

Board *of* Variance

guide



Province of British Columbia
Ministry of Community, Aboriginal and Women's Services

Local Government Management Association

LGMA
of BC

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INTRODUCTION

This guide has been prepared by the Ministry of Community, Aboriginal and Women's Services, Governance and Structure Division in collaboration with the Local Government Management Association. It is designed to assist Boards of Variance and local governments¹ in using the provisions of the *Local Government Act* to establish and administer Boards of Variance:

- Section 2.0 outlines the function, structure and membership of Boards of Variance;
- Section 3.0 explains the grounds for appeal to a Board of Variance;
- Section 4.0 discusses the administrative principles and procedures which are to be followed by Boards of Variance;
- Section 5.0 outlines the type of Board of Variance decisions which are appealable to the courts and the appropriate basis for such appeals; and
- Section 6.0 addresses some specific problems of interpretation or confusion with procedures that have been brought to the Ministry's attention.

Sample bylaw provisions for establishing a Board of Variance are included as an appendix to illustrate what items may be addressed and how these may be prescribed in a bylaw.

Explanations are meant to clarify the occasions upon which the Board of Variance can be used as an avenue of appeal. Nothing in this publication is to be construed as a guarantee of legal certainty. It is only an interpretation of the intent of the legislation.

¹ Throughout this paper, a reference to "local government" includes municipalities, regional districts and the Islands Trust.

FUNCTION, STRUCTURE AND MEMBERSHIP OF A BOARD OF VARIANCE

Sections 899, 900, 901 and 902 of Part 26 of the *Local Government Act* specify the authority, structure and function of a Board of Variance.

Function

Where a council or regional district board has enacted a zoning bylaw section 899 of the *Local Government Act* requires it to establish a Board of Variance by bylaw. The Board of Variance is an avenue for providing minor variances to the interpretation and the strict application of certain local government provisions and regulations in specific circumstances defined in the legislation. It functions separately from the local government that established it and has its own authority under the *Local Government Act*.

Legislative amendments adopted in 2002 enable two or more local governments to fulfill the requirement through establishment of a joint Board.

The Board of Variance is not an appeal board for local government policy decisions and it cannot replace decisions of municipal councils or regional district boards. The Board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of a bylaw adopted by a municipal council or regional district board. Variances can be granted respecting bylaw requirements for the siting, dimensions, or size of buildings that are designed to deal with the most common circumstances and to be applied universally to these situations. In some special cases general regulations or ones prohibiting structural changes in a non-conforming building or requiring services upon subdivision may result in an undue hardship if applied to a particular site. A person may appeal to the Board for a variance only if the application of these general regulations to his or her particular site would impose such a hardship. The Board may also decide on the correctness of a certain type of decision made by a building inspector. The Board is guided in making its decisions by requirements defined in the legislation and explained more fully in Section 3.0 of this guide.

Structure and Membership

A conventional rule of procedural fairness or "natural justice" is that there should be no bias on the part of the members of a tribunal. Bias will be deemed to exist if there is any conflict of interest on the part of any person participating in the tribunal's deliberations. The legislation prescribes who cannot be a member of the Board of Variance and how appointments and removals from office can be made.

Appointments

In a municipality, a Board of Variance will consist of three or five persons, depending upon the population size of the municipality. In a regional district there may be several Boards of Variance, one for each rural land use or zoning bylaw area and each Board will have three members.

The council of a municipality with a population of 25,000 or less, or the board of a regional district, will appoint three members s. 899 (5.3). The Council of a municipality with a population greater than 25,000 will appoint five members.

The members of the Board of Variance cannot be members of an advisory planning commission, elected officials or employees of the local government which appoints them. This is because their responsibilities include both assessing the correctness of an interpretation of the amount of damage given by the local government building inspector and modifying the strict application of local government regulations.

Appendix 3 provides guidelines on selecting members to Boards of Variance.

Removal from Office

Members appointed by a local government may be removed at any time by resolution of that local government. The legislation does not require that reasons be given for the removal of a member of the Board of Variance.

Chair and Procedures

The members of a Board of Variance must elect one of their members as chair. The chair in turn, may appoint an acting chair to act in the absence of the chair.

The bylaw establishing the Board must set out the procedures to be followed by the board including the manner by which an appeal is to be brought and notices under s. 901 (4) of the *Local Government Act* are to be given.

Costs

The local government must provide for the costs of a Board of Variance in its five year financial plan.

DECISIONS OF BOARDS OF VARIANCE

This chapter reviews the exact wording of the legislation which establishes the responsibilities of the Board of Variance. An explanation is given for each of the factors a Board must consider in making decisions specifically authorized by the legislation. The most significant sections of the *Local Government Act* which refer to Boards of Variance are cited in full in Appendix 1.

Categories of Decisions Made by Boards of Variance

The duties of the Board are specified in Section 901 of the *Local Government Act*. There are four grounds for applying for minor variances from local government bylaws...Each involve different considerations. The precise wording of the *Local Government Act* is quoted here, and where there is a reference to another section, that wording is given as well. The four categories of appeal have been characterized as follows:

- variation of zoning regulations;
- variation of tree protection bylaws;
- permitting structural alteration where a non-conforming use is present; and
- variation of subdivision servicing requirements for agricultural and industrial lands.

In addition the Board has a special role with respect to non-conforming uses and structures which is discussed in 3.4 below.

Relaxation of Regulations for Siting, Dimensions or Size of a Building s. 901(1) (a)

Probably the most common type of appeal heard by Boards of Variance is a request for relaxation of certain siting regulations under s. 901(1)(a):

a bylaw respecting the siting, dimensions or size of a building or structure, or the siting of a manufactured home in a manufactured home park;

The variations requested under this section deal only with buildings and structures in terms of their size, dimensions and location on a parcel or the siting of a manufactured home in a manufactured home park. The Board cannot rule on policy issues of the local government such as an increase in density or a change in use. Variances granted under s. 901(1) (a) are limited by s. 901(2) and s.901 (3) which will be explained subsequently.

Protection of Trees s. 901(1) (b)

S. 901(1) (b) of the legislation provides that a Board can provide a variance from a provision of a tree protection bylaw as follows:

- (b) a bylaw under Division 2 of Part 22 other than
 - (i) a bylaw under section 711, or*
 - (ii) a bylaw that has an effect referred to in 714(1), if the council has taken action under subsection (2) of that section to compensate or mitigate the hardship that is caused to the person;**

The first of the two exceptions to a Board of Variance's authority to provide a relaxation protects the right of a council by bylaw to remove hazardous shrubs or trees where there is a concern about safety of people, damage to property or seriously inconvenience to the public. Examples could be diseased trees, trees blocking the view of stop signs or trees which block a pathway or sidewalk.

The second exception to a board's authority is where a council has taken action to compensate or take mitigation actions to offset limiting the use of a property or the density of development on the property. In this case, the property owner cannot appeal to the Board of Variance. In this case the council is acting as an appeal board and has made a judgment.

Structural Alteration or Addition where Non-Conforming Uses s. 901(1) (c)

S. 901(1) (c) of the legislation provides for an appeal from; as follows:

- (c) the prohibition of a structural alteration or addition under section 911(5)*

Section 911(5) specifies:

A structural alteration or addition, except one that is required by an enactment or permitted by a board of variance under section 901(1)(c), shall not, subject to subsection (9), be made in or to a building or structure while the non-conforming use is continued in all or any part of it.

Where the non-conformity relates only to siting, size, dimensions or parking requirements, s. 911(9) allows the building or structure to be repaired, extended or altered without referral to the Board of Variance. However, Board of Variance approval is required, however, if this work would result in a further bylaw contravention. The Board would consider such a request in its normal manner under s. 901(1) (c).

A structural change is not the same as a repair; rather, it is a modification to a floor, or roof, or bearing wall whether an internal or an outside wall. A new doorway in a bearing wall would be a structural change whereas new paneling or new shingles on a roof would not.

When structural alterations of a non-conforming building have been approved by a Board of Variance, these changes must also meet the requirements of statutes including regulations under statutes, for example, the Provincial Building Code, and any other bylaw provisions applicable at the time.

A non-conforming use is not confined only to that part of a building or structure occupied when the non-conformity was established, but can be extended throughout the whole building or structure. However, no structural alterations or additions may be made unless required by an enactment or permitted by the Board of Variance under s. 901(1) (c):

Variation of Subdivision Servicing Requirements in Area Zoned for Industrial or Agricultural use s. 901 (1) (d)

Boards of Variance may approve the relaxation of servicing requirements for subdivisions. S. 901(1) (d) of the legislation states as follows:

a subdivision servicing requirement under section 938(1)(c) in an area zoned for agricultural or industrial use,

Section 938(1)(c) specifies that a council or board may:

require that within a subdivision, a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards prescribed in the bylaw

An appeal from this provision is only available where land is zoned for agricultural or industrial uses.

Scope of Board of Variance Authority

S. 901(2) lays out the scope of authority of a board of variance. It indicates that the board may upon application order that a **minor variance** be permitted from the requirements of a bylaw, or that the applicant be exempted from s. 911(5) if the Board of Variance has considered a number of factors. Each of the factors is considered below.

Hardship

The wording of the legislation makes it clear that the decision as to whether undue hardship is demonstrated is the Board's to make. It must be satisfied a variation is justified by the presence of undue hardship. The scope of the variation, however, is limited by the word "minor" and by s. 901(2) (c) discussed below in 3.3. The application of requirements of the bylaw must create a hardship. Increased cost or loss of an amenity is a hardship but is unlikely to be a sufficient reason on its own.

Undue

The hardship created must be an *undue hardship*. The intent of this term is to limit the concerns of the Board to types of hardship that result from aspects of the site as opposed to those which are personal to or generated by the owner. If a characteristic of a site is that bedrock protruding in the site's building area makes compliance with the siting provisions of a bylaw difficult and unreasonable, the hardship created, through no fault of the property owner himself, is undue. If other properties in the zone do not have the protruding rock, they would not be subject to the same degree of hardship.

The difficulty in determining what undue hardship is revolves around whether the hardship would have been a hardship for everyone. If compliance with the general setback regulations is difficult or expensive but that is the case for all properties within that zone, then one could not argue that there is undue hardship. If a circumstance penalizes one or only a few owners, it would be unfair and unduly onerous.

Minor variance

This terminology limits the scope of the variances the Board may allow. Relaxation of a requirement of a bylaw cannot be a substantial variation. Because the statute limits the Board's authority in this way, the Board must consider this point most carefully. While the decision of the Board is final, the courts may review an appeal on a procedural or jurisdictional issue, including the scope or degree of a variation permitted by the Board.

Result in inappropriate development

The legislation does not limit the interpretation of "inappropriate" solely to an opinion of the Board. It states that the variance must not be "inappropriate". A simple test would be to compare the proposed development with that existing on surrounding lots. The elected officials, to some measure, have defined what is appropriate by specifying general regulations in a bylaw. If these are "appropriate"

for surrounding properties, the Board should determine why they would not be equally appropriate for the particular property which is the subject of appeal.

Adversely affect the natural environment

This condition is a relatively recent addition. It is designed to ensure that the Board of Variance considers the impact of its decisions on the natural environment and does not make decisions that have an adverse effect.

Substantially affect adjacent lands

The full wording in the legislation refers to "substantially affect the use and enjoyment of adjacent land" which includes a full range of considerations such as noise, dust, destruction of views as well as safety concerns. It is the Board's obligation to determine if the variance requested would cause significant impact on surrounding properties. A petition circulated by the applicant to adjoining owners indicating consent to the variance, although a helpful indication does not satisfy this requirement. Ownership changes and what does not offend one neighbor may another. The Board must decide the issue.

Vary permitted uses and densities

Variations allowed by the Board cannot change permitted use or density. Such changes are not minor. They may only be made by elected officials through a zoning bylaw amendment which is subject to full public scrutiny.

The issue of density may add complexity. Variances affecting setbacks, the size and dimensions of a building, site coverage, or the floor space ratio could result in allowing change in the density of a use. However, as long as any increase in density is within the limits established in the zoning bylaw it is within the permitted density.

One example would be where relaxation of a 20 meter setback for an apartment building may allow a larger building to be constructed on the site. It should be clear in the decision that such a relaxation does not give any special right to the developer to increase the number of units over that allowed by bylaw simply because a larger building is now possible. More units beyond the limits of the bylaw would be an increase in density.

Defeat the intent of the bylaw

The Board must try to determine, from reading the bylaw, what the local government intended to be the type of neighborhood established by the zoning regulations. It must decide this by reading the bylaw because that is the only valid definition of the council or regional district board's intent. Any variance granted by the Board should not disrupt the basic harmony with other developments within a zone.

Limits on Board of Variance Authority

The limitations placed on the nature of the orders a Board may make as listed in and described above are further restricted by those matters listed in s. 901(3).

The board of variance must not make an order under subsection (2) that would do any of the following:

- (a) be in conflict with a covenant registered under section 219 of the Land Title Act or 24A of the Land Registry Act, R.S.B.C. 1960, c. 208, before the repeal of that Act, or section 215 of the Land Title Act, or*
- (b) deal with a matter that is covered in a permit under Division 9 of this part or covered in a land use contract*
- (c) deal with a flood plain specification under 910(2)*
- (d) apply to a property*
 - (i) for which an authorization for alterations is required under Part 27*
 - (ii) that is scheduled under section 970.1 (3) (b) or contains a feature or characteristic identified under section 970.1 (3) (c), or*
 - (iii) for which a heritage revitalization agreement under section 966 is in effect*

This section provides a checklist for a Board to aid in its determination of jurisdiction.

The Board of Variance is not an avenue of appeal against provincial floodplain regulations or negotiated agreements between developers and local governments or approving officers reflected in a covenant, development permit, land use contract or other agreement. All of the matters contained within Section 901(3) fall within one of those two categories. Other remedies are available to people wishing to modify these matters.

Extent of Damage Preventing Reconstruction of a Non-Conforming Building

Certain decisions of a building inspector regarding repair or reconstruction of a building which does not conform to the bylaws can be appealed to a Board of Variance under s. 902. Specifically, "if a person alleges that the determination by a building inspector of the amount of damage under s. 911(8) is in error."

S. 911(8) specifies:

Where a building or a structure, the use of which does not conform to the provisions of a rural land use bylaw or a bylaw under this Division is damaged or destroyed to the extent of 75% or more of its value above its foundations, as determined by the building inspector, it shall not be repaired or reconstructed except for a conforming use in accordance with the bylaw

Although in this type of appeal the decision has the effect of allowing or disallowing a use contrary to a bylaw, the issue before the Board of Variance is simply whether or not the building inspector's decision on the degree of damage is correct. If an applicant believes something less than 75% of the value of his building has been destroyed, but the building inspector believes 80% has been destroyed, that decision may be appealed to the Board of Variance.

If the Board concurs with the inspector, the owner of the non-conforming structure may not rebuild or repair that structure as the protection afforded by s. 911(8) for continuing the non-conforming use would cease. However, if the Board concurs with the applicant and believes less than 75% has been destroyed it can allow the appeal and the owner may rebuild.

The wording of s. 902 does not restrict the applicant to being the owner of the building. For example, a neighbor or corporate body may challenge a decision of a building inspector if he has claimed 70% is destroyed, and they feel 80% is destroyed and prefer not to have the non-conforming use continue in a rebuilt building.

S. 902(2) clarifies the effect of a successful appeal:

On an application under subsection (1), the board of variance may set aside the determination of the building inspector and make the determination under section 911(8) in its place.

This gives immediate effect to the decision of the Board. The applicant can take action without having to use a court to direct a reluctant building inspector, who has been found in error, to make a different determination.

Either the applicant or the local government can appeal a decision of the Board of Variance under this subsection to the Supreme Court.

Time Limits

Decisions of a Board of Variance apply to land irrespective of ownership, and are lawful for the existing and subsequent owners unless the Board has limited the time period for initiation of the variance in the original order as provided for in S. 901(7):

In relation to an order under subsection (2),

- (a) if the order sets a time within which the construction of the building, structure or manufactured home park must be completed and the construction is not completed within that time, or*
- (b) if that construction is not substantially started within 2 years after the order was made, or within a longer or shorter time period established by the order,*
- (c) the permission or exemption terminates and the bylaw or section 911 (5), as the case may be, applies.*

For example, a Board may feel that a minor variation would be appropriate if the development was carried out before in filling or development on adjacent properties. Subsequent development on adjacent properties could be designed or sited to take account of the variation. However, ten years later, it may not be appropriate, because other construction would have taken place without anticipation of a modified siting or servicing regulation. In such circumstances the Board can use the provisions of s. 901(7) to ensure the variance is acted upon within a reasonable time frame. It is entirely a decision of the Board to employ this provision or not in any specific case.

ADMINISTRATIVE PRINCIPLES AND PROCEDURES

The *Local Government Act* requires that a Board of Variance follow certain procedures but allows other procedures to be prescribed by a bylaw of the local government establishing the Board.

Members of the Board of Variance do not receive compensation for their work. However, their individual expenses and all of the operating expenses of the Board must be covered in the five year financial plan of the local government.

The legislation requires that the chairperson be selected by the members of the Board themselves and allows the chairperson to appoint a Board member to act as chairperson in situations where he or she must be absent.

Local Government Act requires that before hearing an application the Board must notify the owners and occupiers of the land subject to appeal and of all real property adjacent to the property subject to appeal. The notice must say what is being appealed, and the time and place the appeal will be heard.

The responsibility of local government extends only to the establishment of the Board and payment of operating expenses. The Board operates separately and autonomously under the specific authority of the *Local Government Act*, and there are no requirements in *Local Government Act* for the local government to be notified of every appeal. The local government may, by bylaw, set procedures not covered by *Local Government Act* itself providing always that such procedures are generally fair.

The following two sections of this chapter identify procedural items that may be established by bylaw. A description of some considerations in determining procedural issues is included for illustrative purposes.

General Principles

A local government may specify in its bylaw establishing the Board of Variance, procedures for giving public notice of any hearing that is held, the manner in which appeals are to be brought to the Board's attention, and when hearings are to be held in public. The legislation requires that the hearing of an appeal involving undue hardship provide an opportunity for the applicant and the owners and occupiers of the subject property and adjacent property to be heard. The only discretion in such cases is whether others may be notified or heard. The procedural bylaw may only augment legislative requirements but may not lessen the statutory authority of a duly constituted Board. The adjectives used within s.901 of the legislation, such as "substantially", and "inappropriate", indicate the discretionary nature behind some of the decisions which the Board can make. These terms indicate the intent of the Legislature to enable some flexibility in the application of local government regulations. A Board of Variance's decision

involving the relaxation of local government regulations cannot be changed by the local government, a higher court, or the Minister and cannot be reversed by succeeding Boards. The bylaw, then, cannot grant the local government any special authority over functions of the Board.

The local government bylaw establishing procedures cannot require that local government be heard on every appeal. That would be interpreted as trying to assign special rights to itself which may prejudice the hearing. However, it may allow the Board to get information from technical staff on the requirements of the zoning bylaw and the physical dimensions and characteristics of a lot.

For those appeals that challenge an official's interpretation of a bylaw provision, a procedural bylaw may require that the official whose actions are being reviewed be allowed to report to the Board. This grants the official the right to explain his interpretation which is the subject of the appeal and complies with commonly accepted principles of natural justice or procedural fairness that protect a person whose judgment has been questioned.

Notice, Hearings and Meetings

S. 902(1) mandates that before a Board of Variance makes a decision, it must have heard the applicant and any other person notified. The Board of Variance is given authority to hold its own hearings on any matters before it. S. 93 of the *Community Charter* mandates that all meetings of a Board of variance be held in public.

The legislation mandates that the applicant and occupiers of the subject property and adjacent properties be notified of the application and their right to be heard by the Board. This means then, that some measure of public scrutiny will be present at all hearings and that people most directly affected will be heard.

Local Government Act requires that all decisions of the Board be a matter of public record and that any interested person can have access to them. The results of hearings are therefore recorded and made available for public review during normal business hours.

Sample Bylaw Provisions

The reader with an interest in procedural matters may wish to examine the "sample bylaw provisions" in Appendix 2, which indicate how procedures described in this chapter can be defined. The sample bylaw is designed to ensure that all appeals are treated promptly and all hearings and meetings held in public. The bylaw assumes all parties involved in the issue have a right to be heard.

APPEALS FROM BOARD OF VARIANCE DECISIONS

Any decision of a tribunal like the Board of Variance may be assessed by the courts under the *Judicial Review Procedure Act* which requires that proper procedure is followed. In addition some Board of Variance decisions may be appealed to the courts as incorrect.

Decisions made by a Board of Variance fall into two types. One type can be appealed in court and the other cannot.

901(8) a decision of the board of variance under subsection (2) is final.

Decisions, provided for in Section 902(1), are the Board's assessment of the building inspector's determination of damage and can be challenged in the courts as an incorrect assessment of the facts. S. 902(3) provides that:

the applicant or the local government may appeal a decision of the board of variance under subsection (3) to the Supreme Court.

In this case it is an opinion of the Board of Variance which is the justification for a variance and modifies the application of a general regulation on the basis of the justification. These decisions are matters of opinion delegated by statute to the Board. Each of these cases is discussed in more detail below.

Decisions Not Appeal able to the Court

The first category of decision is one for which the Board of Variance is given complete authority. The legislation allows the Board under certain circumstances to modify some provisions of the general regulations of relevant local government bylaws.

Local Government Act decisions in this category may not be appealed in the conventional sense, although they may be reviewed for procedural fairness under the *Judicial Review Procedure Act* and for compliance with the considerations imposed on the Board by s. 901.

Where the Board has determined that undue hardship has or has not resulted, that determination shall be taken as fact by the courts and may not be subject to appeal, but may be subject to judicial review.

Decisions Appeal able to the Court

The second category of decision is based on errors in judgment. An individual, who feels that a decision by a building inspector on the extent of damage to a non-conforming building is incorrect, may appeal to the Board of Variance to review that decision. The Board can decide if the building inspector's decision was correct and if not, can replace his assessment with its own. The Board's decision can be appealed to the Supreme Court s. 902 (3). A decision of the Supreme Court on a Board of Variance decision can subsequently be appealed to a higher court.

Only the initiator of the original appeal to the Board of Variance can ask the courts to review a Board decision. For example, a neighbor who objects to a non-conforming use may believe a building inspector was in error in assessing damage at 60% of the building thereby allowing the owner to rebuild. The neighbor could apply to the Board of Variance to find 75% or greater was destroyed so the building could not be rebuilt. If the neighbor lost such an appeal he may wish to pursue it further in court but if he won the appeal, the owner or local government could not challenge the Board's decision in court. Once a matter is in the court system however, and the Supreme Court has ruled, further appeals in the court system could be initiated by other parties.

Judicial Review

Under the *Judicial Review Procedure Act* the courts can require a Board to re-hear an appeal on the basis of a procedural error of law, such as improper notice, lack of Board jurisdiction or that the qualifiers to a decision were not satisfied. In such cases the initial decision of the Board is invalid and must be made again. The court may find by the facts of the case that the Board did not have the right to consider a matter because a requirement of *Local Government Act* was not satisfied. The court, under s. 7 of the *Judicial Review Procedure Act* has the power to set aside any order made by the Board on the case before them because they did not have authority to make that decision. However, the courts may not direct that a certain decision be made following an appeal on procedural matters, as only the procedural fairness or jurisdiction is being challenged not the correctness of the final decision. To answer such a challenge, the Board may have to demonstrate that evidence existed which allowed it to assess the qualifying criteria the statute requires is considered, and that those considerations were in fact made. If the court felt correct procedures were not followed or the Board had no evidence upon which to base an opinion, it may order the Board to re-hear an appeal. Or under s. 7 of the *Judicial Review Procedure Act* instead of referring a matter back to the Board of Variance the courts have the power to set aside the decision of the Board of Variance and put an end to the matter.

Here are two examples of how the *Judicial Review Procedure Act* has been used to require Boards of Variance to re-hear appeals.

1. Notices must be mailed to owners of properties adjacent to the property subject to appeal. In one court case, notices were not mailed to owners of properties separated by a 50 foot road allowance from the subject property. The court found these owners were "adjacent" and should have received notice. The Board of Variance had to re-hear the appeal after giving notice. The court did not direct the original decision be changed, only that the application be re-heard.²
2. A Board must hear an appeal regarding whether a structure results in inappropriate development of the site. In this court case the Board had a policy to not hear an appeal after construction. The court ruled that a policy cannot override a statutory duty, and ordered that the Board of Variance policy be quashed and the matter be remitted to the Board for a hearing on its own merits.³

Summary of Categories of Appeal

Table 1 provides an overview of the five types of appeals that can be made to the Board of Variance, offers examples of each category and notes the availability of further appeals from Board of Variance decisions. Appeals from Board of Variance decisions are discussed in more detail in s. 4.0.

TABLE ONE

Summary of Types of Court Appeals			
Type of Appeal		Examples	Appeal
1.	Siting, Dimensions on Size of Building or Structure s. 901(1)(a)	<ul style="list-style-type: none"> ▪ intrusion into side yard ▪ increase in height of a building 	Procedure matters only
2.	Protection of Trees s.901(1)(b)		Procedure matters only
3.	Alteration or Addition of Non-conforming Structure s. 901(1)(c)	<ul style="list-style-type: none"> ▪ additions ▪ fire exits 	Procedure matters only
4.	Relaxation of Subdivision Servicing Requirements s. 901(1)(d)	<ul style="list-style-type: none"> ▪ subdivision of large agricultural or industrial parcel 	Procedure matters only
5.	Extent of Damage Preventing Reconstruction of a Non-Conforming Building s.902		Yes Appeal to Supreme Court

² The Owners, Strata Plan No. 60 v. Town of Sidney(1981), B.C.D. Civ. 3006-01, Judge Wallace

³ Hale v. White Rock Board of Variance, (1985), N.W.R., A850411, Madam Justice Proudfoot

POTENTIAL PROBLEMS

Development Permits and Development Variance Permits

A community plan may provide for the issuance of *development permits* by a council or regional board in order to vary or supplement certain regulations under special circumstances defined in the legislation. Any subdivision or construction in the areas identified must satisfy the conditions of a permit before construction.

An owner may apply for, and a local government may issue, a *development variance permit* which varies provisions of bylaws adopted under Division 7 (Zoning and Other Development Regulations), Division 8 (Use of Land for Agricultural Operations), Division 11 (Subdivision and Development Requirements), of the *Local Government Act* with the agreement of the land owner. Such permits are voluntary and cannot vary the use or density of use of land or flood plain specifications of a bylaw under section 910 of the *Local Government Act*.

Variances granted by a Board of Variance are not the same as development permits. The Board deals only with matters where, in its opinion, there has been undue hardship will be incurred by an individual if he must comply strictly with certain regulations. Development permits and development variance permits are entirely different.

This does not mean that an application for one appeal precludes an application to the other authority. If an appeal to a Board of Variance fails because the Board does not believe the variance is justified or because undue hardship has not been shown, and thus the appeal is not within its jurisdiction, the applicant may approach the council or regional district board in an attempt to achieve the same end through a development variance permit. In this case a local government would be changing its policy which a Board of Variance is not authorized to do. However, development variance permits are intended to apply only where a development is to be initiated. They should not be used as a retroactive agreement to legalize the contravention of a siting provision.

The Board cannot hear an appeal to vary a provision in a development permit or development variance permit. Only a council or regional district board may amend a development permit or development variance permit. These involve actually changing a regulation which is outside the jurisdiction of a Board of Variance.

Liability

Section 287 of the *Local Government Act* provides some protection for members of Boards of Variance against liability for decisions they have made. It provides that no action for damages lies or may be instituted against a Board of Variance member or a former Board of Variance member for:

- (a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of that person's duty or the exercise of the person's power, or
- (b) for any alleged neglect or default in the performance or intended performance of that person's duty or exercise of that person's power.

The legislation goes on to say that the above is not a defense if

- (a) the member has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or willful misconduct, or
- (b) the cause of action is libel or slander

Also the immunity outlined above would not absolve a Board of Variance from vicarious liability arising out of a tort committed by any of the members of a Board for which the Board of Variance would be liable had this provision not been in force.

Constitutional Challenges

The *Charter of Rights and Freedoms*, s. 15, equality provisions may be used to challenge Board of Variance decisions, i.e., equal protection and equal benefit of the law is guaranteed. In order to answer such challenges, Boards are encouraged to make material relating to pending appeals available to the public so interested parties will know what the appellant is requesting. See Section 4(g) of the sample bylaw. Appellants should be encouraged to state their case in their notice of appeal on a form standard to all appeals.

SUMMARY

This publication is intended to clarify the purpose and function of a Board of Variance under the provisions of the British Columbia *Local Government Act*.

The provisions of the *Local Government Act* do not extend any special rights of representation to the local government that establishes a Board of Variance. These Boards function separately under their own authority. As a quasi-judicial tribunal they must be meticulous in preventing any bias or appearance of bias in their actions.

A Board of Variance may not make decisions that change the intent and purpose of bylaws adopted by a local government. It may allow minor variance of some provisions of bylaws under specified circumstances. Members of a Board of Variance are not elected and they may not make or change policy decisions of local government.

A bylaw to establish a Board of Variance can set down very general procedures or prescribe detailed procedures for presentation of evidence and notification. The level of detail appropriate will depend on the needs of the individual area. The sample bylaw provisions in Appendix 2 illustrate the maximum formality from which each jurisdiction may select a level of detail suitable for its needs.

The legislation makes the Board of Variance responsible for maintaining a record of its decisions and for ensuring this is available for public scrutiny.

APPENDIX ONE

Local Government Act Provisions for Boards of Variance

- 899** (1) A local government that has adopted a zoning bylaw must, by bylaw, establish a board of variance.
- (2) If the population of a municipality is 25 000 or less, the board of variance for the municipality is to consist of 3 persons appointed by the council.
- (3) If the population of a municipality is more than 25 000, the board of variance for the municipality is to consist of 5 persons appointed by the council.
- (4) A board may establish one or more boards of variance, but, if more than one board of variance is established, the bylaw establishing them must specify the area of the regional district over which each board of variance is to have jurisdiction and those areas must not overlap.
- (5) Each board of variance in a regional district is to consist of 3 persons appointed by the board.
- (5.1 Two or more local governments may satisfy the obligation under subsection (1) by jointly
) establishing a board of variance by bylaw adopted by all participating local governments.
- (5.2 The bylaw in subsection (5.1) must
)
- (a) specify the area of jurisdiction for the board of variance, which may be all or part of the participating local governments, but must not overlap with the area of jurisdiction of any other board of variance, and
- (b) establish rules for
- (i) appointment and removal of members of the board of variance, and
- (ii) appointment and removal of a chair of the board of variance,
- which apply in place of those established by this section and section 900.
- (5.3 As an exception to subsections (2) to (5) in relation to a board of variance established under
) subsection (5.1),
- (a) if a municipality is one of the participating local governments, the board of variance is to consist of
- (i) 3 persons, if the population of the area of the jurisdiction of the board of variance is 25 000 or less, or
- (ii) 5 persons, if the population of the area of the jurisdiction of the board of variance is more than 25 000, and
- (b) if a municipality is not one of the participating local governments, a board of variance is to consist of 3 persons.
- (6) Subject to subsection (9) and to the rules established under subsection (5.2) (b) (i), an appointment to a board of variance is for the later of
- (a) 3 years, and
- (b) if no successor has been appointed at the end of the 3 year period, until the time that a successor is appointed.
- (7) A person who is
- (a) a member of the advisory planning commission or of the local government, or
- (b) an officer or employee of the local government
- is not eligible to be appointed to a board of variance.
- (8) If a member of a board of variance ceases to hold office, the person's successor is to be appointed in the same manner as the member who ceased to hold office, and, until the appointment of the successor, the remaining members constitute the board of variance.
- (9) A local government may rescind an appointment to a board of variance at any time.
- (10) *Repealed.* [2003-15-15(g)]

- (11) Members of a board of variance must not receive compensation for their services as members, but must be paid reasonable and necessary expenses that arise directly out of the performance of their duties.
- (12) A local government must provide in its annual budget for the necessary funds to pay for the costs of the board.
RS1979-290-961(1) to (6), (9) to (11), (13), (14); 1985-79-8; 1987-14-25; 2000-7-148; 2003-15-15.

Chair and procedures

- 900. (1) The members of a board of variance must elect one of their number as chair.
- (2) The chair may appoint a member of the board of variance as acting chair to preside in the absence of the chair.
- (3) A bylaw establishing a board of variance must set out the procedures to be followed by the board of variance, including the manner by which appeals are to be brought and notices under section 901 (4) are to be given.
- (4) A board of variance must maintain a record of all its decisions and must ensure that the record is available for public inspection during normal business hours.
RS1979-290-961(7), (8), (12), 962(10); 1985-79-8; 1987-14-25.

Variance or exemption to relieve hardship

- 901. (1) A person may apply to a board of variance for an order under subsection (2) if the person alleges that compliance with any of the following would cause the person hardship:
 - (a a bylaw respecting the siting, dimensions or size of a building or structure, or
) the siting of a manufactured home in a manufactured home park;
 - (b a bylaw under Division 2 of Part 22, other than
)
 - (i) a bylaw under section 711, or
 - (ii) a bylaw that has an effect referred to in section 714 (1), if the council has taken action under subsection (2) of that section to compensate or mitigate the hardship that is caused to the person;
 - (c the prohibition of a structural alteration or addition under section 911 (5);
)
 - (d a subdivision servicing requirement under section 938 (1) (c) in an area zoned
) for agricultural or industrial use.
- (2) On an application under subsection (1), the board of variance may order that a minor variance be permitted from the requirements of the bylaw, or that the applicant be exempted from section 911 (5), if the board of variance
 - (a has heard the applicant and any person notified under subsection (4),
)
 - (b finds that undue hardship would be caused to the applicant if the bylaw or
) section 911 (5) is complied with, and
 - (c is of the opinion that the variance or exemption does not
)
 - (i) result in inappropriate development of the site,
(i.1) adversely affect the natural environment,
 - (ii) substantially affect the use and enjoyment of adjacent land,
 - (iii) vary permitted uses and densities under the applicable bylaw, or
 - (iv) defeat the intent of the bylaw.
- (3) The board of variance must not make an order under subsection (2) that would do any of the following:
 - (a be in conflict with a covenant registered under section 219 of the *Land Title Act*
) or section 24A of the *Land Registry Act*, R.S.B.C. 1960, c. 208;
 - (b deal with a matter that is covered in a permit under Division 9 of this Part or
) covered in a land use contract;
 - (c deal with a flood plain specification under section 910 (2);
)

(d apply to a property
)

- (i) for which an authorization for alterations is required under Part 27,
- (ii) that is scheduled under section 970.1 (3) (b) or contains a feature or characteristic identified under section 970.1 (3) (c), or
- (iii) for which a heritage revitalization agreement under section 966 is in effect.

(4) If a person makes an application under subsection (1), the board of variance must notify all owners and tenants in occupation of

(a the land that is the subject of the application, and
)

(b the land that is adjacent to land that is the subject of the application.
)

(5) A notice under subsection (4) must state the subject matter of the application and the time and place where the application will be heard.

(6) The obligation to give notice under subsection (4) must be considered satisfied if the board of variance made a reasonable effort to mail or otherwise deliver the notice.

(7) In relation to an order under subsection (2),

(a if the order sets a time within which the construction of the building, structure
) or manufactured home park must be completed and the construction is not completed within that time, or

(b if that construction is not substantially started within 2 years after the order was
) made, or within a longer or shorter time period established by the order, the permission or exemption terminates and the bylaw or section 911 (5), as the case may be, applies.

(8) A decision of the board of variance under subsection (2) is final.

RS1979-290-962(1), (2), (4) to (7), (9); 1985-79-8; 1987-14-26; 1989-40-161; 1990-53-12; 1992-18-90; 1992-79-7; 1994-43-69; 1994-52-109; 1997-24-9 (B.C.Reg. 354/97); 2000-7-149(b), (c).

Extent of damage preventing

reconstruction as non-conforming use

902 (1) A person may apply to a board of variance for an order under subsection (2) if the person alleges that the determination by a building inspector of the amount of damage under section 911 (8) is in error.

(2) On an application under subsection (1), the board of variance may set aside the determination of the building inspector and make the determination under section 911 (8) in its place.

(3) The applicant or the local government may appeal a decision of the board of variance under subsection (2) to the Supreme Court.

RS1979-290-962(1)(b), (3), (8); 1985-79-8; 1987-14-26; 1989-40-161; 1990-53-12; 1992-18-90; 1992-79-7; 1994-43-69; 1994-52-109.

APPENDIX TWO

Sample Bylaw Provisions

Board of Variance

Establishment

Pursuant to Section 899 of the *Local Government Act*, a Board of Variance is hereby established.⁴

Secretary

The council (or regional district board) shall appoint a Secretary to the Board of Variance. The responsibilities of the Secretary are:

- a) to receive notices of appeal
- b) to determine whether the appeal another matter outside the jurisdiction of the Board of Variance or whether the appeal involves a matter within the jurisdiction of the Board of Variance, specifically whether it seeks to vary a matter covered in the following:
 - a restrictive covenant;
 - a development permit or a land use contract;
 - a flood plain specification under LGA s. 910(2) or
 - specified matters in Part 27 of the *Local Government Act*
- c) if the appeal is outside the jurisdiction of the Board of Variance to notify the appellant
- d) if it is within the Board's jurisdiction to notify the chairperson of the Board of Variance of the receipt of notice of appeal
- e) to ensure that proper notification is given in compliance with this bylaw
- f) to keep proper records of the Board of Variance proceedings, and
- g) to maintain a record of all decisions of the Board and make it available to the public in the municipal office (or regional district office) during normal business hours.

Meetings

- a) A meeting of the Board of Variance shall be held on the first Wednesday of each month, unless otherwise determined by the chairperson of the Board of Variance in consultation with the Secretary and all other members of the Board of Variance.

⁴ An alternate wording which may be used by regional district boards or island trust committees is: "Pursuant to Section 899 of the *Local Government Act*, a Board of Variance is hereby established for those areas of the regional district for which zoning bylaw "100" is applicable".

- b) In the event that no notice of appeal is deposited with the Secretary to the Board of Variance at least 7 calendar days prior to the date of the next meeting, then no meeting need be held.
- c) A meeting of the Board of Variance on a particular appeal shall be held not more than 40 days after the date of receipt of the notice of appeal unless an extension is allowed by the written consent of the appellant.
- d) The Board of Variance shall be convened by the chairperson on the date of hearing and at the time and place set out in the notice.
- e) The Board of Variance shall hear all representations made to the Board.
- f) The deliberations of the Board of Variance shall be open to the public.

Notice of Appeal

- a) Any person desiring to appeal to the Board shall file a written notice of appeal with the Secretary of the Board. The notice shall state clearly the grounds upon which the appeal is based and the relief sought, and shall give an address to which all notices respecting an appeal hearing may be mailed.
- b) Where the appeal is based upon a determination of value made pursuant to section 902 of the *Local Government Act*, the notice of appeal shall be filed with the Secretary of the Board within 30 days of the making of the determination.
- c) The Secretary, upon the filing of an appeal, shall notify the chairperson of the Board of the appeal.
- d) Upon receipt of the decision of the chairperson on whether there should be public notice and the determination of a hearing date, the Secretary shall send by registered mail or otherwise deliver, not less than 7 days prior to the date of the hearing, notice of the hearing to:
 - i) the members of the Board of Variance,
 - ii) the appellant,
 - iii) the registered owners as shown on the last revised assessment roll and all occupiers of the subject property and all real property located adjacent to the parcel which is the subject of the appeal, including those separated by private or public rights-of-way,
 - iv) if an appeal under *Local Government Act* s. 902 the official whose Interpretation is being appealed.

- e) The notice of the hearing shall state the date, place and time of the appeal hearing and shall include a copy of the notice of appeal.
- f) Public notice of the hearing, if ordered by the Board, shall be given by publication of a notice stating the time and place of the hearing and the general nature of the appeal in not less than 2 consecutive issues of a newspaper published or circulating in the municipality (or electoral area), with the last such publication appearing not less than 3 days nor more than 10 days before the date of the hearing.
- g) The Secretary shall upon receipt of any notice of appeal, or of any written evidence entered before the hearing including staff reports, permit the same to be inspected at the Secretary's office during regular office hours.

Conduct of Hearing

- a) A quorum for the hearing is 4 members if the Board numbers 5 and 2 members if the Board numbers 3. If the Chairman is absent for a hearing, those present may appoint an acting chairperson for the duration of that hearing.
- b) Any person or body with interest in property within the municipality (or regional district) is entitled to be heard at the hearing and is entitled to be represented by a solicitor or by an agent duly appointed in writing.
- c) Any person represented, in accordance with subsection 5(b), whether or not also attending in person, shall be deemed to be a party attending the hearing.
- d) Evidence at a hearing may be given orally or in writing.
- e) The Board shall not hear oral evidence except at a regularly constituted hearing of the subject matter of that evidence.
- f) No member of the Board shall discuss the merits of the appeal with any person who is not a member of the Board or the Secretary, before the Board has reached a decision.
- g) The appellant shall be afforded the first opportunity to present his evidence and arguments, and thereafter, evidence and arguments shall be presented in such sequence as the chairperson may direct until all parties to the appeal have been afforded an opportunity to present their evidence and arguments.
- h) The Board may view the property affected by the appeal and surrounding properties. The Board may adjourn the hearing from time to time and may reconvene without further published notice if the time, date and place of reconvening is announced at adjournment.

- i) If the appellant or other persons notified do not appear at the hearing or any adjournment thereof, and have not advised the Secretary in advance that they wish to be heard at another date, the Board may proceed to decide the appeal in his absence.

Decision

- a) The decision of the Board shall be by a majority of those members present and made within 7 days of the hearing.
- b) The Secretary shall, within 7 days of a decision, send by registered mail or otherwise deliver the written decision of the Board of Variance to the appellant, all persons who made representation at the hearing and the local government building inspector.
- c) The Secretary shall, within 7 days of the decision, enter that decision in the record maintained at the local government office.

APPENDIX THREE

Suggested Criteria for Selecting Appointees to a Board of Variance

Purpose

The purpose of this appendix is to provide councils with guidance in selecting community members to sit on a board of variance.

Background Considerations

The following background information will assist councils in considering potential candidates as well as guide potential board members as to whether they wish to serve or not.

- Boards of Variance (BOV) are established where there are zoning bylaws in rural areas, small villages, towns and large urban centers.
- The caliber and availability of suitable members will vary depending upon the number of residents in any one area. It is reasonable to assume that larger centers will have more and more qualified, potential appointees.
- The number of BOV meetings required may vary from region to region.
- The *Local Government Act* prohibits a member of the Advisory Planning Commission or an officer or employee of the local government from being appointed to a BOV.
- Members of the BOV do not receive compensation. However, individual expenses (i.e. gas, mileage) and operating expenses of the BOV must be covered in the annual budget of the local government
- Appointment requires a three-year commitment from members.
- Open meeting legislation applies to the meetings. This means all meetings must be in public.

Criteria

The following outlines criteria for selecting candidates to a Board of Variance.

Experience and Association

- Public or private sector experience in the delivery of public programs or services
- Practical experience in research, analysis, land use planning or local governance
- Resident and respected member of community
- Member of a community organization
- Business owner

Skills and Abilities

- Ability to make decisions
- Ability to assess case-specific information and to visit sites under consideration
- Ability to avoid bias or the appearance of bias in one's actions and decisions
- Ability to think independently and express opinions
- Ability to establish and maintain effective working relationships with planning staff and council
- Ability to collaborate and communicate effectively with colleagues
- Must be literate and able to read a large volume of related material, including architectural plans
- Must exercise sound judgment
- Must be objective
- Must demonstrate tact and diplomacy in dealing with sensitive or contentious issue