

Manitoba Ombudsman

**REPORT UNDER
THE OMBUDSMAN ACT
CASE 2015-0094
RURAL MUNICIPALITY OF HANOVER
REPORT ISSUED ON DECEMBER 22, 2016**

SUMMARY

A property owner in the Rural Municipality of Hanover (the RM) complained to Manitoba Ombudsman that the RM did not comply with its Litter By-law No. 1770 in issuing her an Offence Enforcement Notice (notice) and \$500.00 fine. The complainant further contests the RM's decision to enforce an emergency clean-up of litter and bill her \$902.19 in costs. Finally, the complainant is of the view that she was not provided a fair opportunity to state her case when her appeal was heard by council.

Based on our investigation, Manitoba Ombudsman did not find evidence to support the complaint. However, the RM's litter by-law states that an individual is only liable to a fine upon a summary conviction. In this case, the timeframe to take such legal action regarding the notice issued has expired.

Accordingly, Manitoba Ombudsman makes the following recommendation:

- **That the RM rescind the offence notice fine of \$500.00 dollars. Going forward we would suggest the RM amend its bylaws if its desire is to be able to issue fines without a summary conviction.**

Manitoba Ombudsman also identified other opportunities for administrative improvement and as a result suggests the following:

- **That the RM amend the Litter By-law No. 1770 to reflect the RM's ability to take action and enforce the by-law on an emergency basis without prior notice and that such costs may be collected in the same manner as a tax may be collected or enforced under the Municipal Act.**
- **That the RM ensure appellants are provided with information that will be considered by council in advance of the hearing to ensure procedural fairness.**

OMBUDSMAN JURISDICTION AND ROLE

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.

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. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision.

KEY ISSUES

1. **Was the RM's decision to issue a by-law offence notice and conduct an emergency clean-up of debris on the roadway consistent with the evidence presented, and all applicable legislation and policies?**
2. **Did the complainant have a fair opportunity to state her case during the appeal process?**

BACKGROUND INFORMATION

The RM's by-law officer indicated that he received several complaints on Friday July 18, 2014, regarding a large pile of debris (rocks, branches, sod, boards and fencing) left on a municipal road. He did not record the number of complaints but his file log states the following:

The complainants advised that the rubbish was a hazard on the roadway located in front of the residence on (street name removed) and described the pile as being very large and taking a large portion of the road impeding traffic, being very unsightly as well as a potential danger.

The debris in question had been removed from the complainant's property and piled on the residential road by a landscaping company hired by the complainant.

In an interview with our office, the officer indicates that upon attending the scene he observed the debris blocking approximately half of the residential roadway and also located in the municipal ditch. He indicated that the pile was large enough to prevent two vehicles from passing simultaneously on the roadway. In his opinion, the debris on the roadway presented a potential danger to and liability issue for the municipality should someone be injured.



Photo of litter on roadway in front of complainant's property
(Taken by RM by-law officer on July 21, 2014)

The officer advised that he called the municipal office to determine who owned the property and to obtain the owner's contact information. The municipal office did not have a phone number recorded for the owner on file.

In an attempt to contact the owner, the officer advised that he spoke with a contractor who was working on the complainant's property. He indicated that he was told that the property owners were away but scheduled to return later that evening. To give the property owners an opportunity to remove the debris from the roadway, the officer provided a business card with his contact information to the contractor and asked him to tell the owners to remove the debris from the road immediately, as it presented a hazard.

In an interview with our office, the contractor indicated that he provided the by-law officer's business card with contact information to the owners the following day, Saturday, July 19, 2014, advising them to contact the officer. He indicated that the officer had stated that the debris was to be removed immediately as it was a potential hazard.

The complainant states that upon receiving the officer's message from the contractor on July 19, 2014, she contacted the landscaping company contracted to work on her yard to have them remove the debris. The landscaping company advised that it would remove the debris from the roadway on Monday, July 21, 2104.

The complainant states that she attempted to contact the RM at 6:30 a.m. on Monday, July 21, 2014, to advise the RM that the landscaping company would be cleaning up the debris but was not able to speak to anyone and the option to leave a voicemail on the telephone system was not available.

Upon his return to the municipal office on Monday, July 21, 2014, the officer's log book indicates that he started receiving more complaints at 8:40 a.m. that the debris had not been removed. The log book does not indicate the number of complaints received.

The log book states that the officer attended the property at 9:15 a.m. on July 21, 2014, and observed that the debris had not been cleaned up. The owners were not home at the time. The officer took photos of the debris and issued an Offence Enforcement Notice and \$500.00 fine under the RM's Litter By-law No. 1770 (the by-law), section 2 which states:

No person shall dump, deposit, drop, throw, discard or leave or cause to or permit the dumping, depositing, dropping, throwing, discarding, or leaving of litter upon any public place or area or upon any highway.

In an interview with our office, the officer advised that he enacted an emergency clean-up of the debris in accordance with subsection 239(3) of the Municipal Act, given that it presented a potential danger to and liability issue for the municipality should a motorist or individual on a bicycle run into the debris. A local company was hired by the RM to immediately remove the debris from the roadway.

The officer's log indicates that the complainant contacted him at 11:14 a.m. on Monday, July 21, 2014, to advise that she had arranged for a landscaping company to remove the debris that morning. The officer states that he advised the complainant that the clean-up of the debris was almost completed.

The complainant, however, advised our office that this conversation with the officer happened at 9:30 a.m. on Monday, July 21, 2014, and that she had indicated to the officer that her landscaping company would be attending the property to clean up the roadway that same day. The complainant's landscaping company arrived at the property at approximately 11:30 a.m. just as the RM's landscaping contractor was completing the emergency removal of the debris on the roadway.

The complainant was fined \$500 and charged \$902.19 in emergency clean-up costs. The complainant appealed the Offence Enforcement Notice and associated costs to council on September 24, 2014. Upon hearing submissions by the officer and the complainant, council unanimously voted to deny the appeal and issued a letter to the complainant on September 25, 2014, stating that the notice should be paid within 7 days.

COMPLAINANT'S POSITION

The complainant is of the view that the situation was not an emergency and that she was not given sufficient opportunity to clean up the debris.

She also believes that she was not given a fair opportunity to state her case during her appeal as she did not receive a copy of the officer's report to review prior to the hearing.

RM'S POSITION

The RM believes that the debris located on the road presented a potential danger to and liability issue for the municipality should someone be injured. The RM stated the following to our office in a letter dated June 18, 2015:

The Enforcement Officer provided verbal notice to the complainant's sub-contractor that all rubbish had to be removed from the roadway and provided a business card for the property owners to contact him once they had arrived home from a trip. The Enforcement Officer also provided the opportunity to the property owners to remove the rubbish from the roadway upon their arrival...before issuing any offence notice. The offence notice was only issued on Monday, July 21, 2014 given that the property owner's did not comply.

The RM indicates that in accordance with the by-law, litter cannot be placed on a public thoroughfare including any adjoining ditches within the rural municipality of Hanover, unless a person meets one of three specified exceptions, which the complainant did not. The by-law states:

Littering:

No person shall dump, deposit, drop, throw, discard or leave or cause or permit the dumping, depositing, dropping, throwing, discarding or leaving of litter upon any public place or area or upon any highway, unless:

- i) said litter is deposited at a disposal site designated by the Municipality as a nuisance ground and such deposit is made in accordance with the regulations of the municipality governing the use of said nuisance ground;*
- ii) said litter consisting of industrial waste, carcasses of animals or poultry, eggs, and embryos, is disposed of in accordance with instructions issued by the Department of Health;*
- iii) said person is involved in an emergency situation.*

Under the authority of the Municipal Act, the RM also believes that the actions of the officer were fair and the enforcement of an emergency clean-up justifiable in dealing with the "emergency or extraordinary circumstances" the litter on the roadway created.

SCOPE OF OUR INVESTIGATION

Our investigation of this complaint included the following:

- Review of the Municipal Act, the Highway Traffic Act, and the Summary Convictions Act;
- Review of the RM's Litter By-law No. 1770, the Municipal Act Procedures Manual, policy and procedures;
- Review of documentation received from the complainant;
- Interviews with complainant;
- Review of the documentation received from the RM; and

- Interviews with the by-law officer and CAO of the RM.

ANALYSIS

1. Was the RM's decision to issue a by-law offence notice and conduct an emergency clean-up of debris on the roadway consistent with the evidence presented, and all applicable legislation and policies?

By-law Enforcement

Section 232 of the Municipal Act authorizes municipalities to pass municipal by-laws concerning the safety and protection of people, and activities and things in, on or near a public place including municipal roads.

Subsection 239(1) of the act authorizes municipalities to enforce by-laws and to inspect, remedy, or take action as required within a municipality after providing a reasonable notice to the owner or occupier of the land, building or structure in question.

If a municipality determines that a person is contravening a by-law or any act that the municipality is authorized to enforce, the municipality may, by written order, require the person responsible for the contravention to remedy it.

Sections 239 to 249 of the act provides the authority for an RM to enforce a by-law and the process and steps it must take when enforcing a by-law. These provisions of the act outline inspection, notice, content of the order to remedy a contravention, timeframe for the contravention to be remedied, associated costs of the actions or measures required of a municipality, including issuing a fine of no more than \$500, and a right of appeal for the affected individual if the contravention is not categorized as an emergency.

Emergencies

In order to deal with emergency or extraordinary circumstances the Municipal Act provides municipalities with additional powers beyond those identified with respect to routine by-law enforcement.

Subsection 239(3) of the act outlines that providing notice to the affected parties is not required, and subsection 247(1) states that municipalities may take whatever action or measures are necessary to remedy a situation in an emergency.

Subsection 247(5) of the act also states that the costs of actions or measures taken to eliminate an emergency are an amount owing to the municipality by the person who caused the emergency and may be collected in the same manner as a tax may be collected or enforced under the act.

Actions of the RM

It is not in dispute as to whether leaving the debris on the roadway was unlawful. The RM's Litter By-law No. 1770 section 2 states that no person shall discard or leave litter upon a public place or highway. All roadways are defined as "highways" in the by-law as follows:

...a public thoroughfare within the Rural Municipality of Hanover. Every highway shall be deemed to include all adjoining ditches and all land between the property lines on either side.

Moreover, section 217 of the Highway Traffic Act states that no person shall deposit litter, rubbish or any other injurious matter on a highway, and shall immediately remove any substance or thing likely to injure a person, animal or vehicle.

The Highway Act defines 'highway' as:

...any place or way, including any structure forming part thereof, which or any part of which the public is ordinarily entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor, and includes all the space between the boundary lines thereof; but does not include any area designed or intended, and primarily used, for the parking of vehicles and the necessary passageways thereon.

As such, it was clearly within the RM's authority to take action against the complainant for the debris left on the roadway. At issue is whether the circumstances constituted an emergency or if the RM should have proceeded as it would in dealing with a routine by-law offence. The Municipal Act does not define "emergency," however Black's Law Dictionary provides the following definition:

Situation requiring immediate attention and remedial action. Involves injury, loss of life, damage to the property, or catastrophic interference with the normal activities. A sudden, unexpected, or impending situation.

The complainant notes that the officer observed debris on the roadway on July 18, 2014, but did not enforce emergency actions until July 21. The complainant questions how the debris on the roadway could be considered an emergency on July 21, 2014, if it was first observed by the officer on July 18. As such she believes she should have been provided reasonable notice and given the opportunity to clean up the debris.

In an interview with our office, the officer advises that he did not enact an emergency clean-up of the litter on the roadway on July 18, as to afford the property owners an opportunity to remove the litter without penalty.

The officer further advises that he anticipated that the owners would remove the debris from the roadway immediately following their return home, given his urgent request that the contractor advise the owners to immediately rectify this matter.

The officer also indicates that had the contractor not been present at the complainant's property on July 18, 2014, he would have immediately enacted an emergency clean-up of the litter located on the roadway, as the RM office did not have the owner's current contact information on record.

While municipalities have discretion in determining what is or is not an emergency situation, it is important that they exercise that discretion in a reasonable manner as it confers significant powers.

Clearly the decision by the bylaw officer not to take immediate action on July 18, 2014 when he first deemed the debris on the road to be a hazard caused some confusion. It is understandable that this would lead the complainant to question whether the situation was in fact an emergency.

That, however, doesn't negate the fact that a large volume of debris was left on the road as evidenced in the photograph below.



Photo of litter on roadway in front of complainant's property
(Taken by RM by-law officer on July 21, 2014)

In our view it was not unreasonable for the RM to consider it a hazard that needed to be immediately removed as it presented a potentially dangerous situation. Although the complainant expressed concerns that she should have received written notice to afford her an opportunity to remove the debris from the roadway, she did receive verbal notice (via her contractor) on July 19, 2014. As well, the act does not require that notice be provided to affected parties prior to the RM taking action to eliminate an emergency.

The officer also issued an Offence Enforcement Notice and \$500.00 fine to the complainant in accordance with RM's litter by-law. The by-law states:

*That any person who contravenes or disobeys, or refuses or neglects to obey any provision of this by-law, is guilty of an offence and liable, **on summary conviction**, to a fine not exceeding Five Hundred Dollars in the case of an individual...*

Our understanding is that given this wording the RM cannot enforce the fine without obtaining a summary conviction. As the time frame in which to pursue a summary conviction has expired (it must occur within six months of the issuance of the enforcement notice), we are of the view that the RM cannot enforce the \$500.00 fine.

Recommendation

Although the RM's litter by-law outlines that a fine up to \$500.00 can be issued to an individual who contravenes the by-law, without a summary conviction Manitoba Ombudsman is of the view that the RM cannot enforce the fine and as a result recommends the following:

- That the RM rescind the offence notice fine of \$500.00 dollars. Going forward we would suggest the RM amend its bylaws if its desire is to be able to issue fines without a summary conviction.

Administrative Suggestion

Although the Municipal Act supports the ability of a municipality to act in an emergency situation, we note that the RM's litter by-law does not reflect the RM's ability to act without notice in an "emergency or extraordinary circumstances," or to recover any associated costs as a debt to the municipality.

As a result, we suggest the following to ensure that the RM's authority to take action when dealing with public safety threats is clearly defined:

- That the RM amend the Litter By-law No. 1770 to reflect the RM's ability to take action and enforce the by-law on an emergency basis without prior notice and that the associated costs may be collected in the same manner as a tax may be collected or enforced under the Municipal Act.

2. Did the complainant have a fair opportunity to state her case during the appeal process?

Although the legislation and Litter By-law No. 1770 do not outline a process for an individual to appeal actions taken by the RM on an emergency basis, the RM granted the complainant a delegation before council to appeal the notice and associated fine.

The complainant appeared before council on September 24, 2014. We note that correspondence from the complainant and meeting minutes reflect that the officer and the complainant were afforded time to present information to council regarding this matter.

Upon hearing information presented by the officer and the complainant, council unanimously voted to deny the appeal and issued a letter to the complainant on September 25, 2014, stating that the notice should be paid within seven days.

Based on the evidence, it would appear that the complainant was afforded a reasonable opportunity to present both evidence and argument in support of her position and we are satisfied that she had an opportunity to be heard.

Although afforded the opportunity to appeal the offence notice, the complainant expressed concerns that she did not receive the information the officer provided council for its consideration prior to her appeal on September 24, 2014.

In considering appeals and making appeal decisions, the process should be consistent and fair to all. In accordance with principles of fairness, an appeal process should afford the affected individual access to the information that will be considered prior to the appeal being heard and the opportunity to present their case and to challenge or dispute information contrary to his or her position.

Administrative Suggestion

- That the RM ensure appellants are provided with information that will be considered by council in advance of the hearing to ensure procedural fairness.

CONCLUSION

The role of our office is limited to assessing government action against established benchmarks, such as legislation and policy. We also examine the fairness of government action.

It is important for an RM to exercise its discretion when enforcing by-laws in a manner that is administratively fair. Based on our investigation and the evidence available, we cannot conclude that the RM enforced the by-law, and emergency clean-up of a public roadway under the act in an unfair manner, or failed to act in accordance with any legislative, by-law, or policy requirement. We are also of the view that the complainant was given an opportunity to state her case during the appeal process.

That being said we have made some administrative suggestions we hope will improve and clarify the process concerning by-law enforcement and appeals. As well we have recommended that the \$500 fine be rescinded given that no summary conviction was obtained as required by the litter by-law.

THE RM'S RESPONSE TO THE RECOMMENDATION

We provided the RM with an advance copy of this report so it could advise our office of the steps it proposed to take to give effect to the recommendation. In a written response to our office on December 21, 2016, the RM agreed to accept our recommendation and rescind the offence notice fine of \$500.

The RM also indicated that it will review and amend Litter Bylaw No. 1770 to reflect the RM's ability to take action and enforce the bylaw on an emergency basis without prior notice and that

the associated costs may be collected in the same manner as a tax may be collected or enforced under the Municipal Act.

CLOSING REMARKS

We are pleased the RM has accepted our recommendation to rescind the offence notice fine and is taking our suggestions for administrative improvements under advisement.

We wish to re-iterate that in considering appeals and making appeal decisions, the process should be consistent and fair to all. In accordance with principles of fairness, an appeal process should afford the affected individual access to the information that will be considered prior to the appeal being heard and the opportunity to present their case and to challenge or dispute information contrary to his or her position.

The release of our report now concludes our involvement regarding this complaint.

MANITOBA OMBUDSMAN