Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2014-0402, 3, 4, 5

RURAL MUNICIPALITY OF ST. ANDREWS

REPORT ISSUED ON AUGUST 4, 2016

CASE SUMMARY

Manitoba Ombudsman received two complaints that the approval of a 20-lot subdivision in the Rural Municipality of St. Andrews (the RM) contravened legislation and was inconsistent with previous council decisions regarding the same parcel of land. The complainants also alleged that the Red River Planning District (RRPD) and the RM provided inadequate notice of the public hearing for the subdivision and unfairly restricted citizen participation.

Based on our investigation, Manitoba Ombudsman determined that the RM's approval of the subdivision was consistent with statutory and by-law requirements. Manitoba Ombudsman is also of the view that the RRPD and the RM satisfied the public notice requirements pertaining to the subdivision and provided a reasonable opportunity for the public to make submissions. However, we note that procedural errors regarding notification, although later rectified, contributed to the complainants' perception that the public hearing process and approval of the subdivision was unfair. Therefore, Manitoba Ombudsman suggests the following administrative improvements to the RM and the RRPD:

- That the RM and the RRPD should develop a process/protocol that ensures both public bodies are in agreement about meeting dates, times and locations, and understand the statutory requirements that must be met, before proceeding to notify citizens. The formal process/protocol should ensure that mailings, posted notices, verbal updates, website information and council agendas are all correct, clear and consistent before being posted.

The RM has considered our suggestion and advised our office that it will work with the RRPD to develop a process to ensure meeting notification requirements are met and that information concerning meetings is communicated to residents in a clear and consistent manner. The RRPD also indicated to our office that it recently developed an internal checklist for planning applications and will be reviewing it to ensure meeting dates and hearings are coordinated with the RM.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman 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.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation. 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.

BACKGROUND INFORMATION AND LEGISLATION

The province, through the Planning Act, sets the legislative framework for provincial and local land use planning. Development plans or regional strategies must be generally consistent with the provincial planning regulation, and should guide planning and development applications such as rezoning, subdividing and building.

The requirements and policies for the approval of a subdivision application with respect to this matter are set out in the Planning Act, the Selkirk and District Planning Area Development Plan By-law No. 190-08, and the Rural Municipality of St. Andrews Zoning By-law No. 4066. The statutory basis for the Selkirk and District Planning Area (SDPA)[1] Development Plan is set out in Part 4, Division 1 of the Planning Act. Subsection 40(1) of the Act indicates that a planning district board must prepare a development plan for the entire district. Development plans provide direction to secondary plans and zoning by-laws. Section 68 of the Planning Act requires that a municipality's zoning by-law be generally consistent with the applicable development plan and any secondary plan.

SCOPE OF THE INVESTIGATION

Our investigation of these complaints included the following:

- A review of the Planning Act, the Selkirk and District Development Plan By-law 190/08, the RM of St. Andrews Procedures By-Law 4258, the Rural Municipality of St. Andrews Zoning By-law 4066.
- A review of the RRPD's Planning Reports regarding subdivision applications 04-1955, 08-2184, 09-2246, 13-2510 and 13-2510-Amended.
- Interviews with government officials including the CAO of the RM of St. Andrews, RRPD Planning Officers, and the Assistant Manager with the RRPD.
- Interviews with and information provided by the complainants.

[1]The Selkirk and District Planning Area Board has since been renamed the Red River Planning District; the formal name of the development plan, however, remains the Selkirk and District Planning Area Development Plan By-law No. 190-08.

- A review of written correspondence, council minutes and council agendas from the RM and the RRPD.
- A review of hearing notices, documentation before council at hearings, planning district documentation and minutes of hearings.

ANALYSIS OF ISSUES AND EVIDENCE

1. Was the Red River Planning District's recommendation, and the Rural Municipality of St. Andrews' decision, to approve subdivision application S13-2510-Amended consistent with or contrary to the requirements of the Selkirk and District Development Plan By-law 190/08, and the RM of St. Andrews Zoning By-law 4066?

The complainants are of the view that the approval of the 20-lot subdivision S13-2510-Amended contravened legislation, specifically the requirements of the Selkirk and District Development Plan By-law 190/08, and the RM of St. Andrews Zoning By-law 4066.

Selkirk and District Development Plan By-law 190/08

The *Selkirk and District Development Plan* (SDPA Development Plan) sets out the plans and policies of the planning district. It designated the property at issue as being in the "General Development" area. Under "General Development – B. Policies," the relevant policies that apply to this subdivision proposal are:

> *4. Minimum lot sizes shall be established in the respective Zoning By-laws to permit effective on-site disposal of sewage and to minimize the risk of groundwater pollution. Where lot sizes and soil conditions can not support the effective operation of a septic field, holding tanks shall be used.*
>
> *5. Subdivision and higher density residential development may be considered to enable improved municipal services such as piped sewer and water.*
>
> *6. The growth of General Development areas bordering one side of a provincial highway shall be directed to that side of the highway.*
>
> *7. Proposals involving large multi-lot subdivisions shall require the preparation of secondary plans.*
>
> *8. Development proposals within areas which are currently zoned to allow for subdivision will be reviewed and considered on the basis of the anticipated outcome of secondary plans within the vicinity.*
>
> *11. All future subdivisions within General Development areas shall be serviced with municipal wastewater services. Holding tanks are only to be used should municipal services not yet be available (See SDPA Wastewater Management Plan for more detail). If holding tanks are used, they must be located to enable future connection to municipal*

> *services. Properties utilizing holding tanks must connect to municipal services once available.*

While the complainants are of the view that the proposed subdivision S13-2510-Amended contravenes policy number 7 – that proposals involving large multi-lot subdivisions shall require the preparation of secondary plans – the RRPD and RM disagree. The RRPD explained in correspondence to our office dated August 26, 2014, that policy 7 applies to new areas of development, not infill development, and that policy 7 must be interpreted in conjunction with policy 8:

> two key policies were disputed during the conditional approval of this subdivision: [policies 7 and 8]…. As for #7, our interpretation of this policy is that it is meant to guide new areas of development not infill development such as this. For example, a secondary plan was required for a large proposal involving 100 lots south of this area also along Main St. In this case the plan was needed to establish basic parameters for how development would occur. In cases of infill development, the pattern of development and aspects such as road connections is dictated by the surroundings (i.e. there is very little choice regarding how the proposal will be designed). In addition, the lot sizes, road network and general character of the proposal is very similar to the surrounding neighborhoods.

The SDPA Development Plan defines "Infill Development" in its glossary: "Refers to new development within existing built up areas on lands which are currently vacant or underutilized and is considered at both a neighborhood and individual lot basis." We examined the map of the proposed subdivision from the RRPD May 13, 2014, Planning Report S13-2015-Amended (see Appendix 1). In our view, the parcel included in subdivision S13-2510-Amended meets the SDPA Development Plan's definition of "infill development."

The RRPD also explained to our office in a letter dated October 27, 2014, that:

> The purpose of a secondary plan is to provide regulations and guidelines for development. Key components of the plan are to identify the future extensions of infrastructure as well as land uses. In early 2014, after several years of development, the proposed South St. Andrews Secondary Plan was unfortunately abandoned by Council largely due to opposition from local residents. Also at this time, background work on the Red River Planning District Wastewater Management Plan indicated that sewer was years away from being implemented in the area.
>
> As a result, the [subdivision S13-2510-Amended] proposal was assessed against the likely outcomes of any secondary plan for this area as well as the proposed plan as directed by policy 8 of the SDPA Development Plan "General Development" section. The proposed road network shown in file S13-2501-Amended forms a logical extension and connection with the adjacent neighborhoods. The proposal does not propose to change the use of the land (residential) from what is identified in the SDPA Development Plan and the zoning by-law. The only major element that may have changed is the density of the development (i.e. lot size). If sewer was implemented, then lot sizes could be substantially smaller. To reconcile this, a condition was added to file S13-2510-Amended that requires new houses to be built to one side of the lot allowing the lot to later be split in two when sewer is

> available. As a result, in our assessment the proposal met the likely outcomes of any secondary plan for this area, was consistent with the character of the surrounding neighborhoods, and allowed for future densification when, and if, sewer is available in the area.

In our analysis of this issue, our office notes that the SDPA Development Plan states on page 5 under Interpretation of Requirements, "Individual policies of this development plan should not be viewed or interpreted in isolation, but should only be interpreted while keeping in mind the spirit and intent of all other objectives and policies of this Development Plan." We also note that on page 116 under "Monitoring Performance," the SDPA Development Plan states that "the Plan should be read as a whole to understand its comprehensive and integrative intent as a policy framework for priority setting and decision-making."

Finally, the RRPD's May 13, 2014, planning report to council includes the SDPA Development Plan policies number 4 to 8 and 11, and states that:

> This proposal is generally in keeping with the intent of the Development Plan, with the exception of Policy 7, and in keeping with the Zoning By-law, with minor zoning variances required. Policy 7 states, "*Proposals involving large multi-lot subdivisions shall require the preparation of secondary plans."* However, when read in conjunction with Policy 8, which states, "*Development proposals within areas which are currently zoned to allow for subdivision will be reviewed and considered on the basis of the anticipated outcome of secondary plans within the vicinity,"* it can be resolved that the proposal does not conflict with any anticipated outcomes of a Secondary Plan for this area, and is in keeping with the current neighborhood layout.

As such, we conclude that the recommendation and decision to approve subdivision S13-2510-Amended did not contravene the objectives and policies of the SDPA Development Plan.

<u>The Rural Municipality of St. Andrews Zoning By-Law</u>

The SDPA Development Plan states under "Interpretation of Requirements" on page 5 that "Any lot size, distance and area requirements mentioned throughout this development plan are meant to serve as guidelines only and are defined more explicitly in the zoning by-laws."

The Rural Municipality of St. Andrews Zoning By-law sets out that "the RR Rural Residential Zone has been established to provide land use guidelines for those areas having existing large lot residential development" and provides the minimum site area for RR is 60,000 square feet, or 1.37 acres.

The complainants are of the view that variances are required for 12 of the 20 proposed lots "because they are undersized. The size of these lots is not being dictated by the features of the property, rather by the desire of the applicant to create as many lots as possible while taking full advantage of the 10% in-office variance provision."

In the May 13, 2014, planning report to council, the RRPD notes that the lot size required site area of 1.37 acres is "In Compliance" except for select lots which will require minor variance orders as

follows: lot 8 at 1.26 acres, lots 9 – 14 at 1.33 acres, and lots 16 – 20 at 1.30 acres. All of the lots were in compliance with the required site width of 198 ft. The RRPD notes in the planning report, "that some variances will be required for lot size."

According to *The Planning Act Handbook*, "the variance process allows a board or council to vary the application of the zoning by-law as it affects the person's property in order to mitigate the adverse effects of the by-law." In this case, the applicant would need to apply to council for minor variance orders for the lots above. According to the RM of St. Andrews Zoning By-law, development officers have the authority to approve or deny minor variations:

> ***3.31.5. Minor Variations***
> *Development officers may approve in-office with or without conditions, minor variations not exceeding 10% of the requirements of this by-law governing front, side, rear or any other yard requirements as per* The Planning Act.

The subdivision application, therefore, could be approved or denied by council, with the requirement for the needed variances added as a condition of the subdivision approval.

According to the Planning Act, council is vested with the authority to consider and decide by resolution whether or not to approve or reject subdivision applications. The restrictions on approvals in the Act lay out that:

> ***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.*
>
> ***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.*

From the evidence we reviewed, we conclude that the RRPD's recommendation and the RM's decision to approve subdivision application S13-2510-Amended did not contravene legislation, including the requirements of the SDPA Development Plan By-law 190/08, and the RM of St. Andrews Zoning By-law 4066. The zoning bylaw allows for the exercise of discretion with respect to variations of lot size.

2. Was the RRPD's recommendation, and the RM's decision, to approve the 20-lot subdivision consistent with or contrary to their previous decisions regarding the same parcel of land?

The complainants are of the view that council's approval of the subdivision S13-2510-Amended is inconsistent with previous decisions regarding development proposals for this parcel of land based on the lack of a secondary plan.

In a letter to our office dated July 17, 2014, one of the complainant's states that "The land parcel in question has seen several development proposals over the years and all have been defeated, tabled, or expired. On two occasions the stated reason for tabling the development plan was lack of a Secondary Plan…."

The complainants and the RRPD provided our office with detailed information about the history of the previous subdivision applications from 2004 forward, as summarized by our office in the table below.

Proposals to subdivide Part RL. 46-47 – AD – Plan 3404 RM of St. Andrews

Proposal	*Date*	*Summary*
Subdivision S04-1955		
Application received	December 12, 2004	Application received for 22-lot subdivision plus 2 residual lots, including lands on assessment tax roll no. 23100 and no. 23000.
Conditionally approved	April 12, 2007	**RRPD recommends approval.** **Conditional approval granted by RM** - valid to April 21, 2007.
Extension granted	February 22, 2007	**Conditional approval of one-year extension** granted by RM **- v**alid to April 21, 2008.
Subdivision application amended	October 3, 2007	Application amended from 22- to 20-lots as the lands on assessment roll no. 23000 were sold to a new owner and removed from development.
Amended subdivision conditionally approved	November 14, 2007	**Conditional approval granted by RM** - valid to April 21, 2008.
Application expires	April 21, 2008	Conditions of subdivision approval not met by deadline April 21, 2008. **Conditional approval of S04-1955 expires.**
Subdivision S08-2184		
Application received	July 8, 2008	Application received for a 20-lot subdivision plus 1 residual lot, including lands on assessment tax roll no. 23100.
Application denied	September 9, 2008	**RRPD recommends approval.** **Council rejects subdivision** application S08-2184.
Subdivision S09-2246		

Application received	April 21, 2009	Application received for 19-lot subdivision plus 1 residual lot, including lands on assessment tax roll no. 23100.
Application tabled	July 14, 2009	**RRPD recommends the application be tabled.**[2] **Council tables subdivision** application S09-2246.
Subdivision S13-2510 & BL 4237		
BL 4237 - Rezoning application received	May 30, 2013	Application received to amend the zoning of the property from "RR" Rural Residential to a "RA" Suburban Residential zone, BL 4237.
Subdivision application received	May 30, 2013	Application received for a 44-lot subdivision plus 1 residual lot, including lands on assessment tax roll no. 23100. **RRPD recommends approval** if the rezoning is approved.
Subdivision application amended	January 24, 2014	Application 'S13-2510-Amended' received for a 20-lot subdivision plus 1 residual lot, including lands on assessment tax roll no. 23100.
Rezoning Application withdrawn	February 6, 2014	Applicant requests zoning amendment application be withdrawn.[3]
Amended Subdivision application tabled	May 13, 2014	**RRPD recommends approval.** **Council tables subdivision application** pending consultations with MIT regarding traffic issues.
Amended Subdivision application approved	July 8, 2014 July 16, 2014	**Conditional approval granted** by RM. **Conditional approval granted** by RRPD (approving authority) – valid to July 16, 2016.[4]

Since 2004, there have been four separate subdivision applications regarding this parcel of land, two of which were amended at different stages in the approval process.

As part of the process, the RRPD prepared five planning reports for council with recommendations. In four of those reports, the RRPD recommended that the application be either approved or approved with conditions. Only in one instance did it recommend that an application be tabled.

[2]July 14, 2009, RM council meeting minutes indicate that the RRPD planning report "recommends application be tabled until the Lockport Secondary Plan (sic) is completed…." The secondary plan relevant to the proposed subdivision, however, was the South St. Andrews Secondary Plan. Work on the South St. Andrews Secondary Plan was on-going from September 2009 onward and was defeated at second reading by the RM on June 24, 2014.

[3]August 13, 2013 RM council meeting minutes indicate that the BL 4237 rezoning application public hearing was tabled "as it was felt that until the South St. Andrews Secondary Plan is in place it was not appropriate to hold the hearing."

[4]S13-2510-Amended was given final approval – issued certificate of approval & signed Mylar Subdivision Plans to Applicant – on March 29, 2016.

Council for the RM also made five separate decisions concerning the subdivision applications. It approved three of the applications, tabled one, and decided to reject one application.

Subdivision Application S09-2246

The RRPD recommended tabling application S09-2246 in 2009, for subdivision of 19 + 1 lots. The RRPD states in the planning report to council:

> *Manitoba Conservation is in the process of completing regulatory amendments which will prohibit septic fields within the Red River corridor. This raises concerns with the proposal. At present a number of proposed lots are under the size requirement and the management of wastewater has been highlighted as an issue. It may be more prudent to give consideration to a wastewater treatment plant which would address the issue of wastewater management and allow for smaller lots to be developed.*
>
> *Our office recommends that this application be **TABLED** until such time as servicing is available or the developer revises the proposal with the inclusion of a wastewater treatment plant and reconfiguration the lots proposed.* [5]

The 2009 RRPD planning report recommendation to table the application cites concerns with septic fields and wastewater and does not specifically refer to the need for a secondary plan for the area. The complainants point out, however, that the lack of a secondary plan is identified in the RM's July 14, 2009, council meeting minutes:

> *Subdivision No. S09-2246 Waterside Development*
> *- Summary of application by J. Ferguson, Planner.*
> *- Recommend application be tabled until the Lockport*[6] *Secondary Plan is completed.*

The RRPD, however, explained that the context for the reference to the secondary plan was because such a plan would be addressing the management of wastewater. Moreover, given that work on the secondary plan was soon to begin, the RRPD and council believed it made sense to put the application on hold for the wastewater issue to be addressed. It was not a decision made because the RRPD and council believed the application could not proceed without a secondary plan for the entire area.

Subdivision Application S13-2510

The complainants also claim that in 2013, the same parcel of land was denied subdivision because of the lack of a secondary plan for the area. However, subdivision proposal S13-2510 was for a 44-lot subdivision which would have required a change in the zoning of the area to Rural Suburban

[5]Selkirk and District Planning Area Board report dated June 28, 2008 (sic – typographical error – should have been 2009), File: S09-2246.
[6]RM of St. Andrews July 14, 2009 council meeting minutes (sic. typographical error – should have been South St. Andrews Secondary Plan).

from Rural Residential to allow for smaller lots. According to council minutes, it was felt that a secondary plan was needed because of the need to rezone the land.

The rezoning application (BL 4237) was eventually withdrawn.

Subsequently, the developer amended the subdivision application S13-2510 from a 44-lot subdivision to a 20-lot subdivision in January 2014. As result the land in question did not require rezoning as the 20 lots generally met the requirements of the SDPA Development Plan and the zoning by-law requirements. This amended application was approved by the RRPD.

The RRPD explained to our office:

> As a result, the [S13-2510-Amended] proposal was assessed against the likely outcomes of any secondary plan for this area as well as the proposed plan as directed by policy 8 of the *SDPA Development Plan* 'General Development' section…. As a result, in our assessment the proposal met the likely outcomes of any secondary plan for this area, was consistent with the character of the surrounding neighborhoods, and allowed for future densification when, and if, sewer is available in this area.

In the RRPD's planning report to council regarding the subdivision application S13-2510-Amended, the recommendation reads:

> This proposal is generally in keeping with the intent of the Development Plan, with the exception of Policy 7, and in keeping with the Zoning By-law, with minor zoning variances required. Policy 7 states, "*Proposals involving large multi-lot subdivisions shall require the preparation of secondary plans."* However, when read in conjunction with Policy 8, which states, "*Development proposals within areas which are currently zoned to allow for subdivision will be reviewed and considered on the basis of the anticipated outcome of secondary plans within the vicinity,"* it can be resolved that the proposal does not conflict with any anticipated outcomes of a Secondary Plan for this area, and is in keeping with the current neighborhood layout.

From the evidence reviewed, Manitoba Ombudsman does not find that the RRPD's recommendation, and the RM's decision, to approve subdivision application S13-2510-Amended was inconsistent with their previous decisions regarding the same parcel of land.

In 2009 when the RRPD recommended tabling the application, work on the South St. Andrews Secondary Plan had recently begun. The RRPD explains, "… after several years of development the proposed South St. Andrews Secondary Plan was unfortunately abandoned by Council largely due to opposition from the local residents." The RRPD asserts that while it was reasonable to wait for a secondary plan that was under development in 2009, it was not reasonable in 2014 when the secondary plan had recently been defeated.

The evidence we reviewed shows that the RRPD and the RM did not consistently recommend tabling or denying the subdivision based on the lack of a secondary plan. The various recommendations and decisions have included conditional approval of previous subdivision proposals, depending on the context at the time the decision was made and the number and size of

lots proposed. The development plan's policies 7 and 8 remained the same throughout 2004 to 2014, yet only in 2009 when work on a secondary plan was underway did the RRPD recommend tabling the subdivision application to wait until a secondary plan was approved.

3. Did the RM satisfy the public hearing requirements pertaining to the subdivision S13-2510-Amended, as per the Planning Act and the RM of St. Andrews Procedures By-law?

The complainants are of the view that the public hearing process was procedurally unfair. They allege that notice of the public hearings did not meet statutory notification requirements, that the RM did not prepare sufficient minutes of the meetings, and that citizens were restricted from fully participating.

The RM and RRPD are of the view that the public hearings met all statutory requirements including provisions regarding notification and recording representations, and that the public was provided with an opportunity to participate and have their opinions heard and considered during the public hearings.

Notice of May 13, 2014, public hearing

The Planning Act sets out public hearings regarding subdivision applications are required under certain circumstances.

> ***Hearing when road created***
> ***125(2)*** *If the proposed subdivision will result in the creation of a new public road, the council must*
> *(a) hold a public hearing to receive representations on the proposed subdivision; and*
> *(b) give notice of the hearing in accordance with section 169.*

The subdivision application S13-2510-Amended proposed to subdivide an existing parcel of approximately 38.39 acres into 20 lots connected by a new road that would join Provincial Road 238 (River Road) and Scott Drive, and provides for two future road connections to lots south of the proposed development area. Therefore, according to subsection 125(2) of the Planning Act, council was required to hold a public hearing and give notice of the hearing in accordance with clause 169(1)(c) as follows:

> ***Notice re certain applications***
> ***169(1)*** *Notice of any of the following hearings must be given in accordance with this section:*
> *(c) a hearing on an application for subdivision under subsection 125(2);*
>
> ***Notice to affected property owners***
> ***169(3)*** *A copy of the notice of hearing*
> *(a) must be sent at least 14 days before the hearing to every owner of property located within 100 metres of the affected property; or*
> *(b) where the affected property is not remote or inaccessible, must be posted on that property in accordance with section 170.*

In this matter, a copy of the notice of hearing was mailed to property owners located within 100 metres of the affected property on April 30, 2014, fourteen days before the public hearing scheduled for May 13, 2014. Notice was also posted on the affected property.

The complainants assert, however, that the notification posted on the property did not meet the posting requirements set out in subclause 170(1)(b)(ii) of the Planning Act which requires that the notice must be posted outdoors facing each public road adjacent to the property. The complainant states in a letter to our office dated July 28, 2014, that "No notice was posted on River Road…nor was it posted on Scott Drive which is also a public road access point to the proposed subdivision." The Planning Act sets out:

> ***Posting requirements***
> ***170(1) If notice of a hearing is required to be posted on an affected property under this Act****, the notice must be*
> *(b) posted outdoors for 14 days immediately before the date of the hearing*
> *(ii) facing each public road adjacent to the property …*

The RRPD contends that subsection 169(3) of the Act requires that notice to affected property owners must be provided in one of two ways: either a copy of the hearing notice must be sent to all property owners within 100 metres of the affected property or that a notice be posted on the affected property, not both. While the RRPD posted a notice on the affected property, the RRPD also mailed notification to property owners, which in our view satisfied the statutory requirement of the Planning Act, clause 169(3)(a) and, therefore, it is not necessary to determine whether the RRPD's posted notice on the affected property met the requirements in subclause 170(1)(b)(ii) as the RRPD was not required by law to post such a notice.

Recording representations and minutes of hearings

The complainants are of the view that the minutes of the May 13, 2014, public hearing do not meet the statutory requirements of the Planning Act because the minutes indicate only whether a presenter was in favor or opposed to the subdivision, and this is a departure from the usual detail contained in previous minutes. We reviewed the Planning Act, *The Planning Act Handbook*, and the minutes of public hearings before and after the May hearing to determine if statutory requirements were met.

The Planning Act sets out that:

> ***Conduct of hearing***
> ***172(1)*** *A body holding a hearing under this Act must*
> *(a) subject to subsection (2), hold the hearing at the date, time and place set out in the notice of hearing;*
> *(b) hear any person who wishes to make a representation on the matter to be considered at the hearing; and*
> *(c) keep written minutes of the hearing.*
>
> ***Representations***
> ***173(1)*** *A person may make a representation at a hearing under this Act by*

(a) making an oral submission at the hearing; or
(b) filing a written submission with the body holding the hearing, before or at the hearing.

Recording representations
173(2) *The body holding the hearing must keep a record of all representations made at the hearing.*

We reviewed the minutes of the public hearing that took place on May 13, 2014. Written submissions filed by presenters before or during the hearing were also examined. As well, the RM provided us with the minute-taker's hand-written notes of the public hearing. We also looked at council minutes of other public hearings in 2014 for comparison.

The council minutes of the March 11, 2014, council meeting and subdivision public hearings clearly contain more detail than the minutes of the May 13 public hearing regarding presentations made to council, including presenters' key points, and their support or opposition for a proposal. For comparison, we also reviewed the minutes of the continuation of the public hearing regarding S13-2510-Amended dated July 8, 2014; the recorded representations of the July public hearing were also more detailed than the minutes of the meeting in May 13, including short descriptions of the presenters' key points regarding opposition to or support for the proposed subdivision.

The RM explained to our office that the minutes of the meeting in May were less detailed than council minutes before and after the May public hearing because a new staff member prepared the minutes in May, and included only presenters' names and their positions regarding support or opposition to the proposed subdivision. The minutes were tabled at the next council meeting without being revised to add presenters' key points because the level of detail in the minutes satisfied legislation. The RM explained that after the minutes were tabled and made public, some residents complained about the lack of detail, so the RM had the details typed and provided to any resident who requested them. The RM further explained that although the May 13 council minutes satisfied legislation, the RM ensured that future council meeting minutes included more detail regarding presenters' points and key issues.

After reviewing the documentation, we can find no conclusive evidence that the RM did not meet the statutory requirements of the Planning Act regarding the recording of representations at the public hearing held on May 13, 2014. The RM kept written minutes of the hearing, as per subsections 172(1) and 173(1) of the Planning Act, and kept a record of all representations made at the hearing as per subsection 173(2). The Act does not define or prescribe the level of detail necessary in the minutes, and nor does the *The Planning Act Handbook*. However, the RM acknowledges that the level of detail in the official minutes of the May 13 meeting was a departure from the usual level of detail, and that this was an administrative error that was corrected for the next council meeting.

Manitoba Ombudsman suggests that it is good practice for councils to keep detailed minutes in order to provide accurate, transparent and comprehensive accounts of what transpires at council meetings. Council meeting minutes are the official public record of council proceedings and decisions.

Adjournment and notification of continuation of public hearing

The complainants are of the view that the continuation of the public hearing was procedurally unfair because notification was confusing and inadequate. Council tabled the initial public hearing on May 13, 2014, to gather more information on traffic issues. The minutes of the May 13, 2014, council meeting state, "Resolved that Proposed Subdivision No. S13-2510… be tabled until two residents, Administration and the Developer meet with MIT and report to Red River Planning District. Carried." No date for the continuation of the public hearing was announced at the adjournment of the May 13 hearing. The Planning Act sets out that a public hearing may be adjourned as follows:

> ***Adjournment***
> ***172(2)*** *A hearing under this Act may be adjourned to a fixed date. Unless the new hearing date is announced at the time of adjournment, the body holding the hearing must give notice of the continuation of the hearing as if it were a new hearing.*

We examined correspondence between the RM staff, the group assigned to meet with MIT, and the RRPD community planners who are responsible for providing public notification of hearings. We also reviewed an email exchange between the RM and an area resident inquiring about the date of the continuation of the public hearing.

Significant errors were made regarding notification of the continuation of the public hearing by the RM and the RRPD which contributed to the complainants' perception that the public hearing process was procedurally unfair. On June 3, 2014, RM staff informed an area resident by email that the continuation of the public hearing would resume at the June 10 council meeting. The area resident then shared this information with other concerned citizens including one of the complainants. The complainant states to our office that, "we went door to door and sent email messages to as many of the residents within the prescribed 100 m. radius as we could."

The complainants indicate that by Friday, June 6, 2014, the RM had posted to its website the June 10 Council Meeting Agenda and subdivision S13-2510 appeared, reinforcing the complainants' understanding that the public hearing would resume at the June 10 council meeting.

However, on June 4 the RRPD had advised the RM by email that the hearing could not legally resume at the June 10 council meeting because the RRPD needed time to meet the 14-day notification period required by the Planning Act.

While the complainants now believed that the hearing would resume at the June 10 council meeting, on June 9 a neighbour noticed a sign posted on the subject property that indicated the continuation of the hearing for S13-2510-Amended would take place at the June 24 council meeting at 9:00 am. The neighbour informed one of the complainants who then contacted the RM to determine if the hearing was scheduled for June 10 as per the information provided by the RM and confirmed by the RM's website agenda, or on June 24 as the sign on the property indicated. The RM told the complainant that the RRPD had proceeded prematurely with posting the new notice on the property and in fact the date for the continuance of the hearing was actually July 8, 2014. The RM told the complainant that the incorrect notice would be removed from the property

immediately and new notices stating the hearing would continue on July 8 would be posted and residents would be notified by mail.

At the June 10, 2014, council meeting a resolution was passed setting out that because no date was specified for the continuation of the public hearing when it was adjourned on May 13, council would not be able to continue the hearing on June 10, "therefore be it resolved that the application will now be on the July 8, 2014, agenda at 6:00 pm, the property will be posted with the correct date and letter circulation will be distributed."

While the RM and the RRPD then provided sufficient notification for the continuation of the public hearing to be held on July 8, the complainants were of the view that errors in posting and misleading information provided by the town office were confusing and unfair.

From the evidence we examined, mistakes and misunderstandings regarding the date of the continuation of the public hearing certainly occurred between the RM, the RRPD and area residents. Ultimately, new notification notices were sent to property owners within 100 metres of the affected property more than 14 days prior to the continuance of the public hearing, as per the Planning Act.

While there is no indication that the mistakes made were intentional, Manitoba Ombudsman is of the view that notification should be clear and correct and should not cause public confusion. This is important information for citizens. Notification to area residents should clearly set out the meeting date, time and location; postings, mailings, inquiries to the town administration and the RM's website information should all be confirmed and consistent before being publicized. The onus is on the RM and the RRPD to communicate with each other and be clear about this information before proceeding to notify citizens whether verbally or through postings, websites, agendas, or mailings.

Public participation at July public hearing

The complainants are of the view that the public hearing was procedurally unfair because the RM restricted discussion at the July 8 hearing to traffic issues and new information. We reviewed legislation pertaining to participation at public hearings. The Municipal Act subsection 160(4) allows for municipalities to create their own procedures by-laws for public hearings as follows.

> ***Council may establish procedure in by-law***
> ***160(4)*** *A council may in its procedures by-law establish procedures for public hearings, which may include*
> *(a) prescribing a reasonable time limit for presentations, questions or objections;*
> *(b) providing that the council may decline to hear a presentation, question or objection where the council is satisfied that the matter has been addressed at the hearing;*
> *(c) deciding which presenters the council will hear where it is satisfied that presentations will be the same or similar;*
> *(d) expelling a person from a hearing for improper conduct; and*
> *(e) adjourning a hearing from time to time.*

The RM of St. Andrews Procedures By-Law sets out that the chair may decline to hear further presentations, questions or objections where he is satisfied that the matter has been addressed at the public hearing.

> *12. 1 The chair of the public hearing has the right to limit the time taken by a person to (10) minutes, after which council may wish to ask questions of the person. All questions must be channeled through the Chair of the hearing.*
>
> *12.2 The Chair of the public hearing may decline to hear further presentations, questions or objections where he is satisfied that the matter has been addressed at the public hearing.*
>
> *12.3 The Chair of the public hearing may decide which presenters will be heard, if he is satisfied that the presentations are the same or similar.*

Subdivision application S13-2510-Amended was heard at two public hearings – the first on May 13, 2014, and the continuation of the hearing on July 8. The hearing was tabled on May 13 and the minutes of the council meeting state, "Resolved that Proposed Subdivision No. S13-2510… be tabled until two residents, Administration and the Developer meet with MIT and report to Red River Planning District. Carried."

In a letter to our office dated November 21, 2014, the RM states that "During the public hearing of May 13, no individuals were denied the opportunity to speak. At the hearing of July 8, rules were outlined by the Chair that only new information would be considered, however you can see by the enclosed minutes they were able to talk more about all issues not just the highway access."

The minutes of the July 8, 2014, public hearing regarding subdivision S13-2510-Amended state that, "This was tabled at the last meeting as a meeting was to be scheduled with Manitoba Infrastructure and Transportation regarding access. Only new information on access will be discussed today."

As per the *RM of St. Andrews Procedures By-Law*, the RM had the right to restrict discussion at the July 8 public hearing to traffic issues as per section 12.2. We note, however, that the minutes of the July 8 meeting indicate that presenters were allowed some latitude and ultimately spoke to matters beyond traffic issues including lot size and zoning; the state of the secondary plan; drainage issues; and privacy fences.

CONCLUSION

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, Manitoba Ombudsman found that the RM's approval of subdivision S13-2510-Amended was consistent with statutory and by-law requirements. Manitoba Ombudsman is also of the view that the RM satisfied the public notice requirements pertaining to the subdivision and provided a reasonable opportunity to the public to make submissions regarding the application.

However, our investigation found that the RM and RRPD made significant errors regarding notification of the public hearings which, though rectified, contributed to the complainant's perception that the public hearing process and approval of the subdivision was unfair.

Therefore, Manitoba Ombudsman suggests the following administrative improvements to the Rural Municipality of St. Andrews and the Red River Planning District:

- **That the RM and the RRPD should develop a process/protocol that ensures both public bodies are in agreement about meeting dates, times and locations, and understand the statutory requirements that must be met, before proceeding to notify citizens. The formal process/protocol should ensure that mailings, posted notices, verbal updates, website information and council agendas are all correct, clear and consistent before being posted.**

THE RM AND THE RRPD'S RESPONSE TO THE SUGGESTION

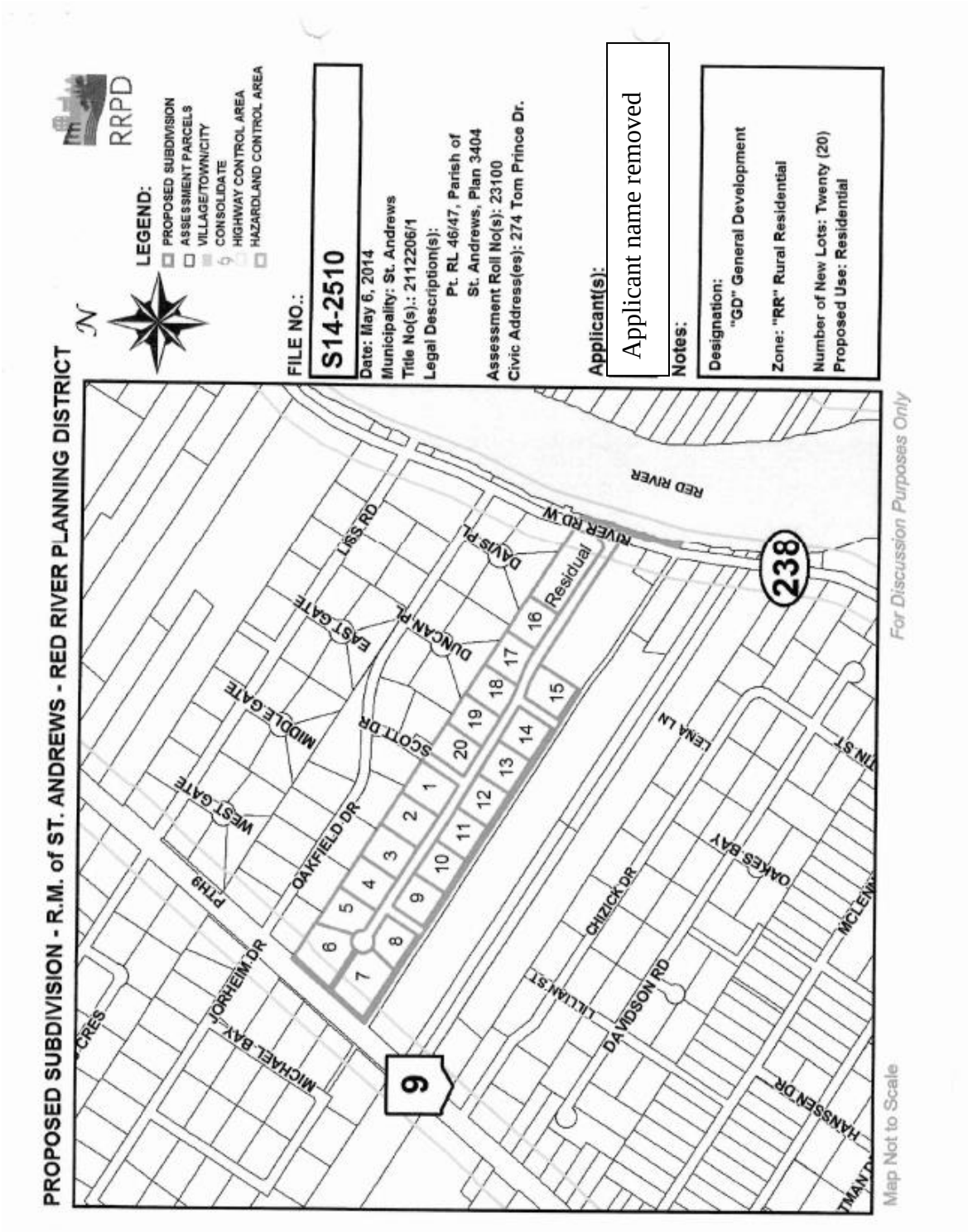
The RM has considered our suggestion and advised our office that it will work with the RRPD to develop a process to ensure the RM and the RRPD are in agreement about meeting dates, times and locations before notifying citizens. The RRPD also indicated to our office that it recently developed an internal checklist for planning applications and will be reviewing it to ensure meeting dates and hearings are coordinated with the RM.

We are pleased that the RM and the RRPD are taking positive steps to ensure meeting notification requirements are met and information meetings and public hearings are communicated to the public in a clear and consistent manner.

The release of this report now concludes our involvement regarding this complaint.

MANITOBA OMBUDSMAN

APPENDIX 1



**Note that the File No. as noted above is incorrect – should be "S13-2510."*