

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2011-0064

CITY OF WINNIPEG – BOARD OF ADJUSTMENT

REPORT ISSUED ON AUGUST 19, 2014

CASE SUMMARY

The Board of Adjustment issued an order rejecting the complainant's variance application because it did not meet the criteria as set out in *The City of Winnipeg Charter*. However, the board did not explain why the criteria were not met. The complainant was concerned about the lack of reasons given for the decision and did not understand why her application had been rejected.

Our investigation found that the Board of Adjustment had never provided the complainant with meaningful reasons for its decision, written or otherwise. We note the board is required by law to provide written reasons for its decisions.

Our investigation also found that the Board of Adjustment's decision was based on irrelevant considerations rather than the criteria set out in statute. As such, the decision was clearly unreasonable.

In response to a draft report setting out our findings in this matter, the City of Winnipeg advised us of the administrative improvements made to the board's practices during the course of this investigation and agreed to waive application costs for a new application from the complainant. In light of that response we found that no recommendation was necessary in this case.

OMBUDSMAN JURISDICTION AND ROLE

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

In this matter, the actions and decision complained about are matters of administration arising from a variance application hearing conducted by the Board of Adjustment and its decision pursuant to *The City of Winnipeg Charter*.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached; the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision-making process.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

THE COMPLAINT

On January 24, 2011, the Manitoba Ombudsman received a complaint regarding the decision by the City of Winnipeg's Board of Adjustment to reject a variance application. The complainant explained that she did not understand why her application had been rejected and she was troubled by the lack of reasons given for the decision.

KEY ISSUES

1. Was the Board of Adjustment's decision consistent with procedural requirements set out in legislation, regulation and policy?
2. Was the Board of Adjustment's decision clearly wrong or unreasonable?

BACKGROUND INFORMATION

There are two residential structures on the complainant's property. The principal structure is divided into two suites. The secondary structure is a one-suite carriage house which has been sporadically occupied for the last 75 years. The tenant-occupied carriage house came to the city's attention in 2009 when a neighbor phoned the city with a complaint. The city investigated and found no health or building code issues. However, there was no occupancy permit for the carriage house, despite the property being taxed as a triplex. The city requested that the complainant apply for the necessary permits to formalize the carriage house as the third unit.

The complainant originally applied to the City Centre Community Committee to rezone her property from its R1 designation (single family) to R2 (multi family). She withdrew her application on advice from the committee who informed her that it would most likely reject the application. The committee was concerned that the rezoning was not supported by the neighbourhood and that it could set a precedent leading to intensive development.

In response to the concerns about the potential long-term effects of a rezoned property, the complainant decided to apply for a variance order which would allow her to get an occupancy permit for the carriage house without rezoning the property. *The City of Winnipeg Charter* sets out the criteria for approving variance applications:

Criteria for approving variances

247(3) An application for a variance with respect to a property may be approved if the variance

- (a) is consistent with Plan Winnipeg and any applicable secondary plan;*
- (b) does not create a substantial adverse effect on the amenities, use, safety and convenience of the adjoining property and adjacent area, including an area separated from the property by a street or waterway;*
- (c) is the minimum modification of a zoning by-law required to relieve the injurious effect of the zoning by-law on the applicant's property; and*
- (d) is compatible with the area in which the property to be affected is situated.*

The complainant obtained an administrative report ("planning report") from Winnipeg's Planning and Land Use Division assessing her variance application. The planning report notes that:

- no new construction is taking place;
- the application would allow the carriage house to be legally established without changing the underlying zoning of the property;
- the application would formalize a long-standing situation; and
- the property is significantly larger than adjacent properties and is on a busy corner.

In light of these factors, the planning report concludes that the application meets the statutory criteria set out in subsection 247(3) of *The City of Winnipeg Charter* in that:

- the carriage house is consistent with Plan Winnipeg;
- the carriage house does not have a substantial adverse effect on adjacent properties;
- the variance application is the minimum modification required to comply with the zoning by-law; and
- the carriage house is compatible with the area.

As a result, the planning report recommends approving the variance application, subject to two conditions. First, that the structures on the property be kept in conformance with the plans attached to the application. Second, that if the carriage house is removed or destroyed, the variance be terminated.

The complainant's variance application was heard by the Board of Adjustment on January 30, 2010. She included the planning report in her evidence. Two of the complainant's neighbours spoke in opposition to the variance. After the hearing, the board rejected the complainant's application for not meeting the statutory criteria. No further analysis or rationale for the decision was provided.

The complainant was also unsuccessful in her appeal to the Appeal Committee heard March 4, 2010. The Variance Appeal Order states that "[u]pon the evidence adduced and submissions made..." the criteria set out in *The City of Winnipeg Charter* subsection 247(3) are not met.

POSITION OF COMPLAINANT

The complainant does not understand why the board rejected her variance application. She applied for a variance to formalize using the carriage house as a third unit. The planning report recommended the board approve the variance. However, the board rejected her application stating it did not meet the statutory criteria. The complainant is of the view that the board "listened only to the opinion of persons opposed to her application and failed to take in consideration that 'the purpose of this hearing was not to weigh public opinion but to determine whether the requirements for ... approval had been met.'"

POSITION OF THE CITY CLERK DEPARTMENT

The City Clerk Department's ("the city clerk") view was that the order issued by the board adequately set out the reasons for the decision. In an email of August 25, 2011, the city clerk explained:

The Board of Adjustment, in deciding on each application, makes a determination whether or not the application meets the criteria set out in The Charter [The City of Winnipeg Charter]. This determination is made in the form of a motion, and recorded in the committee minute documents. This is deemed to be the supporting reasons for the Board's decision.

The city clerk also explained that if applicants wish to understand the interpretation and rationale for decisions, they can obtain audio recordings of board hearings for a fee.

SCOPE OF THE INVESTIGATION

Our investigation of the complaint included the following actions:

- discussions with the complainant;
- a review of the complainant's documentation, including her variance application and supporting documents;
- meeting with Planning, Property and Development Department staff to gather information on the variance application process;
- a review of relevant legislation, in particular *The City of Winnipeg Charter* and the *Board of Adjustment By-law*;
- a review of the audio recording of the Board of Adjustment hearing;
- communications with the city clerk regarding hearing practices and requirements; and
- communications with the city clerk and the Planning, Property and Development Department to attempt to resolve the complaint.

COMMUNICATIONS WITH THE CITY

In a letter dated January 4, 2012, our office wrote to the city clerk outlining our understanding of the board's responsibilities and requesting a response:

Our office's understanding is that the Board of Adjustment's current practice when rejecting a variance is to inform an applicant that she did not meet the four criteria from s. 247(3) of The City of Winnipeg Charter. No information is provided as to which criteria were not met, or why the Board of Adjustment concluded that the criteria were not met. Section 17 of The Board of Adjustment

By-law requires written reasons for its decisions. Making reference to s. 247(3) of The City of Winnipeg Charter does not appear to adequately provide applicants with an understanding of why their application was not approved. Further analysis by the Board of Adjustment explaining why the application did not meet the criteria of s. 247(3) in writing to the applicant appears to be required in order to comply with the by-law.

I am referring this matter to you for review and would appreciate receiving your perspective on this matter. Please let me know if there are other statutory provisions that would allow the Board to reject an application without providing reasons.

The city clerk acknowledged receipt of our letter and indicated that it was reviewing the matter and would respond once the review was complete. This was followed by a letter dated April 20, 2012 where the city clerk informed us:

...we are currently reviewing the processes for variance and conditional use applications heard by the Board of Adjustment, to consider revisions to the information communicated in the decisions. The purpose of such revisions would be to improve the transparency of the Board of Adjustment's decision-making while complying with legal requirements.

I will keep you apprised of progress in this matter.

Our office responded in a letter dated May 8, 2012. We acknowledged the ongoing review of the board's procedures and drew attention to the fact that the complainant still did not have reasons for the board's decision:

As you know, [complainant] advised that she did not receive written reasons for the Board of Adjustment's decision on her variance application, and she remains unaware of why the Board of Adjustment made the decision to deny her variance application.

We would greatly appreciate receiving any information you can provide that would assist us in our review of her complaint.

Our office did not receive a response. In a letter dated November 6, 2012, we again brought the matter to the attention of the city clerk and requested a written response.

In a letter dated November 8, 2012, the city clerk acknowledged receipt of our letter and indicated:

We are currently reviewing processes for variance and conditional use applications heard by the Board of Adjustment and hope to see a report go forward to the political decision making forum in the near future.

In a letter dated February 8, 2013, our office acknowledged the ongoing review and once again requested further information about the complainant's specific matter:

In an effort to address the individual complaint of [complainant] our office would appreciate clarification of the following:

- *Is the City of Winnipeg prepared to provide [complainant] with clear and understandable written reasons why her variance application was denied?*
- *If so, when might the City of Winnipeg be able to do so?*

Alternatively, if the Board of Adjustment cannot sufficiently explain why it made its decision, is it willing to rehear [complainant's] matter in an effort to address this situation? If so, given these special circumstances, could you please confirm that [complainant] would not be responsible for any filing/application costs associated with this new hearing.

In closing, our office would also appreciate an update as to when the City of Winnipeg anticipates the broader review of the variance and conditional use processes will be complete.

Thank you for your assistance in this matter. I am hopeful that by working together collaboratively we can achieve an equitable resolution in the near future and bring closure to [complainant's] complaint.

The city clerk's response, dated March 25, 2013, suggested the complainant could make a new variance application, but did not provide a means of resolving the complainant's specific complaint about the board's lack of reasons for its decision:

As you are aware, [complainant's] application was considered by two separate hearing bodies comprised of different members, the Board of Adjustment and the Appeal Committee. Based on the submissions/presentations made at each hearing, both hearing bodies arrived at the conclusion that the application did not meet the required criteria for approval set out in subsection 247(3) of The City of Winnipeg Charter.

Unfortunately it is not possible for the Board of Adjustment to alter its decision in the application. We have previously provided an audio recording of the hearing at the Board, which may help shed additional light on the concerns the Board had about the application.

It is open to [complainant] to make a new application to the City for development approvals for her property. Under the City's Planning, Building and Development Fees By-law, the Director of Planning, Property and Development is authorized to waive all or part of certain application fees where he is satisfied that the imposition of the fees would be unfair in the circumstances. [Complainant] can

request waiver or reduction of application fees by writing to [the Administrator of Zoning and Permits].

[Administrator]'s decision may be appealed to the Standing Policy Committee on Property and Development.

While waiting for the results of the review of the board's procedures, our office pursued the possibility of the complainant's fees being waived on a new variance application. On October 7, 2013, we contacted the administrator of Zoning and Permits. He explained that according to City of Winnipeg policy there is only one exception to the requirement to pay application fees: when there is a public interest purpose to the application. As the complainant's situation does not fit that exception, the application fees would not be waived. However, the administrator of Zoning and Permits also indicated that the director of Planning, Property and Development has discretion to waive application fees in particular circumstances.

Our office then contacted the office of the director of Planning, Property and Development on October 17, 2013, requesting a meeting to discuss the complaint. On October 24, 2013, the director's office contacted our office seeking information about the property to determine if the application fees could be waived. We reiterated our desire for a meeting and provided the director's office with the requested information. On October 29, 2013, the administrator of Zoning and Permits contacted our office, explaining that he would be our contact for this matter. On November 20, 2013, our office was notified by the administrator that the director had declined to waive the application fee.

On May 23, 2014, our office forwarded a draft report containing our analysis and findings to the new acting chief operating officer for consideration, with an invitation to provide any further response. Subsequently, after discussions between the acting chief operating officer and the acting ombudsman, it was determined that the matter could be concluded without a formal recommendation to council.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was the Board of Adjustment's decision consistent with procedural requirements set out in the legislation, regulations and policies?

The Board of Adjustment is responsible for issuing conditional use and variance orders pursuant to the *Board of Adjustment By-law No. 5894/92*. The board is made up of five citizen members appointed by city council. A number of the board's procedural responsibilities are set out in the by-law, including:

- holding public hearings on applications (s. 12);
- issuing orders approving or rejecting applications in accordance with the criteria set out in *The City of Winnipeg Charter* (s. 4(1)(a)); and
- providing written reasons for decisions (s. 17).

The complainant submitted her variance application to the board and a hearing was held on January 13, 2010. At the hearing, the complainant presented evidence in support of her application, including the planning report recommending approval of the application. Two neighbourhood residents made submissions opposing the application. They argued that the variance would set a precedent in the area for allowing multi-family dwellings on one lot and change the character of the neighbourhood.

After hearing the evidence, the board issued Variance Order DAV 167763/2009C. It lists the statutory criteria on which the board's decision must be made and rejects the variance application:

It is the opinion of the Board of Adjustment that subject to conditions listed below, if any, this Order meets the statutory criteria of The City of Winnipeg Charter in that it:

- (a) Is consistent with Plan Winnipeg, and any applicable secondary plan;*
- (b) Does not create a substantial adverse effect on the amenities, use, safety and convenience of the adjoining property and adjacent area, including an area separated from the property by a street or waterway;*
- (c) Is the minimum modification of a zoning by-law required to relieve the injurious effect of the zoning by-law on the applicant's property; and*
- (d) Is compatible with the area in which the property to be affected is situated.*

C.W. Charter Subsection 247(3)

ORDER:

*The Board of Adjustment orders the application for a Variance file DAV 167763/2009C is **rejected**. [Emphasis added]*

However, no further written explanation or reasons for the decision were provided by the board.

Our office made enquiries with the board who directed us to the city clerk. We asked for more information about the decisions issued by the board. The city clerk explained that:

The Board of Adjustment, in deciding on each application, makes a determination whether or not the application meets the criteria set out in The Charter. This determination is made in the form of a motion, and recorded in the committee minute documents. This is deemed to be the supporting reasons for the Board's decision.

Our office sought clarification from the city clerk, indicating that the complainant wanted to understand why her application had not met the statutory criteria. The city clerk responded that "interpretation and rationale for a committee's decision is not something recorded in committee minutes". However, the city clerk indicated that an audio recording of the hearing was available, and that it would assist in providing a rationale for the board's decision.

Our office obtained and reviewed the audio recording. Unfortunately, the recording does not clarify the reasons for the decision; the chair does not explain how the evidence before the board relates to the statutory criteria or why the criteria are not met.

Manitoba Ombudsman believes that reasons that explain how, why and on what evidence a decision is made are extremely important. They give decision makers the opportunity to address concerns that have been raised and to let people know that their views were considered. They also form an important part of the record if the decision is appealed. In the board's case, city council has imposed upon it an explicit requirement to provide written reasons through the *Board of Adjustment By-law*:

17. The board shall give written reasons for its decisions on an application.

In this case, no information, oral or written, was provided as to which specific criteria were not met, or why the board concluded that they were not met. Simply restating the wording of the legislation as a reason for its decision is inadequate. As such, Manitoba Ombudsman concludes that the board failed to provide written reasons for its decision to reject the complainant's variance application as required by the *Board of Adjustment By-law*.

2. Was the Board of Adjustment's decision clearly wrong or unreasonable?

As noted above, the board is a quasi-judicial body that performs functions delegated to it by city council. As such, the statutory threshold for Manitoba Ombudsman's review of the board's decision is the "clearly wrong or unreasonable" test set out in section 23 of *The Ombudsman Act*:

Limitation on review of discretionary powers

*23(2) Where, in the course of or after an investigation of any decision, act or omission, done or omitted by a department, agency of the government or municipality, or any officer or employee thereof in the exercise of a discretion vested in that department, agency, municipality, officer, or employee, the Ombudsman is satisfied that the decision, act or omission is not **clearly wrong or unreasonable**, the Ombudsman shall make no further investigation of the matter and shall report to the complainant that he is so satisfied. [Emphasis added]*

The threshold or benchmark of clearly wrong or unreasonable is a significantly higher test than allegations of administrative errors or omissions. A difference of opinion regarding the application of legislation, policy, or the weight given to evidence would not constitute a finding of clearly wrong or unreasonable. There must be conclusive evidence that readily and plainly identifies the imputed error, and that error must be shown to significantly affect the result or decision.

As discussed above, Manitoba Ombudsman obtained and reviewed the audio recording. At the end of the hearing, the board's chair recommends rejecting the application because:

- he is uncertain whether the board was the proper forum to legalize the use of the suite;
- he thinks the application should be for a granny suite rather than a variance; and
- much of the evidence from both sides was hearsay and not accompanied by proof.

As discussed above, the criteria for assessing variance applications is set out in *The City of Winnipeg Charter*:

Criteria for approving variances

247(3) *An application for a variance with respect to a property may be approved if the variance*

- (a) is consistent with Plan Winnipeg and any applicable secondary plan;*
- (b) does not create a substantial adverse effect on the amenities, use, safety and convenience of the adjoining property and adjacent area, including an area separated from the property by a street or waterway;*
- (c) is the minimum modification of a zoning by-law required to relieve the injurious effect of the zoning by-law on the applicant's property; and*
- (d) is compatible with the area in which the property to be affected is situated.*

The chair's statements do not relate to the statutory criteria for approving a variance application. This stands in contrast to the planning report provided by the Planning and Land Use Division – a report which connects the factors it considered to the statutory criteria. While the board's order rejects the application for not meeting the statutory criteria, the chair's rationale for rejecting the application hints at procedural concerns (correct forum, correct application and the nature of the evidence) rather than the criteria.

Manitoba Ombudsman concludes that the board based its decision on irrelevant considerations. The board committed a clear error when it rejected the application based on concerns that are unrelated to the statutory criteria upon which the decision must be made. As such, the board's decision is clearly unreasonable.

CONCLUSION

The board's decision was frustrating for the complainant. She was left with the impression that the board had made its decision based on the opinions of the neighbours who opposed her application, instead of assessing the evidence against the statutory criteria.

The best way for decision makers to demonstrate that they have considered the evidence and arrived at a decision based on relevant considerations is to issue clear reasons for decisions.

Reasons for decisions guide prospective applicants in assessing the possibility of a new application being approved or rejected. Reasons also guide parties in assessing whether to appeal a decision and what evidence and arguments are needed to be successful. While it is understood

that each case must be heard on its own merit; decision makers must put their mind to the reasons behind their decision to reject or approve an application and be comfortable in defending their rationale.

The absence of clear and meaningful reasons for decisions can result in individuals forming the belief that the decision maker was biased and/or the decision itself was unfair. Reasons remove the mystery from the decision-making process.

In our publication *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders*, we discuss the benefits of providing written reasons for council decisions. A copy of this guide can be found at www.ombudsman.mb.ca.

Manitoba Ombudsman concludes that the board failed to provide written reasons for its decision to reject the complainant's variance application, contrary to section 17 of the *Board of Adjustment By-Law No. 5894/92*. Merely referencing the criteria from subsection 247(3) of *The City of Winnipeg Charter* does not explain the rationale for the board's decision. Nor is the availability of an audio recording of the board's hearing sufficient to meet the by-law's requirements for written reasons, particularly when the recording does not identify meaningful reasons for the decision.

In many instances, a defect in decision making at a lower level can be corrected at the appeal level. In this case, the complainant appealed the board's decision to the Appeal Committee and argued the merits of her application. The committee rejected her appeal, stating that "[u]pon the evidence adduced and submissions made..." the criteria set out in *The City of Winnipeg Charter* subsection 247(3) are not met." However, the committee did not comment on the lack of reasons provided by the board.

The board's failure to provide meaningful written reasons has had an ongoing impact on the complainant. It hampered both her ability to effectively appeal the decision, and her ability to take steps to address any deficiencies that would exist in a new variance application. It also perpetuates the situation where her property is taxed as a triplex, though she is not permitted to have a tenant in the carriage house.

Consequently, and pursuant to clause 36(1)(c) of *The Ombudsman Act*, we find that the board should have provided written reasons for its decision to reject the complainant's variance application.

Manitoba Ombudsman further concludes that the chair's rationale for rejecting the complainant's variance application did not address the criteria the board is required by law to consider. Accordingly, and pursuant to subclause 36(1)(b)(iii) of *The Ombudsman Act*, we find that the board based its decision on irrelevant considerations.

Response of the City of Winnipeg

As noted earlier, our office provided our assessment and findings to the new acting COO in a letter dated May 23, 2014. Our office received a positive response from the city in a letter dated June 20, 2014. The (acting) chief operating officer described that the city clerk's perspective on the written reasons has changed since our investigation began:

However, in the almost 3 years since that email [of August 25, 2011] was sent, several important developments have occurred. Most significantly, Legal Services has met on numerous occasions with staff from the City Clerk's Department to provide the following advice:

- 1. The provisions of the Charter and the Board of Adjustment By-law require the Board of Adjustment (the "BOA") to include, in an order on an application for a variance or a conditional use, the reasons for its decision.*
- 2. The mere recital of the Charter criteria for approving variances/conditional uses (and a blanket statement that they have been satisfied or not) does not constitute reasons for decision.*
- 3. The BOA should, as soon as possible, develop and institute a process which will ensure that it includes legally adequate reasons in its variance orders and conditional use orders.*
- 4. Every set of reasons should, at a minimum, indicate the BOA's finding on whether each of the separate criteria has been satisfied.*

Legal Services has continued to work with City Clerk's to finalize changes to the process of issuance of City variance and conditional use orders. The BOA and Appeal Committee follow that process now.

Our office is pleased that the city has acknowledged the importance of providing written reasons to applicants.

Further, in light of the circumstances of this case and the impact on the complainant, the city has agreed to waive the application costs associated with the complainant submitting a new application.

In view of the administrative improvements to the board's practices, and the city's agreement to waive application costs, we find no need to make a formal recommendation.

Although this has been a lengthy investigation, and frustrating for the complainant, it must be noted that the outcome has the potential to benefit more people than the individual who complained to our office in 2011. The complaint raised a number of significant issues, the necessity for and value of reasons for decision and the importance of basing decisions on statutory criteria rather than extraneous considerations. The complainant is to be commended for her patience and perseverance.

We would also like to thank the City of Winnipeg for its efforts in bringing this matter to a successful conclusion.

MANITOBA OMBUDSMAN

AUGUST 2014