

Manitoba mbudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2013-0138 (web version)

**SELKIRK AND DISTRICT PLANNING AREA BOARD
(re-named Red River Planning District effective December 16, 2013)**

REPORT ISSUED ON JANUARY 31, 2014

CASE SUMMARY:

Property owners in the Rural Municipality of St. Clements complained to Manitoba Ombudsman that the Selkirk and District Planning Area Board had unfairly revoked the building permits necessary to complete the construction of their planned retirement home.

More than a year after the permits were issued and only after construction had begun, were the complainants told to remove the foundation and return the property to its pre-construction state. The complainants alleged that the planning board did not provide an explanation for its decision to revoke the permits.

Based on our investigation, Manitoba Ombudsman found that the planning board's decision to revoke the permits was consistent with the provisions of the relevant zoning by-law. However, we determined that responsibility for issuing the permits in error rested with the planning board and the manner in which the permits were revoked was unreasonable and imposed an undue hardship upon the complainants.

As a consequence of our investigation, the planning board acknowledged a number of administrative deficiencies associated with the permit issuing process and proposed the following changes to improve its permitting processes:

- **Adoption of a permit review checklist**
- **Permit review by professional planners to ensure compliance with applicable by-laws**
- **A standing order for all by-law amendments to be incorporated in a consolidated version of the by-law**

Manitoba Ombudsman acknowledges the planning board's admission of its error and the steps it has taken to improve its permit application process. The improvements made will help ensure that staff has accurate information to prevent a recurrence of the events that gave rise to this complaint. A more transparent process will promote public confidence in local government administration.

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, 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.

This complaint involves matters that are of an administrative nature arising from the actions and decisions by a district planning board operating on behalf its member municipalities 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 a 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; 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 enhance the relationship between government and the public, and reduce administrative complaints.

THE COMPLAINT

On April 15, 2013, the owners of property in the Rural Municipality of St. Clements (the RM) filed a complaint with Manitoba Ombudsman against the Selkirk and District Planning Area Board (the planning board). The complainants alleged that the actions and decision of the planning board to revoke building and plumbing permits for the construction of the complainants' retirement home was unfair.

KEY ISSUES

1. Was the planning board's decision to revoke the complainants' building and plumbing permits reasonable in light of the applicable zoning provisions?
2. Were the complainants treated fairly and reasonably when the permits were revoked?
3. Did the planning board provide clear reasons for its decision and provide the complainants with an opportunity to challenge the decision?
4. Are the complainants entitled to compensation for expenses incurred in commencing construction and restoring the site to pre-construction condition?

BACKGROUND INFORMATION

The planning board acts on behalf of its member municipalities. At the time this complaint was received, member municipalities included the City of Selkirk, RMs of St. Clements, St. Andrews, West St. Paul and the Village of Dunnottar. It should also be noted that effective December 16, 2013, the planning board's name changed to Red River Planning District.

The planning board is responsible for by-law administration and enforcement. Section 14 and subsection 15(2) of *The Planning Act* set out the planning board's role and responsibilities.

Role of planning districts

14 When a planning district is established, its board is responsible for

- (a) the adoption, administration and enforcement of the development plan by-law for the entire district;
- (b) the administration and enforcement of
 - (i) the zoning by-laws of its member municipalities, or the district's own zoning by-law if it has adopted a district-wide zoning by-law under section 69,

- (ii) any secondary plan by-law in force in the district,
- (iii) the building by-laws of its member municipalities, and
- (iv) the by-laws of its member municipalities dealing with minimum standards of maintenance and occupancy of buildings.

Additional responsibilities

15(2) The board of a planning district may

- (a) review and co-ordinate the policies and programs of its member municipalities relating to land use and development and the provision of public facilities; and
- (b) by agreement, perform duties delegated to it by the council of a member municipal

It should be noted that *The Planning Act* offers no formal avenue of appeal for applicants when permits are denied or revoked.

In 1985, the complainants purchased approximately 98 acres of land in the RM of St. Clements. Recently, they decided that they wanted to build their retirement home on the property and contacted the planning board to obtain the necessary permits. On August 26, 2011, the complainants paid the planning board \$889.62 in fees for building and plumbing permits that were valid for one year from the date of issue. The permits allowed for the construction of a single family dwelling on land the complainants own in the RM of St. Clements which is zoned general industrial.

On June 10, 2012, the complainants asked the planning board for a one year extension of their building permits but were advised by the planning board that their request would not be approved.

In an August 22, 2012 email, the planning board confirmed that the permits would expire August 26, 2012, but stated that it “will not deny construction starting prior to that date”.

As a result, the complainants began work on their home and the building’s foundation was started before the permits expired and the work passed the planning board’s first inspection on August 24, 2012.

However, in letters dated January 14, 2013 and March 25, 2013, the planning board informed the complainants that the building permits were issued by mistake, and that single family dwellings are only permitted in the general industrial zone in conjunction with an identified industrial use. The complainants would not be allowed to build their retirement home and were advised by the planning board that they were responsible for restoring the site to its pre-construction state.

The complainants were reimbursed \$889.62 for the cost of the permits. No further compensation was offered to the complainants to restore the site to its pre-construction state as required by the planning board.

POSITION OF COMPLAINANT

The complainants believe the planning board's decision to revoke the permits for the construction of their retirement home was unfair. The complainants indicate that they were unable to obtain meaningful reasons to clarify the planning board's mistake and its decision to revoke the permits and stop construction. The complainants note that they would not have started construction if the planning board had advised them of the error as soon as it was discovered.

The planning board's decision resulted in a major disappointment for the complainants who had to forego plans to build their retirement home on the property.

POSITION OF THE PLANNING BOARD

The planning board agreed that it erred in issuing the permits. However, the planning board was of the opinion that some responsibility for the error should rest with the complainants who should have known that their proposal to build a single family home did not meet the zoning by-law specifications for the general industrial zone.

In its letter dated May 27, 2013, the planning board offered the following explanation:

... [the complainant] applied for a single family building and plumbing permits which were issued on August 26, 2011. The applications had been reviewed by a junior development officer assigned to single family dwellings as a relatively straight forward proposal. The focus of the review was on compliance with the National Building Code. It was not reviewed by a professional community planner who would have checked the zoning of the property. It is also unfortunate that the By-law No. 5/2002 consolidated office reference document had not been updated or perhaps the development officer would have noted the zoning limitation.

The planning board further explained that the land where the complainants intended to build their single family home is zoned general industrial. In the general industrial zone, a dwelling is only allowed under the terms of the zoning by-law as an accessory to a permitted industrial use.

Officials for the planning board and the RM maintain that prior to the complainants applying for the permits, they had been previously advised that they could not develop their property for residential purposes.

In June 2012, when the complainants requested an extension of their building permits, the planning board discovered that permits had been issued in error but did not advise the complainants of the mistake until January 14, 2013. The planning board attributed the delay in notifying the complainants of its mistake to a reluctance to refund the permit fees.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Review of *The Municipal Act, The Planning Act, Zoning By-law No. 5/2002, By-law amendment 18-2005 and Building By-law No. 2022*
- Review of documentation we received from the planning board and the complainants
- Review of information available on the planning board website (now Red River Planning District)
- Onsite interviews with the planning board staff and the chief administrative officer for the RM of St. Clements
- Additional discussions with the retired and current planning board managers
- Discussions with Manitoba Municipal Government staff regarding statutory interpretation
- Interviews with planning board junior and senior development officers
- Interviews and correspondence with the complainants.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was the planning board's decision to revoke the complainants' building and plumbing permits reasonable in light of the applicable zoning provisions?

We examined information the planning board relied on in deciding to issue building and plumbing permits to the complainants on August 26, 2011 and then revoke them on January 14, 2013, more than 16 months later.

In doing so, we looked for evidence that the planning board's decisions were consistent with *The Planning Act, Zoning By-law No. 5/2002, by-law amendments and Building By-Law No. 2022*.

Sections 147 and 148 of *The Planning Act* set out the requirement to apply for a development permit before development takes place.

Development permit required

147(1) No development may take place unless

- (a) a development permit has been issued in accordance with the applicable zoning by-law; and
- (b) the development complies with the permit.

Application to board or council

147(2) An application for a development permit must be made

- (a) to the board of the planning district in which the proposed development is located;
or
- (b) if the proposed development is not located in a planning district, to the council of the municipality in which the proposed development is located.

Decision on development permit

148(1) The board or council may issue the development permit if it is satisfied that the proposed development generally conforms with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

Review of application

148(2) The board or council may review the application for a period of not longer than 60 days after it is submitted to determine if the proposed development meets the requirements of subsection (1).

In this instance, the building and plumbing permits issued to the complainants allowed construction of a single family dwelling, citing by-law 5-2002. The permit that was issued is signed by a development officer, and validated with a signature showing August 26, 2011 as the effective date of the permit.

The RM of St. Clements Zoning By-law 5-2002 was passed on August 29, 2002. However an amendment passed on April 11, 2006 eliminated the residential single family dwelling criteria, meaning construction of a retirement home such as the one planned by the complainants was no longer allowed on their property. Instead, a single family dwelling is only permitted as an accessory to the primary use of the land zoned general industrial.

Pursuant to the provisions of the amended by-law, the complainants' application to construct a single family dwelling on land zoned as general industrial should not have been approved and no permits should have been issued. Therefore, the planning board's decision to take corrective action and revoke the permits issued by mistake is not substantively unfair.

2. Were the complainants treated fairly and reasonably when the permits were revoked?

The planning board advised our office that it became aware that permits had been issued in error almost a year after they were granted. The error was discovered when the complainants requested a time extension, in the summer of 2012, before starting construction.

The complainants were first notified of the error in a letter dated January 14, 2013. The planning board had determined that a single family dwelling was not permitted and that "regrettably" the building permits were issued in error. The complainants were asked to contact the planning board to confirm the steps and timing for removing the foundation and restoring the property. The complainants were reimbursed for the building permit fees but not for any other costs

associated with the requirement to remove the foundation and fill in the site or for any construction costs incurred prior to the permits being revoked.

According to the complainants, the planning board's January 14, 2013 letter was unexpected and was the first time they were advised that the permits had been issued in error. A second letter, dated March 25, 2013, was sent to the complainants in response to their email challenging the planning board's decision. The planning board clarified that the permits had already been revoked and any further construction would be a violation of the zoning and building by-laws.

In our discussions with representatives of the planning board and the RM on April 25, 2013, the planning board admitted that the permits had been issued in error based on an incorrect application of the zoning by-law by staff.

Our investigation disclosed that when reviewing the complainants' permit applications, planning board staff used a copy of the old by-law which permitted a single family dwelling in the area zoned general industrial. The office copy had not been updated with the amended by-law passed in 2006 which removed "single family dwelling" as a permitted use in the general industrial zone. The development officer reviewing the complainants' permit applications mistakenly approved the permits based on an outdated by-law no longer in effect.

The planning board also acknowledged that it discovered its error when the complainants requested an extension to their permits but chose not to disclose the error to the complainants at that time. The planning board cited a reluctance to refund fees as its only explanation for delaying its decision to revoke the permits.

That decision, however, resulted in the complainants not only losing their investment in terms of monies spent on the initial construction of their home, but also having to pay costs to restore the site to its pre-construction state as stipulated by the planning board.

While admitting the error, the planning board alleged that the complainants had been advised prior to applying for the permits that their land was zoned general industrial, inferring that they should have known that residential construction was not a permitted use. The complainants advised our office that they were not aware of any zoning changes that applied to their land. It is our view that the responsibility to ensure construction is in accordance with municipal bylaws rests fully on the planning board and not the complainants.

It is our view that the planning board's delay in disclosing the error until after the site was excavated and the footings were poured does not demonstrate openness, transparency or accountability for its actions; nor does its action instill public confidence in the planning's board.

Instead of trying to avoid admitting it made a mistake, the responsible course of action would have been for the planning board to have contacted the complainants as soon as the mistake was discovered.

3. Did the planning board provide clear reasons for its decision and provide the landowners with an opportunity to challenge the decision?

In their complaint filed with our office in April 2013, the complainants were first notified of the planning board's error when they received a letter dated January 14, 2013 from the planning board.

In their January 14, 2013 and March 25, 2013 letters, the planning board advised the complainants that the permits were revoked because of a zoning conflict. The planning board did not explain what led to the error in issuing the permits, the delay in disclosing the error to the complainants, or the statutory basis on which the planning board acted to revoke the permits. No apology was made to the complainants other than an indication in the planning board's letters that the error was "regrettable".

The Planning Act offers no formal avenue of appeal for applicants when permits are denied or revoked. Without a formal opportunity to challenge an administrative decision, there is a reasonable expectation from the public that administrative decision makers will fully explain their decisions. In this case, a decision was made to withdraw a permit that resulted in more than an inconvenience; it resulted in significant financial consequences.

Although there was no right of appeal, and the decision to revoke the permits was consistent with the provisions of the by-law, the complainants in this case were owed an honest explanation of why the permits were revoked. The failure to provide an explanation is not consistent with the level of transparency expected of government or required to maintain public confidence in government.

4. Are the complainants entitled to compensation for expenses incurred in commencing construction and restoring the site to pre-construction condition?

The complainants were not offered compensation by the planning board for its error or reimbursed for costs associated with the construction and the planning board's requirement to remove the foundation of the home.

The planning board advised our office that it carries insurance for errors and omissions. We have advised the complainants of their right to make a claim to the planning board which will be referred to its insurer to process.

Because there is an existing process for addressing the issue of compensation, Manitoba Ombudsman did not investigate this issue. In the event that the parties are unable to resolve the matter of compensation, the complainants have the right to file a further complaint with Manitoba Ombudsman at the end of that process if they feel they have not been treated fairly.

CONCLUSION

Our investigation disclosed administrative deficiencies that gave rise to the complaint that the planning board unfairly revoked building permits approximately 16 months after they were issued.

Manitoba Ombudsman did not conclude that the planning board's decision to revoke the permits was substantively unfair. The planning board's initial decision to approve the permits was based on an outdated by-law. As such, the planning board's decision to revoke the permits was reasonable and in accordance with the current zoning by-law.

However, the manner in which the planning board dealt with the error once discovered was inappropriate and unreasonable.

The planning board issued the building permits in error because it had failed to ensure amendments to by-laws were available to staff in order for them to properly apply the laws of the municipality. The former manager neglected to establish a process for ensuring that reference information used for administrative purposes was accurate and up to date.

This mistake by the planning board was then compounded by its decision not to disclose the error to the complainants as soon as it was identified. The explanation provided to our office by the planning board was that it did not want to have to refund the permit fees to the complainant, even though it was clear the planning board was at fault for issuing the permits. The planning board had a responsibility to alert the complainants of the error as soon as it was discovered and take corrective action. By not doing so, the complainants invested money in a property – a contractor was hired, excavation of a site began, and footings were poured – all unnecessary events, had the planning board admitted its error immediately. The decision to not immediately disclose the error also undermined what appeared to be a relatively good working relationship between the planning board and the complainants.

Equally disconcerting is the suggestion by the planning board that the complainants should have known that a single family dwelling was not a permitted use. This is a position without merit. Citizens expect that municipal officials and employees will be knowledgeable about the by-laws, rules, regulations and policies they are responsible for implementing. The creation of bodies such as the planning board is in part to ensure that development occurs in accordance with the by-laws of the municipality. It is its job and responsibility to ensure planning by-laws are applied correctly and that permits and other approvals are in compliance. It is not the job of the citizenry to make sure building permits are properly issued.

Accountability and transparency are the hallmarks of good government. In this instance, the planning board failed to meet those principles by choosing not to immediately disclose its error to the complainants and then suggesting that the complainants bore some of the responsibility for the mistake.

We do note that once we initiated an investigation into this matter, the planning board took immediate steps to replace the copy of the outdated by-law with the amended one. A process has also been established for regular reviews of the office copies to ensure current by-laws are available for accurate reference.

During our investigation, we also found the planning board to be forthcoming with information and genuinely interested in ensuring that this type of mistake is not repeated in the RM of St. Clements or in any of the district municipalities.

This case serves to remind government administrators that the public expects transparency and openness from public officials. Taking corrective action for errors made and apologizing for mistakes is not only desirable, it is good business practice.

GOING FORWARD

Although we found the actions of the planning board to be unreasonable, Manitoba Ombudsman is satisfied that the planning board (now Red River Planning District) has taken progressive steps that will address the administrative deficiencies that resulted in this complaint. The planning board has identified that these steps include:

- adoption of a permit review checklist
- permits will be reviewed by professional planners to ensure compliance with applicable by-laws and
- a standing order for all by-law amendments to be incorporated in a consolidated version of the by-law.

In light of the action proposed by the planning board, no formal recommendations were necessary.

In addition to the above actions, Manitoba Ombudsman strongly urges the planning board that when making decisions such as the one that led to this complaint, that it provide those affected with clear and meaningful reasons for its decision. The absence of such reasons can result in individuals forming the belief that the decision maker was biased and/or the decision itself was unfair. Reasons remove the mystery from the decision-making process.

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

The exercise of providing reasons can also help the planning board satisfy itself that the right factors and information were considered in coming to a decision.

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