



Appendix B - CL-35-22

INVESTIGATION REPORT

Complainant:	[Anon]
Complaint Reference Number:	MUN-14027-0621
Complaint Commenced:	June 16, 2021
Date Required Information Received:	March 21, 2022
Report Date:	May 19, 2022
Investigator:	Michael L. Maynard

Terms of Reference

This report has been prepared pursuant to the ADR Chambers Ombuds Office ("ADRO") Terms of Reference for the City of Burlington ("Burlington" or the "City") 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 Complainant, [Anon] (the "Complainant"), claims that his next-door neighbour, a commercial strip-mall property ("Plaza"), improperly and contrary to the existing Site Plan for the Plaza property, removed a dense tree line buffer between the Plaza property and the Complainant's residential property in 2018. The removal of these trees has exposed the Complainant's family to light and sound emissions and has diminished the enjoyment of his property free from such disturbances. Furthermore, wind, which was no longer blocked by the dense brush of the trees, blew over the line fence and caused damage to the Complainant's vehicle. The Complainant erected a fence on his side of the property and also planted trees to mitigate the problem caused by the removal of the natural tree line buffer by the Plaza owner.

Over the course of several years, the Complainant repeatedly contacted and engaged in back-and-forth communications with various City officials (including his local council

member) about this problem, but as of the date of this Complaint nothing had been done by the City to enforce Site Plan compliance on the part of the Plaza owner – or, if anything had been done by the City, it was not effective and did not result in site plan compliance by the Plaza owner. At varying points in time, the City made representations to the Complainant that the matter would be dealt with, however the issue persisted as no apparent action was taken by the Plaza, meaning that the City either did nothing to enforce its site plan, or otherwise was ineffective in whatever enforcement measures it attempted.

The Complainant holds the City responsible for the damage to, and loss of enjoyment of his property due to the City's unwillingness or inability to enforce the Site Plan and require the Plaza owner to replace the trees it removed in contravention thereof. Specifically, he has requested the following resolution:

"I would like trees to be planted immediately per the site plan and for this activity to be managed by someone other than Kelvin Galbraith due to the perceived conflict of interest as BIA board member, consultant to the property owner per Kelvin, and breach of trust based on false information via email and phone call.

I would like compensation for the trees I planted along my fence (approx. \$923 for three large maples) and the additional cost of the fence over the 6' allotted required to create buffer (additional cost for 8' was approx. \$3,000). I can provide receipts for all.

A written apology from Kelvin Galbraith and the city of Burlington acknowledging their lack of accountability and hardship they have put my family through due to excess noise, artificial light associated with plaza and delivery drivers that work in to early morning 7 days a week."

Investigation

The investigation included: (i) a review of the initial complaint and subsequent documentary evidence and various correspondence provided by the Parties; (ii) a telephone interview with the Complainant on January 14, 2022; (iii) a telephone interview with the Clerk, City of Burlington ("Clerk") on February 28, 2022; (iv) a telephone interview with the City's Manager of Planning Implementation and Community Planning (previously the Manager of Urban Design) (the "Planning Manager") on March 7, 2022; (v) a telephone interview with the City's Manager of

Development & Stormwater Engineering (“Engineering Manager”) on March 15, 2022; and, (vi) independent research, as necessary.

Evidence of the Complainant

The following information was provided by the Complainant in writing, and through the telephone interview process:

In or around May 2018, the Plaza that abuts the Complainant’s property removed a line of trees that had hitherto provided a significant natural buffer between the properties. At some point that year (though no records were provided as to dates), the Complainant asserts that he contacted the City by telephone to inquire about rectifying the situation.

Sometime in January 2019, the Complainant’s spouse contacted the City of Burlington by email requesting assistance with the matter; specifically, to inquire about what was required as a property line buffer and to notify the City that the Plaza appeared not to be in compliance with the City’s zoning requirements. She exchanged emails with various City staff throughout January 2019, including a Zoning Examiner (“Zoning Examiner”) and an Intermediate Landscaping Technician (“ILT”), the latter of whom wrote to the Complainant’s spouse on January 28, 2019 as follows:

The required landscape buffer on the south side of the plaza (10 Spruce trees and 6’ high solid board fence) is shown on the approved site plan, so the trees being cut down becomes a site plan enforcement matter.

I am following up with the plaza owner to correct the situation.

Feel free to contact me if you have any questions.

Later on, in May 2019, the Complainant’s spouse left a phone message for the ILT, apparently advising that the fence separating the properties had fallen on the Complainant’s car, and also making inquiries about the height of the fence and cost sharing relative to erecting a new fence (of a greater height than the existing 6 foot high board fence). The Complainant’s spouse was advised on May 6, 2019:

The plaza owner only has to maintain what was shown on the approved site plan. Replacing the fence to something taller is something you would have to work out with the adjacent land owner and would involve cost sharing.

Please consult with [anon], Zoning Examiner regarding maximum height permitted.

I am not sure what you mean by "How far out is it allowed to come out?". Please let me know and I will try to answer your question.

The Complainant's spouse was further advised by the ILT on May 7, 2019 as follows:

Thanks for your phone message. I have cc'd [anon], the Zoning Examiner who had previously commented (see email below) that "Zoning By-Law 2020 requires a 6 m landscape buffer abutting a residential zone.

Landscape Buffer

The area of a lot which serves to provide separation and to partially obstruct the view of adjacent land uses by means of a dense landscape screen consisting of evergreen trees or a combination of solid screen fencing with evergreen or deciduous trees, shrubs, or berms."

The approved site plan shows "6'-0" high solid board fence", so the adjacent landowner is not obliged to put anything higher than that. If you have questions about the maximum height permitted for the fence (e.g. you mentioned a 10' high fence) please ask [Zoning Examiner]: [...]

The Complainant asserted in his Complaint that nothing was accomplished through his spouse's contact with the City. Accordingly, he also began to contact the City, through various means and to various departments, including the Mayor's office and via social media, in order to spur the City into action over the problem. This effectively remains the status quo as of the date of the Complaint to the Ombudsman's office (and, apart from several trees being planted toward the rear of the property, remains the status quo to at least the end of April 2022).

Throughout the course of this unfolding situation (since 2018) the Complainant has had numerous exchanges with various City officials. At some point, he believes in or around December 2018, he was informed that the City's site plan for the Plaza property required there to be a tree line buffer between the properties.

The Complainant is accordingly asking the City to enforce the Site Plan and/or applicable by-law(s) to establish a new buffer between the Plaza and his residence. He

insists this is necessary, not only because it is required by the site plan, but also because the commercial activities at the plaza are disruptive to his peaceful enjoyment of his property. In particular, he cited the light and noise emissions from a pizzeria, due to its delivery drivers, being disruptive to his children when they are trying to sleep at night.

In addition, the Complainant also wants to be compensated for some trees he planted himself along the property line, for the fence that he repaired / erected after it blew down (due to no longer being protected against the elements by the tree line buffer), and an apology from the City for its several years of apparent inaction.

Evidence of the Respondent

Interviews:

In a telephone interview with the City Clerk, he advised that the City was of the understanding the trees between the Plaza and the Complainant's property were to be planted. He provided the contact information for the appropriate individuals on staff.

The Planning Manager was interviewed. He advised that he was contacted by the ward Councillor after the Complainant had reached out to the Councillor for assistance. He ordered the site plan for the Plaza to be returned from the archives and found the original approval with a landscape plan showing trees along the property line between the Plaza and what is now the Complainant's property. At this point, he provided the information to Engineering Services, which is responsible for planning enforcement (which is separate from by-law enforcement).

His understanding at the time was that Engineering Services was working with the Plaza Owner to have new trees planted, and that the Plaza had a landscaper (the "Plaza's Landscaper") on a retainer. He understood that a plan had been worked out between the City and the Plaza. The goal in such situations is compliance, and the best way to achieve it, in the City's view, was through planning enforcement via Engineering Services. He is unsure if By-law Enforcement was ever involved.

Once he was made aware that a plan was in place, the Planning Manager "closed the loop" with the Councillor by updating him that the matter was being handled by landscaping staff in Engineering Services. All of this occurred in the early part of 2019.

I also interviewed the Engineering Manager, who was involved in this situation from 2019, albeit indirectly (as the matter was being managed by others in the Engineering Services department). He took carriage of the matter in January 2022, as the previous

ILT and Supervisor who were handling the matter no longer work for the City as of June and December, 2021, respectively.

The Engineering Manager indicated that the trees between the subject properties were removed sometime in 2018. The Plaza Owner had indicated that the trees were in poor condition, that root systems were damaging underground services, and that people were trespassing on the property and using the trees as cover for carrying out various anti-social activities behind the Plaza (e.g., graffiti, lighting fires).

The Engineering Manager was aware that the Complainant had reported experiencing noise and light emissions, as well as damage to the fence and to his car.

He was aware that the City staff contacted the Plaza Owner in January 2019 to advise that the property was under site plan control and required a 6 metre landscape buffer between it and adjacent lands. The definition of “landscape buffer” was vague (i.e., not clearly defined – this is further discussed below). He noted that subsequent communications were held with the Plaza Owner, including a letter sent to him in or around June 2020. He also noted that the fence was reinstalled sometime in 2019.

The Engineering Manager noted that the zoning by-law was updated in 2020. During that year, over the various exchanges with the Plaza Owner, it was stated by him that he could not afford to plant new trees due to the economic impacts of COVID-19 (though the Engineering Manager also noted that this situation pre-dated the pandemic and was not addressed by the Plaza Owner in 2019 either). The Plaza Owner referred to the Complainant as being “disgruntled” and wanted to have Council involved. However, the matter was kept at the staff level (notwithstanding that the Parties themselves contacted Members of Council and others – the Complainant to get them involved, and City staff to keep them informed).

The Engineering Manager noted that when staff reviewed the site plan for the Plaza (which dates from 1979) it was not sufficiently detailed to provide for enforcement of the landscape buffer. For example, it did not define what the buffer was required to be, nor did it provide for any maintenance requirements in perpetuity. In addition to this, staff reviewed the 2019 zoning by-law (prior to it being amended in 2020) and determined that the wording in the 2019 version did not provide sufficient details to allow for enforcement of the buffer requirement in the site plan. So, while the plan did require a buffer, it was not deemed to be enforceable due to a lack of clarity in the site plan and by-law themselves. In 2020, the by-law was amended to provide better wording which would allow for enforcement through site plan control (via the Engineering Services Department).

The Engineering Manager noted that staff had met with the Plaza Owner and the Plaza's Landscaper numerous times to try to resolve the matter. In July 2020, there was an agreement that planting of new trees would take place (with various details to be worked out). Eventually, it was determined that the trees would be planted in September 2020, but they were not planted. It was then relayed to the Plaza Owner and Landscaper that the plantings should happen no later than November 2020, after which it would have to wait until 2021. Staff continued to communicate with the Plaza Owner and the involved political representatives on actioning the plantings as agreed. During this period (the Fall of 2020) the Plaza Owner requested that the tree plantings be phased in due to economic impacts. Some plantings were done in 2021, which was confirmed by staff in the Fall of that year, but not all plantings which were agreed upon have been carried out yet.

The Engineering Manager himself has continued to follow up on this matter since taking it over in early 2022, and recently (as of March 2022) contacted the Plaza Owner about the next steps for carrying out the remaining plantings.

The trees which have been planted to date are "nursery stock trees" of 2-3 metres in height (maybe slightly higher than the fence). He is unsure if there was any agreement in place as to species, maturity, or height requirements of the trees to be planted.

The Engineer Manager also asked By-law Enforcement, in March 2022, to look into the issue of light emissions from the Plaza property. Apparently, the By-law Enforcement officer tasked with this contacted the Complainant who was "taken aback and confused" by By-law Enforcement's involvement. The Engineering Manager noted that his intention was to be proactive and helpful.

He also noted that, because of the difficulty arising from this matter, and in particular in dealing with old site plan agreements such as this one, the City has initiated a process to develop a standard operating procedure to deal with similar issues moving forward. That process is underway, and involves the Development and Engineering, Planning, Forestry, Zoning, Legal, and By-law Enforcement departments. As noted, the difficulty with this situation was the fact that the site plan was too vague to be enforceable (in respect of the buffer) on the Plaza Owner. Furthermore, even if the City's legal advisors were confident in the ability to pursue a legal route to enforcement (which they were not), by 2020, the delays in the courts due to COVID-19 made that option impractical (in addition to being likely unsuccessful).

The Engineer Manager indicated that he was aware of the damaged fence / car issue, but he was not sure if the Complainant had submitted a formal claim to the City for damages.

The Engineering Manager was also asked about the involvement of the City Councillor and whether staff had delegated responsibility to the Councillor to deal with this matter. He stated he "...cannot imagine that staff would upload a matter of this type to a councillor" and that, "...one of our staff had commented that this is a matter that staff should deal with, not a councillor resolving the problem."

The City also provided extensive email records and other documents showing the various internal and external processes followed by City staff to deal with this issue. These records generally corroborate the interview evidence of the Planning Manager and Engineering Manager.

For example, email records indicate that on January 18, 2019, the Planning Manager emailed the office of Councillor Kelvin Galbraith, who by this point had been made aware of the situation (seemingly by the Complainant), that the site plan for the Plaza property had been ordered from storage. A further email of January 25, 2019 indicates that the site plan had been returned and reviewed, and that it "...required landscaping (10 spruce trees) on the south side of the plaza as indicated on the approved site plan," and that, in the Planning Manager's view, "...this becomes a site plan enforcement matter if these trees have been cut down."

On January 25, 2019, a copy of the draft compliance letter ("January 2019 Compliance Letter") from the City's ILT to the Plaza owner was shared among staff. It advised the Plaza owner that the property was under the City's site plan control and that the tree line buffer between the Plaza and the Complainant's property was required thereunder. The ILT offered to meet on site or by telephone to "discuss the necessary corrective measures."

Email records indicate that on May 6, 2019, the ILT emailed the Planning Manager and the Coordinator of Site Engineering to advise them that the Complainant's spouse had called about the fence falling on the Complainant's car. She also indicated that no response had been forthcoming from the Plaza owner regarding the above-noted January 2019 Compliance Letter. Further emails indicate that a "Final Letter of Compliance" was to be sent to the Plaza owner by registered mail, following which it would be escalated to the legal department as required (i.e., if the Plaza remained non-compliant). The question was also raised as to whether the fence was also part of the site-plan, and it was determined that it was.

Email records then pick up in May 2020, with the Complainant emailing the Mayor's office on May 19, 2020, indicating that the problem was unresolved, and that he had to "chase" the property owners (Plaza Owner) for the fence repair after it had fallen on his car. That email was forwarded to other staff, in particular, the Manager of Urban Forestry, who indicated he was unaware of the situation but would follow up. On May 22, 2020, he did, and by email to the Mayor's office and other staff (including the ILT and staff in the By-law Enforcement office) stated:

"I had a chance to follow up with my staff about this file. It is a bit unique, and requires a touchpoint to a number of departments, whom I've cc'ed on this email stream.

Any trees removed on private property that was completed prior to Jan. 27, 2020, would be exempt of the City's private tree bylaw. That being said, if it is a question of compliance with an approved site plan application, that would be a different subject. I've cc'ed [the ILT] on this email as she looks after site plan review and approvals. I'll commit to work with [ILT] to assist with any compliance concerns there and loop in legal if required.

Any issues from a property standards perspective (dilapidated fencing) is handled through our bylaw enforcement team. I've cc'ed [by-law officer] on the email.

I hope this can provide a step toward a resolution. I'm happy to coordinate with all parties."

An email chain commencing on June 29, 2020, between the ILT and the spouse of the Plaza Owner indicates that the ILT had followed up again regarding the situation with the tree removal, including by way of a telephone call in which it was indicated that the trees had been removed for various reasons, among them, that some were in "poor condition" and also that certain undesirable conduct (e.g., graffiti and lighting fires) was being done behind the Plaza with the trees used as a cover to shield the anti-social conduct from view. There were also emails exchanged between the Complainant and various staff, including a By-law Enforcement Officer and the ILT, about the ongoing unresolved situation.

Further emails of June 30 and July 6, 2020 indicate that the Plaza's Landscaper was looped into the emails (by the Plaza owner's spouse, at the ILT's request). The ILT indicated to the landscaper that a discussion was required to determine various factors

for the installation of new trees, including the number, size, and types of trees that would be appropriate, and possible root system barriers.

On August 7, 2020, the ILT followed up again with the Plaza Owner's spouse and the Plaza's Landscaper, writing in part:

"I am writing to follow up after our meeting on site to discuss the required tree plantings at 516 Plains Rd. E. As we discussed, a rough sketch is required, showing proposed tree plantings (size, species, location) based on our discussion, and availability at the nursery. I will need to show the sketch to discuss with the councilor prior to the trees being planted."

On August 20, 2020, the Plaza's Landscaper replied with a sketch proposal.

On September 9, 2020, the ILT replied, stating:

"Thanks for the sketch, it is very helpful. As I mentioned, I have to keep the local councilor informed of the planned replacement trees and rationale, since the removal of the trees has been escalated to the mayor's office and will differ from what was removed."

Could you let me know when you plan to order the plant material and install the trees?"

The Plaza's Landscaper replied later that day:

"Once I get the approval of my suggestions I will have to check availability of the trees. Then I will have to propose an estimate to [Plaza Owner's spouse] for approval. As we are getting late in the season it could take time to receive the trees of I have to find them."

I haven't ordered yet as I haven't got confirmation from you."

The following day (September 10, 2020) the ILT replied:

"I have informed the councilor of the proposed plantings and rationale behind the changes."

I am confirming the planting you have proposed. Please proceed with checking the availability and having the estimate approved for planting.

Please let me know if you have any other questions."

The ILT then followed up on September 18, 2020 for a status update and was advised by the Plaza's Landscaper that a quote had been submitted to the Plaza Owner's spouse, and that he was awaiting information on the availability of trees.

The ILT followed up with the Plaza's Landscaper again on September 26, 2020 and was advised that the Plaza Owner's spouse had still not provided an approval of the quote.

On October 8, 2020, the ILT wrote again to the Plaza's Landscaper and the Plaza Owner's spouse, as follows:

"Please provide a timeline for when the trees will be planted. The required replacement trees, as discussed, must be planted ASAP before the winter. The councilor and mayor's offices continue to be contacted and require a timeline."

The next emails in the chain include the City's legal counsel and are redacted due to solicitor-client privilege.

Another chain of email records then picks up in late September 2020, where a number of emails between the Complainant and various City staff, Councillor Galbraith, the Mayor's office, and the office of Burlington's Member of Parliament, demonstrate that the Complainant continued to follow up on (and escalate) his request – now at least more than a year and a half old. Of particular note:

- An email of September 26, 2020 from the ILT to the Complainant indicated that the ILT had followed up with the Plaza owner and landscaper about trees, and that they were awaiting information from the nursery.
- An email from Councillor Galbraith to the Complainant on October 5, 2020 indicating that he had been following the email exchanges.
- An email from the Complainant to Councillor Galbraith and various above-named individuals, including the ILT, the Mayor's Office, and a by-law officer, sent on October 19, 2020, indicating that nothing had been done; and a follow-up email from the Complainant on October 21, 2020 regarding same.

On October 21, 2020, the ILT emailed the Engineering Manager and the aforementioned Planning Manager and the Coordinator of Site Engineering to advise of the ongoing situation, writing as follows:

“As you know, I have been following up about this site plan compliance issue since at least January 2019 (date of the first letter to the property owners) and I have sent a follow up letter, consulted with Legal, met the property owner and landscaper on site and followed up with correspondences with the homeowner, property owners, landscaper and councilor to keep this moving forward. I reviewed the sketch of what was proposed to be planted as replacement, explained the changes to the councilor, and gave confirmation to the landscaper to get a quote, which was presented to the property owners.

The trees that were removed and are required to be planted (as the owner was informed in 2019) must be planted before the ground is frozen, which could be until mid-November (until frost) but is weather dependent, so the sooner the better.

If my job is to comment on and provide guidance regarding landscaping issues for private developments, then I have done so. Now the property owner requested to meet the councilor and mayor to be told to plant the trees (please see attached) because of COVID related financial hardship. The resident continues to send emails to myself, councilor, mayor, (has emailed [anon]) due to inaction.

Is there someone [anon] who should step for site plan compliance related issues? Is it my responsibility to ensure and enforce compliance with the Planning Act?

As noted in the email attached, the councilor was going to meet the property owner on Monday or Thursday this week, so I am not sure if that meeting took place. But it is also not up to the councilor to tell property owners whether they can be out of compliance with their approved site plan or not. Correct? Should a firm staff response be provided? (Firmer than mine, since I lack authority). The property owner is saying they can't afford to plant the trees due to COVID, but were first contacted in 2019 – pre COVID.”

A Response from the Coordinator of Site Engineering on October 22, 2020 read, in part:

Our role is to identify or be advised of non-compliance matters related to Section 41 (and previous versions of Sec. 41) of the Planning Act. Once these non-compliances have been identified, conveyed to the owner(s) and requested to repair, replace and/or reinstate, via an Order to Comply, we follow up to the point that the work is either done or not. If the work is not done within the specified timeframe, the matter needs to get escalated to the Legal Dept.

The Coordinator of Site Engineering went on to describe the potential role of the legal department in assessing and managing the circumstances related to compliance and enforcement of the site plan.

The ILT sent a further reply on October 26, 2020, stating:

"I just spoke with Councillor Kelvin Galbraith's assistant [anon], who is trying to set up a call with [Plaza Owner] in response to his email below (or Councillor Galbraith will cold call [Plaza Owner] who has not responded to several proposed times offered). [Councillor's Assistant] said that Councillor Galbraith's position is not to overstep staff recommendations (re: trees required to be replanted to come into compliance with approved SP) but wanted me to double check with you whether it could be offered as option, to re-plant the required trees in spring 2021, rather than push for fall 2020 (ASAP!).

As noted in the email below from [Plaza Owner] (one of the property owners) they are struggling financially due to COVID.

But as I discussed with [Councillor's Assistant], the property owners were notified in winter of 2019, so had the spring and fall of 2019 to follow up before COVID hit.

Please let me know whether the specified time in which to complete the work should be Fall 2020 (ASAP before the ground freezes) or if Spring 2021 would be acceptable (with some kind of written commitment?) before the issue is escalated to legal."

[In reference to the above, email records also show an email from the Plaza Owner to the ILT on October 9, 2020, indicating financial hardship due to COVID-19, and writing, in part:

I fail to see the justification of spending thousands of dollars on a few trees to satisfy one disgruntled individual while that same money can be used to help these desperately struggling, tax paying business owners. If the mayor and the councillor feel that planting a few trees to satisfy one disgruntled individual is more important than the survival of even one of these hardworking entrepreneurs, I'd like to hear it from the mayor and councillor, then I'll be happy to give them a timeline for a few trees to be planted.

The ILT provided the Mayor and Councillor's contact details to the Plaza Owner and followed up with staff internally (as indicated herein).]

A reply from the Coordinator of Site Engineering on October 27, 2020, read:

"I would like to suggest that for the City to consider the delay in planting to next Spring (which will undoubtedly anger the neighbour), that the plaza owner provide a Letter of Credit in the amount of the proposed planting costs to guarantee the work will get done next Spring (provide a deadline) and that there will be no further attempt to delay or object to the required works (all included in a Letter of Undertaking). At the moment we have nothing (no securities) other than the Sec. 41 Agreement to rely on. With an L/C we will have the needed leverage to get the work done, albeit next Spring. If the plaza owner refuses, then we insist the planting is undertaken immediately. We will need his decision within 2 weeks and if planting is the option, it is to be done by November 30, no exceptions. Thx"

A further email from the ILT (copying an email exchange with the Plaza Owner's spouse, indicated the Plaza Owner was away until the second week of November (2020) and could not deal with the issue until then. The Coordinator of Site Engineering replied:

"I'm sure his wife can reach her husband, so I think we still need to know whether providing an L/C is an option. Otherwise, they need to get going on organizing a landscape firm to plant the necessary trees. We need a decision and the sooner the better. Plant the trees now or provide an L/C and plant in the Spring."

Further email exchanges between City staff, and including the City's legal counsel, indicate more communication about the unfolding situation, but are considered by the City to be solicitor-client privileged and are accordingly redacted.

However, the ILT sent an email to the Plaza Owner's spouse on October 27, 2020, providing the timeline of the various communications between them regarding this matter (detailing some 13 exchanges of emails, calls, or in-person meetings between January 28, 2019 and October 26, 2020), and writing:

"As outlined above, the first site plan compliance letter was sent in January 2019, one year before COVID. I have been discussing the required replacement trees with you (Lisa) since June, and confirmed the proposed plantings on September 10.

Waiting until the second week of November to continue discussions will be too late, since the trees should be planted by mid-November at the latest, before it is too cold (below 5° C) . (Planting conifer trees by end of October and deciduous trees from leaf-fall until the ground freezes is advised). If the trees can't be planted by mid-November (or before temperatures fall below 5° C), the weather may push plantings until Spring 2021.

To consider the delay, the city requires a Letter of Credit in the amount of the proposed planting costs, to guarantee the work will get done next Spring and a signed Letter of Undertaking confirming that there will be no further attempt to delay or object to the required works.

Please let me know whether a Letter of Credit (and signed Letter of Undertaking) can be provided, or whether the trees can be planted as soon as possible, or by mid-November at the latest (unless temperatures drop)."

On April 20, 2021, the ILT wrote to the Plaza Owner and his spouse, as follows:

I hope this email finds you well. I am just following up about the replacement tree planting, as it is the last week of April. I received confirmation from Councilor Kelvin Galbriath in December 2020 that after discussions you had committed to the tree planting in the spring

but depending on the financial situation (compromised by COVID) may request to phase the planting over two years.

The email attached the sketch from the Plaza's landscaper, an overhead photograph of what the site looked like before the trees were removed, and a request for a response. The ILT also forwarded her email (on the same date) to other staff, including the Manager of By-law Enforcement in case, "...further action is required from By-law Enforcement."

The ILT followed up with the Manager of By-law Enforcement and other City staff by email on May 17, 2021, writing as follows:

"I have not received a response from the plaza owners and would like to involve you in setting a date by which they must plant the trees and have follow-up by By-law Enforcement, as we discussed previously.

I have copied [By-law Officer], who has been involved in the ongoing complaints about this property (re: maintenance).

Councillor Kelvin Galbriath has requested a meeting about this tomorrow (Tuesday, May 18) at 9am, so if we could discuss this briefly today so I am clear on next steps that would be helpful."

Further emails between City staff indicate that nothing had come out of the meeting with the Councillor, and that By-law enforcement would discuss the matter further. Most of the remaining emails in the chain are redacted for solicitor-client privilege; however, among them is an email from May 17, 2021, from the Manager of By-law Enforcement to the ILT and other staff, stating:

"As noted at the last meeting, we need to understand what is being enforced. We can enforce the zoning by-law regulations but we do not enforce site plan agreements. I think at our last meeting there was some additional work that needed to be done to determine exactly what we are basing the enforcement on.

If it is zoning by-law, than we need to send a letter with the drop dead date and explain what part of the zoning by-law they are violating. Essentially, a Notice to Comply. We need to know what part of the by-law is not being met and then we could move forward from there. We can assist with the notice once we have clarification of the zoning issue."

The City's Coordinator of Zoning Examination ["CZE"] replied to this, indicating:

"The property is zoned MXG, Mixed Use General, under Zoning By-Law 2020, as amended. Part 5 Mixed Use Corridor Zones, Section 4.4 Landscape Area and Buffer requires a 6 m landscape buffer abutting a residential zone.

Landscape Buffer

The area of a lot which serves to provide separation and to partially obstruct the view of adjacent land uses by means of a dense landscape screen consisting of evergreen trees or a combination of solid screen fencing with evergreen or deciduous trees, shrubs, or berms."

The By-law Enforcement Officer then replied:

Thanks [ILT] and [CZE] for the further response. I will await [By-law Enforcement Manager's] response but [ILT] are you able to clarify why they site plan agreement is unenforceable?

The responding email from this point is redacted due to solicitor-client privilege.

A different email chain with exchanges over December 2020 and January 2021, indicates further emails between the Complainant and City staff (including the ILT), who indicated in December that the Plaza Owner had committed to planting in the Spring; and that the Complainant wanted to know who from the City would supervise to ensure "proper density and height" of the trees. Further email records from January 2021 are redacted for solicitor-client privilege.

[It is noted that there are also emails between the Complainant and his Councillor during this period. Notwithstanding that the Complainant has some concern over the involvement and conduct of the Councillor, the Office of the Municipal Ombudsman has no jurisdiction over the conduct of City Councillors, who are elected representatives with a separate Code of Conduct and other laws (e.g., The Municipal Conflict of Interest Act) which they are must follow. Accordingly, such Complaints are the remit of the City's Integrity Commissioner.]

A further related chain of emails between staff from January 12, 2021 indicate a growing concern about the tone of the Complainant's emails, with some indication that they

were beginning to be viewed as harassing in nature. It was also revealed in these emails that the City's legal counsel determined that the Site Plan was not legally enforceable, with the ILT writing, in part:

"Legal has confirmed that the requirement to plant the trees is not legally enforceable based on the Site Plan agreement, so can I tell [Complainant] that this is not a by-law enforcement issue, that the fence is sufficient and the planting of trees is a courtesy the property owner is not obliged to do, so he should stop emailing anyone about it?"

In the future I will find out first if something is legally enforceable and if it is not, not pursue it further."

...to which the Manager of Site Engineering replied, in part:

"You can reply that you have already responded and there is nothing further that can be done until the Spring. Height and density will be discussed between the plaza owner and staff prior to planting when more information is available.

[...] the reality is (as confirmed by our Legal Dept.) the plaza owner is under no obligation to replace those trees and replanting the trees is being done as a courtesy and the City will continue to be involved in the committed work [...]"

On January 15, 2021, a further staff email exchange discussed the matters of site plan and by-law compliance, and culminated in an email from the Planning Manager to other relevant staff (including the ILT, the Manager of By-law Enforcement, and others) indicated as follows:

"I think we need to meet and discuss as the email thread is getting too long. I have copied [anon] on this email to set up a 1 hour meeting with everyone on this email so we can go through the issue and bring closure to the matter.

It would appear that we are caught between Site Plan enforcement and Zoning By-law enforcement.

Planning staff would not support a minor variance to the Zoning By-law definition of a landscape buffer so as to not require some trees and shrubs in the landscape buffer.

Regardless of the tree cutting occurring prior to our private tree by-law coming in to effect, trees need to go back in this landscape buffer.

We just need to determine the mechanism to require this and the timing of enforcement."

On May 17, 2021, the Complainant emailed the ILT, Mayor's office, and other City Staff, writing as follows:

"It's been spring for a while. We are approaching three years in a few months.

All stores in the plaza are open for business.

Nurseries are open and I have called several landscaping companies to ensure no shortage of trees, and everyone is working.

The property continues to be poorly maintained and full of trash. In fact they just mulch garbage today and I spent 30 minutes cleaning my property. Come see for yourself.

When will dense layer of trees be planted to separate commercial space from retail per city by-law?

I have seen mention of cleaning up aldershot in all BIA minutes, several development proposals in city minutes, sustainability minutes show no mention of social or governance (just outside consultations from academia).

Do you folks need help?"

The Complainant sent further emails and a message by social media in June, 2021.

On June 10, 2021, in response to the Complainant's further communications the ILT wrote to the Planning Manager, the By-law Enforcement Officer, and the Coordinator of Site Engineering, forwarding the communications with the Complainant, and writing:

“Another follow up email from the homeowner is below. Closing this ASAP would be much appreciated by all parties. An email to explain what has, and can be done might help to moderate the expectations. The draft email I sent (Jan 2021) with modifications is what I suggest, in order to discourage continued follow up (as we are realistically very limited as to what can be enforced).

Let me know if you think an email can be sent or whether you prefer to wait until after meeting with Legal (Friday, June 18).”

On June 24, 2021, the ILT emailed the Plaza Owner and his spouse, copying various City staff, as follows:

“Since I have not heard back from you, I will be passing your contact information and the background information on what we had previously discussed for replacement planting to the City’s Legal department, who will be handling it going forward.

As was outlined in letters I sent previously (dated January 28, 2019 and June 9, 2020), the approved site plan shows the trees that have been removed and were required to be planted as part of the original development approval. Site plan approvals (including all features shown on the approved plan), and their respective agreements (as registered on title of a property), are intended to exist in perpetuity or until the owner makes an application and receives approval to change the plans.

While I understand the rationale you provided for removing the trees (security and maintenance concerns due to antisocial behavior being hidden by trees), I have worked with you and your landscaper ([anon]) to find an alternative that is sensitive to your property maintenance and safety concerns, while maintaining the intent of the original site plan approval (provide a “Landscape Buffer”).

It is our expectation that plantings (as shown on the sketch, or equivalent size and species, based on plant availability) will be planted immediately, as you had committed to Councillor Galbraith to complete the plantings this spring.

Please reply all to this email and confirm the date by which you plan to plant trees, and whether you require phased planting, as you had discussed with Councillor Galbraith.

I am hopeful that a resolution can be found that satisfies both your concerns as a property owner (maintenance, safety and financial

constraints) and the City's responsibilities (maintain and enhance the urban tree canopy by replacing removed trees, and maintain the integrity of site plan agreements and particularly between different land uses such as residential and commercial).

Please reply all to this email by the end of the day on July 2, 2021, or legal staff will be seeking further instructions to pursue legal action to enforce the terms and conditions of the Site Plan Agreement to get the trees planted.

Let me know if you have any questions.

On July 2, 2021, the Plaza Owner's spouse emailed the ILT as follows:

Apparently [Plaza Owner] and councillor Galbraith have been in contact. He has also been in touch with [anon] Landscaping. There may have been a misunderstanding as it was discussed that the plantings would take place over 2 years while the Covid situation resolved as half of the commercial units have been shut down at the governmental level. This has put tremendous strain on both the tenants and our company. That being said, we have every intention of planting the said trees. It was agreed in the conversations that plantings during the high heat of summer would be difficult without a proper watering program and we are not onsite to perform what is required.

Please understand that it is our full intention to perform the required action. [Landscaper] suggests that September would be more ideal and has slotted space in their schedule to accommodate this.

Thank you for your continued patience in this matter.

On October 5, 2021, the Coordinator of Site Engineering emailed the Plaza Owner's spouse inquiring as the status of the tree plantings. The Plaza Owner's spouse replied

on the same date, writing: “Thank you for your message. The trees were planted over a week ago, I’m sorry it wasn’t noticed.” The email was acknowledged by the Manager of Site Engineering that same day.

Issues

The issues to be determined in this matter is whether the City of Burlington erred in its handling of the Complainant’s situation, and if so, what are the appropriate remedies and/or recommendations moving forward.

Analysis

From the Complainant’s perspective, this is an incredibly frustrating situation. He has awaited results for approximately 3.5 years and has yet to see any that satisfy his concerns. While there is evidence of communications with the City, including several instances where various undertakings appear to have been made (e.g., planned time periods for planting new trees) the reality is that those dates came and went without the work being done – and indeed, it remains the case to this day that the full complement of tree plantings has not been completed.

What the Complainant probably does not know (until now, in reading this report) is that the City appeared somewhat crippled in its ability to act, and this was of no fault of anyone in particular. The lack of results was not the result of a lack of effort, nor indeed a lack of competence, but in a confluence of circumstances that rendered the City essentially incapable of resolving the situation.

While most of the records containing legal advice have been redacted for privilege (and it is the City’s legal right to do so) what is available for review has revealed that the City found, for legal and practical reasons, that the landscaping requirement (buffer) in the site plan was not enforceable – and indeed, it remains only weakly enforceable now, even after an amendment to the zoning by-law in 2020. This is a matter of legal interpretation by the City’s legal department, as indicated by emailed discussions between staff (and as verbally confirmed by the Engineering Manager during his interview).

What appears not to have occurred, unfortunately (though there may be good reasons for this, including solicitor-client privilege, privacy, or other liability reasons), is clear and ongoing communication with the Complainant about the problems the City was

facing with enforcing the site plan. Indeed, it was only in January 2021 (according to the records provided) that it was even contemplated the Complainant be made aware that the site plan was not viewed as enforceable by the City's legal department, that the tree planting work was essentially being pursued by way of an agreement between the City and the Plaza Owner. This has left the Complainant to wonder, for three and half a years, why the City appeared to be ignoring his problem, when the extensive email records and other communications clearly indicate otherwise – i.e., that the City did take the situation seriously, spent many person-hours working on it, with numerous staff from numerous departments involved, and at least thirteen instances of communication between the City and the Plaza owner between early 2019 and late 2020 alone, including extensive negotiations and planning for replacement trees, as well as various follow-up communications since then (after the by-law was changed, and once staff determined how to – even if weakly – attempt to achieve compliance from the Plaza Owner with respect to the site plan).

In municipal enforcement matters (whether by-law or site plan related) the goal is always to achieve compliance. In this regard, particularly as it relates to by-law enforcement, though in my view the principle is the same either way, the courts had tended to show deference to the municipalities when determining how to deal with enforcement matters.

For example, in *Foley v. Shames* [2008] O.J. No. 3166, 2008 ONCA 588., the Ontario Court of Appeal held that:

"For it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners."

In this case, though the unfortunate situation remained unresolved from the perspective of the Complainant, it cannot be reasonably argued, nor do I find, that the City acted unreasonably in attempting to achieve compliance. The evidence provided by the City demonstrates significant (even if futile) efforts to resolve this matter. Its inability to do so (noting that the plantings remain an ongoing matter and have been partially fulfilled) was not due to a lack of effort or incompetence, but due to circumstance. Where the City may have improved in its handling of this case is in communicating

these difficulties to the Complainant, which appears not to have been sufficiently or effectively.

In regard to the financial aspects of this case, I note that the Complainant is seeking compensation for damages related to the fence falling on his car, including the expenses he incurred to repair the fence. It is recommended that the Complainant submit a claim to the City for its insurance plan to consider, and failing that, the issue becomes a matter of civil law between the Complainant and the City or perhaps between the Complainant and the Plaza Owner. We are unable to provide legal advice or direction on this point and would advise the Complainant to seek independent legal advice should he wish to pursue any economic claims against either the City or Plaza through insurance or legal action.

In considering recommendations, I note that the City is already undertaking a process to develop a standard operating procedure (and indeed, the email records indicate this was contemplated along the way, in one of the many staff emails about resolving this matter). I believe this is a good step, and I would suggest that the City consider a communications plan as part of this procedure to ensure future property owners / ratepayers are kept better apprised of circumstances relating to their Complaints. However, as this work is clearly underway, and because I do not find that the City handled this situation incorrectly in the main, and as I make no specific findings against the City in regard to the conduct of its staff in this matter, I offer no specific recommendations for resolution, as none would be appropriate or effective in bringing this matter to a different conclusion than that for which it already appears to be on course. It is hoped that this report will itself shed sufficient light on the situation so that the Parties are better aware of what occurred and how to better move forward.

Conclusion

It is my conclusion that the situation of the removed tree line buffer is a matter of site plan enforcement, and that the City of Burlington acted reasonably in attempting to achieve compliance in a difficult and complex legal and practical situation largely beyond its control. I do not find that the City erred in its handling of this situation – though I note City staff could probably have found a way to communicate more clearly with the Complainant about the difficulties the City was facing in regard to enforcement (though I also note there are likely compelling legal reasons, including privacy and privilege, as to why any such communications would have to be limited and may still not provide significant clarity in any event).

To be clear, I find it is wholly within the Municipality's discretion to determine the reasonable course(s) of action to achieve compliance with its site plan and by-law and point out that this discretion, subject only to a municipality acting unreasonably, has been upheld by the courts. I do not find this to be a case of unreasonableness, and accordingly make no findings against the City of Burlington.

I accordingly make no recommendations.

I would like to thank the Parties for their assistance and cooperation. I trust this report clarifies the matters at issue and provides reasonable guidance through its conclusion(s).

All of which is respectfully submitted.

Yours very truly,

Michael L. Maynard
ADRO Investigator