

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2016-0228

MUNICIPALITY OF NORTH CYPRESS-LANGFORD

REPORT ISSUED ON OCTOBER 9, 2018

SUMMARY

Manitoba Ombudsman investigated a complaint concerning a decision by the Municipality of North Cypress-Langford (the municipality) to approve multiple staff dwellings on an agriculturally zoned property. The complainant further contests that the property owners did not have a conditional use permit to sell items produced off-site through their home-based business.

Based on our investigation, the municipality met the legislative and by-law requirements to approve the staff dwellings. However, we note the municipality did not have specified criteria to consider in determining that staff dwellings were essential to this agricultural operation, and was further of the view it could review its decision to approve these dwellings within three years. Finally, Manitoba Ombudsman is of the view that in accordance with the municipality's zoning by-law, conditional use approval is required for the home-based business.

Accordingly, Manitoba Ombudsman makes the following recommendations:

- That the municipality ensure it has the ability to impose conditions on approval of agricultural accessory use, staff dwellings, to enable the municipality to amend its decision should circumstances change.**
- That the municipality develop criteria for it to consider, when making decisions as to if an accessory use, building and structure staff dwelling is essential for the maintenance, operation and care of the associated agricultural use.**
- That the municipality enforce its zoning by-law, by requiring the accessory use home-based business owner to apply for conditional use approval, in order to sell items not produced on site.**

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.

THE COMPLAINT

The complainant raised concerns regarding the construction of multiple residential houses adjacent to her property on agriculturally zoned land. The complainant is of the view that council should not have approved three staff dwellings as an accessory use to the agricultural operation, as she believes the dwellings do not meet the requirements of the municipality's zoning by-law. Additionally, the complainant questions what criteria council considered in making its decision to approve these staff dwellings and how this criteria will be monitored going forward, in determining the necessity of these dwellings as related to the maintenance, operation and care of the agricultural operation.

The complainant expressed further concern that the municipality initially approved the staff dwellings as part of a family agricultural operation of an organic tree nursery, but it now includes non-family members living in one of the farm's staff dwellings, with talk of more individuals wanting to live on site. The complainant stated that she, and others neighboring the agricultural operation, feel that their property values have been negatively impacted by council allowing multiple residences on agricultural zoned land, without providing clear answers as to how these houses are essential to the permitted agricultural operation.

The complainant also raised the issue that, at this stage, the tree nursery does not appear to be supporting the staff living in these three additional dwellings, as these individuals are working off farm for outside income. The complainant further contests the ability of the property owners to sell various products not produced on site without receiving a conditional use approval from council, in accordance with the zoning by-law requirements for a home-based business. Lastly, the complainant expressed apprehension regarding the potential for this business to significantly increase traffic volumes in the area.

BACKGROUND INFORMATION

Property owners (the family) of an agricultural zoned property in the Municipality of North Cypress-Langford proposed building two additional houses on their property. The family appeared before council on June 9, 2014, to explain their intent to plant and raise organic fruit trees as a family-run enterprise and requested that council approve these additional residences to enable each of two brothers and their parents to reside on site.

Council requested additional time to consider the request as nurseries are a permitted use under the by-law, but council had not previously considered a request for “staff dwellings” as an “accessory structure.” The zoning by-law states that an accessory structure may be located on the same zoning site as the principal structure, and staff dwellings are allowed on the same site if the dwelling is essential for the maintenance, operation and care of the permitted agricultural use. Council revisited the family’s request for staff dwellings at a council meeting held July 14, 2014. Council advised that in making its decision, it considered a petition and representations from neighbors to the property, and representations from the applicants.

Following the delegation, council stated it approved the construction of two ‘temporary’ single family staff dwellings on the property in support of the proposed family agricultural operation, further stating that the approval be reviewed within three years to determine the status of the agricultural operation.

Following construction of the first single-family dwelling, the family approached council requesting permission to construct the second dwelling on a cement foundation. Council’s August 18, 2015, letter to the Cypress Planning District reflects that on August 11, 2015, council granted permission, allowing construction of the residence on either a cement pad or foundation. The letter further outlined that council was satisfied that foundation walls could be pushed in should the residence need to be removed.

The family approached the development officer for the Cypress Planning District to allow a modification of the second approved dwelling from a single-family residence to a duplex. The property owner’s request to build a duplex instead of a single-family residence was discussed and approved by council at the October 13, 2015, council meeting.

The complainant and an area neighbor appeared before council on March 8, 2016, to discuss various concerns regarding the on-going development on this property and whether it met legislative and zoning by-law requirements.

To obtain further clarification as to council’s interpretation and application of the zoning by-law and the Planning Act, the complainant contacted Community and Regional Planning (community planning) in Brandon on April 27, 2016.

According to community planning, the municipality’s zoning by-law does not designate the staff dwellings as ‘temporary’ and they are not a conditional approval. As such, once approved by council, the dwellings cannot be removed.

In an attempt to resolve this matter, the Municipality of North Cypress-Langford held a meeting of all parties at its office on June 9, 2016.

The parties discussed the number of staff dwellings as related to the permitted agricultural use tree nursery and the additional issue of a conditional use approval being required, to allow the home-based business to sell products not produced onsite.

Unable to resolve this matter with the municipality, the complainant filed a complaint with our office.

SCOPE OF OUR INVESTIGATION

Our investigation of this complaint included the following:

- Review of the Municipal Act, and the Planning Act;
- Review of the Municipality of North Cypress Zoning By-law No. 1896, and the Cypress Planning District Development Plan By-law No. 49;
- Review of documentation received from the complainant;
- Interviews with complainant;
- Review of the documentation received from the municipality;
- Interviews with the CAO and council;
- Review of the documentation received from the Cypress Planning District;
- Interviews with the development officer;
- Review of the documentation received from the Community and Regional Planning, Brandon Regional Office; and
- Interviews with the community planner.

ANALYSIS

1. Was the municipality's decision to approve the construction of multiple 'staff dwellings' for a permitted agricultural operation consistent with applicable legislation and by-laws?

Section 40 and 45 of the Planning Act requires a board or council to prepare and adopt a development by-law. Section 68 of the act requires a municipal council to adopt a zoning by-law to regulate the use and development of land within its municipality that is generally consistent with the development plan by-law and any secondary plan by-law in effect in the municipality.

The zoning by-law must divide the municipality into zones, prescribe permitted and conditional uses for land and buildings within each zone, and set out the procedure for applying for and issuing permits or other zoning documentation. The zoning by-law must also prescribe general development requirements for individual zones, having regard to any permitted or conditional use for each zone. Additionally, the zoning by-law may also include provisions prohibiting or regulating the use of land and the construction or use of buildings, including the number, dimensions and density of dwelling units on a parcel of land.

The municipality's zoning by-law defines agricultural activities as a use of land for agricultural purposes and an 'accessory structure' as a structure located on the same site, in this case a staff dwelling, the nature of which is subordinate to the principal agricultural use.

The agricultural use table of the zoning by-law defines a tree nursery as a permitted use. As such, it is a business allowed in the agricultural zone without requiring conditional use approval. The zoning by-law further provides that single or two-family staff dwellings may be constructed on the same site of the permitted use, if these dwellings are essential for the maintenance, operation and care of this agricultural use.

The complainant voiced concern as to the basis of council's decision to approve these staff dwellings and the criteria it considered to determine these staff dwellings **were essential** to the permitted agricultural use.

The reeve advised that the municipality is very pro-development and it strongly encourages farming operations and other residential or commercial developments in the municipality. The reeve further stated that the municipality wants to expand its tax base and to promote growth within the municipality.

The complainant further questioned the necessity of these staff dwellings, as many individuals residing in the staff dwellings have occupations apart from the tree nursery.

In approving the staff dwellings, the municipality stated that it was aware that the applicants may initially have to work off the farm to supplement their income until their trees and plants reach a maturity where they are saleable. Furthermore, in interviews with our office, the municipality advised that council understands that horticultural operations are very labour intensive and can take years to become viable established operations, as such, this factored into its decision to approve the dwellings. The municipality further advised that in making its decision, it also relied on the following:

...Council considered the matter and considering the two additional houses are temporary and can be moved, that gave them some reassurances that they can take action if the proposal turned out to be anything but a family enterprise.

The municipality maintains that council made its decision to approve staff dwellings in accordance with the municipality's zoning by-law and states that the by-law does not outline "specific criteria" for the municipality to consider or apply in making its decision regarding the necessity of staff dwellings for the agricultural operation.

The municipality further asserted that the council primarily based its decision on the verbal business proposal made by the applicants supporting their need for the staff dwellings.

Meeting minutes reflect that the municipality approved the staff dwellings as 'temporary housing,' intending to review its decision within three years of its approval, to determine the status of the agricultural operation. Meeting minutes further reflect that in approving these staff

dwelling, the municipality was of the view that going forward, it could review its decision regarding the necessity of the staff dwellings for the based on the agricultural operation's needs.

Following council's approval of the staff dwellings as 'temporary housing,' a community planner from Brandon Community and Regional Planning advised the municipality that it could not reverse its decision after deeming the dwellings as essential to the operation of the permitted agricultural use.

In interviews with our office, the community planner advised that upon the municipality's approval of the staff dwellings as an accessory to a permitted agricultural use, the municipality could not order the dwellings removed. The community planner further advised that the municipality's zoning by-law is not written in way to enable the municipality to order the removal of the staff dwellings; to do so, the dwellings would have to require a 'conditional approval.'

Further, the community planner stated that should the agricultural operation cease on the property, the staff dwellings would become a non-conforming use after a year, but this would not necessitate the removal of the housing. The community planner further advised that in this case, if a non-conforming agricultural use ever applies, no further staff dwellings would be allowable under the zoning by-law, nor could any changes be made to the existing dwellings.

The community planner also stated that if the staff dwellings required conditional use approval under the zoning by-law, the municipality could then impose conditions on the dwellings. He further advised that, after imposed, if any conditions established by the municipality in approving a conditional use were not met, the municipality would then have the flexibility to change its decision as to if the staff dwellings were essential to the agricultural use. The community planner further stated that community planning will be recommending that the municipality make agricultural zoning, accessory uses building and structures a conditional use in its next review of the municipality's zoning by-law.

Application of relevant legislation and policy is particularly important when reviewing the actions of municipal governments. In this case, we reviewed the Municipal Act, the Planning Act, the Cypress Planning District Development Plan By-law No. 49, and the Municipality of North Cypress Zoning By-law No. 1896. Based on our review, it appears that the municipality followed the overall process for considering requests for accessory use buildings or structures.

We determined that there are no specific criteria defined in the Planning Act or the municipality's zoning by-law to establish what the municipality must contemplate, in its consideration of the staff dwellings being essential for the maintenance, operation and care of a permitted agricultural use. As such, the municipality exercised its own discretion in evaluating the information presented to council regarding the operational need for these staff dwellings and in its determination to approve the dwellings as 'essential' to the agricultural use.

Under the authority of the Municipal Act, municipal councils have significant autonomy to manage municipal affairs and to make the decisions it believes will best meet the needs of its community.

In our view, the municipality has the discretion to administer its by-laws and in this case, it met the legislative and by-law requirements in approving the accessory use staff dwellings.

Additionally, we note that the complainant expressed concerns with how the municipality arrived at its decision to approve these staff dwellings, and the information/criteria it relied on to make its decision. As such, we considered whether the municipality's decision in this matter was reasonable.

Given our understanding that the zoning by-law does not establish criteria related to the consideration of staff dwellings and that the municipality exercised its discretion with respect to the information it required to make its decision on this matter, we cannot make a determination as to the reasonableness of the municipality's decision.

Recommendations

In this case, although the municipality met the legislative and by-law requirements in making its decision, we note that there was some confusion regarding the municipality's ability to amend or change its decision after approving and deeming the 'accessory use' staff dwellings as essential to the agricultural operation.

Council referred to the dwellings as 'temporary residences' in its July 14, 2014, council meeting minutes and stated that it would review the approval of the dwellings within three years to determine the status of the agricultural operation.

Admittedly, council was of the view that it could review its decision to approve the dwellings as essential to the agricultural operation and change its mind regarding the necessity of the dwellings if needed. In this case, the municipality's approval of the staff dwellings has lasting implications, as its decision cannot be reversed.

This is further supported by conversations our office had with a community planner, who stated that if the agricultural use requiring the dwellings ceased to be operational, this would not result in the removal of existing housing, nor could changes be made to existing dwellings or any further dwellings be approved.

We also note that if accessory uses were a conditional use in the zoning by-law it would necessitate a hearing on the matter, which would provide more opportunity for people in the area to voice their views about potential farm or staff dwellings. Additionally, it would further permit council to impose conditions for the dwellings that if not met, would allow council to take any action or measures it deemed necessary.

As a result, we make the following recommendation:

- That the municipality ensure it has the ability to impose conditions on approval of agricultural accessory use, staff dwellings, to enable the municipality to amend its decision should circumstances change.

When making decisions, it is also important that a council be able to explain what it considered, to support how it achieved its decision. When council exercises ‘unfettered discretion’ in making its decisions, it can lead a potential appearance of bias or perceived lack of fairness.

In our view, establishing criteria for the municipality to consider when assessing applications for accessory use building or structures would help identify the factors council considered and applied in making its decision.

This in turn would provide individuals with context to understand what council considers in making a decision of this nature, and would support the basis of its decision.

As a result, we make the following recommendation:

- That the municipality develop criteria for it to consider, when making decisions as to if an accessory use, building and structure staff dwelling is essential for the maintenance, operation and care of the associated agricultural use.

2. Is a conditional use permit required for the agricultural home-based business to sell products not produced by the farm?

In accordance with the zoning by-law requirements for a home-based business, the complainant contests the ability of the property owners to sell various products not produced on site without receiving a conditional use approval from council.

Section 103 of the Planning Act states that no person may undertake a conditional use without first obtaining approval. The act further states that the owner of an affected property must make an application for approval of a conditional use to the council of the municipality, or the board of the planning district in which the affected property is located. Upon receiving an application for approval of a conditional use, section 105 of the act dictates that a public hearing must be held to receive representations from persons on the application, and notice of the hearing be given in accordance with section 169.

The municipality’s zoning by-law defines a home-based business as an accessory use carried on for the financial gain of the occupant of a dwelling, which is incidental or secondary to the principal use. Clause 6(4)(g) of the agricultural zoning district section of the municipality’s zoning by-law allows a home-based business to operate as a conditional accessory use, on land used for an agricultural purpose.

In this case, the tree nursery is selling trees not grown on site and meets the description of a home-based business as defined by the municipality’s zoning by-law. As such, the zoning by-law adopted by the municipality requires that an individual running a home-based business obtain conditional use approval from council for the retailing of products not produced on site.

In correspondence to our office, we note that the municipality consulted with the development officer of the Cypress Planning District and a community planner from Community Planning

Services. We further recognize that both the officer and community planner advised the municipality that, in this case, the accessory use meets the description of a home-based business. As such, they both advised the municipality that conditional use approval is required for this home-based business to sell products not produced on site, to ensure compliance with the municipality's zoning by-law.

In our communications with the municipality, the reeve stated that if conditional use approval were required to sell items not produced on site, many farms in the area would need "conditional use" permission because they are in similar situations. The reeve further stated that council does not require the conditional use approval because it is a "common practice" for farmers in the area to sell items not produced on their farms.

Elected officials of a municipality are ultimately responsible for administering and enforcing its zoning by-laws. In this case, although the municipality is aware that conditional use approval is required for the home-based business to be in compliance, it has not enforced its by-law to make the owners of the home-based business apply for the required conditional use approval.

Recommendation

The Planning Act requires that a council ensure that a conditional use will be compatible with the general nature of the surrounding area, and generally consistent with the applicable provisions of the zoning by-law and development plan.

Including a conditional use requirement within a zoning by-law requires council to assess how an application may affect neighboring properties within the municipality. The conditional use process affords council the flexibility to add development requirements and conditions to help offset any potential negative effects such as increased traffic and noise concerns, and allows council to act on any development that does not comply with these restrictions. Additionally, conditional uses require a public hearing and, as such, are typically implemented for those uses within a zone that may warrant public review as part of the development application process.

Municipalities are responsible to make decisions on behalf of the community, in accordance with the legislation and the by-laws that govern its actions. Principles of fairness further require that a municipality apply and enforce its by-laws in a manner that is consistent and fair to all. In this case, the accessory use in question meets the description of a home-based business as defined in the zoning by-law adopted by the municipality. As such, in accordance with the municipality's zoning by-law, it requires a conditional use approval.

Accordingly, we recommend the following:

- That the municipality enforce its zoning by-law, by requiring the accessory use home-based business owner to apply for conditional use approval, in order to sell items not produced on site.

CONCLUSION

Based on our investigation and the evidence available, the municipality acted in accordance with the legislative and by-law requirements when it approved the accessory use staff dwellings. Further, we note that although the municipality intended to review its decision to approve the staff dwellings within three years to determine the status of the agricultural operation, we understand that as this decision was not based on a 'conditional approval,' the municipality is unable to change its decision to allow the dwellings.

Finally, Manitoba Ombudsman is of the view that in accordance with the municipality's zoning by-law, conditional use approval is required for the accessory use home-based business to be in compliance when selling items from outside sources.

That being said, we have made some recommendations we hope will improve and clarify the decision and approval process for the application of the municipality's zoning by-law concerning accessory use building and structures.

As well, we have recommended that the municipality have the accessory use home-based business owner apply for conditional use approval to sell items not produced on site.

As a result, this complaint is partly supported.

THE RM'S RESPONSE TO THE RECOMMENDATIONS

We provided the municipality with an advance copy of this report so it could advise our office of the steps it proposed to take, to give effect to our three recommendations. In accordance with sub-section 36(3) of the Ombudsman Act, council met on September 10, 2018, to consider our recommendations in camera. As per sub-section 37(1) of the act, the municipality provided a written response to our office on September 28, 2018, outlining its response to our recommendations.

In response to our recommendation that the municipality ensure it has the ability to impose conditions on approval of agricultural accessory use, staff dwellings, to enable the municipality to amend its decision should circumstances change, the municipality indicated that it plans to review its zoning by-law in the near future. The municipality stated that council intends to discuss its zoning by-law with community planning, in order to explore having more flexibility in its decisions on any future staff dwellings in the municipality. The municipality further advised that for any future considerations of staff dwellings, it would recommend that the council in place have full discussions before considering adding additional accessory residential buildings in agricultural areas.

We also recommended that the municipality develop criteria for it to consider when making decisions as to if an accessory use, building and structure staff dwelling is essential for the maintenance, operation and care of the associated agricultural use. In response, the municipality advised that council has always based its decisions on all information gathered by way of

delegations, information provided by the development officer and regional planning, and its by-laws, and makes its decision based on those factors.

Finally, we recommended that the municipality enforce its zoning by-law, by requiring the accessory use home-based business owner to apply for conditional use approval in order to sell items not produced on site. The municipality responded that while council understands this, it is felt that the business products are now grown on site and that if there is any off sale ongoing, it would be minimal and a conditional use would not be required.

CLOSING REMARKS

We are pleased that the municipality agreed to consider our recommendation and that it intends to explore its options through the renewal of its zoning by-law to afford it more flexibility in municipal decisions regarding staff dwellings.

We are pleased that the municipality defined what it considers when making its decisions regarding accessory use, building and structure staff dwellings. However, we wish to re-iterate that establishing set criteria for the municipality to consider when assessing applications for staff dwellings, in our view, would help identify the factors council considered and applied in making its decision.

Finally, our office is disappointed that the municipality did not agree to enforce its zoning by-law, to ensure that the accessory use home-based business owner apply for conditional use approval, to facilitate the selling of items not produced on site by the business.

We wish to remind the municipality that principles of fairness further require that a municipality apply and enforce its by-laws in a manner that is consistent and fair to all. Municipality's are responsible to make decisions on behalf of the community, in accordance with the legislation and the by-laws that govern its actions. In this case, as the accessory use in question met the definition of a home-based business, according to the municipality's zoning by-law conditional use approval is required.

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

MANITOBA OMBUDSMAN