



INVESTIGATION REPORT

Complainant:	[Anon]
Complaint Reference Number:	MUN-431-0419
Complaint Commenced:	May 16, 2019
Date Required Information Received:	February 7, 2020
Report Date:	May 4, 2020
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 Municipality of Clarington 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 her neighbour's downspout (the "Downspout") leaks water onto her driveway, causing a slip and fall hazard in the winter. She has submitted requests to the By-law Enforcement office ("By-law Office") for the Municipality of Clarington (the "Clarington") but has been left unsatisfied with the attention given to her issue. She has since sought assistance from the ADR Chambers Municipal Ombuds office to investigate and report as to whether the City has properly handled her Downspout complaint, and to make such recommendations as to resolve the matter.

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 September 13, 2019, and December 2, 2019; (iii) a telephone interview with [Anon], Manager of Municipal Law Enforcement for Clarington, ("DA") on November 7, 2019; (iv) a telephone interview with [Anon], Manager of Construction for Clarington ("TR"), on November 8, 2019; (v) independent research on Clarington By-Law 2007-070 ("By-law 2007-070" or the "Property Standards By-law"); and (vi) other research, as necessary.

Statements and Documents of the Complainant

The following statements were provided by the Complainant in writing, and through the telephone interview conducted with the Complainant:

The Complainant lives in Clarington in an end-unit free-hold townhouse which she purchased in 2005. She purchased the home as a new build and stated she was the first person to live on the block.

The Complainant advised that the Downspout for the adjacent property (an attached townhouse) runs down the wall from the neighbour's eavestrough attached to the neighbour's overhanging porch roof. It is secured to a wall that adjoins the homes, on the Complainant's side of the property line, over the Complainant's driveway, beside the garage door. Initially, from the time of builder's installation, the Downspout wrapped tightly around the wall, bending towards the neighbour's front step, where it turned again to run along the step on the neighbour's side of the property line, before bending one final time to deposit the flow of water onto the lawn.

The previous owner of the attached dwelling, however, changed the configuration of the Downspout, extending it to wrap around a flower bed which abuts the front step on the front lawn of the property, approximately 0.3 metres from the Complainant's driveway. The Complainant states that the extended length of the Downspout, and the fact that the elbow over her part of the driveway is not tight to the wall, causes snow and ice to fall on it, loosening it at the elbow connection. The elbow that sits over a portion of the Complainant's driveway, running parallel to the ground where the Downspout begins to wrap around towards the neighbour's side of the property, leaks onto the Complainant's driveway, causing winter ice buildup immediately adjacent to her vehicle, posing a slip and fall risk to her. In warmer temperatures, the water pools next to her foundation.

According to the Complainant, she approached the neighbour in the Spring of 2015 to request that the dripping elbow be repaired; however, the neighbour did not respond to the Complainant's requests.

The Complainant reported that, in the Autumn of 2015, she approached the By-law Enforcement office of the Municipality of Clarington to have the matter addressed. Though initially hesitant to address the matter, someone named "[anon]" ("JM") in the By-law Enforcement office eventually sent a letter to the neighbour to have the leak corrected. Several days after the letter was sent, the Complainant witnessed two men repairing the Downspout. However, after the work was completed, at the time of the next rainfall, the Complainant noticed that the elbow joint – though not damaged – continued to leak water through the seam onto her driveway.

The Complainant stated that she again went to the By-law Enforcement office to advise that the problem persisted. She left numerous messages, but with no call back, she eventually attended in person to speak with Officer JM again. According to the Complainant, Officer JM was disinterested in the Complainant's issue, and instead remarked about "That poor lady and her roof" (in reference to the neighbour, whose shingles were curling, and who, it seemed to the Complainant, had also spoken to Officer JM and had blamed the Complainant for the excess water on her roof, presumably due to the way water drained from the roof through the eavestrough and downspout system for the two properties).

Being unsatisfied with the results of her meeting with Officer JM, the Complainant called the By-law Enforcement office later that day and requested a meeting with DA, the Manager of Municipal Law Enforcement, which was granted. At the meeting, the Complainant claims that DA was "insensitive" to her complaint and told her that the Downspout was "shared" because water drained from the connected roof of both properties. The Complainant disagreed, stating that the contract signed with the builder does not make any mention of shared fixtures, and that in a freehold townhouse, nothing is shared. Moreover, she stated her belief that the Downspout properly belongs to the party to whose roof and eavestrough it is attached. Each house has its own downspout at the front and another at the back. Both front and back downspouts collect water from the adjoined roofs, but that does not, in the Complainant's view, mean that the downspouts are shared.

According to the Complainant, the Municipality refused to deal with the matter any further.

In or around March 2017, the Complainant was visited by her Councillor, whom she claims remarked that the repair job was not of a good quality. The Complainant stated,

however, that to her understanding, "the Councillor did not seem to follow up on the matter with the By-law Enforcement Office and nothing was done¹."

In the summer of 2018, the Complainant sent a registered letter to the Clerk of the Municipality. She received a telephone call several days after sending the letter advising that it had been received and that someone would reply. She then received a letter dated September 6, 2018, signed by DA, stating that the damaged eavestrough (though the issue was about the Downspout, not an eavestrough) had been repaired in 2015 and was determined to be in compliance with property standards. He again advised that the Downspout appears to be "shared" and that the issue was a civil matter between neighbours, and not the business of the Municipality.

After receiving DA's response, the Complainant wrote again to the Clerk advising of her disagreement and dissatisfaction with the By-law Enforcement Office's response and conclusions. The Clerk responded by way of correspondence dated November 26, 2018, in which she stated that the Downspout collects water from both rooftops. The Complainant does not agree that this factor makes the Downspout shared, as the units are freehold.

The Clerk also advised the Complainant that a By-law Enforcement Officer (JM) visited the property and did not believe there to be a compliance issue with the Downspout. According to the Complainant, the By-law Enforcement Officer did not leave her vehicle to conduct the inspection but viewed the Downspout from the road. Furthermore, the Complainant disagrees with the By-law Enforcement Officer's position, as in the Complainant's view, the matter is related to her health and safety. To that end, the Complainant made reference to the Municipality of Clarington website, which states that the purpose of the Property Standards By-law is to set "[...] a minimum standard for property owners to maintain their buildings and properties. We enforce the by-law to protect the health and safety of occupants, the environment and the value of the lands."

The Complainant then set a meeting with the Clarington CAO, ("AA"), who visited the property on or around April 10, 2019. However, the Complainant did not feel that AA responded adequately to the issue. According to the Complainant, AA indicated that he could not determine who owns the Downspout and that he did not know where the

¹ We are not reviewing the conduct of the Councillor in question and make no findings with respect to the Councillor's involvement in this matter, or with respect to the role of Council or Councillors generally.

property line was. AA also referenced the Downspout as being "shared" and noted that the water came from the rooftops of both properties.

In an email from AA to the Complainant, dated April 23, 2019, AA states:

"These pictures make it clear to me that the downspout is shared in the sense that it takes water from both properties and therefore both property owners must share responsibility for its maintenance."

For reasons already outlined in this report, the Complainant disagrees with this assessment.

In addition to her statements to and correspondence with the Ombudsman's office, the Complainant also provided documentary evidence in the form of correspondence with various municipal employees and photographic evidence of the Downspout and surrounding property.

Facts and Issues in the Complaint - Statements and Documents of the Respondent

The following is an excerpt from a letter to the Complainant from the Municipal Clerk for Clarington, [Anon] ("AG"), dated March 15, 2019, in which AG summarized the Municipality's position, a copy of which was provided by both Parties:

"In my discussion with [DA] he confirmed that he fully understands that your townhouse is freehold. When he made the statement in his letter [that the downspout is shared] he was referring to the water that flows through the downspout, not the ownership. As water runs downhill, the downspout which is causing you the concern actually collects any water which flows to it which could be flowing from your roof and your neighbours (sic). ...

My review of the matter (including Municipal Law Enforcement investigation file and supporting documentation, By-law 2007-070, being the Property Standards By-law, and conversing with the Chief Building Official and Officers) leads me to conclude that staff have undertaken a thorough investigation and the matter of a leaking downspout and the location of the downspout do not

create a violation to Clarington's by-laws and therefore no further action is required on behalf of the Municipality.

The downspout is on private property and has not and does not violate any municipal by-laws. [...]"

Interviews with Municipal Staff

The following information was provided by [DA] and [TR] during their respective investigation interviews:

Statement of DA

In the interview with DA, he provided a general history of the circumstances. He stated that the Downspout was initially damaged and repaired by the neighbour pursuant to a request letter issued by the By-law department in 2015, but he believes that the repair was with respect to a leak occurring on the neighbour's side of the property line, not for the elbow over the Complainant's driveway.

According to DA, the Downspout elbow is on the Complainant's property, and he is of the position that he cannot instruct someone to repair something that is on someone else's property. It is his position that where the Downspout is on the neighbour's property, it is the neighbour's responsibility, and where it is located on the Complainant's property, it is the Complainant's responsibility. He has advised the Complainant that she should feel free to make the repair herself, as the issue occurs on her side of the property line.

Statement of TR

In or around April 2019, TR was asked by the CAO, AA, to inspect the property and provide his opinion on the matter.

According to TR, water is collected from both rooftops in an eavestrough, then deposited onto the neighbour's porch roof, where it runs into a second eavestrough and drains through the Downspout in question. He has not determined who owns the Downspout, however, in his opinion that matter is a private civil matter between neighbours. TR would be concerned if the drainage from the Downspout was improper (e.g. if it drained directly onto the sidewalk). As this is not the case in this matter, he does not believe he has jurisdiction to deal with it.

The Municipality, through the Clerk, also pointed out that the courts have tended to show deference to municipal by-law enforcement officers when determining whether or how to deal with enforcement matters.

Facts and Issues in the Complaint – The Law

Clarington's Property Standards By-law states at Section 2.11:

Drainage

- 2.11 Roof or sump drainage shall not be discharged onto sidewalks, stairs, or directly onto adjacent property.

In addition, there is also case law on point. In my analysis (below) I refer to *Foley v. Shamess* [2008] O.J. No. 3166, 2008 ONCA 588.

Analysis

Questions to be Addressed

The questions to be addressed in this investigation and report are therefore:

1. Is the leaking Downspout an issue within the jurisdiction of the Municipality of Clarington, pursuant to the Property Standards By-law?
2. If so, to whom does the Downspout belong?
3. Should Clarington intervene in this matter, or should deference be shown to Clarington's By-law Enforcement Office in respect of its determination(s) on compliance?

Is the Downspout a by-law matter within the jurisdiction of the Municipality?

The Complainant contends that the leaking Downspout is a matter of property standards, and is in contravention of By-law 2007-070, Section 2.11 (*supra*). Furthermore, the Complainant points to the Municipality's website, which states that the purpose of the Property Standards Bylaw is to set:

"[...] a minimum standard for property owners to maintain their buildings and properties. We enforce the by-law to protect the

health and safety of occupants, the environment and the value of the lands."

The Municipality contends that the matter does not fall under the Property Standards By-law, and additionally that it is a private matter between the neighbours, and thus it is outside of Clarington's jurisdiction. Nevertheless, the Municipality has previously inspected the Downspout and found it to be compliant in 2015.

Through a plain language reading of Clarington's By-law 2007-070, it is my view that a leaking Downspout which causes water to be discharged onto a neighbour's property is a matter of property standards and does fall under the jurisdiction of the Municipality, through its Property Standards By-law.

Moreover, the Municipality has stated on its website that the intent of the Property Standards By-law is to "[...] protect the health and safety of occupants [...] and the value of the lands".

It is my view, therefore, that a leaking downspout which causes a potential health and safety hazard or which has the potential to damage property is a matter which falls under the jurisdiction of Clarington municipal property standards pursuant to its By-law, and thus is an issue which *can* be addressed by Clarington's By-law Enforcement office.

To whom does the Downspout belong?

The Complainant asserts that the Downspout is the sole property of the neighbour, while the Respondent asserts that it cannot determine ownership, but points out that there are elements of common ownership. This is an important consideration in this case as if, for instance, the Downspout is a shared fixture, then the By-law cannot be enforced against one owner over another; rather, it would need to be enforced against both sides, and the responsibility for the upkeep of same would be shared, much like it would be with a property-line fence.

The Complainant contends that each property in the development has two downspouts - one at the front and one at the back - and in each case, water is collected from both houses' rooftops and flows through each house's respective front and back downspouts. However, if a property's rear downspout requires repair, the responsibility is not shared, irrespective of whether the water is collected from one or more of the rooftops. The Complainant contends that the same consideration should be applied to the front downspouts.

Accordingly, the Complainant is of the position that ownership of a downspout is determined by where the downspout connects to the eavestrough, and to whose property it drains, not by the flow of water, which does not recognise property lines, nor by the fact that part of a downspout encroaches the adjacent property through a necessity (or error) of design.

The Municipality has taken the position that it cannot determine ownership of the Downspout, as it runs on both sides of the property line at different junctures and deposits water collected in eavestroughs which are connected to both houses. This configuration has been in place since the homes were constructed.

I agree with each party's logic to a point.

It does not in my view make sense that the Downspout in question is shared property when the houses are freehold properties. I also agree that the source or flow of rainwater is not the determinative issue with respect to ownership of the Downspout.

However, it is also clear that the Downspout was designed, from the point of construction, to follow a path which takes it on both sides of the property line, and this may constitute, as the Municipality asserts, an *element* of common ownership (such as with an overhanging tree or line fence).

Precedent in terms of previous actions taken in this case is also a factor for contemplation.

I have accordingly considered the following:

First, it is clear to me that the Downspout is connected to the neighbour's property through the eavestrough on the neighbour's porch roof. However, a small section of that porch roof (and the connected eavestrough) overhangs the property line to the Complainant's side. The connection point between the Downspout and eavestrough is on that part of the porch roof which overhangs the property line. Thus, the connection point of the Downspout to the rooftop appears to be entirely on the Complainant's property.

Second, the Downspout was clearly designed by the builder to deposit water on the neighbour's lawn, not on the Complainant's property. This is clearly visible when viewing the property from the front. Furthermore, it is noted that every other town house on the street appears to have one front Downspout that deposits water on their own lawn. From the best I can tell through viewing the fronts of the homes on Google

StreetView, all properties except the two in question (being the homes of the Complainant and her neighbour) have downspouts that do not cross property boundaries (though they all take water from adjacent rooftops to a certain extent because the houses are all connected, and water does not recognize such boundaries).

Third, the Downspout was altered by the previous owner of the adjacent property to wrap around his flower bed. The Complainant stated that she had no input into this decision. According to the Complainant, the Downspout was considered by the previous owner of the adjacent property to be his alone, and he altered it on his own. The Complainant also reported that the leaks from the elbow joint over her driveway began after these modifications were made. I have no reason to not accept these assertions as true.

Fourth, the Municipality issued a letter to the Complainant's neighbour in the autumn of 2015 *requesting* a repair to the Downspout where it was leaking on the neighbour's property, and thus appears to have recognised (or at least given the impression) at that time that the Downspout is owned by the neighbour, and/or that its upkeep (even to the extent it is on the Complainant's side of the property line) is the responsibility of the neighbour and not of the Complainant. This, in my view, sets a precedent as to how the matter should be handled.

Fifth, there are elements of common ownership in the sense that the function of the Downspout benefits all parties, and additionally due to the fact that the Downspout is located on both sides of the property line.

In view of these considerations, I conclude that it is not possible via this Ombudsman review process to determine the matter of property rights vis-à-vis true ownership of the Downspout.

However, in view of the fact that the Municipality of Clarington already treated the Downspout as being the property of the neighbour (and not of the Complainant) by issuing a letter to the neighbour requesting the Downspout be repaired (solely at the neighbour's expense) I cannot accept the logic that it would alter its position and conversely determine the Downspout to be effectively out of its jurisdiction (as a property rights matter) when it determined to intervene before.

For that reason, I find it is incumbent upon the Municipality to follow its own precedent and treat the leaking Downspout issue as a bylaw matter which is within its jurisdiction.

Additional Considerations

With respect to the Municipality's position that it cannot order a property owner to repair something on a neighbour's property, I acknowledge and understand the logic of such position.

However, the Complainant has clearly and repeatedly indicated that she is not only open to the neighbour fixing the Downspout elbow where it encroaches on her property, but indeed, she has actively advocated for this to happen. If the Complainant approves of the use of her property to make such repair (which, she does), and again noting the exceptionality of these circumstances, there is no reason for the Municipality to point to that issue as a reason for not making such a request of the neighbour just as it had done in 2015.

That being said, I also see no reason before me, given the *elements* of common ownership which I have found to exist (while making no determination on actual ownership or property rights) that the Complainant would be reasonably barred from repairing the leak herself, were she so inclined, in much the same way as she would be enabled to trim an overhanging tree or repair a line fence. The Municipality has clearly indicated it does not object to this from a by-law enforcement perspective. This is a determination which the Complainant will have to make on her own accord, however, and about which she may want to seek legal advice.

Should Clarington intervene in this matter, or should deference be shown to Clarington's By-law Enforcement Office in respect of its determination(s) on compliance?

Clarington has advanced the position that in respect of matters of by-law enforcement, the courts have generally shown deference to by-law enforcement officers to determine compliance (or non-compliance) without interference.

Our own reading of the caselaw on this point indicates that Clarington's position is correct.

In *Foley v. Shames*, 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."

Accordingly, it is my view that, so long as Clarington's By-law Enforcement Office is acting reasonably and in good faith, which is presumed, and it inspects the Downspout to determine compliance (which is understood to have occurred), the Municipality's subsequent determination as to whether the Downspout is in compliance ought not to be fettered by the Ombudsman's office.

To be clear on this point, I do note that Clarington has indicated that the Downspout was inspected and found to be in compliance, and accordingly that the leak does not represent an infraction that requires enforcement action on the municipality's part. A change in circumstances (e.g. should the problem worsen) may warrant a re-inspection. Assuming such an inspection is done reasonably and in good faith, the decision reached on such an inspection is likely not reviewable by the Municipal Ombudsman.

Conclusion

It is my conclusion that the leaking Downspout falls under the jurisdiction of municipal property standards as set out in By-law 2007-070, the Property Standards By-law.

I further conclude that the Municipality set a precedent by treating the Downspout as the neighbour's property (and not as the Complainant's property) in the past, and that the Complainant has a reasonable expectation that the Municipality would continue to act accordingly by not treating the Downspout issue as being out of its jurisdiction.

I also find, however, that it is wholly within the Municipality's By-law Enforcement department's discretion to determine whether the Downspout is compliant with its by-laws, as well as to determine what course(s) of action are to be taken (or not taken) in respect of enforcement.

To the extent Clarington's Municipal By-law Enforcement department has determined through its own inspection of the Downspout that it is compliant with the Property Standards By-law, I am not empowered to make any recommendations and defer, as the courts have done, to the discretion of the By-law Enforcement Officer(s) making such determination(s).

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