



ADRO INVESTIGATION REPORT

Complainant: M R

Complaint Reference Number: MUN-13421-0421

Complaint Commenced: April 15, 2021

Date Required Information Received: October 22, 2021

Report Date: October 25, 2021

Investigator: Gareth Oliver

Terms of Reference

This report has been prepared pursuant to the ADR Chambers Ombuds Office (ADRO) Terms of Reference for the City of Burlington (“City”) which describes 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

M R (herein known as the “complainant”), states that a neighbouring property was largely demolished and rebuilt between 2017 and 2018. Soon after the completion of the property, there was a large storm that resulted in a considerable amount of water being deposited against the foundation of his property. The complainant stated that this had not occurred previously, and he believed that the issue was related to the newly constructed home, which was much larger than the property that preceded it. In addition to its larger size, the complainant noted that the property now contained a sump pump and that the downspouts on the property had been moved closer to the property line. However, the main issue appeared to be a change in grading along the property line, which resulted in water flowing down towards the side of his home.

The complainant stated that he spoke with the builder about the issue, who agreed to pile additional topsoil on the complainant's side of the property. The complainant stated that this appeared to prevent the pooling of water against his house and therefore he and his family did not pursue the issue further.

However, in February 2021, there was a large snowstorm followed by a sudden thaw. This resulted in the flooding of the complainant's basement. At that point, the complainant stated that he contacted the City, and a representative from the building department attended at the property to inspect the issue. The complainant stated that during this meeting the representative informed him that he had attempted to obtain a copy of the grading plan; however, he was unable to find a

copy of it in the file. The representative further suggested that the plan may have “fell through the cracks”, as a result of a change in IT systems.

The complainant states that he escalated the complaint through his ward representative and received a further response from the City, stating that the City acknowledged that they had not received nor approved a grading plan; however, this was not the result of an oversight. The City stated that council had removed low density residential from site plan approval in the fall of 2016, and therefore city approval for this type of construction was not required. They further stated that in 2019, the Drainage and Grading Bylaw was enacted, which again required the submission of grading plans for approval if any change to the existing grade or drainage was to be undertaken.

Despite this response, the complainant believes that the City failed to protect him from an issue that was under their jurisdiction. The complainant has identified that the damage that was caused is significant and believes that it’ll cost in excess of \$10,000 in order to repair the damage to his basement. Having conferred with friends of his in the construction industry, he finds it implausible that the City had not required that a final grade plan be submitted for approval, before construction began on the neighbouring property.

Decision of Burlington

The City of Burlington confirmed that given the renovations in question occurred between 2017 and 2018, there was no provision in place that required the builder to submit a grading plan for approval, given that the work took place after council had removed this requirement, but before the Drainage and Grading Bylaw was enacted in 2019.

Despite this however, the City stated that staff had gone out to the site and had not reviewed any issues with the work that had been done, given that the renovated property was placed at grade. As a result, the City stated that there was nothing further they could do.

ADRO Investigation

My investigation included the examination of all documentation received from the complainant and the City of Burlington, as well as telephone interviews with the following individuals:

- The Complainant, M R

ADRO Analysis

Having examined the information that was provided, and through discussing the events with the complainant and the City of Burlington, I've been able to draw the following conclusions.

The complainant has identified that his property has sustained significant damage as a result of the change in grading to a neighbouring property. As a result, it's important that we confirm whether there were any further steps the City should have taken in order to monitor or protect the complainant from the flood damage that has subsequently occurred to his property.

Having spoken with the complainant, he stated that he and his family moved into their current property in 2010. He further confirmed that they had never experienced any issues with flooding or water collection against the exterior wall of the foundation until 2018, after work had been completed on the neighbouring home. He stated that after speaking with the contractor, they agreed to pile additional topsoil against his property. The complainant confirmed that he did not contact that City at this juncture. The complainant further stated that having spoken with the new owners of the property, they confirmed that they were also having issues with water coming into the basement and therefore installed a French drain between the two homes. This seemed to solve the problem until February 2021, when a large snowfall followed by an abrupt thaw meant that there was a large amount of water flowing between the properties whilst the French drain remained frozen. As a result, he had considerable flooding into his basement, which has subsequently resulted in an accumulation of black mold behind his drywall. The complainant stated that his enquiries with the City have not provided a coherent explanation as to why the previous owners had not provided a grading and drainage plan, with explanations ranging from the report being lost due to computer error, to the City confirming that they did not actually require grading plans to be submitted between 2016 to 2019. The complainant further stated that he disagrees with the City's finding that the land between the two properties is now level, as he estimates the neighbouring property now sits 8-10" higher than it previously did. As a result, he believes that he has been forced to incur approximately \$10,000 in damages.

I would first note that with regards to the complainant's recollection of a City employee advising him that the grading plan may well have been lost as a result of a change in IT systems, although I have no reason to question the complainant's recollection, I was not present during this conversation and therefore cannot determine if this was in fact stated. However, I have spoken with the City, who has confirmed that there were no reported IT issues during the time in question. Furthermore, if a grading plan was submitted, it would have existed on multiple systems and therefore would not simply be misplaced. Lastly, they confirmed that they had never received a grading plan, as it had not been required.

With regards to the complainant's assertion that the neighbouring property is not level, but in fact 8-10" higher than it was previously, I have reviewed some photos that were provided by the complainant. It is difficult to draw any definitive conclusions from them; however, I would find

that the new property does appear to sit noticeably higher than the complainant's own property. I'm unable to confirm the complainant's stated height differential of 8-10", but there would appear to be some degree of sloping towards the property line. In addition, the complainant has provided some photos of his side yard as it had been before construction had taken place. These photos document that the new property is significantly larger than the previous one, and therefore appears to sit closer to the property line. That being said, these issues are only relevant to this investigation if the City required that a grading plan be provided, given that my purview is limited to investigating and ensuring that the City acted in accordance with the laws and regulations that were in place at that time.

To that point, the City has stated that in October 2016, the council carried a motion to eliminate the site plan approval process for low density residential development. As a result of this action, the City no longer required that a grading plan be submitted. The City stated that this action had been taken on the recommendation of staff, who had received a considerable amount of push back from residents and developers, stating that site plan approval was an unnecessary burden. Having read both the minutes from the October 2016 council meeting and the committee report, which had been completed by staff, I was able to confirm that the councillors had voted to eliminate the requirement for site plan approval. However, I also noted that there was a stipulation in the committee report, which stated the following:

“To facilitate the grading and drainage review of low density residential development, the Capital Works department is developing an amendment to the city's site alteration bylaw that will provide site engineering staff with the authorization to review and enforce grading and drainage approvals for low density residential areas.”

Therefore, it was evidently the finding of the staff members that had completed the report, that although they were advocating for the removal of site plan approval, they still wanted to maintain another avenue for reviewing and enforcing changes to grading and drainage on new low density residential construction project. A point that was touched on in the meeting notes, when they state:

“Direct the Executive Director of Capital Works to amend the Site Alteration Bylaw to include the review of grading and drainage matters in low density residential areas and bring forward for enactment at the above noted statutory public meeting.”

However, having corresponded with the City, they stated that when voting on the employee backed proposal to remove site plan approval, council changed the wording of the report from “endorse” to “approve”. As a result, site plan approval for low density housing was removed immediately, before a workable transition plan could be enacted. In addition, the City confirmed that upon reviewing this matter further, it was decided that it was simply too complicated to add an addendum to the Site Alteration Bylaw, covering grading and drainage for low density residential. Therefore, there was no subsequent amendment to the Site Alteration Bylaw to enact at the noted public meeting. The City therefore moved towards drafting a new standalone Grading and Drainage Bylaw, which came into effect in January 2019. As a result, there was a

window between October 2016 and January 2019, where there was no requirement for a grading or drainage plan to be provided.

Although I cannot speak to why this occurred, it would seem to be an oversight on the part of council. The intentions of staff and of the council were evidently to maintain the review of grading and drainage changes for low density residential. However, rescinding the requirement for site plan approval before having an actionable plan to replace it resulted in the City having no mechanism by which to review grading issues for low density residential construction for just over two years between late 2016 and the start of 2019. That being said, it is not my role to comment on nor question the actions of these elected officials, I can only comment on the rules and regulations that were in place, and on that point, there would not appear to have been any requirement for the approval of a grading plan in 2017, when the construction on the house in question was undertaken.

I should also note that in previous correspondence the City exchanged with the complainant, the City had made reference to a separate process, which was in place during this time period, when they stated, "Prior to the bylaw if an applicant had consulted a staff member regarding submission requirements they were honoured past the 2019 bylaw date provided the same staff member conducted the review." Having spoken with the City about this statement, they have confirmed that the process referenced is not applicable to the complainant's situation, insofar that the process was in place for the individual undertaking the work and not for neighbouring property owners. This process meant that if one started making submissions to the City before the 2019 bylaw came into effect, the City would honour the previously submitted documents (which wouldn't have included a grading plan), if the same staff member that reviewed the initial submissions reviewed any subsequent documents for approval. Given that the construction on the property in question occurred in 2017/2018, this process would also not have been used by the previously property owner who had undertaken the work, given the work was completed well before the 2019 bylaw came into effect.

Conclusion and Recommendation

This is an unfortunate situation where I can very much appreciate the complainant's frustration. It would appear that council voted to remove the site plan requirements, with the understanding that there would still be a mechanism to review grading and drainage issues. Unfortunately however, the proposed method by which to undertake this process, being an amendment to the City's Site Alteration Bylaw, was abandoned, given that it was found to be too complex. As a result, there were no requirements to submit a grading plan between October 2016 and January 2019, which was the period in which the construction on the complainant's neighbouring property occurred. The City has stated that having reviewed the grading on site, they did not note any issues with it, however, it's difficult to fully confirm whether the requirement to submit a grading plan at the time of construction would have changed the current outcome. However, as

no requirement was in place and I've found no evidence that suggests that the City is compelled to necessitate site plan approval, it would not appear that the City failed to follow the rules and regulations in place at the time.

Therefore, I don't recommend that the City of Burlington take any further action.

Respectfully submitted,

Gareth Oliver
ADRBO Investigator