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Docket: CI 21-01-31634
(Winnipeg Centre)
Indexed as: Springfield Taxpayers Rights Corp. v. Rural Municipality of Springfield and Berger Peat Moss Ltd.
Cited as: 2022 MBKB 180

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: APPLICATION UNDER *The Municipal Act*, C.C.S.M. c. M225, s. 382 and Queen's Bench Rule 14.05(2)

B E T W E E N:

SPRINGFIELD TAXPAYERS RIGHTS CORP.,	)	Appearances:
	)	
applicant,	)	Kathleen McCandless
	)	for the applicant
- and -	)	
	)	
RURAL MUNICIPALITY OF SPRINGFIELD and BERGER PEAT MOSS LTD.,	)	Karen R. Wittman and
	)	Vienna Luong
	)	for the respondent
respondents.	)	Rural Municipality of Springfield
	)	
	)	Timothy J. Fry and
	)	Thomas K. Reimer
	)	for the respondent
	)	Berger Peat Moss Ltd.
	)	
	)	JUDGMENT DELIVERED ORALLY:
	)	September 14, 2022 at 1:00 p.m.
	)	WRITTEN JUDGMENT:
	)	September 16, 2022

REMPEL J.

Introduction

[1] The notice of application before me falls under the broad category of judicial review. More specifically, the primary relief sought by the applicant in the notice of application as originally drafted is an order of *certiorari* quashing the development permits issued by the Rural Municipality of Springfield (the "RM") for the construction of a peat moss processing plant on land in the RM (the "Plant").

[2] Included in the grounds for relief stated in the notice of application are claims that the RM "*acted in excess of its jurisdiction*" and "*failed to comply*" with mandatory provisions of ***The Planning Act***, C.C.S.M. c. P80, ("***The Planning Act***"). It is further alleged that the RM acted in bad faith in that it failed to comply with its own by-laws in the permitting process. In the alternative, the applicant seeks an order of *mandamus* directing the RM to require the respondent Berger Peat Moss Ltd. ("Berger") to amend the RM's development plan and then to apply for a rezoning of the land on which the Plant is located. The notice of application as drafted does not refer to injunctive relief of any kind.

[3] All of the relief in the notice of application is advanced under the provisions of s. 382 of ***The Municipal Act***, C.C.S.M. c. M225 ("***The Municipal Act***").

[4] The applicant is a non-profit corporation created by a group of residents in the RM who have publicly and consistently opposed the Plant since construction of the Plant started in the spring of 2020. Since then, they have attempted without success to advance their opposition to the Plant with the RM and with various departments or agencies of the provincial government.

[5] The Plant is located on land that was previously used as an equestrian facility that included bleachers with seating for up to 500 spectators and a parking lot for approximately 150 vehicles. Two of the Directors of the applicant live less than one kilometre from the Plant and deposed affidavits in these proceedings.

[6] At all times relevant to this litigation the RM zoning for the land on which the Plant is located was within an agricultural use area.

Deep Issue

[7] The deep issue in this litigation is whether a property owner can rely on the validity of permits and authorizations issued by governmental agencies and authorities to develop and build on their land. The corollary issue that arises is whether anyone can challenge the legitimacy of any such permits and authorizations in court, a significant time after they were issued and well after a property owner has invested substantial resources to develop and build on the land in compliance with the permits and authorizations.

The Motions Before Me

[8] The following preliminary motions were argued before me on September 8, 2022:

i) The applicant's motion to amend the notice of application;

ii) The RM's motion to strike or expunge certain affidavit evidence filed by the applicant;

iii) Berger's motion to stake out the notice of application and to strike or expunge certain affidavit evidence filed by the applicant;

iv) The RM's motion to strike out the notice of application;

v) The RM's motion to dismiss the notice of application for delay; and

vi) Berger's notice of motion to dismiss the notice of application for delay and precluding the amendment to the notice of application sought by the applicant.

Decision

[9] I am dismissing the motion to amend brought by the applicant and allowing the motion to dismiss the notice of application brought by the RM and Berger without a right to amend or to file a further application for other relief against the RM or Berger with respect to the development, construction or operation of the Plant. The motions to expunge or strike affidavits are now moot and I make no order with respect to same. My reasons follow.

Timeline

[10] The following facts are not controversial:

a) A few days prior to their departure for a long winter holiday in the Fall of 2019, Ms. Marion-Akins ("Akins") and her husband observed what seemed to be development activity at the equestrian facility less than one kilometre from their home. They contacted the RM for further information as to what was going on and left on their holiday before they could get a response to their inquiry. At the time they did not know that Berger had purchased the equestrian facility and was planning to build the Plant;

b) Before the end of February of 2020, the RM issued a development permit allowing Berger to start construction of the Plant's foundation. Berger started construction almost immediately and the construction process continued unabated for 18 months. A second development permit to allow the completion of construction of the Plant as a whole issued in June of 2020;

c) By early April of 2020, Akins and her husband were fully aware a peat moss plant was under construction at the site. At first Akins believed that peat moss was being stripped from the land, but she was informed through an exchange of emails with the RM that this was not the case and that the Plant was dedicated to processing and packaging peat moss. This new information offered no comfort to Akins who demanded and in-camera meeting with the council of the RM;

d) Instead of taking legal action to stop the construction process, Akins and her husband communicated their opposition to the Plant by way of emails or other communications to council members of the RM and the provincial Environmental Assessment and Licensing branch;

e) From April 1, 2020 until July of 2021, when the applicant filed the notice of application, Akins and her husband could literally see the ongoing construction of the Plant from the road adjacent to their home. By the time the notice of application was filed, Berger had already invested approximately $14 million in the land and construction of the Plant.

Further, Berger had already recruited, hired, and trained staff to operate the Plant at this stage and restructured its business operations to incorporate the Plant into its Canadian supply chain. Despite these significant and visible efforts to bring the Plant into operation, and all of the other opposition being advanced by the applicant's principals, the applicant and its principals never sought an injunction to stop the construction process;

f) By July of 2020 Akins had already retained lawyers experienced in municipal and environmental matters for advice and she continued to voice her opposition to the Plant at a council meeting of the RM;

g) Akins and her husband retained Jennifer Lim, a registered professional municipal planner, to assist them in opposing the development of the Plant in September of 2020. With Ms. Lim's assistance, Akins and her husband demanded that council revoke the development permits. This included a lengthy written submission to council of the RM and a presentation at a council meeting on September 24, 2020. The council of the RM did not revoke the permits as requested and upheld their validity;

h) On October 10, 2020, Ms. Lim submitted further information to council of the RM on behalf of Akins and her husband requesting a reconsideration of the decision to uphold the validity of the permits. About a week later Ms. Lim, Akins and her husband met with

representatives of the RM, including the Mayor and the development officer of the RM, to voice their concerns about the permits again and they were given the same answer that that the permits would not be revoked;

i) In November of 2020 another request by Ms. Lim and Akins to revoke the development permits was refused;

j) The current Directors of the applicant instructed their lawyers to incorporate the applicant as a non-profit corporation in December of 2020;

k) By way of emails sent on January 21 and 27, 2021, Ms. Lim again demanded that the RM revoke the permits and communicated with senior provincial government officials, including those within the Department of Municipal Relations about the revocation of the permits or other licences necessary for the Plant to operate as a Peat Moss processing facility. All of their appeals and requests were dismissed and the validity of the permits and licenses granted to Berger were upheld;

l) In May of 2021, more than a month prior to the filing of the notice of application, the RM issued an interim occupancy permit for the Plant, which allowed Berger to start business operations;

m) On June 29, 2021, the applicant filed the notice of application in which Berger was not named as a respondent. By this time Berger had

invested well over ten million dollars in the development of the land and construction of the Plant was nearing completion;

n) On July 26, 2021, the RM filed a notice of motion to strike out certain affidavits filed by the applicant or expunging portions of these affidavits;

o) On July 28, 2021, the applicant's previous lawyer and the lawyer for the RM appeared on the uncontested list before Kroft, J. Counsel for Berger appeared as an interested party at that time. The disposition sheet signed by Kroft, J. records the following under the "Details" section:

- *Berger Peat Moss Ltd should get Notice in time to review this matter.*
- *ADJ for Berger Peat Moss to have time (sic) prepare and determine position and obtain counsel*
- *Separate Statement of Claim for injunction*

To Be Clear:

- *By September 8/21 Berger is to advise of their position and how they intend to proceed.*
- *By September 8/21 the applicant will make it known if they intend to bring injunction.*

p) The orders of Kroft, J. were not reduced to writing, but there is no record that the lawyer for the applicant made any effort to challenge the rulings of Kroft, J. or seek clarification of same;

q) In August of 2021, the RM issued a final occupancy permit to Berger;

r) On September 20, 2021, Berger filed a notice of motion to be joined as a party to the litigation;

s) On November 10, 2021, a consent order was pronounced joining Berger as a party to the litigation;

t) On November 22, 2021, Berger filed a motion to strike out the notice of application "*in whole or in part*" and the expungement of certain affidavit evidence prior to a hearing of the substance of the application;

u) On February 14, 2022, the RM filed a motion that also seeks an order that the notice of application be struck out "*in whole or in part*";

v) On April 8, 2022, the applicant filed a notice of change of lawyer;

w) On May 4, 2022, the RM filed a notice of motion dismissing the notice of application for delay;

x) On May 5, 2022, Berger filed a notice of motion in which it also sought an order dismissing the notice of application for delay and "*precluding any amendment to the notice of application as filed*";

y) On May 10, 2022, the newly appointed lawyer for the applicant filed a notice of motion for an order permitting an amendment to the notice of application to seek the following relief:

   i. A "*determination of rights*" under the RM's existing by-law in lieu of an order of *certiorari*;

   ii. A declaration that the Plant is not a permitted use under the by-law in lieu of an order of *mandamus*; and

iii. A permanent injunction requiring Berger to stop all business activity at the Plant, which was by this date already fully constructed and carrying on business.

Abuse of Process in Administrative Proceedings - First Principles

Duty to Act Fairly

[11] The "doctrine of fairness" or the "duty to act fairly" is a long-standing procedural tenet under common law. "*In the absence of prescribed procedural rules, the courts require that a statutory decision that affects the rights of an individual person be made following fair procedures*". (See Sara Blake, *Administrative Law in* Canada, 7th ed. (Toronto: LexisNexis Canada Inc., 2022) at §2.05.)

[12] The concept of advance notice to all persons whose legal interests will be directly affected by a decision of a court or tribunal is inextricably linked to the duty to act fairly. The Blake text addresses the issue of notice as follows, at §2.11:

> **§2.11 NOTICE**
>
> **1. Purposes**
>
> … Failure to give notice will likely be fatal to the validity of any decision. Notice has two purposes. The first is to alert persons whose legal interests may be affected so that they may take steps to protect their interests. The second is to communicate what matters are in issue and the proposed action to be taken so that the parties and the decision maker know what is to be decided. …

Abuse of Process

[13] The most recent case from the Supreme Court of Canada on the doctrine of abuse of process in administrative proceedings is

Law Society of Saskatchewan v. Abrametz, 2022 SCC 29 (CanLII). ***Abrametz*** teaches that the doctrine is "*rooted in the court's inherent and residual discretion to prevent abuse of its process*" (para. 33) and that it is a "*broad concept that applies in various contexts*" (para. 34).

[14] In addition to being a broad concept (para. 34) ***Abrametz*** also notes the doctrine of abuse of process is a flexible one, at para. 35:

> [35] It is also characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of res judicata and issue estoppel: Behn, at para. 40; C.U.P.E., at paras. 37-38. In Behn, at para. 40, LeBel J. referred with approval to Goudge J.A., dissenting, in Canam Enterprises Inc. (C.A.), where Goudge J.A. explained that the doctrine of abuse of process
>
> > engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. [Emphasis added; para. 55.]
>
> Such flexibility is important in the administrative law context, given the wide variety of circumstances in which delegated authority is exercised.
>
> [Emphasis in the original]

[15] In the context of administrative proceedings, ***Abrametz*** teaches that at its core, abuse of process is about procedural fairness (para. 38) and that it can arise in two circumstances, at paras. 41-43:

> [41] The first concerns hearing fairness. The fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable or evidence has been lost: *Blencoe*, at para. 102; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 9:57.

> [42] This is not what is in issue in this appeal. Rather, the Court is concerned with a second category of abuse of process. Even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay: *Blencoe*, at paras. 122 and 132.
>
> [43] *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute: *Behn*, at paras. 40-41.

Delay

[16] In assessing delay, ***Abrametz*** also teaches that, *"addressing delay is an obligation on all parties"* involved in an administrative process and not merely a statutory authority or regulatory body (para. 78).

[17] The issue of delay in seeking declaratory relief was front and centre in ***Gook Country Estates Ltd. v. Quesnel (City of)***, 2008 BCCA 407 (CanLII). As in the case before me, the applicant in ***Gook Country*** was seeking a declaration that two development permits issued by the city were void well after construction of the buildings described in the permits were built, leased and occupied.

[18] ***Gook Country*** confirms the well-understood principle that declaratory relief is discretionary and it can be denied on various grounds, including but not limited to:

> [10] … standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. …

[19] In upholding the decision of the judge at first instance, the British Columbia Court of Appeal noted at para. 18 that:

> [18] . . [the judge] properly considered the possibility of adverse effects on third parties, the plaintiff's delay in bringing the matter before the court, the plaintiff's limited interest in the matter, the lack of any clear utility to a declaration, and the fact that the developments in question had already been built in reliance on the permits. …

[20] The public policy considerations when delay occurs in the context of a challenge to the decisions of governmental authorities to approve development applications and building permits are described as follows in ***Kane v. Lac Pelletier (Rural Municipality)***, 2009 SKQB 348 (CanLII), 342 Sask. R. 113, at para. 43:

> [43] Having found undue delay, I am satisfied that granting the relief sought, if there were basis for relief, would cause substantial hardship or prejudice as well as be detrimental to good administration. When a municipal council gives the green light, so to speak, to a developer to pursue a proposal and they then proceed in reliance upon the actions taken by council to permit a challenge to proceed at this stage would in fact be detrimental to good administration of the municipality. In this instance the project is 85% complete and substantial monies expended. Those who proceed in reliance on what a municipality has done should not have to expect the process could still be challenged almost two years after the initial action taken by council. If that were the norm it could adversely impact on many facets of development in a municipality. In addition to seeking to quash bylaws and resolution of Council by way of *certiorari*, the applicants seek to compel the RM by way of *mandamus* to take proactive steps to stop any development until the Developer obtains a development permit and to oppose the application by the Developer to Fisheries and Oceans Canada. As a prerogative writ, *mandamus* is subject to the same discretion to refuse relief for undue delay. While the relief sought is different in nature than the request for *certiorari*, the objective is the same – to stop the development. For the reasons already outlined, I am satisfied that there has been undue delay and substantial hardship or prejudice.
>
> [Emphasis added]

Delay in the Context of Injunctive Relief

[21] The text by Robert J. Sharpe on *Injunctions and Specific Performance*, (Toronto: Thomson Reuters Canada Limited) (loose-leaf ed. 2021) at §1:21, highlights the risk delay poses to a fair hearing:

> §1:21. Introduction
>
> A plaintiff, once entitled to an injunction or specific performance, may lose that right on account of delay in asserting the claim. Because the principles governing the treatment of delay are the same whether the remedy sought is specific performance or an injunction, it is convenient to discuss in one place the matter of delay as it affects both remedies. The treatment of delay as a factor determining the availability of specific relief is characteristic of most equitable doctrines: the courts apply general principles rather than specific rules, leaving wide scope for discretion in particular cases.
>
> Consideration of delay is an aspect of the more general principle which takes into account the injustice of awarding relief against a party who will be prejudiced on account of a change of position related to acts or omissions of the party seeking relief.
>
> [Citations omitted]

[22] The Sharpe text goes on in the same section to highlight how a party must be able to link their complaint about delay to some prejudice they have suffered.

> Delay in asserting one's rights may, of course, have evidentiary significance. It is often said that a reasonable person is unlikely to sleep on a well-founded claim. However, it has for long been clearly established that delay alone will not be fatal. A combination of delay and prejudice to the defendant is required to deprive the plaintiff of a specific remedy to which he or she is otherwise entitled. In a decision of the Supreme Court of Canada, Duff J. described the principle as follows:
>
> > The doctrine of laches, it has been frequently said, is not a technical doctrine, and in order to constitute a defence there must be such a change of position as would make it inequitable to require the defendant to carry out the contract or the delay must be of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the contract or otherwise to make it unjust to grant specific performance.
> >
> > [Citations omitted]

Analysis

[23] I am satisfied that the delay in the filing of the notice of application and bringing it on for hearing has affected the fairness of the hearing and that it constitutes an abuse of process under the three-step test articulated by the Supreme Court of Canada in ***Abrametz***, because:

a) The delay is inordinate based on assessment of the overall context, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case;
b) The delay itself has caused significant prejudice; and
c) A final assessment of the inordinate delay and significant prejudice shows it is manifestly unfair to the RM and Berger and further that it brings the administration of justice into disrepute.

The Delay is Inordinate

[24] The applicant's inexplicable delay in taking legal action to seek injunctive relief when it first knew of the construction of the Plant in April of 2020 is baffling, because this was the most obvious remedy that should have been pursued in these circumstances. The applicant slept on its rights to pursue the most obvious available remedy, by totally disregarding the deadline imposed by Kroft, J. in his order requiring the lawyer for the applicant to clearly state his client's position with respect to injunctive relief to both Berger and the RM no later than September 8, 2021. Absolutely no explanation has been offered for the refusal of the applicant to comply with this order.

[25] Deadlines imposed by judges on the uncontested list cannot safely be dismissed by lawyers as mere recommendations or suggestions. In this case, the order of Kroft, J. cannot be understood as anything other than an absolute deadline closing the door on injunctive relief should the applicant elect not to disclose its intention to move ahead with that kind of remedy by the date specified. Having chosen not to proceed with injunctive relief by the date specified by Kroft, J., it would be fundamentally unjust to allow the applicant to avail itself of that remedy now.

[26] I do not accept the argument advanced by the applicant that a claim for injunctive relief can safely be read into the original notice of application as drafted. A plain reading of the notice of application as drafted is confusing at best and cannot reasonably have led the RM or Berger to conclude they were at risk of a permanent injunction being issued against them that would result in the shutdown of a nearly completed Plant that was built with all the necessary permits in place. That is why Kroft, J. set a hard deadline for an application for injunctive relief that was to proceed by way of a statement of claim.

[27] The delay in these circumstances is certainly inordinate and fundamentally unfair to Berger, which was entitled to be named as a party in this litigation from the very start and to be informed as to what the case against it was. It is fundamentally unfair to place a party like Berger in a situation in which it could not reasonably assess the legal risk it was facing by carrying on with an approved

construction project or to develop a legal strategy to mitigate its potential losses in its multi-million dollar investment.

[28] It must also be noted that the subject matter of this action is not complex. It boils down to what the applicant describes as a question of whether the construction of a peat moss facility constitutes an agricultural use under the existing zoning by-law. None of the questions the applicant now wishes to raise in opposition to the Plant are novel. Further, the applicant could have easily raised all of these arguments when it first learned of the construction of the Plant in the spring of 2020.

Significant Prejudice

[29] To date Berger has invested about $25 million dollars in the development and construction of the Plant, which is critical to its business operations and the livelihoods of several dozen employees. Berger estimates that ceasing operations at the Plant and relocating to a new facility would cost at least $35 million. In my opinion, Berger was entitled to rely on the validity of the all of the permits issued in these circumstances. The applicant made no serious effort to challenge the assertion that Berger was facing significant prejudice by virtue of the relief it is now seeking.

[30] A shutdown of the Plant as demanded by the applicant would not merely be disruptive to Berger; it would have a devastating impact on the ability of Berger to continue to operate under its current supply chain structure in Canada. In short, the relief sought in the proposed amendments to the original notice of application,

is an existential threat to the business operations of Berger in Manitoba and its investment in a multi-million dollar Plant dedicated to a single use, namely peat moss production and the many jobs the Plant has created.

[31] The applicant cannot simply shrug off the potential losses facing Berger as a matter of a developer who just happened to "roll the dice" on a particular project and now has to wait and see if it suffers a loss. Berger may have taken a risk in closing the purchase of the land before all of its due diligence was completed, but it did not assume a risk after it became the lawful owner of the land because it did not proceed with development and construction of the Plant without the necessary permits and authorizations. Undertaking the enormous costs of construction of the Plant, to the point of virtual completion, with all of the necessary permits and authorizations in hand, should not be seen as a risky move by Berger. It would be completely unreasonable for any developer in Berger's shoes to think it could face the devastating financial consequences that would flow from the revocation of the permits and a permanent injunction that would close the Plant after it was nearly complete.

<u>The Process Manifestly Unfair and brings the Administration of Justice into Disrepute</u>

[32] The notice of application, as drafted by previous counsel for the applicant, is not merely inelegantly framed as current counsel for the applicant suggests; it fails to clearly set out what case the RM has to meet. It even fails to name Berger as a respondent. Quite inexplicably, the applicant resisted all of the efforts of

Berger to be named as a respondent until very late in the day and only after Kroft, J. made it clear that Berger could not be treated as a mere tourist to this litigation.

[33] As drafted, the notice of application mentions the quashing or revoking of the development permits, but fails to set out what exactly is to be reviewed. There is no clarity as to what constitutes the record that is to be reviewed. All of the relief is framed under s. 382(1) of ***The Municipal Act***, which does not allow for judicial review of development permits issued by a municipality. The applicant has also made no attempt over the course of the 14 months since the notice of application was filed to identify or obtain the record on which the RM based its decision. Rather than identifying the record, the applicant chose to file more than 1,000 pages of its own affidavit material in support of its claim for relief.

[34] The notice of application fails to deal with the fundamental nature of judicial review, which by definition is a process, whereby the decision of the administrative decision-maker is reviewed by a judge based on the record that was before the decision-maker at the time of its decision. Blake in her text writes at §7.91:

> Evidence that was not before the tribunal is not admissible without leave of the court <u>because the role of the court is to review the tribunal decision, not to decide the matter anew</u>. This is why the only admissible evidence is the tribunal record. The tribunal's findings of fact may not be challenged with evidence that was not before the tribunal. Opinion evidence may not be filed to challenge the wisdom of the decision or its interpretation of statute. Fresh evidence, discovered since the tribunal made its decision, is not admissible. …
>
> [Emphasis added]

[35] Neither the applicant nor its principals ever requested an injunction to halt the development, construction, staffing, or operation of the Plant prior to

May of 2022. Further, neither the applicant nor its Directors ever challenged the validity of the building permits issued to Berger by the Office of the Fire Commissioner. Initially, the applicant did not even include Berger as a respondent to its application. The applicant also refused Berger's request to be joined as a respondent in this action, despite Berger's obvious legal interest in the outcome of the application.

[36] The proposed amendment to the notice of application is not merely a refinement of what was originally pled; it is a complete overhaul to the substance of the application. The applicant cannot succeed in saying that the proposed amendment is no longer judicial review merely because it no longer explicitly seeks *certiorari* or *mandamus* as a remedy.

[37] By attempting to seek a declaration of its rights under a by-law and a permanent injunction well past the eleventh hour, the applicant is seeking judicial review by other means and totally changing the legal landscape on which it first chose to attack the development and construction of the Plant. Allowing the applicant to have a "do over" at this late date and after so much money has been spent by Berger is clearly an abuse of process.

[38] It would be fundamentally unfair to Berger and the RM to allow "not-in-my-backyard" activists to attack permitting processes long after they have been granted by a municipality and acted on in good faith by a property owner. In her text, Blake states at §7.07:

> Effective public decision making requires that judicial review be commenced without delay to ensure the stability, efficiency and reliability of public administration. The public uncertainty and potential chaos caused by delays are an anathema to these public-interest needs.

[39] Property owners should be entitled to move quickly with development projects once they have been given the green light by the applicable authorities and not have to worry about legal attacks by third parties long after they have invested substantial sums in reliance on those permits. I agree with the RM and Berger that allowing this matter to continue to a substantive hearing on the merits would create public uncertainty and potential chaos that is contrary to the public interest.

[40] Allowing this matter to proceed would open the floodgates to anyone who might want to oppose development projects well after the fact and inject tremendous uncertainty into development projects that have gained the approval of the applicable authorities. In fact, it is not hard to imagine many developers giving up on Manitoba as a place to pursue development and construction projects due to the high risk of costly litigation by third parties that could occur many months or years after a municipality has issued the necessary permits.

[41] Granting the applicant the relief it seeks would serve as reward to the applicant for sleeping on its rights and waiting until well after the last minute to start litigation in order to deliberately inflict catastrophic financial pain on Berger and its employees. This clearly represents an abuse of process that the court must protect both the public and litigants from.

Delay under Queen's Bench Rule 38.12

[42] Even if I am wrong in my analysis as to dismissal based on abuse of process, I would still dismiss the application under Queen's Bench Rule 38.12, which provides:

> DISMISSAL OF APPLICATION FOR DELAY
>
> **Motion**
>
> 38.12(1) The court may on motion dismiss an application for delay.
>
> **Grounds**
>
> 38.12(2) On hearing a motion under this rule, the court may consider,
>
> (a) whether the applicant has unreasonably delayed in obtaining a date for a hearing of a contested application;
>
> (b) whether there is a reasonable justification for any delay;
>
> (c) any prejudice to the respondent; and
>
> (d) any other relevant factor.
>
> **Dismissal not a defence to subsequent application**
>
> 38.12(3) The dismissal of an application for delay is not a defence to a subsequent application unless the order dismissing the application provides otherwise.

[43] My decision with respect to abuse of process covers all of the considerations detailed in Queen's Bench Rule 38.12. The applicant cannot claim the delay was reasonable merely because it attempted to obtain a favourable result from the RM through direct engagement with the RM before choosing to litigate. The repeated failure of the applicant to get a favourable result should have prompted it to proceed with legal action at a much earlier date. The failure to heed the order of Kroft, J. with respect to injunctive relief also closes the door to any argument that the delay was reasonable. It was in fact patently unreasonable.

[44] The argument advanced by the applicant that Akins did not get formal disclosure of documents from the RM and other government agencies regarding construction of the Plant until December of 2020 are also a red herring. Akins and thereby the applicant knew that a peat moss plant was under construction as early as April of 2020. That information was sufficient for the applicant to bring an application with respect to an injunction or judicial review.

[45] There is no legal justification for the delay. The prejudicial effect of the delay is not only overwhelmingly obvious, it would bring about a devastating financial consequence to Berger and result in a precedent that would greatly diminish the ability of local governments to go about the process of lawful property development in an efficient and logical manner that is consistent with the public interest.

Conclusion

[46] For all of these reasons I am dismissing the applicant's motion to amend and granting the motion of the RM and Berger to dismiss the notice of application and barring the applicant from filing any further applications with respect to development, construction or operation of the Plant.

[47] The parties may speak to costs if they cannot agree, provided they have filed written briefs prior to the hearing.

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REMPEL J.