

Manitoba mbudsman

REPORT WITH RECOMMENDATIONS ISSUED AUGUST 12, 2013
RESPONSE TO THE RECOMMENDATIONS ISSUED SEPTEMBER 5, 2013

UNDER

THE OMBUDSMAN ACT

CASE 2012-0369 (web version)

RURAL MUNICIPALITY OF ALEXANDER

OCTOBER 28, 2013

SUMMARY:

A resident of the Rural Municipality of Alexander (the RM) complained that the RM had failed to correctly interpret and adequately enforce provisions of the municipal *Zoning By-Law 08/98* and *By-Law 06-12*. As a result, the complainant incurred costs to obtain a land survey demonstrating a neighbour's lack of compliance with the aforementioned by-laws.

Based on the evidence disclosed by the investigation, the ombudsman found that the complainant had been treated unreasonably and recommended that the RM compensate the complainant for the cost of obtaining a land survey.

THE COMPLAINT

A complaint was filed with the Manitoba Ombudsman on November 9, 2012 against the Rural Municipality of Alexander (the RM). The complainant had previously submitted a written complaint to the RM. He had also attended a council meeting where he identified seven issues regarding a neighboring property, and explained how it affected his property in the RM. When he was unable to resolve his concerns by dealing directly with the RM, the complainant contacted the ombudsman and alleged that the decisions made by the RM were unreasonable and that he had been treated unfairly.

The complaint to our office raised the following concerns:

- the location and existence of a portable car tent on the neighbour's property is not in compliance with the RM's *Zoning By-Law 08/98*

- the existence, size and location of a trellis/fence on the neighbouring property is a danger to wildlife and not in compliance with the zoning by-law
- the RM has not adequately enforced its noise by-law when responding to the complaints concerning the noise level emanating from the neighbour's property
- the RM's decision that he obtain a survey certificate at his expense in order to determine whether or not the neighbour's portable car tent and trellis/fence meet the side yard requirement of the RM's zoning by-law

BACKGROUND INFORMATION

Below is a summary of the complainant's interaction with the RM prior to submitting a complaint to our office.

The complainant submitted a written complaint to the council of the Rural Municipality of Alexander. The RM subsequently considered the written complaint concerning the neighbouring property and provided the following response to the complainant on October 19, 2012:

- Concern – location of car tent
 - “The location of the car tent appears to meet the requirements of the Zoning By-law.”
- Concern – trellis
 - “The trellis is not considered a fence and meets the requirements of the Zoning By-law.”
- Concern – loud music
 - “The RM of Alexander By-Law Officers have attended the property and upon inspection did not feel the music was at a high level.”

On November 9, 2012, the complainant wrote the RM asking for further clarification regarding council's decision. The RM responded on November 21, 2012 as follows:

- “the car tent appears to meet the requirements of the Zoning By-law. Please refer to the attached copy of the Zoning By-law Table VI – Accessory Buildings, Uses, and Structures, including Boathouses. If you are still questioning the distance of the car tent to the side yard you will need to supply a survey.”
- “the trellis is not considered a fence by definition, it is considered a structure and meets the requirements of the Zoning By-law. Please refer to the attached copy of the Zoning By-law under the definition of a “Structure”, and also Table VI – Accessory Buildings, Uses, and Structures, including Boathouses.”

On the basis of the decisions outlined above, the complainant wrote the RM on December 9, 2012, seeking additional clarification from council and a copy of the zoning map referenced in the zoning by-law.

On December 12, 2012, the RM replied to this letter stating:

- “Please be advised that my email of November 21st, 2012, was sent to you by the direction of Council. Council has read all of the correspondence regarding your concerns and once again advise that they made a decision of which was emailed to you on November 21st, 2012. I have attached a copy of the zoning map...”

The complaints made to the RM respecting the neighbouring property were investigated by the RM’s by-law enforcement staff. The RM provided our office with a number of reports which indicate the following action was taken:

- September 29, 2011
 - Reason for inspection – “Excessive noise.”
 - Action taken – “Spoke with the owners of [name of road]. Could not find a concern.”
- June 8, 2012
 - Reason for inspection – “Portable garage on site without permit.”
 - Action taken – “The owners of [name of road] advised to contact [name of the Development Officer/Building Inspector of the Winnipeg River Planning District] to obtain permit for portable garage. Will monitor for compliance.”
- July 17, 2012
 - Reason for inspection – “Noise, portable garage and fence.”
 - Action taken –
 - Noise: “There was music playing from the stereo in the boathouse, but it was not audible from the road and in the writers opinion did not constitute a nuisance.”
 - Portable garage: “The portable shelter is still in place and may be nearer than five feet from the property line. However, as previously indicated, I cannot ascertain the exact location of the property line.”
 - Fence: “Since my last visit, the owners of [name of road] have constructed what they refer to as a trellis to support vines they are growing in their garden. This trellis is approximately 30 feet long and 8 feet high and is constructed of 2x2x8’s, wire mesh and some plastic tie wraps. I sent photos as well to [name of building inspector] for his opinion as to whether this constitutes a fence under the building or zoning by-law. In my opinion, this construct (fence or trellis) is not unsightly, although if it is considered a fence, it may be higher than permitted by regulation.”

When the complainant was unable to resolve his concerns by dealing directly with the RM, a complaint was filed with the ombudsman on November 9, 2012.

SCOPE OF THE INVESTIGATION

Our investigation considered the issues the complainant raised with us and we undertook to address the following questions:

- Were the decisions made by the RM regarding permitted uses of land and side yard requirements in compliance with existing by-laws?
- Do the inspection reports from the municipality's by-law enforcement officer and/or any other sources of evidence support the position taken by the RM?
- Was the decision made by the RM in addressing the noise complaints consistent with existing by-laws?
- Was the decision of the RM, to require the complainant to obtain a survey certificate unfair in the circumstances?
- Were the decisions made by the RM reasonable and supported by the evidence?

As part of our review, we examined the documents provided to our office by both the complainant and RM. We reviewed this information with the RM to ensure we fully understood the factors which affected their decisions in relation to the complaint that was filed.

ANALYSIS OF ISSUES AND EVIDENCE

The results of our investigation of the complainant's concerns with the actions and decisions of the RM of Alexander are set out below:

1. The Portable Car Tent Structure

The complainant indicated that he believed that the portable car tent was a "temporary structure" as defined within the zoning by-law. The RM determined that it was a "structure" as defined within the zoning by-law:

1.2.126 STRUCTURE means anything constructed or erected with a fixed location on or below the ground, or attached to something having a fixed location on the ground and includes buildings, walls, fences, signs, billboards, poster panels, light standards and similar items.

A permit is required whether a structure is defined as temporary or permanent and that the minimum side yard requirements concerning the location of the structure are the same.

Additionally, the complainant indicated that he believed the portable car tent structure was located too close to the property line and as such was in contravention of the parameters outlined within the zoning by-law. The complainant asked the RM to determine if the structure located on the neighboring land met the minimum side yard requirements, as set out in the RM's zoning by-law.

Section 5.4.2 Table VI – “SR” Seasonal Residential Zone Use and Bulk Table of the RM's *Zoning By-Law 8/98* defines the minimum side yard requirements for “Accessory buildings, uses and structures, including boathouses” as being five (5) feet.

The RM confirmed that the portable car tent structure must meet a five (5) feet side yard requirement in accordance with the zoning by-law.

The RM further advised that the term “appears to meet” is used in circumstances where the exact property line cannot be determined (i.e. there are no location certificates, such as a staking certificate or building location certificate from a registered Manitoba land surveyor). Additionally, they advised that in the opinion of their building inspector, the structure “appeared” to be located no nearer than five feet from the property line.

The RM also informed the complainant that “If you are still questioning the distance of the car tent to the side yard you will need to supply a survey.” The RM noted that in circumstances where a person believes the side yard requirements of a neighbouring building is not in compliance with the zoning by-law, and where the building inspector reports that it “appears to conform” to the zoning by-law, it is the practice of the RM to make the complainant responsible to prove otherwise. We are advised that complainants can do this by obtaining a Manitoba land surveyor's certificate. The RM indicated that “Any similar circumstance regarding yard requirements are all handled the same.”

While the RM advised that it has adopted a practice that it consistently applies when responding to complaints regarding the location of buildings, it appears the RM has not given sufficient consideration to the specific circumstances of this situation.

The complainant's opinion was that the structure is closer to the shared property line than the required five (5) feet. The RM's by-law enforcement officer's report of July 17, 2012 states that “The portable shelter is still in place and may be nearer than five feet from the property line.” The officer could not ascertain if the structure was in compliance with the zoning by-law, noting that “...I cannot ascertain the exact location of the property line.”

Further, it is important to note that the neighboring property owners were advised by the by-law enforcement officer to obtain a building permit for the portable car tent structure on June 8 and July 12, 2012, and were subsequently issued a by-law enforcement warning to obtain the necessary building permit on December 31, 2012. At the time of issuing this warning, the RM was aware of the complainant's continued concern regarding the location of this structure and the July 12, 2012 report of the officer indicating that the structure may not meet the zoning by-law's side yard requirement. As such, the RM had the opportunity to address the location of portable

car tent relative to the property border during the building permit application process, to ensure compliance with the zoning by-law.

Pursuant to subsection 16(b) of *By-Law 06-12*, the RM had the authority to require the owners of the neighbouring property to supply a land survey certificate prior to approving the building permit application as follows:

16. If the Building inspector considers that site conditions or a building's size or complexity warrant it, the building inspector may require an applicant to submit in connection with an application,
 - (b) a surveyor's certificate.

If the RM had chosen to exercise that authority, it would have been able to ensure that the distance between the structure and the property line was compliant with the zoning by-law. However, the RM chose to reinforce its original decision and placed the onus on the complainant to obtain a survey in order to address the uncertainty surrounding the compliance of the portable car tent.

The decision of the RM does not appear to be reasonable and the rationale for their decision is not clearly understandable given the circumstances. It is our view that this requirement created an unnecessary obstacle for the complainant.

2. The Trellis/Fence

The complainant believed that the trellis was a fence, and that fences were not allowed in the area. He believes the trellis is oversized and presents a danger to wildlife.

We confirmed with the RM that the zoning by-law permits the construction of fences in this area. The zoning by-law requires fences to meet a maximum height requirement of 3.5 feet in front yards and 6 feet in all other yards. As such, if the structure was considered a fence, it would have to comply with designated height requirements.

The RM advised the complainant that "the trellis is not considered a fence by definition, it is considered a structure and meets the requirements of the zoning by-law." The RM also referenced their zoning by-law and the definition of a "Structure" and "Table VI – Accessory Buildings, Uses, and Structures, including Boathouses" which sets the minimum yard and height requirements for a structure.

We were advised that the RM's by-law enforcement officer attended the neighbouring property, inspected the trellis and determined that, in his opinion, it is not "unsightly" (pursuant to the RM's *Unsightly/Dangerous Property By-Law No. 07/98*).

As well, Manitoba Conservation and Water Stewardship addressed the complainant's concern that the trellis creates a hazard for wildlife. Manitoba Conservation and Water Stewardship determined that the trellis is not deemed an "attractant or lure that could lead to harm of wildlife as described in *The Wildlife Act of Manitoba*."

Since the RM has taken the position that the trellis is a structure, it appears that in accordance with the zoning by-law, the trellis must be located a minimum of five (5) feet from the side, thirty (30) feet from the front, and five (5) feet from the rear yard of shared property lines. Based on the land survey certificate obtained by the complainant, and based on the information we have from the RM about space requirements between structures and property lines, the trellis does not appear to conform to the legislated minimum side-yard requirements of the zoning by-law.

3. Noise Complaints

The complainant had also filed complaints with the RM regarding noise nuisance emanating from the neighbouring property and they were investigated by the by-law enforcement officer.

According to the reports we reviewed, the by-law enforcement officer attended the neighbouring property to determine if the level of noise was in contravention of *Noise By-Law No. 768* and to advise the occupants of this property of their obligations and requirements under this by-law.

The RM has responded to these complaints and advised that the officer “attended the property and upon inspection did not feel the music was at a high level.” We note that the by-law does not specify an unacceptable noise level. As such, the officer’s decision in this matter is based on his opinion and interpretation of what constitutes an infraction under the noise by-law.

Accordingly, as there is no measurable way for us to determine if there was a noise infraction, there is no basis for us to conclude that the RM has failed to take the necessary steps to enforce this by-law.

ATTEMPTS TO RESOLVE CONFLICT

Investigators in my office have attempted to resolve this dispute by encouraging a responsive and reasonable approach on the part of both the complainant and the RM.

In February 2013 an investigator wrote to the RM to provide a preliminary summary of our preliminary findings and to ask if the RM would consider the matter further in an effort to resolve the complaint:

Based on the evidence we have considered during the course of our investigation, we are unable to conclude that the RM’s decision and actions, regarding the portable car tent (i.e. the requirement for [name] to obtain a survey certificate), were reasonable and we would appreciate the RM further consider this matter in an effort to resolve this complaint. Specifically, we would like to know what steps the RM is prepared to take to remedy this situation. For example, has the RM considered covering all, or part of, [name's] expense in obtaining the survey certificate?

This letter is being provided as an opportunity for the RM to review our preliminary findings and to provide additional information which may help to clarify its position.

The RM responded on March 30, 2013, advising that council had defeated a resolution that would have authorized the cost of the building location certificate (survey) and advising that:

Council feels that it is not the responsibility of the Municipality to obtain a Building Location Certificate to show the distances of buildings to the property line on private property.

We also encouraged the complainant ensure that the RM had all of the information it needed to make a fair and reasonable decision. As the complainant had obtained a Manitoba land surveyor's certificate at his own expense, he was reluctant to provide the RM with a copy. While we understood his reluctance, we did ask him to make the certificate available to the RM to confirm the location of the portable car tent and trellis structures in relation to the shared property line.

At our request, the complainant contacted the RM via email on July 24, 2013, to advise he had retained a Manitoba land surveyor and had received a Manitoba land surveyor's certificate confirming the location of the structures relative to the shared property line. He offered to show this survey to the RM and requested corrective action of the RM to ensure the portable car tent and trellis structures were brought into compliance with the requirements outlined within the zoning by-law.

Upon receipt of this new information, the RM replied to the complainant via email July 25, 2013, advising that "...the file is now closed on this issue. Also, Council will not pay for your survey...". The RM also advised the complainant that the owner of the property "...would move his "car tent" by fall, thus the municipality or planning district would not be taking any further action at this time."

CONCLUSION

Based on the evidence we have reviewed, the actions taken by the Rural Municipality of Alexander in response to the complainant's noise complaints do not seem unreasonable and Manitoba Ombudsman will not be making a recommendation in this regard. However, as a matter of best practice, the RM may want to consider adopting a standard and indentifying a less subjective way of measuring noise.

As previously noted in this report, at the suggestion of the RM, the complainant hired a Manitoba land surveyor to survey his property for the sole purpose of determining if the neighbour's portable car tent and trellis structures met the side yard requirements of the Rural Municipality of Alexander's *Zoning By-Law 08/98*. The complainant incurred a cost of \$1,039.50 in having his property surveyed and obtaining a Manitoba land surveyor's certificate so that the RM would enforce its by-law. The complainant maintains it was unfair that he was responsible to obtain and pay for a survey of his property when the portable car tent was erected without permit and when compliance with the zoning by-law was suspect. We agree with the complainant in this regard.

According to the reports we considered, it would appear there was uncertainty on the part of the by-law enforcement officer as to whether the structures met the zoning by-law's minimum side yard requirements. Moreover, the RM was aware of the fact that the car tent had been erected without the necessary permit. It would have been reasonable at that point for the RM to have required the owner of the car tent to provide proof of compliance with the side yard requirements for a structure as part of the permit application process.

Instead, the RM required that the complainant obtain the survey certificate at his expense in order to determine if the two structures (trellis and portable car tent) were compliant with its zoning by-law. It does not seem reasonable that the complainant was expected to incur the expense of obtaining a survey certificate to determine the exact location of these structures relative to his property line. Demonstrating compliance rests, as it should, with the applicant. Transferring this requirement to the complainant was unreasonable.

Accordingly, pursuant to subclause 36(1)(a)(ii) of *The Ombudsman Act*, I find that requiring the complainant to obtain a survey certificate to demonstrate the neighbour's non-compliance with the by-law in question was unreasonable. In light of my finding that the RM's action was unreasonable I make the following recommendation, pursuant to clause 36(2)(g) of *The Ombudsman Act*.

Recommendation 1

- That the Rural Municipality of Alexander reimburses the complainant for the costs he incurred to obtain the Manitoba land surveyor's certificate.

In addition to requiring the complainant to incur costs to support his complaint, it appears that the RM has yet to properly enforce the by-law by taking action to address the non-conforming car tent that was erected without a permit. Accordingly, pursuant to subclause 36(1)(a)(ii) I find that the RM's continued failure to enforce the provisions of its by-law to be unreasonable. In light of my finding that the RM has acted unreasonably, I make the following recommendation pursuant to clause 36(2)(g) of *The Ombudsman Act*.

Recommendation 2

- That the Rural Municipality of Alexander take the necessary steps pursuant to *Zoning By-Law 08/98*, to ensure the location of the portable car tent structure is brought into compliance with the five (5) foot minimum requirement for the location of structures from a shared side yard property line.

In response to the complaint about the trellis that the complainant believed was a fence, the RM concluded that the trellis on the neighbouring property is not a fence but rather a "structure" that meets the requirements of the zoning by-law. However, in light of the information provided in respect of the zoning requirements for structures, this cannot conclude the matter. It is unclear how this structure can be compliant with the side yard requirement of five (5) feet as set out in the zoning by-law. This matter should have been dealt with by the RM as part of the process of addressing the complainant's concerns. Either the structure meets any applicable side yard

requirements in the zoning by-law, in which case the complainant should be told this, or the necessary action should be taken to require compliance. Pursuant to subclause 36(1)(a)(ii) I find the RM's failure to properly address and conclude this by-law complaint to be unreasonable. In light of my finding that the RM has acted unreasonably, I make the following recommendation pursuant to clause 36(2)(g)(ii) of *The Ombudsman Act*.

Recommendation 3

- That the Rural Municipality of Alexander take the necessary steps pursuant to *Zoning By-Law 08/98*, to ensure the location of the trellis structure is brought into compliance with the (5) foot minimum requirement for the location of structures from a shared side yard property line.

RESPONSE FROM RURAL MUNICIPALITY OF ALEXANDER

In a September 5, 2013, email response from the council of the RM of Alexander we were advised that the report dated August 12, 2013, with recommendations from the Acting Manitoba Ombudsman had been reviewed in camera by council at the August 20, 2013 regular meeting of council. Council discussed the report and responded to each recommendation as follows:

Recommendation 1

That the Rural Municipality of Alexander reimburses the complainant for the costs he incurred to obtain the Manitoba land surveyor's certificate.

“The RM of Alexander will not reimburse the complainant for the costs he incurred to obtain the Manitoba Land Surveyor's certificate as he was advised that he ‘can obtain a survey at his own expense’, but was not required by the Municipality. Council also defeated a resolution on March 12, 2013 to authorize the expenditure...”

Recommendation 2

That the Rural Municipality of Alexander take the necessary steps pursuant to *Zoning By-Law 08/98*, to ensure the location of the portable car tent structure is brought into compliance with the (5) foot minimum requirement for the location of structures from a shared side yard property line.

“The RM of Alexander has been advised by the neighbor that the portable car tent structure will be moved this fall.”

Recommendation 3

That the Rural Municipality of Alexander take the necessary steps pursuant to *Zoning By-Law 08/98*, to ensure the location of the trellis structure is brought into compliance with the (5) foot minimum requirement for the location of structures from a shared side yard property line.

“The RM of Alexander is not in the position to confirm the distance of the trellis from the property line until such time as a building location certificate is provided to the municipality for review.”

MANITOBA OMBUDSMAN

October 28, 2013