not bound by the technical rules of evidence applicable to court proceedings, and may accept such oral or written evidence as it considers proper, whether admissible in a court of law or not.[80] The Municipal Government Board has the power to require and enforce the attendance of witnesses and production of documents, to put witnesses under oath and to award costs.[81] A subdivision and development appeal board has no such powers. A municipal council may in a bylaw prescribe procedures for a subdivision and development appeal board,[82] but such procedures must be consistent with the Act and with common law fairness rules.[83] Finally, there are several other sections in Pt. 12 of the Act that pertain to procedures of the Municipal Government Board but it is doubtful they apply to subdivision appeals.[84]

77 Compare *Wiswell v. Winnipeg (City)*, [1965] S.C.R. 512, 51 W.W.R. 513, 51 D.L.R. (2d) 754 [Man.]; *Beaverbrook Ltd. v. Manitoba (Highway Traffic & Motor Transport Board)*, [1973] 4 W.W.R. 473 (Man. Q.B.); *Harvie v. Calgary (City) Regional Planning Commission* (1979), 8 Alta. L.R. (2d) 166, 8 M.P.L.R. 227, 12 A.R. 505, 94 D.L.R. (3d) 49 (C.A.); *Hutfield v. Fort Saskatchewan General Hospital District No. 98* (1986), 74 A.R. 180, 24 Admin. L.R. 250, 49 Alta. L.R. (2d) 256 (Q.B.), affirmed (1988), 60 Alta. L.R. (2d) 165, 31 Admin. L.R. 311, 89 A.R. 274, 52 D.L.R. (4th) 562 (C.A.); and *Knight v. Indian Head School Division No. 19* (1990), 30 C.C.E.L. 237, [1990] 3 W.W.R. 289, 43 Admin. L.R. 157, [1990] 1 S.C.R. 653, 106 N.R. 17, 83 Sask. R. 81, 69 D.L.R. (4th) 489, 90 C.L.L.C. 14,010 [Sask.].

78 By s. 680(3) of the Act a board "must hold the hearing within 30 days" of receipt of the appeal. It is probable that this requirement is satisfied if the board convenes the hearing within the stated time even if it is not concluded until afterward. See also discussion in §10.4(5)(d).

79 *Municipal Government Act*, ss. 680(1) and (1.1) [en. S.A. 1996, c. 30, s. 67]. Certainly, the persons entitled to be heard are far fewer than those the common law would require to be heard, which would include all affected persons.

80 *Ibid.*, s. 496 (as to the Municipal Government Board) and s. 629 (as to a subdivision and development appeal board). For a discussion of how such legislation impacts on a board see §10.5.

81 *Ibid.*, ss. 496-497 and ss. 501-502. The power to award costs in a subdivision or other planning appeal did not exist under former Acts.

82 *Ibid.*, s. 628(1) and s. 145(b).

83 Where a delegated power is used to make a procedural rule that conflicts with common law procedural rights, the rule is *ultra vires* if there is no express authority to derogate from the common law: e.g., *Joplin v. Vancouver (City) Chief Constable*, [1983] 2 W.W.R. 52, 42 B.C.L.R. 34, 2 C.C.C. (3d) 396, (1984), 144 D.L.R. (3d) 285, 4 C.R.R. 208 (S.C.), affirmed (sub nom. Joplin v. Vancouver (City) Commissioners of Police) (1985), 10 Admin. L.R. 204, [1985] 4 W.W.R. 538, 61 B.C.L.R. 398, 19 C.C.C. (3d) 331, 20 D.L.R. (4th) 314 (C.A.)

84 E.g., *ibid.*, ss. 520-524. It is to be noted that s. 488(3) states that ss. 495 to 498, 501 to 504, 506 and 507 (all in Division 2 of Pt. 12) apply to the Municipal Government Board when it hears s. 619 appeals, subdivision appeals under s. 678(2)(a) and intermunicipal disputes under s. 690. Implicitly, this must mean that other sections in Division 2 of Pt. 12 do not apply in those three instances. Indeed, if one examines other procedural provisions in the Part, it is quite clear they relate to assessment matters, the main board function.