Citation: 6165347 Manitoba Inc v Robinson, 2025 MBCA 33
Date: 20250417

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

Docket: AI23-30-09975	)	
B E T W E E N:	)	
	)	***K. T. Williams, K.C.*** *and*
6165347 MANITOBA INC. and	)	***J. M. Nordlund***
7138793 MANITOBA LTD.	)	*for the Appellant*
	)	*M. Robinson*
(Plaintiffs) Respondents	)	
	)	
- and -	)	***N. K. Beasse***
	)	*for the Appellant*
MICHAEL ROBINSON	)	*The City of Winnipeg*
	)	
(Defendant) Appellant	)	
	)	***B. J. Meronek, K.C.*** *and*
- and -	)	***M. Zerbe***
	)	*for the Appellant*
THE CITY OF WINNIPEG, JOHN KIERNAN, BRADEN SMITH and MARTIN GRADY	)	*B. Smith*
	)	
	)	***D. G. Hill****,*
(Defendants)	)	***K. D. Toyne*** *and*
	)	***F. A. Brandson***
Docket: AI23-30-09976	)	*for the Respondents*
B E T W E E N:	)	
	)	
6165347 MANITOBA INC. and	)	*Appeals heard:*
7138793 MANITOBA LTD.	)	***April 10-11, 2024***
	)	
(Plaintiffs) Respondents	)	
	)	*Judgment delivered:*
- and -	)	***April 17, 2025***
	)	

THE CITY OF WINNIPEG	)
	)
(Defendant) Appellant	)
	)
- and -	)
	)
JOHN KIERNAN, BRADEN SMITH, MICHAEL ROBINSON and MARTIN GRADY	)
	)
(*Defendants)*	)
	)
Docket: AI23-30-09979	)
B E T W E E N*:*	)
	)
6165347 MANITOBA INC. and 7138793 MANITOBA LTD.	)
	)
(Plaintiffs) Respondents	)
	)
- and -	)
	)
BRADEN SMITH	)
	)
(Defendant) Appellant	)
	)
- and -	)
	)
THE CITY OF WINNIPEG, JOHN KIERNAN, MICHAEL ROBINSON and MARTIN GRADY	)
	)
(Defendants)	)

On appeal from *6165347 Manitoba Inc v The City of Winnipeg*, 2023 MBKB 114 [*trial decision*]

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EDMOND JA

Introduction

[1] These appeals address the development of land located in the River Heights/Fort Garry ward of the appellant, the City of Winnipeg (the City). The respondents, 6165347 Manitoba Inc. (616) and 7138793 Manitoba Ltd., which carries on business as Gem Equities Inc. (Gem), are the developers of approximately forty-seven acres of land commonly referred to as the Parker Lands (Parker Lands). After a lengthy trial, two employees of the City at the relevant time, the appellants, Braden Smith (Smith) and Michael Robinson (Robinson), were found liable for misfeasance in public office. The City was found vicariously liable for the acts of its employees and the City, Smith and Robinson were found jointly and severally liable to pay Gem compensatory and exemplary damages of $5 million.

[2] Since there are many defined terms in this decision, I have attached an appendix with a list of the defined terms and parties for ease of reference.

[3] Smith was, at the relevant time, the chief planner for the Urban Planning Division (UPD) of the City's Planning, Property and Development Department (PPD) and oversaw UPD's branches: the Development Application Branch (the DA Branch) and the Plan Implementation Branch (the PI Branch). The PPD has other divisions, and the relevant divisions for these appeals are the UPD and the zoning and permits division (the ZPD).

[4] The PI Branch was responsible for, and reviewed, what are referred to as area master plans, master plans, local area plans or secondary plans. Despite having different names, each of these plans serves the same purpose:

they lay out the overarching vision for the development of a parcel of land within the City. For consistency, I will refer to Gem's master plan for the Parker Lands as the secondary plan.

[5] Robinson was employed by the City as a senior planner in the DA Branch. As its name implies, the DA Branch reviews what is called a development application for subdivision and rezoning (DASZ). A DASZ establishes a land's zoning designation and creates a plan of subdivision, specifying a property's layout, lot sizes, road locations, parks and forest preserves and other boundaries.

[6] In 2009, Gem acquired the Parker Lands from the City in a "land swap" (*trial decision* at para 3). In exchange for the Parker Lands, Gem transferred to the City certain property it owned in the Fort Rouge Yards area. Gem intended to develop the Parker Lands into a multi-family development called Fulton Grove (the proposed development). Because the Parker Lands were zoned M2–Manufacturing General district pursuant to the City's zoning by-law, Gem was required to prepare a secondary plan and a DASZ (collectively, the development applications) for approval by City council.

[7] The preparation and approval of the development applications proved lengthy and complex. What started out as a collaborative process involving representatives of Gem and the PI Branch of the UPD morphed into something quite different as a number of challenging issues emerged. These issues include:

(1) the expropriation of two separate parcels of the Parker Lands to facilitate the construction of a bus rapid transit (BRT) corridor and the Cockburn-Calrossie sewer relief project (the sewer

relief project) that included the construction of a retention pond;

(2) whether the secondary plan would proceed to approval as a statutory plan (by-law) or as a non-statutory plan (policy);

(3) whether the development applications would proceed to approval separately (with the secondary plan being approved first) or concurrently;

(4) determining the appropriate location and size of the major access route into and through the proposed development, taking into account pre-existing, adjacent neighbourhoods;

(5) integrating the proposed development with a number of other major capital projects ongoing in the area, including the BRT corridor, the sewer relief project, the Waverley underpass and the Jubilee underpass projects;

(6) grading the development site to connect a gravity land drainage and sewer system to existing infrastructure and securing the fill permit therefor;

(7) addressing local community protests directed at preventing Gem from cutting down trees in the forest located within the Parker Lands; and

(8) significant revisions to the form and content of the secondary plan caused by a number of factors, including:

- certain requirements and revisions requested by the planners in the PI Branch;
- changes to the density of the proposed development, as well as the location of high-density and low-density development within the Parker Lands;
- changes to Parker Lands' size and configuration following the City's expropriations;
- changes to Gem's internal professional planning team and its vision for the proposed development; and
- changes to the City's planning team tasked with assisting Gem in the preparation of the developer-led secondary plan.

[8] The law applicable to the tort of misfeasance in public office is not disputed on these appeals and the trial judge cited the principles from the leading authorities, including *Ontario (Attorney General) v Clark*, 2021 SCC 18 [*Clark*]; *Rocky Point Metalcraft Ltd v Cowichan Valley Regional District*, 2012 BCSC 756; *Alevizos v Manitoba Chiropractors Association*, 2009 MBQB 116; *Ontario Racing Commission v O'Dwyer*, 2008 ONCA 446; *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*]; *Gershman v Manitoba Vegetable Producers' Marketing Board* (1976), 69 DLR (3d) 114, 1976 CanLII 1093 (MBCA); *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC).

[9] In *Odhavji*, the Supreme Court of Canada stated that the tort of misfeasance in a public office is an intentional tort whose distinguishing

elements are twofold: (1) deliberate unlawful conduct in the exercise of public functions, and (2) awareness that the conduct is unlawful and likely to injure the plaintiff (see para 32).

[10] As pointed out by the Supreme Court in the more recent decision of *Clark* at para 23:

> The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty (*Odhavji*, at para. 24). The minimum requirement of subjective awareness has been described as "subjective recklessness" or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff (*Odhavji*, at paras. 25 and 29; *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14 (C.A.), at para. 7; *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1 (H.L.), at pp. 194-95, per Lord Steyn).

[11] The trial judge found that Smith was responsible for deliberate attempts to slow down or thwart the development applications with little or no regard for the costs or implications to Gem in doing so and, therefore, she found him liable for exercising his power as a public official for an improper purpose or in breach of his statutory and professional obligations with reckless disregard for the interests of Gem (see *trial decision* at para 281).

[12] As regards Robinson, the trial judge found that Robinson, Smith and James Platt (Platt) attempted to persuade Martin Grady (Grady) with the ZPD to deny Gem's application for a fill permit and that their conduct in doing so was outside of their statutory authority, done for an improper purpose and with conscious disregard for the costs to Gem (see *ibid* at para 302). Further, the trial judge found that Robinson, in preventing Gem from having its DASZ

considered by the City Centre Community Committee (CCCC), was an abuse of his authority and was done for an improper purpose with conscious disregard for the consequences to Gem (see *ibid* at para 308).

[13] The trial judge dismissed the claims against the other individual named parties, Grady and John Kiernan (Kiernan).

[14] As I will explain, I am satisfied the trial judge made palpable and overriding errors in certain findings of fact and in the inferences that she drew from the evidence to conclude Smith and Robinson engaged in deliberate and unlawful conduct in their capacity as public officers. In my view, the evidence falls short of establishing deliberate and unlawful conduct. The evidence also falls short of proving Smith and Robinson had the minimum required "subjective recklessness" or "conscious disregard" (*Clark* at para 23) for the lawfulness of their conduct and the likely harm to Gem.

[15] For the reasons that follow, I would allow the appeals and dismiss the claims against Smith, Robinson and the City.

Secondary Plans, Development and Zoning Process and City By-Laws

[16] Before reviewing the background facts, it is useful to review aspects of the City's planning, development and zoning process.

[17] The City is a municipal corporation governed by *The City of Winnipeg Charter*, SM 2002, c 39 [the *Charter*]. City council consists of the elected mayor and fifteen councillors. Councillor John Orlikow (Orlikow) is the elected representative for the River Heights/Fort Garry ward. Although he was not named as a defendant and was not a witness at the trial, significant

evidence was led regarding his concerns and input about the proposed development of the Parker Lands.

[18] City council delegated certain powers and responsibilities for the development process to certain committees, including the Standing Policy Committee on Property and Development, Heritage and Downtown Development (SPC) and the Executive Policy Committee (EPC).

[19] In addition, City council created five community committees that review, at first instance, secondary plans and DASZs. The CCCC deals with River Heights/Fort Garry development matters and is comprised of three councillors, including Orlikow. In 2018, Orlikow was a member of each of the CCCC, SPC and EPC.

[20] At the relevant time, OurWinnipeg was the City's official development plan (see City of Winnipeg, by-law No 67/2010, *OurWinnipeg Plan By-law* (20 July 2011) [the *OurWinnipeg By-law*])[1]. Also in force at the relevant time was the City's related development strategy by-law (see City of Winnipeg, by-law No 68/2010, *Complete Communities Direction Strategy By-law* (20 July 2011) [the *CC By-law*])[2]. The Parker Lands comprised part of a larger major redevelopment site—one of eleven identified in the *CC By-law*, which are areas within or adjacent to existing neighbourhoods that present opportunities for infill development.

[1] It was repealed and replaced by City of Winnipeg, by-law No 120/2020, *OurWinnipeg By-law* (26 May 2022), s 3.
[2] It was repealed and replaced by City of Winnipeg, by-law No 119/2020, *Complete Communities Direction Strategy 2.0 By-law* (26 May 2022), s 4 [the *CC By-law 2.0*].

Secondary Plans

[21] At the relevant time, section 234 of the *Charter* provided:

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.	**Adoption des plans secondaires** **234(1)** Le conseil peut, par règlement municipal, adopter un plan secondaire pour énoncer les objectifs et actions qu'il juge nécessaires ou indiqués pour faire face, dans un quartier, un district ou un secteur de la ville, à toute question qui relève de sa compétence, notamment toute question visée par le plan d'aménagement ou liée au développement économique, à la mise en valeur ou à la protection des richesses du patrimoine ou des biens-fonds sensibles.
Conformity with Plan Winnipeg **234(2)** A secondary plan by-law must be consistent with Plan Winnipeg.	**Compatibilité** **234(2)** Un plan secondaire doit être compatible avec le Plan de la ville de 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	**Audience** **234(3)** Après la première lecture du projet de règlement municipal portant sur un plan secondaire : a) la ville donne avis de l'audience qu'un comité du conseil tiendra sur le projet de règlement;

(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.	b) le comité désigné tient une audience et remet son rapport au conseil.

[22] The trial judge found that a secondary plan could be adopted by way of a by-law or a City council policy and accepted that the City had the authority to determine the process in any given case. However, she found that the process generally applicable to an application like the one being put forward by Gem was to proceed by way of a non-statutory process (see *trial decision* at para 273).

[23] 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.

[24] Smith testified that while the City previously permitted secondary plans to be endorsed as City council policies, as opposed to as by-laws, this practice was reviewed, and it was concluded that the by-law approach is the optimal planning tool to guide development because it offers greater specificity, transparency, consistency and certainty. According to Smith, the City phased out the use of non-statutory secondary plans between 2014 and 2016. The trial judge did not accept Smith's evidence that there had been a change in policy at that time (see *ibid* at para 248).

DASZ

[25] The process governing a DASZ is set out in the *Charter* and in the City's by-law No 160/2011, *Development Procedures By-law* (14 December 2011), as repealed by City of Winnipeg, by-law No 104/2020, *Development Procedures By-law* (29 October 2020), s 62. Section 275(2) of the *Charter* provides that a DASZ must conform with Plan Winnipeg or a secondary plan. At the material time, there was not a mandatory statutory requirement that a secondary plan by-law must be enacted prior to a DASZ being approved. They could be approved concurrently, as long as the secondary plan is approved at the same time. It is important to emphasize that a DASZ could only be approved in one manner, the statutory process, which required a public hearing at the CCCC and approval by the SPC, EPC and City council.

TOD

[26] Section 54(9) of the City's by-law No 200/2006, *Winnipeg Zoning By-law* (19 December 2007) [the *Zoning By-law*], as amended by City of Winnipeg, by-law No 135/2016, *Winnipeg Zoning By-law* (14 December 2016), s 3 [the *amended Zoning By-law*], defines a transit-oriented development (TOD) as:

> ***Transit Oriented Development (TOD)***
> 54(9) The Transit Oriented Development (TOD) district is intended to facilitate mixed use development at a scale and density exceeding all other districts. These sites are intended to be adjacent to [BRTs] with a Council endorsed [secondary plan] in place to guide development. Site design should fulfill the objectives of the Transit Oriented Development Handbook.

[27] The transit-oriented development handbook (the TOD handbook) was endorsed as City council policy on February 22, 2012. It defines TOD as:

> Moderate to higher density compact mixed-use development, located within an easy five to ten minute (approximately 400m to 800m) walk of a major transit stop. TOD involves high quality urban development with a mix of residential, employment and shopping opportunities, designed in a pedestrian oriented manner without excluding the automobile. TOD can be new construction or redevelopment of one or more buildings whose design and orientation facilitate the use of convenient and sustainable modes of transportation, including public transit and Active Transportation.
>
> [emphasis omitted]

Background Facts

2009-2015

[28] In mid-2009, 616 acquired approximately forty-seven acres of the northern Parker Lands from the City pursuant to the land swap referenced in the introduction. The land swap was approved following a vote by City council.

[29] Gem ultimately acquired the Parker Lands.

[30] Council minutes of the meeting where the land swap was approved indicate that the City was "to prepare a developer led secondary plan for the Fort Rouge lands and the Parker Lands, which secondary planning process shall incorporate appropriate public consultations."

[31] Prior to the land swap, Andrew Marquess (Marquess), through 616, a corporation owned and controlled by him, developed lands on the east side

of the intersection of Pembina Highway and Jubilee Avenue in Winnipeg, known as the Fort Rouge Yards. The evidence of Marquess and others was that the planning process for the Fort Rouge Yards commenced in April 2010, and that a team assembled by him worked with the City to create a non-statutory secondary plan and DASZ. As described above, non-statutory simply meant that the secondary plan was approved by City council as a policy, and not as a by-law, such that the public hearing consultation process and approval were not required.

[32] The development applications for the Fort Rouge Yards were considered concurrently by City council in the fall of 2010. Approval for the development applications occurred in December 2010. Building on the experience and timeline of the Fort Rouge Yards, Gem began planning the development of the Parker Lands in early 2013.

[33] Marquess initiated the process by contacting the PPD and then meeting with Smith to obtain information as to how to proceed. Smith and Marquess had preliminary discussions regarding the planning process.

[34] Smith and Marquess again met a few months later, and Smith committed to dedicate PPD resources to assist Gem in a collaborative manner.

[35] Smith assigned Glen Doney (Doney), senior planner of the PI Branch, to assist in the planning process. Doney compiled information for Gem and sought input from other members of the PPD. Doney described the proposed development as “lands [that] are likely to be developed into transit-oriented multiple-family dwellings, parks and some commercial and institutional uses.”

[36] In December 2013, Doney provided Marquess with an information package that included existing by-laws that governed the development process, including the *OurWinnipeg By-law* and the *CC By-law*. The information also indicated the site was to be developed in accordance with the principles of a TOD.

[37] In January 2014, Marquess was advised that the City intended to construct a retention pond on the Parker Lands. As a result, Marquess met with the chief operating officer of the City and Orlikow about the retention pond. Marquess testified he wanted to discuss and determine the retention pond's location. The location had not been established at that time.

[38] On February 9, 2014, Marquess emailed Smith about a meeting scheduled for February 10, 2014. Marquess advised that he and Gem's planners, Geoffrey Zywina (Zywina) and Lawrence Bird (Bird), had a meeting with Orlikow on February 7, 2014, and "got a clear view on what [Orlikow] will support and what he won't support in the redevelopment of the Parker [Lands]."

[39] Smith testified that he met with Marquess on February 10, 2014, and that Marquess, through this developer-led process, really valued and wanted the viewpoints of Orlikow as a major stakeholder in the Parker Lands development.

[40] On February 11, 2014, Zywina provided Doney, Smith and others with Gem's preliminary concept plan or proposal for the Parker Lands. The concept plan was circulated amongst various departments of the City, including the Winnipeg Transit and the Water and Waste Department. Concerns were expressed regarding the concept plan's alignment with the

BRT corridor and whether the proposed development could achieve the design requirements for the ongoing sewer relief project.

[41] In April 2014, Marquess requested that Smith assign Robinson to the Parker Lands project. Smith acceded to that request.

[42] It was also in April 2014, when Bird completed a first draft of the secondary plan and provided it to Doney for review. Doney advised Marquess the development applications could be considered at the same meeting of the CCCC (heard concurrently). Further, Gem engaged experts to assess environmental, site servicing and traffic assessments in the Parker Lands.

[43] In mid-May 2014, Doney suggested to Gem that it proceed with public consultation. Marquess responded that he wanted a high degree of alignment with the PPD, followed by other city departments and Orlikow. Marquess wrote: "Finally when everyone is aligned and informed, we can then plan the public consultation." At that time, Doney acknowledged the goal was to finalize the development applications and have them considered by the CCCC by November 2014.

[44] Marquess is not a professional planner and, for that reason, Gem engaged Zywina, Bird and Chris Snelgrove (Snelgrove). In 2016, Bird left Gem and was replaced by John Wintrup (Wintrup) and Michelle Richard (Richard) of Richard Wintrup & Associates Ltd., two professional planners who had previously been employed by the City. By December 2017, a further planning consultant was engaged by Gem, Jennifer Keesmaat (Keesmaat), a former chief planner of the City of Toronto.

[45] As noted earlier, Robinson was a planner in the DA Branch of UPD (which Smith headed). Robinson's direct supervisor in the DA Branch was James Veitch (Veitch). Robinson's job was to review and process DASZs.

[46] Robinson testified that he was not principally involved in the preparation and review of secondary plans. They were dealt with by planners within the PI Branch. In the case of the Parker Lands, the principal planners were Doney, and then later Platt.

[47] Robinson explained that his work included collaborating with developers, engaging with local area councillors and preparing administrative reports in connection with a DASZ. On occasion, he was assigned to work on large projects within the UPD. For example, Robinson worked on the technical advisory committee (TAC) that drafted the TOD handbook. He was also involved in drafting the *CC By-law* and its successor, *CC By-law 2.0*.

[48] Smith described the process by which DASZs were approved by the CCCC, SPC, EPC and City council. Robinson explained how the DA Branch would consider the possible use of a plan development overlay (PDO). A PDO could be used to alter or modify certain zoning requirements otherwise granted in a DASZ. For example, a PDO could be used to allow small to moderate increases or decreases in the densities permitted in a certain area to be consistent with the next closest zoning district.

[49] On June 6, 2014, Doney met with Orlikow to discuss Gem's "draft [secondary] plan and [its] associated topics." Following that meeting, Doney sent an email to his PI Branch supervisor, Brett Shenback (Shenback), and Robinson, advising that Orlikow's view on the Parker Lands plan "shall be approved as a secondary [statutory] plan", "there's [no] rush to complete the

[secondary] Plan" and "no public engagement should take place before the Civic Election."

[50] Shenback relayed the contents of Doney's June 6, 2014 email to Smith, stating:

> [Orlikow] believes that the Plan should be approved as a secondary [statutory] plan. Thus far all other [secondary plans] have not been statutory. This area is somewhat unique given that in 2009 there was a motion directing the Public Service to prepare a developer led **secondary plan** for Parker lands. [Orlikow] believes that this provides the justification for a secondary plan as opposed to a non-stat plan. A bit of a wrinkle–The motion also included Fort Rouge Yards, which was **not adopted as a secondary [statutory] plan** but rather endorsed by Council.
>
> [emphasis in original]

[51] On June 7, 2014, Orlikow emailed Doney, advising that the preparation of the developer-led secondary plan was not necessary at that time and that he did not believe the project was ready for a consultation process. Doney forwarded this email to Shenback and Smith.

[52] On September 29, 2014, Marquess sent an email to Doney inquiring about the rezoning process and asking whether it was "slowed down and is stalled" as "[n]othing has progressed for [a long] time."

[53] In October and November 2014, Doney raised questions about the location of the retention pond. On November 13, 2014, Marquess emailed Doney advising that Gem needed to know about the specific dimensions of the retention pond so it could complete the development design work.

[54] On November 20, 2014, Doney emailed Shenback, Robinson and Donna Beaton (Beaton), a planner with the UPD, that Gem needed to be advised of Orlikow's expectations respecting the forest and the contents of the secondary plan. Shenback then advised Smith, copied to Doney, that a meeting with Orlikow would be arranged.

[55] On November 24, 2014, Doney emailed Smith, copied to Platt, Shenback and Robinson, confirming no formal application for approval of the development applications has been made to date. He reiterated some of the matters that were discussed during the meeting with Orlikow on June 6, 2014. Doney also indicated that next steps should include "updating [Orlikow] and learning his thoughts on the draft [secondary plan, including] determining how the [secondary plan] should address the existing Aspen forest and future residential densities" [emphasis omitted].

[56] Also on November 24, 2014, Doney emailed Orlikow stating that the UPD wanted to plan the use and development of the Parker Lands and they were at a point where the UPD wanted to determine how to engage stakeholders. Orlikow emailed the director of PPD, Barry Thorgrimson (Thorgrimson), that same day requesting that he call him. Thorgrimson responded by inviting Orlikow's input "as a stakeholder with respect to the [Parker Lands] Plan" (*trial decision* at para 65).

[57] On December 16, 2014, Doney emailed Shenback, stating, "Orlikow has referred to the Master Plan as a secondary plan and so did Council in a motion a while back. I need to know whether it will be approved as a secondary plan or endorsed as Council policy. Gem and the City are close to creating a Master Plan that could be made public." Shenback then forwarded

that email to Smith and stated that it was his "understanding that there is an expectation that the Parker [Lands] plan is adopted by Council as a Secondary Plan." That email thread was sent by Smith back to Shenback, who replied: "I understood that it was to be a Secondary Plan. That was relayed to me at the same meeting [Doney] attended with [Orlikow] a while back. [Doney] should research the conditions of the Parker Land Swap to determine what Council's intent was."

[58] Doney responded to Shenback: "Then I should inform [Gem], yes? My guess is [Smith] changed his mind because of what Orlikow said." Shenback replied to Doney the next day, suggesting they chat and stated: "The motion from 2009 was specific to [the Parker Lands] and Fort Rouge Yards. I'm assuming that the motion was connected to the land swap. Obviously the plan for Fort Rouge was not statutory. We might need to chat this through a bit and perhaps put our thoughts down on paper."

[59] At that point, Doney's view was that a non-statutory (policy) secondary plan was consistent with the 2009 City council directive. Others did not necessarily share that view. On December 18, 2014, Robinson replied to an email from Doney, stating:

> Orlikow indicated in the meeting we had with him that his expectation is that the Parker Lands plan will be a statutory plan. If there is disagreement or differing interpretations of this, it should be clarified with [Orlikow] in writing.
>
> If we try to submit the plan as a non-statutory plan – and [Orlikow] is opposed to this – we will not have his support.

[60] Doney replied, stating, “we should be directed to P&D to do so, rather than by [Orlikow].” Evidence was that P&D was interpreted as a reference to the SPC, not the PPD.

[61] On February 9, 2015, a briefing note was sent from Smith to the acting director of PPD, Marc Pittet (Pittet), to describe the status of the planning process and identify related issues (the February briefing note). Smith testified that he did not prepare it. He believed that Doney or Shenback prepared it on his behalf and that he forwarded it to Pittet. The February briefing note states: “Orlikow has stated that he wants the Master Plan to be approved by secondary plan by-law. The merits of this type of approval compared to endorsement as Council policy, should be considered further.” Smith testified that a decision had not been made as to whether the secondary plan was to proceed as a by-law or a non-statutory plan at that time.

[62] On February 19, 2015, Bird, on behalf of Gem, sent Doney an email, copied to Shenback and Robinson, with the eighth draft of the secondary plan.

[63] By April 2015, the City advised Gem that it intended to acquire a portion of the Parker Lands by expropriation for construction of the retention pond. Gem objected to the expropriation and a hearing was scheduled to be held.

[64] On July 17, 2015, Doney emailed Veitch, his supervisor, and copied Smith regarding a list of key points discussed at a meeting Doney had with Orlikow. Doney wrote that Orlikow said, “the planning of the Parker Lands now is affecting the expropriation process, perhaps raising the perceived value of the land to be expropriated”. Smith testified that this was Orlikow’s view, not his. Smith stated there was no intention or any conduct on the part of the

UPD to consider the value of the expropriated land in responding to the Parker Lands development applications.

[65] On July 20, 2015, Doney emailed Smith, providing responses to the points raised by Orlikow. Smith testified that because it had been a year and a half since the planning process started, he felt it was appropriate to have a second set of eyes review the draft secondary plan.

[66] Smith and Orlikow met to discuss the draft secondary plan. This meeting was confirmed by an email from Orlikow to Smith, stating: "I want to confirm that I do not support the proposed development. The density, lack of public space, lack of connectivity, uniformity of density types to areas, traffic impact and lack of relation to the BRT and other adjacent lands are just some of my concerns."

[67] On July 31, 2015, Smith replied to Orlikow that he had asked for a peer review of the file, including the draft secondary plan and associated PDO. Smith assigned Veitch (the DA Branch) and Shenback (the PI Branch) to complete the review.

[68] Smith stated:

> Following our recent meeting I've asked for a peer review of the file, draft Master Plan and associated PDO. My two Principal Planners, [Veitch] and [Shenback], have been tasked to do this review. They will report back to me in early September. I, like you, need to be confident that the plan is integrated with all of the other moving parts, both on site and on the adjacent lands. I will keep you apprised of the review. Thanks again for taking the time to meet with me on this project and for your commitment to getting this Plan right.

[69] On September 10, 2015, Marquess emailed Smith to advise that Gem had finished the development applications and they wanted to schedule some open houses. He also inquired as to whether Orlikow had scheduled his own Parker Lands open houses.

[70] On September 14, 2015, Veitch emailed Smith and copied to Shenback, outlining the findings of the peer review (the peer review report). The email identified a number of issues, summarized as follows:

i) The document was poorly formatted and included confusing maps and poor graphics;

ii) Certain sections were out of order and illogically sequenced;

iii) Policy area descriptions were limited and policy sections did not follow the policy map;

iv) There had been no public consultation on the Parker Lands (and issue that Veitch and Shenback identified as being a "red flag" and a "recipe for disaster");

v) Water and Waste had requested that the regional storm water retention basin be incorporated into the plan;

vi) All of the future land drainage works were being referred to in a single high-level paragraph;

vii) The Water, Wastewater & Land Drainage Works only showed existing infrastructure, but not the future work;

viii) GEM had indicated that Orlikow wanted to save 10% of the habitat land and had been trying to identify the best location for this retention. GEM and Orlikow had "agreed to work together to figure it all out", but the status of that initiative was unknown at that time;

ix) The policy map identified the SW BRT 1, BRT road, and station "for information only, subject to change";

x) The plan intended to have a [TOD] appendix that was currently under development;

xi) It was uncertain if the public plaza would form part of Phase 2 of the Southwest BRT Request for Proposals or [whose] responsibility it would be to build the plazas;

xii) The policy language required a closer, in depth review;

xiii) The graphics, formatting and sequencing needed attention;

xiv) Public consultation was necessary; and

xv) a final TAC review was required.

[footnote omitted]

[71] The results of the peer review were never shared with Gem.

October 2015-2020

[72] In October 2015, Kiernan became the director of the PPD.

[73] On October 1, 2015, Marquess emailed Smith saying, "It has been 24 months since I first contacted you on the rezoning for this piece of land. That is way too long. What is the hold up? We rezoned Fort Rouge Yards in 9 months from start of process to approval from City Council." Smith replied to Marquess, suggesting the length of time "may be due in large measure to the number of draft plan iterations, which [he believes] now is the 11th or 12th."

[74] Also on that day, Orlikow met with Smith, Veitch and Shenback. Meeting notes record Orlikow's concern that the City will "get hammered" on expropriation and that he is "not pleased [with] what he's seen" [emphasis

omitted]. The notes also reflect Orlikow's concern about the lack of public consultation. Veitch testified that, to the best of his recollection, there was some discussion about a potential motion by City council to put the Parker Lands development process on hold until public consultation was completed. No such motion was ever brought.

[75] On October 30, 2015, Smith emailed Marquess, copied to Veitch, Shenback, Kiernan, Bird and Zywina (the October 2015 email), summarized as follows:

> i) He was still waiting for technical comments from other stakeholders on the latest version of the master plan;
>
> ii) Marquess was at liberty to schedule an open house whenever he wanted, but the City recommended that Marquess forward any display boards to the City so the City could review them and provide feedback in advance of any public sessions.
>
> iii) With respect to the development application and approval process, the area master plan would be considered a "secondary plan application". The application would be made at [the ZPD] and the approval process would follow the path below:
>
> A) [CCCC] → [SPC] → [EPC] → Council (first reading)
>
> B) [CCCC] (Public Hearing) → [SPC] → [EPC] → Council (2nd and 3rd reading).
>
> iv) The rezoning would be advanced as a DASZ and could be moved forward concurrently with the area master plan. Both the master plan and the PDO could be considered at the same public hearing at the [CCCC].
>
> [footnote and emphasis omitted]

[76] On November 23, 2015, George Ulyatt (Ulyatt) prepared a report respecting the expropriation of a portion of the Parker Lands. The report recommended the proposed expropriation be denied. The report concluded, among other things, the City had been "secretive, uncommunicative, and non-consultative . . .. Furthermore, when [Marquess], upon learning of the City's plans, pursued discussions at the highest level of the City's administration, he did not receive a truthful answer."

[77] Despite Ulyatt's findings, in January 2016, City council voted to expropriate the land required for the retention pond. The expropriation of land for the BRT corridor had already been approved by City council in February 2015. Neither Smith nor Robinson had any involvement in these expropriations.

[78] In February 2016, Gem began revising its plans, including the traffic impact assessment, to reflect the size and configuration of the Parker Lands development post-expropriation.

[79] On February 10, 2016, Gem held the first public open house.

[80] In March 2016, there was an exchange of emails between Marquess and Shenback regarding the draft secondary plan. Shenback provided feedback regarding the plan.

[81] In June 2016, Smith advised Marquess that Platt (the PI Branch) would assume responsibility for assisting Marquess and Gem in bringing the secondary plan process to completion.

[82] Smith testified that Platt's assumption of the Parker Lands file was the result of a realignment within the UPD. Smith stated he asked Platt to "put the pedal to the [metal]" and come to a favorable conclusion, permitting the department to devote resources to other development plans. Thereafter, Smith did not provide instructions to Platt on how to specifically deal with the secondary plan process.

[83] In August 2016, Gem held a second public open house. Following the open house, Zywina indicated he would prepare and provide to Orlikow a brief summary thereof.

[84] On September 7, 2016, Platt sent an internal email reporting on the status of the Parker Lands development. In the email, Platt stated he advised Gem that it should consider submitting its secondary plan for approval prior to submitting the DASZ. Platt stated the reason for this suggestion was that "it [was] possible that [Orlikow would] make some drastic changes to the Plan during the approvals process. Should this happen, the proposed DASZ design [would] not conform with the Plan and the DASZ [would] have to be redesigned and re-advertised for another Public Hearing."

[85] On October 7, 2016, Platt sent a meeting invitation to Smith and indicated: "Robinson and I are caught in a dilemma related to [Orlikow] wanting to limit densities at a TOD site (Parker Lands) for non-planning related reasons. That is, [Orlikow] appears to feel that giving property rights to build above ~6 [storeys] would increase the value of the Retention Pond land, which is being valued as part of the expropriation."

[86] Smith testified that, while he could not remember specifically attending the meeting, he did remember the discussion. He stated that, as a

planner, they are always managing expectations from stakeholders and that their job is to make sure they put forward their best professional recommendations based on planning principles. In his view, the expropriation value was not a planning principle.

[87] On October 13, 2016, a meeting was held with Orlikow, Robinson, Platt and Smith. In the meeting notes, Platt wrote: "Value determined [at] time of sale; Not in accordance with a Plan approved after the sale". Smith testified that this value comment was conveyed to Orlikow and that Orlikow's concerns in that regard were baseless. The work that was being done to finalize a plan did not have any impact on the expropriation value because the value was determined at the time of expropriation.

[88] In late 2016, there were ongoing discussions about the proposed height and densities of the buildings, the existence and location of the forest, the construction and design of Hurst Way, and the size and location of the drainage system.

[89] On December 14, 2016, the *Zoning By-law* was amended by the *amended Zoning By-law*, to include the TOD zoning district.

[90] In early 2017, Platt suggested that Gem submit a DASZ pre-application to get feedback from the DA Branch. The same suggestion was made by Robinson on March 6, 2017 (see *trial decision* at paras 130, 135).

[91] On March 17, 2017, Gem submitted a DASZ pre-application, seeking approval for 1,792 units on the Parker Lands.

[92] On May 5, 2017, the City provided Gem its DASZ pre-application feedback. Robinson explained that the standard six to eight weeks' response time was required to permit circulation of the pre-application to the various City departments to obtain their feedback and to prepare a comprehensive response.

[93] The DASZ pre-application feedback raised questions about the most appropriate zoning district for Parker Lands. The UPD formed the opinion that the suggested TOD zoning district was not the most appropriate zoning district for the Parker Lands. Reasons were given why the TOD zoning district was not appropriate for the entire Parker Lands.

[94] On the other hand, UPD shared Gem's view that the Parker Lands was a TOD site because it is adjacent to the BRT corridor. As a result, the UPD recommended three categories of neighbourhoods within the TOD site utilizing three staggered zoning districts (becoming progressively less dense as the districts move away from the BRT station).

[95] On May 24, 2017, Platt emailed Zywina, indicating that the draft secondary plan needed to follow the template provided to Gem in February 2017. Platt also advised that the City did not support the current iteration of the secondary plan and that it required a significant rewrite.

The Fill Permit

[96] In June 2017, Gem applied to the City's ZPD for a permit to stockpile and grade fill on the Parker Lands (the fill permit). The source of the fill was from a City construction project nearby.

[97] The City had no issue with Gem stockpiling fill on the site. The issue related to Gem's intention to use a significant amount of fill to raise a portion of the Parker Lands to allow for the proposed gravity land drainage and sewer system to be operative. Robinson explained during his testimony that the UPD had never experienced a developer applying for a permit to grade a site prior to approval of a DASZ.

[98] On June 14, 2017, Platt sent an email to Smith with a subject line, "Withholding a Permit (Charter)", discussing a means by which the City and the council could delay responding to the fill permit application. On June 19, 2017, Beaton emailed a number of representatives of the UPD (copied to Platt and Robinson) respecting a number of concerns relating to the fill permit. She referenced the fact that there did not seem to be a process to prevent a permit from being issued even where a development plan had not yet been approved. She suggested the concerns be communicated to Grady.

[99] On July 11, 2017, Gem was advised that the fill permit was put on hold until the development agreements could be finalized.

[100] The City and the UPD remained involved in the ongoing dialogue surrounding the potential location of the forest preserve. Robinson testified that local residents had been extremely vocal about their desire to see some, or all, of the forest preserved on the Parker Lands.

[101] The UPD was also concerned that grading the fill on the Parker Lands might divert water towards the forest, thereby flooding it and killing the trees.

[102] Robinson also testified that UPD raised its concerns with the ZPD so that no development permit that allowed for substantive grading would be issued until the development applications were finalized and approved. The Water and Waste Department shared similar concerns.

[103] By July 2017, Marquess and Gem had become frustrated with the process. On July 3, 2017, Marquess emailed Platt and Orlikow, indicating that they were going to start clearing trees from the Parker Lands. Orlikow responded that he preferred they wait until the secondary plan was approved.

[104] On July 10, 2017, Marquess wrote to the City's chief administrative officer, Doug McNeil (McNeil), and to then-mayor, Brian Bowman, outlining the history of the planning process thus far, stating they would be making an application for developer-led development applications, and they expected the development applications to be processed and scheduled for a concurrent hearing.

[105] In mid-July 2017, protesters attended at the Parker Lands to, among other things, prevent the clearing of trees. The trial judge accepted Marquess' testimony that he was advised by the Winnipeg Police Service that they were directed by the City not to intervene.

[106] Gem filed a statement of claim in the Court of King's Bench and obtained an interlocutory order enjoining the protesters from blocking the Parker Lands. Thereafter, Gem cleared the majority of the forest on the Parker Lands.

[107] In August 2017, Marquess, Zywina, Richard and Wintrup met with McNeil, Michael Jack (Jack), Smith, Kiernan and Platt to discuss how best to

work out areas of disagreement and move forward with the development applications. Richard testified that McNeil and Smith agreed that the development applications would proceed concurrently. Others had a different view of what was discussed at the meeting. Smith believed Gem was going to submit the development applications for review and that the application process would proceed forthwith.

[108] By October 2017, after discussions between the Water and Waste Department and Gem, the Water and Waste Department was prepared to issue a fill permit, which permitted stockpiling and rough grading on the Parker Lands upon receipt from Gem of stamped plans from an engineer.

[109] Once the stamped plans were received, the fill permit was granted.

[110] Robinson had no involvement in the final decision to issue the fill permit.

The Filing of the Development Applications

[111] On December 17, 2017, Gem filed a letter of intent with the City, stamped by its planning consultants, indicating it would be filing a secondary plan application for approval as a by-law (statutory plan) for a hearing before the City council.

[112] A presentation of the draft secondary plan was made by Gem's planner, Keesmaat. It included changes to the green space, more townhomes and fewer single-family homes. The location of the high-density neighbourhood was no longer adjacent to the BRT station, but instead, was

relocated adjacent to the CN rail line at the north of the Parker Lands. The proposed density was increased to 1,918 dwelling units.

[113] On January 12, 2018, for the first time, Gem formally submitted its secondary plan. The plan specified that it was a statutory (by-law) plan.

[114] Despite the wording of the secondary plan, at trial, Marquess testified he made a decision not to follow the City's process. He decided to revert to where he believed they were in 2014 and seek a non-statutory plan and a concurrent DASZ application.

[115] On January 26, 2018, Platt emailed Kiernan, outlining the procedural process and target dates, as well as available options. Platt confirmed that he and Smith had prepared a first reading report for Gem's secondary plan. Platt stated: "Robinson and I have been steadfast with GEM that we will not be processing the DASZ until the Secondary Plan is adopted. [Orlikow] has also communicated this to GEM. Regardless, we anticipate a DASZ application shortly."

[116] Gem's DASZ was filed on February 9, 2018. The DASZ sought a TOD zoning district across the entire Parker Lands, rather than zoning districts (and associated PDOs), as recommended by the UPD.

[117] On February 13, 2018, Platt emailed Smith, copied to Robinson, advising that a preliminary review of the Parker Lands secondary plan had "uncovered many issues" and that he wanted to explore different options, including "as a last resort, [to] 'recommend rejection'".

[118] On February 15, 2018, Platt made a presentation to the Planning Executive Advisory Committee regarding the development applications. At the end of the presentation, he reviewed five options for how to proceed:

> 1) Recommend for First Reading
>
> - Prepare report for Public Hearing with recommended changes (a LOT of changes)
>
> 2) Recommend Rejection at First Reading
>
> - Robust report with rationale for rejection
>
> 3) Recommend Changes at First Reading
>
> - Robust report with rationale for changes (a LOT of changes)
>
> 4) Contact Applicant with List of Changes to be made and have them resubmit.
>
> 5) Do not accept application

[119] On February 20, 2018, Marquess asked Smith and Kiernan when the secondary plan would go to the SPC and City council for first reading. The evidence of Richard, Wintrup, Platt and Shenback all confirmed that first readings of applications usually proceeded as of right and the public service rarely recommended rejection.

[120] The secondary plan was circulated to various City departments for their input and review.

[121] On February 22, 2018, there was an exchange of emails respecting concerns by Michelle Ho (Ho), a City zoning development officer.

[122] On February 26, 2018, Marquess wrote a letter to Kiernan, outlining his concerns about the process, stating that his "preferred course of action is to work collaboratively with members of the Public Service". Further, he stated:

> Perhaps most concerning is the overall political involvement in our project. We have witnessed your staff on numerous occasions referencing their need to mirror [Orlikow's] position on this file or involving [Orlikow] in planning decisions and concepts. This is not considered appropriate conduct for professional planners of having their 'planning' opinion and judgments to be based on the political views of [Orlikow] rather than proper analysis and due diligence.
>
> [emphasis omitted]

[123] Smith testified that he was perplexed by Marquess' observation, as it was his understanding the developer-led process included Orlikow as an important stakeholder for feedback and for understanding the plan, and with the view to have a plan that would be acceptable to the City council, and generally, by the community. Smith indicated the feedback was really important.

[124] Smith also explained that the intent of public planners is to go out to stakeholders, solicit feedback and incorporate the feedback as best they can to arrive at a robust plan.

[125] On March 2, 2018, Grady sent a letter to Gem, rejecting its DASZ application on three grounds, summarized below:

> First, on the basis that it did not comply with the zoning bylaw which reads[:]

> Transit-Oriented Development (TOD)
>
> (9) The Transit Oriented Developed (TOD) district is intended to facilitate mixed use development at a [scope] and density exceeding all other districts. These sites are intended to be adjacent to rapid transit stations with a council endorsed local area plan in place to guide development.
>
> Second, on the basis that there is no Secondary Plan approved by council.
>
> Third, Grady indicates that "only a limited portion of the site which you are proposing to rezone to the TOD district is adjacent to a rapid transit station."
>
> [emphasis and footnotes omitted]

[126] Marquess testified that that was the first time he was told a portion of the site was too far away from the BRT station to rezone to a TOD zoning district. On March 14, 2018, Gem appealed the rejection of its DASZ.

[127] At that point, a review of the secondary plan application was still ongoing.

[128] On March 12 and April 2, 2018, Marquess wrote further letters to Kiernan outlining his concerns. Kiernan testified that, at that point, communications were being exchanged between Gem's legal counsel and the City's legal services department. Kiernan did not respond. As such, City legal services responded that it would accept for review the DASZ to move the development process towards completion.

[129] On April 9, 2018, Gem attended a meeting of the SPC to appeal the rejection of its DASZ. It requested that Orlikow recuse himself and, as a result, the appeal was adjourned.

[130] Also on April 9, 2018, Platt sent a report to Smith, copied to Robinson, identifying issues the City's various departments had identified with the secondary plan, and responded to allegations made by Marquess.

[131] On May 2, 2018, City legal services responded to counsel for Gem, indicating the City was willing to accept the DASZ for review and requested that Gem abandon its appeal. Gem did not agree to abandon its appeal and, ultimately, Smith indicated the City would accept the application for processing.

[132] On May 11, 2018, Gem resubmitted its DASZ. Smith advised Robinson that no response should be made to Gem until, at a minimum, City legal services and the PPD reviewed the application.

[133] On May 18, 2018, Michele Hammerberg (Hammerberg), the development applications coordinator, emailed Marquess, advising:

> a) the Public Service had not refused GEM's development application;
>
> b) the application had been accepted for processing and had been assigned File No. DASZ 12/2018;
>
> c) in any event, documentation was missing from the application, including letters of authorization from all the property owners; and
>
> d) her office could not process the application if they had not received authorization from all the property owners that were the subject of the DASZ application.
>
> [footnote omitted]

[134] On May 14, 2018, Ludwig Lee (Lee), a zoning development officer with the ZPD, advised Marquess and Snelgrove that the DASZ could not be distributed amongst the various departments for review because Robinson himself intended to make some recommendations for revision.

[135] Marquess replied to the emails from Hammerberg and Lee, copying a number of persons in the PPD, accusing them of attempting to thwart Gem's application.

[136] On June 7, 2018, Gem filed an application in the Court of King's Bench seeking an order of *mandamus* requiring the CCCC to hear its development applications concurrently (the *mandamus* application). I do not propose to summarize what occurred before the application judge. Her decisions on the *mandamus* application and the subsequent motion for contempt are reported and are not being appealed herein (see *6165347 Manitoba Inc v The City of Winnipeg*, 2019 MBQB 121 [*contempt decision*]; *6165347 Manitoba Inc v The City of Winnipeg*, 2018 MBQB 153 [*mandamus decision*]).

[137] While the proceedings were ongoing, the UPD continued to review the development applications. On July 17, 2018, Platt internally circulated the draft first reading report for the secondary plan, recommending the by-law not receive first reading for the reasons outlined in the report. The UPD concluded the secondary plan contained numerous problematic and fundamental issues.

[138] On August 24, 2018, Platt's first reading report recommending rejection was submitted to Jack, who signed off. On September 4, 2018, the SPC accepted the public service recommendation to refuse Gem's secondary plan.

[139] On October 12, 2018, the application judge granted the *mandamus* application, ordering, among other things, the City to move the development applications forward to be heard concurrently at the CCCC meeting on November 13, 2018 (the *mandamus* order).

[140] On October 16, 2018, Gem issued a statement of claim naming the City, Kiernan, Smith, Robinson and Grady as defendants (the action).

[141] In October 2018, Gem cleared the remainder of the forest on the Parker Lands, precluding dedication of the forest to the City under the development applications. Gem's DASZ included a dedicated green space, not a forest.

[142] On October 29, 2018, Gem provided revised plans and new reports in response to comments from some of the City's departments. The plans and reports dealt with a number of issues, including an updated traffic impact study. The documents included an updated conceptual development plan, an updated proposed plan of subdivision and a revised PDO. Although the information was not incorporated into the administrative reports circulated to the CCCC members, Gem was advised they could present the information directly to the CCCC at the public hearing.

[143] The changes to the development applications included the creation of a dry retention pond in the northwest corner of the Parker Lands, shortening of the western access road, an extension of the associated back lane and a change to the alignment of the middle access road.

[144] On November 1, 2018, Robinson finalized the DASZ administrative report (the 2018 DASZ report) and recommended Gem's DASZ be rejected for nine principal reasons, summarized as follows:

> i. First, the TOD zoning district was unsuitable for the Parker Lands in its entirety. When applied across the entire site, the TOD zoning district could yield a total residential density of 6,970 dwelling units;
>
> ii. Second, while a PDO could be used to reduce the total density, the PDO still would have permitted 3,162 dwelling units across the entire Parker Lands. The [UPD] considered this density to be extremely high and inappropriate for the site.
>
> iii. Third, [Gem's] stated intention was only to develop ***1,918*** units on the Parker Lands, a figure far lower than the 3,162 that would be permitted under [Gem's] proposed DASZ application. As a consequence, the TOD zoning district was unnecessary and there were other zoning districts that could accommodate [Gem's] development plans.
>
> iv. Fourth, leaving aside the inconsistencies between the dwelling unit densities permitted under the proposed DASZ application and [Gem's] stated intention to develop 1,918 units on the site, the [UPD] had concerns about the appropriateness of ***either*** of these two dwelling unit densities given the site's lack of connectivity to the amenities north of the CN rail line and the adjacent neighborhood development south of the BRT corridor. The [UPD] was of the view that a maximum of 1,600 dwelling units was more appropriate.
>
> v. Fifth, the TOD zoning district permitted a number of commercial uses that the [UPD] perceived to be inappropriate for the Parker Lands, including commercial schools (such as universities), amusement enterprises, concert halls, and hotels;
>
> vi. Sixth, [Gem's] DASZ application would have allowed single-family and two-family residential development ***anywhere*** on the site. The [UPD] was of the view that this

development was more appropriately located at the rear of the site away from the BRT Station;

vii. Seventh, under [Gem's] proposed development, every multi-family building which was not "mixed-use" would require a conditional use approval to permit a building without commercial uses on the ground floor;

viii. [Eighth], [Gem's] DASZ application only showed one block with back lanes, whereas the [UPD] was of the view that all of the blocks in the lower density area ought to have back lanes as a consequence of snow storage issues and the desire to promote walkability; and

ix. Ninth, the [UPD] was of the view that in the absence of a forest preserve, the most appropriate green space would be one centrally located public park rather than the *quasi*-connected green pathway proposed by [Gem].

[emphasis and footnote omitted]

[145] The CCCC meeting was held on November 13, 2018. Robinson presented the 2018 DASZ report even though he had been named as a defendant in the action. At trial, Robinson explained the numerous reasons for rejecting the DASZ.

[146] The CCCC agreed with the UPD recommendation and rejected the DASZ. Robinson's presentation constituted his last substantial involvement in the Parker Lands development application process. The UPD continued to recommend the DASZ be rejected even after Robinson's involvement ended.

[147] On December 14, 2018, Gem brought a motion for an order declaring the City in contempt for failing to adhere to the *mandamus* order. The application judge concluded the City was in contempt (see *contempt decision* at para 79) and ordered the decisions made by the CCCC be set aside

(see *ibid* at para 76). The application judge also clarified that the *mandamus* order required the City to hear the development applications on November 13, 2018 and the City could have complied by proceeding with the secondary plan application pursuant to a non-statutory (policy) approach.

[148] A subsequent motion by the City to set aside the finding of contempt was dismissed.

[149] Revised UPD administrative reports respecting the development applications were prepared and submitted at an SPC meeting in May 2020. The secondary plan administrative report was prepared by another planner in the UPD. The UPD administrative report respecting the DASZ was prepared by another planner in the UPD, not Robinson (the 2020 DASZ report). Both reports recommended the proposed development applications not be approved for the reasons outlined in the reports.

[150] On November 26, 2020, following meetings held before the SPC and the EPC, City council approved the development applications. The approval was contingent on several conditions, including Gem and the City entering into a development agreement.

Issues

[151] The Smith and Robinson appeals raise the following issues:

(1) Did the trial judge make palpable and overriding errors in her consideration of the evidence, the inferences she drew and the findings of fact she made?

(2) Did the trial judge err in law by misapplying the test of misfeasance in public office?

[152] The City's appeal focuses on issues of causation and damages. Its first issue is the same as the second issue raised in the Smith and Robinson appeals. Its second issue is: Did the trial judge misapply the law of damages?

Standard of Review

[153] The parties agree, as do I, that the applicable standard of review is as set out in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. Questions of fact and mixed fact and law are reviewed on the standard of palpable and overriding error, unless there is an extricable error of law. Questions of law are reviewed on the standard of correctness (see *ibid* at paras 8, 10, 37).

[154] Applying these principles, the appellants submit the misapplication of the law of misfeasance in public office amounts to errors of mixed fact and law with extricable legal errors. They submit the extricable legal errors are (1) whether the trial judge failed to identify and examine the parameters or framework within which the public officials were compelled to act, and (2) whether the trial judge failed to address the mental element of the tort of misfeasance in public office. I agree these questions and, specifically, whether she misapplied the law are extricable legal errors reviewed on a standard of correctness. The balance of the errors alleged by the appellants are errors of fact or mixed fact and law and are reviewable on the palpable and overriding standard of review.

[155] The standard of palpable and overriding error is one that "is 'plainly seen', 'plainly identified', or 'obvious'" (*R v Kruk*, 2024 SCC 7 at para 97,

citing *Housen* at paras 5-6) and "it must be overriding, in that it must go to the core of the outcome of the case, such that it affected the result" (*R v Perswain*, 2023 MBCA 33 at para 12; see also *Benhaim v St-Germain*, 2016 SCC 48 at para 38, quoting *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46; *R v Clark*, 2005 SCC 2 at para 9).

Issue #1: Did the Trial Judge Make Palpable and Overriding Errors in Her Consideration of the Evidence, the Inferences She Drew and the Findings of Fact She Made?

[156] Before addressing the specific findings of fact and inferences drawn by the trial judge, it is important to examine the law of misfeasance in public office and to consider the test to be applied when drawing inferences to prove serious allegations of wrongdoing.

Legal Principles

[157] In the introduction, I briefly referenced the leading authorities that identify the elements and the proper scope of the tort of misfeasance in public office. In *Odhavji*, the Supreme Court noted that the tort of misfeasance in public office can arise in one of two ways, defined as Category A and Category B. Justice Iacobucci described them as follows (*ibid* at para 23):

> First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the

> express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[158] Later, Iacobucci J provided the following concise summary of the elements of the tort: "The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of 'bad faith' or 'dishonesty'" (*ibid* at para 28).

[159] The authorities stress that the intentional tort of misfeasance in public office involves "egregious intentional misconduct" and should be applied with caution and restraint (*Rain Coast Water Corp v British Columbia*, 2019 BCCA 201 at para 3 [*Rain Coast*], leave to appeal to SCC refused, 38791 (16 January 2020)). In that case, the defendants were found liable for various causes of action, including misfeasance in public office and the unlawful means tort.

[160] The British Columbia Court of Appeal allowed the defendants' appeal. It made the following observations respecting serious allegations of wrongdoing against public officers in the discharge of their duties (*ibid*):

> The appeal raises issues of procedural fairness, limitations and the requirements of proof of serious allegations of wrongdoing against public officers in the discharge of their duties. Primarily fact-driven, it serves to remind all concerned that claims for damages for the misuse of public power by dissatisfied citizens must be advanced, scrutinized and resolved with caution and restraint. As Justice Newbury explained in *Powder Mountain Resorts Ltd. v.*

> *British Columbia*, 2001 BCCA 619, the tort of misfeasance in public office provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties. For this reason, when addressing claims of misfeasance in public office, the courts strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions.

[161] And further (*ibid* at paras 144, 150):

> [M]isfeasance in public office is among the most egregious of tortious conduct.
>
> The underlying rationale of the tort is the protection of every citizen's reasonable expectation that those who hold public office will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of their public functions. Its ambit is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct: *Powder Mountain* at paras. 2, 8–9; *J.P.* at paras. 319–323, 329.

[162] In the decision of *Powder Mountain Resorts Ltd v British Columbia*, 2001 BCCA 619 [*Powder Mountain*], Newbury JA wrote about the "stench of dishonesty" (at para 8) as follows (*ibid*):

> Because abuse of public office remains an intentional tort requiring proof of bad faith, it will in the minds of most observers carry the 'stench of dishonesty'. This court has suggested that where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided: see ***MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*** (1995) 10 B.C.L.R. (3d) 121 *per* Finch J.A. (as he then was) at 181-2. (Lve. to app. to S.C.C. dism'd.) In ***First National Properties Ltd. v. McMinn*** (2001) 198 D.L.R. (4th) 443, we also

> stated that courts should be cautious in dealing with the tort because it is an exception to the normal disinterest of the civil law in the motive underlying conduct, as opposed to the conduct itself: see ***Bradford Corp. v. Pickles*** [1895] A.C. 587 (H.L.). (The criminal law distinguishes between "motive" and "intention" but that distinction seems inoperative in the present context.) Motive is of course notoriously difficult to discern, and one may act for more than one motive.
>
> [emphasis in original]

[163] Another case addressing the tort of misfeasance in public office and drawing inferences is *JP v British Columbia (Children and Family Development)*, 2017 BCCA 308 [*JP*], leave to appeal to SCC refused, 37817 (8 March 2018). That case involved a mother who brought a claim for misfeasance in public office against a team leader for a unit that investigated and assessed reports of potential harm to children. The trial judge found one of the defendants liable for Category B misfeasance, noting that the defendant "had a 'closed mind' toward the mother as a result of his 'ill will', 'antipathy' and '*animus*' toward her" (*ibid* at para 333).

[164] The British Columbia Court of Appeal overturned the decision, reviewing the differences between inferences and speculation (see *ibid* at paras 339-41). Justice Smith, writing for the Court, concluded that the factual foundation upon which the inference was drawn resulted from a misapprehension of evidence, and that the inference itself reflected palpable error (see *ibid* at para 341).

[165] Justice Smith addressed the subject of inferences as follows (*ibid* at para 338):

> Further, finding that [the defendant] had a "closed mind" based on his "ill will", "antipathy" and "*animus*" toward the mother is effectively a finding of targeted malice or improper motive under Category A misfeasance, for which the judge found no direct evidence. Therefore, targeted malice or improper motive could only have been inferred. Relying on *Miguna v. Toronto (City) Police Services Board*, 2008 ONCA 799 at paras. 28–30, [the defendant] submits that, in the absence of direct evidence, malice or improper motive cannot be inferred unless they are the only reasonable inferences to be drawn from the proven facts. On this point, *Miguna* is arguably inconsistent with *Alberta (Minister of Public Works, Supply & Services) v. Nilsson*, 2002 ABCA 283 at para. 112, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 35 ("*Nilsson*") and with Lord Hutton's reasons in *Three Rivers District Council v. Bank of England*, [2001] UKHL 16 at para. 148. In my view, it is unnecessary to resolve the point to dispose of this appeal and I would leave for another day resolution of the seemingly divergent lines of authority on this issue. For the purposes of this appeal, I am content to proceed on the footing that an inference of malice or improper motive need not be the only reasonable inference. As noted in *Powder Mountain*, however, such an inference must be grounded in evidence that provides proof commensurate with the seriousness of the wrong.

[166] I agree with the reasoning of Smith JA in *JP*, and it applies equally to the present case. The City submits that, in the absence of direct evidence, a court ought not to infer knowledge or recklessness as to the unlawfulness of conduct or bad faith unless there is no other reasonable inference other than bad faith (see *Greengen Holdings Ltd v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758 at paras 152-57 [*Greengen*]; *Miguna v Toronto Police Services Board*, 2008 ONCA 799 at para 32 [*Miguna*]). The principle articulated in *Greengen* and *Miguna* is arguably inconsistent with other cases referred to in *JP*. I agree that it is unnecessary to resolve the apparent divergent lines of authority on this issue to dispose of the present appeals. I am content to apply the general law on

drawing inferences from facts, as I am not satisfied it is necessary to apply the restrictive test on drawing inferences argued by the City. That said, an inference of deliberate, unlawful conduct or bad faith must be grounded in evidence that provides proof commensurate with the seriousness of the wrong.

[167] As pointed out by the Supreme Court in *FH v McDougall*, 2008 SCC 53 at paras 40, 49 [*FH*]; and in *Rain Coast* at para 108, there is only one civil standard of proof, and a judge must scrutinize the relevant evidence with care when making factual determinations, particularly where the allegations are serious.

[168] When deciding to draw an inference, a trial judge must rely on logic, common sense and experience, taking into account the totality of the evidence. (see *Rain Coast* at para 69; *R v Calnen*, 2019 SCC 6 at para 112 [*Calnen*]).

[169] If there is an evidentiary gap between the established facts and a proposed inference, the inference is unavailable, and it is an error for a trial judge to draw it. On the other hand, if an inference can reasonably and logically be drawn from proven facts, it is available to the trial judge and they may choose among any number of available reasonable inferences. However, if the factual foundation upon which an inference is drawn rests upon a misapprehension of the evidence, it is a palpable error for a trial judge to draw the inference (see *Rain Coast* at para 69; *Calnen* at para 112).

[170] I would summarize the principles governing the tort of misfeasance in public office as follows:

(1) It is an intentional tort whose distinguishing elements are:

(a) deliberate and unlawful conduct in the exercise of public functions; and

(b) awareness that the conduct is unlawful and likely to injure the plaintiff (see *Odhavji* at para 32).

(2) The plaintiff must also prove the other requirements common to all torts, including:

(a) that the tortious conduct was the legal cause of their injuries; and

(b) that the injuries suffered are compensable in tort law (see *ibid*).

(3) Misfeasance in public office involves egregious behaviour and is applied with caution and restraint (see *Rain Coast* at para 3);

(4) It provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties (see *ibid*);

(5) Because misfeasance in public office is an intentional tort, the actions and motivations of each individual actor involved must be considered separately (see *ibid* at para 151);

(6) The courts must strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making

decisions for the public good from unmeritorious claims by those adversely affected by their decisions (see *ibid* at para 3);

(7) The ambit of the tort is narrow, and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct (see *ibid* at para 150; *Powder Mountain* at paras 2, 8-9; *JP* at paras 319-23, 329);

(8) While an inference of malice or improper motive need not be the only reasonable inference drawn by a trial judge, such an inference must be grounded in evidence and there must be proof commensurate with the seriousness of the wrong (see *JP* at para 338);

(9) A trial judge must rely on logic, common sense and experience, taking into account the totality of the evidence when deciding when to draw an inference (see *Rain Coast* at para 69; *Calnen* at para 112);

(10) There is a distinction between an inference grounded in the evidence and one based on speculation. An inference can be reasonably and logically drawn from an established fact or group of facts, whereas speculation is mere conjecture based on guesswork. If there is an evidentiary gap between the established facts and a proposed inference, the inference is unavailable, and it is an error for a judge to draw it (see *Rain Coast* at para 69); and

(11) As noted by the Supreme Court in *FH*, there is only one civil standard of proof and that is proof on a balance of probabilities. Evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Seriousness of the allegations or consequences does not change the standard of proof. However, it is a factor for the trial judge to consider in weighing the evidence (see *Rain Coast* at para 108; *FH* paras 40, 49).

Findings of Fact and Inferences

[171] Against this backdrop, I propose to review the specific findings of fact and inferences drawn from the evidence and discuss the material errors of fact made by the trial judge.

[172] The trial judge made a number of distinct factual findings regarding the conduct of Smith and Robinson. Since there were no admissions of misfeasance by either of them, the trial judge made several findings based on inferences drawn from the documents filed and testimony at trial.

[173] Smith and Robinson had different roles within the PPD. Since Smith was the chief planner and oversaw the work being done by all planners in the UPD, some of the findings of fact relate to both Smith and Robinson. While the overlapping findings relating to both Smith and Robinson will be reviewed, it is necessary to examine the conduct of each of them separately to determine whether the trial judge made palpable and overriding errors in her findings of facts supporting her conclusion that they were each liable for misfeasance in public office.

Robinson—Analysis

[174] In his notice of appeal, Robinson alleges many errors by the trial judge in her findings of fact and mixed fact and law. In his factum and at the appeal hearing, he relied on three principal errors, namely, he committed misfeasance in public office because of his:

(1) involvement with the fill permit;

(2) purported "recommendation that the DASZ be rejected at First Reading" (*trial decision* at para 303); and

(3) recommendations to limit or restrict building heights or densities made solely based upon the interests and direction of Orlikow and for non-planning-related reasons and contrary to the concept of a TOD zoning district in the areas near a BRT station.

[175] I will deal with each of these findings in turn.

The Fill Permit

[176] The summary of the evidence in the *trial decision* regarding the fill permit is found at paragraphs 146-62. On June 20, 2017, Gem filed the fill permit with the City's development and inspection branch, which handled zoning and permit applications. The application sought a permit to stockpile and grade fill required on the Parker Lands site. Grady was named as a defendant and testified at the trial. At the time, Grady supervised the development and inspection branch. The application for the fill permit predates the filing of the development applications.

[177] The evidence establishes the UPD investigated whether the fill permit could be withheld, in part, as a consequence of the potentially deleterious effect that grading at the site would have on the forest, as well as the risk that the grading plan would interfere with the location and grades of building lots, roads, sidewalks and other infrastructure, which would be established in due course when the DASZ was considered and approved.

[178] Robinson submits that once he determined there was no authority to withhold the fill permit, he simply raised UPD's concerns with the ZPD, following which, he had no further involvement in the decision whether to issue the fill permit.

[179] Gem relies upon several exhibits, as well as Robinson's admission at trial that "there were no valid planning reasons to delay the permit" (*trial decision* at para 150).

[180] The trial judge found "there is no evidence before the Court which would suggest that Grady personally took steps to prevent the issuance of the fill permit for any bad faith or non-planning related reasons" (*ibid* at para 226). She further stated (*ibid* at para 227):

> In fact, there were a number of legitimate planning concerns raised by individuals in various departments with respect to the stockpiling and/or grading of fill on the site prior to approval of a Secondary Plan or DASZ. There was concern expressed as to how it would affect grading, drainage and the forest.

[181] Having made those findings, the trial judge went on to find "attempting to persuade Grady to deny the permit, rather than asking that any

legitimate planning concerns be addressed, was conduct outside of [Robinson, Platt and Smith's] statutory authority" (*ibid* at para 302).

[182] The trial judge made findings regarding Robinson's involvement with the fill permit application. She stated (*ibid* at para 300):

> While I determined that Grady did not act inappropriately in his role, the same cannot be said of the involvement of [UPD]. Robinson conceded at trial that normally planners do not involve themselves in permit applications with respect to fill. However, here he testified that the PPD was concerned with respect to potential damage to trees caused by the grading of the property. However, rather than seek to have [Gem] address any concerns, Platt was immediately instructed to research how to prevent the issuance of a permit. This was done with the knowledge of the obvious benefit to [Gem] of being able to access fill being created by other developments in the immediate area, including the digging of the retention pond on the property expropriated from [Gem] by the City.

[183] She further stated (*ibid* at para 302):

> The involvement of Robinson, Platt and Smith in attempting to persuade Grady to deny the permit, rather than asking that any legitimate planning concerns be addressed, was conduct outside of their statutory authority and for an improper purpose, and was done with conscious disregard for the cost to [Gem].

[184] Gem submits that there is evidentiary support for these findings and there is no palpable and overriding error in her findings.

[185] I am not satisfied that the steps taken by Robinson in connection with the fill permit constitute misfeasance in public office. First, the public officer must have been engaged in deliberate and unlawful conduct in his

capacity as a public officer. Second, the public officer must have been aware that his conduct was both unlawful and likely to harm Gem.

[186] Robinson is a professional planner and, in the course of his duties, was investigating whether a permit could be issued that would affect the site prior to the development applications being approved. The trial judge points to no unlawful conduct or breach of the *Charter* or breach of his professional duties.

[187] Contrary to the finding of the trial judge, Robinson did request that the ZPD address legitimate planning concerns. Those legitimate planning concerns were raised by the trial judge (see *trial decision* at para 227). Robinson raised the same or similar legitimate planning issues that were referenced by the trial judge when the trial judge concluded that Grady was not liable for misfeasance in public office.

[188] A legitimate planning concern raised by Robinson was whether a fill permit should be approved in advance of approval of a secondary plan and a DASZ. The UPD investigated the appropriateness of issuing a fill permit for that reason.

[189] The fill permit was filed in 2017, before the development applications were filed in 2018. As explained earlier, the DASZ would establish the land zoning designation and create a plan of subdivision that would provide details including the property's layout, lot sizes, road locations and other geographic boundaries, including the location of parks and forest reserves. It would also establish the location of sewer and water lines, sidewalks and traffic signals. I agree it was a legitimate planning concern to investigate whether grading should occur before the DASZ had been

recommended by the City and approved by City council. Robinson and others testified they had never seen this before.

[190] Other than the investigation conducted by the UPD, Robinson did not have further involvement with the fill permit. Nor did he make the decision to issue it.

[191] While I agree that Robinson conceded that planners normally do not involve themselves in fill permit applications, the UPD was concerned about the potential damage to the forest caused by grading the site. That was a legitimate planning concern. In my view, it was an error to find the steps taken by Robinson to investigate whether the issuance of the fill permit could be delayed amounts to deliberate and unlawful conduct or bad faith, which supports a finding of misfeasance in public office.

[192] While Robinson, Platt and Smith investigated whether the fill permit could be withheld, there was no evidence Robinson instructed Platt, Grady or others to deny the permit. Robinson was performing his job as a planner when he raised concerns regarding grades, drainage and the effect on the forest located within the Parker Lands.

[193] The findings of the trial judge amount to palpable and overriding errors, as the evidence does not establish that Robinson did anything unlawful for an improper purpose or outside his statutory authority. Further, there was a lack of proof of subjective recklessness or conscious disregard for the lawfulness of Robinson's conduct and the consequences to Gem (see *Odhavji* at paras 25-29).

Recommending Rejection of the DASZ at First Reading

[194] The trial judge found that Robinson committed the tort of misfeasance in public office because of his "recommendation that the DASZ be rejected at First Reading" (*trial decision* at para 303).

[195] The trial judge stated as follows (*ibid* at paras 303-4):

> Finally, I find that Robinson acted inappropriately with respect to his recommendation that the DASZ be rejected at First Reading. In my view, the DASZ was rejected solely because it was filed almost immediately after the Secondary Plan was submitted, rather than after the Secondary Plan was approved, as required by [Orlikow]. Smith and Robinson concede that Robinson had advised Lee not to accept the DASZ for review and Grady testified that refusing a DASZ was very rare. Grady stated that only City Council could "reject" a DASZ.
>
> In looking for reasons to reject the application, Robinson indicated to a City zoning development officer that the City was expecting to prepare the PDO, not the other way around. This completely flies in the face of the fact that the PDO had been drafted from the start by the City planner in consultation with GEM. As well, Robinson had already reviewed the DASZ and PDO at the pre-application stage. No indication was ever given to [Gem] that it had to be drafted differently or by the City.

[196] Before analyzing these findings, it is important to delineate the role of a planner in reviewing a DASZ. Smith and Robinson, as well as other planners, testified that the role of a planner is not to make decisions, but rather, to make recommendations to the committees and City council regarding zoning applications. Planners go out to the stakeholders, solicit feedback and try to accommodate the feedback as best they can to develop a robust plan. City councillors represent their constituencies and Orlikow was the councillor for the River Heights/Fort Garry ward. There was nothing untoward about

soliciting his views at the various meetings that occurred. Marquess and other representatives of Gem met with Orlikow on numerous occasions as well to discuss his views and the planning process.

[197] Once the information is received and reviewed, it is a planner's responsibility to prepare an administrative report reviewing the application. It is the CCCC, SPC, EPC and City council that make decisions on secondary plans and zoning applications.

[198] As stated earlier, the 2018 DASZ report prepared by the UPD recommended rejection of the DASZ based on nine principal reasons outlined in paragraph 144 herein.

[199] It is not clear exactly what the trial judge meant when she stated Robinson recommended that the DASZ be rejected at first reading. It appears she may have been referencing the filing of the DASZ to the ZPD on February 9, 2018. Upon receipt of the DASZ, the ZPD considered whether it conformed to the *Zoning By-law*. The ZPD considered this issue in consultation with the UPD. On February 22, 2018, Ho sent an email to Robinson and Grady and raised a number of concerns with the DASZ. Robinson responded, indicating Gem did not discuss the concerns she raised nor the contents of the PDO before applying and the UPD had been expecting "to prepare the PDO, with [Gem's] input—not the other way around."

[200] Robinson's email to Ho was sent in the context of the ZPD's consideration of whether it could accept the DASZ. It did not deal with the first reading of the DASZ or the UPD's recommendation that the committees reject the DASZ.

[201] The ZPD concluded it could not accept the DASZ and, on March 2, 2018, Grady advised Gem that the DASZ was refused on three grounds (see paragraph 125 herein). That decision had nothing to do with the PDO and who prepared it. It had more to do with the lack of an approved secondary plan and Gem's intention to apply the TOD zoning district criteria across the entire Parker Lands.

[202] The trial judge concluded Grady was not liable for the tort of misfeasance in public office. However, she found Robinson's recommendation, at the time, did constitute misfeasance in public office. In my view, these findings are inconsistent and, as I will explain, the evidence does not support a finding that Robinson committed a deliberate and unlawful act amounting to misfeasance in public office.

[203] The issue of first reading came up in the context of the secondary plan, not the DASZ. The administrative report respecting the secondary plan was prepared by Platt, not Robinson (the 2018 SP report). As indicated earlier, Platt wrote Smith, advising that the first reading report for the secondary plan had been prepared by him and Smith. This report ultimately recommended rejection of the secondary plan.

[204] Gem submits the trial judge clearly understood the difference between a secondary plan and a DASZ and the different processes to be followed and should not be faulted for a minor misstatement in the *trial decision*. It submits the trial judge heard evidence that:

(a) secondary plan applications are generally considered by City councillors before the related DASZ is considered;

(b) Gem was advised their DASZ would not be processed until the secondary plan had been approved;

(c) first reading of a secondary plan usually proceeded as of right, with the public service rarely ever recommending against it; and

(d) rejection of the secondary plan at first reading meant the related DASZ would also be rejected.

[205] As a planner, Robinson was tasked with preparing the 2018 DASZ report addressing the DASZ. In that report, the UPD recommended rejection of the DASZ for the nine principal reasons referenced above.

[206] I agree it is likely that the recommendation of the UPD to reject the DASZ is what was considered by the trial judge (see *trial decision* at para 308). The 2018 DASZ report was considered by the CCCC on November 13, 2018, pursuant to the *mandamus* order.

[207] The tort of misfeasance in public office is an intentional tort that is difficult to establish. Gem had to prove more than mere negligence, mismanagement or poor judgment. To succeed, Gem had the onus of proving Robinson knowingly acted illegally, for an improper purpose or in bad faith, and chose a course of action he knew was unlawful and was likely to injure Gem.

[208] In my view, the preparation of the 2018 DASZ report and the steps taken by Robinson were done pursuant to his role as a planner. The trial judge found the actions of Robinson in preventing Gem from having its DASZ

considered by a committee were an abuse of his authority as a public servant and done for an improper purpose. I disagree that the conduct of Robinson establishes that. The nine principal reasons raised in the 2018 DASZ report to support his recommendation do not demonstrate Robinson knowingly acted illegally or for an improper purpose, or that he deliberately chose a course of action to injure Gem.

[209] While it appears that the trial judge considered the multiple concerns raised by Robinson, she stated that "Wintrup testified [that these concerns] were largely manufactured issues which in his experience should not have prevented an applicant from proceeding through First Reading" (*trial decision* at para 206).

[210] First, Wintrup's critique focussed on the administrative report dated November 2, 2020 (the 2020 DASZ report), which had been authored by someone other than Robinson. Although there were similarities between the 2018 and the 2020 DASZ reports, there were also differences.

[211] Second, it is not surprising Robinson and Wintrup had different opinions about the DASZ. Planners may differ in their views respecting a development. Wintrup admitted he was an advocate retained by Gem and was assisting it to get the development applications approved. The fact the planners held different opinions does not prove Robinson acted deliberately and unlawfully or in excess or abuse of his authority, or that he knew that his actions were illegal and would likely cause injury to Gem. While Robinson's opinion was critiqued or disputed by Wintrup, and the trial judge preferred Wintrup's opinion, in my view, it does not follow that Robinson exercised his duties or made his recommendation for an improper or illegal purpose.

[212] Further, the trial judge stated that Robinson continued to recommend rejection of the DASZ when it was considered at the CCCC, in compliance with the *mandamus* order (see *trial decision* at para 306). She went on to say there was "no indication as to how long down the road, and under what circumstances, the public service would have supported [Gem] proceeding with [its] application before committee if an order of *mandamus* had not been granted. I see no indication in the evidence that their efforts to prevent the applications from being considered was going to let up any time soon" (*ibid* at para 307).

[213] It is important to note that the *mandamus* application dealt with two issues: (1) whether the secondary plan should proceed as a statutory by-law or a non-statutory process approved as a City council policy, and (2) whether the development applications could be heard concurrently by the CCCC. The application judge ordered the secondary plan to proceed as a non-statutory plan and that both applications proceed concurrently to a public hearing before the CCCC.

[214] Robinson was required to perform his professional duty and, in doing so, he prepared an administrative report. The *mandamus* application did not require the UPD or the CCCC to accept Gem's submission of the DASZ. The *mandamus* decision simply ordered that the public hearing considering the development applications take place. It had nothing to do with the recommendations and the 2018 DASZ report drafted by Robinson. It is also important to emphasize that the DASZ had been accepted by the ZPD before the CCCC hearing took place on November 13, 2018.

[215] Therefore, it does not follow that Robinson's actions in submitting the recommendation that was part of the 2018 DASZ report could amount to an abuse of his authority as a public servant and was done for an improper purpose with a conscious disregard for the consequences to Gem.

[216] In my view, the trial judge misunderstood the nature of the *mandamus* and *contempt decisions* and conflated evidence relating to completely distinct events. As a consequence, her findings supporting her conclusion that Robinson was liable for misfeasance in public office amount to palpable and overriding errors.

Recommendations to Limit or Restrict Building Heights or Densities Made at the Direction of Orlikow

[217] The trial judge made numerous references to the influence Orlikow had on the PPD and, specifically, on Smith and Robinson. Dealing with Robinson in particular, the trial judge made a general finding regarding Orlikow's input and involvement. She stated (*trial decision* at paras 297-99):

> The series of events just outlined is, in my view, consistent with the pattern seen throughout the course of the development planning process. Whenever an issue arose that was likely of concern to [Orlikow] a meeting would follow between members of the PPD and Orlikow, and following that meeting action would be taken by the public service which was consistent with the well-documented interests and views of [Orlikow]. In my view, it was no coincidence that after receiving an inquiry about the planning process from the Expropriation Department a meeting was convened almost immediately with Orlikow and steps were then taken by Robinson and Platt to limit densities and change the designation of the development. Consistent with the wishes of [Orlikow], GEM was also advised as part of the DASZ feedback that the Secondary Plan must be fully adopted prior to the DASZ being submitted for review. While this had been discussed

> internally for some time, and indicated repeatedly by Orlikow, this appears to be the first time that this two-step process was presented to GEM, not only as the expectation, but as a requirement. PPD had now gone from initially indicating that the Secondary Plan and DASZ could be considered together at one meeting, to requiring full completion of one application before commencing the second. The delay and opportunity for objection inherent in this requirement is obvious.
>
> Similarly, determination that the Parker Lands is not a TOD site serves to significantly reduce the density of development permitted on the property. This has significant implications for the design and profitability of the development.
>
> These decisions appear to have been made solely based upon the interests and direction of [Orlikow]. Limiting building heights to three stories is contrary to the earlier determination made by City planners that the optimum height for the City of Winnipeg was eight stories. I also accept the evidence of Richard that limiting densities in the manner suggested by Robinson in the DASZ pre-application feedback is contrary to the concept of TOD in areas near rapid transit stations which are expected to have greater densities than an average site.

[218] As stated earlier, Robinson's role as a professional planner was to review the DASZ submitted by Gem, circulate it for review and consideration by the various City departments and then prepare an administrative report for review by the various committees and, ultimately, by the City council.

[219] In my view, the trial judge incorrectly referred to Robinson personally as "limiting densities", "[changing] the designation of the development", or "significantly [reducing] the density of development permitted" on the Parker Lands based on instructions received from Orlikow (*ibid* at paras 297-99).

[220] Robinson did not make decisions to limit dwelling unit densities, change zoning designations, or otherwise approve or reject the DASZ. His role was to prepare an administrative report and to make recommendations. The ultimate decisions could only be made by City council after consideration by various committees.

[221] Although numerous exhibits referred to Orlikow and his many concerns respecting the proposed development, he was not called to testify. In my view, Orlikow was a stakeholder representing the constituents of the River Heights/Fort Garry ward and there was nothing untoward about meeting with him and discussing his and his constituents' various concerns. It was for the same reason that Marquess and his planning team met with Orlikow on numerous occasions. There was ample evidence that both Gem and the PPD preferred to have the ward councillor on side.

[222] The evidence does not establish, as found by the trial judge, that steps were taken by Robinson and Platt to limit densities and change the designation of the proposed development. The trial judge's reference to limiting building heights to three storeys was not recommended by Robinson. Robinson's recommendation was that the dwelling unit densities be higher closest to the BRT station, and lower as they move away from the BRT station. The UPD's recommendation was that the proposed development should have staggered heights with the tallest buildings (twelve storeys) near the BRT station and the lowest buildings (three storeys) located furthest away, as well as medium-sized buildings in between.

[223] While there was some evidence that the Winnipeg sweet spot in terms of storeys was eight, there was no evidence as to who made this notation or the manner in which it applied to the DASZ.

[224] There was evidence that Orlikow expressed a concern about the effect the Parker Lands development would have on the value of the land being expropriated by the City. I agree that it would have been improper for Robinson and the UPD to make recommendations respecting the Parker Lands based on expropriation values. That was clearly not a relevant planning consideration. While the issue appears to have been discussed at meetings with Orlikow, there was no evidence that the UPD, Smith or Robinson considered expropriation value to be a relevant factor.

[225] The expropriation by the City for the land required for the retention pond occurred in January 2016. On October 13, 2016, there was a meeting with Orlikow, Robinson, Platt and Smith. The meeting notes indicate the value is determined at the time of sale, not in accordance with the plan approved after the sale. The trial judge noted Robinson testified that from his perspective, any issue respecting the value of the expropriated land was put to rest. It was not relevant to planning considerations.

[226] In my view, Robinson's testimony is consistent with the documents produced and the inference drawn by the trial judge about the "dilemma" raised by Platt, specifically saying that "they were in a dilemma with respect to pressure they were receiving from Orlikow to limit densities for non-planning related reasons" (*trial decision* at para 291), is based on speculation and is not a reasonable and logical inference that can be drawn from a review of all of the evidence. There was no evidence Robinson made

recommendations to limit densities based on expropriation values for the Parker Lands.

[227] The references by the trial judge that Robinson improperly took steps to treat the Parker Lands as not being a TOD site are also inconsistent with the evidence. Other than a single email from Platt, the UPD and Robinson emphasized the Parker Lands should be considered a TOD site. The feedback to Gem following the submission of its DASZ pre-application and the 2018 DASZ report prepared by Robinson described the Parker Lands as a TOD site. Robinson's planning opinion was that it was not appropriate for the TOD zoning district to apply to the entire Parker Lands.

[228] In my view, the evidence establishes Orlikow had significant input concerning the proposed development of the Parker Lands and the documents were replete with references to Orlikow being opposed to the proposed development for various reasons. These concerns were factors the UPD took into account as Orlikow was a stakeholder representing constituents of the River Heights/Fort Garry ward. Some of Orlikow's concerns were political in nature, which is not surprising as he is a politician after all.

[229] There is no dispute that Orlikow raised some inappropriate concerns. For example, the expropriation value concern and his desire to delay the proposed development. However, raising these concerns does not amount to proof that Orlikow directed the planners and that Robinson specifically followed that direction knowing it was illegal to do so. The evidence simply falls short of proving that conclusion.

[230] I am not satisfied the inferences drawn by the trial judge regarding Orlikow's concerns or involvement prove Robinson is liable for misfeasance

in public office. Orlikow was not named as a defendant and did not testify. The totality of the evidence does not support the finding that Robinson deliberately and unlawfully exercised his duties in such a manner. I am mindful of the caution expressed in *Housen* at para 22 that appellate courts will be hard-pressed to find palpable and overriding error. The trial judge is in an advantageous position when it comes to assessing and weighing vast quantities of evidence.

[231] Bearing that caution in mind, the evidence simply does not support the inferences made and the trial judge's conclusion. Robinson's actions and recommendations detailed in the DASZ pre-application feedback and the 2018 DASZ report were based on planning considerations and what he believed were proper considerations for the relevant committees and City council.

[232] As stated earlier, for Gem to succeed, it is necessary for the Court to find deliberate and unlawful conduct in the exercise of Robinson's duties, along with subjective awareness that his conduct is unlawful. It is not enough to show negligence or bad judgment in performing his public duty. If the evidence of Gem and its consultants is accepted, that evidence establishes Robinson may have exercised bad judgment as a planner or made some recommendations that appeared to be unreasonable and caused delay to Gem. However, that is insufficient to establish Robinson's conduct was unlawful, in excess of his powers as a planner, an exercise of power for an improper purpose, or a breach of his statutory duty. Further, the evidence is insufficient to prove he had the subjective awareness of the unlawfulness, as well as the likelihood it would cause damage to Gem.

[233] In the result, I would allow Robinson's appeal and dismiss the claim against him.

Smith—Analysis

[234] The trial judge concluded that deliberate attempts were made by Smith to slow down or thwart the development applications with little or no regard for the costs or implications to Gem (see *trial decision* at para 281). She found Smith liable for exercising his power as a public official for an improper purpose and in breach of his statutory and professional obligations with reckless disregard for the interests of Gem. The findings of fact that she stated supporting her conclusion are found at paragraphs 244-74 of the *trial decision*.

[235] The trial judge set out the key findings supporting her conclusion as follows (*ibid* at para 280):

> With respect to Smith's conduct and direction given to planners on this file, I find on a balance of probabilities that he was responsible for the following:
>
> (a) He directed Doney to slow down the planning process;
>
> (b) When Doney did not slow the process down to his satisfaction he replaced him as the lead planner on the file;
>
> (c) He arranged for a peer review of the development plan prepared in consultation with Doney for the purpose of slowing the development planning process;
>
> (d) He instructed Platt to slow down the planning process;

(e) He was complicit in withholding information from Kiernan with respect to the directions coming from Orlikow with respect to the planning process;

(f) He did not report concerns coming from his planners with respect to the involvement of [Orlikow] in the planning process to Kiernan or anyone above him;

(g) Notwithstanding the expressed concerns of his planners he continued to carry out the wishes of [Orlikow] even when they were not consistent with planning principles or moving the applications through the approval process;

(h) He understood that concerns of [Orlikow] such as an increase in the value of expropriated lands, or political interests related to elections and the interests of his constituents, were not planning considerations governing the duties of the public service; and

(i) He withheld and concealed information from GEM as to [Orlikow's] input in the process.

[236] Smith submits the findings of fact amount to palpable and overriding errors because they are clearly wrong, taken out of context, or do not apply to him.

[237] Gem submits that the trial judge's findings are reasonable, logical and supported by a review of the evidence. None of the findings constitute palpable and overriding errors. I propose to review the key findings made and inferences drawn by the trial judge.

Slow Down or Thwart the Development Process

[238] The first three findings noted above in paragraphs 280(a)–280(c) of the *trial decision* appear to support the conclusion reached by the trial judge

that Smith made deliberate attempts to slow down or thwart the development applications.

[239] It is important to point out that a motion was made at the commencement of the trial to further amend the statement of claim to include specific allegations of misfeasance in public office following the appointment of Kiernan as the director of the PPD on October 1, 2015. The amendment was allowed and the allegations of misfeasance in public office were alleged to have commenced on or after October 1, 2015.

[240] The trial judge found that following a meeting between Smith and Orlikow held in July 2015, where Orlikow expressed his lack of support for the proposed development as well as many planning-related concerns, Smith responded by arranging for a peer review of the draft secondary plan. Further, she found that "[i]t appear[ed] clear from the timing of [the] decision that Smith was utilizing a peer review to carry out [Orlikow's] wishes that the development process be slowed down or stopped. Around the same time, Doney was reprimanded for continuing to advance the development plan" (*trial decision* at para 249).

[241] Leaving aside for the moment that these findings predate the allegations of misfeasance in public office in the re-amended statement of claim, the evidence simply does not support these inferences and findings. On July 20, 2015, Doney reported to Smith that Orlikow had issues with the proposed development. As a result, Smith decided that since the PI Branch had been working on the secondary plan for approximately eighteen months, a peer review of the secondary plan should be conducted. There is no dispute

that Doney was told to slow down work on the secondary plan while the peer review was conducted.

[242] Doney testified that he was told to slow down work on the secondary plan while the internal review or peer review was taking place, not at any other time. He was not told why the peer review was being done. The peer review was completed in about six weeks and, on September 14, 2015, the peer review report was sent to Smith. Doney continued to work on the Parker Lands file following the peer review. Contrary to the trial judge's findings, Doney specifically testified in cross-examination that he was not aware of any request coming from anyone in the public service to delay or thwart the progress of the development applications and he received no instructions from Robinson or anyone to delay or thwart the applications. Gem's own witnesses—Veitch, Platt and Shenback—made similar statements during their testimony.

[243] While Doney was replaced as the lead planner on the Parker Lands development, that did not occur until June 2016 and there was no evidence the decision occurred because Doney failed to slow down the development application process to Smith's satisfaction. The evidence was that there was a divisional realignment in the PPD. Doney was switched to the DA Branch and the inference drawn by the trial judge as to the motive or reason is, in my view, speculative. Transferring Doney to another position is within the discretion of the chief planner and does not support the finding Smith acted unlawfully or for an improper purpose or in bad faith.

[244] As the chief planner, he was taking steps to move the plan forward. Smith assigned Platt as the manager of the Parker Lands file and instructed Platt to put the pedal to the metal and come to a favorable conclusion so the

department could get the secondary plan wrapped up and devote their resources to other plans.

Peer Review

[245] The trial judge imputed an unlawful motive or bad faith because Smith ordered the peer review of the secondary plan. She found the purpose was to slow down or thwart the development applications. The inference drawn appears to be based on the fact that Smith's request for peer review occurred shortly after an email from Doney identifying issues Orlikow had with the proposed development. Although ordering a peer review was not common, Smith testified it was ordered so he could be confident the secondary plan was integrated with all the other moving parts, both on-site and on the adjacent lands. At the time, Orlikow did identify planning issues that were appropriate for the PPD to consider.

[246] Further, the peer review report of Shenback and Veitch was not dictated by Smith, but was based on their own professional judgments as planners. There is no allegation that Shenback and Veitch acted for an improper or unlawful purpose in preparing the peer review report.

[247] The trial judge stated that the peer review "identified primarily formatting issues and the need for the appropriate level of comfort from [Orlikow]. The content was largely reported to be okay" (*trial decision* at para 251). However, the peer review did raise several significant issues as detailed above at paragraph 70.

[248] As pointed out in the authorities, clear proof of bad faith or unlawful conduct should be provided, and judicial caution is advised when assessing such allegations (see *Powder Mountain* at paras 8-9).

[249] There was some conflicting evidence as to whether Doney was directed to tell Marquess that a peer review had been undertaken. In any event, that fact alone does not establish an improper or unlawful motive for ordering the peer review.

[250] Gem submits the trial judge's finding regarding the peer review, as noted above, is reasonable, logical and supported by the evidence. While there was no doubt that Orlikow had concerns respecting the Parker Lands development, I am not satisfied that drawing the inference that Smith ordered the peer review to carry out Orlikow's wishes to slow or stop the development planning process is a reasonable or logical inference supported by the proven evidence.

[251] In my view, there was ample evidence to support Smith's reasons for ordering the peer review in the circumstances, given the length of time it had taken and the number of drafts of the secondary plan that had been prepared by that time with no consensus about the secondary plan complying with the City's zoning by-laws. I am not satisfied that the inferences drawn by the trial judge respecting an improper purpose, unlawfulness or bad faith were reasonable or justified when there was evidence that Smith's conduct was performed in good faith for legitimate planning purposes.

[252] Borrowing wording from the British Columbia Court of Appeal in *Powder Mountain*, it is difficult to imagine that a motive on the part of Smith

as the chief planner to protect the City's best interests could be characterized as an ulterior, improper motive or bad faith (see para 66).

The Fill Permit

[253] There is no question that Platt emailed Smith about attempting to withhold the fill permit (see paragraph 98 herein). As stated earlier regarding the allegations against Robinson, that evidence does not establish Robinson or Smith actually slowed down the fill permit process for an improper or illegal purpose. Other than receiving an email from Platt, there is no evidence to support the trial judge's findings that Smith's actions regarding the fill permit support that he is liable for misfeasance in public office.

Expropriation/Political Interest

[254] Again, there is no question that Orlikow was not shy about expressing his views and concerns respecting the Parker Lands development. Smith and others in the PPD had many meetings with Orlikow. As noted above, one of the reasons expressed by Orlikow for wanting the proposed development delayed was his view that the value of the lands expropriated from Gem by the City would increase once the proposed development proceeded. The trial judge found, and the parties do not dispute, this was not a proper planning consideration.

[255] A briefing note dated October 1, 2015 to Kiernan prepared by Veitch did not include reference to Orlikow's issue regarding the expropriation value (the October briefing note). The trial judge specifically found Smith "was complicit in withholding information from Kiernan with respect to the

directions coming from Orlikow with respect to the planning process" (*trial decision* at para 280(e)).

[256] The evidence does not support the inference that excluding the reference to Orlikow's issue regarding the expropriation value from the October briefing note was based on an instruction from Smith. The evidence is undisputed that Orlikow's concern was not a proper planning consideration and, therefore, it was not an issue that entered into the planning assessment and recommendations respecting the secondary plan.

[257] Does the evidence support a finding that Smith deliberately and improperly withheld information from Kiernan to carry out the wishes of Orlikow knowing that it was unlawful to do so? Or was this simply a status report to the new director concerning proper planning considerations respecting the Parker Lands development?

[258] Neither Smith nor Veitch was cross-examined on the October briefing note and, while failure to reference one of Orlikow's concerns can be criticized, it is not proof that Smith withheld information from Kiernan for an illegal or improper purpose with the intention of slowing down and thwarting the development applications with little or no regard for the costs or implications to Gem in doing so.

[259] Kiernan's evidence was that he was aware of Orlikow's involvement and concerns and that it was common for there to be regular dialogue between area councillors and planners. Kiernan had monthly meetings with Orlikow as the councillor was the chairman of the SPC.

[260] As stated earlier, there is no dispute that Orlikow raised some irrelevant concerns. However, raising these concerns does not amount to proof that Orlikow directed Smith, and that Smith specifically followed the direction knowing that it was illegal to do so.

[261] Reference was made to a meeting invitation from Platt to Smith on October 7, 2016. In the invitation, Platt stated he and Robinson were caught in a dilemma relating to Orlikow wanting to limit densities at a TOD site for non-planning-related reasons. Orlikow appeared to feel that allowing Gem to build above six storeys would increase the value of the retention pond land, which was being valued as part of the expropriation.

[262] Smith testified that he advised Orlikow that this concern was baseless. The UPD did not factor expropriation into their planning considerations. He stated this was not one of the factors considered.

[263] On October 13, 2016, there was a meeting held with Orlikow, Robinson, Platt, and Smith, and the meeting notes are consistent with Smith's evidence. The notes state that the value is determined at the time of sale, not in accordance with the plan approved after the sale.

[264] Kiernan's evidence was that any concerns by the planners would go to their manager, who was Smith. Orlikow did not give direction to the planners as he was not their employer. Kiernan's testimony did not indicate that Smith was obligated to report Orlikow's non-planning concerns to him, nor did it suggest that failing to do so was improper.

[265] Smith, Platt and Robinson all testified that Orlikow raised some non-planning concerns, and those views did not factor into their planning assessment and recommendations.

[266] Meetings with Doney, Robinson, Smith and others with Orlikow and the timing of those meetings are not proof that they were directed by Orlikow for non-planning reasons. While I agree with Gem that Platt, Robinson and Smith downplayed the importance of the dilemma referenced by Platt (see paragraph 85 herein), I agree that by the time the meeting notes were made on October 13, 2016, the planning process was irrelevant to the expropriation value (see paragraph 87 herein).

[267] Further, there is no evidence to prove that Smith made any decisions respecting the secondary plan or the DASZ to consider or implement non-planning considerations in the planning process. Platt was called as Gem's witness and testified that non-planning considerations were not taken into account in his review of the secondary plan.

[268] While Orlikow's concern about the value of the expropriated lands and political interests related to elections were not planning considerations, as stated earlier, his and the constituents of the River Heights/Fort Garry ward's concerns were proper planning considerations. Orlikow and the constituents were stakeholders, and it is appropriate for planners to take into account their concerns respecting the development, including preserving the forest, the density of the development, the public space, connectivity to the BRT station and other areas, and traffic impact, among others. In my view, it was appropriate to consider the views of the stakeholders in the development

process. This was acknowledged by Gem's witnesses, including Marquess, Platt, Zywina and Doney, as well as Smith and Robinson.

[269] Seeking input from the stakeholders is not exercising power for an improper purpose, in breach of a statutory duty or a breach of a professional obligation. Reference was made to the Canadian Institute of Planners, *CIP: Member Code of Professional Conduct and Statement of Values* (Ottawa: CIP, 2016), online: <cip-icu.ca/wp-content/uploads/2023/10/CIP-Member-Professional-Codes-of-Conduct-and-Ethics.pdf>, which provides, in part, that planners work for the public good and that members have a primary responsibility to define and serve the interests of the public. Planners are required to take into account the public interest and those interests are represented through local area councillors, such as Orlikow.

[270] Most of the witnesses confirmed it was normal to meet with councillors because their opinion was valued. The trial judge stated that Richard testified she could not recall actively engaging with a City councillor during the planning process for a developer-led plan while employed at PPD (see *trial decision* at para 258). Her evidence was that discussions with councillors took place before applications were filed. One-on-one meetings, as well as meetings involving a district planner or manager of planning with councillors, also occurred during the development process.

[271] Wintrup acknowledged he had interactions with councillors where a councillor wanted to ensure there was public engagement.

[272] Smith testified he was perplexed by Marquess' allegations about the conduct of professional planners and it being inappropriate for their opinions and judgments to be based, in part, on the political view of a local councillor.

He also testified that it was a developer-led process and Orlikow was an important stakeholder for feedback and understanding about the plan with a view to having a plan that would be acceptable to the City council, and generally, by the community. He stated that such feedback was really important.

[273] It is reasonable to accept that Orlikow's input was important. However, despite the caution urged in the case law, the trial judge's inference that Orlikow's input dictated the planning process for an illegal or improper purpose does not reasonably or logically follow from a review of the evidence. Misfeasance in public office provides a cause of action in response to deliberate, unlawful conduct in exercising duties in a public office. This type of serious allegation requires proof commensurate with the seriousness of the alleged wrong (see *Rain Coast* at para 108; *FH* at paras 40, 49).

[274] Smith's conduct and actions do not support an inference that he acted deliberately for an illegal or improper purpose to slow down or thwart the development applications. His conduct is more consistent with performing his duties as the chief planner to ensure the proposed development was consistent with existing by-laws and proper planning principles.

[275] The trial judge found that Smith understood the concerns of Orlikow, such as an increase in the value of expropriated lands or political interests related to elections, and the interests of his constituents were not planning considerations governing the duties of the public service (see *trial decision* at para 280(h)).

[276] The reference to political interests related to elections appears to be a reference to a meeting that Doney had with Orlikow on June 6, 2014. The

email reporting on the meeting expressed Orlikow's view that no public engagement should take place before the civic election. That may have been Orlikow's view at that time, but there is nothing in the evidence indicating that direction was intentionally followed by Smith or anyone else in the PPD. In my view, the trial judge correctly found that Smith understood the value of the expropriated lands and political interests related to elections were not planning considerations.

[277] However, the inference drawn by the trial judge that these facts support her conclusion that deliberate attempts were made by Smith to slow down or thwart the development applications with little or no regard for the costs or implications to it amounts to a palpable and overriding error. The inference does not reasonably or logically follow from those facts. As stated earlier, a finding of deliberate, illegal or improper conduct is a high bar. It must be supported by evidence that the public officer engaged in deliberate and unlawful conduct and that the public officer was aware that his conduct was unlawful and likely to harm Gem. The evidence in this case falls short of that high bar.

[278] The trial judge found Smith "withheld and concealed information from Gem as to [Orlikow's] input in the process" (*ibid* at para 280(i)). The trial judge did not provide details as to when information was withheld or concealed from Gem. On the other hand, the evidence establishes representatives of Gem, including Marquess and his consulting team, met with Orlikow to obtain feedback on the planning process. At trial, Marquess and Zywina, his planner, acknowledged Orlikow was an important stakeholder in the development process.

[279] Marquess testified he had periodic contact with Orlikow and, in essence, his desire was to proceed as one with the City on the site planning process. As early as May 2014, Doney suggested to Marquess that Gem proceed with public consultation. Marquess responded that he wanted a high degree of alignment with the PPD, followed by other City departments and then Orlikow. Marquess wanted everyone aligned and informed before public consultation.

[280] There are numerous examples of Gem meeting with Orlikow, or requesting his involvement with the public service, including February 7, 2014; April 15, 2015; and September 2015 to September 2017.

[281] In my view, it is difficult to discern with any confidence what planning issues, if any, were deliberately withheld and concealed from Gem. More importantly, if this allegation is a reference to the value of the expropriated lands or political interests related to elections, Smith knew these were not proper planning considerations and, therefore, it would not make sense to share that information with Gem. The political interests were not Smith's concern and were not factored into the decision-making process.

[282] Following the peer review, Smith sent the October 2015 email to Marquess, advising, among other things, that Gem was at liberty to schedule an open house; the statutory process would apply to the secondary plan; and the development applications could be moved forward concurrently (see paragraph 75 herein).

[283] The October 2015 email, and other evidence, suggest Smith was attempting to move the development applications forward, not hold them back. He was providing important feedback to Marquess at that time that Gem

was at liberty to schedule an open house whenever it wanted. He also gave advice about the development applications and that they could move forward concurrently.

Statutory Plan (By-law) Process vs. Non-Statutory Plan (Policy) Process

[284] As pointed out in paragraph 7 above, the proposed development of the Parker Lands was lengthy and complex and took far longer than it should have to reach the approval stage. Without repeating the various issues referenced above, I propose to address two issues that the trial judge considered in her analysis: (1) the secondary statutory plan (by-law) versus the non-statutory plan (policy) process; and (2) whether the development applications were required to proceed to approval separately or whether they could proceed concurrently.

[285] The trial judge specifically rejected Smith's evidence regarding the change in City policy related to the approval process for secondary plans (see *trial decision* at para 248). Gem states that it does not dispute the City had the discretion to require secondary plans to be approved as a secondary plan by-law. Further, Gem agrees the City could make that decision provided it is made for legitimate planning purposes.

[286] As previously discussed, starting at paragraph 113 herein, Gem filed its secondary plan on January 12, 2018, and its DASZ on February 9, 2018. Marquess acknowledged Gem preferred full buy-in from the City and Orlikow before submitting the development applications. Marquess testified that the decision not to submit the development applications until 2018 was his to make.

[287] The October 2015 email from Smith to Marquess confirmed the secondary plan would follow the statutory by-law process. Marquess and Gem appear to have accepted that the secondary plan would be approved by the statutory by-law process. Both the letter of intent dated December 17, 2017 and the secondary plan dated January 12, 2018 specified that the secondary plan would follow the City statutory plan (by-law) process. By March 2018, Marquess was frustrated with the delays and conveyed to the City he was proceeding with a non-statutory process.

[288] There is no doubt Orlikow expressed the view the secondary plan should proceed by way of the statutory by-law process. Although there were some differences of opinion amongst the planners, Smith believed it was appropriate to proceed with the statutory plan process.

[289] The trial judge acknowledged the City had authority to determine the process. However, she also drew the inference that the determination to proceed by way of statutory process was "at the behest of [Orlikow] as a means of slowing down, and giving him more control over, the process" (*trial decision* at para 273). The statutory process permitted greater public scrutiny which, in the circumstances, was reasonable and Smith believed it was appropriate to proceed in that fashion. Since the City had the authority to determine the process, as I will explain, the inference drawn by the trial judge does not logically follow from the evidence.

[290] I agree the statutory plan process probably took longer than the non-statutory approval process, but it simply does not follow that the process was changed at the behest of Orlikow as a means of slowing down and giving him more control over the process.

[291] There is no doubt there was significant evidence that Marquess and Gem were frustrated by the delays in finalizing the development applications and, therefore, chose to file their applications with the City in early 2018. When the applications were rejected, Gem chose to file the *mandamus* application.

[292] At the time the *mandamus* application was heard, the application judge stated that the City had the right to insist on a statutory plan and that it just had to act fairly. She also found, on the basis of the evidence filed in the *mandamus* application, that the City had not acted in bad faith and that both parties had contributed to the delay (see *mandamus decision* at paras 26-27).

[293] Smith supported proceeding with the statutory process and gave valid planning reasons for recommending its adoption by the City. There is insufficient evidence to infer Smith supported that approach at the behest of Orlikow or, more importantly, that he did so for an unlawful purpose or that the recommendation or decision was in breach of a statutory authority.

[294] Pursuant to section 234(1) of the *Charter*, City council may adopt a secondary plan by by-law. Proceeding to do so was a legitimate planning purpose authorized by the *Charter*.

[295] I acknowledge that the action had significantly more evidence than what was before the application judge on the *mandamus* application. However, the evidence at trial is consistent with the application judge's findings and does not support a finding that Smith acted in bad faith or was directing the conduct of the planners to delay or thwart the development applications at the behest of Orlikow.

[296] Gem's witnesses testified there were no attempts made by the individual defendants to delay or thwart the progress of the development applications. Veitch testified that the intention was to get the development applications to a state where they could proceed at a public hearing and be approved with everyone on the same page. He was not aware of any plot or conspiracy within the PPD to delay the application. Doney, Platt and Shenback agreed.

[297] The trial judge found Smith was aware of Platt's recommendations respecting Gem's secondary plan and states that "[h]e was also aware of, and signed off on, the recommendations of PPD that both applications be rejected without First Reading" (*trial decision* at para 267). The 2018 SP report was prepared by Platt, and Smith, as the chief planner of UPD, was aware of the recommendations. It appears that Smith supported the decision made by the other planners. The recommendations of Platt were reviewed by Kiernan and approved by him and other City officers, including McNeil, Jack and City legal services.

[298] At that point, City legal services was involved in most communications due to the *mandamus* application and the action. The consensus of the City at that time was that the recommendations were based on planning considerations, which the UPD was entitled to make. Ultimately, City council decided whether to accept or reject the recommendations made by the UPD.

[299] The trial judge was critical of Platt's work and the 2018 SP report he prepared respecting the secondary plan. She preferred the evidence of Richard and Wintrup to the evidence given by the City planners. None of the

planners were qualified as independent experts to provide opinion evidence. A properly qualified expert may provide opinion evidence to assist the trier of fact where their technical expertise is required to assist in drawing inferences (see *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23). None of the planners testified as expert witnesses.

[300] Opinion evidence from lay witnesses may be admissible in certain circumstances (see *R v Jenkins*, 2024 ONCA 533; *R v Chester* (1990), 64 Man R (2d) 146, 1990 CanLII 11190 (MBCA); *Graat v R*, 1982 CanLII 33 (SCC); Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 12.15).

[301] The trial judge was not asked, nor did she conduct an analysis, to determine whether lay opinion evidence was admissible. During Wintrup's cross-examination, she stated that the planners were only testifying regarding their experiences, not offering opinions. In my view, it is unnecessary to decide if the opinion evidence is admissible in this case because even if it is admissible, it does not establish that Smith or Robinson are liable for misfeasance in public office. The trial judge found that where the opinions of Richard and Wintrup differed from those of the defendants, she generally accepted the evidence of Gem's witnesses (see *trial decision* at para 272). She stated: "Based upon that evidence, I am satisfied that Platt was fabricating issues with the proposed Secondary Plan that should not have prevented [Gem] from advancing [its] plan to the various committees for approval" (*ibid*).

[302] Platt was not a defendant in the action and the trial judge did not find that he committed misfeasance in public office. It is difficult to follow

how the trial judge's finding respecting work done by a senior planner translates to an inference and conclusion that Smith exercised his powers as a public official for an improper purpose and in breach of his statutory and professional duties and is, therefore, liable for misfeasance in a public office.

[303] Platt's reasons for recommending the secondary plan by-law not receive first reading were based generally on the following planning issues:

> 1. The Plan applies an incorrect TOD Type within the Plan Area.
>
> 2. The Plan does not provide sufficient detail to properly evaluate development proposals within the Plan Area.
>
> 3. The Plan permits both industrial and high density residential uses to be established in the Neighbourhood Policy Area.
>
> 4. The Plan does not effectively protect a clearly defined portion of the remaining forest area as presented at the public Open House events.
>
> 5. The Plan requires significant 'clean up' and re-organization before it can be considered for adoption as a Council By-law.
>
> 6. The Plan is missing important content and policies.

[304] Preferring the evidence and opinions of Wintrup and Richard over Platt or other City planners is one thing. That preference in the evidence does not prove that Smith is liable for misfeasance in public office. Marquess acknowledged in his testimony that he believed Platt's views were honestly held beliefs.

[305] As identified in the authorities, more is required to prove misfeasance in public office. The conduct must be illegal or where a public official has exercised his power for an improper purpose with a subjective

recklessness or conscious disregard for the lawfulness of the conduct and the consequences to Gem. In my view, the recommendation that the secondary plan proceed as a statutory by-law is not evidence that proves Smith deliberately delayed the development applications for an illegal or improper purpose.

Concurrent Hearing of the Development Applications

[306] The trial judge found the requirement that Gem proceed first through the statutory process respecting the secondary plan, which required a public meeting, and then proceed separately through a DASZ process, which also required a public meeting, "was imposed at the insistence of [Orlikow] and not for PPD reasons" (*trial decision* at para 274).

[307] As early as the October 2015 email, Smith advised Marquess the DASZ could be moved forward concurrently with the secondary plan and its corresponding PDO, and could be considered at the same public meeting at the CCCC. At some point following the formal filing of the development applications in 2018, a recommendation was made that the two applications should not proceed concurrently, and the secondary plan should proceed first.

[308] Two different branches of the UPD have the responsibility to prepare administrative reports and make recommendations respecting the development applications. Platt prepared the 2018 SP report on the secondary plan and Robinson prepared the 2018 DASZ report respecting the DASZ.

[309] A secondary plan is the overall vision for the development of a site. The DASZ provides the additional detail for the development, as noted above. Therefore, even if they are heard concurrently, the secondary plan would have

to be approved before or at the same time the DASZ is approved. There were prior examples of secondary plans and DASZs proceeding concurrently. That was the case with the Fort Rouge Yards. It is not clear who made the final decision that the development applications could not proceed concurrently.

[310] According to the evidence, if the development applications do not proceed concurrently, any delay would have been a matter of a month to six weeks, not years, and Smith testified that was outside of his control. According to Smith, the process-related issues are not big issues. The primary issues pertain to the content of the secondary plan.

[311] Smith denied he was ever directed to delay, thwart or sabotage the development applications or that any view, advice, opinions or instructions he gave during the planning process were anything other than his best professional belief honestly held based on planning principles.

[312] None of the planners testified that Smith directed them to delay, thwart or sabotage the development applications. Although the recommendation to have them proceed separately may have caused some delay to Gem, the evidence does not rise to the level of misfeasance in public office. It was not done for an illegal or improper purpose with a conscious disregard that the conduct was likely to injure Gem.

[313] To conclude, applying the principles outlined above, the trial judge made palpable and overriding errors in her findings of fact and in the inferences she drew to find Smith liable for misfeasance in public office. There was insufficient evidence to prove Smith's conduct was deliberately unlawful, in breach of his duties as the chief planner, done for an improper purpose, or done in bad faith. Further, there was insufficient evidence to

conclude he had a conscious disregard for the lawfulness of his conduct and the consequences to Gem. In the result, I would allow Smith's appeal and dismiss the claim against him.

[314] The trial judge found the City vicariously liable for the conduct of Robinson and Smith. Since I would allow the appeals and dismiss the claims against Robinson and Smith, it follows that I would also allow the City's appeal and dismiss the claim against it.

Issue #2: Did the Trial Judge Err in Law by Misapplying the Test of Misfeasance in Public Office?

[315] Since I would allow the appeals and dismiss the claims against Robinson, Smith and the City, it is unnecessary to address this issue. However, as I will explain, two aspects of the submissions made regarding the application of the proper test of misfeasance in public office deserve further consideration.

Analysis

[316] The parties agree that the trial judge generally set out the correct legal test to be applied respecting the tort of misfeasance in public office.

[317] As explained in the authorities, the tort of misfeasance in public office has two distinct branches, commonly referred to as Category A and Category B misfeasance. In this case, the trial judge focussed on Category B misfeasance. In *JP*, Smith JA explained the requisite mental elements as follows (at paras 326-27, cited in *Rain Coast* at para 152):

> Category A misfeasance is established when a public officer exercises his or her power for the specific purpose of harming the plaintiff. *Three Rivers* described it as "targeted malice" that includes conduct done for the ulterior or improper purpose of harming the plaintiff. Proof of the specific intent to harm the plaintiff will be sufficient to establish that the public officer had knowledge his or her conduct was likely to harm the plaintiff: *Odhavji* at para. 23.
>
> Category B misfeasance is more complex. It does not require a finding of specific intent to harm the plaintiff, but rather an objective determination that the public officer knowingly engaged in a deliberate unlawful act with an awareness that his or her conduct would likely harm the plaintiff or a class of plaintiffs. Knowledge of harm alone is insufficient to establish that the public officer acted in bad faith or dishonestly. Rather, the officer must know that the deliberate conduct is inconsistent with the obligations of the office, including that it exceeds the powers of the office, or omits a legally required act: *Odhavji* at para. 28 and *Powder Mountain* at para. 67.

[318] The misfeasance authorities describe the high standard of proof required to establish bad faith or dishonesty on the part of the public officer, as well as the line between misfeasance in public office on the one hand and, on the other, negligent acts committed without knowledge or subjective recklessness as to their unlawfulness and probable consequences (see *Rain Coast* at para 153).

[319] Justice Smith described the mental element as follows (*JP* at para 329, quoted in *Rain Coast* at para 153):

> The mental element of Category A or Category B misfeasance establishes the "bad faith" or "dishonesty" of the public officer. Accordingly, it requires "clear proof commensurate with the seriousness of the wrong": *Powder Mountain* at para. 8 and *Odhavji* at para. 28. Awareness or knowledge that the unlawful act is likely to harm the plaintiff requires at least a subjective

> recklessness or wilful blindness, if not actual knowledge, of the likely consequences of the unlawful act: *Powder Mountain* at paras. 7 and *Odhavji* at paras. 25 and 38. Subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence. The mental element of the tort thus constrains its ambit from including inadvertent or negligent conduct by a public officer in the discharge of his or her official obligations: *Odhavji* at para. 26.

[320] In *Odhavji*, the Supreme Court reviewed the underlying rationale for the narrow application of the tort of misfeasance in public office. Justice Iacobucci explained (*ibid* at para 28, quoted in *Rain Coast* at para 154):

> In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[321] The Supreme Court further explained that the second part of the test restricts the ambit of the tort. Justice Iacobucci explained (*Odhavji* at para 29):

> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an

> individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.
>
> [emphasis in original]

[322] In my view, the trial judge erred in her application of the law in two respects: (1) she failed to examine the parameters or framework within which Smith and Robinson, as public officials, were compelled to act; and (2) she failed to address that Smith and Robinson must be subjectively aware of the unlawfulness of their conduct and the likelihood of harm to Gem.

[323] As to the first error, the trial judge failed to consider the relevant statutory, by-law or policy framework to determine the nature and extent of the breach of an obligation owed by the public officers. There must be an assessment of the public officer's authority before one can assess whether it was exceeded or the actions were in breach of a relevant duty.

[324] For example, the trial judge found that Robinson's conduct in relation to the fill permit application was outside his statutory authority (see *trial decision* at para 302). What statutory authority was the trial judge referencing? In what manner was this statutory authority breached? The evidence was that Robinson investigated the appropriateness of permit applications that impact upon planning matters and specifically, in this case, the DASZ. How, therefore, was doing that outside Robinson's statutory authority?

[325] The trial judge appears to have concluded that seeking feedback from Orlikow was a breach of duty by both Smith and Robinson. In my view, it was incumbent upon the trial judge to analyze the framework so that she

could determine the extent to which it was permissible for public officials like Smith and Robinson to consider feedback and the opinions of local area councillors.

[326] As stated earlier, Orlikow was a local area councillor who was publicly elected to represent the constituents of the River Heights/Fort Garry ward. Local area councillors are stakeholders and their input is important. There is nothing nefarious about meeting with and receiving feedback from Orlikow.

[327] However, there is a line that has to be drawn, and a public official may at some point find themself acting outside the parameters of their lawful authority by seeking direction and feedback from a local area councillor. In this case, the trial judge failed to undertake an analysis to determine where that line must be drawn. The trial judge made conclusory statements that Smith exercised "his power as a public official for an improper purpose and in breach of his statutory and professional obligations" (*ibid* at para 281). The trial judge also stated that Robinson's conduct "was an abuse of his authority as a public servant and done for an improper purpose" (*ibid* at para 308).

[328] The trial judge did not consider the framework that established the parameters surrounding Robinson's and Smith's conduct. As a result, the trial judge misapplied the law.

[329] The second error was that the trial judge failed to assess the mental element of the tort. As explained in *Odhavji*, the subjective recklessness or conscious disregard for the lawfulness of the conduct and the consequences to the persons affected restricts the ambit of the tort. It is not enough to find that Smith's and Robinson's conduct were deliberate attempts to slow down

and thwart the development applications. There must be cogent evidence that demonstrates they had a conscious disregard for the interests of those affected by the misconduct, in this case Gem. Although the trial judge stated they both had a reckless or conscious disregard for the interests of Gem (see *trial decision* at paras 281, 308), she did not conduct a robust assessment of this aspect of the test.

[330] In my view, the trial judge's failure to assess this aspect of the test resulted in a failure to establish the required nexus between the parties. Absent some awareness of harm, there is no basis on which to conclude that Smith and Robinson breached an obligation that they owed to Gem. Absent a breach of an obligation that Smith or Robinson owed to Gem, there can be no liability in tort. Therefore, the trial judge misapplied the law.

[331] Because the trial judge misapplied the law of misfeasance in public office, this Court is required to apply the law to the facts as outlined above. As I reviewed in detail above, in my view, the trial judge erred in her findings of fact and inferences grounded on those findings. If the law is applied to the facts of this case, the evidence falls short of meeting the high bar of proving that Smith and Robinson are liable for misfeasance in public office.

Damages

[332] The trial judge awarded Gem compensatory and exemplary damages in the amount of $5 million. The City appeals the trial judge's damages award.

[333] Since I would allow the appeals on liability, it is unnecessary to review the award of damages made by the trial judge. This decision should not be read as an endorsement of either the damages awarded or the reasoning

of the trial judge. I leave for another day providing an opinion on when and in what circumstances an award of compensatory and exemplary damages at large should be granted.

Conclusion

[334] For all the foregoing reasons, I would allow the appeals, set aside the judgment below and dismiss the action in its entirety. I would order Gem to pay costs in this Court and the Court below.

Edmond JA

I agree: Cameron JA

I agree: Kroft JA

APPENDIX

Defined terms used in this decision:

616	6165347 Manitoba Inc.
2018 DASZ report	DASZ administrative report dated November 1, 2018 prepared by Robinson
2018 SP report	administrative report respecting the secondary plan prepared by Platt
2020 DASZ report	administrative report dated November 2, 2020
Beaton	Donna Beaton, Parks strategic planner in the Planning Division
Bird	Lawrence Bird, consultant for Gem until 2016
BRT	bus rapid transit
CCCC	City Centre Community Committee
contempt decision	*6165347 Manitoba Inc v The City of Winnipeg*, 2019 MBQB 121
DA Branch	Development Application Branch of the City's Urban Planning Division
DASZ	Development Application for Subdivision and Rezoning
development applications	Gem's secondary plan and a DASZ
the proposed development	development of the Parker Lands into a multi-family development called Fulton Grove
Doney	Glen Doney, senior planner in the PI Branch of the UPD
February briefing note	February 9, 2015, a briefing note was sent from Smith to the acting director of PPD, Marc Pittet (Pittet), to describe the status of the planning process and identify related issues
EPC	Executive Policy Committee
Gem	6165347 Manitoba Inc. and 7138793 Manitoba Ltd.
Grady	Martin Grady, administrator, ZPD
Ho	Michelle Ho, zoning development officer in the PPD
Jack	Michael Jack, held different positions, including chief corporate services officer (2015-2020) and chief administrative officer (July 23, 2021)

Keesmaat	Jennifer Keesmaat, consultant for Gem from October 2017, former planner with the City of Toronto
Kiernan	John Kiernan, manager of UPD until October 1, 2015, then became director of PPD
mandamus application	June 7, 2018, Gem filed an application in the Court of King's Bench seeking an order of *mandamus* requiring the CCCC to hear its secondary plan application and DASZ concurrently
mandamus order	October 12, 2018, the application judge granted Gem's *mandamus* application, ordering, among other things, the City to move the development applications forward to be heard concurrently at the CCCC meeting on November 13, 2018
Marquess	Andrew Marquess, principal of 6165347 Manitoba Inc.
McNeil	Doug McNeil, chief administrative officer from October 2015 to 2019
October briefing note	briefing note dated October 1, 2015 to Kiernan prepared by Veitch did not include reference to Orlikow's issue regarding the expropriation value
Orlikow	John Orlikow, City Councillor for the River Heights/Fort Garry ward
Parker Lands	47 acres of land located in the River Heights/Fort Garry ward of the City commonly referred to as the Parker Lands
PDO	Plan Development Overlay
peer review report	September 14, 2015, Veitch emailed Smith, outlining the findings of the peer review
PI Branch	Plan Implementation Branch of the City's Urban Planning Division
Pittet	Marc Pittet, acting director of PPD
Platt	James Platt, senior planner, PI Branch of the PPD
PPD	Planning, Property and Development Department
Richard	Michelle Richard, consultant for Gem, former planner with the PPD
Robinson	Michael Robinson, senior planner in the DA Branch of the UPD
secondary plan	overarching vision for the development of the Parker Lands
sewer relief project	Cockburn-Calrossie sewer relief project
Shenback	Brett Shenback, supervisor of the PI Branch

Smith	Braden Smith, chief planner of the UPD
Snelgrove	Chris Snelgrove, consultant to Gem
SPC	Standing Policy Committee on Property and Development, Heritage and Downtown Development
TAC	technical advisory committee
the action	statement of claim naming the City, Kiernan, Smith, Robinson and Grady as defendants
the City	City of Winnipeg
the fill permit	permit to stockpile and grade fill on the Parker Lands
Thorgrimson	Barry Thorgrimson, then-director of PPD
TOD	transit-oriented development
TOD handbook	transit-oriented development handbook
Ulyatt	George Ulyatt, prepared a report respecting the expropriation of a portion of the Parker Lands
UPD	Urban Planning Division
Veitch	James Veitch, supervisor of the DA Branch
Wintrup	John Wintrup, consultant to Gem, former planner with the PPD
ZPD	Zoning and Permits Division
Zywina	Geoffrey Zywina, consultant to Gem