

Ombudsman Act Investigation Report
Case 2018-0313: City of Winnipeg

June 2021

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**REPORT UNDER
THE OMBUDSMAN ACT
2019-0313
CITY OF WINNIPEG – CITY CENTRE COMMUNITY COMMITTEE**

COMPLAINT

A Winnipeg resident applied for permission to construct a driveway that did not conform to one of the rules set out for residential approaches (e.g. driveways) in Winnipeg's Private Access By-law. The bylaw allows the community committee for the area where the property is located to approve an application even when a proposed driveway does not meet the rules.

The resident complained to our office that his application was treated unfairly when it was denied by the community committee at its July 3, 2018, meeting. He felt that the process was not fair because the councillor for his area did not attend the community committee meeting, leaving the decision making to councillors who are less familiar with his area. The resident felt that he had not received fair service from the city because the community committee and Public Works disagreed about the application of the Private Access By-law to his matter. Finally, he did not believe that the decision to deny the application was fair, being of the view that the community committee did not judge his application on its merits.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman Act, we investigate complaints about administrative actions and decisions made by any department or agency of the Manitoba government or a municipal government. In this case, we reviewed actions and decisions made by the City of Winnipeg.

A matter of administration can include any practice, procedure, action or decision that government makes as it implements or administers its laws and policies. We assess whether administrative processes and procedures are followed according to applicable legislation, regulation and/or existing policies.

Manitoba Ombudsman investigations review complaints to identify areas requiring administrative improvement. Our reviews take a broad view that considers the fairness and reasonableness of government actions and decisions.

Improved administrative practices can enhance the relationship between government and the public, and reduce administrative complaints. To help government bodies achieve better administration, where appropriate, our reports include recommendations for administrative improvement.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included a review of the following:

- Review of documentation and evidence provided by the resident
- Review of the agenda and minutes for the June 12, 2018, July 3, 2018 and July 9, 2019, City Centre Community Committee meetings
- Review of the video recording of the committee's July 3, 2018 meeting
- Review of City of Winnipeg By-laws, including
 - Private Access By-law No. 49/2008
 - City Organization By-law No. 7100/97
 - Procedures By-law No. 50/2007
 - Development Procedures By-law No. 160/2011
- Interviews with the resident, the clerk of the City Centre Community Committee, the director of Public Works and an employee of Public Works.

KEY ISSUES

We reviewed the following questions in response to the complaint:

1. Was it a fair process for the community committee to consider the resident's driveway application though the resident's councillor was not present?
2. Did the city provide fair service to the resident regarding the application of the Private Access By-law?

3. Was the community committee's decision to deny the resident's driveway application fair in the sense that it was understandable and evaluated against established criteria?

BACKGROUND

The resident submitted the first application for his driveway with a detached garage to the department of Public Works on May 3, 2018, and paid the \$223.65 application fee. His proposed driveway did not conform to section 18(c) of the Private Access By-law, which prohibits driveways if there is a lane at least 4.5 metres wide adjacent to the property. The resident's property has a 4.9-metre-wide lane behind it.

The bylaw authorizes community committees to approve applications that do not conform to the rules, subject to criteria set out in the bylaw. When a proposed driveway does not meet the rules, Public Works prepares a report and sends the application to the community committee for the area where the property is located.

The resident's application was heard and denied by the City Centre Community Committee at its June 12, 2018, meeting. Due to a misunderstanding with Public Works, the resident did not attend the meeting to speak in support of his application.

The resident consulted with the Public Works department, which had recommended approval of his application in its report to the community committee. Public Works identified that the Private Access By-law imposes a 12-month waiting period between applications, unless there has been a material change in circumstances. Public Works indicated that an example of a "material change in circumstances" would be switching to an attached garage with a wider driveway.

The resident modified his plans from a single detached to a double attached garage and widened the proposed driveway. Public Works accepted the resident's second application on June 18, 2018, and he paid the \$223.65 application fee another time. Public Works prepared a second report recommending approval of the modified application to the City Centre Community Committee.

The resident's second application was placed on the agenda for the July 3, 2018, committee meeting. Video of the July 3 meeting shows that the committee initially did not want to address the application, being of the view that another driveway application should not be considered until a year had elapsed from previous month's meeting. However, the clerk of the community committee advised that the application had to be heard as it had been accepted by Public

Works and placed on the committee's agenda. The resident and his neighbours spoke about the application and the committee denied it a second time.

The resident complained to our office that his driveway application had not been treated fairly after it was denied by the community committee for the second time on July 3, 2018. He felt that the process was not fair because the councillor for his area did not attend the community committee meeting, leaving the decision making to councillors who are less familiar with his area. The resident also felt that he had not received fair service from the city because the community committee and Public Works disagreed about the application of the Private Access By-law with respect to his application. Finally, he did not believe the community committee's decision was fair because his application was not judged on its merits.

The resident submitted his driveway application to Public Works and paid the \$223.65 application fee for the third time on May 30, 2019. The proposed driveway was the same as the one considered and rejected by the City Centre Community Committee at its July 3, 2018, meeting. The resident's application was considered by the committee at its July 9, 2019, meeting and approved.

ANALYSIS

1. WAS IT A FAIR PROCESS FOR THE COMMUNITY COMMITTEE TO CONSIDER THE RESIDENT'S DRIVEWAY APPLICATION THOUGH THE RESIDENT'S COUNCILLOR WAS NOT PRESENT?

Community Committees are created by the City Organization By-law. They are composed of three city councillors who represent the wards that form the community for which the committee is responsible. The resident's property is in the Fort Rouge-East Fort Garry ward so his application went to the City Centre Community Committee, which also includes the Daniel McIntyre and River Heights-Fort Garry wards.

The resident is of the view that the absence of his councillor at the City Centre Community Committee's July 3, 2018, meeting resulted in an unfair process. The resident explained that his ward's councillor would be most familiar with his area and the appropriateness of his driveway application. In contrast, the other councillors on the committee have a better understanding of their own wards. The resident believes his application would have been assessed more favourably by the committee if his councillor had been present.

The clerk for the community committee explained to our office that committee decisions are made by the committee as a group, as opposed to by the individual councillors that form the committee. Provided there is quorum (the minimum number of councillors needed to make a

decision), the committee is allowed to make decisions regardless of the absence of any of its members.

Pursuant to the city's Procedure By-law, a quorum of a committee is made up of a majority of its councillors. In the case of community committees, it means two of the three councillors who form the committee are needed to make quorum. As demonstrated by the video and minutes of the meeting, two councillors from the City Centre Community Committee were present at the July 3 meeting, resulting in there being a quorum of the committee.

Our office concludes that the absence of the resident's councillor at the City Centre Community Committee's July 3, 2018, meeting did not result in an unfair process. There was a quorum of the committee at the meeting. The committee acted consistently with the Procedures By-law in making a decision with respect to the resident's driveway application despite the absence of his councillor.

2. DID THE CITY PROVIDE FAIR SERVICE TO THE RESIDENT REGARDING THE APPLICATION OF THE PRIVATE ACCESS BY-LAW?

The Private Access By-law requires applicants whose applications have been rejected to wait 12 months before a similar application can be made. The exception to this waiting period is where there has been "a material change in circumstances."

Applications for private access permit

9(3) Unless there has been a material change in circumstances, where a decision has been made in respect of an application pursuant to this By-law, no substantially similar application in respect of the same property may be made within a period of 12 months.

The resident advised that he felt unfairly caught between the differing approaches Public Works and the community committee had to applying section 9(3) of the bylaw to his driveway applications.

"Material change in circumstances"

The resident consulted with Public Works after his first application was rejected at the June 12, 2018, meeting. Public Works identified that the Private Access By-law imposes a 12-month waiting period between applications, unless there has been a material change in circumstances. Public Works indicated that an example of a material change in circumstances would be switching to an attached garage with a wider driveway.

The resident converted his plans for a detached garage to an attached garage and widened the proposed driveway. The resident's second application and application fee were accepted by Public Works one month after his first application, based on there being a material change in circumstances between his first and second applications.

However, at the July 3, 2018, meeting, the committee challenged the Public Works representative and disagreed that there was a material change in circumstances between the applications. The committee stated that it did not want hear the application. It was of the view that the application should not be considered until 12 months had elapsed from the previous month's meeting when the first application was denied.

Public Works' and the committee's differing views of a "material change in circumstances" were not resolved at the meeting. The clerk of the community committee advised that the committee was required to hear the application as it had been accepted by Public Works and placed on the committee's agenda. The committee acceded to the clerk's instruction. The resident and his neighbours spoke about the application and the committee denied the resident's application again.

Public Works explained to our office that it has no written guidelines setting out what constitutes a material change in circumstances. Staff rely on what community committees have decided in the past to guide what will likely be considered a material change in circumstances. In some cases, staff do not understand why something has or has not been considered a material change in circumstances by community committees.

As discussed below, the resident is of the view that the committee's belief that there had not been a material change in circumstances contributed to its decision to deny his application.

"12 months"

On contacting our office, one of the resident's concerns was that the committee would not hear another driveway application until September 2019, based on the committee's meeting dates through the summer. September 2019 was 16 months after the resident first submitted a driveway application to Public Works and would give him little time to complete his driveway before the weather turned cold.

Our office received different answers when we inquired with Public Works and the clerk of the community committee regarding when the 12-month period before resident could submit another application would elapse. Public Works was of the view that he could resubmit his application as of May 3, 2019. The clerk for the community committee advised that the committee would not rehear the application before its July 9, 2019, meeting.

Public Works advised that they use the date an application was received to determine when a new application can be accepted. Applications take 4-6 weeks of processing time before they can go to the committee, though that can be a shorter process for resubmitted applications. The resident's first application was made May 3, 2018, so he could resubmit it as of May 3, 2019.

On the other hand, the clerk of the community committee indicated that the committee considers that the 12 months starts running from the date of the last decision denying the application. In the resident's case, that decision was made July 3, 2018, and so the application could not be considered again until July 3, 2019. In 2019, the first City Centre Community Committee meeting after that date was on July 9, 2019.

The resident's third driveway application was accepted by Public Works on May 30, 2019. It was heard and approved by the community committee on July 9, 2019.

In our view, it is unfair for residents to feel caught between city entities' differing applications of a bylaw. Residents should be able to trust and rely on the information they receive from the city. Inconsistent interpretations or applications of bylaws lead to uncertainty for everyone in the process and can lead to the perception that city decisions are arbitrary or unfair.

It is important that public bodies develop policies, procedures, guidelines, rules and other guidance documents to assist staff administering public programs and services. The framework for decision making should open, transparent and fair. Therefore, we recommend:

Recommendation 1: That the city review section 9(3) of the Private Access By-law for clarity and ensure that city entities share a common interpretation of the provision. The city should document its interpretation in writing and make it available to the public.

Our office observes that if the resident had not resubmitted his application a second time based on consultation with Public Works, he would not have paid a second application fee. In May 2019, the resident paid his third application fee in two years. Given the effect of Public Works' and the committee's differing interpretations and applications of the bylaw in this matter, we recommend:

Recommendation 2: That the city refund the resident one of the \$223.65 application fees paid to have his matter considered.

3. WAS THE COMMUNITY COMMITTEE'S DECISION TO DENY THE RESIDENT'S DRIVEWAY APPLICATION FAIR IN THE SENSE THAT IT WAS UNDERSTANDABLE AND EVALUATED AGAINST ESTABLISHED CRITERIA?

The resident advised our office that he does not understand why his second application for a driveway was denied at the July 3, 2018, community committee meeting. He did not understand how the committee could comment favourably on his application, then deny it without identifying any deficiencies. From his perspective, the committee rejected his application because, as discussed above, it did not agree with Public Works that there had been a material change in circumstances between applications.

The clerk for the community committee advised our office that the bylaw does not require reasons to be recorded. The statements made by the committee during the meeting are considered the reasons for its decisions and are captured by video as meetings are recorded. Reasons are not included in the meeting minutes.

Our office notes that while the Private Access By-law does not require the committee to provide reasons for its decisions, it sets out the criteria to be considered in assessing the resident's driveway application:

Criteria for approval of permits by Council Committees

15. A Council committee may approve a private access permit...where the Committee considers that:

- (a) conformity with the rules set out in sections 17 to 21 [rules for private approaches, e.g. driveways] would be unreasonable in the circumstances, including the use to which the property is intended to be put;
- (b) the location and size of the proposed private access is reasonably required for the use to which the property is intended to be put; and
- (c) the location and size of the proposed private access would not be detrimental to the safe and efficient movement of vehicular and pedestrian traffic on the adjacent street.

The resident has a legitimate expectation that the committee will consider the relevant criteria and that the decision about his application will be based on an assessment of merit relative to those criteria.

Our office viewed the video recording and the minutes of the meeting. We were unable to determine the reasons the committee denied the application from our review of the video or

the minutes of the meeting. The committee did not refer to the criteria set out in section 15 of the bylaw when assessing the resident's application. Consequently, our office concludes that the committee's decision was not fair because the reasons for the decision are not understandable and do not explain how the application did not meet the criteria set out in the bylaw.

Giving reasons for decisions is a key element of a fair process. Documenting and providing reasons for decisions reduces the chance of subjective or improper decisions and cultivates the confidence of citizens and public officials. Reasons can demonstrate that decision-makers considered and understood the information presented to them and that they considered relevant criteria.

The absence of clear and meaningful written reasons for decisions can result in individuals forming the belief that the decision maker was biased and the decision itself was unfair. When reasons are provided to an unsuccessful party, he or she is more likely to understand and accept the decision, and the public entity is less likely to receive a complaint about the decision. Reasons can also give prospective applicants an ability to meaningfully participate in the process and, in this case, guide them in assessing the possibility of a new application being approved or rejected.

In our view, the best way for a committee to demonstrate that it has met the legitimate expectation that relevant criteria have been applied and considered is for it to issue clear written reasons for its decision. The City of Winnipeg already serves the interests of transparency and accountability by making meeting agendas, minutes and video recordings publicly available on its website. The process of issuing decisions could be as simple as the committee delivering clear reasons verbally at the time it makes a decision and including the reasons in the written meeting minutes, which are publicly available.

In our publication *Fairness by Design* we discuss the benefits of providing written reasons for decisions. A copy of this guide can be found at www.ombudsman.mb.ca.

Given the many important benefits of written reasons, our view is that they should be provided regardless of whether there is a legal requirement to do so. Recognizing the administrative challenges of providing formal written reasons, our office makes the following recommendation:

Recommendation 3: That community committees deliver clear verbal reasons for decisions at their meetings and record these reasons in their written meeting minutes, which are publicly available.

CONCLUSION AND RECOMMENDATIONS

Our office concludes that the City Centre Community Committee followed its established procedures at the July 3, 2018, meeting with respect to his non-conforming approach application. However, the resident was not provided with clear reasons for the decision to deny his application and encountered inconsistent interpretations of the Private Access By-law among city entities. Consequently, we make the following recommendations:

Recommendation 1: That the city review section 9(3) of the Private Access By-law for clarity and ensure that city entities share a common interpretation of the provision. The city should document its interpretation in writing and make it available to the public.

Recommendation 2: That the city refund the resident one of the \$223.65 application fees paid to have his matter considered.

Recommendation 3: That community committees deliver clear verbal reasons for decisions at their meetings and record the reasons in their written meeting minutes, which are publicly available.

RESPONSE TO RECOMMENDATIONS

The City of Winnipeg advised our office that it accepts the recommendations and is prepared to take the following actions to implement them:

In response to recommendation 1:

The Public Service has had our Legal Services Department review section 9(3) of the Private Access By-law and will be recommending revisions for Council approval.

In response to recommendation 2:

The Public Service has verified that payment has not been returned to the appellant. Upon the final report being released the payment will be refunded.

In response to recommendation 3:

The Public Service agrees with the recommendation and will implement the changes proposed with respect to future non-conforming approach applications being considered by committees in accordance with the Private Access By-law.

This report concludes our investigation of this complaint.

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