

Manitoba mbudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2011- 0474 (web version)

THE RURAL MUNICIPALITY OF SASKATCHEWAN

REPORT ISSUED ON NOVEMBER 27, 2013

CASE SUMMARY

A landowner in the Rural Municipality of Saskatchewan (the RM) complained that the RM unfairly rejected her conditional use application to build a residence on land she owned in the municipality. The complainant believed the decision was inconsistent with previous decisions in which similar conditional use applications were approved. She believed council had a personal bias against her which influenced its ruling. The complainant also maintained that the public hearing held to consider her request was procedurally unfair.

Based on our investigation, Manitoba Ombudsman did not find evidence to support the complaint that the conditional use hearing was procedurally unfair or the decision to reject the conditional use application substantively unfair.

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

OMBUDSMAN JURISDICTION

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

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

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

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or 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 September 12, 2011, a landowner in the RM of Saskatchewan (the RM), filed a complaint with our office alleging the RM had treated her unfairly. She believed that the RM's decision to reject her conditional use (CU) application to establish a "non-farm dwelling" on a parcel of land she owned in the municipality was substantively unfair. She also claims that she was treated unfairly at the public hearing held to consider her application. In her written complaint to our office, she stated the following:

There has never been a conditional use such as this ever denied in this RM. In fact, the property of [name] just ¼ mile N of this parcel applied for a Conditional Use for the use of establishing a non-farm dwelling in Jan. of 2011 and was approved with no problem. Before we purchased this property I had spoken with the Planning District and it was explained that I would need a Conditional Use order to build on this property but, that it should not be an issue. The planning officer was out to the site and found no issues with my application. This decision by the RM has the effect of sterilizing this property and it is causing me financial hardship.

KEY ISSUES

1. **Did the complainant receive a fair and impartial hearing to consider her CU application?**
2. **Was council's decision to reject the complainant's CU application reasonable and consistent with relevant legislation, by-laws, established policy and the evidence?**

BACKGROUND

The complainant co-purchased two existing parcels of land in the RM in 2010, each under separate title. One parcel is 6.31 acres and the other, approximately 136 acres. Both parcels are in areas of the municipality zoned as AG (Agriculture General). The minimum parcel size to qualify as a farm site in the AG zone is 80 acres.

In September 2010, the complainant approached council with a proposal to subdivide the 136-acre parcel into a residential subdivision. Council was not receptive to the idea of residential development on agricultural land and the complainant did not pursue a formal application for subdivision.

In the fall of 2011, the complainant made a CU application to establish a single family home on her 6.31-acre parcel of land. Conditional use approval was required to bring the existing site into conformance with the RM's *Zoning By-Law 1144*, which was in effect at the time of the application. By-law 1144 lists "Non-Farm Dwellings" as a conditional use. CU applications are approved or rejected pursuant to subsection 106(1) of *The Planning Act* which is referenced later in this report.

In this case, the Mid-West Planning District reviewed the application and determined that all the statutory requirements under subsections 103(1) to 103(4), and 169(1) and 169(3) of *The Planning Act* had been fulfilled. The CU application, however, was rejected following a public hearing held as a requirement of section 105 of *The Planning Act*.

Public hearing

105 Upon receiving an application for approval of a conditional use, the board, council, or planning commission must

(a) hold a public hearing to receive representations from any person on the application; and

(b) give notice of the hearing in accordance with section 169.

POSITION OF COMPLAINANT

The complainant believed that council treated her unfairly at the public hearing held to consider her CU application. She alleged that the time she was allotted to make her representation was limited to a few minutes, which did not allow her to fully present her case or address opposing views.

The complainant also claims that council's decision to reject her CU application was unfair. She alleged that the decision was not consistent with decisions made with respect to similar CU applications. The complainant believed that some council members suspected that she had an underlying motive related to the earlier subdivision proposal involving her 136-acre property. She maintained that the subdivision proposal was unrelated to her CU application but believes her previous interaction with council resulted in a dislike for her which was reflected in council's treatment of her during the hearing and its decision to reject her CU application.

She also believed that suspicion about her intentions was fuelled by a petition circulated by a neighbouring property owner who opposed her conditional use. She alleged that the petition considered by council was based on inaccurate and misleading information.

POSITION OF THE RURAL MUNICIPALITY

The RM maintains its decision to reject the CU application was made in accordance with *The Planning Act* and the municipality's by-laws. In a written response to our office the RM's chief administrative officer (CAO) stated the following:

Under the Municipality's Zoning By-law in the 'AG' General Zone non-farm dwellings are only permitted following the approval of a conditional use under the Planning Act. Under the Planning Act Council considers the application based on the application, the material filed with the Municipality, and the representations for and against the proposal.

The RM referenced the authority councils derive from subsection 106(1) of *the Planning Act* to reject or approve conditional use applications:

Decision

106(1) After holding the hearing, the board, council or planning commission must make an order

(a) rejecting the application; or

(b) approving the application if the conditional use proposed in the application

(i) will be compatible with the general nature of the surrounding area,

(ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area, and

(iii) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.”

The RM maintains that it did not approve any CU applications in the past which it considered to be similar to the complainant’s application.

The RM also denied the complainant’s allegation that the hearing held to consider her CU application was procedurally unfair, indicating that the hearing was conducted in accordance with the provisions of the legislation and the RM’s procedures by-law.

The RM stated that in its opinion, the complainant has been treated fairly throughout the process and expressed its intent to continue to do so.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- A review of *The Planning Act*, the RM’s *Zoning By-Law 1144*, and documentation provided to our office by the RM and the complainant.
- Interviews with a number of government officials including the CAO, Manitoba Local Government representatives, and extensive discussions with the Mid-West Planning District development officer regarding the interpretation of municipal by-laws.

- Interviews with the complainant and members of council.
- An interview with the RM's legal counsel regarding the RM's interpretation and application of *The Planning Act* and the RM's by-laws as they relate to the complainant's CU application.
- A visit to the location of the complainant's property and surrounding properties for further insight into the concerns expressed by both parties.
- A meeting with council on September 5, 2013 to share our investigative findings and receive any additional information.

ANALYSIS OF ISSUES AND EVIDENCE

1. Did the complainant receive a fair and impartial hearing to consider her CU application?

The complainant believed that she was treated differently than other conditional use applicants in that she was restricted to a few minutes to make her presentation in support of her application.

She also alleged that she was not given the opportunity to challenge information presented in opposition to her application; including a petition that she indicated was misrepresented to neighbouring landowners. She alleged that some landowners who signed the petition were led to believe that she was intending to apply for a residential subdivision, which was false. The complainant maintained that council considered the petition in its decision but did not engage in discussion of the petition or allow her to present evidence to challenge its veracity.

The complainant indicated that she was not provided with an explanation from council for denying her CU application. Without an explanation, the complainant's perception that council did not like her was confirmed.

In its response to our inquiries, the RM advised our office by letter that the hearing was conducted in accordance with existing laws:

The hearing itself was conducted in accordance with the Planning and Municipal Act requirements, and the Municipality's procedural by-law. Everyone present at the hearing was treated respectfully and afforded an opportunity to make a representation to Council for its consideration. [The complainant] was not restricted in doing so in any way.

The RM advised our office that while the complainant was not invited to challenge the petition, neither did she ask for an opportunity to challenge the petition at the hearing. The RM further alleged that the complainant did not use the entire time she was allotted for her presentation.

The hearing proceedings were not recorded and so there is no definitive record as to what transpired. That being said, we were unable to establish that the complainant asked for and was denied the opportunity to challenge information presented at the hearing. While the complainant may not have been invited to challenge the petition, this is different from being refused an opportunity to challenge the petition. For the complainant to succeed in her argument that she was denied the opportunity to challenge the petition, she would have had to have asked to challenge the document, or at least have attempted to do so, and been denied. There is no evidence that this occurred.

While the complainant may have felt that she was afforded too little time to fully present her case, there is no evidence that she requested additional time or objected to the time she was afforded. Absent such evidence, and taking note of the RM's position that she did not use all of the time that was allotted, we are unable to support her claim that she was denied sufficient time to make her case.

Given the above, we are of the view that there is no conclusive evidence that the complainant was unreasonably restricted from presenting her case or prevented from challenging objections to her application.

2. Was council's decision to reject the complainant's CU application reasonable and consistent with relevant legislation, by-laws, established policy and the evidence?

By-law 1144, Table 4.1 lists "non-farm dwellings" as a conditional use in the AG zone and specifies a minimum site size of two acres to a maximum of 10 acres. A parcel of land must be 80 acres or more to conform to the farm site size requirement under the terms of this by-law.

A non-farm or non-conforming site is property that does not meet the size requirements of the zoning by-law. The intent of the conditional use is to bring a non-conforming (non-farm) site into conformance with the by-law for a conditional use; such as establishing a home, which is described in the by-law as a non-farm dwelling.

The complainant's 6.31-acre site is considered a non-farm site in the AG zone due to its size. Conditional use approval is therefore required for the establishment of a non-farm dwelling in the area zoned for general agriculture. The complainant declared that her sole intended use of the 6.31-acre parcel was to construct a single family home for her and her father, a retired farmer. The complainant further argued that her application would have no effect on the use of the adjacent 136-acre parcel of land she co-owns.

The complainant cited examples of CU applications that were approved and argued that her application was comparable to these applications. She did not understand why her application was rejected when others were approved.

As part of our investigation, we examined four CU applications that were received by the Mid-West Planning District for its review and comment before being forwarded to the RM for a public hearing. The Mid-West Planning District representative reported that the CU applications,

including that of the complainant, all met the statutory requirements of *The Planning Act* which require compatibility with the surrounding area and consistency with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

It is important to note that the assessment of the planning district is put before council and is information council may rely upon in reaching its decision. It is not determinative of the issue as the final decision rests with council.

The complainant was of the view that she was treated differently by council, therefore unfairly. No reasons were provided to her by council to explain why her application was rejected. The complainant drew her own conclusion; that council disliked and mistrusted her and as a result rejected her application.

In response to our inquiries, the RM indicated that council considers each application on its own merits and does not make decisions based on personal feelings towards the applicant. The RM also disagreed with the complainant's belief that CU applications similar to hers were approved. In representations to our office it stated:

...existing residential development in the valley are farming oriented except for two, the one established before the Zoning By-law came into effect, and the [name] residence. In these cases the developments are physically separated by geographical conditions from the adjacent agricultural parcels. [The complainant's] 6.3 acre parcel is not separated by geographical conditions; she has an unobstructed connection to the adjacent parcel. There have not been any applications like her's (sic) that have been approved.

Council viewed the [name] application as utilizing a parcel of unproductive agricultural land on a steep rocky hillside adjacent to the municipal well. The quarter section was already fragmented. [The complainant's] parcel is not limited the same way, and remains suitable for farming activity. Council is of the view that development in this area must be limited to agricultural.

We reviewed the complainant's CU application and compared it with a sample of other CU applications to establish a non-farm dwelling on non-farm sites that were approved by the RM in 2011. Based on our examination of approved CU applications, the applications were similar on paper to that of the complainant's. All were made in accordance with the provisions of by-law 1144 for the purpose of establishing a non-farm dwelling on a non-farm site. The conditional use would serve to bring the use of each site into conformance with the by-law. Regarding each of the applications reviewed, the Mid-West Planning District expressed "no concerns".

Absent written reasons, we made further inquiries in order to understand the basis for council's decision. In response, the RM identified a number of factors for rejecting the complainant's CU application:

A petition was presented to Council by one of the objectors. Council accepted this petition as it does any information that a presenter wants to present. Council does

not tell a presenter what they can present. What weight or use Council will give to the information is a different matter. Council considers the application together with all of the other material and representations it receives in making its decision.

In the case of [the complainant's] application there were a number of issues or concerns Council had to consider as part of the decision making process including: Council's view of limiting non-agricultural development in the valley, opposition from people residing in the area, proximity to another residence with the resulting potential for water and sewage disposal concerns, uncertainty over [the complainant's] intent respecting the uses for the property, and work to be completed to accommodate the proposal including the construction of an access to the property.

We also reviewed council's representations to see if its decision was in accordance with subsection 106(1) of *The Planning Act*, which sets out the basis for accepting or rejecting CU applications:

Decision

106(1) After holding the hearing, the board, council or planning commission must make an order

(a) rejecting the application; or

(b) approving the application if the conditional use proposed in the application

(i) will be compatible with the general nature of the surrounding area,

(ii) will not be detrimental to the health or general welfare of people living or working in the surrounding area, or negatively affect other properties or potential development in the surrounding area, and

(iii) is generally consistent with the applicable provisions of the development plan by-law, the zoning by-law and any secondary plan by-law.

In reaching a decision to approve a conditional use, council must be satisfied that the proposed use meets the requirements of clause 106(1)(b) of *The Planning Act*. It is entitled to consider the concerns of parties who assert that they will be affected by their decision to approve a conditional use. In this case, council appears to have accepted the arguments it heard in opposition to the complainant's CU application.

While not all of council's rationale for rejecting the complainant's application appears to be related to the provisions set out in *The Planning Act*, we are unable to conclude that the decision was contrary to the law or clearly wrong or unreasonable.

Undue Hardship

The complainant claimed that the RM's decision to reject her CU application had a "sterilizing" effect on her property, causing her financial hardship.

The RM advised us that in September 2011, the complainant applied for and was issued a specialized agricultural permit. Table 4.1 of the RM's zoning by-law lists "Agricultural Activities Specialized" as a permitted use for non-farm parcels of land no smaller than two acres. "Activities" described include such things as market gardens, nurseries or greenhouses. Permitted uses do not require a public hearing.

The specialized agricultural permit issued to the complainant allowed her to establish a residence on her 6.31-acre parcel of land, subject to carrying out the farming activities specified in the permit.

As a result, it is our view that the RM's decision to reject the complainant's CU application did not have a "sterilizing" effect on her property causing her financial hardship.

CONCLUSION

Procedural and Substantive Unfairness Not Supported

Under *The Municipal Act*, municipal councils have a general duty to consider the well-being and interests of the municipality as a whole.

Councils must sometimes operate in situations where they are considering the interests of the community while making decisions affecting individual rights, pursuant to specific statutory criteria, such as *The Planning Act*. Some of their 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 both financial and personal terms.

Our investigation determined that the evidence did not support the complainant's belief that council's decision was inconsistent with other conditional use decisions made by the RM or based on irrelevant considerations. Nor could we conclude that the conduct of the hearing, although unsatisfying for the complainant, resulted in her being treated unfairly.

Providing Meaningful Reasons for Decisions

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

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

In this case, the application process and the hearing before council were frustrating for the complainant. She was left with a firm belief that she had been treated unfairly; that a significant decision affecting her life was not reasonable and that she had been treated differently than others in similar situations.

The absence of clear and meaningful reasons for decisions can result in individuals forming the belief that the decision maker was biased and/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 council decisions. A copy of this guide can be found at www.ombudsman.mb.ca.

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

For all of the reasons above, Manitoba Ombudsman strongly urges the RM of Saskatchewan, and all other municipalities, to issue written reasons for decisions in respect of conditional use applications.

November 27, 2013

MANITOBA OMBUDSMAN