

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE FILE NUMBER 2011-0555

RURAL MUNICIPALITY OF ALEXANDER

REPORT ISSUED ON JUNE 17, 2014

CASE SUMMARY:

After the failure of a shoreline erosion protection barrier, a cottage owner in the Rural Municipality of Alexander complained to Manitoba Ombudsman that the municipality failed to properly manage the construction of the barrier, and had not adequately responded to his concerns.

Based on our investigation, Manitoba Ombudsman found that there was not sufficient evidence to conclude that any deficiencies in the supervision and management of the project led to the failure of the shoreline protection barrier. However, we found that the RM did not secure and retain essential documents related to the project, and that it failed to act in a timely manner to address cottagers' concerns about potential deficiencies after the barrier was damaged by several storms.

As a result we suggested that the RM take the following steps to prevent any recurrence with respect to future capital projects, particularly those that proceed by way of a local improvement.

- **Clearly define in writing the responsibilities of all parties involved in local improvement projects**
- **Ensure that essential documents are obtained and retained by the RM**
- **Set out in its procedures by-law, or a written policy, a process and a timeline for responding to resident complaints**
- **Revise its current Tendering and Procurement Policy**

OMBUDSMAN JURISDICTION

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

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

The administrative actions and decisions complained about in this matter relate to the management of a shoreline erosion protection project, funded through a local improvement by the Rural Municipality of Alexander.

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

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

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

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

THE COMPLAINT

The complainant alleges that the Rural Municipality of Alexander failed to properly manage the construction of a shoreline erosion protection barrier that was intended to protect his property and the properties of other cottage owners in the municipality. He claims the RM was not responsive when cottagers identified deficiencies in the structure and did not implement proper financial controls to ensure the barrier was properly built.

KEY ISSUES/QUESTIONS

1. What were the roles and responsibilities of the RM in the financing and construction of the shoreline erosion protection barrier?
2. Was the project properly managed by the RM?
3. Did the RM respond appropriately and in a timely manner to the complainant's concerns, particularly in the aftermath of several storms which damaged the barrier?

BACKGROUND

The Municipal Act provides municipalities with the legislative framework to govern and provide municipal services. In this matter, the construction of the shoreline erosion protection barrier proceeded by way of a local improvement. A local improvement is one means by which a municipality can borrow money for large capital projects and then raise the funds through municipal taxes to repay that money. *The Municipal Act* outlines the requirements for local improvements and special services. Clause 311(b) of the act states:

Local improvement

311 *If approved by by-law, a municipality may undertake, as a local improvement for all or part of the municipality*

b) any other project the cost of which includes a capital component

Additionally, section 313 outlines the circumstances in which a local improvement plan can proceed:

Plan or Proposal

313 *A municipality must prepare a local improvement plan or special service proposal if the local improvement or special service has been*

(a) proposed by the council;

(b) requested by the committee of a local urban district; or

(c) requested in a petition to the council signed by at least 2/3 of the potential taxpayers under the plan or proposal

Provincial law requires that a local improvement proposal identify the cost of the project for which money is to be borrowed; who is to bear the tax burden; how that burden is to be distributed; and the details of the borrowing itself.

The process for a local improvement requires a resolution by council, followed by a notice of a public hearing to potential taxpayers with detailed information about the cost of the project, the method of collecting tax, and the terms of repayment. If there is no opposition, or objections by less than two-thirds of potential taxpayers to the proposed local improvement development, council will give first reading to the by-law to approve the plan and authorize the imposition of taxes.

Council must also submit the by-law application and accompanying documentation to Manitoba Municipal Government for review prior to forwarding to the Municipal Board of Manitoba. The Municipal Board reviews the by-law and has the authority to approve, refuse or amend the by-law. In this case, the Municipal Board approved the borrowing by-law on December 27, 2006.

The complainant in this matter is a member of the Sunrise Beach Cottage Owners Association (SBCOA) who approached the RM about constructing a shoreline erosion protection barrier under a local improvement on Traverse Bay, Lake Winnipeg.

The local improvement levy for the barrier which was completed in 2008 was applied to the tax bills of the affected property owners. The complainant's portion of the project was \$21,000 plus interest amortized over a 15-year period.

The engineer hired by the RM prepared the specifications document to be used for the tendering and construction of the barrier. The cottagers signed a document that outlined the conditions agreed upon, including the amount of the down payment. The cottagers had a designated contact person who represented the SBCOA in communications with the engineer and the RM. There were also meetings between the cottagers and the engineer. At times, representatives from the RM were in attendance.

Following completion of the barrier in 2008, a series of storms damaged the structure with the most serious occurring in October 2010, when the community was hit with a severe storm with winds of up to 100 km/h. The following year, the complainant spent \$22,750 to rebuild the shoreline erosion protection barrier in front of his property.

POSITION OF COMPLAINANT

In a letter to our office dated November 14, 2011, the complainant alleged that the RM mismanaged the construction of the shoreline barrier with respect to the following by:

- failing to ensure the barrier was properly installed
- not having in its possession essential documents related to the project
- paying the contractor prematurely and failing to ensure proper holdbacks were in place to cover the deficient work

- neglecting to respond to deficiencies identified by cottagers during construction of the barrier and after it was damaged by several storms

The complainant advised that the barrier was effective for a period of one year and then failed following several storms, the first of which occurred in the fall of 2008. In October 2010, a severe storm caused damage to the barrier in front of the complainant's cottage. It is the complainant's belief that the early failure was due to improper installation and the use of inadequate materials which resulted in the settling of the protection barrier.

The complainant maintains that it was the responsibility of the RM to control and oversee the project. The complainant notes that it was the RM who was responsible for hiring the engineer to supervise the project and that many of the documents associated with the project were prepared by the municipality.

The complainant advised our office that when the SBCOA asked for financial assistance/compensation to fix the shoreline barrier following the October 2010 storm, it did not receive a direct response from council but instead was provided with two letters from legal counsel acting on behalf of the RM and its insurance agent.

The first letter claimed that the RM was not responsible for the construction of the project but that its involvement was limited to the approval of the debt financing by-law.

The second letter advised cottage owners affected by the failed shoreline barrier that the limitation period in section 21 of *The Public Officers Act* had passed and as such, the opportunity to seek compensation against the RM had expired. Subsection 21(1) of *The Public Officers Act* states:

Limitation of actions against public officials

21(1) No action, prosecution, or other proceedings lies or shall be instituted against a person for an act done in pursuance or execution or intended execution of a statute or of a rule or regulation made thereunder, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of the statute, rule, regulation, duty, or authority, unless it is commenced within two years next after the act, neglect, or default complained of, or in case of continuance of injury or damage, within two years next after the ceasing thereof.

The complainant claims that he worked patiently and in good faith with the RM and despite many positive past discussions, believes the RM abandoned his concerns and was not interested in listening to its ratepayers when they began identifying deficiencies with the barrier.

POSITION OF RESPONDENT

The RM acknowledged that it borrowed funds on the basis of its authority so the project could proceed, however, it disputes that it had any special expertise to override the advice, specifications, drawings, designs, and recommendations of the project engineer.

The RM noted that it was the SBCOA that first approached the RM about the feasibility of a local improvement development and that the association worked closely with the engineer with respect to the planning and implementation of the barrier.

Our office asked what administrative steps were taken by the municipality to ensure the engineer/contractor fulfilled their contractual obligations. In a March 27, 2013 letter to our office, the RM indicated:

The R.M. is not aware of any breach of contractual obligations by the engineer or contractor. Concerns with the project were identified. SBCOA met with the engineer and identified these concerns. The engineer relayed these concerns to the contractor. The RM did some finishing work at a cost of \$30,000 which was not included in the Local Improvement District levy. [Name] (the project's engineer) certified that the project was compliant with his specifications and drawings such that the holdback could be released. The RM had another engineering company, [name], come in and certify that the project met the elevation requirements shown on the construction documents provided by [name of project engineer]. Although the RM was arguably not obliged to perform these additional functions, you can consider additional administrative steps performed by the RM to assist with the project.

In response to the SBCOA request for compensation for the shoreline protection barrier, the RM indicated that the municipality's liability insurer would not consider the claim and that the RM itself did not have funds available to compensate the cottagers.

SCOPE OF THE INVESTIGATION

During the course of our investigation we undertook the following:

- Contacted the RM of Alexander and Manitoba Municipal Government to obtain information related to the complaint.
- Interviewed former and present staff of the RM of Alexander and contracted staff involved in the project.
- Reviewed *The Municipal Act*, the *Municipal Act Procedures Manual*, a resource document titled *The Council Members Guide Once Elected... What is Expected?*, *Lake Winnipeg Shoreline Management Handbook*, and the Terms of Reference of the Shoreline Technical Review Committee.
- Reviewed extensive documentation provided by the complainant and the RM through its legal counsel.

Note: Some witnesses involved in this project (engineer [name] and Reeve [name]), are now deceased and therefore our office was not able to verify information with them. Additionally, there has been

turnover in the chief administrative officer (CAO) position since the time of the project. The ward councillor involved in the project, however, is currently serving as the reeve of the municipality.

ANALYSIS OF ISSUES AND EVIDENCE

1. What were the roles and responsibilities of the RM in the financing and construction of the shoreline erosion protection barrier?

Before assessing whether the project was properly managed, it is necessary to determine the roles and responsibilities of the RM regarding the shoreline erosion protection barrier as this is an area of dispute between the complainant and respondent.

Initiation of the Local Improvement

In February of 2006 cottagers made a presentation to council with respect to the development of the barrier and suggested the possibility of partnering with the RM. Several emails between the SBCOA representative and the RM's CAO were exchanged in May 2006 regarding the project.

Members of our Association would like to move ahead with plans to have this work scheduled for next winter and would like to have a formal indication of where Council sits on the matter, particular with reference to having this rather major project considered as a local improvement district. – [name] (SBCOA representative) to [name] CAO

Please be informed that I have contacted 3 contractors requesting their interest in submitting proposals to install shoreline erosion structure at Sunrise Beach Estate – [name of SBCOA representative] to [name of CAO].

I would suggest that once you have obtained the estimated costs as per your contractors request and how they proposed to approach the project, that we receive same at your earliest convenience. – Reeve [name] to [name of SBCOA representative].

The emails noted above indicate that the project was initiated by the SBCOA and it was the cottagers who, in the early stages, sought out estimates from contractors.

Although the RM initially denied the request to participate in the local improvement process and had advised the SBOCA of this decision on May 12, 2006, the SBOCA representative [name] sent an email to the other cottagers (copied [name of project engineer] and Reeve [name]) on June 1, 2006 stating the following:

----- that Reeve [name] intends to proceed with a recommendation to Council the project be considered a local improvement district... Should it be accepted as a LID, the RM would then take responsibility for contracting the job, providing on site supervision, paying the contractor and establishing a "pay back formula" to recover the costs from cottagers concerned on an annual tax levy.

We have received 2 cost estimates- one from [name] (approx \$28,000 per 90' lot for rip rap format), and one from [name] (approx \$22,000 per 90' lot for gabion basket format).

Both these estimates have been forwarded to Reeve [name] in order to assist in moving the project along with Council.

[Name] has agreed to replace me as the "point person" with reference to continuing discussions with Reeve [name] and Council as well as communicating within the cottagers group.

In a September 2006 email, [name], also a member of the SBCOA, consulted with [name] (who would later server as the project engineer) about the design of the barrier, the potential impact of storm conditions and the approval process for such a project.

The following month (October of 2006) the SBCOA issued a tender package for the project.

Sunrise Beach Estates of Traverse Bay Manitoba invites interested parties to submit a Request For Proposal to supply materials for and the installation of a shoreline erosion control structure...Attached as Appendix 2 is a design plan of the erosion control structure

This package was provided by the SBCOA to the RM on October 18, 2006. It would appear at this juncture that the SBCOA was taking the lead on the project.

Public Hearing for Proposed Local Improvement for Shoreline Stabilization - November 21, 2006

This public hearing was held to discuss with residents a proposed local improvement development for the shoreline barrier. The municipality's reeve, four ward councillors, the chief administrative officer, the complainants and other cottagers were in attendance. The minutes from the meeting indicate the following:

Reeve [name] gave a brief background on the proposed LID. [Names] were in attendance to make representation in support of the proposal. A general discussion occurred with the decision that the municipality would hire an engineer for supervision, and the affected residents would hire the contractor. The municipality requests confirmation in writing from all of the participants as to the percentage of down payment. The municipality will send a form of the pertinent information required from the affected residents.

Project Documents

Local Improvement Development Sign Off Sheet:

In December 6, 2006, cottagers affected by the project signed a document prepared by the RM. It was addressed to all proponents and the cottagers were asked to indicate if they agreed or disagreed with the proposed tasks which included the following

- contractor agreed upon by proponent and hired by the municipality
- municipality to hire engineer to supervise the project
- ward councillor to fill out Development Permit for municipality
- municipality to fund project and at completion to bill back on proponents taxes over the term as agreed upon
- percentage down minimum of 20 per cent

The SBOCA points to this document as an indication that the RM was responsible for managing this project. We note that there is no signature from any representative of the RM on the sign off sheet.

The RM maintains that while the unsigned document is not legally binding, the municipality did undertake and complete all of the tasks identified in the sign off sheet. In a March 27, 2013 letter to our office in stated the following:

The sign up sheet says that the R.M. was to hire a contractor, hire an engineer to supervise, along with completing of a development permit, and pay for the project and to bill the proponents' taxes on completion. The R.M. did all of that.

Rural Municipality of Alexander By-Law No. 1806:

By-law 1806 authorized the expenditure and borrowing of money for the completion of the shoreline barrier as a local improvement. It states the following:

And whereas the Council of the R.M. of Alexander has prepared Local Improvement Plan No. 7 providing for the spending, borrowing authority, and imposition of taxes for the Shoreline Stabilization as a local improvement pursuant to Part 10 of The Municipal Act

By-law 11-08 was drafted and submitted by the RM to the Manitoba Municipal Board who on October 8, 2008, approved the by-law as a local improvement and the issuance of a debenture in the amount of \$46,491.12. With the passing of the by-law, the RM's role in the project became more formal as it was responsible for paying out monies to various parties involving in the construction of the barrier. As a result, it would be reasonable to expect that this would include ensuring that agreed upon work is completed.

Specifications for Shoreline Erosion Protection - Sunrise Bay - Traverse Bay - Lake Winnipeg - Rural Municipality of Alexander:

This document, which was prepared by the project engineer [name], outlines the scope of the project. It appears to be the basis of the agreement with the contractor, however it is undated and unsigned. The title of the document identifies the RM as the proponent and indicates the following:

- Clause 3 - The contractor shall provide assurance in writing to RM
- Clause 7 - Should the contractor not meet his obligation, the RM reserves the right to terminate the contract
- Clause 11- The bidder shall provide the municipality with...

The bid form further indicates that bids are to be submitted to the CAO of the RM of Alexander and that the RM will accept bids and authorize contractors to undertake the work according to the attached specifications and plan.

Shoreline Development Application:

The Shoreline Development Application specifies that the municipality was overseeing the project and lists the CAO of the RM as the applicant. It states the following:

The RM is creating a local improvement district and will become the Authority to oversee this project and will be in a position to issue a development permit upon completion. The LID By-law has been approved and we need to complete this project by March 2007.

The SBOCA maintains that the project documents identified above clearly indicate that the RM was the proponent and responsible for managing the project. However, the SBOCA continued to play a significant role in the project, even after the debt-financing by-law was passed as evidenced in the following emails:

We as a group (SBOCA) met last night with [name], project engineer, to review and discuss our options with the submitted shoreline tender bids. After some considerable discussion we as a group have decided it would be in our best interest to have [name] do this work for us.

Dean will be sending out letters to the two unsuccessful bidders.

Dean also indicated he will be looking after the project from this point on from start to completion as part of his contract fees. – [name] (SBOCA) to Reeve [name] (Jan. 30, 2007)

After much conversation between [name] and [name] this morning. It has been determined that we will use [name] for our project. – [name] (SBOCA) to CAO [name] (Jan. 31, 2007)

As part of our investigation we looked to see whether the substance of the various documents/discussions in terms of roles and responsibilities was reflected in council minutes or correspondence from the RM. There is no record in council minutes that council accepted the responsibility to undertake the project, had approved the contractor, or appointed a project supervisor.

There was no evidence of any written communication from the RM to the cottagers clearly indicating what the municipality's role was with respect to this project, nor confirming that it would be supervising the construction or the activities of the engineer.

RM's Role in Managing the Project

There does not appear to be any documentation signed and agreed to by both parties that clearly defines their roles and responsibilities regarding this capital project. Our review indicates while the RM passed the debt financing by-law and was responsible for obtaining the required permit and

approvals for the project, the SBOCA was also actively involved with respect to hiring contractors, meeting with the engineer and discussing design and specifications of the shoreline barrier.

It would appear that this project was implemented at the request of the cottagers, who had a relationship with the engineer and were initially responsible for drafting the tender. Upon the approval of the local improvement plan, the responsibility for the management of the project clearly rested with the RM. However, there appeared to be confusion and disagreement as to the responsibilities of the parties.

2. Was the project properly managed by the RM?

We examined whether the RM obtained important documents related to the project, its actions with respect to construction of the barrier, and its response to deficiencies identified by the cottagers during construction.

Did the RM obtain essential documents related to the project?

Part of the responsibility of managing large capital projects is ensuring that any required documents, such as contracts, are obtained and secured. The RM advised our office that it does not have copies of signed contracts with the engineer or the contractor.

We note that at one point Reeve [name], in a February 9, 2011 email to the complainant, requested any information the complainant may have with respect to the original contract with engineer [name], specifically if there was any information regarding [name's] supervision of the project. The complainant responds that he had never seen an original contract with the engineer [name] or the contractor and assumed that the RM would have these documents.

In its initial response to our office, the RM advised that it did not receive all of the relevant documentation at the early stages of the project. In a March 15, 2012 letter to our office it stated the following:

It was the Association (SBOCA) which worked with [name] in developing the specifications for the project before and after the R.M. agreed to facilitate an LID levy. The Association's engineer prepared the drawing and standards to which the project was to be built. The R.M. does not have in its records the completed stamped drawings and specifications prepared by [name] and used by the Association in selecting the contractor for the project. The assumption is that the R.M. was not provided with them as the Association and [name] were dealing with the contractor.

Clearly there was confusion as to who would be securing and provide for the safekeeping of essential documents. It is, however, reasonable to expect that the RM, given its role in the financing of the project, would have an active role in obtaining and securing the relevant and necessary documentation for a capital project valued at over \$200,000.

Management of project during construction

We reviewed several documents which relate to the construction of the barrier. These documents include recommendations from an independent advisory committee as to what materials should be used, the height of the barrier and potential failures /risks from weather-related events.

As part of the process, the RM was required to submit a permit application permit to be reviewed by the Shoreline Erosion Technical Committee (SETC).

The SETC provides technical advice and reviews proposed shoreline protection works. The composition of the SETC includes at least three engineers from relevant government departments, and representatives from Fisheries and Oceans Canada (DFO), Manitoba Hydro and the planning district.

The RM's CAO wrote to the SETC to inquire about the lifespan of a shoreline erosion protection barrier. The SETC responded to the CAO in a letter dated October 10, 2006.

Before discussing the specifics of the SETC letter, it is important to note that the chairman of the SETC who signed the letter of response to the RM was [name], who was chosen by cottagers and subsequently hired by the RM as the project engineer. This would appear to be a conflict of interest, or certainly could create the appearance of a conflict of interest, with the SETC providing advice and reviewing a shoreline protection project that was being supervised by its chairman. This is a situation in the future that should be avoided.

The SETC letter stated the following:

*A shoreline erosion design is based upon a design event and occurrence frequency as are flood proofing measures. This criteria presents a design for events that would occur for example once in 20 years and is a computed value of **probable Lake Winnipeg levels, extreme weather events and periods of sustained conditions** that would develop in lake setup levels and wave energy. Shoreline protection can be designed for specified events but does not eliminate the possibility that the design event will be exceeded.*

Engineers can apply their technical knowledge in the design of shoreline protection to the level of knowledge of the day, and for this be held accountable. This design is based upon historic event data which has been obtained and interpreted by others including Government Agencies. No engineer can be held accountable for damage should the data be incorrect or the design event be exceeded by the state of nature.

In summary, the Local Improvement District requirement for a guarantee that shoreline protection design works would last for a specified period is impractical and I would advise you to get a legal confirmation."

This letter suggests that the CAO made inquiries about the lifespan of the barrier. The RM indicated that it was unable to confirm whether legal counsel was contacted with respect to the possibility of obtaining a guarantee.

SETC Approval of Shoreline Development Application:

We also reviewed a letter, dated February 2, 2007, from [name], vice-chair of the SETC, to the CAO, approving the application for shoreline work. The application was provided to the SETC on January 22, 2007. The letter states the following:

A. Geotechnical and Subsurface Soils and Subsurface Drainage

The drainage between the soil and the shoreline erosion protection is extremely important and should be designed carefully, of adequate size and capacity to allow wave water recession without causing soil transport. Should the drainage not be adequate, rapid failure of the erosion protection can occur as receding water can remove soil from behind the erosion protection. In review of your application it is our view that a granular layer between soil and the armour stone as opposed to the geotextile is advantageous.

B. Shoreline Hydraulics

The shoreline at this location has a high historic rate of erosion which according to the Baird report ranges between 1 and 3 meters per year over a 39 year period. Your project should reduce this erosion rate significantly. The proposed infilling to maintain shoreline alignment should reduce the eddy current development during high Lake Winnipeg levels and result in lesser hydraulic forces tending to produce erosion. Placement of this material during February-March 2007 under frozen conditions may necessitate maintenance of the upper slope.

SETC recommended the following:

- 1. Adequate sediment and erosion protection (i.e. silt fences, erosion control blankets etc) be provided during the construction work to provide lake water contamination protection.*
- 2. The project should be constructed above the Average High Water Mark (AHWM) for Lake Winnipeg which is defined as Elevation 713.6 feet a.s.l. to avoid infilling of fish habitat. Construction should not occur between April 1 and June 1 of any given year to protect spawning fish their incubating eggs and larval life stages.*
- 3. We strongly urge incorporating native plants such as grasses and shrubs with deep root systems into the crest of the dike and the infilled zone in order to provide precipitation erosion protections.*
- 4. The ends of the protection should be tapered into the shoreline of adjoining properties to avoid causing erosion and eddy currents that could cause damage.*

Our office reviewed evidence that included photographs and progress notes taken during construction regarding the materials and methods used to construct the barrier. During construction, project engineer [name] hired [name] to inspect the barrier. Mr. [name] attended a council meeting in March

2007 and reported on the progress of the construction of the shoreline barrier, confirming that it would be complete by April 1, 2007.

[Name] also prepared a report to council dated March 31, 2007 and provided a chronology of shoreline barrier project events. The report concluded that after the inspection by Mr. [name] on March 28, 2007, the remaining work consisted of leveling, regrading and seeding the upper properties, and that large boulders were to be placed at the end of Sunrise Road as traffic barriers.

RM's response to concerns raised by the cottagers during construction of the barrier

During the construction of the barrier, the cottagers raised concerns about the project in several emails to the project engineer and the CAO. We reviewed an email from the SBCOA to the engineer, dated April 2, 2007, asking if there were any deficiencies noted during an inspection the previous week. A meeting between the SBOCA and [name] was scheduled for April 12, 2007 to discuss deficiencies regarding the barrier.

At the meeting, the SBCOA identified a number of areas where they had concerns. These included the size of the stones used to construct the barrier as it was felt that the rocks were too small. The cottagers also were of the view that the various sizes of stones had not been distributed evenly throughout the barrier. The SBCOA also questioned whether there were enough stones to achieve the required height of the barrier of 721.8 feet. The SBOCA indicated that an independent survey would be needed to confirm elevation.

Although the RM was invited to attend the meeting, there was no representation from the municipality present. Minutes of the meeting indicate that [name] was to discuss the issues with the RM and provide council with a list of the deficiencies. The SBCOA felt that there should be a substantial holdback pending resolution.

An SBCOA representative emailed the CAO, reeve, and ward councillor, advising that the meeting had occurred and that the cottagers still felt there were many items to be addressed before the project was completed. The list of deficiencies was forwarded to the CAO on April 17, 2007 for the municipality to review and record.

In a letter to the reeve and council dated May 18, 2007, [name of project engineer] advised council of certain contract deficiencies. He identified that the outstanding action required of [name] was to remove large boulders at the end of Sunrise Road, and that additional fill, leveling and regrading was to be done in front of three cottages.

On June 13, 2007, the SBCOA representative sent an email to the CAO, ward councillor, reeve and engineer, indicating that he was surprised to hear that the contractor had not yet been informed of any deficiencies that require action on the shoreline barrier.

An August 14, 2007 email from [name] to the ward councillor and CAO, indicates that there had been a meeting with the cottagers the previous evening and that a letter was to be drafted for the RM's solicitor to review.

The letter to [name] of [name] from the RM of Alexander dated August 14, 2007, advises that concerns were relayed to him on May 8, 2007 alleging that [name] had not fulfilled the contract agreement.

The outstanding issues that were not addressed:

1. *The height of the rock rip rap did not meet the contract requirements and will need to be raised to the specified Elevation of 220 meters. As you are aware, this issue has been raised on various occasions and a verification survey was made. This survey was provided to you in June.*
2. *Any subsidence that occurred is considered a result of poor placement of the infill material (Item 4, of the Bid Form) and may need further regrading.*

As a result of these outstanding deficiencies we are not prepared to issue a Certificate of Substantial Performance according to the Mechanics Lien Act nor are we prepared to release the holdback monies retained for satisfactory completion of the contract.

The exchange of correspondence between the various parties highlights not only the deficiencies identified by the cottagers but also the length of time it took for the RM to respond to these concerns. In this instance, the cottagers raised concerns about the integrity of the shoreline erosion protection barrier in April 2007. The RM was alerted in May 2007, however, did not send a letter to the contractor about the work that needed to be done until August 14, 2007, about four months later.

[Name] Review

Given concerns regarding the deficiencies, the RM hired another engineer from [name], an independent engineering firm, to review the shoreline barrier in front of three cottages (including the complainant's cottage). The report was issued on November 8, 2007 following a site visit on October 24, 2007. It states the following:

The purpose of the review was to comment about the cause of the infill settlement in this area. ...during the site visit, elevation was taken from the top of the rock armour stone by RM of Alexander Public Works personnel. Comparing these elevations to the design elevation of 721.8 m, identified that the existing top of rock armour is approximately 0.45 m (1.5 ft) lower than design.

Typically, to address fill settlement due to "winter" construction, the proposed fill embankment may be installed to an elevation higher than design to compensate for this settlement. As it is difficult to determine exactly how much settlement may occur, contractor's generally construct fill embankments to proposed design elevation and add or "top up" settlement areas in the summer or fall after this type of settlement occurs.

It is my opinion that the fill settlement is the result of un-compacted granular/clay fill settling as described above.

On November 15, 2007, the CAO notified the contractor that the existing top of the rock armour was approximately 1.5 ft lower than design.

The RM asked [name] to complete another site visit on March 14, 2008 to review the elevations of the rock armour which were previously identified as being below the required design elevation. The engineer reported the following:

...during site visit elevations were taken from the top of the rock armour stone by RM of Alexander Public Works personnel, who identified that the top of rock armour ranged in elevation from approximately 220.0 m to 220.37 m. These elevations are at or above the proposed design elevation of 220.0 m, which is considered to be in conformance with the elevation requirements as shown on the construction drawings for this project.

This second report indicates that the requirements for construction as it pertained to elevation were met. The inspection, however, did not include a comprehensive review of the design or materials used to construct the barrier.

Financial Holdbacks

As already noted, the SBCOA was of the position that the RM failed to implement proper holdbacks to ensure any deficiencies with respect to the shoreline barrier were addressed. In response to this allegation the RM states the following to our office in a letter dated March 27, 2013:

By letter dated May 18, 2007, to the RM, [name] noted some deficiencies and release of \$56,472.80 which included a holdback release of \$19,000 from the Holdback Account. He indicates the remaining \$6,231.84 could be released upon correction of the deficiencies. By statute, after issuing payments as recommended by [name], the RM. was obliged o hold back \$7,666.12. That was done. The R.M. was entitled to rely on the advice of the engineer from [name] in releasing the last bit of holdback moneys.

On June 10, 2008 council passed a resolution (234/08) that the RM had completed the Sunrise Shoreline Erosion Project.



Completed protection barrier in front of lots 5, 6, & 7 Sleepy Hollow, May 2008 (photo taken by complainant)

3. Did the RM respond appropriately and in a timely manner to the complainant's concerns, particularly in the aftermath of several storms which damaged the barrier?

There were several storms following the completion of the shoreline barrier in 2008 which damaged the structure. We reviewed the response of the RM to concerns raised by cottagers following those incidents.

In an October 31, 2008 email to [name], the ward councillor at the time, the complainant states the following:

The pounding of waves during the storm of October 25-27 (2008) caused our shoreline protection at Sunrise Beach, off Traverse Bay North road to fail with the bottom portion of the wall having slid down to low water's level or simply carried away to further down the beach. The shoreline wall has now been hollowed out and weakened significantly. My concern is that with another repeat storm of last week the top portion of the wall will come down and be carried away too. Clearly many of the small stones have been washed out and portions of the dike have flattened out. We seek your early opinion what should be done in order to minimize further erosion.

My opinion is that the work needs to be re-done using blasted granite again, however this time the placing needs to be done correctly with the smaller stones on the bottom and not on top and the bottom of the slope needs to be anchored by a row of large stones in order to keep the stones from sliding or washing out. Perhaps the height of the wall needs to be revisited as the waves splashed over the top. I wonder if the water behind the wall helps push out the stones. [Name] thanks for your willingness to help again. I favour your thoughts of having the municipalities' engineer take a look at this and follow his direction.

On the same date (October 31, 2008), Councillor [name] forwarded the above email to the CAO and asked her to put it as an agenda item at the next committee meeting.

The complainant sent another email to fellow cottagers on October 31, 2008, advising that the barrier failed after the storm. He states that Councillor [name] suggested that the municipality's engineer look at the barrier and indicated that the concerns of cottagers would be forwarded to council.

On November 8, 2008, Councillor [name] responds to the complainant's October 21, 2008 email, stating that the shoreline situation was discussed at a committee meeting and that administration would be providing a response. There is no evidence, however, of the complainant ever receiving a response.

Moreover, based on the information provided to our office, there is no evidence as to whether there was any consultation with the municipality's engineer, or if [name], the project engineer, was asked to assess the deterioration of the barrier given that it was completed just a few months earlier. We also could not find any evidence that the municipality tried to contact its insurance company about potential flaws soon after the complainant notified Councillor [name] in October 2008.

Request for Financial Assistance

In August 28, 2009, the cottagers wrote to the municipality that another storm on July 16, 2009 caused additional damage to the shoreline erosion barrier. There were also photographs attached that showed how the stones were washed from the wall and left on the beach in May 2009.

We believe this early failure to be due to improper installation (not build to specifications), the use of improper materials (too many small stones and fines) and settling of the wall (due to failure of compacting the fill behind the wall). The top of the wall with the spray painted markings, originally made by the contractor, indicating the high mark have rolled down to the bottom and much of the small stones have been carried away by wave action and are spread all over the beach making it near impossible to walk on the beach. The storm in July 2009 has also began eroding the earth behind the wall indicating the original wall was not high enough, a concern pointed out by the cottage owners in previous meetings.

Our concern now is that with a few more storms the wall will be beyond repair. ... We are seeking your assistance in accessing federal government infrastructure or Stimulus funding in order to complete this project to be seen as a demonstration/test site for proper shoreline protection.



Stones washed out and slid down the bank into the water (photo taken by complainant)

The assistant CAO responded on behalf of council by letter on September 29, 2009, indicating that the municipality will be seeking financial assistance from the provincial and federal governments. There was evidence that the cottagers met with federal elected officials to request funding. An email was sent by cottagers to the reeve and ward councillor on November 18, 2009, advising that the application process has to go through the RM.

However, there is no evidence of any follow-up from the RM to inquire about the possibility of financial assistance.

In October 2010 a severe weather storm further damaged the already weakened shoreline erosion protection barrier.



October 2010 storm removed top 3-4 feet from entire 86 meter section #3. The red line indicates the edge of the bank before the storm. The metal ring is from a fire pit that stood on the edge of the bank in the exact location – only now 4' lower (photo taken by complainant)

Once again, the SBCOA approached the municipality about assistance to repair the damaged shoreline barrier in January 2011 and subsequently made a presentation to council on February 8, 2011.

In a February 9, 2011 email to the complainant, Reeve [name] requested any information the complainant may have with respect to the original contract with [name], specifically, if there was any information of [name] supervising the project. The complainant advised the reeve that he had never seen an original contract with the engineer or the contractor and assumed that the RM would have these documents.

As for the SBOCA request for compensation for the shoreline protection barrier, the RM stated the following to our office:

The demand letter from the Association dated January 25, 2011, requested significant financial assistance for the 're-doing' of the \$220,000+ project. The R.M. does not have unmarked amounts of funds in that range available on demand. The R.M. also has the needs of other ratepayers in the area to consider. The R.M. referred the demand letter to its liability insurer to see if insurance coverage would be available. The insurer hired an adjuster and legal counsel for investigation and response. A response was sent to the Association by letter

dated May 26, 2011, indicating that the municipality's liability insurer would not entertain the claim.

In order to protect his property, the complainant and two other cottagers made arrangements to rebuild the shoreline barrier in March 2011 at a cost of \$22,750 each to mitigate further damage. The RM contributed \$4,183.32 to the restoration for the 17.63 feet of public pathway by reimbursing the three cottagers.

FINDINGS

1. What were the roles and responsibilities of the RM in the financing and construction of the shoreline erosion protection barrier?

The SBCOA point to a number of documents such as the local improvement plan sign-off sheet, the shoreline development application and the fact that the RM passed the debt-financing bylaw, all of which clearly make the RM responsible for its proper management.

The RM, however, referred to a series of emails which show the SBCOA taking the lead in terms of dealing with engineers and contractors.

It is clear that both parties were involved in various aspects of this project. Responsibilities were not set out in writing. A review of council minutes failed to provide any further clarity as to the responsibility for management of the project or decision making.

Best practices would suggest that roles and responsibilities are clearly set out at the onset of a project so that all parties are aware of parameters in the event there is a problem or issue after completion of the project.

Ultimately, the RM is responsible for publicly funded projects.

2. Was the project appropriately/properly managed by the RM?

Management during construction

The complainants believe the shoreline protection barrier failed because of deficiencies in material and construction. They hold the RM responsible for the failure on the basis of their belief that the RM failed to properly manage the construction of the project.

Given the evidence, it is not possible to make an assessment if the shoreline barrier failed as a result of inadequate design and/or construction. The RM retained a professional engineer, expert in the field, to supervise the project. They were entitled to rely upon his assessment of the quality and sufficiency of construction.

While the RM's response to post-construction complaints was less than perfect, the RM did hire external engineering consultants to review the project and acted upon the recommendations of that engineer.

Response of RM to concerns about the barrier during its construction

Residents are reasonably entitled to expect a response to concerns they raise with their municipal government.

In April 2007, cottagers raised concerns with the RM about the integrity of the shoreline erosion protection barrier. The RM, however, did not send a letter to the contractor about the work that needed to be done until August 14, 2007, about four months later. No explanation for this delay was provided.

Complainants believe that the RM failed to hold back sufficient funds in light of the concerns they had raised about the project. The RM was advised on project deficiencies and the amount of the appropriate holdback by the project engineer. Council was entitled to rely on the engineer's advice and in doing so cannot be said to have acted inappropriately.

Obtaining essential documents

With such a substantial financial investment, it would seem prudent for the RM to obtain copies of contracts with clearly defined roles and responsibilities in writing at the start of the project. This did not happen. The RM did not have a contract with the engineer or stamped drawings to ensure certification.

Instead it appears that the RM may have relied upon cottagers to retain copies of important documents. We note at one point the ward councillor at the time asked the complainant if he had a copy of a contract with the engineer. Citizens expect that government will retain proper documentation regarding publicly funded capital projects and that there will be continuity from one municipal administration to the next.

It is unclear how this particular local improvement project was able to proceed, and funds be released, before signed and executed copies of agreements were secured and clear roles and responsibilities were defined.

3. Did the RM respond appropriately and in a timely manner to the complainant's concerns, particularly in the aftermath of several storms which damaged the barrier?

The complainant alerted the ward councillor with respect to the integrity of the barrier following a storm in October 2008. This failure of the barrier, just a few months after it was completed, should have caused concern for the municipality. We could not find evidence that the municipality contacted the engineer or insurance companies about these concerns when they were brought to the attention of the ward councillor. The ward councillor indicated that administration would send a reply to the complainant about the actions the RM may take. There is no evidence of a response from the RM to the complainant concerning the failure of the barrier.

In August 28, 2009, the cottagers wrote to the municipality that another storm on July 16, 2009 caused additional damage to the shoreline erosion barrier. The cottagers believed that the failure was due to improper installation, the use of improper materials and settling of the wall. The assistant CAO responded on behalf of council by letter on September 29, 2009, indicating that the municipality will be seeking financial assistance from the provincial and federal governments. There was no evidence that that this was ever followed up on at the time.

The RM did contact the insurer after the major storm in October 2010 damaged the barrier. Complainants believe that the RM should have acted sooner. Our investigation has provided no evidence on which to conclude that an earlier response would have prevented the subsequent damage that led to the failure of the barrier.

It is fair and reasonable that the SBCOA would expect to receive a response to concerns raised in a timely manner and that the RM would take reasonable action to address those concerns. This does not appear to have occurred.

In response to cottager's concerns the RM hired an independent engineering firm at a cost of \$30,000 to review the project. This review determined there was compliance with the engineer's specifications with respect to the height of the barrier. It did not address the other concerns raised by cottagers.

The complainant felt the RM had abandoned his concerns and, despite many positive past discussions, was no longer interested in listening to its ratepayers. He felt that he was not treated fairly by the RM.

Fairness requires that government be approachable; be clear with people about what can or cannot be done; and take the time to listen. As such, it is reasonable to expect that the RM would be responsive to its ratepayers either by responding to outstanding concerns and/or providing additional information to clarify its decisions.

Based on the evidence reviewed, we find that while it was reasonable for the RM to rely on the opinions of experts during planning and construction phase of the shoreline erosion barrier, it was not responsive in addressing inadequacies of the barrier or the concerns of cottagers in the aftermath of the series of storms which damaged the structure.

OTHER MATTERS

During the course of the investigation the RM's tendering policy was identified as an issue.

The RM did not have a tendering policy in place at when the shoreline erosion protection barrier was being built but we were advised by a former employee of the RM that a tendering policy was drafted after completion of the shoreline erosion protection project.

The Municipal Act was amended in June 2012 to require municipalities to adopt best practices in governance and administration. Effective January 1, 2013, all municipalities are required to have a tendering and procurement policy to ensure accountability and transparency when obtaining goods and services.

As reference, subsection 251.1 of *The Municipal Act* provides:

Public tendering and procurement policy

251.1 *The council of a municipality must establish a public tendering and procurement policy in respect of the municipality's acquisition of goods or services by purchase, hire-purchase, lease, rental or other agreement, which may*

- (a) establish criteria for soliciting procurements by public tenders or other forms of competitive bids;*
- (b) establish forms of contract and determine when they are to be used; and*
- (c) govern the process for awarding contracts of procurement.*

All CAOs received a November 6, 2012 letter from Manitoba Municipal Government advising of the legislative amendment with an enclosed sample tendering policy and an insert for *The Municipal Act Procedures Manual*. The RM advised our office that its tendering processes and record keeping practices were updated in 2008. It is unfortunate that the RM did not have a tendering policy in place prior to construction of the shoreline barrier.

We reviewed the tendering policy of the RM and compared it to the sample policy that was circulated by Manitoba Municipal Government. Although municipalities have the discretion in what they include in the policy, we noted a number of items missing from the RM's policy that could cause further confusion in future capital projects and fail to meet the statutory requirement set out in legislation.

The RM policy does not specify how it will advertise bid opportunities, how tenders will be evaluated and awarded, and does not provide information on the processes that will be followed relating to requests for proposals or formal tenders. There does not appear to be any section of the policy that addresses when contracts should be reviewed by the municipal solicitor. Finally, there is no reference as to the retention of important records such as original bids, letters of award and associated documentation.

We note that the sample policy distributed to all municipalities by Manitoba Municipal Government recommends including the sections currently missing from the RM's policy.

In a review of the contents of the RM website, we noted that the Tendering and Procurement Policy is not currently posted. This is a public document that should be available for viewing.

We did note that the recent minutes of the RM council meetings provide detailed information to ratepayers about the activities and decisions of council. There is information about who is awarded a tender, the costs associated with the tender, and information about when municipal administration is authorized to tender the contract. Generally, our office has not reviewed council meeting minutes of this quality and other municipalities may want to follow the example set forward by this RM. (See May 27, 2014 minutes).

CONCLUSION

There is insufficient evidence to conclude that any deficiencies in the supervision and management of the project led to the failure of the shoreline protection barrier.

The RM of Alexander was entitled to rely upon the advice of the contract engineer with respect to alleged deficiencies and the amount of the appropriate holdback.

There was inadequate documentation of the roles and responsibilities of the parties, and the failure to maintain essential documents.

The RM did not adequately respond to cottagers' concerns in 2008 after the barrier was damaged by the first of a series of storms.

The current Tendering and Procurement Policy of the RM of Alexander does not meet the standard set in sample policy provided by the province to provide direction to municipalities to achieve statutory compliance.

The investigation disclosed no basis for a recommendation that would benefit the complainant. However, as a result of the investigation Manitoba Ombudsman identified a number of areas where administrative improvement could benefit the RM and residents when implementing local improvement plans.

As a result, Manitoba Ombudsman suggests that the RM take the following actions to ensure that future projects are properly managed:

- Clearly define in writing the responsibilities of all parties involved in local improvement projects and ensure all parties clearly understand and are in agreement with their roles.
- Ensure that essential documents such as signed contracts or stamped engineer drawings are obtained and retained by the RM.
- Set out in its procedures by-law, or a written policy, a process and a timeline for responding to resident complaints.
- Revise its current Tendering and Procurement Policy and make it available for public viewing on its website.

MANITOBA OMBUDSMAN