ADR Chambers Ombuds Office

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June 25, 2020

BY E-MAIL: Kevin.Arjoon@burlington.ca

Kevin Arjoon, City Clerk
The Corporation of the City of Burlington
Office of the City Clerk
426 Brant Street
Burlington, ON L7R 3Z6

Dear Sir:

RE: MUN-472-0819 Complaint against the City of Burlington

Our investigation of the above complaint against the City of Burlington has been completed, and I have enclosed the Ombudsman's report.

As you are aware, both parties were provided the opportunity to comment on the draft report. The Ombudsman then takes the comments into account and makes any modifications deemed appropriate. In this case, apart from anonymizing the final report (replacing names with titles and/or initials), the report is unchanged from the most recent version you received.

Our file in this matter is now closed.

Yours sincerely,

Peter Maniatakis
Deputy Ombuds

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ADRO INVESTIGATION REPORT

Complainants: The Complainants
Complaint Reference Number: MUN-472-0819
Complaint Commenced: August 26, 2019
Date All Required Information Received: May 14, 2020
Report Date: June 25, 2020
Investigator: Ben Drory

Terms of Reference

This report has been prepared pursuant to the ADR Chambers Ombuds Office (ADRO) Terms of Reference, which describe the scope of ADRO's mandate, its process upon receiving Complaints, and the authority and responsibilities of an ADRO Investigator. Defined terms used below have the same meaning as in the Terms of Reference.

Complaint

The Complainants (individually "Mr. Complainant" and "Mrs. Complainant") are husband and wife, and are residents of the City of Burlington (the "City"). They submitted a complaint against the City to ADRO in August 2019, which read as follows:

> *In January 2019 the owner (next-door) demolished and began construction of a new home on this property. Soon after we noted that it was the tallest home in the neighbourhood. Upon investigation we discovered that the home exceeds code for height. We alerted the building department and asked for an independent measurement of the height. We had not been consulted at any time during the approval process for planning + construction of the new home. Throughout this process debris fell into your yard including shingles blown onto our hot tub. Throughout the process we communicated via phone + email and sent photos to the city of our concerns. We do not feel safe in our hot tub or walking along our backyard walkway without the risk of falling ice during the winter months due to the steep pitch of the roof, the fact that 50% of the roof is flat and that the two story cedar hedge which would have been a barrier had been removed by the new owner. Several months ago we had submitted a written complaint asking for a meeting with the building dept to ask for an independent measurement and to understand why were not consulted when its our understanding they exceeded existing by law heights.*

> *To date we have had no response from the Building Department to meet + discuss our written complaint. We have completed the City online written complaint + have not received a response.*
>
> *We will need to build a structure over the hot tub to make it safe from falling objects. We expect the city to cover the cost of the structure.*

In a follow-up email to ADRO dated October 18, 2019, Mrs. Complainant added as follows:

> *We have asked for financial compensation to construct protection of our hot tub due to the three story home south of us that exceeds bylaw and creates safety concerns for us. We had expressed our concerns throughout the process to city hall staff but feel our concerns have never been taken into account.*
>
> *When we researched local bylaw the home exceeds height bylaws. We were never consulted or made aware this was going to happen. During construction roof shingles nails and wood fell on our hot tub. The height and pitch of the roof creates concerns that icicles and ice will fall on us while in our hot tub. In addition the neighbour's removed the 70 year old two story cedars and their deck now overlooks our backyard with the deck lights on each night. Our neighbours have also pointed a security camera back towards the side yards from front right corner of their home which impinges on our feeling of privacy in our own yard particularly while entering our hot tub. In addition even though we made them aware of this their kitchen window directly overlooks our hot tub back deck and back yard.*
>
> *While excavating for their home the builder did a vertical cut at the exact edge of the properties rather than an angled excavation. This caused us undue stress as our brand new driveway was at the edge of our property line and they did not shore up the area with support. We were also exposed to insulation over our back deck hot tub and driveway when they blew insulation into their home without properly closing the vent facing onto our property. I happened to be home for lunch and it looked like snow falling on my back deck. I quickly realized they had an insultation vehicle blowing insulation onto our property through an opening in their house.*
>
> *I have also attached a photo of the builder in a movable crane hanging over my car as he attempted to move some of his equipment. I asked him to get off my property as if he was injured or damaged my car it would be my insurance but instead he called me an "f…… c..t" and continued to hang over my car and property until he was done.*
>
> *Our request is for $30,000 to create a suitable structure to provide coverage so we feel safe from falling snow and ice from their roof when in our hot tub as well as privacy from their kitchen window raised deck and security camera which all now face onto our hot tub.*

ADRO Investigation

I conducted telephone interviews with:

- The Complainants
- The City's Supervisor of Building Inspections

Prior to conducting these telephone interviews, I read the information in the file provided by both parties.

The Complainants originally provided six photographs. One showed the front of their home adjacent to the property described, which was being constructed. Two photos showed the hot tub in relation to the neighboring property. One photo showed a worker in a crane hovering directly over a car parked on the Complainants' driveway. A fifth photo showed the fence between the properties, and the sixth photo showed what appeared to be dirt excavation from the construction. They later submitted additional photos showing the new home with a raised deck, and a kitchen window and security camera from the neighboring property that overlooked their hot tub deck and backyard.

The City provided one document respecting the case – a spreadsheet that outlined actions the City took in the matter over time. It indicated as follows:

- A councillor received an email from the Complainants on November 23, 2018 regarding site works at the next-door property, noting concerns with the excavation and grading of the site. Site Works advised the councillor that a zoning clearance was issued for the construction of the new house.
- The Complainants called the City on January 14, 2019, and spoke with an individual in Planning. The Complainants were concerned about a new home being built next door that wasn't in accordance with approvals of maximum height – they felt the height should be 7m, but they measured and believed it was approximately 11m high. The Complainants advised they would like the building inspected to confirm the roof height complied before the next phase of construction was completed.
- Later that day, the area building inspector (the "Inspector") advised the Supervisor of Building Inspections (the "Supervisor") that he had received the surveyor certificate for the top of the foundation wall, and it confirmed the top of the foundation had been built in conformance with approved plans. He advised he would physically measure the height of the building with the builder.
- The next day, the contractor/owner emailed the Inspector stating they confirmed mid-grade to peak was 9.24m.
- The City's Zoning Examiner emailed the Inspector on January 21, 2019, advising that the maximum height permitted was 10m, which is what the applicant proposed.
- The Inspector then emailed the Supervisor, advising that the height from rough grade to trop of truss was measured at 8.5m, and the building height conformed to building permit plans. He was waiting for confirmation of zoning height compliance.
- The Zoning Examiner emailed City staff on January 23, 2019, advising that height is measured from fixed grade to the peak/top of the roof. Fixed grade is the midpoint of the front lot line, and she had a survey to confirm this. The building elevation plans she approved showed a height of 10m, which was the maximum permitted for a peaked roof. The roof was both peaked and flat, but the majority was peaked, so

therefore they applied the peaked roof regulations. This was consistent with other interpretations they had done where roofs have a combination of flat and peaked portions. Fixed grade was noted as 89.81 and the height was noted at 99.81 = 10m. Therefore, the plans they had complied with the zoning regulations for height.

- The Supervisor then emailed the Councillor's office that day explaining that the height was under the maximum permitted.
- The City closed the Complainants' complaint on February 4, 2019, on the basis that the height conformed with approved zoning clearance and building permit plans.
- On February 6, 2019, the Councillor's office asked the Supervisor to provide further details on the measurements taken, as the Complainants had requested the measurements taken by the Inspector and builder. The Supervisor responded to the councillor's office the next day, explaining how they measured building height. She advised the councillor that they would not be providing calculations to the Complainants.
- The Complainants followed up with the councillor's office on February 16, 2019, asking:
    - what the maximum height is for new builds in their area;
    - what the process is if they want a roof height higher than the maximum allowed in the by-law, and whether neighbours would be notified if they wanted to go higher; and
    - what the height of the property in question was, and how it had been calculated
- The Complainants formally complained to the Supervisor on June 6, 2019, alleging that the roof exceeded the maximum height permitted, and that none of the neighbours were consulted. The Complainants wanted independent measurements taken of the home, and a meeting to discuss further with the Building Department.

I spoke with the Supervisor (the City's Deputy Chief Building Official – Supervisor of Building Inspections). She said that *Ontario Building Code* infractions come to her first, and she assigns them to an area inspector. The building inspector will go and physically measure the building height with the contractor. The City doesn't typically ask for surveys respecting height, as that gets determined as the building gets framed or goes up. In this case, the inspector measured the building in-person, and it was under the maximum height for the project.

The Supervisor said that if a build isn't in accordance with approved plans, then the inspector will stop the construction, and the owner will have to reapply, seeking approval for changes – they would need to seek a Minor Variance if a height beyond the requirements was to be excepted. An owner could build above height if a Minor Variance was granted; but they couldn't do so without going through a Variance application – in which case a notice would go out to neighboring properties, so that they could have a chance to appeal to the Committee of Adjustment (the "CoA"). The CoA is a hearing body that meets monthly, and would either support the Minor Variance Application or not, following which there would be a further 20-day appeal period. However, the Supervisor said that this building didn't exceed the height requirement, so it didn't have to go through the Minor Variance process at all. Accordingly, the neighboring properties had no specific right to comment on it.

The Supervisor said that she spoke with the councillor's Office, and explained that an inspector attended and measured the height as being under the maximum. She didn't think she had any direct correspondence with the Complainants; rather, it was all through the councillor's Office. The Supervisor said that she didn't share the calculations with the Complainants because she didn't feel they needed to know the actual numbers/measurements – she had told them it was below the maximum height. She said there was a lot of back-and-forth, and she just wanted to confirm for them that everything checked out. She added there were a lot of privacy issues – she didn't think the exact measurements would have changed anything, but less is more sometimes. She said the City has to be very careful about what it shares with complainants regarding other property owners. She added that there was no City policy on point – what is shared is discretionary, based on the staff's professional experience. She felt that if she had shared the dimensions with the Complainants, then they probably would have continued questioning her on those dimensions.

The City advised that the zoning by-law regulates building height, and the zoning by-law falls under the purview of the Planning Department. The Supervisor acknowledged the Complainants were entitled to ask the City to measure, and involving her department in this matter had definitely been appropriate. However, she noted that any of the Complainants' complaints about the contractor – for example, relating to damage to their property – would be a civil matter. She said that when there's an active permit site, the City tries to have them keep the area as clean as possible, and recommends to homeowners that they document everything in case they have to defend themselves legally.

Following our discussion, the Supervisor forwarded me relevant emails from the winter of 2019.

The Complainants emailed their local councillor on January 21, 2019 as follows:

> *… On January 11, 2019 I contacted (employee) in the planning department to discuss this matter. (Employee) explained that according to bylaw a flat roof dwelling can be built to a maximum height of 7 meters above grade and a peaked roof dwelling can be built to a height of 10 meters above grade.*
>
> *That is not the case at (property) as the flat roof is actually at the same height as the peaked roofs. (Employee) investigated further and discovered that there was an agreement by city staff, and without any consultation with local neighbours that since the plans called for both flat and peaked sections it would allow for both sections to be at 10 metres above grade. We wonder why this was allowed?*
>
> *I asked (employee) to explain why it was allowed and he noted that there was not a variance to allow for this scenario and as I have indicated there was certainly no consultation with existing homeowners. In our opinions as the homeowners of (adjacent property) this is a very flawed process.*
>
> *Through my own position as a construction manager I have measured the height of the new build. It is well over the 10 meter limit to grade level! We have concerns that ice build up will have the potential to fall from this height onto our property and cause injury*

> *and or damage, particularly since the new house is within 1.8 metres of the property line. As a result we have contacted the building department to discuss the matter.*
>
> *To date we have not had a response from the building department. We have left several messages with both (Supervisor) as well as her supervisor from Jan 14th – 18th, 2019.*
>
> *We are therefore, asking for your assistance in this matter. Why is such a tall building that exceeds by law height requirements being built right adjacent to our home and in such proximity (1.8 meters) to the property line?*

The Supervisor followed up in writing with the Chief Planner's Administrative Assistant as follows on January 23, 2019:

> *CONFIDENTIAL*
>
> *…*
>
> *Building Inspections has been investigating this and the building inspector has been out and had the contractor measure the height to top of truss. The building height measured from rough grade to top of truss was 28'-0" (8.5m). The building inspector also contacted Zoning to verify the maximum height allowance for this property and heard back from Zoning yesterday who confirmed the maximum height allowed is 32'-0" (10.0m).*
>
> *I am just waiting on verification from (Zoning Examiner) to clarifying whether maximum building height is measured to the halfway point of the trusses or to top of trusses.*

The Zoning Examiner responded later that day:

> *Height is measured from fixed grade to the peak/top of the roof. Fixed grade is the midpoint of the front lot line, and I have a survey from (surveyors) to confirm this. The building elevation plans I approved shows a height of 10m, which is the maximum permitted for a peaked roof. The roof is both peaked and flat, but the majority of the roof is peaked, therefore we applied the peaked roof regulations. This is consistent with other interpretations we have done where roofs have a combination flat portion and peaked portion. Fixed grade is noted as 89.81 and the height is noted at 99.81 = 10m. Therefore, the plans we have comply with the zoning regulations for this height.*

The Councillor's Assistant responded to the Complainants as follows on February 5, 2019:

> *Ms. Complainant, I believe that Councillor has spoken to your husband late Friday afternoon, and promised to forward the email received by staff. As such, please see the response below:*
>
> > *The building inspector for this property has investigated this complaint and met the contractor on site to physically measure the total height of the building. The*

> *height measured actually came under the maximum height of 10.0 metres, measuring to 8.5 metres from rough grade to top of roof trusses. The complainant should be reminded that the height of the building will reduce further when the property receives final grading. At this point, there is no cause for further enforcement from the Building Section.*
>
> *…*
>
> *Regards,*
>
> *Supervisor*

The Complainants replied as follows the next day:

> *Thank you for the information Councillor's Assistant.*
>
> *Would you kindly provide details as to how they came up with this measurement. We would like to receive a written copy of their calculations. We strongly disagree with this measurement and are looking into hiring a company to provide us with an accurate measurement.*

The Supervisor responded as follows:

> *Hi Councillor's Assistant,*
>
> *Typically when we go out to meet a contractor to confirm building height the contractor will physically pull out a tape measure and measure the heights for us. In this specific case the contractor did just that with the building inspector. The overall height was determined by measuring the vertical heights starting from the lowest point at rough grade to the top of the first floor. Then measured again from top of first floor through to the top of the roof trusses. The building inspector visually saw each measurement and was able to confirm the total overall height did not exceed 8.5 metres.*
>
> *Once again, the complainants should be reminded that final grading has not been completed so this height could reduce further. We will not be providing the complainants with the measurements that were taken.*
>
> *…*
>
> *With respect to the debris from the construction site falling onto the complainant's property, the building inspector has made contact with the contractor to address the situation and promote a clean-up. As building officials we do not have any legislative power to enforce them to clean up the site but will try and work with them by verbally requesting the site be kept tidy.*

I spoke with the Complainants by telephone. Mr. ComplainantComplainant said the problem began when the new house (the "Property") was being built – when he saw the framing go up, he knew the height and proximity to their property line was going to be a problem. He called the City's Building Department and asked an individual how the *Ontario Building Code* ("*OBC*", or *"Building Code"*) dealt with the matter; the employee said the building was sufficiently within code – for a peaked roof the maximum height could be 10m (above grade), but for a flat roof could be 7m. He said he told the employee he took a measurement using a laser measuring tool, and the Property had a flat roof greater than 10m high. He asked the employee if the Property owners had a variance, but the employee said it wasn't necessary, so they just approved it.

I asked Mr. Complainant to describe the laser measuring tool he mentioned. He said it's a tool he uses for work – he's a Project Manager at construction sites. He trusts it's accurate because he uses it at work – he's used it against drawings, which give him the same number. Mr. Complainant said he hasn't re-measured the Property since the grading was done, but the height was going to be extremely close to the limit – even the drawings indicated it would be 10m high.

The Complainants said that the Property is fully built now. Going forward, their big concern now is ice falling off the flat part of the roof. During construction the contractors were doing shingling; the wind snapped the bundle apart, and threw shingles all over the hot tub. They said it makes sense that if shingles could fall there, ice could too – and accordingly the height and proximity make it important to cover the hot tub from ice and snow. Mrs. Complainant added that neighbour's kitchen window overlooks their hot tub, and the neighbours also have a camera at the corner of their house, which has a view of their entire pool/hot tub area. Building a structure would assist in blocking the camera's sightlines.

I asked the Complainants how they determined the $30,000 amount they were seeking in compensation. Mr. Complainant acknowledged they didn't have hard numbers for that; he said they have a friend who was getting outdoor structures built, and they asked if he could come by and give a quote regarding building such a structure – it came in at $30,000. Mrs. Complainant added that there also a 70-year old cedar hedge on the property line that their neighbours had removed, which used to be a natural protection. They were probably 7-8m high. The Complainants said there had been some question whether the neighbours were allowed to remove those cedars; overall they believed it was probably their right to have done so, but the trunks were so close to the property line it was very close.

I asked the Complainants if they had ever commenced any action against their neighbours. They replied no – they saw this matter as a City issue. The City issued permits to the Property owners, so the onus fell on the City because they didn't do their due diligence, and didn't notify neighbours and local residents that the structure was being approved. In fact, the Complainants said they had approached the neighbours and asked why they were putting up such a large house; the neighbours told them the City said they had to. They had also built the similar house three houses south, so it was in line with the neighbourhood. Apparently the builder wasn't allowed to build a 1.5-story structure, and had to do a 2-story structure. Mr. Complainant said the City didn't take into consideration that the property circumvented the *OBC*, and by allowing a flat roof so close to the property line it created hazards. He said the Property owners should have

had to apply for a Variance rather than getting it rubber-stamped – it was not constructed in accordance with the *OBC.*

Mr. Complainant felt the roof was a mixed roof – it has some peaks, but most of it is flat, which would have called for a 7m limit – and accordingly, if the roof wasn't completely peaked, the City should have been communicating this building to people next door for their comments. Instead they were never informed or communicated with. Mr. Complainant said his measurement disagreed with the City's; he acknowledged there could have been a difference of opinion forever on that, but he felt that what the City approved should have gone through the variance procedure.

Mr. Complainant said they raised the matter with the Ombudsman's Office because he tried calling and emailing the City's Building Department, and got absolutely no response from the Supervisor. They were also upset with the Councillor's response – they said the Councillor verbally told them they were just upset a big new house was being built beside them, but there was nothing they could do about it, and he had a big house himself, they should just accept big houses. Mr. Complainant said he didn't understand why this should mean people are allowed to exceed the zoning by-law. They had expected that an elected official would put forth effort to investigate and ensure that City staff and local builders were adhering to the rules for their zone.

Mr. Complainant said the City's process bothered him the most about the situation. He didn't understand how the City could approve something that wasn't in accordance with the rules, nor why they weren't allowed to meet with the City to discuss how they could live with the problem that the City improperly allowed beside them. There were no meetings to get their concerns addressed, and if there had been a meeting (as, for example, in the Minor Variance procedure), then perhaps the builders would've changed their designs during the final design phase – but that never happened.

Following my discussions with the City and the Complainants, both parties forwarded me the relevant portion of Burlington's Zoning By-Law.[1] Section 2.31 ('Residential Building Height') in Part 1 (General Provisions and Conditions) outlines new dwelling height limits as follows:

2.31 RESIDENTIAL BUILDING HEIGHT (Part 1)

Table 2.31.1

A) R1, R2, R3, R4 Zones					
Peaked Roof Dwellings	**Building Height Maximum**				
Detached Semi-Detached Cluster	1 storey to 7.5 m (a)	1 ½ storey to 8.5 m (a)	2 storey to 10 m (a)	2 ½ storey N/A (a)	N/A
Flat Roof Dwellings	**Building Height Maximum**				
Detached Semi-Detached Cluster	1 storey to 4.5 m	N/A	2 storey to 7 m	N/A	N/A

[1] *Zoning By-Law 2020*: https://www.burlington.ca/en/zoning/index.asp

This confirms that for two-story buildings, a peaked roof dwelling can extend to 10m, and a flat roof dwelling can extend to 7m.

I communicated with the Zoning Examiner by email. She advised that the City doesn't define a peaked roof, but defines a flat roof as "a roof having a slope of less than 1:10". She added that height for new dwellings is taken from fixed grade (which is a defined as a specific point on the property), and stated that:

> *It is our standard interpretation that if a roof is a mixture of flat and peak roof, we apply the regulation of the majority of the roof type (generally over 50%). We do not have a definition or regulation that outlines unique roof designs and how to regulate them.*

The Zoning Examiner advised me that a Minor Variance is required when a development doesn't comply with the applicable Zoning By-law regulations, and the legislative framework is under the provincial *Planning Act*.[2] She stated that once a complete Minor Variance application is received, it is scheduled onto the first available Committee of Adjustment ("CoA") hearing, which must be heard within 30 days. The Minor Variance application is a public process, and any property owners within 60m/200ft of the property will receive a written notice in the mail at least 10 days before the scheduled CoA hearing, which is open to the public to attend (both are legislated requirements). The CoA can either approve or deny the application (including partially), or defer the application. Upon disposition, there is a further 20-day appeal period available to stakeholders who wrote or attended the hearing. If that appeal period passes, the variance becomes final and binding, and the development would be deemed compliant with the Zoning By-law.

I followed up further with the Zoning Examiner, asking how to interpret her January 23, 2019 comment that "Fixed grade is noted as 89.81 and the height is noted at 99.81 = 10m." She replied as follows:

> *The height proposed was exactly 10 m.*
>
> *The number 89.81 is a grade elevation (metres above sea level), and the height is noted at 99.81 (metres above sea level). When you subtract the height elevation from grade elevation, it equals 10m exactly.*

I reviewed the *Planning Act*. Under s. 8.1 of the Act, a municipal council may constitute one appeal body for local land use planning matters, which may hear appeals and motions respecting a site plan control area, zoning by-laws, interim control, and consents. The City's CoA has all the powers and duties of the provincial Local Planning Appeal Tribunal ("LPAT"); under its Terms of Reference (the "Terms"),[3] the CoA is an independent decision-making body appointed by Council, which may authorize minor variances from the zoning by-law in light of the *Planning Act*. The CoA may authorize such minor variance from the provisions of the by-law as, in its opinion, is desirable for the appropriate development of the land or building, if in the

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[2] *Planning Act*, R.S.O. 1990, c. P-13 https://www.ontario.ca/laws/statute/90p13

[3] CoA Terms of Reference: https://www.burlington.ca/en/services-for-you/resources/Planning_and_Development/development_Applications/CofA_Terms_of_Reference.pdf

CoA's opinion the general intent and purpose of the by-law (and any official plan) are maintained. Any minor variance must also confirm with any prescribed criteria and criteria established by the municipality's by-law.

The City submitted several additional comments to me following the initial issuance of the Draft Report in in the matter. They identified that the Zoning By-Law sets limits for height, setbacks, and lot coverage, but an owner/applicant may determine how big a home they wish to construct within those limits. They denied that the measurement was 10m, but that their measurement was in fact approximately 8.5m – well below the maximum height of 10m – based on an actual measurement on site, to the top of the truss. They were further of the opinion that the Building Department shared the overall height measurement of 8.5m and how it was obtained with the Complainants – which I interpret to be the email to the councillor's office. The City added that their staff are professional building officials regulated by the *Building Code Act* and the *Code of Conduct*, and the measurement was verified by a Ministry-qualified Building Inspector. They felt that if a measurement against the zoning by-law meets those requirements, then there is no need for a consultation nor appeal, as there is no by-law violation.

The City also took issue with the Complainants' use of a laser measuring tool – they said that to properly use such a tool, a person must be on site with the tool placed firmly against a surface. They did not condone Mr. Complainant trespassing on private lands under the *Trespass Act*, as a private citizen could not have conducted measurements on lands they did not own.

ADRO Analysis

I admit to having some sympathy for the Complainants' argument. The right to the extensive consultation process and a CoA hearing only comes into play when the City measures a deviance from the Zoning By-Law; but there is no independent opportunity to appeal the City's *measurement itself*. Accordingly, the consequences of the City's measurements – especially in a case like this where they may be very close to the limit – are substantial. Where the City determines that measurements are within the By-Law, that effectively ends the question, and anyone who may dispute the measurement has nowhere to turn to appeal.

But the City also has very limited discretion to alter system from the basic model mandated by the provincial *Planning Act.* The City's CoA is consistent with the scheme in the province's *Planning Act.* Therefore, the ultimate question in this case is whether the City followed its procedures appropriately in reaching its decision – which is fundamentally about whether the City followed its Rules, procedures, or By-Laws. By that measure, the answer must be no. The City followed its By-Law, and its usual procedures for making measurements, and measured the building's height to be within the By-Law.

The Complainants' arguments then are two-fold – either that (a) the measurement was substantively wrong, or (b) the City's By-Law and policies themselves are inadequate. The second question is easier to address – it is not ADRO's role to tell the City what its policies ought to be, where all relevant laws are followed. Even while acknowledging there can scientifically be a degree of imprecision in any measurement, the City is still a trained and capable body for taking the relevant measurements. The system needs to allow for finality, and I agree with the Supervisor,

that the question of any actual measurement could be capable of being debated forever without actually being solved, if this were to be allowed.

The City advised that their staff are trained, regulated, and subject to a Code of Conduct. A certain degree of deference is appropriate to their expertise. I am aware the Complainant is also trained and regulated within the same field. However, the City took great issue with how the Complainant may have taken his measurement. As the City described it, to properly use a laser measuring tool, a person must be on site with the tool placed firmly against a surface. Thus, they posited that the Complainant's measurement was problematic no matter what – either (1) the Complainant used the tool while on the adjacent property – which would have been an act of trespass, and thus illegal; or (2) the Complainant used the tool from his own property – which would have made the measurement unreliable, as it wasn't conducted in the proper way to use the tool. I find this argument makes sense. Accordingly, the Complainant's measurement cannot constitute "good evidence" for the measurement of the adjacent building. As a practical matter, the City's word about what the measurements were simply has to be relied on at face value, the way the system is set up. The evidence is also insufficient to suggest that the system itself – which is fundamentally in place across Ontario – needs to be changed.

None of this addresses any specific acts that the Complainants' next door neighbours, or their contractors, may have improperly committed against them personally – which could include trespass onto their own property. Those are private matters between the neighbours, which must be addressed as such (for example, through private negotiation, or through the courts). It would be inappropriate to hold the City accountable for them all relevant regulations and by-laws were followed.

Conclusion and Recommendation

The evidence establishes that the City followed its Rules, procedures, and By-Laws in making its measurement and determining that the height of the building was legal. Even if I had found that the City did not follow its procedures effectively, I still would not have recommended that the City pay any specific compensation to the Complainants, as there could not have been any definitive proof that the Property was in fact built illegally. There may be opportunities for the City to improve its communications with stakeholders making similar inquiries as the Complainants', but that would be up to the City to determine. Any actions that the Complainants wish to pursue against the next door neighbours, or their contractors, would need to be pursued through private avenues.

Respectfully submitted,

Ben Drory
ADRO Investigator