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(Winnipeg Centre)
Indexed as: 6165347 Manitoba Inc. et al.
v. The City of Winnipeg et al.
Cited as: 2018 MBQB 153

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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applicants,	)	DAVE HILL
- and -	)	for the applicants
THE CITY OF WINNIPEG and CITY CENTRE COMMUNITY COMMITTEE,	)	VIVIAN LI
	)	for the respondents
respondents.	)	
	)	JUDGMENT DELIVERED:
	)	September 19, 2018

GRAMMOND J.

INTRODUCTION

[1] The applicants seek, among other things, an order for *mandamus*, requiring the respondent City Centre Community Committee (the "**Committee**") to hear two applications: a secondary plan application in file no. SP1/2018 (the "**Secondary Plan Application**") and a rezoning application in DASZ file no. 12/2018 (the "**Zoning Application**"), (collectively the "**Applications**"), at a meeting on November 13, 2018.

BACKGROUND INFORMATION

[2] The applicants are developers, and the owners of 33 acres of land in Winnipeg, zoned as industrial, and commonly known as part of the Parker Lands (the "**Land**"). The applicants seek to redevelop the Land in connection with which discussions have been ongoing with the respondent The City of Winnipeg (the "**City**") since late 2013.

[3] The Land was part of a land exchange approved of in July 2009, by the City's Municipal Council, on the recommendation of the Standing Policy Committee on Property and Development. As a condition of the land exchange approval, the Municipal Council directed that the City Public Service "be directed to prepare a developer led secondary plan for the... Parker Lands, which secondary planning process shall incorporate appropriate public consultations." (the "**2009 Directive**").

RELEVANT LEGAL PRINCIPLES

[4] Pursuant to Court of Queen's Bench Rule 68.01, the Court may grant an order of *mandamus*, but pursuant to the common law it is an extraordinary remedy to be granted only in exceptional circumstances (***Humphrey (Township) v. Robinette***, [1993] O.J. No. 1995).

[5] The parties agree that the applicable test was summarized by this Court in ***Sowemimo v. College of Physicians & Surgeons of Manitoba***, 2013 MBQB 42, with reference to ***Halsbury's Laws of Canada*** (online), Administrative Law (2018 Reissue), (VI.3.(3)) at HAD-132 "Compelling performance of statutory duty", as follows:

> **Requirements.** The general requirements for an order of *mandamus* are:
>
> - A clear legal right;

- A specific and public duty owed to the party seeking a remedy;
- A decision-making power with little or no room for discretion; and
- A prior demand and refusal to exercise the duty.

Conditions. The specific conditions for the grant of an order of *mandamus* are as follows:

1. There must be a public legal duty to act;

2. The duty must be owed to the applicant;

3. There is a clear right to performance of that duty, in particular:

   (a) the applicant has satisfied all conditions precedent giving rise to the duty;

   (b) there was

      (i) a prior demand for performance of the duty;

      (ii) a reasonable time to comply with the demand unless refused outright; and

      (iii) a subsequent refusal which can be either expressed or implied, *e.g.*, unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

   (a) in exercising a discretion, the decision maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

   (b) *mandamus* is unavailable if the decision maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

   (c) in the exercise of a "fettered" discretion, the decision maker must act upon "relevant", as opposed to "irrelevant", considerations;

   (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) *mandamus* is only available when the decision maker's discretion is "spent"; *i.e.*, the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought;

8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

Adequate alternate remedy. The number of possible appeals internal to administrative structures makes applications for *mandamus* particularly vulnerable to refusal on the grounds that there is an adequate alternative remedy available.

[6] The applicants also pointed to ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44, in support of their argument that a writ of *mandamus* may issue despite the fact that the respondents have not made a decision in this matter. Quite the opposite, the applicants are seeking to have the Applications heard. The applicants relied upon the following passage from ***Blencoe*** (at paras. 149 and 150):

> Today, there is no doubt that mandamus may be used to control procedural delays.... Members of our Court have on occasion alluded to the use of mandamus specifically to control delay.... And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship... In such a context in *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.), at p. 317, Strayer J. offers this widely quoted statement:
>
> > But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis in original]
>
> The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes

> through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes.

[7] The respondents argued that the *mandamus* request is premature, in that the Applications continue to move through the normal process applicable to each file, and are being handled in good faith. The respondents have taken the position that the Secondary Plan Application will proceed pursuant to a statutory by-law as opposed to a non-statutory policy decision.

[8] The applicants argued that the Secondary Plan Application should proceed pursuant to a non-statutory policy and that the City has treated the Applications differently than other applications, and in bad faith, which has caused significant delay.

ANALYSIS

[9] Pursuant to the 2009 Directive, the Land was to be developed pursuant to a developer led secondary plan. The term "developer led secondary plan" is undefined, and the 2009 Directive is silent as to whether the plan should proceed pursuant to a by-law or a policy. Having said that, the evidence reflects that other lands also subject to the 2009 Directive, the Fort Rouge Yards, were developed in 2010 pursuant to a non-statutory policy decision.

[10] The term "secondary plan" is defined in the City's Complete Communities Direction Strategy By-Law No. 68/10 as "[a] term that has been used to describe a detailed statutory plan which includes a statement of the City's polices and proposals for the development, redevelopment or improvement of a specific area of the city".

This definition does not dictate that every secondary plan is or must become a statutory plan.

[11] The term "secondary plan by-law" is defined in ***The City of Winnipeg Charter***, S.M. 2002, c. 39 (the "***Charter***") as: "a by-law passed under Part 6 (Planning and Development) that adopts, replaces or amends a secondary plan". In other words, a secondary plan can become a statutory plan, if Council passes a by-law.

[12] Similarly, Section 234(1) of the ***Charter*** provides:

> **Adoption of secondary plans**
>
> 234(1) Council may by by-law adopt a secondary plan to provide such objectives and actions as council considers necessary or advisable to address, in a neighbourhood, district or area of the city, any matter within a sphere of authority of the city, including, without limitation, any matter
>
> (a) dealt with in Plan Winnipeg; or
>
> (b) pertaining to economic development or the enhancement or special protection of heritage resources or sensitive lands.
>
> **Conformity with Plan Winnipeg**
>
> 234(2) A secondary plan by-law must be consistent with Plan Winnipeg.
>
> **Hearing on secondary plan by-law**
>
> 234(3) After council gives first reading to a proposed secondary plan by-law,
>
> (a) the city must give notice of a hearing by a committee of council respecting the proposed by-law; and
>
> (b) the committee of council designated for the purpose must conduct a hearing respecting the proposed by-law and submit its report respecting the proposed by-law to council.
>
> [emphasis added]

[13] Pursuant to s. 234(1), Council may adopt a secondary plan by by-law, or by other means. This interpretation is consistent with the evidence of former City employees, now engaged by the applicants as private consultants, that:

a) in the past, the City has defined a "secondary plan" as both statutory (by-law) and non-statutory (policy);

b) the City has a long standing practice of adopting Council policies with respect to a variety of matters, including land development;

c) the City has followed similar planning processes for statutory (by-law) and non-statutory plans (policy), which include gathering information, sharing information with stakeholders, receiving input, revising and finalizing plans; and

d) both the statutory and non-statutory approaches are used for the same purpose: to guide a specific area's growth in a well-planned and orderly manner.

[14] The applicants identified that the main procedural difference between the two approaches is that pursuant to the statutory (by-law) approach, there are public hearings, whereas pursuant to the non-statutory (policy) approach, there are public assemblies only.

[15] In addition, the applicants submitted that the City has advanced many secondary plans pursuant to policies adopted by City Council, as opposed to secondary plan by-laws, in other cases. Some examples from 2014 through 2017 include:

a) Bishop Grandin Crossing (2014);

b) Assiniboia Downs (2016);

c) Red River Exhibition Lands (2016); and

d) Railside at the Forks (2017).

[16] The City agreed on cross-examination that these developments passed by Council resolution as a policy, as had been recommended to Council.

[17] The City put forward evidence through its chief planner that while it previously permitted land use plans to be endorsed as Council policies instead of pursuant to a secondary plan by-law, this practice was reviewed, and it was concluded that a secondary plan by-law is the optimal planning tool to guide development. The reasons for this conclusion included greater specificity, transparency, consistency and certainty. Accordingly, the City phased out the use of non-statutory policies for secondary plans between 2014 and 2016.

[18] In this matter, the City agreed initially that the Secondary Plan Application could proceed pursuant to a non-statutory policy, concurrently with the Zoning Application. Representatives of the City confirmed this on cross-examination, and written confirmation was provided to the applicants over the course of discussions. In particular:

a) on May 27, 2014, the City advised the applicants that "[t]he Master Plan [which could become a secondary plan] can be considered at an earlier meeting than a development application is considered or at the same meeting" of the Committee, and that the goal was to bring all matters to the Committee in November 2014;

b) on October 30, 2015, the City again advised the applicants that the Applications would move through a concurrent approval process, to be considered together

by the Committee. The City also advised that there would be three readings before City Council, which is indicative of a statutory (by-law) process, but the City did not expressly advise either that a by-law would be required, or that it was suggesting a change in the process discussed previously; and

c) on March 29, 2016, the City directed the applicants to the secondary plan used in another development as a precedent document for use in this matter. That secondary plan was implemented pursuant to a policy adopted by City Council, not pursuant to a by-law.

[19] It is the process referenced by the City in 2014 and 2016 which the applicants seek to follow, and which is different from what the City now espouses. The City has departed from its earlier advice to the applicants, and has purported to particularize the process to be followed pursuant to the 2009 Directive.

[20] The City argued that by July 2016, it had clearly advised the applicants that the secondary plan was to proceed by by-law, which was expected to be put before City Council on a final reading in early 2017, and that the applicants did not oppose this approach.

[21] The respondents have not pointed to any authority to support the suggestion that a "secondary plan" must be limited to a statutory context. I have concluded that there is no statutory or other requirement that a secondary plan must be implemented by by-law. Accordingly, the Secondary Plan Application can proceed pursuant to a policy adopted by Council.

[22] I will also comment upon the approval process for the Zoning Application, which is set out in both the ***Charter*** and the Development Procedures By-Law No. 160/2011. Pursuant to Section 275(2) of the ***Charter***, the Zoning Application must conform with Plan Winnipeg or a secondary plan. There is no requirement that a secondary plan by-law be enacted prior to a zoning application being accepted.

[23] The applicants argued that the respondents have attempted to usurp the role of the Court by proceeding with the Secondary Plan Application as a by-law application, ignoring the option of proceeding pursuant to a Council policy. Most recently, with respect to the Secondary Plan Application, a report was provided by the Public Service to the Standing Policy Committee of the City on September 4, 2018 (the "**Public Service Report**"), recommending that City Council refuse to give first reading to the applicants' "proposed secondary plan by-law". If the City proceeds with this approach, City Council would consider that recommendation at a meeting on September 20, 2018.

[24] The Public Service Report was provided to the Court with the consent of both sides. It reflects that after the first appearance in this application on August 22, 2018, but before arguments on September 10, 2018, the Public Service recommended that City Council refuse to give first reading to the Secondary Plan Application "by-law" for a variety of reasons. I have reviewed the Secondary Plan Application, which contains no reference to a request for a by-law. In other words, the City processed the Secondary Plan Application as a request for a by-law, on its own, and in the absence of any direction from the Court to do so.

[25] There is no specific evidence as to the City's intentions in taking these steps when it did, and I am not prepared to conclude that it acted in bad faith. I note that on August 22, 2018, counsel for the respondents advised the Court that a report had been prepared and first reading could occur on September 20, 2018. In other words, the Court was apprised of the steps being taken by the City.

[26] With respect to the *mandamus* application, I am satisfied that the applicants have a clear legal right to have the Applications heard, and that the respondents have a corresponding public duty to the applicants to deal with the Applications. While the City may have some discretion relative to the process under which an application is dealt with, including whether the Secondary Plan Application would proceed pursuant to a by-law (statutory) or a policy (non-statutory), that discretion must be exercised fairly. That is so particularly where, as in this case, the applicants did not apply for a Secondary Plan by-law. I am also satisfied that the applicants demanded that the Applications be heard by the Committee, which the respondents refused.

[27] I will address briefly the issues of fairness and delay in this matter, in respect of which voluminous evidence was put before the Court. I have concluded that the cause of the delay from December 2013 lies with both sides, as follows:

a) after years of communication and work between the parties with respect to the development of the Land, the City purported to change its approach on how the secondary plan would proceed; namely that a by-law would be required. While as a general principle the City's change in approach may be appropriate and preferable, in this case given the time and resources expended by both sides

with respect to the development of the Land, the fairness of this change mid-process is questionable;

b) the applicants did not file the Applications until early 2018. The Applications should have been filed more quickly, particularly in the context of the many inquiries and complaints made by the applicants over the years relative to the slow pace at which matters were progressing. Having said that, I have seen no evidence that the respondents cautioned the applicants about engaging in discussions in the absence of applications having been filed, or warned that there could be significant additional delays after filing. In fact, it appears as though the applicants believed that by engaging in detailed, iterative communications with the City prior to filing, the process after filing would proceed smoothly;

c) once filed, the City did not proceed with the Applications promptly, in that:

   i) from the filing of the Secondary Plan Application on January 12, 2018 until early September 2018, the only steps completed by the City were distribution to and receipt of comments from its Technical Advisory Committee, which led to preparation of the Public Service Report;

   ii) the City advised the applicants that a letter of authorization would be provided in February 2018, but it was not provided until after this application was filed and served in June 2018;

   iii) the City advised the applicants in May 2018 that no file number existed relative to the Zoning Application filed in February 2018, and that the Zoning Application would not be distributed to other City departments

until a particular City employee reviewed and revised the Zoning Application. This approach was atypical; and

iv) the City has not identified a timeline on which the Applications will be heard and completed; and

d) the applicants did not satisfy the City's inquiries with respect to right-of-way dimensions relative to the Zoning Application until approximately August 24, 2018.

[28] I am not satisfied that any delay by the applicants disentitles them to equitable relief or that the City has provided an adequate explanation for its delay either before or after the Applications were filed. In addition, the balance of convenience favours granting the order for *mandamus*. Both sides have expended significant time and resources to the Land over a period of almost five years, with no tangible progress having been achieved. It is time that the substance of the Applications are addressed. I accept that there are exceptional circumstances in this case, and I am exercising my discretion in favour of the applicants.

MOTION TO EXPUNGE

[29] The applicants filed a motion to expunge certain paragraphs contained within two affidavits filed by the respondents, on the basis that the affidavits as written do not comply with Queen's Bench Rule 39.01(5), which reads as follows:

> An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[30] In ***Fawley et al v. Moslenko***, 2017 MBCA 47 (paragraph 76), the Court of Appeal confirmed that the purpose of this rule is to admit evidence on an application that is otherwise inadmissible, but the pre-conditions to admissibility are that the source of the information must be specified in the affidavit, and the facts deposed to must not be contentious.

[31] On their face, all of the impugned paragraphs in this case contain statements for which the deponents have not provided the sources of their information, and some of the facts deposed to are contentious. Accordingly, the paragraphs are inadmissible, and I have disregarded them in deciding the application.

CONCLUSION

[32] The writ of *mandamus* is granted. The Committee is ordered to hear the Applications at its meeting on November 13, 2018. As requested by the applicants, the City is required to take all steps necessary to have the required material in relation to the Applications available to the Committee to consider on November 13, 2018.

[33] The applicants shall have their costs with respect to this application. If the quantum of costs cannot be agreed upon as between counsel, time can be set to argue the matter before me.

Grammond J.