

Cumulative Impacts in the Planning Context

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B R O W N L E E
L L P
B a r r i s t e r s & S o l i c i t o r s

I. Introduction

Quality of life in Alberta is dependent, in part, upon the health and sustainability of our water resources. As our population continues to grow, so do the demands on the Province's limited water supply. Years of tremendous growth in Alberta have dramatically increased the pressure on our limited water resources.

The population in Alberta is predicted to continue to increase with particular settlement in the Calgary metropolitan area over the next 50-60 years. Consequently, urban areas will likely face increasing pressure to further expand their land area to accommodate larger populations and associated residential and commercial development. Increases in population will likely also increase the demand for rural residential developments. Both trends will have significant implications for the environment and, specifically, on the quality and quantity of water.

As a result of increased settlement, further pressures will be placed on natural landscapes and the human reach will be expanded into undeveloped areas. Increased development into previously undeveloped areas can cause landscape alterations that impede natural ecological processes, including water.

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 various issues including the impact of development on the natural environment.

II. Cumulative Impacts and ALSA

The *Alberta Land Stewardship Act* ("ALSA") was proclaimed on October 1, 2009. *ALSA* was introduced to provide a means for regional planning initiatives and a basis for sustainable development in Alberta. These goals will be achieved primarily through the creation of seven "Regional Plans" for various geographic regions of the Province based on river basins.

The primary intended benefit of the Regional Plans is that all forms of development in the Regions will be coordinated and considered in a cohesive fashion. Rather than unchecked development taking place throughout the Region without coordination between the various municipalities and Provincial departments, development will focus on the growth nodes identified within the Regions where infrastructure and resources can be directed. Ideally, the Regional Plans will help ensure that environmentally sensitive areas are protected throughout the Region, regardless of jurisdictional boundaries, and municipalities and the various Provincial departments responsible for forestry, energy, agriculture, environment, and recreation on public and private lands can work together to plan growth with a view to minimizing and managing impacts on the natural resources of the area.

A. "Priority" Regions

The Province has identified the Lower Athabasca and South Saskatchewan Regions as "priority" areas and originally set an aggressive 2010 target date for completion of the Regional Plans for

both Regions. However, the Regional Plans are still underway and have not yet been completed for either Area to date.

The South Saskatchewan Region has experienced the greatest development in the Province but also has the greatest limitations on water supplies. This Region covers most of the land located south of the Town of Crossfield, stretches the width of the Province, and contains 45% of Alberta's population. This Region has the least water in the Province, contains 13 irrigation districts, contains some of the Province's most productive agricultural land and is home to the Province's largest City. The South Saskatchewan Region has experienced prolonged periods of drought, and in some years, the demand for water has outstripped supply. Access to water is undoubtedly the major limiting factor on the Region's future growth and prosperity and served as the basis for identifying this Region as a "priority" area.

B. Effects of ALSA

ALSA introduces a new level of regional planning in Alberta that must be considered and followed by municipalities. The impact of Regional Plans is retroactive in effect requiring municipalities to bring existing planning legislation such as Land Use Bylaws and Statutory Plans into conformity with the Regional Plans (Section 20, *ALSA*). Where an inconsistency exists between a Statutory Plan, a Land Use Bylaw, and a Regional Plan, the Regional Plan prevails to the extent of the inconsistency.

The new Regional Plans will be mandatory, will have the status of binding legislation when planning decisions are being made, including decisions made by Subdivision and Development Appeal Boards on appeals from subdivision and development decisions, and will directly influence any future municipal planning decisions.

Most notably, *ALSA* serves as the enabling legislation for the Alberta "Land Use Framework", which was first released by the Province in December, 2008. The Land Use Framework was drafted to address the cumulative impact on regions created by development which had historically been regulated by local municipalities as well as different Provincial departments with limited inter-departmental coordination. *ALSA*, the Regulations and the various Regional Plans will implement the Provincial policies, goals and objectives set out in the Land Use Framework.

ALSA also has the effect of diminishing the role of Provincial Land Use Policies. The Land Use Policies reference a number of areas, including resource conservation, focusing in part on the need for planning to take into account the integrity of significant water resources (i.e. lakes, rivers, groundwater).

Section 622(4) of the *Municipal Government Act* indicates that Land Use Policies "do not apply in a planning region within the meaning of the *Alberta Land Stewardship Act* in respect of which there is an *ALSA* regional plan." As various *ALSA* Regional Plans are implemented, the Land Use Policies will be phased out. In the meantime, as the Regional Plans remain under development, the Land Use Policies continue to play a role in guiding land use decisions in much of Alberta.

Ultimately, *ALSA* provides the Provincial Government greater oversight into community planning. Whereas municipalities formerly held greater 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.

With respect to Subdivision and Development Appeal Boards (“SDAB”), *ALSA* imposes additional considerations and obligations when rendering a decision. The legislation that enacted *ALSA* also amended the *Municipal Government Act* to require SDABs to act in accordance with “any applicable *ALSA* Regional Plan” when rendering decisions on subdivision or development matters. Where an SDAB fails to “act in accordance” with a Regional Plan, it has arguably made an error of law, and its decision will be subject to appeal on that basis.

C. Bill 10 – the Alberta Land Stewardship Amendment Act, 2011

The Alberta Government has proposed amendments to *ALSA* through Bill 10, the *Alberta Land Stewardship Amendment Act, 2011*, which received first reading in the Alberta Legislature on March 1, 2011. The following are some highlights of the proposed amendments:

- Adds clear statements that property and other rights of individuals are respected and that *ALSA* does not limit any existing rights to compensation or appeal [Section 2];
- Clarifies that land titles and freehold mineral titles were never included in the definition of “statutory consents” under *ALSA* [Section 2]
- Requires public consultation before Regional Plans and amendments are made [Section 5];
- Requires the Stewardship Minister to table a proposed Regional Plan or amendment with the Legislative Assembly prior to it being approved by Cabinet [Section 5];
- Provides that a Regional Plan may not affect, amend or rescind a development permit, an approval in respect of a development permit, or an approval for which no development permit is required under a land use bylaw where the development has progressed to the installation of improvements at the time the Regional Plan comes into force [Section 11];
- Allows title holders to apply for a variance to the Plan in appropriate cases [Section 15.1];
- Allows landowners to apply for compensation if they believe they have been the subject of a compensable taking [Section 19]; and
- Allows anyone directly and adversely affected by a Regional Plan to request a government review of the Plan [Section 19.2].

III. Cumulative Impacts in the context of Statutory Plans and Non-Statutory Plans

In addition to the effect Regional Plans will have on tackling the issues of growth management, sustainability and cumulative impacts in the seven regions, issues respecting cumulative impacts and managing impacts on the natural environment can also be addressed at the local level in the planning context through Statutory Plans (ie. Municipal Development Plans, Inter-municipal

Development Plans, Area Structure Plans and Area Redevelopment Plans) and Land Use Bylaws.

Many municipalities have already taken the proactive approach to implement goals, objectives and policies respecting growth management, sustainability and cumulative impacts through statutory and non-statutory plans. Examples of the approaches taken by municipalities in both statutory and non-statutory plans are discussed below.

In light of *ALSA*, we are often asked whether municipalities should continue with inter-municipal or regional initiatives, given that the new Provincial planning regime is evolving. Municipalities have expressed concern with respect to investing scarce municipal resources in proposed regional or inter-municipal initiatives, given the uncertainty of the new planning framework.

We encourage municipalities to wholeheartedly pursue inter-municipal and regional initiatives. The best case scenario is that by pursuing inter-municipal or regional initiatives at the grass roots level, the conclusions of that planning process, which can be incorporated into formal statutory plans, may form the basis of policies in a Regional Plan.

Municipalities must recognize that there will be very limited opportunities for comprehensive analysis during the Regional Planning process. By this, we mean that the number of issues that must be incorporated into a Regional Plan together with the aggressive time frame adopted by the Province will limit the policies that may be incorporated into a Regional Plan. If a group of municipalities have already created a regional policy for a specific area or issue, the Province may well simply adopt that locally developed policy into the Regional Plan.

ALSA requires that all Statutory Plans be consistent with the Regional Plans. While the specific content and form of the Regional Plans remain unknown, the purpose of *ALSA* is centred around enabling sustainable development by taking account of and responding to the cumulative effects of human activity on the land including, the impact on the Province's water resources. The cumulative impacts of regional development on Alberta's water resources will undoubtedly be of significant importance in the Regional Plans, which must consequently be followed by municipalities in their planning and development decisions and made consistent with the municipalities' statutory plans.

Growth management and cumulative impacts can be addressed in the planning context on the local and regional level through Statutory Plans including, Municipal Development Plans, Intermunicipal Development Plans, Area Structure Plans and Area Redevelopment Plans.

A. 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-range and broad-brush planning vision for the municipality as a whole. Pursuant to Section 632 of the *Municipal Government Act*, municipalities with a population over 3500 are required to adopt a MDP. A MDP must address the following:

- Future land use in the municipality;
- The manner of and proposals for future development in the municipality;
- Coordination of land use, future growth patterns, infrastructure with adjacent municipalities;
- The provision of required transportation systems;
- The provision of municipal services and facilities.

A MDP may address environmental matters and economic development, as well as other matters relating to the physical, social or economic development of the municipality.

B. Intermunicipal Development Plans

Pursuant to Section 631 of the *Municipal Government Act*, two or more municipalities may prepare an Intermunicipal Development Plan (“IDP”) to address the future development of a shared sub-region. An IDP is optional: municipalities are not required to have IDPs.

The mandatory content of IDPs is limited to developing a process to resolve disputes and providing for administering and changing the IDP. 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 which may well include addressing cumulative impacts that development in each municipality has on the natural resources of the broader region.

Many municipalities use different documents to address some of the same issues as an IDP, including mutual agreements, sections in their respective MDPs, intermunicipal dispute resolution processes, or mutually adopted “mirror” Area Structure Plans.

C. Area Structure Plans and Area Redevelopment Plans

Area Structure Plans (“ASP”) and Area Redevelopment Plans (“ARP”) may be adopted by municipalities pursuant to Sections 633 and 634 of the *Municipal Government Act*, respectively. These Plans may be adopted by municipalities that wish to plan for areas in greater detail for future development (ASP) or for redevelopment (ARP). ASPs and ARPs are both used to address detailed development issues including infrastructure needs, types of development, development sequence, and density. While ASPs are typically adopted with respect to areas of raw land which are ripe for development, ARPs are adopted with respect to developed areas which will be subject to intensification of use which will result in upgraded or new infrastructure.

In accordance with Section 633, ASPs must describe:

- The sequence of development proposed for the area,
- Land uses proposed for the area,
- Density of population proposed for the area, and
- The general location of major transportation routes and public utilities.

ASPs may also contain any other matter that Council considers necessary.

In accordance with Section 635, ARPs must describe:

- Objectives of the plan and how they are proposed to be achieved,
- Proposed land uses for the area,
- If a redevelopment levy is to be imposed, the reasons for imposing it, and
- Any proposals for the acquisition of land for any municipal use, school facilities, parks and recreation facilities.

ARPs may contain any other proposals that Council considers necessary.

D. Examples of municipalities addressing growth management, sustainability and cumulative impacts through statutory and non-statutory plans

Many municipalities have taken the proactive approach to address growth management, sustainability and cumulative impacts on a regional level through their statutory and non-statutory plans. Some of examples of these statutory and non-statutory plans are discussed in further detail below.

i) Statutory Plans (MDP, IDP, ASP, ARP)

Statutory plans should contain policies directed towards sustainability and growth management. Certain statutory plans adopted in the Province have articulated sustainability principles such as:

- Strategies and approaches that preserve, enhance and regenerate nature and life-sustaining ecosystems;
- Strategies and approaches that limit use of non-renewable natural resources and environmental impacts;
- Strategies and approaches in design, manufacturing and consumption that minimize environmental impacts;
- Social solutions and activities that allow every person to meet basic human needs and achieve their potential in life, now and in the future, while minimizing environmental impacts;
- Utilizing sustainable development and operational practices that promote energy efficiency, water conservation and the reduction of solid waste and other environmental impacts;
- Incorporating environmental sustainability principles in land use planning decisions and development practices;
- Ensuring future growth does not exceed available water supply; and
- Identification of sensitive eco-systems, hazard lands, natural areas such as rivers, creeks and wetlands, significant natural features, soils, agricultural lands, and water sources.

Examples of activities that address sustainability principles include:

- Redeveloping existing sites and building before constructing new ones;
- Integrating ecological features to serve as green infrastructure elements;
- Creating a well-defined buffer of natural space and agricultural lands;
- Reducing water use and recycling waste water;
- Biological sewage treatment;
- Retention of natural infrastructure;
- Mandatory development of ASPs that consider social, economic and environmental factors prior to development in certain areas;
- Mandatory inclusion of strategies to ensure efficient water, sewer, stormwater and shallow utility infrastructure in all developments;
- Wetland management;
- Watershed management;
- Addressing adequacy of water supply and cumulative impacts at re-zoning stage;
- Development of “best practice” policies; and
- Consideration of the best ways to use the new conservation and stewardship provisions available under *ALSA*.

ii) *Non-Statutory Plans*

Certain municipalities have implemented growth management plans which propose a long term land-use vision that is based on principles of sustainability and smart growth. The motivation for many of these growth management plans was the significant growth pressured experienced by the municipalities in the early-mid 2000’s which had tremendous impact on the municipalities’ local services, infrastructure and environment.

One of the specific concerns often addressed in growth management plans is the quality and quantity of potable water, which is an increasingly scarce resource and has its own management needs. Often, the growth management plans aims to recognize the limits of this natural resource together with the existing infrastructure capacities, and to plan growth around this existing and anticipated infrastructure and in the context of the availability of this important resource.

Another example of a non-statutory plan that has been adopted by some municipalities in the Province are environmental action plans. These types of plans set out a series of goals, objectives and policies for achieving environmental sustainability and to enhance and support environmental stewardship within the community.

This type of plan typically includes specific water management strategies which can include:

- Reduction of distribution system losses with 5, 10, 15 and 20 year targets
- Reduction of residential, industrial, commercial and institutional water use with 5, 10, 15 and 20 year targets
- Conservation strategies
- Metering
- Wetland management

- Watershed management

Given that development and subdivision approving bodies, SDABs and the MGB are not required to have any level of consideration for non-statutory plans such as growth management plans or environmental action plans, the policies and objectives set out in these non-statutory plans should be incorporated into the municipality's statutory plans and land use bylaws in order to ensure that these important policies and strategies are implemented in the planning and development decision making process.

IV. Cumulative Impacts and SDAB Decisions

The Subdivision and Development Appeal Board ("SDAB") hears appeals from municipal subdivision and development authorities.

In the case of rendering decisions on subdivision appeals, the SDAB must act in accordance with any applicable *ALSA* Regional Plans, conform with the uses of land referred to in the land use bylaw, and be consistent with land use policies. However, the SDAB must only have regard for statutory plans and the *Subdivision and Development Regulations*. Subject to the provisions of Regional Plans, unless the requirement to consider the cumulative impact of development are articulated in the land use bylaw or statutory plans, there is no obligation on the SDAB to take cumulative impacts of development into consideration.

Although not specifically bound by statutory plans on subdivision appeals, the SDAB must carefully consider the provisions of the statutory plans and clearly articulate its analysis of the applicable provisions of the statutory plans in the context of the appeal in its decision. If the SDAB fails to disclose how it has considered the statutory plan provisions, the SDAB decision may be subject to a successful appeal to the Court of Appeal on that basis.

There is less discretion afforded to the SDAB on development appeals. In addition to its mandatory compliance with *ALSA* Regional Plans, uses in the land use bylaw (subject to the SDAB's variance power under Section 687(3)(d) of the *Municipal Government Act*), and land use policies, the SDAB must also comply with any statutory plans in a development appeal context.

To the extent the statutory plans address growth management, sustainability and cumulative impacts through goals, objectives and policies contained in the statutory plans, the SDAB is required to comply with the provisions of the statutory plans when making its decision on a development appeal. Any failure on the part of the SDAB to comply with the statutory plans, will serve as grounds to appeal the decision to the Alberta Court of Appeal.

A. Jurisdiction of the SDAB

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 *Municipal Government Act*;
- (b) Comply with the principles of natural justice; and
- (c) Must only make decisions on matters which are properly before the Board

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 hears certain subdivision appeals.

SDAB decisions may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction, including where the Board acts *ultra vires* by taking into account irrelevant considerations or otherwise acting outside of the Board's powers, conducting an unfair hearing, and/or providing inadequate reasons for the Board's decision.

As acting *ultra vires* or outside of its jurisdiction is a basis for an appeal of a decision of the SDAB to the Court of Appeal, SDABs must be mindful of the requirements of the statutory law that governs them, as set out in the *Municipal Government Act*, *ALSA*, Regional Plans and SDAB bylaws.

B. Section 617 of the *Municipal Government Act*

Section 617 of the *Municipal Government Act* outlines the purpose of planning, which sets the broad test the SDAB applies to balance the interest of the private land owner against the interest of his or her neighbours. The purpose of planning, as stated in Section 617 of the *Municipal Government Act* is to provide a means whereby plans and related matters may be prepared and adopted to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and 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, except as necessary for the overall greater public interest.

Given the inherent recognition of private landowner rights in Section 617, it is imperative that municipalities address the "greater public interest" of cumulative impacts on the environment and natural resources of the area in their respective statutory plans and land use bylaw in order to ensure that this element is given proper consideration by the development and subdivision approving bodies as well as the SDAB.

C. Subdivision Appeals

In determining an appeal pertaining to the approval or denial of a subdivision application, Section 680 of the *Municipal Government Act* provides that the SDAB has the following rights and obligations:

- (a) Must act in accordance with any applicable *ALSA* Regional Plan;
- (a.1) Must have regard to any statutory plan;

- (b) Must conform with the uses of land referred to in the land use bylaw;
- (c) Must be consistent with the land use policies;
- (d) Must have regard to but is not bound by the *Subdivision and Development Regulations*;
- (e) May confirm, 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;
- (f) May, in addition to the other powers it has, exercise the same power as a subdivision authority is permitted to exercise pursuant to Part 17 of the *Municipal Government Act* or the regulations or bylaws under Part 17 of the *Municipal Government Act*.

The *Municipal Government Act* requires a “subdivision authority” to take into account the specific factors detailed in Section 654 of the *Municipal Government Act*, including the suitability of the subject lands for the purpose for which the subdivision is intended. Therefore, in considering a subdivision appeal, the SDAB may at times properly refuse a subdivision approval if it finds, for example, on the application and evidence before it that the subject land is not suitable for the development because of topographical constraints, inadequacy of water, sewage disposal difficulties or any other relevant planning and development consideration.

On subdivision appeals, it is mandatory that the SDAB act in accordance with any applicable *ALSA* Regional Plans, conform with the uses of land referred to in the land use bylaw, and be consistent with land use policies. However, the SDAB must only have regard for statutory plans and the *Subdivision and Development Regulations*.

To the extent *ALSA* Regional Plans provide policies addressing growth management, sustainability and cumulative impacts, the SDAB will be bound to ensure its decision accords with any such policies. That being said, no Regional Plans have been completed to date and there is uncertainty respecting when such Plans will be completed for each of the seven Regions, as well as the expected content of each Plan.

As discussed in the section above, many municipalities address growth management, sustainability and cumulative impacts in their statutory plans and land use bylaws. On subdivision appeals, the SDAB must only “have regard to” statutory plans, meaning they must address their minds to the statutory plans and provisions thereunder including any such provisions of the municipality’s goals, objectives and policies respecting growth management, sustainability and cumulative impacts, but are not bound to comply with the provisions therein. That being said, we consistently caution against an SDAB departing from a statutory plan unless there are compelling planning and development reasons for doing so.

Although not specifically bound by statutory plans on subdivision appeals, the SDAB must carefully consider their provisions and articulate the considerations of the statutory plans in its decision. Otherwise, if the SDAB fails to disclose in its decision and reasons, expressly or by necessary implication, that it has considered the plan and has chosen for good planning reasons not to apply it, the SDAB decision may be subject to a successful appeal on that basis.

In *Mountain View (County) v. Mountain View (County) (Subdivision and Appeal Board)* (2010), the Court of Appeal held that a departure from a strict interpretation of statutory plans must be supported by reasons that disclose how and why the Board reached its result.

D. Development Appeals

In determining an appeal pertaining to the issuance or refusal of a development permit application, Section 687 of the *Municipal Government Act* provides that the SDAB has the following rights and obligations:

- (a) Must act in accordance with any applicable *ALSA* Regional Plan;
- (a.1) Must comply with the land use policies, and statutory plans and, subject to clause (d) the land use bylaw in effect;
- (b) Must have regard to but is not bound by the *Subdivision and Development Regulations*;
- (c) 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;
- (d) 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,
 - (i) The proposed development would not
 - (A) Unduly interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
 - (B) Materially interfere with or affect the use, enjoyment or value of the neighbouring parcels of land,
 and
 - (ii) The proposed development conforms with the use prescribed for that land or building in the land use bylaw.

There is a higher standard, and less discretion afforded to the SDAB on development appeals. In addition to its mandatory compliance with *ALSA* Regional Plans, uses in the land use bylaw (subject to the SDAB's variance power under Section 687(3)(d) of the *Municipal Government Act*), and land use policies, the SDAB must also comply with any statutory plans.

To the extent the statutory plans address growth management, sustainability and cumulative impacts through goals, objectives and policies contained in the statutory plans, the SDAB is required to comply with the provisions of the statutory plans when making its decision on a development appeal. Any failure on the part of the SDAB to comply with the statutory plans, will serve as grounds to appeal the decision to the Alberta Court of Appeal.

E. SDAB decisions and adequate reasons

In making the decision on subdivision and development appeals, the SDAB must consider the legislative framework of any application. In order to accord the appropriate weight to the relevant planning documents in hearing an appeal, SDAB members must be familiar with the

nature and content of these documents. Further, SDAB members need to be familiar with the wider planning consideration used in decision-making.

Planners and planning bodies, including the SDAB, must consider broad planning principles when evaluating applications, including:

- Compatibility with existing development;
- Future considerations for the lands;
- Values in planning;
- Cumulative impacts;
- Mitigating negative impacts; and
- Assessing the severity of any negative impacts

In making its decision, the SDAB must base its decision on relevant planning considerations. Cumulative impacts of the development on adjacent lands, the surrounding area and the environment are relevant considerations that the Board should take into account on hearing an appeal from subdivision and development decisions.

The SDAB must provide adequate written reasons for its decision. The rationale for this requirement is clear. Written reasons reduce the chances of arbitrary or capricious decisions, reinforce public confidence in the tribunal process, and provide parties with the ability to determine whether there are valid grounds for review. In stating reasons, the Board must give its underlying reasons; a statement of mere conclusions is insufficient. The Courts have stated the following with respect to reasons in SDAB decisions:

1. **Evidence**

The Board's reasons must show how and why or on what evidence the Board came to its conclusions

2. **Not just a "Parrot"**

The Board may not merely paraphrase the *Municipal Government Act*, statutory plans, policies or bylaws. The Board must not simply state a conclusion, but must indicate how or why or on what evidence the conclusion was reached.

3. **Facts**

The decision must contain a statement of facts to which the decision relates. The decision cannot be reviewed satisfactorily if it is not known whether it was influenced by irrelevant facts or failed to take into account relevant facts.

4. **Conflicting Facts**

If there are conflicting relevant facts, the Board should outline which version it preferred, and why.

5. Context

The sufficiency of reasons must be considered in the whole context of the decision. This includes not only the nature of the matter or decision by the tribunal, statutory descriptions and directives, planning instruments and the like, but also the written records, and in some cases, the arguments adduced.

6. Objective

In providing its reasons, the Board's objective should be to clearly show that it weighed all of the relevant facts before it against the relevant provisions of the *Municipal Government Act*, the Land Use Policies, the Subdivision and Development Regulations, and the municipality's land use bylaws and statutory plans.

The SDAB's decision should clearly show that it weighed all of the relevant facts before it against the relevant provisions of the *Municipal Government Act*, statutory plans, *ALSA* Regional Plans (once applicable), land use policies, land use bylaw and *Subdivision and Development Regulations* by articulating its analysis and conclusions.

To limit the instances of challenges on the adequacy of reasons, or successfully defend such a challenge, the decision and reasons should tell the reader how the facts, issues, and legislation, regulations, plans and policies fit together and why the Board reached its conclusion instead of another. Even if the Board reached the right conclusions, the decision can be struck down at the Court of Appeal if the written reasons justifying such conclusions are inadequate. In our experience, the Court of Appeal is hesitant to make any logical leaps required to understand how the Board reached its conclusions.

V. Judicial Commentary on the role of Environmental considerations in the Planning and Development Context

The Courts have consistently held that environmental considerations are relevant considerations for the SDAB:

A. *Hutterian Brethren Church of Starland v. Starland (Municipal District)* 1991 ABCA 179 (CanLII).

The Church owned land in the MD on which it desired to construct buildings to house up to 120 persons, and facilities for 3,150 hogs, 50 cows and 5,000 chickens. This was an intensive agriculture use and required a development permit. The Church applied to the MD for a development permit. The MPC gave conditional approval. The MPC decision was appealed and the Development Appeal Board refused the Church's application. The Church then appealed to the Court of Appeal from the decision of the Board.

One of the allegations advanced by the Church was that the Board's power to consider environmental, health and water matters is limited by Provincial legislation giving other governmental bodies authority to make directions. The Court of Appeal did not accept this argument and stated the following at para. 3 of the decision:

[3] ... We also reject the suggestion that the Board's power to consider environmental, health and water matters is repugnant to, and therefore limited by, provincial legislation giving other governmental bodies authority to make directions with respect to them. The Board is empowered to consider these matters in evaluating a development. It does so in a land use setting. Other bodies deal with these matters in accordance with the objectives of the legislation creating them.

(emphasis added)

The Court of Appeal allowed the Church's appeal on other grounds. In the Court's opinion, the Board did not have adequate information to make its decision and in failing to give the Church the opportunity to collect the information and put it before the Board at a later date, the Board denied the Church a fair hearing.

B. *Robertson v. Edmonton (City)*, 1990 CarswellAlta 33, 72 Alta. L.R. (ABQB)

The City optioned some land, and City Council prepared two bylaws to enable the land to be used as a municipal dump: Bylaw 1 adopted a new area structure plan under the *Planning Act*, and Bylaw 2 rezoned the lands.

While the Board of Health was responsible for reviewing environmental issues as they might affect public health, the proposed area structure plan dealt with environmental concerns and required the City to consider an environmental impact report as part of its review of the plan.

A public hearing was held, where first and second readings were given to both bylaws, which were ultimately passed two weeks after the hearing. The applicants applied to the Court of Queen's Bench for an Order quashing both Bylaws on various grounds, including that the failure of Council to take into account the relevant considerations vis à vis environmental impacts constituted jurisdictional error.

The Court held that the respondent City's failure to take relevant factors into account constituted a jurisdictional error and provided a basis for judicial review. The Court stated it would be incorrect for City Council to ignore environmental issues altogether as they are relevant planning considerations in and of themselves.

The Court stating that notwithstanding that the Board of Health is charged with reviewing environmental issues as they impact public health, Council must also take into account environmental issues in the context of making their planning decision. Although speakers were allowed to discuss environmental issues, the Court found that Council overwhelmingly indicated its lack of concern with those issues. Whether or not the *Planning Act* specifically required

environmental considerations to be taken into account in the area structure plan, the plan encompassed these concerns. The Court found that it made little sense that environmental issues be included in the area structure plan and yet speakers addressing the bylaw adopting the plan were discouraged from dealing with environmental issues in their presentations.

The Court ultimately granted the application and quashed both bylaws.

C. *Patricia Hills Landowners Society v. Parkland County (Subdivision & Development Appeal Board)*, 2010 CarswellAlta 2476, 2010 ABCA 413.

The Applicant sought leave to appeal from the County's SDAB decision granting Yellowhead Aggregates an amendment to its development permit. The amendment allowed Yellowhead Aggregates to extract gravel in a 305 metre buffer zone between the excavation area of its gravel pit and the Patricia Hills subdivision. The Applicant sought leave to appeal on, among other grounds, the ground that the SDAB wrongfully declined jurisdiction to consider environmental concerns.

The Applicant argued that the SDAB erred in law when it refused to address areas of concern by stating in a comment made in the context of an adjournment request that those areas were within the jurisdiction of other bodies.

The Court cited *Hutterian Brethren Church of Starland* (above) and *Robertson* (above) in finding that municipal authorities have the jurisdiction to address environmental facts even though the environment is regulated by the Province.

The County argued that notwithstanding the unfortunate comment made by one of the Board members, the record of the evidence heard by the SDAB shows that it was cognizant of its role to address relevant planning issues including environmental concerns. The County further stated that the transcript showed that the representative from Yellowhead Aggregates was questioned on environmental issues such as distance to the nearest residence, shelter belt, duration and groundwater. The County further argued that the conditions imposed on the development permit address environmental concerns and would not have been imposed had the SDAB believed there was no jurisdiction to impose those conditions.

The Court granted leave to appeal and held that any suggestion that a public body such as the SDAB may have misunderstood its role and its jurisdiction raises issues of public importance, sufficiently important to merit further appeal.

D. *Camrose County No. 22 v. Alberta (Provincial Planning Board)*, 1981 CarswellAlta 218, 31 A.R. 392. (ABCA)

The County appealed from the decision of the Alberta Planning Board authorizing Newport Industries Ltd. to subdivide a portion of a quarter section into 28 residential lots. One of the grounds on which the County appealed was that the Board improperly delegated its powers to others in respect of potable water and sewage disposal questions.

The Court of Appeal held that the Board had to determine, as directed by Section 88(1)(a) of the *Planning Act*, that the proposed rural residential subdivision was suitable for the subject land. The Court also stated that one of the important questions in determining suitability for rural residential lots is whether or not there is adequate supply of potable water. The Court found that there was some evidence before the Board respecting water but that the Board was clearly not satisfied that they had before them sufficient evidence to determine this important question as evidenced by the following condition the Board imposed on the development:

[T]he appellant conducting well pump tests to the standards of Alberta Environment. The results of the tests are to be evaluated by Alberta Environment and the local health authority to determine the adequacy and quality of a potable water supply. The final density of lots to a maximum of 28 shall be determined by the Commissioner based on the recommendations of Alberta Environment and the health authority.

The Court recited the following guideline from the regional plan (which it stated might not be binding on the Board):

The Commission will allow acreage development to a maximum of 24 parcels per quarter section. Lower densities will be required in areas where groundwater flows, as established by controlled pump test, are insufficient for the full 24 parcels. In analyzing groundwater data, the Commission will bear in mind the total groundwater demand in the local area, not just on the subject quarter section.

The Court held that a simple reading of the above guideline clearly pointed to the importance of evidence to show an adequate water supply, not limited to the parcel being proposed for subdivision, but the total groundwater demand in the area. To that end, the Court held that to find a parcel suitable for subdivision requires sufficient evidence respecting the availability of water.

The Court went on to state that there is absolutely nothing wrong with the Board or a SDAB granting development permits subject to conditions. However, it is not possible for the Board, being satisfied that it did not have sufficient evidence respecting potable water, to permit a development in the absence of such evidence. The Court held that the Board had to be satisfied that the land was suitable for rural residential development. The Court concluded the land could only be suitable if there was a sufficient supply of potable water.

The Court ultimately held that the Board erred in law when it found that the land was suitable for development without sufficient evidence respecting potable water as the condition imposed on the development permit shows.

The Board's decision was quashed and the matter was returned for a re-hearing.

E. *Seabolt Watershed Assn. v. Yellowhead (County) Subdivision & Development Appeal Board*, 2001 CarswellAlta 70, 2001 ABCA.

The Applicants sought leave to appeal two decisions of the Respondent SDAB which denied the Applicants' appeals in respect of two development permits; one relating to an intensive recreation development; and the other relating to a dug-out, designed to catch runoff water, on the intensive recreations development site. Leave to appeal was sought on numerous grounds.

The Respondent County's Land Use Bylaw contained the following provision:

Section 34(3) Notwithstanding that a proposed development conforms in all respects with this Bylaw, where the application is for **development on lands that are or maybe subject to flooding or subsidence**, the Development Authority shall not issue a development permit unless the applicant can demonstrate that preventative engineering and construction measures can be instituted to make the site suitable for the proposed development.

(emphasis added)

The Applicants argued that S. 34(3) contained a condition precedent to the issuance of a development permit on lands that are or may be subject to flooding. The Applicants led some evidence before the SDAB that the developments would be on lands that are or may be subject to flooding. There was other evidence, including a 1:100 year Floodplain Study prepared for Alberta Environment in 1991 that the lands would not be subject to flooding.

The Applicants argued that the SDAB misdirected itself on a matter of law by limiting its consideration of flooding to the location of the land in relation to the elevations on the Alberta Environment Floodplain Study, rather than considering the totality of the evidence relating to flooding.

The Respondents argued that the SDAB did not conclude, as a matter of law, that S. 34(3) limited its inquiry to a consideration of the Floodplain Study. Rather, they argued, that the SDAB simply concluded, on all of the evidence, that the Floodplain Study was an accurate indication of the potential for flooding on these lands in the circumstances of this case.

The Court found that the SDAB's reasons on the flooding issue were brief, and nearly every sentence referred in some way to the Floodplain Study. The Court accepted the Respondents' argument that the determination of error requires a consideration of the record as a whole, and the record contains evidence in addition to the Floodplain Study. The Applicants countered that argument by stating that if the Respondents are correct that the SDAB merely reached a conclusion on all of the evidence, then the reasons are inadequate because the reasons disclose little analysis of evidence beyond the Floodplain Study.

The Applicants also argued that rather than considering whether suitable preventative measures had been demonstrated before issuing the development permit, the SDAB erred in law by issuing the permit and then imposing a condition which improperly delegated to others the task of determining whether suitable preventative measures had been demonstrated.

The Court held that the Applicants' argument that S. 34(3) of the County's Land Use Bylaw imposed a condition precedent to the issuance of a development permit which the SDAB improperly delegated had a reasonable chance of success. As an alternative, the Court concluded that the inadequacy of the SDAB's reasons on the issue had a reasonable prospect of success.

The Applicants' were granted leave to appeal.

F. *Morris v. Wetaskiwin (County)*, 2002 CarswellAlta 1253, 1002 ABQB 906

The Respondent sought to subdivide a portion of her agricultural lands for residential purposes and applied to the County for rezoning and adoption of an area structure plan. The County approved the development of 15 residential lots subject to a condition respecting compliance with the *Water Act*. The Applicants, who were cottage owners in the adjacent summer village to the land in question, sought judicial review of the County's decision to approve the development and contented that Council committed an error of law in approving the subdivision plan subject to the condition respecting the *Water Act* compliance, since applicable legislation required as a condition precedent to granting approval that suitability of the site's water supply be confirmed.

The Applicants also claimed that Council erred in law in granting approval subject to receiving a water report, thereby improperly delegating its task of ensuring compliance with the statutory condition precedent.

The Applicants argued that in approving the subdivision plan subject to a condition respecting *Water Act* compliance, Council breached the *MGA*, the Land Use Bylaw, the MDP, and the *Water Act*, all of which required as a condition precedent to granting approval that the suitability of the site's water supply be confirmed.

The Respondent argued, among other things, that Council complied with its guidelines in the MDP and maintained authority over the water supply aspect of the approval process by stipulating that non-compliance with its specific performance criteria would invalidate the approval. With respect to the issue of improper sub-delegation, the Respondents pointed out that Council imposed very specific performance criteria (1,250 cubic metres of water per year per household). The Respondents further argued that if the criteria were not met, the approval would be void and, accordingly, the Council maintained its control over the approval and did not sub-delegate its decision-making power.

The Court of Queen's Bench held that there was no breach of statutory conditions precedent to the granting of subdivision approval. The Court was of the view that the wording of the approval, being subject to specific water supply conditions, complied with planning requirements. The approval would not become complete without the necessary water report indicating *Water Act* compliance. Otherwise, the approval would be void. The Court found that Council addressed itself to the need to ensure water suitability before its approval could be completed and acted upon. In so doing, the Court found that Council did not commit an error of law. The Court further held that there was no improper sub-delegation of Council's authority. Council issued specific performance criteria in the form of technical testing requirements which, if unsuccessful,

would render the approval void. In so doing, the Court held that Council retained its decision-making authority over this important issue.

The Court distinguished the case at hand from the *Camrose* and *Seabolt* cases (discussed above). In respect to *Camrose*, the Court distinguished the case on the basis that in *Camrose* the Board purported to delegate determinations with respect to quality and adequacy of water supply to other agencies, as well as the final density of lots. In the case at hand, the Court held that although Council did not have before it evidence of compliance with the *Water Act* it specified the criteria to be met in dealing with the water supply issue, and further made it clear that unless those criteria were met the approval would be void.

In respect of *Seabolt*, the Court distinguished the case on a number of grounds. For the purposes of our interest with the case, the Court distinguished *Seabolt* on the basis that the wording of the condition in *Seabolt* was much broader and purported to delegate to a third party. In the present case, the subdivision authority set clear and specific performance criteria in their approval which, if not met, would void the approval.

The application for Judicial Review was dismissed.

VI. Conclusion

Since the turn of the millennium, Alberta has experienced significant population growth, which resulted in significant pressure on municipalities to approve development to accommodate residential, commercial and industrial growth. Necessarily, this development pressure has had significant implications for the environment. The population in Alberta is predicted to continue increasing, which will only increase development pressure and resulting environmental impacts.

While the purpose of *ALSA* is to provide a means for regional planning initiatives and to provide a basis for sustainable development in Alberta, growth management, sustainability and cumulative impacts can be addressed at local and regional level through provisions implemented by municipalities in statutory and non-statutory plans. Several municipalities in the Province have already implemented statutory and non-statutory plans addressing growth management, sustainability and cumulative impacts for the purpose of consideration in future planning and development with a focus on water resources.

In making its decision, the SDAB must base its decision on relevant planning considerations. Cumulative impacts of the development on adjacent lands, the surrounding area and the environment are relevant considerations, the Board should take into account and analyze in its decisions on appeals from subdivision and development decisions. However, municipalities should take steps to include policies and strategies addressing assessment of cumulative impacts in statutory plans and land use bylaws in order to ensure that development and subdivision authorities and SDABs consider cumulative impacts in the day to day planning and development decisions.

If you have questions relating to cumulative impacts in the planning and development context, we invite you to contact a member of the Brownlee LLP Municipal Team:

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