

11. APPEAL JURISDICTION GUIDELINE

This guideline is for handling appeals where jurisdiction of the board is unclear.

Section 219 of *The Act* outlines the right of appeal on The Zoning Bylaw. An individual has the right to appeal to the Development Appeals Board in accordance with subsection 219(1) of *The Planning and Development Act, 2007*, where the Development Control Officer:

- is alleged to have misapplied the Zoning Bylaw in issuing a development permit;
- refuses to issue a development permit because it would contravene the Zoning Bylaw; or
- issues an Order to Comply pursuant to subsection 242(4) of the Act.

An individual also has the right to appeal to the Board in accordance with Section 58, 60(9), 60(10), 228(1) and 228(3) of *The Act*, where:

- a Discretionary Use was issued with prescribed development standards or conditions and the applicant is of the opinion that the development standards and/or conditions exceed those necessary to secure the objectives of the Zoning Bylaw;
- a Minor Variance was revoked based on an objection by a property owner having a common boundary;
- a Minor Variance was refused;
- a Minor Variance was approved with terms and conditions;
- a Subdivision has been refused or revoked; or
- a Subdivision has been approved with specific development standards for a development on hazardous lands.

An individual does not have the right to appeal if a development permit was refused on the basis that the use:

- is not a permitted use;
- is a discretionary use that has not been approved by resolution of Council; or
- is a prohibited use.

The Board will consider all circumstances, including the foregoing, in considering its jurisdiction.

Permitted Use

A permitted use is defined under *The Act* as a use of land or a building or form of development that is prescribed in the Zoning Bylaw as a use that is allowed on a parcel. Questions to ask to determine if the development is permitted on the land include:

- 1) *Is the development identified within the Zoning Bylaw as a permitted land use?*
- 2) *Is the type of development allowed within the Zoning District?*
- 3) *Does the development require a development permit be issued?*

When a development is not identified as permitted and/or allowed in the Zoning District, then move onto Discretionary use.

Discretionary Use

A discretionary use is defined under *The Act* as a use of land or a building or form of development that:

- is prescribed as a discretionary use in the Zoning Bylaw; and
- requires the approval of Council pursuant to Section 56.

Questions to consider when determining if a discretionary use exists include:

- 1) *Is the type of development a discretionary use under the Zoning Bylaw? For example, if a restaurant development, is that a discretionary use in the Residential Zone?*
- 2) *If the discretionary use is not permitted in the Zone, has Council considered or approved this type of discretionary use?*
- 3) *If Council has not decided, is the City Administration seeking a Council resolution to allow the development as a discretionary use within the Zone?*

Council maintains jurisdiction over discretionary uses. Once resolved by Council, applicants may go through the development application processes. If Council chooses not to approve the discretionary use, the applicant may wish to pursue the development in a Zone approved for it and/or pursue the matter further in Court.

The last area where there is no right of appeal is on a prohibited use.

Prohibited Use

Prohibited uses are defined under *The Act* as a use of land or a building or form of development that is prescribed in the Zoning Bylaw as not allowed on a parcel.

A development that is a prohibited use is not allowed in the Zoning Districts at all. These types of developments are clearly outlined in the Zoning Bylaw. For example, a commercial business would be a prohibited use in a residential zoning district. Additionally, some home-based businesses would be prohibited uses in a residential zoning district.

Board Procedure

As the City Clerk and City Administration roles are designed to support both Council and the City's interests, they are not involved in determining whether an appeal should go forward or not. They are neutral parties and therefore the Board is responsible for determining if appeals are properly before the Board.

That being said, it is in the best interest of the Board and all parties to the appeal, for applications that may require the issue of jurisdiction to be considered as a preliminary matter to be flagged by the Secretary so that the parties have sufficient time to prepare.

Where uncertainty on jurisdiction exists, either as flagged by the Secretary and confirmed by the Board, or later questioned by any party and confirmed by the Board, the Board Chair, in consultation with Board Members, will have the Board Secretary advise the Appellant and Respondent (City Administration) that the hearing will be bifurcated. The first part (a “pre-hearing”) will be to hear evidence from each party as to why the Board has or hasn’t the jurisdiction to hear the appeal. Parties are invited to provide evidence, in writing or verbally at the pre-hearing.

After hearing the evidence, the Board may continue with the second part - the appeal Hearing proper and/or may adjourn for a short time, for example 15-30 minutes to consider the evidence. The Board will advise the parties at the Hearing if only a short period is required to discuss the matter or may adjourn the appeal to a new Hearing date.

If the Board decides the appeal is not within its jurisdiction to hear, the decision will be issued in the form of a letter, indicating the option for further appeal, and the appeal fee will be refunded in full.

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