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The City of Winnipeg et al.
Cited as: 2023 MBKB 114

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

6165347 MANITOBA INC. and 7138793 MANITOBA LTD., plaintiffs,	)	Dave G. Hill Kevin D. Toyne and Faye A. Brandson for the plaintiffs
- and -	)	Douglas R. Brown Nicole K. Beasse and
THE CITY OF WINNIPEG, JOHN KIERNAN, BRADEN SMITH, MICHAEL ROBINSON and MARTIN GRADY,	)	Vivian F.Y. Li for the defendant The City of Winnipeg
defendants.	)	Thor J. Hansell and Danielle A. Barchyn for the defendant John Kiernan
	)	Brian J. Meronek, K.C. and Erin Lawlor Forsyth for the defendant Braden Smith
	)	Kevin T. Williams and J. Matthew Nordlund for the defendant Michael Robinson
	)	Michael G. Finlayson for the defendant Martin Grady
	)	Judgment Delivered: July 6, 2023

McCARTHY J.

INTRODUCTION

[1] The Plaintiffs, 6165347 Manitoba Inc. and 7138793 Manitoba Ltd., which I will collectively describe as GEM, have made a claim against four employees of the Defendant, The City of Winnipeg (the "City") for misfeasance in public office. The City is also named as a Defendant and concedes that if any of the named Defendants are found liable, the City is vicariously liable for any wrongdoing of their employees in the course of their employment.

[2] For the reasons that follow I find that Braden Smith ("Smith"), Michael Robinson ("Robinson") and the City are liable for misfeasance in public office. The claims against John Kiernan ("Kiernan") and Martin Grady ("Grady") are dismissed.

OVERVIEW

[3] In 2009 GEM acquired approximately 58 acres of the northern Parker Lands ("Parker Lands") from the City pursuant to a "land swap" for property it owned in the Fort Rouge Yard area ("FRY"). The intention in acquiring the Parker Lands was to develop it into a multi-family development called Fulton Grove.

[4] The City Council minutes which approved the transfer of the lands to the Plaintiffs indicated that the development process was to be a developer led secondary planning process involving public consultations.

[5] For the purposes of this decision it is important to comment on some of the terminology used throughout. Although they mean somewhat different things in some circumstances, in this decision reference to an Area Master Plan, Master Plan, Local Area Plan and Secondary Plan are used interchangeably. Within that category of plans there can be two types: statutory and non-statutory. Statutory plans are also referred to at times as by-law plans.

[6] Similarly, development applications in this decision are referred to as a Development Application for Subdivision and Rezoning ("DASZ") which for the purposes of this decision incorporates a Plan Development Overlay ("PDO").

[7] The Defendant, Kiernan, had been a manager of Urban Planning and Design ("Urban Planning") until October 1, 2015 when he became the Director of the City's Planning, Property & Development Department ("PPD"). That department has several divisions within it including Urban Planning and Zoning and Permits.

[8] The Urban Planning Division of PPD is divided into the Development Application Branch and the Plan Implementation Branch.

[9] In this case, Robinson worked in the Development Application Branch under the supervision of James Veitch ("Veitch"). That branch handled DASZ applications.

[10] The Plan Implementation Branch was responsible for Secondary Plan applications. Glen Doney ("Doney") and James Platt ("Platt") were planners in that branch who worked under the supervision of Brett Shenback ("Shenback").

[11] Smith in his capacity as Chief Planner of Urban Planning oversaw both divisions.

[12] All Defendants are educated and have earned designations as planners, except Kiernan. The Defendants and their respective departments, as well as other City departments, are sometimes referred to herein as the "public service" for ease of reference.

[13] In the fall of 2013, GEM began working collaboratively with Doney on a plan for development of the Parker Lands.

[14] In the spring of 2014, the Plaintiffs had engaged environmental, site servicing and traffic assessments of the Parker Lands and on April 4, 2014, Lawrence Bird ("Bird"), the planner for the Plaintiffs, provided the first draft of a Secondary Plan to Doney for review.

[15] By late May 2014 Doney advised the Plaintiffs and various City employees that the goal was to bring the Secondary Plan and DASZ to the City Centre Community Committee ("CCCC") by November 2014 for their approval.

[16] By November 2014, however, a number of issues with respect to the development had been raised by the area Councillor, John Orlikow ("Orlikow"), and the City had not yet advised of the specifics of the Plan with respect to a retention pond they wished to build on the Parker Lands.

[17] By mid-December 2014, the Plaintiffs and Doney were both indicating that the Secondary Plan was close to the point where it could be made public.

[18] Between February 2015 and January 2018 the Plaintiffs and PPD were unable to finalize the Secondary Plan and the DASZ to their mutual satisfaction for reasons that will be outlined in detail later in these reasons.

[19] On January 12, 2018, the Plaintiffs formally submitted their Secondary Plan and on February 9, 2018, the Plaintiffs submitted their DASZ. The feedback from the public service was that extensive changes were required and the applications could not proceed concurrently.

[20] On June 7, 2018, the Plaintiffs filed a Mandamus Application in the Court of Queen's Bench (as it was then) seeking that the City be required to consider the DASZ and the Secondary Plan applications at the same meeting and on a non-statutory basis.

[21] In September 2018, GEM's applications were denied First Reading by the Standing Policy Committee on Property and Development, Heritage and Downtown Development (the "SPC") on the recommendation of PPD.

[22] On September 19, 2018, the Plaintiffs were granted an Order of Mandamus in the Court of Queen's Bench, and on October 12, 2018, a further Order was granted requiring the City to move the applications forward at its CCCC meeting on November 18, 2018.

[23] On November 13, 2018, the CCCC considered the Secondary Plan and rejected the applications without First Reading based upon the recommendations of the public service.

[24] On February 15, 2019, the City and the CCCC were found to be in contempt of the Court of Queen's Bench Order and their decisions of November 2018 were set aside. A motion by the City to set aside the Contempt Order was dismissed.

[25] On November 26, 2020, both the Secondary Plan and the DASZ were approved by City Council. The approval was contingent upon the Plaintiffs and the City entering into a Development Agreement. At the time of trial no Development Agreement had been completed.

[26] At trial the Plaintiffs called Andrew Marquess ("Marquess"), Geoff Zywina ("Zywina"), and Chris Snelgrove ("Snelgrove") on behalf of GEM, two planners, Michelle Richard ("Richard") and John Wintrup ("Wintrup") hired by GEM as consultants, and four employees of PPD, Doney, Veitch, Shenback and Platt to give evidence.

[27] Each of the Defendants testified on their own behalf and the current Chief Administrative Officer ("CAO") for the City, Michael Jack ("Jack"), testified.

ISSUES

[28] The issues in this trial were:

(a) Have the Defendants committed the tort of misfeasance in public office?

(b) If so, is the City vicariously liable?

(c) Damages.

MISFEASANCE IN PUBLIC OFFICE

The Law

[29] The Supreme Court of Canada first set out the test for misfeasance in public office in 1959 in the case of ***Roncarelli v. Duplessis***, 1959 CanLII 50 (SCC), [1959] SCR 121. That case involved abuse of public office for a purpose.

[30] The Roncarelli test has since been applied in Manitoba in ***Gershman v. Manitoba Vegetable Producers' Marketing Board***, 1976 CanLII 1093 (MB CA), [1976] MJ No 129 (QL), at pp.123 and 125, where O'Sullivan J.A. stated:

> The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers cannot be in doubt in Canada since the landmark case of *Roncarelli v. Duplessis* (1959), 16 D.L.R. (2d) 689, [1959] S.C.R. 121. Since that case, it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort.

…

In the case before us, there was no power in the defendant Board to use its authority for the purpose either of driving the Gershman family out of business or of punishing the plaintiff for his representations concerning the Gershman company debt or of forcing the plaintiff to have the company pay a debt for which it was liable but for which he was not.

[31] In ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, Iacobucci J. stated:

22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts*, *supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. 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.

…

32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that

> the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[32] In 2012, the British Columbia Supreme Court in ***Rocky Point Metalcraft Ltd. v. Cowichan Valley Regional District***, 2012 BCSC 756, the Honourable Fisher J. stated:

> [82] Bad faith covers a wide range of conduct in the exercise of local government authority. It includes dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, unreasonable conduct, and conduct based on an improper motive or undertaken for an improper, indirect or ulterior purpose. Bad faith does not necessarily require wrongdoing or personal advantage on the part of any members …
>
> [83] Unlawful discrimination may be found where a bylaw singles out one property without regard to valid and *bona fide* planning principles, or where there is an improper motive to favour or hurt one property without regard to the public interest…
>
> [84] Whether or not there is bad faith or discrimination is essentially a question of fact to be determined on the totality of the evidence in each case. In many cases, inferences of bad faith may have to be made …

[33] And most recently, in 2021 the Supreme Court of Canada in ***Ontario (Attorney General) v. Clark***, 2021 SCC 18, Abella J. stated:

> [22] The elements and proper scope of the tort of misfeasance are not disputed in this appeal. A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263, at para. 23, per Iacobucci J.).
>
> [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), 2001 BCCA 619 (CanLII), 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).

[34] In 2008, the Ontario Court of Appeal in ***Ontario Racing Commission v. O'Dwyer***, 2008 ONCA 446, at para.43 noted that public office is to be defined in "a relatively wide sense". In ***Clark***, Abella J. used the term "public official". And in ***Alevizos v. Manitoba Chiropractors Association et al***, 2009 MBQB 116, McKelvey J. stated at para. 118 that "[a] public official is one who has a duty imposed on him/her under an Act or regulation. This definition is wide enough to include those who hold public office or who act under a statutory authority…" and defines "public officer" to include any person in the public service of the government.

[35] There was no dispute in this case that each of the Defendants are public officials and subject to the common law principles outlined above.

[36] In this case, the Plaintiffs allege that each of the individual Defendants have committed acts of misfeasance and that the City is vicariously liable as a result.

[37] As these claims are against individual City employees, I will address my findings of misfeasance in public office generally and will then address the conduct of each named Defendant individually.

Positions of the Parties

[38] The Plaintiffs argue that the evidence before the Court, and in particular the internal email communications and meeting notes of various members of the public service demonstrate that the Defendants were acting deliberately and unlawfully in an effort to slow down or thwart the Plaintiffs' development with disregard for the harm their actions were causing the Plaintiffs. The Plaintiffs point to several actions by the Defendants as being an exercise of power for an improper purpose, bad faith, and/or a

breach of their statutory duties as planners under the authority of ***The City of Winnipeg Charter Act*** ("***Charter***"), and their professional Codes of Conduct. Such conduct, they argued, included acting and instructing others to act based upon the political wishes of a ward Councillor, rather than development and planning principles; instructing City employees to slow the process down; recommending that the developer's applications not be properly considered by City Council and/or committees to the detriment of the developer; attempting to delay, or prevent, the issuance of a fill permit; interfering with the protection of the Plaintiffs' property rights; and withholding, or subverting, the provision of information to which the Plaintiffs were entitled.

[39] The Plaintiffs allege that the named Defendants intentionally tried to slow down and prevent the approval of their development plans at the request of the ward Councillor and that they knew that his reasons for not wanting the development to proceed were, at least in part, for political reasons, and to keep the value down on the land expropriated from the Plaintiffs until they had been paid.

[40] The Defendants argued that there was no evidence of unlawful or intentional actions by any of the Defendants which were deliberate and intended to cause delay or harm to the Plaintiffs. In the alternative, if there was any such conduct, no damage was suffered by, or proven by, the Plaintiffs.

[41] The Defendants argued that the development process for Parker Lands was lengthy and complex because of the nature of the development and related developments in the surrounding areas. They also argued that the development process was hampered at times by a significant lack of resources within the public service which occasionally

caused delays. They also attributed some of the complexity and delay in the process to changing policies within the public service rather than an intention to treat this development differently than other similar developments.

[42] The Defendants deny any connection between the Plaintiffs' development applications and the proceedings before the Land Value Appraisal Commission ("LVAC"), the City expropriation branch, with respect to the Plaintiffs' expropriated lands. They argued that the Plaintiffs misunderstand the appraisal process as it relates to expropriated lands.

[43] And finally, the Defendants argued that the public service, while taking into account the views and wishes of the ward Councillor as a stakeholder, was not taking direction from him or acting with disregard for their duties as planners and public servants.

The Facts

[44] The law of misfeasance in public office, as set out above, requires a determination of whether, on the balance of probabilities, the individual Defendants have engaged in a deliberate disregard of their public duties with knowledge that the misconduct was likely to harm the Plaintiffs. That determination must be made on a careful assessment of the whole of the evidence.

[45] What follows is a lengthy dissertation of the facts gleaned from several weeks of testimony and thousands of pages of documents. As one might expect, there are no admissions of misfeasance relied upon by the Plaintiffs. Rather, a review of the lengthy development process was required in order for the Court to identify the conduct of each

of the Defendants and to draw appropriate inferences as to the intentions behind that conduct.

[46] In this case, I am satisfied on a balance of probabilities that the evidence as a whole establishes a pattern of conduct of the Defendants, Smith and Robinson, which rises to the level of misfeasance in public office. With respect to the other Defendants, the Plaintiffs have not met the onus of proving misfeasance. I am also of the view that the City is vicariously liable for the improper conduct of its employees and the reasonable damages that flow from their conduct.

[47] The 2009 minutes of the City Council vote that approved the initial land swap between the City and the Plaintiffs indicated that the process was to be "…a developer led secondary plan for the Fort Rouge lands and the Parker Lands, which secondary planning process shall incorporate appropriate public consultations".

[48] Thereafter, the Plaintiffs commenced the planning process for the FRY property in 2010, and a non-statutory Secondary Plan and DASZ were developed cooperatively between the PPD and GEM. In the FRY case, both applications were heard at one meeting by the relevant City committees in the fall of 2010, and were both approved by City Council within nine months of the process starting. Further, the FRY development was treated as a transit-oriented development ("TOD"), notwithstanding the fact that the City's zoning by-law had not yet been amended to include a TOD zone and the City's official TOD handbook was still being developed.

2013

[49] In early 2013, the Parker Lands development process was initiated by Marquess contacting PPD on behalf of GEM and meeting with Smith. Smith then assigned Doney as the City planner on the project in November 2013. Both Marquess and Doney described undertaking a collaborative developer led planning process at that time.

[50] In compiling the initial package of information for the Plaintiffs, Doney solicited input from other members of PPD, telling them that "[t]hese lands are likely to be developed into transit-oriented multiple-family dwellings, parks and some commercial and institutional uses" (Ex. 11).

[51] In December 2013, Doney provided Marquess with an information package containing information that the Parker Lands "will not be connected by a road or path" to the Taylor Major Redevelopment Site ("MRS"). It also indicated that the site was to be developed in accordance with the principles of TOD. The package included the OurWinnipeg and Complete Communities information that would govern the development process (Ex. 12). OurWinnipeg is the City's official development plan and Complete Communities is a related development strategy by-law. The Parker Lands are designated as one of 11 MRS's within those development plans and by-laws.

[52] There was no indication in that package that the forest was to be preserved or that the City intended to expropriate 6.7 hectares of the land from the Plaintiffs, two issues that would later become very significant to the planning process. There was also no indication that the site was considered isolated or otherwise particularly problematic for residential development, issues also raised by the public service years later.

[53] Based upon internal City communications at that time the need for a retention pond in the area had already been identified, but that information was not provided to the Plaintiffs until January 2014 when they were told that the City wished to put a retention pond on part of the Parker Lands (Ex. 27).

2014

[54] In early 2014 as a result of this information Marquess attended a meeting with the Chief Operating Officer of the City, and Orlikow, the City Councillor representing the River Heights and the Fort Garry wards where the Parker Lands were located, to inquire into whether the City retention pond could be located somewhere else. No response to that inquiry was known for several months.

[55] In April of 2014, the Plaintiffs had arranged for environmental, site servicing and traffic assessments of the Parker Lands and submitted their first draft of the Secondary Plan to Doney for review. At that time they were still awaiting a decision by the City on the location of the retention pond.

[56] In mid-May 2014, Doney suggested proceeding with public consultation, however, Marquess advised that he wanted to wait until PPD and the area Councillor were all on the same page before holding public consultations (Ex. 64 p. 1).

[57] By May 27, 2014, Doney had advised the Plaintiffs and others in PPD that the goal was to have the Secondary Plan and the DASZ go concurrently for committee approval in November 2014 (Ex. 68 and Ex. 73 p.1).

[58] On June 6, 2014, without the knowledge of Marquess, Doney met with Orlikow "to discuss the draft plan and its associated topics" (Ex. 84). Following that meeting Doney

sent an email to his supervisor, Shenback and Robinson, conveying a message from Orlikow to PPD that "the Parker Lands Plan (the Plan) shall be approved as a Secondary Plan" and "there's not rush to complete the Plan [sic]" and "no public engagement should take place before the Civic Election" (Ex. 86). This information was not shared with the Plaintiffs.

[59] Shenback then relayed the content of Doney's June 6, 2014 email to Smith. Shenback stated that:

> The Councillor believes that the Plan should be approved as a secondary plan. Thus far all other Area Master 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. The Councillor 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 plan but rather endorsed by Council. (Ex. 87)

[60] On June 9, 2014, Orlikow wrote to Doney that the preparation of a developer led Secondary Plan was not necessary at that time, and that in his view the project was not ready for consultation. Doney forwarded this email to the attention of Smith and Shenback, but it was not shared with the Plaintiffs (Ex. 89).

[61] By September 29, 2014, no public engagement had yet occurred and Marquess sent Doney an email inquiring about the rezoning process and asking whether it was "slowed down and is stalled? Nothing has progressed for a long time" (Ex. 105 p. 6).

[62] In late October 2014, Doney told Marquess that the City was not reviewing the servicing, sewer and water reports regarding the portions of the Plaintiffs' land where the City intended to place a retention pond. Doney also emailed some of his colleagues and

urged them to make the City's position on the retention pond clear as the City had not, at that point, conveyed its intention to expropriate land from the Plaintiffs (Ex. 111).

[63] This issue persisted into November 2014, at which point Marquess advised Doney that he needed to know about the specific dimensions of a City retention pond on the Plaintiffs' land in order for his engineers to complete the work required to design a development on the Parker Lands (Ex. 116).

[64] On November 20, 2014, Doney expressed concern to Shenback that GEM needed to be advised of the Councillor's expectations on the forest and the contents of the Master Plan (Ex. 119). Shenback then advised Smith that a meeting would be arranged with Orlikow (Ex. 120).

[65] On November 24, 2014, Doney emailed Orlikow to advise that they were wanting to plan the use and development of the Parker Lands. Orlikow almost immediately emailed the Director of PPD requesting that he call him. The Director responded inviting the input of the Councillor as a stakeholder with respect to the Plan (Ex. 112). Later that same day, Doney emailed Smith and copied Platt, Shenback and Robinson. The email indicated in bold that no formal application for approval of either Plan had been made. He went on to reiterate matters decided at his June 6, 2014 meeting with Orlikow, including that Urban Planning should not be discussing the forest issue with GEM, that there was no rush to complete the Master Plan and that no public engagement should take place before the election. He also outlined subsequent direction from the Councillor that he required assistance from Planning (PPD?) to save the forest and would speak to Smith about that, that preparation of the Secondary Plan was not necessary until all

servicing and forest issues had been determined. Next steps were identified by Doney as updating the Councillor and learning his thoughts on the Plan.

[66] On December 16, 2014, Doney emailed Shenback to advise that the Plaintiffs and the City were "close to creating a Master Plan that could be made public." (Ex. 130) Doney's use of "Master Plan" suggested the process would be non-statutory. This email was forwarded to Smith who replied to Doney and Shenback that "I understood that it was to be a [statutory] Secondary Plan. That was relayed to me at the same meeting Glen attended with Cllr Orlikow a while back" (Ex. 130). Shortly after receiving Smith's email about Orlikow's instructions, Doney wrote to Shenback "[t]hen I should inform Gem Equities, yes? My guess is Braden changed his mind because of what Orlikow said" (Ex. 133). (Braden refers to Smith.)

[67] At this point the Plaintiffs considered the non-statutory Secondary Plan they had been working on as almost complete. Marquess testified that by December 2014, he believed that the Plaintiffs were close to completing a plan that could be made public. Doney did not disagree with this characterization of where matters were at by the end of 2014. Doney confirmed that much of the information missing from the Appendices of the Secondary Plan could be quickly cut and pasted in from various sources which were already identified.

[68] On December 18, 2014, Doney emailed Shenback and Robinson explaining his opinion that a non-statutory Secondary Plan was compliant with the 2009 Council directive. Robinson replied to this email saying, "Orlikow indicted 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 Councillor Orlikow in writing." Doney replied that "we should be directed to P&D to do so, rather than by the ward councillor" (Ex. 139).

2015

[69] Marquess testified that as of January 2015, the Plaintiffs were behind on their desired timeline, but nonetheless hopeful that they would be able to have occupancy in their Parker Lands development by 2016.

[70] On January 1, 2015, Doney wrote to Shenback indicating that they needed to know which process, statutory or non-statutory, Orlikow wanted them to use for the Parker Lands (Ex. 151).

[71] On February 9, 2015, Smith provided a Briefing Note to the Acting Director of PPD indicating that Orlikow wanted the Plan approved as a by-law, and the "merits of this type of approval compared to endorsement as Council policy, should be considered further." (Ex. 157 p. 3) Doney's opinion remained that a non-statutory plan was consistent with the original resolution. The Plaintiffs were not made aware of this debate about what type of plan would be required.

[72] On February 19, 2015, Bird sent Doney an email with the 8th draft of the Master Plan and indicated that it was the Plaintiffs' expectation that it would be a final draft. At this point, work on the plan had been underway for almost a year. (Ex. 164)

[73] In April of 2015 GEM learned that the City wished to acquire a portion of the Parker Lands by expropriation for construction of a City retention pond. The Plaintiffs objected to the expropriation and a hearing was held with respect to same. A determination of

that issue was not received until November 2015. Following that decision, in January of 2016 City Council approved expropriation of a portion of the Parker Lands (Ex. 177).

[74] On July 17, 2015, Doney met again with Orlikow about the proposed development. Doney reported to Smith and Veitch after the meeting that Orlikow indicated that the densities were too high, that planning of the Parker Lands was premature and affecting the value of the expropriated land, and again, that he wanted the Parker Lands approved as a statutory plan (Ex. 180).

[75] A few days later on July 20, 2015, Doney emailed Smith responding to concerns raised by Orlikow. Doney expressed his opinion as a planner that Master Plans are non-statutory and that while a Master Plan may add value to the land, the site was already designated as an MRS in Complete Communities (Ex. 181).

[76] Orlikow and Smith then met and on July 25, 2015, Orlikow emailed Smith to thank him for meeting and stated that "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 area, traffic impact and lack of relation to the BRT and other adjacent lands are just some of my concerns" (Ex. 183).

[77] In response to this email, on July 31, 2015, Smith replied to Orlikow that:

> Following our recent meeting, I've asked for a peer review of the file, draft Master Plan and associated PDO**.** My two Principal Planners, James Veitch and Brett 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 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. (Ex. 184)

[78] Marquess testified he was not made aware of these meetings with the Councillor or the peer review. There is no evidence to suggest otherwise.

[79] Doney testified that he had been asked to slow down the pace of his work on the Parker Lands project, and that he had done so. He also testified that he was not aware of why a peer review was arranged for the project that he was in charge of, or why he was replaced as the planner assigned to the development. He presented as somewhat offended or annoyed by this turn of events. He testified that no one in PPD had ever expressed dissatisfaction about his work on developing the Plan with the Plaintiffs. No witnesses from the public service identified any issue with Doney's work on this project or otherwise. Shenback also confirmed on cross-examination that he had never previously undertaken a peer review of a Secondary Plan. Veitch said that he had been involved in a very small number of peer reviews out of the 900 or so applications PPD receives each year.

[80] The Plaintiffs maintain that the Secondary Plan produced in August 2015 (Ex. 192, 225 and 578) was effectively ready to be put before the appropriate committees and Council for approval. Marquess and Doney both testified that there was some content to be added to some Appendices, but that just involved copying and pasting from prepared sources such as the City website. Doney also confirmed, both in testimony and in writing, that this Plan had already been revised in accordance with the comments provided by other city departments (Ex. 214).

[81] On September 1, 2015, Bird emailed Doney stating "I sense we're really getting close to the end…. we've been working with the City on this for a year and a half!" (Ex. 193)

[82] On September 4, 2015, Shenback wrote to Doney stating that Smith "met with you and I several weeks back and advised that we significantly reduce our involvement in the planning process until our internal review is completed" (Ex. 195). Doney later defended himself to Smith stating that the process had been moving much slower than other development plans (Ex. 221).

[83] On September 10, 2015, Marquess emailed Smith to advise him that he believed they had finished the Secondary Plan and DASZ, and indicated that he wanted to schedule some open houses. Marquess also inquired as to whether Orlikow had scheduled his own Parker Lands open houses without the Plaintiffs' knowledge. (Ex. 198)

[84] On September 14, 2015, the results of the peer-review of the Parker Land plans were shared internally with Smith. The fact that the review had been done was still unknown to the Plaintiffs. The review concluded that while there were some formatting issues, the "actual policy language is good and was generally supported by TAC" but also notes that "Councillor input into the plan to date limited, going public without an appropriate level of comfort from the Councillor not recommended." (Ex. 199 p. 1 and 3)

[85] Marquess testified that GEM was not asked to fix any formatting issues following this peer review, and that the formatting had been determined by Doney. Doney confirmed that he had written sections A and B of the Secondary Plan and that he and GEM had collaborated on section C. Doney had not been consulted as part of the peer review of his work, and he never saw the document produced as a result of that review. Doney acknowledged some formatting challenges in the exchange of documents between the City and the Plaintiffs, as they were not operating with the same word processor.

[86] The results of the peer review were never shared with the Plaintiffs.

[87] On October 1, 2015, Marquess emailed Smith to say that 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" (Ex. 227). That same day, Smith replied to Marquess suggesting that "[a]s for timelines, it may be due in large measure to the number of draft plan iterations, which I believe now is the 11th or 12th" (Ex. 227 p. 4). Smith did not mention the meetings with Orlikow, the peer review, or direction he had given to Doney to slow down.

[88] On October 1, 2015 Smith advised Marquess that he had always had the option of scheduling an open house on his own (Ex. 209). Marquess testified that he understood that open houses would be scheduled for the developer and the City to attend together and answer questions.

[89] That same day Orlikow met again with Smith, Veitch and Shenback. Meeting notes from that date express concerns that the City will "get hammered" on expropriation and that Orlikow is "not pleased with what he has seen". The planners' notes indicate that they "need Counc. Orlikow strategy. How does he get to community committee?" and "We can give J.O. language for motion Parker on hold" (Ex. 212).

[90] Also on October 1, 2015, Kiernan was appointed as Director of PPD. At that time he was supplied with a Briefing Note from Smith which was authored by Veitch with respect to the Parker Lands process. It outlined Orlikow's concerns with the proposed development including "increased value of lands." (Ex. 211 p. 4) When Veitch provided

this Brief to Smith on October 1, 2015, he wrote, "I did not mention the piece about the valuation of the land potentially going down if we put the plan on hold" (Ex. 213).

[91] On October 6, 2015, the City's then CAO, Doug McNeil ("McNeil"), emailed Smith and Kiernan to advise them that Orlikow wanted Kiernan to be the overseer of the development of these lands, and Orlikow wanted PPD to prepare the Secondary Plan while having the developer pay the costs of required site servicing and engineering studies (Ex. 216).

[92] On October 16, 2015, Smith, Veitch, Shenback and Doney held a meeting about the next steps with the Parker Lands. The notes from this meeting indicated that Doney "was to slow down but did not" and "we are off track with a plan we do not want." Smith testified that he meant exactly that. Marquess testified that he was not advised of these concerns.

[93] On October 17, 2015, an email is sent from Doney to Veitch and Shenback. He was concerned that Smith may be getting asked why there was a completed draft Master Plan and advised that it had been 22 months since the start of the planning process which "shows that the process is moving along quite slowly when compared to the pace of planning other major redevelopment sites and precincts" (Ex. 221).

[94] On October 20, 2015, Doney wrote to Veitch offering the opinion that it would not look good if the planners were to "sit on" the comments from the other departments, but that "giving them to Gem Equities may not be the best move either because, if we were to do that Gem Equities could conclude the plan can be presented to the public." Doney stated that "we are largely in control of the public engagement process because Gem

Equities wants the City (and perhaps MB Hydro) to be a part of it." He added that "of course" the City should not encourage public engagement until the expropriation hearing conclusions were made available, there was a price for the expropriated land agreed to, and Orlikow had signed off on this approach (Ex. 222 pp.1 and 2). In his testimony, Doney confirmed that he had advised the Plaintiffs to wait to do public engagement until such time as certain issues had been resolved.

[95] On October 27, 2015, Marquess followed up on Smith's email asking for comments on the Plan as promised since September and responded that GEM had been following a process with the City planner which had necessitated the iterations of the Plan. Marquess also asked for some clarity with respect to the Master Plan and PDO, public engagement, and for the process to approval by Council (Ex. 226).

[96] Smith responded to Marquess on October 30, 2015, and copied Kiernan and others. In this email he advised GEM that the Plan required approval as a statutory Secondary Plan, and outlined the process to get the Plan before council (Ex. 227). GEM was advised that the Master Plan and the PDO could be considered at the same public hearing at CCCC and that GEM could proceed with public engagement. They suggested, however, that the Plaintiffs' presentation boards should be provided to the City for review prior to any open house (Ex. 227).

[97] On November 12, 2015, Shenback sent a meeting request to Smith and Orlikow indicating that Orlikow was wanting to meet (Ex. 231).

[98] On November 23, 2015, the Ulyatt Inquiry Report into the expropriation of the Plaintiffs' lands for the retention pond was released and made findings that the City had

been "secretive, uncommunicative and non-consultative" and, "[f]urthermore, when the Objector, 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" (Ex. 230 p. 2).

2016

[99] Notwithstanding the report, City Council again voted to expropriate the land from the Plaintiff, 6165347 in January of 2016.

[100] On February 2, 2016, Bird emailed Doney following up on GEM's inquiries of September 2015. He asked again for the City's comments on the Secondary Plan. He advised that they needed the comments on the Traffic Impact Assessment ("TIA") so that they could commission a new TIA factoring in elimination of the newly expropriated land from their site maps.

[101] On February 10, 2016 the Plaintiffs held their first public engagement open house. Doney attended this open house.

[102] In mid-March 2016, Marquess emailed Shenback asking yet again for the City's comments on the Secondary Plan (Ex. 241). As a result, the City planners met internally (Ex. 242) and on March 29, 2016, Shenback emailed the Plaintiffs with the feedback on the draft Secondary Plan and copied Smith, but not Doney (Ex. 244). Shenback advised the Plaintiffs that they needed to change the formatting of the Plan to that used for the Master Plan for Bishop Grandin Crossing. Marquess testified that since Bishop Grandin was based on the FRY plan, it would have been his preference to use that format from the start, however, they had been advised to use a different format by Doney in April 2014. GEM did not want to change the format at this stage.

[103] At that point Doney was still distributing the Plan to the various departments for feedback and he had advised Robinson that from his perspective nothing further was required with respect to the PDO. Robinson advised GEM of that by email and also answered several questions on procedure. With respect to the difference between an Area Masterplan and a statutory plan he explained that the difference was primarily in the amendment process (Ex. 247).

[104] In May 2016 Orlikow wrote to the CAO inquiring about whether there is a drainage plan for Parker Lands to make sure the forest was not drowned out. The Water and Works department indicated that there was no updated plan.

[105] On June 6, 2016 there was a meeting involving Smith and Shenback indicating that GEM wanted to make their application in a couple of months. The notes indicated the Premier's Economic Advisory Council support and that servicing had been reconsidered. There were concerns noted as coming from the ward Councillor about not wanting a fence around the retention pond and there was a notation to "keep Glen on the project" (Ex. 253).

[106] On June 9, 2016, Doney, Shenback and Platt met with GEM to plan the second open house. It was noted that an ecological study was underway and would be ready for the open house. The notes also indicated that maybe a project management was needed rather than a new planner.

[107] On June 14, 2016, there was a meeting between Marquess and Smith and where Smith advised that Platt had been assigned as the new City planner on the project.

Marquess thanked Smith for his assurances that matters would be moved along and obstacles (if any) removed.

[108] On June 20, 2016, Platt contacted Doney and Shenback for input into how he should proceed, and on July 18, 2016, Platt emailed the Plaintiffs a chart of possible timelines for Council approval of their Plan. The email estimated four months for the Secondary Plan to move through the approval process (Ex. 258). Platt explained in his testimony that some of these timelines had already passed and that they were just intended to give GEM an idea of the process. He did not specify separate timelines for the DASZ.

[109] On July 18, 2016, there was a meeting between GEM and Platt. The notes indicate that 11 or 12 versions had been done with Doney and that Doney had worked on the PDO because of the TOD nature of the development. There was also reference to the area Councillor wanting to save the environment in the area and discussion about greenspace, Hurst Way and the upcoming open house.

[110] In August 2016, the Plaintiffs held their second open house which Doney and Platt attended. It was described as a success. As GEM had been unable to reach agreement with Orlikow, or a group known as the Parker Wetlanders on the issue of the forest, they arranged for a representative from an environmental consulting firm, EcoLogic Consultants Ltd., to attend to make available their findings on the ecological significance of the site.

[111] On the suggestion of Platt, GEM sent a notice of the open house and their ecological study to Orlikow. In response, Orlikow contacted Smith and a meeting was

held between Smith, Platt and Orlikow. It was reported back to the public service that Orlikow wanted to see no development adjacent to the Humane Society, a tree buffer between the development and the tracks including a walking path, a linear park system rather than the block proposed, and a force main rather than a gravity fed system to preserve the trees. It was noted that GEM was trying to meet with the Councillor about these issues.

[112] At that time Platt also sent an email to GEM advising them to submit their Secondary Plan for approval prior to submitting their DASZ (Ex. 268). The reason given was "that it is possible that Orliko will make some drastic changes to the Plan during the approvals process [sic]" (Ex. 268 p.1).

[113] September 9, 2016 GEM met with Platt and Donna Beaton ("Beaton), Park Strategic Planner, and Rodney Penner ("Penner"), another planner with the Parks Division of PPD, to discuss the forest issues. Penner is noted to have stated that 20 acres of forest was needed to make the park worth saving, otherwise develop it. It was agreed that a study would be done to base the decision on better information.

[114] On September 15, 2016, GEM met with Robinson, Beaton and Platt and discussed Orlikow's position. The notes of that meeting indicate that "package SP and ZBLA in one hearing may be a good way to do things. Opposition will only have one chance instead of two" (Ex. 275).

[115] The next day GEM met with Orlikow and reported to Platt that they thought it went well and that they could get the Councillor on side with their plan (Ex. 276). GEM was optimistic that the green space issues had been resolved.

[116] In September Doney and Platt were also noted to be researching densities for the purpose of the PDO and noted that the "sweet spot in Winnipeg was 8 stories" (Ex. 273). Notes at that point also indicated expected excavation dates of summer 2017 or fall/winter of 2017. It was pointed out by GEM at a September 28, 2016 meeting that costs and interest rates were rising (Ex. 279). The question was raised whether Orlikow could be brought into the process.

[117] On October 4, 2016, there was a meeting between Orlikow, Platt, Penner, Beaton and other members of the public service. Despite Penner again indicating that there had been no study, and 20 acres was needed to preserve the forest, the decision was made to require that four acres of forest be preserved on the Parker Lands and the City would try to acquire other forest in the area. The meeting notes indicate that Orlikow and Platt were going to meet with GEM about this new position. A summary of the discussion was provided by Beaton to Orlikow for approval, in response to which the Councillor offered further direction on a number of issues.

[118] On October 4, 2016, Platt emailed Orlikow. He indicated that he and Robinson were meeting with GEM the next day and that GEM was "obviously unaware of our direction to preserve a portion of the forest". The email asked if he could communicate his direction to GEM prior to the meeting (Ex. 283).

[119] On October 5, 2016, there was a meeting held between Platt, Robinson and GEM. The Plaintiffs indicated they were aiming for 1,740 units and they would like to meet with the Councillor to determine his position on that. Robinson also undertook to work on the PDO with an underlying TOD zone. There was no mention in the meeting minutes of any

discussion about the forest (Ex. 284). Later Beaton asked Platt if the topic of the park came up at the meeting and he responded that he and Robinson avoided the discussion (Ex. 286).

[120] On October 7, 2016, Platt wrote to Smith:

> Robinson and I are caught in a dilemma related to the Councillor wanting to limit densities at a TOD site (Parker Lands) for non-planning related reasons. That is, the Councillor appears to feel that giving property rights to build above ~6 stories would increase the value of the Retention Pond land, which is being valued as part of the expropriation. (Ex. 290)

[121] Meanwhile on October 6, 2016, GEM provided PPD with traffic, biophysical and servicing reports (Ex. 287). Marquess testified that at this point, roughly 15 out of the 20 buildings planned for the site were over six storeys. Precluding buildings over six storeys would have significantly reduced the total number of units on site. GEM was not advised of the Councillor's expressed concerns regarding building heights or his direction regarding the forest.

[122] On October 12, 2016, Platt organized a meeting to be held in Smith's office (Ex. 292). Later that afternoon Platt emailed Smith and copied Robinson saying "Braden, see attached… Let me know if you need additional content (re: additional detail, questions to be answered etc)". The email shows "161012 Issue Summary.pdf" as an attachment (Ex. 291). That Summary was not included in exhibits filed at trial.

[123] On October 13, 2016, there was a meeting held between Orlikow, Robinson, Platt and Smith. The meeting notes state at the outset, "value determined at time of sale, not in accordance with a plan approved after sale". They then go on to indicate that FRY should be done before this starts. That the Secondary Plan and PDO will not come at the same time. The notes also say that there should not be a wall of tall buildings, that

massing is the issue, phasing is important and Orlikow is to have a meeting with GEM to discuss the park (Ex. 293).

[124] On October 17, 2016, there was a meeting involving GEM, Orlikow and Platt to discuss densities and green space. Another meeting was held on October 25, 2016 between GEM, Robinson and others from the public service, including Beaton to discuss the forest. Also in late October, GEM was advised that the road access to the development would be a two lane rural cross section. Marquess and some City planners from the Traffic Division expressed that they felt this would be insufficient to handle the traffic in an out of the development and would pose a significant problem for the development plans.

[125] At the suggestion of GEM, in December 2016 a forest walk was held with the public service in an effort to understand and resolve the forest classification issue. Also in December of 2016 the 12th version of the Secondary Plan was prepared to accommodate Platt's requests for new formatting.

[126] On December 23, 2016, Marquess wrote to Platt and copies several others at the City:

> For clarity we are not providing design alternatives until we have a meeting to understanding [*sic*] this new classification system just proposed yesterday.
>
> In the three years we have discussed the park issue we have had three different classification systems put forward by the City. Initially the land was all classed as grade A habitat. Then we had an area that was considered the best of the grade A habitat.
>
> Now the areas we were told were the best of the grade A habitat has changed and some of these areas aren't the best of the grade A habitat and new areas now appear that are better, while old "best" areas are not as desirable. It is so confusing, it is hard to describe what was best is now not best but other areas which were not best are now best.

> I have spent thousands upon thousands of dollars on environment assessments and reports from qualified individuals and companies on this piece of land. Their assessment of the site has not supported the previous City views on this land and based on a conversation with them yesterday afternoon they are even more perplexed by this new classification system.
>
> GEM has spent countless hours and thousands of dollars in consultant fees in the last two and a half years discussing what areas the City would like to keep as greenspace and the City's perspective continually changes as evidenced by your map of yesterday.
>
> This process of the City changing their minds every six months and sending GEM on a wild goose chase to produce new site plans to incorporate the latest whim of a park location has to stop and is going to stop from GEM's perspective. (Ex. 310)

2017

[127] In January 2017, another version of the Secondary Plan was prepared. Marquess testified that GEM was increasingly confused about what the City wanted. GEM also sent Platt six options for the park location in an effort to resolve that issue (Ex. 318).

[128] On January 11, 2017, Platt sent an email to Smith, Robert Galston ("Galston"), Beaton and Shenback. The email stated, "see attached document for summary of recent events related to the Parker lands project…" (Ex. 315). Attachment "170111 summary.pdf" was not filed as an exhibit in these proceedings.

[129] GEM's planner, Bird, also left his employment in early 2017 and the Plaintiffs then retained private planning firm Richard Wintrup to complete the planning applications for the project. Both John Wintrup ("Wintrup") and Michelle Richard ("Richard") had formerly been employees of the City's PPD.

[130] Also at that time in early 2017, Platt suggested that GEM submit a DASZ "pre-application" in order to get feedback on their plan (Ex. 317). Marquess testified

that this was the first time he had been advised of a pre-application option. He was amenable to that suggestion.

[131] On January 20, 2017, there was a meeting of Platt, Robinson and Galston and two representatives of GEM. Notes from that meeting indicated that the new TOD zone was now in effect and there was a short to do list to finish the Secondary Plan and the DASZ pre-application (Ex. 319).

[132] On February 17, 2017, Doney and another City staff person received an email from an Acting Senior Appraiser in the LVAC department, which handles expropriations, asking for current planning developments on the site (Ex. 324).

[133] On February 23, 2017, a meeting was held between Orlikow, Robinson and Platt. A number of issues relating to the Parker Lands were discussed and it was noted again that the Council minutes said the Secondary Plan must be completed first.

[134] On February 27, 2017, there was a meeting between GEM and the public service including Robinson and Platt. The topic was largely the TOD zoning.

[135] On March 6, 2017, Robinson suggested that GEM submit their DASZ pre-application. It was submitted on March 17, 2017, seeking approval for 1,792 units on the site (Ex. 332).

[136] A meeting of public service staff including Robinson and Platt was held on March 24, 2017 to discuss viability of the TOD area and to consider lowering the densities. Mention was made to set up a meeting with Shenback and Smith to discuss the Parker development.

[137] On April 7, 2017, an email between City planners about the DASZ pre-application indicated as an action item that Robinson was to "[p]ut together MSWord document containing bullet points from the TOD Handbook which suggest the Parker Lands is not a TOD site." It was also indicated that a meeting was to be set up with Orlikow, and that Platt was to produce a new version of the model with three-story buildings (Ex. 344).

[138] Marquess testified that in addition to densities, around this time PPD started to express concerns that the site was isolated, and therefore should be automobile centric. This, in his view and that of Richard, was completely contrary to the transit-oriented plan for the site.

[139] On April 19, 2017 there was a meeting between Orlikow, Robinson and Platt. Meeting notes state that "motion for land swap indicates SP [secondary plan] must be done first" (Ex. 348).

[140] On April 20, 2017, the public service engaged in an internal discussion about the design of Hurst Way. The Land Development Services Coordinator noted that while the design for a rural road and ditch had already been approved "it would be in the City's best interest to carefully review the cost of the redesign vs. the impact of having to demolish this new road later" based on the needs of the Parker Lands development. (Ex. 349) The Plaintiffs were not involved in, or advised of, this discussion.

[141] On May 5, 2017, Robinson wrote to the Plaintiffs outlining the public service's feedback on the DASZ pre-application. The feedback included an indication that the Secondary Plan must be fully adopted prior to the DASZ being submitted for review (Ex. 359).

[142] The pre-application feedback also characterized much of the site as "neighbourhood medium density" and limited the densities proposed by the Plaintiffs. The feedback indicated that PPD would only support building heights greater than six storeys for the three buildings immediately adjacent to the rapid transit station, whereas the site plan proposed by the Plaintiffs sought 15 buildings greater than six storeys. Marquess testified that this effectively limited the maximum densities to approximately 730. (Ex. 707). The feedback recommended that GEM purchase Hydro land for future expansion of Hurst Way. Marquess testified that PPD was aware that Manitoba Hydro would not sell to GEM.

[143] On May 17, 2017, Marquess wrote to the public service indicating that, per Robinson's request, GEM was providing a list of traffic questions. He expressed frustration that they had been waiting a year for the traffic plans on the area (Ex. 364).

[144] On May 24, 2017, Platt emailed the Plaintiffs indicating his strong recommendation that the draft Secondary Plan needed to follow the template provided in February of 2017 as the public service did not support it as proposed.

[145] On June 7, 2017, Orlikow emailed a proposed green space Expropriation Motion to Kiernan and Smith for their assistance in drafting and suggested that they meet to discuss it. Beaton made a few comments in response, including whether they should concern themselves with the developability of the rest of the land, and suggested that perhaps a meeting would be beneficial (Ex. 370).

[146] On June 12, 2017, Snelgrove followed up with Zoning Development Officer, Ludwig Lee ("Lee"), about a fill permit he had submitted the prior week. This application

was submitted to Development and Inspections, supervised by Grady. Lee responded that his review on it was "pretty easy, but my supervisor has asked me to put this on hold at the moment". Later that day, Lee asked GEM for some changes to the application and further information. Lee did not respond to GEM as to who advised him to put it on hold.

[147] On June 14, 2017, Platt provided a memo to Smith and Robinson with a subject line "Withholding a Permit (Charter)". He attached s. 246 of the ***Charter*** and advised that removal of vegetation did not require a permit, but that grading or moving earth onto a property did. He set out means by which the public service and Council could delay responding to the permit application and advised that "it should be noted that when an application is withheld, the applicant may be entitled to compensation (264.3.b)" (Ex. 372).

[148] On June 19, 2017, Beaton emailed a number of concerns with respect to the fill permit to other public service departments including Platt and Robinson. She stated that there did not seem to be a process to prevent a permit being issued even when a development plan had not yet been approved, but suggested that the concerns be provided to Grady (Ex. 442).

[149] On July 11, 2017, the Plaintiffs were advised that their fill permit was being put on hold until the Development Agreements have been finalized (Ex. 410 p. 6).

[150] Robinson testified that normally planners do not involve themselves in permit applications for the stockpiling of fill, but in this case the City planners were worried about the damage to the trees by grading. He testified that there were no valid planning

reasons to delay the permit, so he and his colleagues turned their mind to conditions they would recommend with respect to a fill permit. Robinson prepared the City's response with respect to these conditions and requested a grading plan. The fill permit was issued with conditions in late October 2017.

[151] Also on June 19, 2017, there was a meeting held at Orlikow's request between various members of the public service, including Platt, Robinson and Kiernan, and Orlikow. The notes are titled "Parker Hurst Way" and it is noted among other things that "Biggest rationale we have for limiting density is traffic limitations" and "we don't know what existing capacity is for new units" (Ex. 375).

[152] On June 21, 2017, Richard emailed Orlikow for feedback on the forest options provided by GEM. She referred to their meeting of June 12, 2017 and provided maps of the forest area.

[153] Platt also emailed Orlikow on June 21, 2017 about the fill permit. That day Robinson also expressed concern to Grady that having grading completed within a year was unrealistic.

[154] On July 3, 2017, Marquess emailed Platt and Orlikow indicating that GEM was going to start clearing trees as per the maps provided by Richard. Orlikow responded that he preferred they waited until the Plan was approved (Ex. 385).

[155] Becoming obviously frustrated with the process, on July 10, 2017, Marquess wrote a letter to both McNeil and Mayor Brian Bowman outlining the efforts the Plaintiffs had made in the planning process to date and stating that they would:

> …be making an application for a developer led (as per Council direction) secondary plan and DASZ (subdivision and rezoning). We expect that these applications will

> be processed and scheduled for a concurrent hearing as afforded through law, specifically through the City of Winnipeg Charter. (Ex. 387)

[156] Also in mid-July 2017, protesters attended to the Parker Lands and prevented the clearing of trees planned by GEM to allow for soil sampling and surveying on the site. The Plaintiffs allege that the City was aware of this planned protest and interfered by instructing the police not to remove the protesters. I accept the testimony of Marquess that he was advised by a Sergeant with the Winnipeg Police Service that the police were told by the City not to intervene, however, who gave that instruction or the truth of the statement made by the officer was not established. Marquess testified that GEM made Freedom of Information and Protection of Privacy Act requests for additional information about the City's involvement which were denied (Ex. 423).

[157] As a result of police unwillingness to intervene in the trespassing, the Plaintiffs sought and obtained a civil injunction to have the protesters removed.

[158] On August 3, 2017, Marquess, Zywina, Richard and Wintrup met with McNeil, Jack, Smith, Kiernan and Platt in response to the Marquess letter of July 10, 2017. Attempts were made to work out areas of disagreement and move forward with the Plan. Richard was at the meeting and testified that it was agreed by McNeil and Smith that the two applications would proceed concurrently.

[159] On August 16, 2017, Marquess raised the issue of the suspension of the fill permit with Kiernan by email (Ex. 410 p. 1) and on September 15, 2017 Grady wrote to Kiernan that "[t]his is beginning to escalate now that the courts have ordered the protestors off the land" (Ex. 417).

[160] On September 19, 2017, Kiernan emailed Marquess to indicate the City would "get the permissions moving but we have some restrictions" (Ex. 418). Platt then sent an email to Smith on September 20, 2017 wherein he referred to "claims" from the Plaintiffs that they spoke with Kiernan about the fill permit (Ex. 419). The evidence of Kiernan and Grady was that their concerns with the fill permit was primarily that they did not have a grading plan. After one was provided the permit was issued.

[161] Marquess testified that the plan was to stockpile and not grade the fill, although that was contradicted on cross-examination by correspondence to GEM's lender indicating that they anticipated having it 35% graded when the fill was brought in.

[162] On October 23, 2017, the fill permit had not yet been issued and Marquess wrote to Kiernan that the "inability to accept the fill material from Nelson River is costing me $4,000/day" (Ex. 435). At this point, Marquess had started copying his legal counsel on his communications with the City, including this one. The public service and Marquess had a meeting on October 25, 2017 and a fill permit was issued a few days later. Kiernan testified that it was issued only once they had received the required grading plan.

[163] By December of 2017, the parties had still been unable to resolve the issues with respect to the forest or green space in the development. As a result, in addition to the input of Richard and Wintrup, GEM hired Jennifer Keesmaat ("Keesmaat"), a former Chief Planner from the City of Toronto, to conduct a peer review of the Plan and to make recommendations.

[164] In December 2017 the Plaintiffs prepared a further draft of their Secondary Plan and DASZ (Ex. 475). In this iteration of the plan, Keesmaat suggested changes to the

greenspace and inclusion of more townhomes and fewer single-family homes, thereby bringing the total unit count from 1,742 to 1,918. On December 18, 2017, Keesmaat attended a meeting with City representatives and presented her recommendations (Ex. 476).

2018

[165] On January 12, 2018, the Plaintiffs formally submitted their Secondary Plan application (Ex. 485). The application did not request approval as a non-statutory plan.

[166] In early 2018, based upon the recommendation of Platt, the Plaintiffs also undertook additional public consultation in an online format to draw the public's attention to the changes in the greenspace portion of the proposal.

[167] On January 26, 2018, Platt wrote to Kiernan to tell him that the First Reading Report for the Secondary Plan had been prepared by him and Smith (Ex. 495). Platt also noted that "Robinson and I have been steadfast with GEM that we will not be processing the DASZ until the Secondary Plan is adopted. The Councillor has also communicated this to GEM. Regardless, we anticipate a DASZ application shortly" (Ex. 495 p 1 and 2).

[168] On February 9, 2018, the Plaintiffs submitted their DASZ application (Ex. 500).

[169] On February 13, 2018, Platt emailed Smith and advised him that the review of the Secondary Plan had "uncovered many issues" and suggested "as a last resort, [to] 'recommend rejection'" (Ex. 501).

[170] On February 15, 2018, Platt made a presentation to City staff with respect to the Plaintiffs' Secondary Plan and DASZ. On a slide titled "Issues" Platt listed some of the issues as: residential density, drainage, fill and forest protection. (Ex. 503). The

presentation included options, among which was to recommend rejection at First Reading (Ex. 503 p. 28). The Plaintiffs were not included in, or made aware of, this presentation or the First Reading Report which had been formulated.

[171] It was the evidence of Richard and Wintrup that First Readings usually proceeded as of right with the public service rarely ever recommending against it. Platt testified that he had never before recommended against First Reading of a secondary Plan, and Shenback said that he had only seen it once or twice, but could not say when.

[172] On February 22, 2018, an email from a City Zoning Development Officer to Robinson and copied to Grady indicated "I know you're still trying to figure out if we can move forward with this DASZ application" before listing five detailed concerns of her own with the application (Ex. 509). Robinson replied that "[w]e were expecting to prepare the PDO, with their input – not the other way around". At this stage the PDO had already been reviewed by the public service at both the pre-application stage and the peer review (Ex. 184 and 227).

[173] The Plaintiffs were not made aware that the public service was considering rejecting both applications without a First Reading.

[174] On February 26, 2018, Marquess wrote a four-page letter to Kiernan, again outlining his concerns with the process. Despite his obvious frustration at that point, the letter stated that it was his "preferred course of action to work collaboratively with members of the Public Service" (Ex. 511).

[175] On March 2, 2018 Grady refused to accept the Plaintiffs' DASZ application on three grounds:

(a) that it did not comply with the zoning by-law which reads;

> Transit-Oriented Development (TOD)
>
> (9) The Transit Oriented Developed (TOD) district is intended to facilitate mixed use development at a scape 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.

(b) that there is no Secondary Plan approved by council; and

(c) only a limited portion of the site which you are proposing to rezone to the TOD district is adjacent to a rapid transit station. (Ex. 516)

[176] Marquess testified that this was the first time he was told that too much of the site was too far away from the rapid transit station to get the TOD designation.

[177] Grady's letter indicated that the appeal body was the SPC. At that time the SPC was chaired by Orlikow.

[178] On March 14, 2018, the Plaintiffs wrote to the City Clerks to indicate their wish to appeal the rejection of their DASZ (Ex. 520).

[179] On March 16, 2018, Platt emailed the Plaintiffs to advise that comments had been received on the Secondary Plan application, but that the planning group "hope[s] to resolve as many issues as possible in advance of preparing our First Reading report" (Ex. 521). Marquess testified that the planning group did not ever reach out with respect to what those issues were, or how to resolve them, in advance of First Reading Report, or advise GEM of their recommendation to reject at First Reading. At trial Platt testified

that it had been his intention to try to work out problems in advance of First Reading, but he was unable to say why that did not happen.

[180] On March 23, and April 2, 2018, Marquess wrote detailed letters to Kiernan outlining his concerns with the course of events (Ex. 519 and 527). There was no reply to these letters. Kiernan testified that by this time the matter was already in the hands of lawyers and that he saw these letters as motivated by litigation the Plaintiffs were planning.

[181] On April 3, 2018, the senior negotiator for LVAC, the department handling expropriation and land acquisition transactions with GEM, inquired whether PPD had any concerns about the sale of City owned lands to the Plaintiffs. Robinson responded that:

> "…the City is hoping to preserve as much of the existing forest as possible. Currently, the developer is only required to provide 8% dedication….it would be desirable from the City's perspective, to see more of the forest preserved. Consequently, the Urban Planning Division sees the subject City lands as a potential bargaining chip to acquire more of the forest". (Ex. 529)

[182] Gordon Chappell ("Chappell"), an administrator in PPD, replied to the above email from Robinson that "your comments have gone beyond Planning matters. Please provide a revised response based on Planning issues only…" (Ex. 529). At trial, Smith conceded that bargaining of this sort is not a planning consideration. Robinson did not provide an explanation or justification.

[183] On April 6, 2018, Platt emailed Marquess to tell him that PPD was still working through issues and that he expected "that we will be providing you with feedback in advance of us submitting a Report to Council" (Ex. 531).

[184] On April 9, 2018, Platt sent an email to Smith, and copied Robinson, indicating "[w]e have identified ~225 separate issues with the Proposed Plan". The email outlined

constraints of the site, including isolation, and stated that "we have new policy suggestions for the following" including phasing, building heights and density, among others (Ex. 539). Marquess testified that these issues and new policy suggestions were not provided to the Plaintiffs.

[185] Not having received any feedback, Marquess sent a final letter to Kiernan on April 9, 2018 outlining a number of plaintiff concerns (Ex. 532). No response was provided for the same reason.

[186] Also on April 9, 2018, the Plaintiffs attended a meeting of the SPC intending to appeal the rejection of their DASZ. At that meeting, the Plaintiffs requested that Orlikow recuse himself. The appeal was therefore adjourned as it was determined that without the Chair the committee did not have quorum.

[187] On April 13, 2018, counsel for the Plaintiffs wrote to Kiernan suggesting that the Plaintiffs would essentially agree to any and all terms of the City in order to have their applications approved (Ex. 543).

[188] On May 2, 2018, the City legal department responded to counsel for the Plaintiffs indicating that the City was willing to accept the DASZ for processing if the Plaintiffs were to abandon their appeal (Ex. 551). The Plaintiffs did not agreed to abandon their appeal citing the potential for further delay (Ex. 552). However, despite the Plaintiffs' wish to proceed, the appeal of the rejection of their DASZ was not heard. Instead, Smith indicated to the committee that the public service had decided to accept the application for processing (Ex. 556).

[189] On May 11, 2018, the Plaintiffs re-submitted their DASZ.

[190] On May 14, 2018, Lee wrote the Plaintiffs to indicate that "the file cannot be distributed to all departments for review at this time. The District Planner Michael Robinson has stated he will be making some recommendations for revision. One copy of the submission has been forwarded to Michael Robinson at this time" (Ex. 560).

[191] The following day Marquess replied to this email copying their counsel and City legal services characterizing Lee's email as the second rejection of the DASZ (Ex. 564).

[192] On May 14, 2018, the City's Development Applications Coordinator, Michelle Hammerberg ("Hammerberg"), emailed the Plaintiffs to suggest that they pick up their application materials because a "Letter of Authorization" was required from all landowners (in this case the City) and had not been provided (Ex. 567). Marquess testified he had previously discussed receiving the City's Letter of Authorization with Chappell and did not expect this to be a problem. He was not challenged on this evidence.

[193] On May 28, 2018, Lee again emailed the Plaintiffs and asked them to retrieve their remaining materials "and make the revisions that the Land Development Branch and District Planner Michael Robinson requested" (Ex. 567).

[194] Marquess replied to the emails from Hammerberg and Lee the same day, copying Robinson, Grady, Kiernan and Smith, among others, accusing them of attempting to thwart their application (Ex. 567).

[195] On June 7, 2018, the Plaintiffs filed an Application for Mandamus in the Court of Queen's Bench asking the Court to order that the application be considered concurrently, immediately and on a non-statutory basis (Ex. 571).

[196] On July 17, 2018, Platt internally circulated the draft First Reading Report for the Parker Lands in which the public service was recommending that the Secondary Plan not receive First Reading (Ex. 184).

[197] In a follow up email on July 28, 2018, Platt referred to "boatloads of issues" with the Secondary Plan (Ex. 584). These issues had not been outlined to GEM.

[198] On August 24, 2018, the First Reading Report recommending rejection was submitted to Jack who signed off on it (Ex. 595), and on September 4, 2018, SPC accepted the public service recommendation to refuse First Reading of the Plaintiffs' Secondary Plan (Ex. 600).

[199] After rejection of the First Reading, the Plaintiffs' consultants prepared a critique of the First Reading Report (Ex. 599).

[200] In late August and early September 2018, the Court heard the Plaintiffs' mandamus application for an order compelling the CCCC to consider the applications (Ex. 571). On September 19, 2018, Grammond J. granted the Plaintiffs' application for mandamus. Her decision, ***6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.***, 2018 MBQB 153, at paras. 21 and 22, noted that the City was unable to point to "…any authority to support the suggestion that a 'secondary plan' must be limited to a statutory context." She also found that there "…is no requirement that a secondary plan by-law be enacted prior to a zoning application being accepted" and that the Plaintiffs had a clear legal right to have the application heard and the City has an obligation to deal fairly with the applications (Ex. 607).

[201] On September 19, 2018, the Plaintiffs wrote to McNeil in an effort to engage him in the process. At this time, the City and the Plaintiffs were still unable to agree on the plan (Ex. 612).

[202] On October 9, 2018, Smith and other City planners met and Smith again recommended rejecting the Secondary Plan and having the public service create a plan instead (Ex. 622).

[203] On October 12, 2018, Grammond J. ordered the City to move the applications forward at its CCCC meeting on November 18, 2018 (Ex. 707 and 688).

[204] On October 15, 2018, Robinson emailed Platt a draft report on the DASZ he had created (Ex. 633).

[205] On October 29, 2018, the Plaintiffs provided revised plans and new reports in response to comments from some of the City departments (Ex. 720). The new information included an updated Traffic Impact Study and changes to the DASZ conceptual plans and PDO (Ex. 641). The changes included information about where water would be stored in the Fulton Grove subdivision before being released into the neighbouring retention basin on the land expropriated from the Plaintiffs. On November 2, 2018, City legal services advised the Plaintiffs that the information provided by the Plaintiffs on October 29, 2018 would not be incorporated into the Administrative Report circulated to the CCCC members in advance of the hearing, but that the Plaintiffs could present this information directly to the committee at the public hearing on November 13, 2018 (Ex. 655).

[206] On November 2, 2018, Robinson sent a final draft of his report on the Plaintiffs' DASZ to Smith. This report recommended rejecting the DASZ (Ex. 653). Smith concurred

with the recommendation (Ex. 657). The report listed multiple concerns that had not been provided to the Plaintiffs and which Wintrup testified were largely manufactured issues which in his experience should not have prevented an applicant from proceeding through First Reading.

[207] On November 7, 2018, counsel for the Plaintiffs advised City legal services that they would take the position that failure to circulate the materials constituted non-compliance with the Order of Grammond J. (Ex. 661). City legal services advised that the information could be presented at the hearing.

[208] On November 18, 2018, the CCCC proceeded to hear the Secondary Plan pursuant to a statutory process, and concurred with the recommendations of the public service to reject the applications without First Reading.

2019

[209] On January 7, 2019, the SPC laid the matter of the applications over indefinitely (Ex. 686).

[210] Subsequently the CCCC decisions of November 18, 2018 were set aside by Grammond J. who indicated in her decision of August 6, 2019, ***6165347 Manitoba Inc. et al.***, 2019 MBQB 121, that it was clear from her order that the City and the CCCC were to follow a non-statutory approach (Ex. 682 para. 69). She found the City and the CCCC in contempt of her Order.

[211] Grammond J. declined on two subsequent occasions to set her contempt Order aside (Ex. 684 and 687).

[212] Smith and Richard had some conversations in the spring of 2019 about how to resolve the ongoing issues between the Plaintiffs and the Defendants, however nothing was resolved and Smith subsequently left his employment with the City of Winnipeg and relocated to British Columbia.

2020

[213] A further Administrative Report for the Plaintiffs' Secondary Plan application was prepared for a SPC meeting in May 2020. The Report again recommended that the proposed Secondary Plan not be approved (Ex. 686). However, after being considered at SPC and the Executive Policy Committee, and notwithstanding the public service's administrative reports recommending rejection of both, (Ex. 689 and 690), on November 26, 2020, both the Secondary Plan and DASZ were approved by City Council (Ex. 693). The approval was contingent upon the Plaintiffs and the City entering into a Development Agreement. At the time of trial no such agreement had been entered into.

Analysis

[214] I am mindful of the requirement that the evidence must be sufficiently clear and cogent to note the necessary findings of fact.

[215] In this case, the chronology of events set out above, and in particular the internal communications within the public service, in my view, make it clear that there were considerations other than planning considerations at play in the decision making and conduct of the public service in this case. While City employees have immunity from liability for acts of negligence under the ***Charter***, no such immunity applies to intentional acts that constitute misfeasance. I find that there were several instances of bad faith

and deliberate conduct which were intended to slow or frustrate the Plaintiffs' applications and that the individuals involved were aware that their conduct was unlawful and likely to cause harm to the Plaintiffs.

[216] Of particular concern is that on a few occasions concerns were raised by individuals in the public service about conduct that was deemed inappropriate, and notwithstanding that, the conduct of some parties continued. The evidence is also clear, in my view, that the impetus and motivation for this deliberate interference with the Plaintiffs' applications were primarily the wishes and demands of the area Councillor, and the desire of some public servants to accommodate those wishes.

[217] With respect to the submission of the City, and at least one other defendant, that the Plaintiffs failed to comply with the rule in ***Browne v. Dunn***, 1893 CanLII 65 (FOREP), and therefore no findings should be made against the Defendants, I cannot accept that argument in this case. The rule in ***Browne*** is a rule of fairness. Its intention is to allow a witness to address any contradictory evidence.

[218] In this case, the Defendants had participated in extensive pre-trial disclosure and examination. They were aware that the allegations against each of them were that they had intentionally acted in bad faith or for an improper purpose. They had heard days of testimony of Marquess and the allegations against them prior to testifying. And finally, there were no objections raised at trial or attempts by the Plaintiffs to reopen their case after the Defendants had testified.

[219] I find that the Defendants had every opportunity to respond to the allegations and that there was no breach of the principle in ***Brown*** in this case that requires any remedy.

[220] With respect to the involvement of City employees or elected officials other than those named as Defendants in this matter, it is important to note that, while it was necessary to outline their involvement in the factual matrix and findings of fact in this case, nothing in this decision is intended to be a finding with respect to their conduct in this matter. For instance there was no evidence led or argument advanced with respect to the role of a ward Councillor in representing the interests of his constituents, or sitting on several City committees. Similarly, there were no allegations made that several of the City employees called as witnesses by the Plaintiffs acted in a manner that would constitute misfeasance, and nothing in this decision should be taken as a finding either way.

[221] The only issue before the Court was whether the named Defendants, in their role as public servants, acted in a manner contrary to their lawful obligations.

[222] I will first deal with the two Defendants who I have found are not liable in misfeasance.

Martin Grady

[223] One of the difficulties in this case is that, notwithstanding the test for misfeasance in public office, which requires an element of intention by the individual Defendant, the Plaintiffs tended to lump all Defendants together for the purposes of the allegations and argument in this matter.

[224] I have therefore had to look to the pleadings and separate out the evidence with respect to each individual Defendant to determine the allegations and whether they were proven at trial.

[225] With respect to Grady, while he was the Zoning and Permits Administrator in PPD at the time that the fill permit application was made, the specific allegation in the Re-Amended Statement of Claim with respect to the fill permit was that the Urban Planning Division of PPD investigated how to withhold a fill permit sought by the Plaintiffs in an effort to persuade Grady to deny issuing it. There was no allegation made or argued that Grady personally directed, or was involved in, an effort to inappropriately deny the fill permit.

[226] Further, upon a careful review of the evidence, 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.

[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.

[228] There was one indication in the internal documentation that Grady was concerned that if the fill permit was issued the Plaintiffs may take that as approval of the plans as a whole. While that consideration may have been outside of the considerations of his division on this permit request, it does not amount to bad faith.

[229] The second allegation against Grady was that he improperly rejected and refused to process the Plaintiffs' DASZ in March 2018 without any factual or legal basis for doing so.

[230] The Plaintiffs allege that the basis for rejecting the application was incorrect at law and was done with the intention of delaying or thwarting the Plaintiffs' application. The dispute revolves around a letter sent by Grady on March 21, 2018 in which he rejected the application on the basis that the zoning district that was the subject of the application did not comply with the zoning by-law because it was not entirely adjacent to rapid transit stations, and that there was no Council endorsed local area plan in place at the time to guide the development.

[231] Much evidence and argument was considered at trial with respect to the opinion endorsed by Grady in that letter. Having considered the various arguments, it is my view that Grady may well have been incorrect in his interpretation of the by-law, however, I am not satisfied that he intentionally gave an incorrect interpretation in an effort to stop the application for proceeding.

[232] I preferred the evidence of Richard at trial that the existing OurWinnipeg development plan and the Complete Communities by-law are sufficient to guide the development in a manner consistent with the objectives of the TOD handbook. It also seemed to be a stretch that all portions of TOD development would be required to be immediately adjacent to the rapid transit station. Again, I preferred the evidence of Richard on this point that, in her experience, a development could be characterized as TOD without being entirely adjacent.

[233] I also note that subsequent to the position being taken by Grady, the City's position was reversed and the legal department indicated that the DASZ would be accepted for consideration.

[234] However, being wrong is not the same as acting in bad faith or outside of one's authority. The threshold for misfeasance is not a low one and requires evidence of an excess of authority or improper intention, plus disregard for the consequences to the Plaintiffs. I find on a balance of probabilities that the Plaintiffs have failed to demonstrate that the Defendant Grady is liable for misfeasance in public office.

John Kiernan

[235] The allegation with respect to Kiernan is largely that he was the Director of PPD commencing on October 1, 2015 and that, as such, the Court should infer that he knew about, and was involved in, or directed, the inappropriate conduct of the department.

[236] The Plaintiffs point to a request relayed by McNeil to Kiernan that Orlikow wanted Kiernan to oversee the Parker Lands development as proof that he was overseeing the development process and that he was directing the actions of the planners in carrying out the wishes of Orlikow.

[237] The difficulty with this position is that there is no evidence to support that argument. While I accept that the Councillor made that request, Kiernan denies that he ever assumed that role, and the evidence suggests that Kiernan's involvement in the Parker Lands development was relatively minor. Kiernan is not himself a planner, and as such, was not involved in most of the planning meetings, either internally, or with GEM. Further, he did not appear to be directing Smith or anyone else to take steps to frustrate the planning process.

[238] There are no emails or internal documents which suggest that Kiernan was directing Smith or anyone working in PPD to act on the wishes or instructions of Orlikow,

rather than on their own judgement as planners. Most of the meetings with the ward Councillor were held with Smith or with the planners without Kiernan present.

[239] In fact, there is evidence in the documentation that some of the involvement of the Councillor was being intentionally hidden from Kiernan. For instance, when he was provided an initial memo with respect to the Parker Lands development, Veitch indicated that he intentionally left out reference to Orlikow's concern that the plan could increase the value of the land expropriated from GEM.

[240] The evidence was also consistent between Smith and Robinson that concerns raised by Platt with respect to the area Councillor's involvement were not reported to Kiernan.

[241] The few times that Kiernan became personally involved in Parker Lands it was generally at the request of GEM. It was clear from the testimony of Marquess, and the documentary evidence, that Marquess found Kiernan to be helpful and that matters generally moved along once he got involved.

[242] This changed in 2018 when GEM threatened legal proceedings and their legal counsel became involved. At that point, Kiernan became largely unresponsive to GEM. While his refusal to respond was unfortunate given his ongoing role as the Director of PPD, it appears to be based upon a determination made that it was now a legal, rather than planning, matter. The problem with that approach was that it contributed to ongoing delay of an active planning application and further loss to the Plaintiffs. However, there is no evidence that Kiernan's decision not to respond to the Plaintiffs to move the

development forward was made with the intention of thwarting or delaying the development or to carry out the wishes of the Councillor.

[243] The Plaintiffs have not satisfied me on a balance of probabilities that Kiernan's conduct in this matter constituted misfeasance in public office.

Braden Smith

[244] Smith was the Chief Planner for the Urban Planning Division of PPD. Defendant Robinson and witnesses Shenback, Veitch, Doney and Platt all worked under his supervision.

[245] Smith was the person initially contacted by Marquess to initiate the planning process for Parker Lands and was responsible for assigning planners to assist in development and review of the Plaintiffs' development plans.

[246] In June of 2014, approximately a year after the Plaintiffs initiated the planning process, the assigned planner, Doney, had a meeting with the area Councillor to discuss the plan. At that time, Doney reported back to his immediate supervisor and to Robinson direction from the Councillor that the Plan was to be approved as a statutory plan and that no public engagement was to take place prior to the Civic election. He was also instructed that there was no rush to complete the Plan. The issue of the Councillor's directions to Doney was then brought the attention of Smith. It was pointed out that the Councillor was insisting on a statutory plan process rather than the non-statutory process previously followed by PPD on the FRY development which was governed by the same City Council minutes. A subsequent email containing similar directions from Orlikow to Doney was also forwarded to the attention of Smith.

[247] In December of 2014 when Doney reported that the Plaintiffs and the City were close to having a non-statutory plan ready to be made public, Smith intervened indicating that Orlikow was requiring it to proceed as a statutory plan. Smith's position in this regard persisted despite the fact that it was contrary to the advice of the assigned planner, and his supervisor, that a non-statutory process was consistent with the direction of City Council and past practices on similar developments.

[248] Smith testified at trial that this change was the result of a new policy decision that all Secondary Plans should follow a statutory approval process. The existence of such a policy, however, was not known to the planners who testified at trial, and was not consistent with Smith indicating in early 2015 that Orlikow wanted the Plan approved as a by-law, and that consideration should be given to that approval process. If there had been a policy in place such a request would not have been necessary. There is no mention of a "policy" in any of the communication internally or with GEM.

[249] In July 2015, following a meeting between Smith and Orlikow, where the Councillor expressed his lack of support for the proposed development and many planning related concerns, Smith responded by arranging for a peer review of the Plan Doney had been working on with the Plaintiffs. Around that time, Smith also instructed Doney to slow down the pace of his work on the project. Despite the fact that Smith indicated that a peer review was a normal process, he did not advise Doney, or the Plaintiffs, of this arrangement. It appears clear from the timing of this decision that Smith was utilizing a peer review to carry out the Councillor'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.

[250] When Marquess inquired about why the process was taking so much longer than it had on FRY, Smith blamed the number versions of the Plan developed, but made no mention of the instructions coming from Orlikow, his direction to Doney to slow down, or his decision to order the peer review.

[251] In September 2015 when the peer review was completed, it identified primarily formatting issues and the need for the appropriate level of comfort from the Councillor. The content was largely reported to be okay. However, by that time Smith had been made aware that one of Orlikow's reasons for wanting the development delayed was that approval would, in the Councillor's view, increase the value of lands expropriated from GEM which the City had not yet paid for. This was clearly not a planning consideration and, in fact, in October 2015, when Kiernan was appointed as Director of PPD, Veitch was careful to point out to Smith that he did not mention the piece about the valuation potentially going down if they put the plan on hold in the briefing memo to Kiernan.

[252] By early 2016 Doney was still the assigned planner on file and was distributing the plan to various government departments for feedback. He was also of the view at that time that the PDO was complete. However, Shenback, who had conducted the peer review, was communicating to the Plaintiffs, but not Doney, that the formatting of the plan should be changed entirely.

[253] Then in June of 2016, with concerns continuing to be noted as coming from the area Councillor, Smith replaced Doney and assigned Platt as the new lead planner on the

project. At the same time, he assured Marquess matters would be moved along. Marquess testified at trial that he had, in fact, suggested that a new planner be assigned as he was unable to understand why the delays were occurring. It was after the appointment of Platt as the lead planner, however, that the process became even further bogged down in delay and a series of unreasonable requirements.

[254] In August 2016, GEM sent Orlikow a copy of its ecological study and notice of a planned open house. Shortly thereafter, Smith was requested to attend a meeting with Orlikow were the Councillor outlined a number of things that he wanted to see with respect to the development. While GEM does not appear to have been advised about the meeting or the content of the discussions, they were advised by Platt that they were required to submit their Secondary Plan for approval prior to proceeding with their DASZ. This two-step process was a change from the earlier indication by Doney and Smith that the two applications could be heard at the same public meeting, as had occurred with the FRY approvals. They were also advised that Orlikow may make some drastic changes to the plans during the approval process. However, they were not given any detailed information about what the Councillor was wanting to see.

[255] I do not agree with the Defendants' assertion that an email from Doney to GEM in May of 2014 was notice to the Plaintiffs that the process may require separate approval. I am satisfied that the message the Plaintiffs had received from Doney and Smith prior to the pre-application feedback had been that the two applications could proceed concurrently. If a two-step process had already been established, the subsequent

notations by the public service and directives from the ward Councillor would not have been necessary.

[256] The meetings with Orlikow continued, with the public service receiving direction from the Councillor on a number of planning related issues, from allowable densities and requirements for forest retention, to minor issues such as fencing around the pond, back lanes and sidewalks. Finally, on October 7, 2016, Platt felt it necessary to write to Smith indicating that he and Robinson were caught in a dilemma with respect to the Councillor wanting to limit densities in the development for non-planning related reasons. At that point, a meeting was arranged with Smith to discuss the issue. Notably, a memo prepared by Platt outlining his concerns in preparation for that meeting was not filed as evidence at trial. Further, Robinson denied that he had any concerns with respect to the input of the Councillor. I do not accept Robinson's evidence on this point. In my view, in considering all of the internal documentation, it is unlikely that Platt included Robinson in the "dilemma" memo unless they had had a discussion in which they had both expressed concern. At this point, Smith had a serious concern brought to his attention by two of his planners. His response was to meet with Orlikow, Platt and Robinson to discuss the matter, but not to report the concerns to Kiernan, the professional regulator, or anyone else at the higher City levels.

[257] Smith testified that he conveyed his opinion to Orlikow that the value for expropriation purposes would not be determined by the development plans and that he was satisfied that he had addressed the issue. At that meeting, however, further direction and concerns were noted, including that the FRY development should be completed

before Parker Lands started. That was a new direction from the Councillor which would result in further delay in the development process.

[258] Despite the fact that all of the Defendants testified at trial that the area Councillor was only one stakeholder in the planning process, it is clear from the internal documentation on this file that PPD was receiving and responding to considerable input and direction from Orlikow. He was giving direction to the parks planners with respect to forest preservation, to the transit department with respect to road access, public works with respect to drainage and was meeting regularly with Doney, Platt and Smith throughout the planning process. In contrast, Richard testified at trial that when she was employed at PPD she could not recall ever having actively engaged with a City Councillor during the planning process on a developer led plan.

[259] It is also noteworthy that the Plaintiffs were generally kept unaware that these meetings were occurring or the specifics of the issues and concerns raised by the Councillor. In fact, on at least one occasion, Orlikow was asked by Robinson whether the content to the discussions could be shared with GEM and he directed that the information remain for internal purposes.

[260] The documentary evidence is also clear that the Councillor's issues and input relating to the planning process had been repeatedly changing and were at times contradictory. Notwithstanding this, it appears that the direction given, or example set, for the planners by Smith was to carry out the wishes of the Councillor. While one would expect the input of all stakeholders to be part of a transparent planning process, here

Smith was frequently concealing the Councillor's involvement while reporting to GEM that his sole purpose was to move matters along within the PPD.

[261] By January 2017 Marquess testified that GEM was increasingly confused about what the City wanted. He could not be blamed for his confusion. The target kept moving to the extent that GEM was forced to hire a consulting firm to assist with the process and they were starting to make proposals with multiple options to try to obtain approval for their plans. GEM was effectively kept in the dark about the extent and nature of the interactions between various members of the public service and the area Councillor with respect to what was supposed to be a developer led planning process.

[262] As but one example, the input from the Councillor with respect to the preservation of the forest had changed so many times that the planners were now asking Orlikow to convey his "decisions" directly to GEM. At one point, he was asked if he could at least hint to GEM as to his latest requirements regarding the forest before the next meeting of the planners and GEM. When he did not do so the planners intentionally avoided the subject during their planning meeting. It is clear on a review of the internal communications of the public service that they were increasingly uncomfortable with the directions they were being given.

[263] Notwithstanding that, when Orlikow requested that Smith and Kiernan provide assistance with drafting of a green space Expropriation Motion, when he was unable to compel GEM to include forest preservation acceptable to him in the plan, this request was circulated within PPD for their assistance.

[264] Notably, again a summary provided by Platt to Smith, Shenback and other planning departments on January 11, 2017 was not filed as an exhibit at trial. By that point Marquess had started to express frustration with the moving targets and the costs that GEM was incurring as a result.

[265] Also around that time an inquiry was made by an appraiser with the Expropriation Department as to the status of the development. A meeting followed within days between Orlikow, Robinson and Platt. One can only assume that a topic of discussion at that meeting was Orlikow's concern that approval of the development with high densities would increase the amount due to GEM on the expropriation.

[266] Also, when GEM submitted an application for a fill permit Smith was provided with a memo from Platt with respect to withholding the permit. It was clear that Smith was aware that the planners were trying to prevent the permit from issuing. This despite the fact that Urban Planning would not generally be involved in issuance of such permits.

[267] And further, Smith was kept apprised of Platt's conclusions with respect to his review of the Plaintiffs' Secondary Plan after it was submitted. He was also aware of, and signed off on, the recommendations of PPD that both applications be rejected without First Reading. It was clear that he was actively involved in this development plan and was providing direction and support to his planners which was contrary to his obligations as a public official to provide fair and impartial planning related services to the public.

[268] With respect to Platt's feedback and recommendations on the Secondary Plan, I can only say that they rose at times to the level of ridiculous. After many months of collaborative work between Doney, who was a seasoned and by all accounts competent

City planner, and GEM, Platt effectively discarded the work done to that point and required that the Plaintiffs start over. He suggested that much of the content be removed from the draft of the Secondary Plan and he required that the formatting be scrapped and an entirely new format adopted. Doney testified at trial that he was not consulted by Platt with respect to the Plan that he had largely drafted over many months. Platt conceded that he was not aware that Doney had drafted most of the Plan, and no reasonable justification was given for removal of large portions of background content or starting over with the format. He agreed that there was no standard or required format for a Secondary Plan. Both Richard, who was the lead coordinator for OurWinnipeg, Complete Communities and the TOD Handbook when she was a planner with the City, and Doney, felt that the background content was appropriate and helpful for the purposes of approval and implementation of the Plan.

[269] Further, with respect to some of the content of the Plan, Wintrup provided a critique of Platt's feedback indicating that some of the requirements with respect to back lanes and sidewalks etc. amounted to a difference of opinion, rather than planning requirements. Both Richard and Wintrup were adamant in their testimony that the over 200 problems identified by Platt with the proposed Secondary Plan were contrived and not consistent with accepted planning principles. Both witnesses had many years of planning experience with the City and privately, and had been involved with the FRY development process.

[270] With respect to the content of the proposed Plans, there were different opinions provided to the Court by several planners who were effectively participant expert

witnesses. All had the qualifications necessary to express opinions on planning matters. The Defendants cross-examined Richard and Wintrup vigorously at trial and urged me to find that they were offering opinions which were biased and partial. My conclusion was the opposite. I found the testimony of Richard to be logical, measured, founded on relevant experience and largely consistent with that of Doney, a current City employee. I accepted her evidence and to the extent that it contradicted defence evidence I preferred it.

[271] And with respect to Wintrup, he was clearly a very concrete thinker who did not provide opinions in shades of grey. Allegations were made that he was offering his opinions as a result of a vendetta against Robinson for a former workplace disagreement. However, his critique of the positions taken by the Defendants with respect to the Plan related primarily to Platt's work and was not prepared in anticipation of litigation, but rather to assist GEM in completing their development applications when their planner, Bird, left their employ. I did not find him to be biased in his testimony.

[272] Where the opinions of these witnesses differed from those of the Defendants, I generally accept the evidence on GEM's behalf. Based upon that evidence, I am satisfied that Platt was fabricating issues with the proposed Secondary Plan that should not have prevented the Plaintiffs from advancing their plan to the various committees for approval.

[273] I am also satisfied 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. Having said that, I accept that the City has the authority to determine the process in any given case. I do find here, however, that the determination to proceed by way of statutory

process was not determined by the original Council minutes or by any planning related considerations or policy of the PPD. Rather I find that the process was changed at the behest of the area Councillor as a means of slowing down, and giving him more control over, the process.

[274] Similarly, I find that the requirement that the Plaintiffs proceed first through the statutory process with respect to the Secondary Plan which requires a public meeting, and then proceed separately through the DASZ process which also requires a public meeting, was imposed at the insistence of the area Councillor and not for PPD reasons.

[275] Both of these decisions by PPD had the effect of causing delay and expense to the Plaintiffs.

[276] As was first identified by the court in ***Roncarelli***, the separation of public service duties of government from the political, or personal, interests of elected officials is an important feature of our system of governance. Citizens must be able to rely upon the fact that their interactions with the public service will be governed by policies and principles that apply equally to all citizens accessing those services. While the duties of public servants include elements of discretion, that discretion is to be exercised in a manner consistent with policies, and within the statutory framework, of the department they serve.

[277] A citizen applying for a permit, or approval of a development plan, is entitled to rely upon the fact that the public service, and the specialized employees such as municipal planners, are acting within their statutory authority and applying legislation and by-laws enacted by elected officials in a fair and consistent manner and not for improper reasons.

Such obligations of City planners was acknowledged by the Defendants at trial. It was agreed that they are governed by the City ***Charter*** and regulations, enacted by-laws, and their professional obligations as planners governed by a professional code of conduct.

[278] As the Supreme Court of Canada identified in ***Odhavji*** and ***Clark***, misfeasance may be established where a public official has exercised his or her power for an improper purpose with subjective recklessness or conscious disregard for the lawfulness of the conduct and the consequences to the plaintiff.

[279] It is apparent, based upon the chronology of events and facts as outlined herein, that Smith was actively involved in directing the conduct of his planners.

[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 the area Councillor 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 the area Councillor even when they were not consistent with planning principles or moving the applications through the approval process;

(h) He understood that concerns of the area Councillor 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 the Councillor's input in the process.

[281] These were, in my view, deliberate attempts made by Smith to slow down or thwart the Plaintiffs' development applications with little or no regard for the costs or implications to the Plaintiffs in doing so. He is therefore liable to the Plaintiffs 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 the Plaintiffs.

Michael Robinson

[282] Robinson's first involvement with the Parker Lands development was being copied on an initial email from Smith to Marquess on November 13, 2013. However, Robinson had previously been involved with GEM on the FRY development and both sides reported that they had established a good working relationship.

[283] He was a planner in the Development Applications Branch of Urban Planning of PPD. His immediate supervisor was Veitch, who, in turn, reported to Smith.

[284] In June 2014, Robinson was copied with an email from Doney indicating Orlikow's wishes that the Parker Lands Secondary Plan be approved as a statutory plan and that the public service not rush to complete the Plan. That email also included Orlikow's direction that public engagement was not to take place before the Civic election.

[285] In November 2014, Robinson was copied on an email from Doney advising that Orlikow wished to require that the forest be retained, contrary to GEM's plans for development. Then, in December 2014, Robinson was involved as the local area planner for Orlikow's ward in an internal discussion about whether the Secondary Plan should proceed by way of a statutory or non-statutory process. In response to Doney's opinion that a non-statutory plan would be consistent with the directive of City Council in the 2009 motion, Robinson responded "if we try to submit the plan as a non-statutory plan - and the councillor is opposed to this-we we will not have his support". He indicated that any disagreement or differing interpretations should be clarified with Orlikow in writing (Ex. 139). Doney indicated in response that he felt the direction should come from PPD rather than the ward Councillor.

[286] Robinson testified that his motivation in raising this concern was to increase the likelihood of the Secondary Plan being approved, rather than to delay the application.

[287] In other respects, Robinson's involvement with the Secondary Plan application was minimal other than answering some process questions emailed to him by the Plaintiffs.

[288] With respect to his involvement with the DASZ, Robinson was more hands-on. In March 2016 Robinson was advised by Doney that, from his perspective, nothing further was required with respect to the PDO. Robinson advised GEM of that by email at that

time and answered several procedural questions including explaining the differences between a statutory and non-statutory Secondary Plan. Contrary to the public service position at trial, there was no mention over several emails between Robinson and GEM, of a policy for approval of Secondary Plans as a by-law. It was clear that both GEM and Robinson were aware that Orlikow was pushing for a statutory process (Ex. 247).

[289] In September 2016, Robinson participated in a meeting with Beaton, Platt and GEM to discuss Orlikow's position on planning matters, including retention of the forest. It was noted in that meeting that proceeding on the Secondary Plan and DASZ approval applications at one meeting may be a good way to proceed.

[290] By the next month Orlikow had changed his position with respect to the requirements for retention of the forest. While this change was known to the public service, it was not communicated to GEM at a meeting that Robinson attended. In fact, Platt advised Beaton that he and Robinson had intentionally avoided the topic of the forest with GEM.

[291] Two days later, Platt indicated to Smith that he and Robinson felt they were in a dilemma with respect to pressure they were receiving from Orlikow to limit densities for non-planning related reasons. That email was followed up with arrangements for a meeting with Smith and provision of an "Issue Summary" prepared by Platt.

[292] When questioned about the dilemma at trial, Robinson denied that he felt that there was a dilemma at the time. He also denied having received Platt's email. He testified that he was accustomed to dealing with Orlikow on developments in his ward and did not find his involvement in this case to pose a "dilemma". With respect to his

testimony on this point, it is my view that he had likely expressed some concern to Platt which led Platt to reference him in the email. His refusal to acknowledge any concerns he had about the Councillor's involvement only add to my conclusions that he knew it was improper to be taking the direction from outside the PPD and was attempting to distance himself.

[293] Robinson did confirm that he attended a meeting with Orlikow, Platt and Smith less than a week after Platt had raised his concern with Smith. He testified that the issue of the expropriation value was discussed, and he expressed the opinion that the value of the expropriated land was determined at the time of sale, and not in accordance with a plan approved later. He testified that from his perspective any issue was put to rest. His testimony on this point suggests some recognition that attempts to limit densities for reasons related to expropriation value was inappropriate. However, it is noteworthy that rather than decline to follow to the wishes of the Councillor on that issue, he attempted to change the Councillor's mind and his instructions to the planners.

[294] In January 2017 Robinson attended a meeting with Platt and another planner. At that meeting it was noted that there was going to be a new TOD zone to work with and there was a short list to finish the Secondary Plan and DASZ pre-application.

[295] The next month Robinson was communicating with GEM about site maps and the DASZ pre-application and a meeting was arranged for them to meet on February 22, 2017. That same day Doney and another planner received a request for information on current planning developments on Parker Lands from an appraiser in the Expropriation Department. Robinson's February 22, 2017 meeting with GEM was

subsequently rescheduled to February 27, 2017, and on February 23, 2017, Robinson attended a meeting with Orlikow and Platt. The notes do not say much about the discussion at the meeting, but direction was noted again that the Secondary Plan must be approved first.

[296] The viability of Parker Lands as a TOD area, and the possibility of lowering densities, was discussed at a meeting between Robinson and Platt on March 24, 2017. This was just days after GEM submitted their DASZ pre-application seeking approval as a TOD site for 1,792 units. Subsequently, on April 7, 2017 an email between city planners with respect to the pre-application indicated that Robinson was to outline points from the TOD handbook which suggested that the Parker Lands was *not* a TOD site. Platt was to produce a new version of the Plan with three-story buildings and a meeting was to be arranged with Orlikow.

[297] 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 the area Councillor, 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 the Councillor. 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 the area Councillor, 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.

[298] 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.

[299] These decisions appear to have been made solely based upon the interests and direction of the area Councillor. 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.

[300] Another area of concern with respect to Robinson's involvement in this development process was with respect to the fill permit application. While I determined that Grady did not act inappropriately in his role, the same cannot be said of the involvement of Urban Planning. 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 the Plaintiffs 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 the Plaintiffs 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 the Plaintiffs by the City.

[301] Rather than looking for a way to accommodate the application of the Plaintiffs while addressing any valid concerns, steps were immediately taken to deny and delay the issuance of a permit with disregard for the costs to the Plaintiffs in doing so. Robinson acknowledged at trial that there was no valid planning reason to delay the permit so he and his colleagues eventually had to turn their mind to conditions they could recommend with respect to the fill permit. Steps to prevent and delay the issuance of the permit occurred even after Platt pointed out that when an application is withheld the applicant may be entitled to compensation.

[302] After several months, once the Plaintiffs were made aware of what information the City required, that information was furnished and the permit was issued. 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 the Plaintiffs.

[303] 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 the area Councillor. 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.

[304] 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 the Plaintiffs that it had to be drafted differently or by the City.

[305] Further, despite the fact that First Reading is usually automatic, the Plaintiffs were not advised of Robinson's recommendation that the DASZ be rejected at First Reading. The steps taken to prevent the application from being considered at committee were a blatant attempt to delay and thwart the application. That conduct continued when Robinson instructed the zoning development officer not to accept the DASZ when it was submitted for a second time by agreement through legal counsel.

[306] Ultimately, Robinson continued to recommend rejection of the application, however, it was considered at committee in compliance with the order of Grammond J.

[307] There is no indication as to how long down the road, and under what circumstances, the public service would have supported the Plaintiffs proceeding with their 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.

[308] Again, I find that the actions of Robinson in preventing the Plaintiffs from having their DASZ considered by committee was an abuse of his authority as a public servant and done for an improper purpose with conscious disregard for the consequences to the Plaintiffs.

The City of Winnipeg

[309] The governing case with respect to vicarious liability is ***Bazley v. Curry***, 1999 CanLII 692 (SCC), which found that any finding of vicarious liability requires a determination that there is a nexus between the wrongful or tortious act and the employment of the individual and set out the criteria to be considered.

[310] In this case, the City acknowledges that if any of the individual Defendants are found liable for misfeasance in public office the City, as their employer, is vicariously liable.

[311] Having found Smith and Robinson liable for misfeasance in public office for their conduct in carrying out their duties as planners for the City, I find the City to be vicariously liable for the misconduct of these employees.

DAMAGES

[312] Prior to trial, the Plaintiffs abandoned their claim for damages related to the expropriated lands. It was determined that those damages, if any, would be pursued through the LVAC process. This may have resulted, at least in part, from the Plaintiffs being denied leave to rely upon late disclosure.

[313] The damages being sought by the Plaintiffs at trial were with respect to interest accrued on several mortgages that were registered against the Parker Lands, consultant fees for the services of planners hired to advise on the applications, and punitive damages against the individual Defendants. If the Court is not prepared to award mortgage interest, they argued that damages at large should be awarded in amount similar to the interest amount being sought.

THE LAW ON DAMAGES

[314] In a claim for misfeasance in public office, the plaintiff must prove that a defendant's misfeasance was the legal cause of the damages claimed, and that the damages are compensable in tort law (***Odhavji***, at para.32). The conduct of the tortfeasors must be established to be the proximate cause of the damages, and the damages must be established to be reasonably foreseeable.

[315] Once it is established that the misfeasance was the legal cause of the damages the plaintiff is entitled to be compensated for all proven damage that flows from the tortious act (***Gershman*** at p. 119).

[316] The principle behind damages in cases involving misconduct of public officials dates back to ***Ashby v. White*** (1703), 2 Ld. Raym. 938, 92 E.R. 126, where the court

stated "…[i]f publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences." (at p. 137) The court also pointed out that financial losses are not the only losses compensable for the tortious misconduct of others.

[317] In ***Roncarelli***, the Supreme Court stated, "…Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of its broad features …" (at pp. 144-145)

[318] In ***Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)***, 2001 MBCA 40, at para.66, Kroft J.A. held that "…precise measurement or limits should not be expected" for damages at large. He cited with approval the statement of the Newfoundland Court of Appeal in ***Canadian Broadcasting Corporation v Farrell***, 1987 CanLII 3929 (NL CA) (at paras. 51-53), that damages at large include awards of damages involving bad conduct and economic loss that can be foreseen but not readily quantified.

[319] In ***Grand Financial Management Inc. v. Solemio Transportation Inc.***, 2016 ONCA 175, the Ontario Court of Appeal cited with approval the principles relating to assessment of damages at large by the Manitoba Court of Appeal in ***Uni-Jet*** and the summary of those principles by the British Columbia Superior Court in ***Howard v. Madill***, 2010 BCSC 525, as follows:

> [84] …
>
> > An accurate summary of the law with respect to the assessment of damages at large, and the circumstances in which such an award

> may be made, is contained in *Uni-Jet* at paras. 66 to 73. I summarize these principles as follows:
>
> 1. Damages other than for pecuniary loss are "damages at large" and generally include compensation for loss of reputation, injured feelings, bad or good conduct by either party, or punishment.
>
> 2. Damages at large are compensatory for loss that can be foreseen but cannot be readily quantified.
>
> 3. Damages at large are a matter of discretion for the trial judge and are more a "matter of impression and not addition".
>
> 4. Were damages at large are imposed for intentional torts, the assessment of damages provides an opportunity to condemn flagrant abuses of the legal process.

[320] In ***Vickar v MJ Roofing & Supply Ltd.***, 2016 MBCA 77, MacInnes J.A. stated:

> [52] While the calculation and the assessment of the damage may be difficult, a trial judge must do the best he can in the circumstances. As stated by Seaton JA in *British Columbia Hydro and Power Authority v Marathon Realty Co Ltd et al* (1992), 1992 CanLII 634 (BC CA), 11 BCAC 185 (at paras 30-31):
>
> > In my view, what we have here is a case in which it is quite impossible to calculate the loss with great precision. Nor can we calculate the cost of each item. It might not be impossible but it would be unreasonable to spend the court's time valuing each letter, each phone call, each intervention by a Hydro person.
> >
> > This is not a case of there not being proof of a loss. There is proof of a loss but it is one that is difficult to quantify. The court has an obligation to do so, keeping in mind that the onus is on the plaintiff.
>
> [53] Cromwell JA (as he then was) wrote in *BMG v Nova Scotia (Attorney General)*, 2007 NSCA 120, 260 NSR (2d) 257 (at para 172):
>
> > The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer [sic] from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply do its best on the evidence available: S.M. Waddams, *The Law of Damages*, 2nd Ed. Looseleaf (Toronto: Canada Law Book Ltd., 1991), at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[321] And finally, in ***Rosenhek v. Windsor Regional Hospital***, 2010 ONCA 13, (at para. 38), the Ontario Court of Appeal stated that "…[t]he principle appears to be that nominal damages are not appropriate where a substantial loss has been demonstrated, even if evidence proving quantum is lacking."

ANALYSIS

[322] In this case I have found that the conduct of Smith and Robinson constituted misfeasance in public office.

[323] Now it must be determined whether that misfeasance was the proximate cause of the loss to the plaintiff and whether the loss claimed by the plaintiff was reasonably foreseeable.

[324] While the defendant does not have to be aware of all potential damages, pecuniary damages must be proven to the satisfaction of the court.

[325] With respect to the proximate cause, the Defendants have argued that the cause of the delay in obtaining development approval was not occasioned by the actions of the Defendants, even if they are found to be guilty of misfeasance.

[326] Rather, they argued that the delays were occasioned by the Plaintiffs themselves. They also argued that from the Defendants' end it was not tortious conduct by the Defendants that caused the delay, but rather a lack of resources. They argued that there was no intentional conduct by the Defendants that caused any delay in the Plaintiffs obtaining their approvals. They also pointed out that there was never any guarantee that the approvals would be granted.

[327] With respect to the Plaintiffs' role in the delay, I accept that inexperience on the part of the Plaintiffs with a development of this size may have led to some delays in preparation of their applications, obtaining the necessary studies and obtaining public input and approval for their proposed plans. This was a developer lead process and I agree that the fact that it took longer to get to the approval stage on this project than on FRY was not entirely attributable to misfeasance of the Defendants.

[328] There was also evidence of delays within the public service which were beyond the control of the Defendants Smith and Robinson. These include delays in decision making relating to road access plans, expropriation for development of a retention pond, and consideration of the lift station. There was no evidence, however, that these delays affected the ability of the Plaintiffs to put their proposed plans forward for approval.

[329] It was the evidence of Doney, an experienced City planner, that both the PDO and the Secondary Plan were largely completed in the fall of 2014 and were almost ready to proceed to committee for approval in December of 2014. At that point however, the local area Councillor had started raising concerns and had expressed the strongly held opinion that the Secondary Plan should proceed for approval as a by-law, rather than a policy as Doney and GEM had been planning.

[330] At that point, Marquess testified that GEM was still optimistic that they would proceed for approval shortly and would start work on the project by 2016.

[331] On January 1, 2015, Doney indicated internally that he needed to know which process to utilize. On February 9, 2015, GEM's planner submitted what he described as the final draft of the Plan to Doney.

[332] The Defendants argued that the Plaintiffs' plans kept changing and those changes continued to prevent them from proceeding to committee. While I agree that the Plan which was approved in 2020 was very different than the Plan being prepared in 2014, most of the changes resulted from attempts by GEM to address issues raised by the public service. I am satisfied that GEM would have put forward a Plan in 2015, albeit a different Plan than they ultimately put forward.

[333] Given the complexities of the development, and the timeframe estimates provided by Platt, I find that it was reasonable to expect that the Plan would have gone to committee in the spring of 2015 if Doney had been permitted to continue working collaboratively with GEM without directions being imposed upon him that conflicted with his professional duties and judgement as a planner.

[334] In Doney's opinion, the process would have been to proceed concurrently on a non-statutory Secondary Plan and DASZ at one public meeting.

[335] However, as early as November 2014, Doney was already referencing the area Counsellor's "decisions" and by December he was being given directions with respect to process which were contrary to his opinion as the assigned planner. I am satisfied that the efforts over time of both Smith and Robinson to slow down or prevent the applications from going to the approval process caused the Plaintiffs to suffer loss.

[336] With respect to the period of time over which that loss was occasioned, at the outset of trial the Plaintiffs sought to re-amend their Statement of Claim. The amendment was granted on the basis that the Defendants were being given a short adjournment to examine the Plaintiffs with respect to late disclosure. At that time, the Plaintiffs amended

their Statement of Claim to move up the date at which they alleged the misfeasance of the Defendants commenced to October 1, 2015.

[337] Therefore, although the delay occasioned by misfeasance commenced prior to October 1, 2015, the period for which damages are payable is October 1, 2015 to May 2020 when the Plaintiffs' development applications were considered by committee.

[338] The next issue is whether damages sought by the Plaintiffs were reasonably foreseeable. In my view, there is no question that it was reasonably foreseeable that causing delay of almost five years to a major real estate development would occasion loss to the developer.

[339] It is easily foreseeable that delay may result in increased carrying costs associated with the property, or delay in realizing the increased value or revenue that results from development. It is also foreseeable that the unlawful and/or bad faith imposition of obstacles, or the failure by a public official to carry out their duties, may result in increased costs such as, salaries, professional and consulting fees, extra studies and updated reports.

[340] As stated earlier, once proximity and foreseeability of loss has been established the plaintiff is entitled to be compensated for all damages that flow from the tortious act. The issue is, therefore, whether the plaintiff has satisfied the court as to what damages were incurred.

[341] The Plaintiffs in this case were seeking compensation for interest incurred on several mortgages registered against the Parker Lands during the period of the Defendants' misfeasance. The total amount sought at trial was $17,903,302.40.

[342] The Defendants argued that the Plaintiffs have not established when the development would have started producing revenue, and when the mortgages would have been paid off, and are therefore, unable to establish their loss. The Defendants argued that the FRY development is still not complete more than 11 years after approval, therefore, the Plaintiffs have suffered no loss as a result of a five-year delay because the development would not likely have been completed in that time anyway.

[343] The Defendants' argument in this regard is flawed. What the Plaintiffs are seeking is compensation for the delay prior to approval of the development which was occasioned by the actions, or inaction, of the Defendants. The reality is that the period of time it was going to take to complete the development, and start generating revenue, was increased by the period during which, due to the conduct of the Defendants, the Plaintiffs were unable to even apply for approval. If the development was going to take 10 years after approval under normal circumstances, it is now going to take 10 years, plus the almost five years they waited to apply. Losses that can be proven to have been incurred during that additional period are compensable.

[344] The Defendants also argued that the Plaintiffs have failed to establish valid and commercially reasonable losses resulting from the delay. In particular, they argued that the interest amount sought involves mortgages securing indebtedness of corporations other than the Plaintiffs; that mortgage funds were utilized for projects other than the Parker Lands; that the indebtedness includes interest accrued and capitalized long before the period of losses claimed; that the loans appear to be non-arm's length; that interest has never been paid on the loans; that the interest rate is unreasonably high; and that

the Plaintiffs have failed to provide complete disclosure, or independent evidence, with respect to the indebtedness and the calculations of interest sought. They pointed out the existence of identified errors that have not been explained, and argued that the Plaintiffs have not met their burden of establishing their damages.

[345] The Plaintiffs argued that GEM Equities is comprised of a number of corporate entities which work together on land development projects. The Parker Lands were obtained in a land swap with the City in 2009. Subsequently, GEM used the land as security for a number of corporate loans. They argued that the mortgage and associated loan documents are evidence of indebtedness which is accruing interest and which was intended to be paid down after development of the property. It is their position that it is not relevant what specific corporation owes the debt or when they would have been paid down. They need only establish that the indebtedness is an obligation of the Plaintiffs for as long as their land is securing the debt, and that the Defendants should be liable for the interest accruing on that debt for the period that they were unable, due to the conduct of the Defendants, to apply for approval of the development.

[346] Conceptually, the idea that the Plaintiffs are entitled to compensation for interest accrued on loans secured by the land is not unreasonable. Arguably, but for the misfeasance of the Defendants, the Plaintiffs would have had an opportunity to begin paying on those encumbrances much earlier, thereby increasing their equity in the property. However, there are a number of considerations in this case that complicate that premise.

[347] First, the delay caused by the Defendants was a delay in the period of time the Plaintiffs had to wait to apply to have their development approved. Approval, of course, was never a guarantee. Therefore, it cannot be said with certainty that the only thing preventing the Plaintiffs from paying that mortgage interest was the conduct of the Defendants. Even if the Plaintiffs had been able to proceed for approval four and half years earlier, if approval had not been granted, the interest would have continued to accrue and remain unpaid by the Parker Lands development. On that basis alone, the damages cannot be proven with certainty in this case, but through no fault of the Plaintiffs.

[348] Further, while the complexity of the Plaintiffs' financial and corporate arrangements should not preclude them from being entitled to compensation for reasonably foreseeable losses, the onus remains on the Plaintiffs to prove their damages. In this case, the Defendants have outlined a number of valid shortcomings with respect to the proof and calculation of the interest expenses sought. There is no evidence before the Court with respect to what the indebtedness relates to and what the Plaintiffs' intended obligations or plans were with respect to payment of the various debts secured by the mortgages. While I accept the evidence of Marquess that the Plaintiffs have suffered losses as a result of the delay occasioned by the Defendants, which losses include unpaid interest obligations, the information provided with respect to the interrelatedness or contractual arrangements between the debtors, or with respect to the obligations or payment terms binding the Plaintiffs were simply inadequate to quantify the loss.

[349] The evidence provided with respect to the Plaintiffs' interest claim is therefore not adequate to support that claim for compensation.

[350] The Plaintiffs argued that, in the event that the Court was unwilling to order compensation with respect to interest incurred, the Plaintiffs should be awarded damages at large in a similar amount.

[351] The Defendants, on the other hand argued that because the Plaintiffs had not established their interest claim, no award for damages should be made.

[352] In my view, it is not sufficient to say that, because the Plaintiffs cannot, or have not, adequately established their financial losses caused by the intentional tort of the defendants, no damages should follow. I am satisfied that the Plaintiffs did suffer losses occasioned by the conduct of the Defendants, even if those losses have not been adequately quantified.

[353] More importantly, I am of the view that exemplary damages should be awarded at large as an express condemnation of the improper conduct of the public servants in this case. As determined by the Ontario Court of Appeal in ***Grand Financial***, damages at large may be appropriate to reflect the Court's condemnation of flagrant abuses of authority or discretion.

[354] Consistent with the case law cited earlier, where the plaintiffs have established that a loss has probably been suffered, difficulty in determining the amount should not excuse the wrong-doer from paying damages.

[355] I find in this case that, while the Plaintiffs have not proven its claim in excess of $17 million in interest expenses, an award of damages at large in an amount sufficient to sanction the misfeasance of the public officials is warranted.

[356] In all of the circumstances, I award both compensatory and exemplary damages at large in the amount $5,000,000.00.

[357] The Defendants Smith, Robinson and the City of Winnipeg are jointly and severally liable for those damages.

CONSULTING FEES

[358] Immediately before the commencement of trial, the Plaintiffs disclosed and sought to rely upon a number of documents that had not been previously disclosed. The Defendants sought to have an order preventing the Plaintiffs from being permitted to tender the evidence at trial. I ordered that some documents, including the Richard Wintrup consulting invoices, which had long been in the possession of the Plaintiffs could not be relied upon at trial.

[359] The Plaintiffs' counsel then led evidence on direct examination of Richard with respect to the amount paid for the consulting services by her firm with respect to the Parker Lands development applications.

[360] The Plaintiffs now seek compensation for the consulting fees paid to Richard and Wintrup in relation to the review and completion of the Plaintiffs' Secondary Plan and DASZ applications.

[361] The Defendants are opposed to compensation with respect to these fees on the basis that the Plaintiffs were prohibited from filing or relying upon the invoices for these

services at trial, and therefore, they should not be permitted to rely upon oral evidence as to the content of the disallowed documentary evidence.

[362] I agree with the submissions of the Defendants in this regard. Filing of the invoices in this case was disallowed because of the late disclosure and inadequate explanation with respect to same. This ruling was made in the context of other late disclosure rulings made both by the trial judge and the pre-trial judge. To now allow the Plaintiffs to benefit from that evidence, particularly when the Defendants did not have an opportunity to examine on the amounts claimed, and what the services related to, would be unfair to the Defendants and would undermine the earlier ruling of the Court.

[363] The claim with respect to consulting fees is therefore dismissed.

PUNITIVE DAMAGES

[364] The Plaintiffs argued that where a court has found misfeasance in public office punitive damages will usually be appropriate.

[365] In support of that position they cited the ***Gershman*** decision where O'Sullivan J.A. held that punitive damages are appropriate where there is "oppressive, arbitrary or unconstitutional actions by servants of the government" (at p. 126). That decision involved a public official being found liable for the tort of knowingly inducing a breach of contract. In that case, the Manitoba Court of Appeal upheld the trial judge's award which included both compensation for the plaintiff's losses and an unknown amount to serve as punitive damages for *maliciously* interfering with the plaintiff's occupation.

[366] They also relied upon ***Pikangikum v. Nault***, 2010 ONSC 5122, where Wright J. at para. 315 stated, "The tort of misfeasance in public office has and should have a high

threshold before liability is imposed.… However, if that threshold is met then the maintenance of the integrity of our political system demands that punitive damages be considered." Wright J. at para. 281 cited ***Guerin v. The Queen***, 1981 CanLII 4721 (FC), [1982] 2 FC 385 (at p. 440), noting that "[e]ven though damages may be difficult, or almost impossible of calculation, if a court is satisfied damage or loss has indeed been sustained, then a court must assess damages as best it can, even if it involves guess-work".

[367] The Manitoba Court of Appeal in ***Grant v Electra Sign Ltd.***, 2018 MBCA 5, set out a number of the principles governing awards of punitive damages:

> [57] …
>
> - punitive damages are very much the exception, rather than the rule;
>
> - punitive damages are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
>
> - punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;
>
> - their purpose is not to compensate the plaintiff, but to give the defendant and others his or her just dessert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what happened; and
>
> - punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these

> objectives, and they are given in an amount that is no greater than necessary to rationally accomplish their purpose;
>
> [58] …
>
> - the type of conduct that merits punitive damages must be 'harsh, vindictive, reprehensible and malicious, as well as extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment….

[368] I am also mindful of the fact that the Manitoba Court of the Appeal in ***Uni-Jet*** found that a "…more stringent test should be applied when scrutinizing the actions of powerful government agencies and their officials than might be used to judge ordinary individuals…" (at para. 88).

[369] Having considered all of the above factors, it is my view that punitive damages are not appropriate in this case.

[370] Already inherent in a finding of misfeasance in public office is a finding that a defendant has acted unlawfully and in bad faith in the discharge of their duties. The court must be careful in considering an award of punitive damages to ensure that the defendant is not doubly penalized for his conduct.

[371] There is no evidence in this case of conduct by the Defendants Smith and Robinson which could be described as highly reprehensible, malicious or vindictive. This is also not a case like ***Uni-Jet*** were punitive damages were awarded to punish and send a strong message regarding improper conduct by a public official to advance his own self-interest.

[372] I am satisfied that the general damages awarded herein will serve to adequately deter and condemn the impugned conduct of the Defendants.

[373] The request for punitive damages is dismissed.

Costs

[374] Having succeeded in proving their claim against two of the Defendants and the City, the Plaintiffs are entitled to an aware of costs. However, given the complexity of the issues and the mixed results with the dismissal of the claims against two of the Defendants, I will allow an opportunity for counsel to discuss costs and if unable to reach agreement I invite further submissions with respect to same. Those submissions may be made in writing, or time may be arranged for oral submissions.

_____ J.