

Manitoba mbudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2015-0086

LOCAL GOVERNMENT DISTRICT OF PINAWA

REPORT ISSUED ON JUNE 24, 2016

CASE SUMMARY:

Manitoba Ombudsman received a complaint from a resident in the Local Government District of Pinawa (the LGD). The complainant indicated that a business located in a residential building in the LGD was contravening several requirements for home occupations in the LGD zoning by-law.

The LGD acknowledged that prior to the complaint, it was aware that this particular home-based business was not complying with the zoning by-law. The LGD indicated that it was trying to resolve the matter with the business owner. However, there are no records of the discussions the LGD had with the business or any other records of the LGD's decision making in this matter. As a result, we recommend the following:

- That the LGD establish a policy for how it addresses by-law non-compliance and make the policy publicly available. This policy should clarify how the LGD will keep records of its investigations, inspections and decisions regarding non-compliance matters.

The LGD council considered the recommendation and decided that a policy concerning how to address by-law non-compliance will be prepared for council approval. The LGD indicates that upon final approval, the policy will be made publicly available and published on the LGD's website.

The LGD states that going forward, it will ensure that written records are maintained for site inspections that arise following allegations of unlawful activity and that these inspections are conducted by LGD staff.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is 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 review complaints and to identify areas requiring improvement.

KEY ISSUES

- 1. Did the LGD address the zoning by-law contravention in a reasonable manner?**
- 2. Was it reasonable for the LGD to determine that restricted material was not being stored at the property?**

BACKGROUND INFORMATION

In December 2014, the complainant contacted the LGD about a home-based business that she believed did not comply with the LGD's zoning by-law because it was located in a home that was not the business owner's primary residence and had more than one non-resident employee. The complainant also believed the business might be contravening the zoning by-law by storing hazardous material on the premises.

LGD zoning by-law (by-law no. 658-04) permits a business to operate in a residential building if the following requirements are met:

- Home Occupations shall have a valid business license issued by the LGD and shall:*
- be limited to a maximum of 40% the total floor area of the dwelling unit;*
 - be operated by a live-in owner as a secondary use and may have a maximum of 1 non-resident employee;*
 - be open to the public only between the hours of 8:00 a.m. and 8:00 p.m.;*
 - provide customer parking space in the existing driveway or yard;*
 - restrict parking for business vehicles to 1 parking space in the existing driveway;*
 - not have exterior storage of business equipment, materials, merchandise or inventory;*
 - not change the principal character or external appearance of the dwelling;*
 - not generate traffic beyond what is normally characteristic of the area;*
 - not use, store or produce toxic, explosive, flammable, combustible, corrosive, radioactive or other restricted material;*
 - be limited to 1 non-illuminated, non-flashing sign with a maximum permitted area of 0.4 m² for Home Occupations within one-family or two-family dwellings. Exterior signage for home occupations within multiple dwellings shall not be permitted; and*
 - where near provincial highways, be reviewed by Manitoba Transportation and*

Government Services.

The LGD acknowledged that prior to the complaint, it was already aware that this particular home-based business was not complying with the zoning by-law and that it was trying to resolve the matter with the business owner.

COMPLAINANT'S POSITION

The complainant questions why, other than a letter from the business dated December 22, 2014 indicating that the business planned to construct a new building, the LGD has no documentation about its attempts to resolve the business's contravention of the by-law.

She believes the December 22, 2014 letter that the business sent the LGD was a result of public attention regarding allegations of non-compliance. The complainant is of the view that the LGD should have taken action to enforce the zoning by-law requirements when it became aware of the non-compliance several years previously.

Further, the complainant asserts that the LGD's approach to the non-compliance is not fair to businesses in the LGD that comply with the zoning by-law restrictions on home-based businesses.

LGD OF PINAWA'S POSITION

The LGD advises that it addresses by-law non-compliance issues by sending letters to the offender explaining the by-law requirements and requesting compliance, and often following-up with dialogue and additional letters until compliance is achieved. The LGD indicates that this non-confrontational approach was successful in addressing past non-compliance of temporary structures in new LGD subdivisions and the non-compliance of canvas-covered storage buildings.

The LGD advises that it has known for some time that the business is not complying with some of the home business requirements in the LGD's zoning by-law. The LGD states that it has addressed the non-compliance by having an ongoing dialogue with the business, which had indicated to the LGD that its long-term plan was to build a structure on commercial property belonging to the business owner. The LGD is of the view that this outcome will lead to significant economic development for the LGD, including commercial tax revenue and job creation, and is in the best interest of the community.

As such, the LGD decided to allow the business to operate in the home location until the new building is constructed. In March 2015, the LGD advised our office that if the new building did not materialize in 2016, it would take stronger action to address the matter.

In June 2015, the LGD informed our office that the business owner had revised his intentions for relocating the business. The LGD advised that the business owner had purchased a commercial building and that following renovations, the business would be relocating to that site. In April

2016, the LGD advised our office that renovations were near completion and it expected the business to relocate before summer 2016.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Review of documents provided by the complainant and the LGD;
- Interviews with the complainant and the LGD;
- Review of the LGD zoning by-law (by-law no. 658-04) and business licensing by-law (by-law no. 763-13); and
- Review of the Planning Act and the *Municipal Act Procedures Manual*.

ANALYSIS

1. Did the LGD address the zoning by-law contravention in a reasonable manner?

Section 3.4 of the LGD zoning by-law states that enforcement of the by-law shall be in accordance with the Planning Act. Part 12 of the Act sets out municipal inspection and enforcement powers, but does not require a municipality to take any steps to enforce a by-law. The Act gives a designated employee or officer of a municipality the authority to inspect land and buildings and request that anything be produced to assist in the inspection. If the designated employee or officer finds that a person is contravening a by-law adopted under the Planning Act, they may issue a written order requiring the person to remedy the contravention. If a person does not comply with such an order, a municipality may take any action that is reasonable to remedy the contravention or may apply for a court order to enforce the by-law.

Municipalities also have recourse to a court prosecution for the enforcement of a by-law. A court prosecution may be commenced if an individual or corporation contravenes a by-law adopted under the Planning Act (such as a zoning by-law). If an individual or a corporation is convicted, the court may impose a fine and/or order the individual or corporation to comply with the by-law.

While Manitoba Municipal Government's *Municipal Act Procedures Manual* speaks specifically to municipal powers under the Municipal Act, we believe the following guidance from this manual is also applicable to the enforcement of by-laws adopted under the Planning Act.

By-law enforcement has been a traditionally difficult area for municipalities. It is often time consuming and costly. Enforcement should be viewed, however, as a service to those that are adhering to the legislation and your municipal by-laws. For example, residents who maintain their properties should not suffer because of proximity to unsightly property. Enacting by-laws without the resources or the will to enforce them may diminish the credibility of the municipality and lead to increased non-compliance.

Municipalities are responsible for by-law enforcement. However, a municipality's decision on how and when to address non-compliance with a by-law is not always straightforward. Municipalities may need to balance competing public interests and priorities in deciding how to proceed. We recognize that municipalities have flexibility and discretion in deciding their course of action. In our view, municipalities should be responsive to concerns of non-compliance and take action that is proportionate to the nature of the non-compliance.

We note that many options are available to municipalities to change non-compliant behaviour and deter future non-compliance, including providing information or advice on how to comply with by-laws, negotiating compliance agreements, issuing warnings and taking enforcement action.

When a municipality exercises its discretion to choose one of these options (or others) to address non-compliance (i.e. deciding whether to take a persuasive approach or an enforcement approach), it must do so reasonably and in accordance with principles of procedural fairness. In March 2016, the Office of the British Columbia Ombudsperson released its guide on best practices for local government by-law enforcement. We agree with the view of the British Columbia Ombudsperson that the approach of seeking voluntary by-law compliance can be effective, but it is still important for municipalities to take enforcement action when necessary. Otherwise, the credibility of municipal by-laws is reduced over time and likely so is voluntary by-law compliance.

In this case, the LGD advises that the home business did not comply with the zoning by-law because the home is not the business owner's principle residence, the business has more than one non-resident employee and the business exceeds 40 per cent of the total floor area of the home.

While the LGD provided records confirming that it has known about this home business since February 2009, we were unable to find any evidence to establish when the LGD first became aware that the business might not be complying with the zoning by-law. We asked the LGD to provide records to establish this, but the LGD did not have any.

The LGD states that over time it had conversations with the business owner regarding the non-compliance and felt that the owner's responses were sufficient. However, other than the December 22, 2014 letter from the business, the LGD was unable to provide any other records regarding its attempts to resolve the non-compliance. Nor could the LGD provide any other records to support its belief that the business was committed to moving out of the residential building and into a commercial space.

As such, we cannot come to a conclusion about whether the LGD's decisions in this matter were reasonable because there are no records of the conversations the LGD had with the business or any other records of the LGD's decision making in this matter. For instance, there are no records of the following:

- when the LGD became aware of the non-compliance;
- the LGD's initial assessment of the non-compliance;

- any LGD attempts to investigate or collect evidence regarding the non-compliance;
- any instructions to staff regarding the non-compliance;
- what action the LGD took to address the non-compliance;
- the LGD's conversations with the owner of the home business;
- any direction the LGD provided the home business for the purpose of resolving the non-compliance;
- any agreements the LGD made with the home business;
- why the LGD took the approach that it did in this matter; or
- any relevant LGD meeting minutes.

We note that the LGD has no policy that requires record keeping for non-compliance matters. Establishing LGD policy for by-law non-compliance would have many benefits. By guiding the exercise of LGD discretion for dealing with non-compliance, written policy can help ensure consistent and well-documented decision making, particularly if more than one individual at the LGD deals with by-law non-compliance matters. Policy can also assist LGD decision makers by setting out the relevant considerations the LGD will take into account in dealing with by-law non-compliance and describing the type of LGD response that is likely to be chosen for different levels of non-compliance. This can clarify for the public how it can expect the LGD to address non-compliance issues and help the LGD respond consistently and efficiently to allegations of an unfair approach to such issues. Record-keeping also allows any new LGD staff to see how the LGD addressed issues in the past and ensure similar approaches are taken in the future. As a result, we recommend the following:

Recommendation

- **That the LGD establish policy for how it addresses by-law non-compliance and make the policy publicly available. This policy should clarify how the LGD will keep records of its investigations, inspections and decisions regarding non-compliance matters. It should also indicate how LGD staff receive, record and acknowledge complaints regarding non-compliance and how the LGD communicates results to complainants.**

Making this policy publicly available can help LGD residents better understand how the LGD addresses by-law non-compliance. Record-keeping of how the LGD addresses by-law non-compliance is important because these LGD decisions may be scrutinized by members of the public, property owners subject to LGD enforcement action, or individuals who report unlawful activity. Records should include what information was included in a complaint about non-compliance, the outcome of a complaint, and when staff acknowledged a complaint and communicated the result to the complainant. Records will help the LGD be transparent and accountable for its decisions to take (or not take) action and help the LGD provide meaningful reasons for its decisions. In this case, the lack of records limited the LGD's ability to provide

comprehensive and meaningful reasons to the complainant and our office regarding its approach to the non-compliance.

The lack of LGD records also concerned the complainant when she learned that the LGD had signed a memorandum of understanding with the business in which the business agreed, at no cost to the LGD, to install water quality monitoring equipment in the Pinawa Water Treatment Plant. The complainant questions whether this agreement influenced how the LGD addressed the business's non-compliance with the zoning by-law. The LGD states that it signed the agreement with the business in September 2014 but that it did not affect how it addressed the non-compliance.

While we found no evidence indicating that the LGD treated the business differently because of this agreement, municipalities should be aware that such agreements may create a perception of bias or conflict of interest in relation to certain individuals or businesses. This can undermine the credibility of LGD decision making regarding by-law non-compliance. In this case, if the LGD had records that explained its approach to the business's non-compliance over the years, this might alleviate the complainant's concern that the LGD's agreement with the business affected its approach to the non-compliance.

2. Was it reasonable for the LGD to determine that restricted material was not being stored at the property?

Section 4.12 of the LGD zoning by-law states that home businesses shall not “use, store or produce toxic, explosive, flammable, combustible, corrosive, radioactive or other restricted material.”

The complainant informed the LGD on March 5, 2015 that she was concerned the business might be storing hazardous material at its home location.

The LGD responded that day and indicated it would review this matter. The LGD advises that a councillor attended the site in early March 2015 and that the business owner provided him a tour. According to the LGD, the councillor was satisfied that there were no restricted materials stored at the site. The LGD indicates that no photographs were taken of the inspection. The LGD advised us that according to the business owner, the facility was inspected by Workplace Safety and Health in 2014 and the business was found to be in compliance.

Because there is little documentation about the inspection, there is insufficient information on which our office can evaluate whether it was reasonable for the LGD to determine that restricted material was not being stored at the property.

Going forward, we suggest that the LGD keep a clear record of any site inspections that arise following allegations of unlawful activity. Such records should include the time and date of the inspection, details of what the LGD representative saw and who they spoke with, and any other information the LGD representative obtained, including photographs.

The LGD advises that normally an LGD designated representative is responsible for these type of property inspections, but in this case a councillor took the initiative to inspect the property himself.

The British Columbia Ombudsperson's March 2016 guide on best practices for local government by-law enforcement indicates that councillors should strive to remain uninvolved in a specific bylaw enforcement decision unless and until the matter is discussed at council. The guide states the following:

Defining and maintaining separation between council and front-line enforcement staff is essential to an administratively fair bylaw enforcement system. It is important for council members to be aware of how their own actions can affect the fairness of an enforcement process. This means that while council sets policy and provides general direction on enforcement priorities, its individual members should not become directly involved in enforcement action by directing enforcement against specific residents, groups or businesses, or by directing that enforcement action not occur in a particular circumstance. Rather, individual enforcement decisions should be made by delegated bylaw enforcement staff or contractors.

We agree with this guidance and agree with the British Columbia Ombudsperson that as a best practice, municipalities should develop written policy that defines the separate roles of staff, council as a whole and individual councillors regarding by-law enforcement.

CONCLUSION

Manitoba Ombudsman cannot come to a conclusion about whether the LGD addressed the zoning by-law contravention in a reasonable manner because there are no records of the conversations the LGD had with the business. Similarly, the lack of records makes it difficult to assess the LGD's decision as it relates to the storage of hazardous materials. Our office is of the view, however, that our recommendation on page 6 concerning record-keeping and our suggestion with respect to site inspections will enhance the administrative policies and practices of the LGD and contribute to transparent and accountable decision-making.

THE LGD'S RESPONSE TO THE RECOMMENDATION AND SUGGESTIONS

We provided the LGD a copy of this report. The LGD provided us the following response:

Council of the Local Government District of Pinawa discussed the preliminary report that was provided in reference to Ombudsman File 2015-0086.

As a result, a policy concerning how to address by-law non-compliance will be prepared for council approval. Upon final approval, the policy will be made publicly available and published on the Pinawa website.

The LGD also informed our office that going forward, it will ensure that written records are maintained for site inspections that arise following allegations of unlawful activity and that these inspections are conducted by LGD staff.

We are pleased that the LGD has accepted our recommendation and suggestions. The release of this report now concludes our involvement regarding this complaint.

MANITOBA OMBUDSMAN