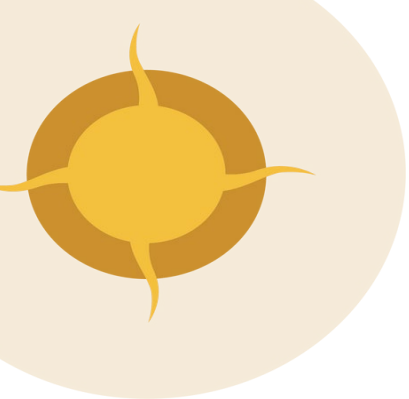




Best Practices for Discretionary Decision-Making

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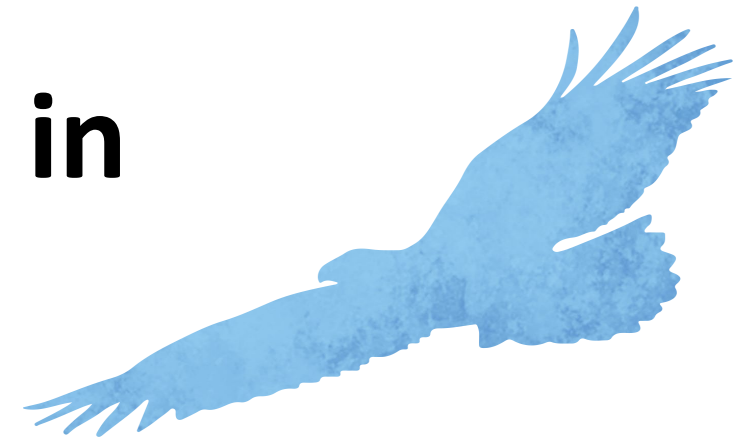


Overview

- Discretionary v. as-of-right laws
- Best practices for decision-making
- Common law and human rights legal considerations
- Specific v. general considerations
- How the RC can help



Discretionary and As-of-Right in Decision-Making



- **Discretionary:**
 - Whereby Chief and Council hold decision making authority and final approval even when proposed development aligns with relevant laws and policy.
- **As-of-Right:**
 - Whereby development is permitted if it conforms with and adheres to relevant laws and policy. In as of right contexts, decision makers are bound to what limits exist in the laws.

Discretionary v. As-of-Right

Discretionary	As-of-Right
Chief and Council <u>may approve</u> ...	The Lands Manager <u>shall approve</u> ...
No guarantee of permit issuance	Permit issued upon meeting x, y, z development standards
Types of development applications: - LUP Amendment / Rezoning Amendment - Discretionary Use / Development - Variance - Change to a Legal Non-Conforming Use / Development - Development Permit Only (Rare with Municipalities)	Types of development applications: - Development Permit Only
Typically includes a community engagement or public notice component	Typically does not include a community engagement or public notice requirement
Typically used for complex developments requiring tailored development approvals	Typically used for simple developments (e.g. decks, signs, accessory buildings, detached homes)
High level of control / right of refusal	Predictable / developer preferred

Discretionary Example: Subdivision, Servicing, and Development Law

As soon as practicable after receiving the application and information set out in section X, Council shall decide whether to approve the application, and without limiting the generality of Council's authority, Council may:

- a) reject the application; or*
- b) approve the application with any reasonable terms or conditions, including but not limited to, terms and conditions relating the items set out in section Y.*



Decision-Making: Best Practices

- Is procedurally fair, transparent, clear and consistent during the development application process
- Follows the processes set out in Land Code and land laws
- Demonstrates consistent and reasonable decision-making (e.g., following policy/objective direction of the Land Use Plan)
- Avoids bias and discrimination
- Where possible, supports decision-making with analyses (especially important with discretionary decision-making)

Decision-Making: Reasonableness

- **Reasonableness** is the standard by which courts will measure a decision or process
- If challenged, a decision must be **reasonable** for a court not to interfere with it
- The route to a decision must be plain to see on the record:
 - Clarity in Land Code and land laws
 - Records of decision-making process (e.g., briefing reports, Lands Advisory Authority minutes/recommendation, additional reports and studies)



Decision-Making: Procedural Fairness

- **Procedural Fairness** involves the processes that must be followed before, during, and after a decision is made
- If a decision is challenged, the courts may check for evidence of:
 - Clear communication
 - Timeliness
 - Proper record-keeping
 - Proper notice
 - Clear reasons for the decision including the consideration of how input was received or heard
 - The applicant's opportunity to be heard and/or present case

Decision-Making: Bias

Conflict of interest can lead to **Bias**. For example, if Chief and Council interact with proponent lobbyists and render a decision without hearing from the community, the decision could be bias.

Decision-maker(s) should consider an application with an open mind before rendering a decision.

"A councillor is not disqualified by reason of bias unless they have prejudged the matter to the extent that they are no longer capable of persuasion"

Decision-Making: Administrative Discrimination

Administrative Discrimination “relates to the drawing of distinctions between persons or classes that ... ‘do not apply equally to all those engaged in the activity that is the subject of the enactment’”.

Administrative Discrimination is different than human rights or *Charter* sense.

Decision makers should consider how the land is used, not who uses it; careful attention is needed to avoid conditions that effectively regulate people rather than land use to avoid **Administrative Discrimination**.

If in doubt, seek legal counsel on the legality of the proposed conditions.

Specific Considerations

Specific Considerations	Example of Supporting Analysis
Compliance with Laws and Regulations	Internal Staff Report Assessment of Laws and Regulations
Development in Hazardous Areas (E.g., Flood Risk Area, Landslide Zone, Unstable Slopes)	Staff Report Assessment OR External/Consultant Professional Engineer Report
Protection of Cultural and Heritage Sites	Internal Staff Assessment of Development Proximity to Cultural and Heritage Sites
Shadow Casting	External Consultant Professional Architect or Engineer Shadow Study
Traffic Generation and On-site Parking	External Consultant Professional Engineer Traffic Impact Study (TIS)
Site Operations (E.g., Large Truck Movements, Unloading)	Staff Report Assessment of Operations OR (Applicant) Business Operations Plan OR External/Consultant Certified Engineering Technologist (Auto Turn Report for Large Truck Movements)
Light Emissions from Exterior Lighting and Signage	Staff Report Assessment of Signage Specifications OR External/Consultant Professional Architect or Engineer Projected Light Emissions Study

General Considerations

General Considerations	Example of Supporting Analysis
Alignment with Land Use Plan	Internal Staff Report Assessment of Land Use Plan Policies OR External/Consultant Professional Planner Development Application Report
Promotion of Health, Safety, Convenience, and Welfare of Members	Internal Staff Report Assessment of Community Compatibility OR External/Consultant Professional Planner Community Compatibility Report
Compatibility with Culture	Internal Staff Report Assessment of Compatibility with Culture (Input from Elders, Knowledge Keepers)
Viewscales, Aesthetics, and Visual Qualities	Internal Staff Report of Land Use Plan Policies OR External/Consultant Professional Architect / Professional Planner Design Report
Neighbourhood Character	Internal Staff Report Assessment of Neighbourhood Compatibility OR External/Consultant Professional Planner Land Use Compatibility Report
Impact on Adjacent Uses, Owners, and Occupants	Internal Staff Report Assessment of Neighbourhood Compatibility OR External/Consultant Professional Planner Land Use Compatibility Report
Community Engagement Feedback	Internal Staff Summary of Community Engagement

How the Resource Centre Can Help

- Interpretation of your development/zoning laws
- Gap analysis of development framework
- Assistance with development approval processes
- Tools and tips to strengthen development laws
- Future workshops

Q & A



Thank you

