Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2012-0213 (web version)

RURAL MUNICIPALITY OF MACDONALD

REPORT ISSUED ON DECEMBER 4, 2013

CASE SUMMARY

A landowner in the Rural Municipality of Macdonald (the RM) complained that the RM had unfairly denied two variances required for the subdivision of his land. The landowner had received approval of a subdivision application subject to a number of conditions, one of which was to acquire the variances from the RM for the parcels of land. The complainant spent approximately $4000 to obtain a land survey in order to apply for the variances. The complainant believed the decision to deny his two required variances – and therefore prevent his subdivision – was unfair and inconsistent with other subdivisions approved by council.

The complainant also believed that the public hearing held to consider his variance requests was procedurally unfair because he was not advised as to when the vote on his variance applications would take place. The vote did not take place directly after the hearing but instead occurred four months later.

Based on our investigation, Manitoba Ombudsman did not find evidence to support the complaint that the decision to deny the variances was substantively unfair or based on irrelevant considerations. Manitoba Ombudsman also did not find evidence to support the complaint that the variance hearing was procedurally unfair or that the denial of the variances was inconsistent with other subdivisions approved by council

Our investigation, however, did identify that the absence of reasons for the decision by the RM contributed significantly to the complainant's perception that he was treated unfairly. Manitoba Ombudsman suggests that the RM adopt a practice of providing documented reasons that explain and support council decisions on future subdivision and variance applications.

OMBUDSMAN JURISDICTION

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. The responsibilities and authority of the ombudsman are set out in *The Ombudsman Act*, *The Freedom of Information and Protection of Privacy Act*, *The Personal Health Information Act*, and *The Public Interest Disclosure (Whistleblower Protection) Act*.

Under *The Ombudsman Act* (*the act*), Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

The actions and decisions complained about in this case are matters of an administrative nature arising from a hearing conducted and decisions reached by a municipal council pursuant to the provisions of a provincial statute, *The Planning Act*.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or municipal by-law. On other occasions it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision. A complaint can raise questions of procedural fairness, substantive fairness or relational fairness. Procedural fairness relates to how decisions are reached including the steps followed before, during and after decisions are made. Substantive fairness relates to the fairness of the decision itself and relational fairness relates to how people are treated during the decision-making process.

While our office has a mandate to investigate complaints, the investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker, and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

THE COMPLAINT

On June 26, 2012, a landowner in the RM of Macdonald (the RM) submitted a complaint to our office alleging that municipal council's denial of two variances required for a subdivision of his land was unfair. The complainant believed that:

- The RM had been inconsistent regarding the approval of subdivisions, allowing other applicants to subdivide their land, but not allowing him to do so.

- The public hearing held to consider his variance requests was procedurally unfair in that he was not informed of the date when council would vote on his variance applications, which occurred many months later.

The complainant noted that he was not provided with any written reasons why his variance applications were denied.

KEY ISSUES

1. Was council's decision to deny the required variances, and therefore prevent the subdivision from going ahead, substantively and procedurally fair?

2. Was council's decision to deny the variances consistent with the approval of other subdivisions?

3. Should the landowner have been given advance notice of the date of the council meeting at which the vote on the landowner's variances was to take place in accordance with *The Planning Act* s. 96?

BACKGROUND

On August 27, 2009, the complainant applied to subdivide his existing legal non-conforming parcel of land in the AR (Agricultural Restricted) zone of the RM into a 24.43-acre parcel for residential purposes, and a 12.67-acre residual parcel which contains his existing residence.

As per *The Planning Act*, Manitoba Local Government Community Planning Services circulated the application to provincial departments/agencies for review and then sent a planning report dated November 5, 2009, to the RM. In the report, Community Planning Services referenced legislation that in their view was relevant to the subdivision application, clause 3.3.4.3(d) of the *Macdonald-Richot District Development Plan*.

The planning report recommended that council approve the subdivision subject to a number of conditions. One of the conditions was that variation orders from the RM of Macdonald would be required for both parcels because neither parcel met the Macdonald *Zoning By-law No. 15/95 –*

AR zone minimum site area of 80 acres for the intended purpose. Council approved the subdivision but with a number of conditions.

Subdivision Conditions: Variances Denied

The landowner spent approximately $4000 to obtain a land survey which was required by the RM for the two variance applications. He applied for the variances February 16, 2011. The RM held a public hearing in March 2011, as required by section 96 of *The Planning Act* to consider the variances.

In August 2011, council voted and denied Variations 8/11 and 9/11 to allow the subdivision of two parcels less than the minimum parcel size requirement of 80 acres in the AR zone. Council did not provide any written reasons for the decision. As a result of the decision, the applicant was not able to subdivide his land.

POSITION OF COMPLAINANT

The complainant believed that it was substantively unfair of council to initially approve his subdivision application with conditions, and then approximately one year later deny the variances that it had set as conditions to obtain his subdivision. The complainant notes that it cost approximately $4000 to acquire a land survey in order to apply for the required variances which were subsequently denied. The complainant believed that if the RM did not want the subdivision to occur, council should have denied the original subdivision application instead of allowing the complainant to spend approximately $4000 on a land survey to apply for variances that the RM subsequently denied.

The complainant was also of the view that the RM has been inconsistent regarding the approval of subdivisions, allowing other applicants to subdivide their own parcels of land but denying him the opportunity to do so.

The complainant also believed that council had treated him unfairly during the public hearing held to consider his variance applications. He alleged that he should have been given advance notice of the council meeting during which the vote on his variances would take place.

POSITION OF THE RURAL MUNICIPALITY OF MACDONALD

The RM denied the complainant's allegation that its decision to deny the two variance applications was substantively unfair. Our office wrote to the RM's chief administrative officer (CAO) on July 9, 2012, requesting the RM's written response to the complaint. In response, the RM stated:

> Council was of the opinion that the application was not consistent with the objectives and policies of the Development Plan to maintain and enhance the significant role of agricultural activities within the municipality. In addition, the decision was consistent

with the Objectives of the Development Plan, 3.2.2 to minimize the unnecessary fragmentation of large land parcels as a means of preserving the agricultural viability and rural character of the planning district.

The RM maintained that its decision was not inconsistent with other subdivision applications and that the hearing held to consider the landowner's variance applications was procedurally fair and conducted in accordance with the provisions of the legislation.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- A review of *The Planning Act*, the RM's *Zoning By-Law No. 15/05*, the *Macdonald-Ritchot Planning District Development Plans* 2003 and 2011, and the planning report from Community Planning Services, Manitoba Local Government as well as information received from the RM and from the complainant.

- Interviews with a number of government officials including the CAO of the RM of Macdonald, the Manitoba Local Government's community planner, and the municipal services officer.

- Interview with complainant.

- A review of council minutes and council agendas.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was council's decision to deny the required variances, and therefore prevent the subdivision from going ahead, substantively and procedurally fair?

We looked for evidence to indicate whether the public bodies involved in the subdivision and variance application process followed *The Planning Act*, the RM's *Zoning By-Law 15/95*, and the *Macdonald-Richot Planning District Development Plan By-Law 2/02*. We also looked at whether there was evidence that council's decision to deny the variances was based on irrelevant factors, as suggested by the complainant.

We noted that Manitoba Local Government Community Planning Services, which is responsible for receiving and assessing the subdivision application for the RM, determined that the complainant's subdivision appeared to meet the intent of the Development Plan By-Law No. 2-02 Rural Policy Area clause 3.3.4.3(d):

3.3.4. Agricultural Land Division

> 3. Subdivision of land for farm residential purposes may be permitted in accordance with the following criteria:
>
> > (d) A bona fide farmstead site that has been rendered surplus due to a consolidation or amalgamation. The continued existence of the surplus farmstead will not have a negative impact on adjacent agricultural lands and must contain a livable farm residence, is located within a well-defined yardsite and is not larger than required to meet the needs of a non-farm residential lot.

The assessment of the planning office is put before council and is information council may rely upon in reaching its decision. However, it is not determinative of the issue as the final decision rests with council.

According to the RM, the basis for their decision to deny the two variance applications included a number of considerations including:

- representations made against the variances at the public hearing;
- the fact that the landowner was not a farmer nor had he or his wife actively farmed the land;
- the factual parcel information from the Manitoba Land Survey;
- that the intended use of the subdivision did not conform to the 2003 Development Plan clause 3.3.4.3(d); and
- the view that the proposed subdivision did not conform with the overall objective of the 2003 or 2011 development plans which is to "maintain and enhance" the role of agriculture in the district by "minimizing" the unnecessary fragmentation of large land parcels.

Even though the 2011 development plan came into force with its third reading one month after council voted on the landowner's variance applications, the RM explained that council was mindful of the changes coming in the revised development plan:

> As part of considering the broader overall land use objectives of the municipality, Council needs to be conscious of proposed amendments that are currently under consideration. Specific to the landowner's application, this approach would not have affected the final decision on the basis that the policies in the 2003 or the 2011 version of the Development Plan would not support the proposed subdivision application.

In reaching a decision to approve a variance, council must be satisfied that the proposed variances and subdivision conform with the broader overall land use objectives of the municipality and with the *Macdonald-Richot Planning District Development Plan By-Law 2/02* and the RM's *Zoning By-Law 15/95*. It is also entitled to consider the concerns of parties who assert that they will be affected by council's decision to approve the variances and subdivision.

Therefore, we were unable to conclude that the decision was contrary to the law or clearly wrong or unreasonable.

2. Was council's decision to deny the variances consistent with the approval of other subdivisions?

The complainant provided our office with a number of approved subdivisions and or variances for comparison and suggested that council's denial of his variances were inconsistent with other subdivision applications that were approved. During our investigation, however, we noted that the variances provided by the complainant that were approved by council were substantially different in a number of ways, and do not demonstrate inconsistent decisions made in similar circumstances.

One subdivision in 2009, for example, that was provided as evidence of inconsistent decision making was a subdivision of a 122-acre farm in the Agricultural General Zone, into a surplus farmstead subdivision of a parcel of 15.95 acres with an existing single family dwelling, and a parcel of 106.05 acres of farmland. This subdivision would conform to the 2003 development plan clause 3.3.4.3(d) which was in force at the time (see above for exact wording). This section allows a retiring farmer to keep his or her home and sell the excess farmland to another farmer to consolidate with a larger agricultural parcel of land.

We did a similar analysis of the other three subdivisions provided by the complainant as evidence of inconsistent decision making. One included variances to subdivide an 80-acre parcel of land into a75-acre and a 5-acre parcel to allow an existing fertilizer business to be on its own title. Another subdivision varied the bylaw regarding the yard size requirements to allow the installation of an office building for an existing aerial spraying business. The final set of variances provided by the complainant allowed for a realignment of property lines with no net increase in titles.

None of the subdivisions allowed indicate inconsistent decision making in regard to the complainant's denial.

3. Should the landowner have been given advance notice of the variation vote in accordance with *The Planning Act* s. 96?

We reviewed *The Planning Act*, the council minutes, and we spoke to the RM, and a Community Planning Services planning officer to determine whether the RM had a statutory obligation to inform the complainant and other public hearing presenters of the date of the impending vote on the variance applications. *The Planning Act* sets out that:

> ***The Planning Act, Part 6: Variances***
>
> **Public hearing**
> 96 Upon receiving an application under section 94, the board, council or planning commission must

(a) hold a public hearing to receive representations from any person on the application; and
(b) give notice of the hearing in accordance with section 169.

Decision

97(1) After holding the hearing, the board, council or planning commission must make an order,
(a) rejecting the requested variance; or
(b) varying the application of specific provisions of the zoning by-law with regard to the affected property in the manner specified in the order if the variance
(i) will be compatible with the general nature of the surrounding area,
(ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area,
(iii) is the minimum modification of a zoning by-law required to relieve the injurious affect of the zoning by-law on the applicant's property, and
(iv) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

The complainant alleged that he should have been given advance notice of the council meeting during which the vote on his variances would take place because he considered the vote part of the public hearing. The complainant was of the view that if the vote occurs at a different date than the public hearing, it constitutes an adjournment of the public hearing. In response, the RM advised us that the public hearing was not adjourned; rather, only the vote was deferred. Therefore, there was no statutory obligation to advise the applicant of the variances, nor the people who made representations during the public hearing, of the date of the impending vote on the variance requests.

We reviewed *The Planning Act, Part 6: Variances* as above, and we spoke to Community Planning Services, Manitoba Local Government and there is no statutory obligation to give notice of the date of a variance application vote. Both Community Planning Services, Manitoba Local Government and the RM were of the opinion that an RM may defer a vote after a public hearing has ended to gather more information and deliberate on the evidence acquired before making a decision. We have discovered no conclusive evidence that any presentations were allowed or invited at the council meeting in August to indicate that the public hearing was adjourned and not deferred; we do have evidence that the RM voted on the variances during the August meeting.

Therefore, we are unable to support the complainant's assertion that the variance hearing and voting process was procedurally unfair as there is no legislative requirement for the RM to provide advance notice of the voting date to each person who made representations at the public hearing in March.

CONCLUSION

Procedural and Substantive Unfairness Not Supported

Under *The Municipal Act*, municipal councils have a general duty to consider the well-being and interests of the municipality as a whole. Councils also perform specific functions and duties arising under other statutes in the manner required by those statutes, such as *The Planning Act*.

Councils must sometimes operate in situations where they are considering the general well-being and at the same time making decisions affecting individual rights, pursuant to specific statutory criteria. Some of the decisions in these circumstances can be difficult and controversial. The decisions of a municipal council can have significant impact on the lives of individuals, in financial or personal terms or both.

In this matter, we found that the evidence did not support the complainant's belief that council's decision was inconsistent with other subdivision decisions made by council or based on irrelevant considerations**.** Nor could we conclude that the conduct of the public hearing and vote, although unsatisfying for the complainant, resulted in his being treated unfairly.

We note that applicants for variance applications may pay a substantial fee if a Manitoba land survey is required. In this case, Community Planning Services did not require a Manitoba land survey at the time the subdivision application was made. However, when the landowner attempted to satisfy the subdivision condition of acquiring two variances for the resulting subdivision parcels, the RM did require a Manitoba land survey because the dimensions of the land in question were not clearly defined or easily calculated.

In this case, the landowner spent approximately $4,000 to acquire the Manitoba land survey to apply for the variances. Incurring this expense and then having council deny the variances added to his frustration. Such costs, however, do occur when applying for such variances and the RM was acting reasonably to require factual information on which to base its decision when it required a Manitoba land survey.

Meaningful Reasons for Decision

Under *The Planning Act*, there is no stated requirement for council to provide reasons for its decisions. However, the act sets out the factors to be considered when approving a variance application. There is a legitimate expectation that councils will consider the statutory provisions relevant to the decision they are making and that the decision will be based on an assessment of merit relative to those provisions.

The best way to demonstrate that a council has met that legitimate expectation is to issue clear reasons for a decision. Meaningful reasons for decisions guide prospective applicants in assessing the possibility of a new application being approved or rejected. While it is understood that each case must be heard on its own merit, decision makers must put their mind to the

reasons behind their decision to reject or approve an application and be comfortable in defending their rationale.

In this case, the application process and the deferral of the variance vote was frustrating for the complainant. It left him with a firm belief that he had been treated unfairly, that a significant decision affecting his life was not reasonable and that he had been treated differently than others in similar situations.

The absence of clear and meaningful reasons for decisions can result in individuals forming the belief that the decision maker was biased and the decision itself was unfair. Reasons remove the mystery from the decision making process. Moreover, when reasons are provided applicants are more likely to understand and accept the decision, and the municipality is less likely to receive a complaint about the decision.

In our publication *Understanding Fairness: A Handbook on Fairness for Manitoba Municipal Leaders*, we discuss the benefits of providing written reasons for council decisions. A copy of this guide can be found at www.ombudsman.mb.ca.

The exercise of providing reasons can help council satisfy itself that it considered the right factors and information and reached the right decision.

For all of the reasons above, Manitoba Ombudsman strongly urges the RM of Macdonald-Richot, and all municipalities, to issue written reasons for decisions in respect of variance and subdivision applications.

December 2013
MANITOBA OMBUDSMAN