

Manitoba Ombudsman

THE OMBUDSMAN ACT

CASE 2015-0040

RED RIVER PLANNING DISTRICT

REPORT ISSUED ON MARCH 22, 2016

CASE SUMMARY

On January 19, 2015, our office received a complaint from a property owner in the Rural Municipality of St. Clements (the RM) alleging that the Red River Planning District (the RRPD) handled his subdivision application unfairly.

The complainant's application to subdivide his 4.2 acre parcel of land was conditionally approved by the RM's council. However the RRPD board, which is the approving authority, rejected the application at its December 3, 2014, board meeting.

The complainant alleges that the RRPD did not provide him with sufficient notification of the December 3, 2014, board meeting. The complainant further alleges that the RRPD board did not provide him with meaningful reasons for its decision.

Based on our investigation, Manitoba Ombudsman concludes that the RRPD did not breach any statutory requirements regarding meeting notification or the provision of reasons. However, Manitoba Ombudsman suggests the following administrative improvements to the Red River Planning District:

1. The Red River Planning District should better inform citizens about the subdivision process. Online and printed information should be revised to clarify the following:
 - a. that the RRPD consideration of subdivision proposals takes place during a board meeting that is open to the public.
 - b. that the onus is on the applicant to make inquiries concerning the RRPD meeting schedule should he or she wish to attend.
2. The Red River Planning District should adopt a practice of providing meaningful reasons to applicants that clearly explain board decisions. At a minimum, reasons should explain the issues that were considered and in what way specific requirements were not met.

OMBUDSMAN JURISDICTION AND ROLE

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*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees.

The actions and decisions complained about in this case are matters of an administrative nature arising from the handling of a subdivision application by the Red River Planning District (the RRPD), formerly known as the Selkirk and District Planning Area Board, 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. In cases concerning an impact on individual rights or benefits, we also examine the fairness of the action or decision.

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.

POSITION OF THE COMPLAINANT

The complainant believes that the RRPD did not provide him with sufficient notification of the December 3, 2014, RRPD board meeting at which the approving authority rejected his subdivision application.

The complainant notes that he had been provided with advance notification of the municipal council meeting of November 18, 2014, and he attended the meeting as suggested in the subdivision guidance material he received from the RRPD. Municipal council voted to conditionally approve his subdivision application at that time and he was aware that the approving authority – the RRPD board – would be provided with the resolution from council to proceed with their consideration and final decision regarding his proposed subdivision. He was aware that the subdivision approval process was two-fold, and he states that he was told at the council meeting in November that the RRPD would contact him regarding the next step of the process. He fully expected to be notified by the RRPD in advance of any decision on his subdivision application, just as he had been notified in advance of the municipal council meeting.

The complainant waited for the RRPD to contact him after the council meeting of November 18, 2014. On December 9, 2014, he contacted the RRPD for more information regarding the status of his proposal and the next stage of the process. The RRPD informed him that its meeting had already taken place on December 3, 2014, and that the board had rejected his subdivision application.

The complainant believes that he should have been informed in advance of the RRPD decision-making board meeting; he believes that the lack of notification had the effect of denying him the opportunity to attend the board meeting and hear the analysis and reasons for the rejection of his application.

The complainant also notes that the RRPD did not provide him with meaningful reasons for its decision. He believes that the lack of meaningful reasons put him at a disadvantage in terms of deciding whether to exercise his right to appeal the decision to the Manitoba Municipal Board.

POSITION OF THE RED RIVER PLANNING DISTRICT

The RRPD indicates that there is no requirement in *The Planning Act* to provide a subdivision applicant with advance notification of a decision-making RRPD board meeting.

The RRPD also states that the planning district does not have a formal policy regarding notification of upcoming board meetings to subdivision applicants, and the standard practice of the RRPD is to advise applicants of the date of the meeting if applicants inquire. The RRPD explains that every subdivision applicant is provided with a two-page “Subdivision Process” document, which includes a general summary of the steps involved in the process.

In regards to providing the applicant with reasons for its decision, the RRPD states that *The Planning Act* does not require the approving authority to provide reasons for its decision. However, the RRPD asserts that it provided reasons for its denial of the subdivision application in the planning report it prepared for council and in an email sent to the applicant on December 12, 2014, after the decision was made.

KEY ISSUES

In response to the complaint filed with our office, our investigation set out to investigate the following issues:

1. **Was the complainant entitled by statute, regulation, policy, or procedural fairness to advance notification of the RRPD board meeting at which his subdivision application was rejected?**
2. **Was the complainant given meaningful reasons for the RRPD board’s decision in accordance with the principles of natural justice and procedural fairness?**

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Interviews with the complainant; RRPD staff; a regional manager with community and regional planning, Manitoba Municipal Government; staff at Brandon and Area Planning District; and staff at South Interlake Planning District;
- Review of documentation provided by the complainant;
- Review of information provided by the RRPD and the RM of St. Clements;
- Review of minutes from relevant planning district meetings;
- Review of legislation and by-laws including *The Planning Act*, Subdivision Regulation, the RRPD development plan (*By-law No. 190-08*), the zoning by-law for the RM of St. Clements (*By-law No. 5-2002*), and the RRPD *By-Law 207 Procedural By-Law*; and
- Review of subdivision process documents from the RRPD, Brandon and Area Planning District, South Interlake Planning District, and the department of Manitoba Municipal Government.

BACKGROUND INFORMATION

The Manitoba Municipal Government land use and development website describes land use planning in the province as a partnership between the provincial and local governments and their citizens. Each plays a key role in the planning process, managing land uses and deciding where best to develop homes, parks, agriculture and industry.

The province, through *The Planning Act* and *The City of Winnipeg Charter*, sets the legislative framework for provincial and local land use planning. *The Provincial Planning Regulation* sets out the province's interest in land use planning and guides local and provincial authorities in preparing land use plans and making land use and development decisions. The regulation serves as a guide to local authorities and provincial departments in preparing, reviewing and amending development plans. Development plans or regional strategies must be generally consistent with the provincial planning regulation, and guide planning and development applications such as rezoning, subdivision, building, and so on. Local development plans are the basis for municipal secondary plans and zoning by-laws.

Local planning districts and municipalities are responsible for the development of land and resources in their municipalities and designated districts. Municipalities pass zoning by-laws to regulate activities identified in the development plan. These plans also guide decisions including the subdivision of land, the local provision of infrastructure and other public services.

Land use planning and, specifically, subdivision approvals are long-term decisions with broad reach. In many cases, approval of subdivisions cause permanent changes to the landscape of their municipalities. Therefore, the subdivision approval process in the province is two-fold. First local government must consider the application and second, if approved, the province represented by the subdivision approving authority must make a decision regarding the application within 60 days, or the application is considered rejected.

Subdivision legislation

The requirements and policies for the approval of a subdivision application are set out in *The Planning Act*, the RRPD development plan (*By-law No. 190-08*), and the Rural Municipality of St. Clements zoning by-law (*By-law No. 5-2002*). Section 68 of *The Planning Act* requires that a municipality's zoning by-law be generally consistent with the applicable development plan and secondary plan.

Part 8 of *The Planning Act* sets out the statutory requirements for the approval of a subdivision application in the province of Manitoba.

Approval required for subdivision of land

121(1) A district registrar may not accept for registration any instrument that has the effect, or may have the effect, of subdividing a parcel of land, including

- (a) a plan of subdivision;*
- (b) a plan of survey;*
- (c) an order or judgment of a court; and*
- (d) a caveat;*

unless the subdivision has been approved by the approving authority.

...

Restriction on approvals

123 A subdivision of land must not be approved unless

- (a) the land that is proposed to be subdivided is suitable for the purpose for which the subdivision is intended; and*
- (b) the proposed subdivision conforms with*
 - (i) the development plan by-law and zoning by-law,*
 - (ii) any secondary plan by-law, and*
 - (iii) the regulations under section 146.*

The act sets out numerous procedural requirements for the approval of subdivision applications. The owner of land, or a person authorized by the owner, may apply to the approving authority for subdivision. The minister of Municipal Government is the approving authority for subdivisions outside of the City of Winnipeg, with representatives in community and regional planning offices throughout the province.

Subdivision approving authority has also been delegated to some planning district boards. At present the five planning district boards that are subdivision approving authorities are:

- Brandon and Area Planning District,
- Cypress Planning District,
- Red River Planning District (formerly known as the Selkirk and District Planning Area)
- Lac du Bonnet Planning District, and
- South Interlake Planning District.

Of the 137 municipalities in Manitoba, 19 belong to the five district planning boards that have been delegated approving authority for subdivision control (*The Planning Act*, s. 120).

The approving authority – whether a planning district board or a planning office – must refer the application to various government departments and other entities for comment; prepare a planning report which is sent along with the application to the council of the municipality in which the land is located; then council must consider and make a decision on the application.

Approving authority to prepare report

124(2) Upon receiving an application, the approving authority must, in accordance with the regulations,

- (a) refer the application to government departments and other entities for comment;*
- (b) prepare a planning report; and*
- (c) send the planning report along with a copy of the application to the council of the municipality in which the affected land is located.*

Review by council

125(1) Upon receiving the application and a copy of the planning report from the approving authority, the council must consider the application and decide, by resolution,

- (a) to reject it; or*
- (b) to approve the application, with or without any of the conditions described in section 135.*

Decision-Making Process for Subdivision Applications

In the RM of St. Clements, a subdivision proposal is submitted to the local approving authority, the RRPD, for processing. A planner with the RRPD ensures the subdivision application is complete; then it is circulated to various government departments; finally, a planning report is prepared and distributed to the local council and to the applicant.

The Planning Act sets out that after council has made its decision on the subdivision application, it must send the official resolution to the applicable approving authority which must either reject the application if council has rejected it, or consider and make a decision on the application if council approved it.

Role of approving authority

126(1) Upon receiving a resolution of the council to approve or reject the application, the approving authority must

- (a) reject the application if the council has rejected it; or*
- (b) consider the application, if the council has approved it.*

Decision of approving authority

126(2) After considering an application approved by council, the approving authority must do one of the following:

- (a) reject the application;*
- (b) give conditional approval to the subdivision, subject to*

- (i) any conditions specified by council under clause 125(1)(b), and
- (ii) any additional conditions described in section 135 that the approving authority considers appropriate.

Notice of decision

126(3) *The approving authority must send a copy of its decision to the applicant, the council and, where a board is the approving authority, to the minister.*

If the approving authority rejects the subdivision application, the applicant may appeal the decision to the Manitoba Municipal Board under section 129 of *The Planning Act*. If the planning district does not make a decision within 60 days from the date of council's decision, the applicant may consider the planning district to have rejected the application and he or she may appeal the rejection to the Municipal Board.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was the complainant entitled by statute, regulation, policy, or procedural fairness to advance notification of the RRPD board meeting at which his subdivision application was rejected?

There is no statute or regulation that requires the RRPD to provide direct advance notification to subdivision applicants of approving authority board meetings at which a subdivision will be considered.

With respect to RRPD policies and practices, board meetings are governed by the RRPD's "Procedural By-law No. 207" as per section 21(1) of *The Planning Act* which sets out that a board must adopt a by-law respecting the procedures of the board and the conduct of its affairs. The by-law sets out in section 5.1 that the RRPD board "shall hold its regular meetings in the Board Chambers located at 806 Manitoba Ave., Selkirk, Manitoba on the third Wednesday of every month at the hour of 7:00 o'clock in the evening." The date may be changed provided certain procedures are followed, and each member of the board is given two days notice. In addition, the change of the day in the notice is not to exceed two weeks from the original scheduled date of the meeting.

Section 5.9 of the by-law sets out that "The Board shall hold its meeting openly and no person shall be excluded, except for improper conduct by a majority vote of the Board."

There is no evidence that the RRPD contravened their own by-law, policy or practice in this case. The date, time and location of the board meeting met the by-law requirements, and the meeting was open to the public.

The RRPD also explained to our office in a January 29, 2015, email that there is no formal policy regarding notification to subdivision applicants regarding decision-making RRPD board meetings; standard practice is to advise of the date and time of the meeting if the applicant inquires. "Every applicant is provided with the 'Subdivision Process' document. Applicants are not notified when their subdivision application is going to be heard by the Board. If the applicant inquires, staff will let them know when it is expected to go to the Board."

RRPD Subdivision Information for Citizens

While *The Planning Act*, the St. Clements zoning by-law 5-2002, and the RRPD's *Procedural By-law No. 207* do not require direct advance notification be given to subdivision applicants of approving authority board meetings, our office looks to see if adequate general notice is provided to people who may be affected by a decision of government. When we investigate complaints from members of the public, we assess the fairness of all aspects of the administration of government, including the processes, policies, practices, regulations and decisions.

In our review of this complaint, we examined the information available to prospective subdivision applicants in the RM of St. Clements, both digital material online as well as printed material to determine if adequate notice regarding the decision-making board meeting was provided.

The RRPD online subdivision information located at selkirkplanning.com/subdivisions includes five web pages ranging from basic information to the subdivision process. In addition, there is a "Frequently Asked Questions" web page which encourages people to refer to the other web pages or phone the office.

We reviewed the content of all of the pages to see what information was provided to the public regarding approving authority meetings. We note that in several instances citizens are informed that the municipal council makes a decision on subdivision applications during a council meeting and suggests to applicants that they attend the council meeting.

However, there is no indication to an applicant in any of the online content that the RRPD board as the approving authority considers and makes a decision regarding the subdivision application during a board meeting that is open to the public.

RRPD Subdivision Brochure

In addition to reviewing RRPD online subdivision information, we also reviewed a printed brochure titled "Subdivisions" which provides general information about the subdivision process in the Red River Planning District region.

The pamphlet states that "the RRPD can proceed only after Council's resolution has been received. If Council has refused your application, RRPD must do likewise. If approved by the Board, our office will issue a letter of conditional approval to the property owner(s)." There is no mention in the brochure that the board considers the application during a meeting open to the public.

Analysis

The Planning Act, the St. Clements zoning by-law 5-2002, and the RRPD's *Procedural By-law No. 207* do not require direct advance notification be given to subdivision applicants of approving authority board meetings at which subdivision applications will be considered. Neither

do the act or the by-laws require public hearings or their requisite notification for subdivision applications proposing one new lot in the RM of St. Clements.

However, we are of the view that the information provided by the RRPD online and in print does not adequately notify applicants that the RRPD must consider subdivision applications during meetings that are open to the public. This is important information for applicants. The subdivision information available to citizens should be clear that meetings to approve subdivisions are open to the public and the onus is on the applicant to inquire as to the meeting date, time and location.

2. Was the complainant given meaningful reasons for the RRPD board's decision in accordance with the principles of natural justice and procedural fairness?

It is important to give reasons for a decision when that decision is likely to detrimentally affect the rights or interests of an individual. Under *The Planning Act* there is no stated legislative requirement for an approving authority to provide reasons for its decisions regarding subdivision applications. However, clear and meaningful reasons can support procedural fairness by helping people understand how a decision was reached. Providing meaningful reasons for decisions is good administrative practice. If an avenue of appeal is available, providing reasons for a decision can help an applicant determine if he or she should exercise the right to appeal.

In this case, the complainant contacted the RRPD office on December 9, 2014, and discovered the board had met on December 3, 2014, and rejected his application. The complainant then asked the RRPD to provide him with reasons for the approving authority's decision. In response, the RRPD emailed him December 12, 2014, and explained: "Written reasons why the subdivision was not approved: please see the planner's report (attached). The reason it was not approved was that it is not consistent with the Development Plan and the Zoning by-law." For reference, the relevant section of the said planner's report reads as follows:

Recommendations:

*This proposal is not in keeping with the intent of the Development Plan and it does not conform to the Zoning By-law. Manitoba Municipal Government (formerly the Department of Local Government) had serious concerns with this subdivision application as it does not conform to the minimum site area requirement of the "AR" Agricultural Restricted Zone in the St. Clements Zoning By-Law. As a consequence, the Provincial Department recommended that the application **not** be approved.*

In 2013, the Red River Planning District recommended that Council await the results of the South St. Clements Secondary Plan before proceeding with a decision on this proposed subdivision. The rationale was that the Secondary Plan would provide policy direction for properties in South St. Clements found between Rebeck Rd. and Raleigh Rd.

Since 2013, however, the Red River Planning District has proposed a Development Plan amendment that would allow the creation of 2 acre lots in South St. Clements when these lots have direct frontage onto an all-weather registered road. This amendment has not yet been approved by the Province. As such, our office recommends that this subdivision

be tabled until such time that the Province renders a decision on the District Development Plan amendment.

Both the December 12, 2014, email to the applicant and the planning report quoted above state that the subdivision proposal is not in keeping with the intent of the development plan and it does not conform to the zoning by-law. However, neither the email nor the planning report provide any meaningful reasons to explain in what way the proposed subdivision is not in keeping with the development plan and the zoning by-law. Council had approved the proposed subdivision two weeks prior to the approving authority's rejection, and the applicant had evidence of other similar-sized subdivisions that had been approved by both council and the approving authority in the recent past, so he was unsure in what way his proposed subdivision was different in the approving authority's view.

On December 11, 2014, the applicant sent an email addressed to all the RRPD board members asking individuals to indicate how he or she voted and their reasons for either supporting or rejecting his subdivision proposal.

The chairman of the RRPD board replied on behalf of all board members in a letter dated December 17, 2014, stating: "The Board is still awaiting a decision from the Province on the Development Plan Amendment. It is the Administration's and Board's duty to ensure that subdivision applications are consistent with the Development Plan and Zoning By-law. There is a process in place through the Municipal Board to appeal the decision of the Red River Planning District, if you are not satisfied."

Further to our investigation into this matter, the RRPD explained to our office in a letter dated May 26, 2015:

Section 126(3) of The Planning Act requires the approving authority (RRPD) to provide a copy of its decision to the applicant. The Planning Act does not require the approving authority to provide reasons on their decision. However, the reasons of why this particular subdivision application should not have been approved, and why it did not meet The Planning Act criteria for subdivision approval, was provided in a report prepared by the RRPD. A copy of the report was provided to the applicant prior to the Public Hearing at the RM of St. Clements.

The report referred to by the RRPD above is the planning report, referenced on page 9 of this report, which states in part that "this proposal is not in keeping with the intent of the Development Plan and it does not conform to the Zoning By-law." The municipal council of the RM of St. Clements considered the same statutory provisions relevant to the decision as did the RRPD board, yet council decided to conditionally approve the subdivision application on November 18, 2014, while the RRPD board decided to reject it. Both decision-making bodies referred to the same development plan, zoning by-law and planning report yet came to very different conclusions. Clearly there was a difference of opinion regarding the application of legislation, policy, and the weight given to evidence. In asking for the reasons for the RRPD board's decision to reject his application, the applicant was requesting the board's interpretation and weighting of the evidence, as to what information the RRPD had relied upon in making its decision.

While *The Planning Act* does not require the approving authority to provide reasons for its decisions, the act sets out the factors to be considered when approving a subdivision application. There is a legitimate expectation that approving authorities 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.

Analysis

In our view, the best way to demonstrate that an approving authority has met this legitimate expectation is to issue clear and meaningful reasons for its decision, particularly in matters in which it disagrees with the decision reached by municipal council. Giving reasons should enable the people affected by the decision to understand why a particular decision was made, and the facts and reasoning that were the basis for the decision.

Giving reasons for decisions also serves the values of fair and transparent decision making, reduces the chance of subjective or improper decisions, and cultivates the confidence of citizens and public officials. In the words of Justice Binnie of the Supreme Court of Canada, reasons “constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court” (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), at para. 63).

Providing meaningful reasons is not necessarily a time-consuming process. The process could be as simple as the board delivering adequate reasons verbally at a board meeting at the time it makes a decision, including the reasons in the board meeting minutes, and providing a copy of the minutes to interested parties.

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.

CONCLUSION

Based on our investigation, Manitoba Ombudsman concludes that the Red River Planning District did not breach any statute, regulation, or policy regarding notification of the RRPD board meeting at which the complainant’s subdivision was rejected.

However, Manitoba Ombudsman suggests the following administrative improvements to the Red River Planning District which, if implemented, could benefit the RRPD and residents:

1. The Red River Planning District should better inform citizens about the subdivision process. Online and printed information should be revised to clarify the following:
 - a. that the RRPD consideration of subdivision proposals takes place during a board meeting that is open to the public.
 - b. that the onus is on the applicant to make inquiries concerning the RRPD meeting schedule should he or she wish to attend.

2. The Red River Planning District should adopt a practice of providing meaningful reasons to applicants that clearly explain board decisions, particularly when it disagrees with the decision reached by municipal council. At a minimum, reasons should explain the issues that were considered and in what way specific requirements were not met.

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