



# Ombudsman Toronto

*Listening. Investigating. Improving City Services.*

## **Ombudsman Toronto Enquiry Report**

### **Enquiry into the City of Toronto's Handling of a Building Permit for Construction of a House**

**May 15, 2018**

#### **Complaint Summary**

1. Mr. L complained to Ombudsman Toronto. He said that because of what he considered to be a series of mistakes by the City, he was unable to occupy his new house, which cost him money and delayed its eventual sale.
2. In the fall of 2013, the City's Toronto Building Division (Toronto Building) gave Mr. L a building permit to demolish an existing house and build a new one on his corner lot.
3. In November 2014, before receiving the required approval from Urban Forestry – a branch of the City's Parks, Forestry & Recreation Division (PF&R) – Mr. L removed a tree. Urban Forestry imposed conditions for Mr. L to meet to bring the property back into compliance.
4. In June 2015, Toronto Building revoked Mr. L's building permit. This was because Toronto Building discovered that it had misinterpreted a section of the new zoning bylaw relating to the location of the driveway, and had therefore issued the permit in error.
5. Mr. L went to the Committee of Adjustment (C of A) in September 2015. The C of A allowed the driveway on Mr. L's plans. This result required Toronto Building to reinstate the building permit.
6. The City appealed the C of A's decision about the driveway to the Ontario Municipal Board (OMB) on September 25, 2015. This had the effect of temporarily staying (suspending the effect of) the C of A decision requiring Toronto Building to reinstate the building permit.
7. Several months later, in January 2016, the City withdrew its appeal to the OMB. This made the C of A decision final and binding and required Toronto Building to reinstate the building permit.

## Ombudsman Toronto's Enquiry

8. In gathering information for our Enquiry, we spoke with staff from several different City divisions and departments:
  - Toronto Building
  - Transportation Services
  - Parks, Forestry & Recreation (PF&R)
  - The Committee of Adjustment (C of A), part of the City Planning Division
  - Legal Services.
9. We also reviewed the relevant legislation, including the *Building Code Act, 1992* and its regulations (the Ontario Building Code) as well as the City's zoning and tree bylaws.
10. We received excellent co-operation from City staff during our Enquiry.

## Analysis

### *The City's Authority to Issue and Revoke Building Permits*

11. Toronto Building is responsible for issuing building permits and conducting mandatory inspections in accordance with the Ontario Building Code. The City has no discretion to refuse a permit if the application meets "all applicable law" under the Ontario Building Code.
12. In certain circumstances, however, the City has discretion to revoke a permit, including when it has issued it in error (*Building Code Act*, s. 8(10)(d)).
13. The *Municipal Code* provides that where the Chief Building Official intends to revoke a permit for some reasons (not relevant here), they must provide the permit holder with written notice of the intention to revoke it. Where the proposed revocation is because a permit has been issued in error, however, written notice of the intention to revoke the permit is discretionary, not mandatory (*Municipal Code*, Chapter §363-7B).
14. The *Municipal Code* does not address what efforts the City should make to allow permit holders to bring a permit into compliance before revoking it.

### *Toronto Building Issues the Building Permit in Error*

15. Mr. L made an initial application for a building permit in June 2013. Toronto Building told him he would need to obtain several variances at the C of A before Toronto Building could issue a building permit.

16. One month before, in May 2013, Toronto had enacted a new City-wide zoning bylaw. The new zoning bylaw required a driveway on a corner lot to "flank" the frontage of the property<sup>1</sup>. This had not been a requirement of the previous zoning bylaw covering Mr. L's property.
17. Under the new zoning bylaw, the driveway should have been located on the flanking street, but the City approved his plans with the driveway on the wrong street. Toronto Building's review of Mr. L's building permit application did not identify the non-flanking driveway as something requiring a variance.
18. In response to other issues that Toronto Building identified in its review, Mr. L changed his building plans in August 2013. This meant that he did not have to apply to the C of A for the variances Toronto Building had told him he would need.
19. Toronto Building issued Mr. L's building permit in October 2013 without a flanking driveway, contrary to the new zoning bylaw. One staff member told us that the new bylaw was confusing and that back in 2013, some zoning examiners, who review building permit applications, did not require applicants to comply with the flanking provision.
20. Because Mr. L's plans did not comply with the new zoning bylaw's flanking requirements, Toronto Building's issuance of a building permit was an error.

#### *City Tree Bylaws and Tree Removal*

21. The City protects both City trees and privately owned trees from injury and removal through its tree protection bylaws, set out under *Municipal Code* Chapter 813 (Articles II and III respectively). Any work that could result in the injury, destruction or removal of a protected tree<sup>2</sup> requires a permit from Urban Forestry.
22. Under these bylaws, proposed work affecting both City and private trees requires the local Ward Councillor's satisfaction with the landscape plan.

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<sup>1</sup> The City told us that the new zoning bylaw does not define "flanking street" because it is a commonly understood term "in the planning business". Only corner lots have a flanking street. The City explained that a flanking street is "the street abutting a property's side lot line" on a corner lot. This requires a determination of the front lot line, often by using the measurements of the proposed building. For a corner lot, either street-facing side of a property may be considered the "front lot line" for the purposes of the new zoning bylaw's requirements. Because of the new zoning bylaw's required minimum lot frontage and building setbacks, however, owners usually choose the street where the frontage is shorter, resulting in a lot of greater depth than width. In Mr. L's plans, the proposed house conformed with the front and side lot requirements of the new zoning bylaw only if the front lot line was assigned to the street that also had the driveway. This designation made the other street the "flanking" street, as it runs along the flank of the front lot line. Under the new zoning bylaw, the driveway should have been on this flanking street, not on the street where the front lot line was.

<sup>2</sup> Under Article II of Chapter 813, "Trees on City Streets", a protected tree is a tree of any size or any species. Under Article III, "Private Tree Protection" a protected tree is every tree with a diameter of 30 cm or more, regardless of species.

23. Urban Forestry can impose fines, tree planting requirements, and other conditions when someone removes a tree without a permit.

*Mr. L Removes a City Tree Without Permission*

24. In the summer of 2014, while Mr. L's house was under construction, he applied for a permit to remove a City tree to allow him to widen the driveway.
25. Urban Forestry staff were in touch with Mr. L throughout the application process.
26. Mr. L removed the tree in early November 2014 before getting approval from Urban Forestry. As a result, Urban Forestry required Mr. L to satisfy several conditions before it would issue a Compliance Notice. The conditions included planting three new trees, payment in lieu of planting two additional trees, and payment of a tree survival guarantee.
27. Further, Transportation Services, responsible for curb cuts and Right of Way Management, said that Mr. L needed to comply with Urban Forestry's conditions before it would proceed with the larger curb cut for the driveway.

*Toronto Building Revokes the Building Permit*

28. In the spring of 2015, Toronto Building realized that the approved plans violated the zoning bylaw. This meant that Toronto Building had issued the building permit in error.
29. It is not clear how Toronto Building discovered its error.
30. Toronto Building told us that whenever it discovers that it has issued a permit in error, its practice is to seek an assurance from the permit holder that the zoning violation will be fixed. In this case, that would have required Mr. L to apply to the C of A for a minor variance.
31. Toronto Building told us that it would only revoke a permit issued in error if it could not contact the permit holder to discuss how they can bring the permit into compliance, or if the permit holder refused to address the violation. Revoking the permit, according to staff, is usually a last resort. As one staff member put it, Toronto Building will not "use a hammer to kill a mosquito" by revoking a permit if it can have the permit holder bring the permit into compliance.
32. It is unclear whether Toronto Building notified Mr. L of its error when it discovered it. Staff speculated that a particular employee, now retired, likely tried to contact Mr. L about the error. However, Toronto Building has no record that anyone spoke to Mr. L or gave him an opportunity to fix the problem before it revoked his building permit.
33. Mr. L has no recollection of Toronto Building staff contacting him about the zoning violation before it revoked his permit. He does not believe that they did.

34. In June 2015, Toronto Building revoked Mr. L's building permit. This had the practical effect that the house could not be occupied and affected Mr. L's ability to sell it.
35. Toronto Building staff advised Mr. L to go to the C of A to obtain a minor variance for the driveway so his permit could be reinstated.

*Mr. L Gets a Minor Variance from the Committee of Adjustment and the City Appeals*

36. Mr. L appeared before the C of A on September 9, 2015 to seek a minor variance allowing the non-flanking driveway. Transportation Services staff did not object to the request and the C of A granted the variance. Mr. L obtained a Compliance Notice from Urban Forestry two days later.
37. On September 29, 2015, the Ward Councillor directed City staff to appeal the C of A decision to the OMB. At the time, City Council was in summer recess and a Member's Motion passed by Council before the recess allowed individual councillors to request that the City appear at the OMB without requiring a Council vote.
38. The appeal had the effect of temporarily staying (suspending) the C of A decision that had allowed the location of the driveway. This meant that Toronto Building could not reinstate the building permit.
39. Four months later, in January 2016, the City withdrew its OMB appeal. This meant that the C of A's minor variance decision was back in place, and the building permit could be reinstated.
40. The OMB informed the C of A by letter, with a copy to Mr. L, that the City had withdrawn the appeal. The North York C of A office also wrote to Mr. L on February 5, 2016 to advise him that its September 2015 decision was now final and binding.
41. During our Enquiry, we learned that the North York C of A office stopped its practice of writing letters to applicants to inform them of OMB appeal withdrawals in 2017. We also learned that none of the other C of A offices send out such letters, and were not sending them in 2016.
42. In early February 2016, Mr. L wrote to Toronto Building about the OMB withdrawal and asked them to reinstate the permit. Toronto Building reinstated the building permit.
43. Mr. L was confused about what the withdrawal of the appeal to the OMB meant for him. He emailed Toronto Building in March 2016 to confirm that the occupancy permit – part of the building permit – had also been reinstated. Toronto Building confirmed that reinstatement of the building permit had also reinstated the occupancy permit.

44. After the City withdrew its OMB appeal, Mr. L applied for a revision to the building permit. This was because the driveway he had constructed was wider than the one Toronto Building had approved three years before.
45. Toronto Building issued a revised building permit in March 2016 for the widened driveway.
46. Mr. L sold the house in April 2016.

## **Findings**

47. We learned that Mr. L has started a legal action against the City in this matter, alleging negligence. Our Enquiry did not review the matters in dispute in the litigation. It focused on identifying systemic issues of administrative fairness and making recommendations for improvements to the practices of Toronto Building and the C of A.

### *The Law Permitted Toronto Building to Revoke the Initial Building Permit*

48. When Toronto Building approved the initial building permit application, it failed to apply the "flanking" provision of the new zoning bylaw.
49. Under the *Building Code Act*, Toronto Building may revoke a building permit issued in error. Therefore, it appears that Toronto Building's decision to revoke the permit was legally permitted.

### *Toronto Building Could not Confirm Whether it Followed its Own Unwritten Policy of Trying to Obtain Compliance Before Revocation*

50. With revocation at one end of the enforcement continuum, and voluntary compliance at the other, Toronto Building explained that its practice favours the latter. Toronto Building told us that generally, its practice is to only revoke a building permit if it cannot reach the permit holder, or when the permit holder refuses to take the necessary steps to comply (for example by applying for a minor variance).
51. Toronto Building told us that when it became aware of the error, it took steps to contact Mr. L to advise him to seek a variance from the C of A.
52. Toronto Building has no record however of any such steps. Mr. L has no recollection of Toronto Building contacting him before revoking his permit, and believes it did not do so. Even if Toronto Building did attempt to contact Mr. L, it did not document its efforts.
53. Fair and effective service to the public requires that Toronto Building document the steps it takes to offer a permit holder the opportunity to comply before it decides to revoke a permit. If for some reason immediate permit revocation is necessary (for

example because of a pressing health and safety concern), Toronto Building should also document that.

#### *City Staff's Actions in Appealing the C of A Decision to the OMB Were not Improper*

54. The Ward Councillor directed City staff to appeal the C of A's variance for the flanking driveway. The Councillor had legal authority to issue this direction, and City staff was obliged to comply.

#### *The Committee of Adjustment is not Complying with Provincial Requirements*

55. Under subsection 45(15) of the *Planning Act*, the Secretary-Treasurer of the C of A is required to notify applicants when all appeals to "the Tribunal" have been withdrawn. While in this case, the North York C of A office sent Mr. L a letter to inform him that the City had withdrawn its appeal to the OMB, it no longer sends such letters. In fact, none of the C of A offices is currently complying with this requirement.
56. All of the City's C of A offices should be complying with section 45(15) of the *Planning Act* by providing written notice to applicants when all appeals to the Tribunal have been withdrawn.

#### **Ombudsman Recommendations**

57. In consideration of the information gathered through this Enquiry, we make the following recommendations:
1. Toronto Building should outline in writing the steps that staff should take before revoking a permit that Toronto Building issued in error. Toronto Building should publish these steps on its website.
  2. Toronto Building should amend its standard operating procedures to require that staff properly document the steps taken under the revocation process in its internal electronic database, making that information accessible to all inspectors and management within Toronto Building.
  3. As required by section 45(15) of the *Planning Act*, the Committee of Adjustment should send the applicant written notice in every case where all appeals to the Tribunal have been withdrawn. That letter should make it clear that the applicant must take action to contact Toronto Building to inform it that the Committee of Adjustment's decision on the minor variance(s) that had been under appeal is now final and binding.

## **City Response**

58. Both Toronto Building and the Committee of Adjustment accept our findings. They have agreed to implement our recommendations.

## **Follow-Up**

59. Ombudsman Toronto will follow up with Toronto Building and the Committee of Adjustment on a quarterly basis until implementation of our recommendations is complete.

[Original Signed]

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Susan E. Opler  
Ombudsman