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Docket: CI 18-01-15026
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

6165347 MANITOBA INC. and 7138793 MANITOBA LTD.,	)	Counsel:
	)	DAVE G. HILL and
applicants,	)	KEVIN D. TOYNE
- and -	)	for the applicants
	)	
THE CITY OF WINNIPEG and CITY CENTRE COMMUNITY COMMITTEE,	)	BRIAN J. MERONEK Q.C. and
	)	ERIN A. LAWLOR-FORSYTH
	)	for the respondents
respondents.	)	
	)	JUDGMENT DELIVERED:
	)	OCTOBER 5, 2020

***Notice**: Due to the COVID-19 pandemic, this matter was heard remotely, by teleconference.*

GRAMMOND J.

INTRODUCTION

[1] This decision relates to two motions in this acrimonious dispute: the applicants' motion to vary a previous order and the respondents' motion to expunge some of the applicants' evidence.

BACKGROUND

[2] The following context is important to this decision.

[3] On September 19, 2018, I granted an order for *mandamus*[1] (the "Mandamus Order"), which included the following provisions:

> 2. **THIS COURT FURTHER ORDERS THAT** the respondent City Centre Community Committee conduct a public meeting regarding Application SP1/2018 and conduct a public hearing regarding DASZ File No. 12/2018 at its meeting on November 13, 2018.
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> 3. **THIS COURT FURTHER ORDERS THAT** the City[2] through its administration is required to take all steps necessary to have the required material in relation to the Applications available to the said Committee for its consideration on November 13, 2018.

[4] On August 6, 2019, I found the respondents in contempt of paragraph 2 of the Mandamus Order for failing to process Application SP1/2018 (the "Secondary Plan Application") at a public meeting, pursuant to the non-statutory (policy) approach (the "Contempt Finding")[3].

[5] On March 30, 2020, I denied the respondents' request that the Contempt Finding be reconsidered (the "March 30 Decision")[4], and I stated:

> [62] Although the respondents have not purged their contempt, they filed evidence that if the reconsideration motion is denied, the City will do so, by forwarding the Secondary Plan Application to be dealt with by the City Standing Policy Committee, without delay. This committee is the next body that should address the Applications pursuant to the non-statutory (policy) approach.
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> . . .

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[1] The reasons for the Mandamus Order are found at ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2018 MBQB 153

[2] The "City" is the respondent, The City of Winnipeg

[3] The reasons for the Contempt Finding are found at ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2019 MBQB 121 (the "Contempt Reasons")

[4] The reasons for the March 30 Decision are found at ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2020 MBQB 60.

> [64] … in my view this "evidence"[5] is more properly characterized as the respondents' position … Accordingly, despite the manner in which it was put before the court, I accept the substance of the statement as a position that the respondents have undertaken, and from which they cannot and will not resile.
>
> [65] I do not agree with the applicants' request that the Applications[6] now be referred directly to City Council to be heard, because I appreciate that the planning of a new development is a process that involves many factors and nuances that require analysis and discussion. An additional step in the process prior to a decision by City Council will require the parties to further consider, and hopefully discuss, any substantive issues with the Applications.
>
> [66] I am ordering that the Applications be considered and dealt with by the City Standing Policy Committee, pursuant to the non-statutory (policy) approach, without delay. The Secondary Plan Application should be addressed first, followed by the applicants' zoning application. I previously set aside the decisions that the Committee made at the Meeting, and it is logical that the Applications continue to be dealt with concurrently, and in sequence.

[6] The order that flowed from the March 30 Decision (the "Order"), included the following provisions:

> 2. **THIS COURT FURTHER ORDERS THAT** the November 13, 2018 decisions of the City Centre Community Committee concerning DASZ 12/2018 and SP 1/2018 be and hereby are set aside.
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> . . .
>
> 4. **THIS COURT FURTHER ORDERS THAT** the City's Standing Policy Committee on Property and Development, Heritage and Downtown Development consider and deal with application SP 1/2018 pursuant to the non-statutory (policy) approach and the application DASZ 12/2018 concurrently in sequence and without delay.

[7] On May 21, 2020, the City's Standing Policy Committee on Property and Development, Heritage and Downtown Development (the "SPC") held a meeting (the "SPC Meeting") and recommended both that the Secondary Plan Application not be

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[5] The applicants submitted, and I agreed, that this evidence was not admissible as filed.

[6] "Applications" includes both the Secondary Plan Application and the DASZ Application in File No. 12/2018 (the "Zoning Application").

approved, with permission to amend, and that the Zoning Application be rejected. In doing so, the SPC relied upon the recommendations of the City's Public Service.

[8] On May 22, 2020, the Executive Policy Committee (the "EPC") held a meeting at which it concurred in the recommendations of the SPC.

MOTION TO EXPUNGE

[9] I will deal first with the respondents' motion to expunge the following excerpts of the affidavit of Andrew Marquess, sworn July 24, 2020 (the "Affidavit")[7]:

a) paragraph 28 of the Affidavit and one paragraph of Exhibit "R", which is a letter written to me by Mr. Toyne dated May 28, 2020;

b) paragraphs 42 through 49 and Exhibit "BB", which relate to external legal costs incurred by the City; and

c) paragraphs 55, 56, 57(a), (b), (c), (d), (f), (g), (h) and (i), and Exhibits "DD" and "FF", which relate to the merits of the Applications, and in particular, potential changes to certain City policies.

Relevant Legal Principles

[10] Queen's Bench Rule 25.11(1)(c) provides that the court may expunge all or part of a document on the ground that it is an abuse of process.

[11] In ***Nygård International Partnership v. Canadian Broadcasting Corporation et al.***, 2011 MBQB 124 (CanLII), the court stated:

> [16] Abuse of process has been succinctly described in the oft-quoted passage by Arbour J. in ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77:

[7] The respondents' motion, as filed, also contained a request to strike various paragraphs of the applicants' motions brief relative to the motion to vary, on the grounds that the content was scandalous and vexatious. After discussion at the hearing, the respondents agreed not to pursue that aspect of the motion.

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" …, and as "oppressive treatment" …

[12] In ***Behn v. Moulton Contracting Ltd.***, 2013 SCC 26, the court stated:

> [40] The doctrine of abuse of process is characterized by its flexibility. … abuse of process is unencumbered by specific requirements. … the doctrine of abuse of process
>
> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it …
> >
> > [Emphasis in ***Behn***]

[13] In ***Vitacea Company Ltd. et al. v. The Winning Combination Inc. et al.***, 2016 MBQB 180 (CanLII), the court stated:

> [87] … An abuse of process may arise when a legal process is used for an ulterior motive, other than that for which it was intended. When properly invoked, an allegation of abuse of process is meant to provide protection against harassment or the perversion of the legal process for the purposes of accomplishing an improper result. See ***Re Moss*** (1999), 1999 CanLII 14182 (MB QB), 137 Man.R. (2d) 199 at para. 35 (C.A.). … A particular or unique emphasis and focus of an abuse of process claim is on the court's integrity and its interest in maintaining confidence in the administration of justice.

Position of the Parties

Respondents

[14] The respondents argued that the impugned evidence was irrelevant and improperly before the court, such that it was an abuse of process.

Applicants

[15] The applicants opposed the hearing of the expungement motion on the basis of late filing. The Affidavit was served on July 27, 2020 and was not cross-examined upon. The motion was served on the afternoon of Friday, September 4, before a long weekend and the hearing date of September 9. In addition, the respondents tendered no evidence in support of their request for short leave.

[16] The applicants argued on the merits of the motion that all of the impugned evidence was relevant to the motion to vary, and admissible as filed.

Analysis

[17] I agreed to hear the motion, although the late filing was not explained by the respondents. I did so because irrelevant and inadmissible evidence must be expunged or disregarded, and I was satisfied that any prejudice to the applicants arising from the late filing could be compensated by an award of costs.

[18] It is important to note that the respondents bore the onus of establishing that any part of the Affidavit was an abuse of process and should be expunged.

[19] I will address first paragraph 28 and Exhibit "R" of the Affidavit. In paragraph 28, Mr. Marquess deposed that he provided a list to Mr. Toyne of zoning applications heard by the SPC between 2016 and 2019, having obtained it from the City's website. The impugned paragraph of Exhibit "R" reflects that list.

[20] As set out below, one of the issues raised by the respondents on the motion to vary is whether the SPC can hear the Zoning Application afresh. As such, whether the

SPC has done so in the past is relevant to the motion, even if, as the respondents argued, the SPC did so pursuant to specific authority that does not apply here.

[21] The respondents also argued that the evidence is not before the court properly because it is found in a letter written by Mr. Toyne, attached to the Affidavit as an exhibit. I agree that a better approach would have been Mr. Marquess deposing to and attaching the internet searches that he conducted, but that was not done. As written, the Affidavit discloses the source of the public information set out in Exhibit "R", and it is admissible under Queen's Bench Rule 39.01(4).

[22] For these reasons, this evidence does not constitute an abuse of process, so neither paragraph 28 nor the impugned paragraph of Exhibit "R" will be expunged.

[23] Paragraphs 42 to 49 and Exhibit "BB" of the Affidavit relate to external legal costs incurred by the City in other litigation matters, which the respondents argued are irrelevant and intended as an abuse to inflame the court's view of the respondents. The applicants argued that this information is relevant to their request that I impose fines upon the respondents, and in particular the quantum of the requested fines, to which ability to pay and access to funds are relevant. In other words, the requested fines constitute a small percentage (1.43%) of the amounts that the respondents have spent and will spend on external legal counsel.

[24] Again, the impugned evidence is available publicly and has some relevance to the issues before me. The City's external legal costs are one benchmark against which the proposed fines could be measured, though there are surely other components of its overall budget that could be utilized for the same purpose. Having said that, the evidence

does not constitute an abuse of process, because it is neither unfair nor oppressive. Similarly, I have no evidence that it was filed for an ulterior motive, or any improper purpose, and I am not prepared to infer such an intention. Accordingly, paragraphs 42 to 49 and Exhibit "BB" of the Affidavit will not be expunged.

[25] The evidence at paragraphs 55, 56, 57(a), (b), (c), (d), (f), (g), (h) and (i), and Exhibits "DD" and "FF" of the Affidavit relates to proposed changes to documents governing the density of developments along rapid transit corridors in Winnipeg, which is an issue on the merits of the Applications. The respondents argued that this evidence is irrelevant to the motion to vary. The applicants submitted that the City's intention to amend the documents supports their request that the Order be varied to reflect that the Applications be considered by City Council forthwith.

[26] I accept that this evidence was tendered to support the applicants' submissions on urgency, because if the proposed changes are implemented the merits of the Applications could be impacted. Having said that, as I have stated repeatedly over the course of this litigation, the merits of the Applications are not before me, so the evidence is only marginally relevant. I have concluded, however, that the evidence does not constitute an abuse of process, because it is neither unfair nor oppressive. I have no evidence that it was filed for an ulterior motive, or any improper purpose, and I am not prepared to infer such an intention. Again, the majority of the evidence was obtained from the City's website.

[27] For all of these reasons the respondents' motion is dismissed.

SHOULD THE ORDER BE VARIED?

[28] The applicants sought to vary paragraph 4 of the Order to provide that the Applications should be heard afresh by City Council, because the respondents have failed to purge their contempt.

[29] The respondents argued that they are no longer in contempt, and that neither City Council nor the SPC can hear the Applications afresh pursuant to Development Procedures By-law No. 160/2011. Instead, the Applications, having been considered by the EPC, should proceed either to City Council on the current record or to the respondent City Centre Community Committee (the "Community Committee"), as the original hearing body. In the alternative, the respondents advised that they would not oppose the Applications being heard afresh by the SPC, with new material before it, if the process unfolded in a clear, efficient and thorough manner.

Relevant Legal Principles

[30] Court of Queen's Bench Rule 59.06(2) provides that a party who seeks to obtain relief other than that originally awarded may make a motion in the proceeding for the relief claimed.

[31] In ***The Assiniboine Credit Union Limited v. Tresoor***, 2002 MBQB 325 (CanLII), the court stated:

> [2] … it is well established that the court has discretion to vary or amend its own decision where it is satisfied that the original decision was in error because of overlooked or misconstrued material evidence or misapplied law, or where it is necessary to clarify ambiguous language.
>
> [3] It is also well established that this discretion should be used sparingly and with the greatest of care so that abuse of the court process does not occur. It should not be used, however, to allow a party to fix a "broken down case" after

> the fact (see ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983).

[32] In ***Wong v. Grant Mitchell Law Corporation et al.***, 2015 MBQB 146 (CanLII), the court held that the applicability of Rule 59.06(2)(d) is:

> [16] … restricted to instances in which different forms of relief might flow from the same finding of liability and gives to a judge who has ordered one form of relief a discretion to replace it with another form of relief upon a plaintiff or defendant showing significant cause. …

[33] In ***Wong v. Grant Mitchell Law Corp. et al.***, 2016 MBCA 65 (CanLII), the court stated:

> [4] … Rule 59.06 sets out the narrow set of circumstances of when a … motion judge has discretion to potentially re-open a formalized judgment or order. …

And further stated:

> [5] Rule 59.06 is not intended as a back door appeal of the merits of an unfavourable decision. …

[34] More specifically, and in the context of a contempt order, Court of Queen's Bench Rule 60.10 provides:

> **Content of order**
> 60.10(5) In disposing of a motion under subrule (1) the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
>
> . . .
>
> (d) do[es] … an act; [and]
>
> . . .
>
> (f) compl[ies] with any other order that the judge considers necessary;
>
> . . .
>
> **Discharging or setting aside contempt order**
> 60.10(8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrules (5) or (6) and may grant such other relief and make such other order as is just.

[35] In other words, the court has a broad power in contempt matters, which is consistent with established authorities regarding the importance of the rule of law.[8]

[36] In ***Chiang (Re)***, 2009 ONCA 3 (CanLII), the court stated:

> [118] … These rules give to the court an ongoing supervisory role over a civil contemnor together with the discretion to vary … a contempt order if the contemnor purges the contempt.

[37] In ***Sabourin and Sun Group of Companies v. Laiken***, 2013 ONCA 530 (CanLII), the court stated:

> [34] … as the ultimate aim of the law of civil contempt is to secure respect for an compliance with court orders, there must be a certain element of flexibility in the way it is applied.

The court also confirmed that Rule 59.06(2) applies to contempt proceedings.

Analysis

[38] I will address first the question of whether the respondents have purged their contempt.

[39] The respondents argued that they did so because at the SPC Meeting the Secondary Plan Application was considered pursuant to the non-statutory (policy) approach.

[40] The applicants argued that the respondents' contempt has not been purged, because they have failed to comply with paragraph 4 of the Order in three ways:

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[8] ***Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.***, 1992 CanLII 29 (SCC); ***United Nurses of Alberta v. Alberta (Attorney General)***, 1992 1 S.C.R. 901; ***Vancouver Sun (Re)***, 2004 SCC 43; ***Larkin v. Glase***, 2009 BCCA 321

a) the SPC did not consider the Applications without delay;

b) when the SPC considered the Applications on May 21, 2020, it did not hear the Zoning Application afresh; and

c) when the SPC considered the Applications on May 21, 2020, it did not have before if all of the required information in relation to the Applications.

[41] I will deal with each of these points in turn.

Delay

[42] The applicants argued that the SPC held a meeting on April 20, 2020, but did not consider the Applications. In addition, by the same date the respondents' counsel had not responded to various items of correspondence sent by the applicants' counsel after the March 30 Decision. The respondents have not explained their conduct.

[43] There may be valid reasons why the Applications did not appear before the SPC at the April 20, 2020 meeting given its proximity to the release of the March 30 Decision. Unfortunately, the respondents have not explained why the Applications did not appear, despite the clear order to proceed "without delay".

[44] In addition, the applicants' counsel sent correspondence to the respondents' counsel on each of March 31, April 2, April 8 and April 14, 2020. The respondents' counsel advised on April 14, 2020 that he was awaiting instructions from the respondents, and on April 21, 2020 (after another letter from the applicants' counsel) he advised that he had not had the opportunity to update the respondents on these matters. This delay has not been explained, and unfortunately it occurred despite my repeated suggestions that the parties communicate with one another.

[45] Given these facts, and in particular the lack of explanation advanced by the respondents, I cannot conclude that the SPC Meeting took place without delay, in compliance with the Order.

Fresh Hearing

[46] The applicants argued that pursuant to the Order, the Applications were to be heard anew, to achieve compliance with the Mandamus Order, which has not happened.

[47] On May 20, 2020, the day before the SPC Meeting, the City Solicitor sent to the applicants' counsel a letter setting out the process that the City proposed to follow at the SPC Meeting. The letter reflected that "it is the City's intention to not re-hold the public hearing in respect of [the Zoning Application]. [Emphasis in original.]

[48] The City Solicitor noted that although I set aside the "recommendations" of the Community Committee (paragraph 2 of the Order), I did not set aside the public hearing that took place in respect of the Zoning Application on November 13, 2018. To my knowledge, this distinction was never before raised or argued, and it is unclear what the respondents believed "setting aside" the decisions of the Community Committee entailed, if not a fresh hearing of the Applications. Having said that, and as the respondents argued, the Order does not provide expressly that the Zoning Application must be heard "afresh".

[49] The City Solicitor also stated that the SPC could not hear representations on the Zoning Application because it was previously the subject of a public hearing before the Community Committee. The City Solicitor pointed to section 51(9) of Procedure By-law No. 50/2007 as the authority for this position.

[50] On the motion to vary, the respondents took the position that pursuant to the by-laws the SPC does not hear zoning applications afresh, except in two specific situations, neither of which apply here. Accordingly, the SPC is equipped to hear zoning applications in the first instance.

[51] As set out above, the respondents suggested, prior to the issuance of the March 30 Decision, that the SPC deal with the Secondary Plan Application as a means of purging their contempt. The respondents took no other, distinct position relative to the hearing of the Zoning Application, such as whether it could or should be heard by the SPC, or some other body. They did not refer me to either the Procedure By-law or the Developments Procedure By-law.

[52] I am mindful of the fact that the Contempt Finding did not pertain to the Zoning Application, and within that narrow context that I understand the respondents' approach. Having said that, in the Contempt Reasons I stated the following with respect to the relationship between the Applications:

> [37] … it was and is my understanding, and I thought the parties' understanding also, that a secondary plan would accompany the Zoning Application. The Applications were filed together and at all times the applicants have sought to pursue them concurrently.
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> . . .
>
> [76] Given the finding of contempt, I agree that the decisions should be set aside, and I so order. Given that the Applications are to proceed concurrently, the respondents' failure to comply with the Order relative to the Secondary Plan Application may have impacted the Committee's decision relative to the Zoning Application, so I am satisfied that <u>both decisions should be set aside</u>.
>
> [Emphasis added.]

[53] Accordingly, and within this broader context, I find the respondents' approach troubling. I am not suggesting that their proposal was an attempt to mislead, but it seems that my reliance upon the proposal, in the context of the Applications being heard together, gave rise to an order that the respondents now say could not be carried out as written.

[54] The applicants directed me to the following cases considering tribunal decisions set aside by the court:

a) ***R. v. Northumberland Compensation Appeal Tribunal***, [1952] K.B. 338 at pages 346-47, where Lord Denning stated:

> … the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the Tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. …

b) ***Watco v. St. Clements (Rural Municipality)***, 1979 CanLII 2567 (MBQB), where the court stated:

> 14 … the responsibility of the council would be properly exercised and the interests of the ratepayers would be properly protected if the municipality… started its reconsideration of the matter at the point where it erred in its procedure. …

c) ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848, at pages 862-63, where the court stated:

> … Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision …

And quoting ***Re Trizec Equities Ltd. and Assessor Burnaby-New Westminster***, (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) wrote:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing a render a valid decision …

[55] The respondents argued that these cases do not apply because the Order did not provide that the Applications were to be heard by the Community Committee that heard them initially in November 2018. Rather, the Applications were sent to another body, the SPC, which could not consider new material and could not hold a public hearing for the Zoning Application. The respondents did not, however, provide me with authorities to support this distinction.

[56] On the basis of the authorities before me, I am satisfied that when I "set aside" the November 13, 2018 decisions of the Community Committee (paragraph 2 of the Order), it followed that the Applications were to be heard afresh pursuant to paragraph 4 of the Order. In other words, since the SPC did not hear the Zoning Application afresh on May 21, 2020 paragraph 4 of the Order was not complied with. If the language of the Order was ambiguous, it requires clarification, and I am ordering that paragraph 4 of the Order be varied as set out at paragraph 70 below.

Required Information

[57] As set out above, pursuant to the Mandamus Order the City was ordered to take all steps necessary to have the required material available to the Community Committee on November 13, 2018. Unfortunately, not all of the information submitted by the applicants was made available. Although I did not find the respondents in contempt with respect to this issue, I stated in the Contempt Reasons that:

> [42] On October 29, 2018, the applicants delivered a letter and enclosures (the "October 29 Delivery") to each of three City employees ... The October 29 Delivery included a proposed "minor" amendment to the applicants' development, in response to comments made by the City on October 19, 2018 to the applicants' engineering consultants.
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> . . .
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> [44] On November 2, 2018, counsel for the City advised the applicants that the October 29 Delivery ":was not received in time to be incorporated into the Administration Report for this matter. However, you are welcome to present this information directly to the Community Committee at the public hearing on November 13, 2018".
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> . . .
>
> [53] The City has provided no explanation for its refusal to distribute the October 29 Delivery, except that it was not filed with the City Clerk's office. …
>
> [54] I am troubled by the City's approach, particularly given the issuance of the [Mandamus] Order, and the applicants' warning that the Committee would not be informed fully without the October 29 Delivery. I would have anticipated that the City would act vigilantly and with caution, particularly given the applicants' previous allegations of bad faith against it. Instead, it seems to have chosen to be uncooperative with respect to distribution of the October 29 Delivery.

[58] In addition, one of the reasons that the Community Committee recommended the rejection of the Zoning Application was the lack of information before it, and in particular information that was submitted by the applicants but not put before the Community Committee.

[59] I recognize that the Order did not specify what information was to be put before the SPC, but it is clear that, again, not all of the information submitted by the applicants was made available. I do not understand this approach, in light of my comments in the Contempt Reasons, cited at paragraph 57 above.

[60] In fairness to the respondents, however, there is no evidence that the applicants made any attempts to ascertain what information the respondents would put before the

SPC. Similarly, the applicants chose not to attend the SPC Meeting. While they may have had no legal obligation to do so, if the applicants had taken either or both of those steps some of the issues that arose at the SPC meeting might have been mitigated.

[61] In conclusion, since the SPC did not have before it all of the required material as provided in the Mandamus Order, it is clear that the applicants have yet to receive the full benefit of that order.

Conclusion

[62] The Secondary Plan Application was dealt with at the SPC Meeting pursuant to the non-statutory (policy) approach, but that fact must be considered flexibly and in the context of the whole dispute for the purposes of determining whether the respondents have purged their contempt. For the reasons set out above regarding the issues of delay, a fresh hearing of the Zoning Application and the placement of required information before the SPC, I have concluded that the respondents have not yet purged their contempt.

City Clerk's Evidence

[63] In support of their contention that the SPC cannot hear the Zoning Application afresh, the respondents relied upon the evidence of the City Clerk (see affidavit of Marc A. Lemoine, City Clerk and Senior Election Official in the City Clerk's Department of the City, sworn August 17, 2020), and in particular his recitation and interpretation of the Procedure By-law and the Development Procedures By-law.

[64] The applicants took issue with reliance upon this non-expert opinion evidence on the basis that, among other things, the four requirements set out at paragraph 87 of

Ladco Company Limited v. The City of Winnipeg, 2020 MBQB 101, were not met. One of those requirements is that the witness is in a better position than the trier of fact to draw a particular inference, which is not met in this case. The by-law provisions speak for themselves and could have been filed as authorities upon which the respondents relied, and asked me to interpret, such that sworn evidence was unnecessary.

[65] Similarly, the evidence does not reflect either that the City Clerk has personal knowledge of the Applications or that he has drawn inferences after personally observing certain facts, which are also required. Accordingly, I have attached no weight to his opinion as to the by-law provisions, particularly in light of the respondents' acknowledgment that the SPC can hear the Zoning Application afresh pursuant to an order of this court.

Next Steps

[66] I have considered the applicants' request that the Applications be heard afresh by City Council, but I remain of the view that any outstanding substantive issues relative to the Applications should be reviewed and discussed at every possible stage of the process. Again, I encourage all parties to communicate and work together to address all outstanding issues. Given past events, I understand the applicants' hesitation to engage in a multi-stage proceeding, but this approach will provide the best opportunity for review and discussion of the substance of the Applications.

[67] I will add that as governmental authorities, the respondents' obligations in ongoing litigation differ from those of a private litigant[9], and in addition they must handle the

[9] ***1784049 Ontario Limited (Alpha Care Studio 45) v. Toronto (City)***, 2010 ONSC 1204

Applications with care and accuracy at all times. I do not accept the applicants' submission that the Applications should be heard afresh by City Council. Rather, the SPC and the EPC must fulfill their obligations to the applicants, and comply with the proper administrative process.

[68] With respect to timing and the applicants' allegations of delay, it is important to note that in May 2020 the Applications progressed from the SPC to the EPC very quickly, and since City Council meets regularly, I am not satisfied that any undue delay will arise from additional procedural steps. In addition, I have no evidence either that the City will implement imminently any proposed changes to the policies underlying the Applications or that the new provisions would apply to the Applications retroactively.

[69] I acknowledge that after the SPC Meeting in late May 2020, the applicants took the position that the Applications should be reconsidered by the SPC, and that they later changed their position to contend that City Council should act as decision-maker. While this shift may have frustrated the respondents, the applicants were entitled to make that decision at that time. Changes of position are a reality in litigation, and the applicants did so in this case after the respondents agreed to suggest a process for next steps and failed to do so. Accordingly, on June 17, 2020 the applicants put forward a proposal, which at the very least was an attempt to communicate with the respondents.

[70] On the basis of all of the foregoing, and the flexible approach to be applied in contempt cases, I am exercising my discretion and order that the SPC hold a fresh public meeting to consider the Secondary Plan Application, pursuant to the non-statutory (policy) approach, followed by a fresh public hearing to consider the Zoning Application.

As set out in the Affidavit, the SPC has experience hearing zoning applications in specific circumstances. I am satisfied that it is equipped to hear the Zoning Application afresh and that this approach is not prohibited by any by-law. To be clear, I am ordering that paragraph 4 of the Order be varied as follows:

> 4. **THIS COURT FURTHER ORDERS THAT** the City's Standing Policy Committee on Property and Development, Heritage and Downtown Development consider and deal with application SP 1/2018 afresh and at a public meeting, pursuant to the non-statutory (policy) approach and hear the application DASZ 12/2018 afresh and at a public hearing, concurrently in sequence and without delay, after fulfillment of applicable public notice requirements.

[71] In addition, prior to the SPC considering the Applications and as requested by the applicants, the City's Public Service will revise the administrative reports to address and take into account the following information:

a) the report provided by the applicants to the respondents on September 19, 2018, constituting the applicants' review of the July 31, 2018 City Administrative Report (Exhibit "W" to the Affidavit);

b) all of the information provided by the applicants to the respondents on October 29, 2018; and

c) the increased flow allowance for the land drainage release rate confirmed in emails exchanged between December 2019 and March 2020 (Exhibit "X" to the Affidavit).

[72] The applicants will then be given a reasonable opportunity[10] to review and respond to the revised administrative reports prior to the SPC public meeting/hearing. The

[10] No specific timeframe was suggested by the applicants, but in my view a reasonable opportunity is a minimum of 7 days.

applicants will then submit any responses to the revised administrative reports, after which the respondents will circulate the revised administrative reports and the applicants' responses thereto to the SPC, with notice to the applicants' counsel.

[73] In addition, all applicable public notice requirements must be met. I will not truncate the notice period, because the merits of the Applications must be considered fully, including any public responses that may be forthcoming.

[74] The evidence reflects that the SPC will next meet on November 2, 2020, but it may be difficult to complete revisions to the administrative reports and fulfill the applicable public notice requirements in advance of that date. Accordingly, the Applications will be considered at the following SPC meeting, set for November 16, 2020, and will proceed from there to the EPC and on to City Council, without delay.

SHOULD THE RESPONDENTS BE ORDERED TO PAY A FINE?

Relevant Legal Principles

[75] Court of Queen's Bench Rule 60.10(5) provides that where a finding of contempt is made, the court may order that the person in contempt pay a fine, and in doing so the court has a broad discretion.[11] In addition, the primary objective of sentencing in civil contempt is enforcement of the court order, and the secondary objective is punishment[12].

[76] I will add, as argued by the applicants, that in ***Chiang (Re)***, at paragraph 44, the court stated that it has "the ability to impose measured, but incremental, sanctions to obtain compliance" with an order, and to meaningfully address a contemnor's continuing

[11] The March 30 Decision at paragraphs 43 and 44.

[12] The March 30 Decision, at paragraph 45. Additional principles relevant to sentencing for civil contempt are found in the March 30 Decision, at paragraphs 46 to 48.

defiance.

[77] In ***Re Axelrod et al. and City of Toronto*** (1984), 48 O.R. (2d) 586 (Ont. H.C.J.), the court ordered the payment of a lump sum fine, plus an additional amount per day until a *mandamus* order was complied with.

Position of the Parties

Applicants

[78] The applicants sought an order that the respondents be fined, as a measured, incremental sanction:

a) the sum of $68,600, representing $100 per day from November 14, 2018 to September 30, 2020; and

b) an ongoing sum of $200 per day, until compliance.

[79] The applicants argued that the respondents believe they are in an "ivory tower", above the law, and they must learn that defiance of a court order by government cannot be tolerated because it strikes at the heart of the rule of law.

Respondents

[80] The respondents submitted that their actions after the March 30 Decision have demonstrated their genuinely-held belief that the Order was complied with, and that they have not been wilfully disobedient. Since their actions have been inconsistent with contempt, no fine should be imposed.

Analysis

[81] In the March 30 Decision, I stated:

> [68] I appreciate the argument of the applicants that any fine to be imposed [upon the respondents] should not be absorbed easily, because the respondents must face consequences for their actions. Having said that, and even though the respondents have the ability to pay a fine, I have concluded that the taxpayers should not ultimately bear that financial burden. I am also mindful, as was done in ***Axelrod***, that both the Contempt Finding itself and any orders of costs against the respondents should be taken into account in determining the overall sanction. In my view, both of those components are weighty in this case. In addition, I note that the City's conduct in ***Axelrod*** was held to be flagrant, deliberate, and "a mockery of law and order" that would not be tolerated. The conduct of the respondents in this case was not nearly that serious …
>
> . . .
>
> [70] … The main sanctioning objective is compliance with the Contempt Finding, not punishment of the respondents. While the Applications will now proceed without delay pursuant to the non-statutory (policy) approach, the fact remains that the land development and the Applications generally have progressed slowly for many reasons, with delay attributable to both sides. It would not be fair in that context to impose an ever-increasing fine upon the respondents, the expiry of which would depend upon the timing of a Standing Policy Committee meeting. This is so particularly given that the parties should engage in discussions about the substance of the Applications prior to that meeting.

[82] I have already concluded that the respondents have not purged their contempt, so there is a clear basis upon which a fine could be imposed upon them.

[83] Having said that, I agree that the respondents made efforts to comply with the Order, and characterized in its best light there was yet another misunderstanding over how this matter was to proceed, which can be attributed to both sides, in part.

[84] In addition to the comments that I have made already with respect to the conduct of both sides, I note that in December 2019 the respondents' in-house counsel forwarded to the applicants' counsel the City's position on various substantive aspects of the Applications, to which the applicants did not respond. Although the merits of the Applications are not now and have never been before me, it seems unfortunate that the applicants did not engage in discussions. While their reasons for not responding, which

are not in evidence, may have been fair and appropriate, this course of conduct illustrates that both sides are responsible for the lack of communication that has plagued this matter at times.

[85] Accordingly, with respect to sentencing I have concluded that little has changed since the Order was issued, and I am not convinced that the imposition of a fine upon the respondents is fair and equitable at this time.

COSTS

[86] The applicants and the respondents have requested orders for lawyer and client costs against each other.

[87] I have a general discretion to award costs under Queen's Bench Rule 60.10(5)(e), including on a lawyer and client basis, having regard to a series of factors set out in Rule 57.01(1), which include the importance of the issues, the conduct of the parties in the litigation and the relative success of a party in the litigation.

[88] Typically, lawyer and client costs may be awarded where there has been reprehensible, scandalous or outrageous conduct.[13] A finding of reprehensible conduct is sufficient to make an order of lawyer and client costs, which can include conduct deserving of reproof or rebuke.[14] In addition, although an order of lawyer and client costs will typically flow from a contempt finding, costs are always in the discretion of the court.

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[13] ***Young v. Young***, [1993] 4 S.C.R. 3, ***Judges of the Provincial Court (Man.) v. Manitoba et al.***, 2013 MBCA 74

[14] ***Judges of the Provincial Court (Man.)***, *supra* note 13

[89] In my view, the applicants are entitled to an order of lawyer and client costs relative to the expungement motion. It was filed on short notice, without any explanation, and lacked merit. I appreciate that the respondents sought to avoid an argument that the impugned evidence could not be challenged if no motion was filed, but in all of the circumstances and in particular the late filing, they should have argued that the impugned evidence carried little or no weight. Moreover, it appears that the motion was filed in response to the applicants' criticism of the City Clerk's evidence, such that it was driven more by strategy than by merit in any event. All of these factors are deserving of rebuke.

[90] The applicants shall also have their costs relative to the motion to vary, but not on a lawyer and client basis, because most of the requested relief was denied. Enhanced costs are appropriate, however, because of the respondents' unresponsive and at times uncooperative conduct in this litigation, as described in these reasons. Accordingly, the respondents shall pay to the applicants double costs on a class 4 basis.

[91] Since the respondents have been slow to pay previous costs orders, without explanation, I am ordering that the respondents pay the costs awards within 30 days of the bills of costs being finalized.

[92] If the parties cannot agree on the quantum of costs, I will set the amounts upon receipt of bills of costs for my review.

CONCLUSION

[93] The respondents' motion to expunge is dismissed, with costs to the applicants on a lawyer and client basis.

[94] The applicants' motion to vary is granted, with enhanced costs to the applicants.

Grammond J. Digitally signed by Grammond J. Date: 2020.10.05 14:45:03 -05'00' J.