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(Winnipeg Centre)
Indexed as: Viceversa Developments Inc. v. The City of Winnipeg
Cited as: 2022 MBQB 169

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Appearances:
VICEVERSA DEVELOPMENTS INC.,	)	
	)	Dave Hill and Faye Brandson
plaintiff,	)	for the plaintiff
- and -	)	
	)	Michael Finlayson and
	)	Gabrielle Lisi
THE CITY OF WINNIPEG,	)	for the defendant
	)	
defendant.	)	
	)	JUDGMENT DELIVERED:
	)	August 18, 2022

BOCK J.

Introduction

[1] The plaintiff, Viceversa Developments Inc. ("Viceversa"), alleges the City of Winnipeg (the "City"), was negligent in completing certain steps necessary to bring into force amendments to Zoning By-Law No. 6400/94, causing it damage.

[2] For the reasons that follow, Viceversa's claim is dismissed.

The facts

[3] Alec Katz, 77, is a retired Winnipeg architect. He practised architecture in Winnipeg for over 35 years, most of those with Stechesen Katz, where he contributed to

that firm's reputation for innovative and award-winning design. A heart attack in 2005 prompted his retirement. About two years later, he relocated to Victoria, British Columbia.

[4] Mr. Katz owns and controls Viceversa, a company he incorporated in the early 2000's to acquire a particular parcel of property from Canadian National Railway ("CNR"). That property, and Mr. Katz's imaginative idea for its redevelopment, are at the centre of this dispute.

[5] CNR owned and operated the Oak Point branch line for nearly 100 years. The Oak Point Bridge (the "Bridge"), a steel truss railway bridge, formed part of the Oak Point branch line. Constructed in about 1910, the Bridge crosses the Assiniboine River between two well-known and well-used Winnipeg streets, Wolseley Avenue West and Academy Road, at a point just east of a high-traffic Winnipeg bridge, the St. James Bridge.

[6] In the late 1990's CNR abandoned the Oak Point branch line. In December 2003, CNR sold the Bridge, along with two parcels of land on either side of it, to Viceversa for $250,000. The land on the north side of the Bridge (the "North Parcel") comprised only 7,265 square feet; the land on the south side of the Bridge (the "South Parcel") comprised a much larger parcel of about 1.5 acres; the Bridge itself is 440 feet long and 20 feet wide. (The Bridge, together with the North and South Parcels, are identified in these reasons as the "Property".)

[7] Three roadways (the "Roadways"), including sidewalks and a bicycle/pedestrian path, all built and maintained by the City, are located on the Property. They are: (a) Wolseley Avenue West, which crosses the North Parcel under the Bridge; (b) Wellington

Crescent and a bicycle/pedestrian path, which cross the South Parcel under the Bridge; and (c) a turnoff and approach to the St. James Bridge, which are located on Academy Road at the southern limit of the South Parcel. Winnipeg residents will be familiar with the Roadways, which have been freely and continuously used by the general public since the 1930's.

[8] As I will discuss, upon taking possession and title to the Property, Viceversa took the position that it owned and had exclusive control over the Roadways, and that the City was therefore trespassing on them. The City flatly rejected Viceversa's position. This became a serious point of contention between the parties, and was ultimately resolved in the City's favour after a trial in 2013 (***Viceversa Developments Inc. v. Winnipeg (City)***, 2013 MBQB 312, 301 Man.R. (2d) 77), and a subsequent appeal in 2015 (***Viceversa Developments Inc. v. Winnipeg (City)***, 2015 MBCA 38, 319 Man.R. (2d) 25).

[9] When Viceversa acquired the Property in 2003, it did so with a view to developing it. Mr. Katz's imaginative development proposal contemplated widening the Bridge by 20 feet and constructing a three-storey, 30-unit residential condominium building on top of it. Units would range in size from 1,600 to 3,200 square feet. Parking would be provided by means of two enclosed parking structures suspended under either end of it.

[10] Viceversa's first step toward realizing this vision was an application to the City to amend the existing zoning by-law, By-Law no. 6400/94 (the "Zoning By-Law"). The Property was subject to a peculiar mix of zoning when Viceversa bought it. The North Parcel was zoned C2 Commercial District ("C2"), while the South Parcel was split into

three differently zoned areas: the northeast quarter was zoned Parks and Recreation District ("PR-1"); the southeast corner was zoned C2; and the western half was zoned Single-Family Residence District ("R1 5.5A").

[11] On January 29, 2004, Viceversa submitted a development application to the City for an amendment to the Zoning By-Law which, if allowed, would result in a consolidation of the Property's zoning as C2. C2 zoning would in turn allow for the possibility of the type of multi-family residential development contemplated by Viceversa's concept for the Bridge. Viceversa's development application triggered a review by the City's Senior Planner, Ross Mitchell. Mr. Mitchell's report and recommendation to grant the application, dated July 12, 2004, were then submitted to the City Centre Community Committee for a public hearing on July 13, 2004.

[12] Viceversa's application sparked a great deal of interest in the community, not all of it positive. The City Centre Community Committee minutes record that more than 40 representations were made at the hearing in support of Viceversa's rezoning application, and over 60 in opposition.

[13] On July 26, 2004, following the public hearing on July 13, 2004, the City Centre Community Committee submitted its own report and recommendation to grant Viceversa's application to the City's Standing Policy Committee on Property and Development. At the same time, the City Centre Community Committee issued to Viceversa a "Conditional Use Order" and "Variance" under the Zoning By-law to permit the establishment of a 30-unit residential building on the Bridge. The Conditional Use Order and Variance were important to Viceversa. Provided it obtained the necessary

rezoning, it would need both in order to apply to the City for the issuance of a development permit for construction of the project.

[14] Viceversa's development application then went before the Standing Policy Committee, where it eventually received approval on June 7, 2005. The Standing Policy Committee's approval was followed by further consideration and approval by the City's Executive Policy Committee on June 22, 2005. Viceversa's development application finally received approval from Council as a whole on June 29, 2005 (subject to a small error which Council corrected on July 27, 2005). I will refer to Council's decision to approve the application as the "Rezoning Decision".

[15] The effect of the Rezoning Decision was to approve the amendment of the Zoning By-law by rezoning the Property to a "C2" designation, subject to nine specific conditions. None of these conditions would have come as a surprise to Viceversa, because they were all substantially similar to conditions proposed by the Senior Planner in his report of July 12, 2004.

[16] For the purpose of this litigation, Conditions 1, 2, 4, 6 and 9 of the Rezoning Decision are especially relevant. In summary:

(a) Condition 1 required Viceversa, among other things, to enter into a "Zoning Agreement" with the City. The Zoning Agreement would govern and limit the use to which the Property could be put. Condition 1 also imposed strict conditions on Viceversa with respect to the issuance of a development permit;

(b) Condition 2 required Viceversa to enter into a "Servicing Agreement" with the City. The Servicing Agreement would deal with, among other things, the Roadways, by requiring Viceversa to grant a perpetual easement in favour of the City in respect of Wellington Crescent and Wolseley Avenue West, and to provide and legally open, at no cost to the City, property required to widen the turnoff and approach to the St. James Bridge on Academy Road;

(c) Condition 4 imposed a 24-month deadline for the enactment of the amendment to the Zoning By-law, in these terms:

> That in the event the application is not proceeded with expeditiously and the by-law is not enacted within twenty-four (24) months after adoption of the report by Council the matter shall be deemed to be concluded and shall not be proceeded with unless an extension of time is applied for prior to the expiry of this twenty-four (24) month period and the extension is subsequently approved by Council.

(d) Condition 6 provided that the amendment of the Zoning By-law would come into effect when the Zoning Agreement had been registered by caveat against title to the Property at the Winnipeg Land Titles Office, so long as the effective date of registration occurred within 24 months of the Rezoning Decision;

(e) Condition 9 provided that the City's "Solicitor/Manager of Legal Services" would be requested to do all things necessary for implementation of the Rezoning Decision. This would include drafting the Zoning and Servicing Agreements.

[17] The Rezoning Decision also triggered deadlines contained in the Conditional Use Order and Variance mentioned earlier. Each provided, in effect, that it would terminate unless Viceversa's project was "established" by the issuance of a development permit within two years of the Rezoning Decision, in which case Viceversa would have to make fresh applications at a public hearing before the City Centre Community Committee.

[18] By July 27, 2005, with the Rezoning Decision in hand, Viceversa had successfully cleared the first hurdle in its path toward development of the Property – zoning approval. But, as the Senior Planner, Mr. Mitchell, had noted in his report of July 12, 2004, many hurdles remained (Exhibit 16, at pp. 43 – 44):

> Zoning approval is the first of several hurdles the applicant must cross in order to bring this to fruition. Should Council approve the rezoning, the applicant will have 2 years to register the Zoning Agreement. Baring [*sic*] this, the applicant must either reapply for rezoning or request Council to extend the time limit. Regarding the Conditional Use and Zoning Variances, if approved, the applicant will have 2 years from the date of the Orders to take out a development permit. Baring [*sic*] this, the Orders will automatically terminate, and the applicant must reapply to establish the conditional use and zoning variances.

[19] Tom Janzen, an expert in urban planning relied on by the City, offers a similarly daunting description of the challenges that Viceversa faced at page 16 of his report, filed as Exhibit 134: "Securing rezoning approval from the City would have been just one of many key milestones that Viceversa would have had to achieve as part of the development process ... ." He then goes on to identify the kinds of engineering reports (including transportation, bridge structural, municipal, civil, geotechnical, geo-environmental and hydrogeological), assessments (including noise, wind, ambient air,

and natural-cultural-archeological heritage), and government approvals that would have been required as part of the development process for the Bridge.

[20] In the years that followed, Viceversa did not pursue its application "expeditiously". To the contrary, after the Rezoning Decision, it never made any real progress on its plans to develop the Property. In fairness to Viceversa, the unique location of the Property, Mr. Katz's personal circumstances and the complexity of the project presented significant, and ultimately insurmountable, challenges.

[21] Because of its location, development of the Property was subject to federal, provincial and municipal jurisdiction. As a result, in order to proceed Viceversa's development required, but ultimately did not gain, approval from all three levels of government.

[22] In 2004, Mr. Katz did have a promising exchange of correspondence with a representative of the federal Department of Fisheries and Oceans about Viceversa's plans for a condominium complex on the Bridge, but thereafter he did not take the steps necessary to obtain formal authorization for the development pursuant to the ***Fisheries Act***, R.S.C., 1985, c. F-14.

[23] In January 2006, Mr. Katz met with the provincial Minister of Conservation seeking an easement in respect of the air space over the Bridge, the rights to which were reserved to the Crown pursuant to s. 4(1)(c) of ***The Crown Lands Act***, C.C.S.M. c. C340. The meeting proved to be a disappointment to Mr. Katz. In an e-mail dated January 10, 2006 to an officer in the Department of Conservation (Exhibit 35), Mr. Katz wrote that although the "Minister was very generous with his time" and "gave me a fair hearing", he

nevertheless "left the meeting realizing that this project as anticipated will not proceed because the province will block an air rights agreement being let." Despite a declaration in that same e-mail that he "will not give up the battle yet", Mr. Katz did in fact give up the battle, and made no further efforts to obtain an air rights agreement with the Province.

[24] Viceversa also required, but never sought, additional municipal permits from the City because the Property was located in a "designated floodway fringe area" within the meaning of ***The City of Winnipeg Charter***, S.M. 2002, c. 39, and was located sufficiently near the Richardson International Airport to fall within the "Airport Vicinity Protection Area" described in the Airport Vicinity Protection Area Zoning By-law No. 6418/94.

[25] Mr. Katz's age, health and lack of financial resources to fund a project of this magnitude and complexity also hindered Viceversa's efforts to advance development. Mr. Katz adverted to some of these challenges in his submission to the Minister of Conservation in January 2006 (writing about himself in the third person; Exhibit 34, p. 3): "The proponent has some serious health issues, and cannot indefinitely withstand uncertainty, risk and stress associated with regulatory delays. He wants to devote as much of his time and energy as possible to actual design and construction … ." In an e-mail to a Winnipeg Free Press reporter dated October 27, 2009 (Exhibit 51), Mr. Katz made reference to his financial circumstances: "Retirement has its advantages as it relates to stress reduction, but there is still the balancing act of making ends meet without a paycheck every two weeks."

[26] Mr. Katz made sporadic efforts after the Rezoning Decision to attract financial backers to fund Viceversa's plans for the Property, but these failed to generate any serious interest. His occasional efforts after 2005 to negotiate paid advertising on the Bridge failed to generate any interest, too. Any plans to place advertising on the Bridge were probably doomed to fail anyway, though, because Viceversa lacked appropriate authorization from the City to do so.

[27] As a result, after the Rezoning Decision in 2005, Viceversa never made any meaningful advance on the development of the Property. A meaningful advance in this context might have involved efforts to prepare the kinds of plans and reports stipulated in the Rezoning Decision for the issuance of a development permit, such as: preparation of detailed plans showing site layout, access, parking, loading, building elevations and materials, landscaping, fencing, garbage enclosures, exterior lighting, pedestrian access and signage for the approval of the City Centre Community Committee; a detailed engineering report outlining the proposed servicing for the development for the approval of the Director of Water and Waste; or a traffic access plan for the approval of the Standing Committee on Public Works. Taking steps to obtain engineering reports, assessments and government approvals of the type described by Mr. Janzen might also have constituted a meaningful advance. But Viceversa never made such efforts.

[28] By contrast, after it acquired the Property in 2003, Viceversa consistently, and sometimes quite belligerently, asserted its position that the City was trespassing on the Roadways. For instance, in August 2004, the City was informed by the lawyer for a nearby property owner that "Mr. Katz has verbally threatened that he may take steps to

close" Wolseley Avenue West (Exhibit 18). In a similar vein, Viceversa's lawyer wrote to one of the City's solicitors on August 31, 2004 to outline "concerns that arise out of the status" of the Roadways, and invited a meeting to see what might be done to "regularize" and "rationalize" the situation "in the mutual interests of the City and Mr. Katz (ViceVersa Developments Inc.)" (Exhibit 19).

[29] This pattern continued almost annually in the years that followed. By letter dated May 24, 2005, Mr. Katz made demand on the City for compensation "on a monthly basis" for the City's ongoing trespass on the Roadways (Exhibit 137-4). In an e-mail dated May 2, 2006, he proposed the City pay Viceversa for the use of the Roadways based on traffic volumes (Exhibit 137-6). On March 7, 2008, he informed one of the City's solicitors that, having "not heard from the City as it relates to a settlement on the trespass of my property I am assuming that the City is not interested in maintaining access", and was thereby "giving the City notice that access will be terminated in April of 2008" (Exhibit 44). Mr. Katz made similar pronouncements and threats to the City about the Roadways in 2009 and 2010, but to no avail.

[30] Mr. Katz testified that the City did once offer Viceversa $75,000 to settle its claims with respect to the Roadways, to which Mr. Katz responded with a counteroffer of $10 million. (Although I was not informed of the date of these negotiations, Mr. Katz makes reference to the City's offer in e-mails from 2010. From this I infer that the City's offer must have been made in 2010 or earlier.) There was no evidence of any other settlement negotiations between the parties. Rather, in all of its dealings with Mr. Katz the City consistently asserted its position that it had exclusive jurisdiction over the Roadways.

[31] Mr. Katz's efforts to establish Viceversa's claim to the Roadways culminated in a lawsuit commenced against the City in October 2012 in which it sought injunctive and declaratory relief as well as damages. As noted earlier, that litigation was ultimately resolved in the City's favour after a trial in 2013 and a subsequent appeal in 2015. Only then, in 2017, did Viceversa commence this lawsuit against the City.

[32] Despite the fact that it was not advancing its development application expeditiously, Viceversa did seek and obtain from Council two extensions, as permitted by Condition 4 of the Rezoning Decision. On January 24, 2007, Council granted an extension to March 15, 2009; on January 28, 2009, Council granted a second extension to March 15, 2011.

[33] However, on February 23, 2011, Council denied Viceversa's third request for an extension. Its decision to deny Viceversa's request was supported by recommendations received from the City Centre Community Committee, the Standing Policy Committee on Property and Development and the Executive Policy Committee. Instead, Council passed By-Law No. 29/2011, by which it amended Zoning By-Law No. 200/2006 to zone all of the South Parcel as C2 (the "Amended Zoning By-Law"). Significantly, the Amended Zoning By-Law did not come into force on February 23, 2011. Rather, section 2 of the Amended Zoning By-Law stipulated that it would only come into force upon the occurrence of two events: (a) registration by caveat of an executed Zoning Agreement within 24 months (that is, by February 23, 2013), failing which it would expire, and (b) the City's execution of a Servicing Agreement, the execution of which would remain in the absolute discretion of Council.

[34] The Amended Zoning By-Law never came into force, because the City's lawyer did not prepare a Zoning Agreement for Viceversa's execution until April 10, 2013, well after the February 23, 2013 deadline. Thus, the Property's split zoning remains more or less as it was when Viceversa acquired it in 2003. Some changes in zoning did come into effect in 2008 after the City's adoption of Zoning By-Law 200/2006 in place of By-Law 6400/94. While the North Parcel remained zoned C2 under the new by-law, the South Parcel was split into C3 – Commercial Corridor, PR2 – Parks and Recreation and R1-L - Residential Single Family Large. For the purpose of this decision, however, those changes are not relevant.

[35] In 2019, the City commissioned a report by WSP, a professional engineering firm, to identify the components of the Bridge that would need to be repaired, replaced or rehabilitated should the City decide to purchase the Bridge and convert it to a pathway for pedestrians and cyclists. The report was filed as Exhibit 136. The professional engineer who authored it, Edmund Ho, testified that the estimated cost to repair the Bridge's base was approximately $2.5 million as of the date of that report. Presumably the cost of such repairs would have been lower in 2013 than in 2019, and will have increased since 2019, but there was no evidence led at trial to quantify those amounts with any precision.

[36] The City has not made an offer to acquire the Bridge from Viceversa. Viceversa continues to own the Property, and has not taken any steps to sell or otherwise develop it.

The positions of the parties

[37] Viceversa submits the City's failure to present a Zoning Agreement for its execution before February 23, 2013 was negligent. At trial this was essentially conceded by the City, which described its failure as an "oversight". The real issue dividing the parties is whether the delivery of a Zoning Agreement by the City to Viceversa before February 23, 2013 would have made any difference. The City says no, because any Zoning Agreement would have been conditional on Viceversa's release of any claims it might have had in respect of the Roadways, something Viceversa was not then prepared to give.

[38] Viceversa disagrees. It submits it would have accepted the City's terms for a Zoning Agreement, including the release of its claims in respect of the Roadways, in order to bring into force the Amended Zoning By-law and secure the Property's C2 zoning.

[39] Viceversa argues that if the Amended Zoning By-Law had been enacted, the value of the Property would have increased substantially because of the C2 zoning. In this regard, it relies on an expert report authored by Rocky Neufeld, a property appraiser, in which he estimates the market value of the Property, fully rezoned as C2, to be $6.2 million as of July 17, 2013.

[40] The City disagrees. The City submits that the expiry of the Amended Zoning By-Law has had no effect on the value of the Property. The Property was no less developable after the expiry of the Amended Zoning By-Law than it was before. At worst, Viceversa has lost the chance to carry out the condominium development concept on the Bridge for which it received conditional zoning approval. Furthermore, in January 2017, the City communicated to Viceversa that if it renewed its rezoning application it would be

supported by the City's Planning, Property and Development Department, and that the normal fee associated with such an application would be waived. Despite that, Viceversa has made no application.

[41] According to the City's expert appraiser, Brett Ferguson, the market value of the Property, as of July 17, 2013 and subject to the split zoning then in effect, was $730,000.

Discussion and disposition

[42] My discussion and disposition of the plaintiff's claim are organized around these five conclusions:

(a) the City owed Viceversa a duty of care to prepare a Zoning Agreement on a timely basis;

(b) the City neglected to prepare a Zoning Agreement on a timely basis;

(c) the City's negligence did not cause Viceversa any legally compensable damage;

(d) in the alternative, any damage caused to Viceversa by the City's negligence is negligible;

(e) further in the alternative, Viceversa has failed to act reasonably in mitigation of any damages it may have suffered.

(a) The City owed Viceversa a duty of care to prepare a Zoning Agreement on a timely basis

[43] A government agency is subject to the application of traditional tort law unless its alleged liability arises out of a policy-making decision, or is subject to an explicit statutory exemption. Where, as here, liability is alleged to arise out of an agency's operational

function, a traditional torts analysis ensues (***Just v. British Columbia***, [1989] 2 S.C.R. 1228, (S.C.C.) at pp. 1244 – 45).

[44] In this case, neither exception applies. The preparation of a Zoning Agreement by the City's legal department was strictly an operational activity. It did not involve a policy-making decision, nor was it subject to an explicit statutory exemption. Viceversa's allegation that the City's legal department performed its work negligently is therefore to be considered in accordance with the usual requirements for an action in negligence, namely, duty, breach, causation and damage (***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3.).

[45] The City clearly owed Viceversa a duty of care to prepare a Zoning Agreement on a timely basis so that, assuming its terms were acceptable, Viceversa would be in a position to execute and register it by caveat by the deadline of February 23, 2013. At trial this was effectively uncontested by the City, so I will only briefly touch on the evidence that leads me to this conclusion.

[46] To begin, all of the relevant Council minutes in evidence confirm that the City had assumed responsibility, through its in-house legal staff, to draft the necessary Zoning Agreement, from the minutes recording Council's Zoning Decision on June 29, 2005 to the minutes recording Council's decision to enact the Amended Zoning By-Law on February 23, 2011.

[47] Furthermore, representatives of the City confirmed with Mr. Katz that the City would prepare the Zoning Agreement. So, for instance, in an e-mail to Mr. Katz dated July 6, 2012 (Exhibit 102), Ms. Gagnon, an administrative assistant to the City's in-house

lawyer with conduct of this matter, confirmed the City's lawyer was preparing the draft Zoning Agreement and the Land Development Branch was preparing the Servicing Agreement.

[48] Finally, on cross-examination, Ms. Gagnon testified she would have expected Mr. Katz to rely on her assurance to him that the Zoning Agreement and Servicing Agreement would be prepared by the City. She also confirmed in her testimony that it was the City's responsibility to prepare those agreements, and that by early 2013 the matter was urgent because of the looming February 23 deadline.

[49] In short, in these circumstances the City and its lawyer could reasonably foresee that a failure to take reasonable care in the timely preparation of the Zoning Agreement might cause Viceversa damage, and they therefore owed Viceversa a duty of care in the performance of that work.

(b) The City neglected to prepare a Zoning Agreement on a timely basis

[50] The City was clearly negligent in its preparation of the Zoning Agreement, because despite being aware of the February 23, 2013 deadline, its lawyer did not produce an agreement until April 10, 2013. This, too, was essentially uncontested by the City. Nevertheless, I will briefly summarize the evidence that leads me to this conclusion.

[51] The City lawyer with responsibility for the preparation of the Zoning Agreement did not testify at trial. However, based on admissions from his examination for discovery on behalf of the City read in by Viceversa as part of its case, I conclude his failure to prepare a Zoning Agreement before February 23, 2013 was due to his own inattention.

[52] In particular, those admissions on discovery lead me to conclude as follows. Once the Amended Zoning By-Law passed in February 2011, the City's "normal process" would

call for the preparation of a Servicing Agreement by the City's Land Development Branch for review by the City's legal department. Upon receipt of the Servicing Agreement, the legal department would begin drafting a Zoning Agreement. In due course the completed agreements, together with any other agreements that might be required in the circumstances, would be sent as a package to Viceversa. The City's lawyer knew all along that unless the Zoning Agreement was executed and registered by caveat in the Land Titles Office by February 23, 2013 the Amended Zoning By-Law would expire. Although there was ample to prepare the Zoning Agreement in advance of the deadline, the City's legal department did not have a system to track such deadlines. When the City's lawyer received a Servicing Agreement from the Land Development Branch for his review on December 21, 2012, it should have prompted him to review it and begin preparation of the Zoning Agreement. That did not happen in this instance, because at the time he had so much other work to attend to that he set it aside. In the result, he did not finalize a Zoning Agreement until April 10, 2013 and did not complete his review of the Servicing Agreement until April 17, 2013. By then, of course, the deadline had passed.

[53] In this case, the exercise of reasonable care by the City's lawyer ought to have resulted in the timely preparation of a Zoning Agreement well before February 23, 2013. But reasonable care was not exercised by either the City or its lawyer and, as a result of that negligence, the Zoning Agreement was prepared belatedly. The City is both directly responsible for its negligence and vicariously responsible for its lawyer`s negligence.

(c) The City's negligence did not cause Viceversa any legally compensable damage

[54] The City owed Viceversa a duty to take reasonable care, and it failed to exercise reasonable care in the preparation of the Zoning Agreement. As a result, Viceversa submits, the Amended Zoning By-Law expired and it lost the benefit of the C2 zoning that would otherwise have applied to the whole Property.

[55] The City submits in response that Viceversa has failed to prove that the City's negligence was the legal cause of Viceversa's loss, because as a condition of entering into a Zoning Agreement, the City would have required Viceversa to release its claims in respect of the Roadways, something it was not prepared to do. If that is so, then the Amended Zoning By-Law would have expired anyway. I agree with the City's submission.

[56] As a matter of law, Viceversa must satisfy the "but for" test articulated in ***Resurfice Corp. v. Hanke***, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21 – 22. Viceversa must therefore show that the Amended Zoning By-Law would not have expired but for the City's delay in preparing the Zoning Agreement. At minimum, therefore, Viceversa must prove that it would have accepted whatever terms the City put forward concerning the Zoning Agreement.

[57] Ms. Gagnon, the City lawyer's legal assistant, testified that the package of agreements that would have been sent to Mr. Katz for execution by Viceversa are substantially in the form contained at Exhibits 130 and 131.

[58] Exhibit 130 is a form of Servicing Agreement. Schedule "C" to the Servicing Agreement includes, in Section II, a term which obliges Viceversa to "provide and legally

open" those portions of the Roadways – Academy Road, Wellington Crescent, and Wolseley Avenue West – required by the City. This term is consistent with the City's position throughout, and can be traced back to the report and recommendation of the Senior Planner in 2004 and Council's Rezoning Decision in 2005.

[59] Exhibit 131 is a form of Zoning Agreement, and includes a release for execution by Mr. Katz and Viceversa in respect of any claims they might have in respect of two of the three Roadways, Academy Road and Wellington Crescent. The need for a release from Viceversa was identified by another, senior member of the City's legal department in June 2012. In an e-mail dated June 26, 2012 to City officials (Exhibit 95), including the City lawyer with conduct of this matter, she recommended that in light of Viceversa's previous claims for trespass, the City not enter into any agreements with Mr. Katz and his company without obtaining a release. The form of release that forms part of Exhibit 131 appears to have been drafted following this e-mail, given that it makes reference to an execution date in July 2012. (The release does not include any claims in respect of Wolseley Avenue West, and no explanation was provided at trial for this omission. I assume this was an oversight by the City's lawyer, since Viceversa's assertions of ownership, allegations of trespass and demands for compensation had always been made in reference to all three Roadways.)

[60] The City contends, and I accept, that it would not have proceeded with the execution of the Zoning Agreement unless Viceversa also accepted the terms of the release and Servicing Agreement. This makes sense given the City's stated intention to preserve its control over the Roadways, and is consistent with the position that had been

taken by the City in all its dealings with Viceversa. On cross-examination, Mr. Katz admitted that at no time did the City ever indicate to him that it would back off its position with respect to the Roadways.

[61] At trial, Mr. Katz testified that by February 2013, he would have executed the agreements in the form in which they appear in Exhibits 130 and 131, because by that stage he felt he had no choice. He said he would not have abandoned the C2 zoning provided by the Amended Zoning By-Law under any circumstances. In retrospect, he testified, his decision to sue the City for trespass in 2012 had been a mistake.

[62] I find Mr. Katz's professed willingness at trial to execute the agreements and give up Viceversa's claims to Academy Road, Wellington Crescent and Wolseley Avenue West incredible. His evidence is completely at odds with the history of his claims against the City for trespass, which, as noted earlier, began in 2004, continued regularly thereafter, and were being litigated by October 2012.

[63] Rather, I find Mr. Katz made a deliberate and strategic choice to pursue Viceversa's claims for trespass instead of pursuing his plans to develop the Property.

[64] By 2013, Viceversa had failed to advance the development of the Property in any way, and had failed to attract the interest of any other investors or developers. All of the hurdles that had stood in Viceversa's way in 2005 remained in place and appeared to be insurmountable. Mr. Katz knew this, as reflected by this comment in his e-mail to a Winnipeg Free Press reporter on October 27, 2009 (Exhibit 51): "The bridge project as well as the development of the entire project is still very much on my mind, but I guess it will not be executed by me." He continued, "I anticipate that we will sell the property

and hope that whoever picks it up will do so to execute the dream." But Mr. Katz was ultimately unable to interest any other party to "execute the dream."

[65] As distinct from the moribund status of his dream for the Bridge, Mr. Katz clearly assessed Viceversa's claims against the City as having real financial value. This was reflected in, among other things, his $10 million offer to the City to settle Viceversa's claims for trespass, his decision to commence action against the City in respect of the Roadways in October 2012, and his commitment to litigate that action through trial and appeal. Had Viceversa prevailed in that litigation, the value of the Property might have increased considerably, at a relatively modest cost comprising little more than its legal expenses.

[66] Thus, had the City presented a Zoning Agreement to Mr. Katz before February 23, 2013, I find he would have rejected it, because he could not accept it and preserve Viceversa's pending claims against the City for trespass. I find Mr. Katz considered it in Vicerversa's financial interest, and, by extension, his own financial interest, to preserve and prosecute those claims, even if doing so resulted in the expiry of the Amended Zoning By-Law.

[67] I therefore conclude the City's negligence did not cause Viceversa any legally compensable damage.

(d) In the alternative, any damage caused to Viceversa by the City's negligence is negligible

[68] If I am mistaken with respect to Mr. Katz's willingness to give up Viceversa's claims in trespass, then it is necessary to consider the quantum of the damage caused by the

City's neglect in failing to present a Zoning Agreement for Viceversa's execution before the February 23, 2013 deadline.

[69] On Viceversa's view of the matter, had a Zoning Agreement been signed and registered in time, the Amended Zoning By-Law would have come into force, and the Property would have been rezoned C2. This would have significantly increased the market value of the Property, it says. But, because of the City's negligence, the Amended Zoning By-Law did not come into force. As a result, Viceversa submits, it has lost the chance to realize the increase in the market value of the Property that it would otherwise have enjoyed.

[70] Viceversa's position engages the law with respect to loss of chance. In ***B.P.I. Resources Ltd. v. Merrill Lynch Canada Inc.***, 1989 ABCA 106, 67 Alta. L.R. (2d) 97, the Alberta Court of Appeal considered this issue. Its decision provides a very helpful guide to the proper approach to be taken in cases where a plaintiff claims damages for the loss of a chance to obtain a prospective economic advantage.

[71] The court traced the development of the law on loss of chance from ***Chaplin v. Hicks***, [1911] 2 K.B. 786, through ***Kinkel v. Hyman***, [1939] S.C.R. 364, [1939] 4 D.L.R. 1, ***Kovats et al. v. Ogilvie et al.***, [1970] 17 D.L.R. (3d) 343, [1970] B.C.J. No. 653 (BC C.A.), ***Mallett v. McMonagle***, [1970] A.C. 166 and ***Janiak v. Ippolito***, [1985] 1 S.C.R. 146 (SCC), and on that basis identified two steps in the determination of a plaintiff's claim for such loss. First, the plaintiff must prove on a balance of probabilities the existence of "a reasonable chance as opposed to a merely speculative chance…i.e., there must be a proven factual basis which establishes the existence of a chance" (see ***B.P.I. Resources***

Ltd., at para. 29). Once a reasonable chance has been proven to exist, the court continued, the issue of assessment of the worth of the chance arises and the standard of proof may be relaxed (see ***B.P.I. Resources Ltd.***, at para. 34). This assessment may involve estimating the likelihood that a particular thing would have happened, and reflecting that likelihood in the amount of damages awarded.

[72] In ***B.P.I. Resources*** the loss alleged to have been caused by the tortfeasor was the chance to negotiate a lucrative merger with another company, and the chance to issue a public debenture on favourable terms. The court found the plaintiff had failed to prove a reasonable chance that either scenario would have been realized, and it was therefore unnecessary to embark on the second step of the analysis by assessing the worth of either chance.

[73] As I will discuss below, the application of this approach leads me to conclude that Viceversa's claim for loss of chance fails on both steps of the analysis. First, Viceversa has not proved that it had a reasonable chance to realize any economic benefit from the Amended Zoning By-Law. Second, Viceversa has not proved that the Amended Zoning By-Law would have had any material affect on the market value of the Property – the chance in question had no real value.

[74] At the outset, it is important to consider that the Amended Zoning By-Law did not give Viceversa *carte blanche* to pursue any use or development of the Property that might be permitted on land zoned C2. Rather, Viceversa would have been constrained by the terms and conditions of the Amended Zoning By-Law, Conditional Use Order and Variance, which only authorized the development of a three-storey, 30-unit residential

condominium building on top of the Bridge, with two enclosed parking structures suspended under either end of the Bridge.

[75] Even if the Amended Zoning By-Law had come into force, any development of the Property beyond the original concept of a condominium complex on the Bridge would still have been subject to public input and hearings, as well as municipal oversight and approval. As the Senior Planner noted in his report of July 12, 2004 (Exhibit 16) – a report which Mr. Katz said at the public hearings on July 13, 2004 (Exhibit 15) had left him "very impressed" and "astounded at the order and clarity with which he [i.e., the Senior Planner] reviewed the issues of this project" – further development of the South Parcel would be contingent on the successful completion of a number of steps: additional public hearings, fresh applications for conditional use and zoning variances, a Zoning Agreement amendment should Viceversa desire additional commercial uses other than those that had been recommended, and approval of building, site and landscape plans by the City Centre Community Committee and City administration prior to the issuance of a development permit. It bears repeating that Viceversa did not take, let alone complete, any of these steps. Had the Amended Zoning By-Law come into force, the evidence gives me no reason to think Viceversa would have been stirred to action.

[76] Despite this, Viceversa's expert appraiser, Mr. Neufeld, opines that the market value of the Property under the Amended Zoning By-Law would have been $6.2 million. He bases that figure on the assumption that 148 residential units, not 30, could have been developed on the Property, including 24 on the North Parcel, 94 on the South Parcel, and 30 on the Bridge, at a sale price of $42,000 per unit. He justifies his assumption on

the basis that, strictly speaking, this level of density was permitted under the Amended Zoning By-law and would therefore have received the City's approval.

[77] I attach no weight to Mr. Neufeld's opinion. To begin, there is no evidence to support his assumption that development of a 30-unit condominium building on the Bridge is economically or structurally feasible. Viceversa's own experience from 2005 to 2013, its utter lack of progress during that period, and its inability to attract any outside financial support from lenders or developers support this conclusion. There is no expert evidence to suggest that the Bridge could be widened by the 20 feet needed to accommodate Mr. Katz's vision, or that the Bridge is otherwise structurally capable of supporting a three-storey building. Finally, there is no evidence that there is any market for a unique project like this in Winnipeg. To the contrary, as Mr. Neufeld himself notes in his report, Winnipeg's only experience with commercial development on a bridge is a 4000 square foot restaurant space installed on the Provencher Bridge in 2003, and it has not been a success.

[78] Additionally, there is scant evidence to support Mr. Neufeld's assumption that the development of 118 units on the remainder of the Property is economically or structurally feasible, or that such a proposal would survive the public hearing process and receive the necessary municipal approvals that the Senior Planner identified in his July 12, 2004 report.

[79] Aside from the lack of evidence to ground the assumptions on which Mr. Neufeld bases his opinion of market value, I also attach no weight to his opinion because he failed to carry out his duty as an expert witness to provide his evidence fairly and without bias.

I am not the first judge to make such a finding – see Rempel J.'s decision in ***McLeod Estate v. Cole***, 2021 MBQB 24, [2021] M.J. No. 28, at paras. 392- 3. Despite that recent reminder of his duty to the court and the importance of carrying it out, before me Mr. Neufeld appeared to be either unwilling or unable to do so.

[80] I will not identify every one of the numerous respects in which Mr. Neufeld fell short in his duty. These examples are representative of his general lack of independence and impartiality:

(a) on cross-examination, he repeatedly and unreasonably refused to respond to appropriate hypotheticals put to him by counsel;

(b) on cross-examination, he objected to the suggestion that the Bridge was under a "flight path", despite its location relative to Runway 31 at the Richardson International Airport and within the Airport Vicinity Protection Area. Instead, he absurdly suggested that if this particular area were characterized as a flight path, then all of Canada is under a flight path;

(c) Mr. Neufeld's stated objective was to estimate the market value of the Property as of July 17, 2013. In his report, filed as Exhibit 132, he defined "market value", in part, as the "most probable price" a buyer would pay a seller in a competitive market "with the buyer and seller each acting prudently, knowledgably, and for self-interest …" (p. 11). Despite this, he unreasonably dismissed or discounted factors that a prudent, knowledgable and self-interested buyer would surely consider relevant and take into account in arriving at a price for the Property, such as: the potential

> presence of contaminants on the site given its historical use as a railway and Mr. Katz's own description of it as a "brown field"; the lack of vehicular access to the South Parcel from Academy Road; the lack of air rights over the Bridge; the possibility that the Bridge's close proximity to the high-traffic St. James Bridge would make it an undesirable residential location in the eyes of the buying public; the risk that necessary conditional uses and variances might not be obtainable for the development of 148 multi-family residential units on the Property; whether the Bridge could physically support the construction of the condominium complex and, if so, at what cost.

[81] In comparison, I find the appraisal report of the City's expert witness, Mr. Ferguson, to be fair, even-handed and reasonable, and I accept his evidence that the Property had a market value of $730,000 as at July 17, 2013, and as it was then zoned. (The report was filed as Exhibit 135.)

[82] Mr. Ferguson's stated objective, similar to Mr. Neufeld's, was to determine the market value of the Property as at July 17, 2013. His definition of "market value", similar to Mr. Neufeld's, includes the price that a hypothetical buyer would pay to a hypothetical seller where both parties act in their best interests, "knowledgeably, prudently, and without compulsion" (p. 2).

[83] Mr. Ferguson takes a clear-eyed view of the factors that one would reasonably expect a knowledgeable, prudent and self-interested buyer to take into account. Among other things, he makes these assumptions and observations in his report:

(a) the split zoning, with three different zoning districts covering different areas of the Property, would make development very difficult. However, over the years the City has demonstrated its willingness to allow for a zoning consolidation to allow for the commercial development of the Property, and it is therefore reasonable to assume that the challenge of split zoning would be overcome by City Council's enactment of such zoning consolidation;

(b) even with consolidation of the zoning, commercial development of the Property would be challenging in light of a number of factors, including:

(i) the site topography, which includes a raised rail bed and elevations significantly higher than surrounding lands;

(ii) the odd configuration of the Property, which follows the narrow, elongated shape of the former rail line;

(iii) the lack of access to the South Parcel from Academy Road;

(iv) complications and costs involved in servicing the North Parcel with water and sewer services;

(v) proximity to the high-traffic St. James Bridge and the potential adverse impact that could have on the marketability of residential units;

(vi) the need for adherence to the specific requirements for developments within the Airport Vicinity Protection Area; and

(vii) despite Mr. Katz's vision for the Bridge, a "typical or practical developer" may view it as a liability rather than as an asset, given

> the potential cost either to repair and rehabilitate it (based on Mr. Ho's estimate of $2.5 million in 2019), or to demolish it.

[84] Although the site would "not be considered a prime or preferred residential development site", Mr. Ferguson does identify it as "a rather unique opportunity for a creative infill development" (Exhibit 135, p. 26). He continues, "It is therefore reasonable to conclude that the highest and best use of the subject lands [i.e., the Property] would be for mixed-use infill development – multi-family residential and commercial, as allowed under the C2 designation" (p. 26).

[85] Mr. Ferguson then considers and describes an array of comparable sales in Winnipeg to support his market value conclusion of $730,000 as at July 17, 2013.

[86] Viceversa's arguments in opposition to Mr. Ferguson's opinion – for instance, that in considering comparable sales he was unaware of one particular sale of a much smaller commercial property on Academy Road (the "Moulé" site), that he expressed the view that a "typical or practical developer" would look on the Bridge as a liability without actually obtaining a developer`s view on it, or his concession that Mr. Katz's vision for the Bridge was a "fairly cool" idea – are weak, and they do not affect my view of his evidence.

[87] Accepting Mr. Ferguson's opinion as I do, it is reasonable to conclude that from December 2003, when Viceversa acquired the Property, to July 17, 2013, the value of its investment nearly tripled, from $250,000 to $730,000.

[88] In the circumstances, I find there is no evidence from which to conclude that Viceversa has lost anything as a result of the expiry of the Amended Zoning By-Law, other

than, perhaps, the fees charged for its initial development application and subsequent requests for extensions of that application – an amount quantified in hundreds, not thousands, of dollars, and so modest that Viceversa did not even claim it at trial.

[89] Viceversa still owns the Property. The City remains open to and supportive of a fresh rezoning application, no doubt in recognition of the fact that the current split zoning impedes any kind of development, which is not in the City's interests. The expert planner who testified on behalf of Viceversa, John Wintrup, and the City's expert planner, Tom Janzen, both testified that, subject to rezoning, the Property continues to be suitable for some form of commercial development with a multi-family residential component under the City's current zoning by-law, an opinion shared by Mr. Ferguson. (Mr. Wintrup goes on to say in his report, filed as Exhibit 133, that he finds the City`s decision not to grant Viceversa a further extension of the Rezoning Decision in February 2011 "perplexing". Given Viceversa's complete lack of progress on the file in the preceding years, I do not find it perplexing at all.)

[90] In these circumstances, I find Viceversa is in no worse position to develop the Property without the Amended Zoning By-Law than it would have been had it come into force. In other words, it has not lost the chance to develop the Property.

[91] In summary, Viceversa has not proved that it had a reasonable chance to realize any economic benefit from the Amended Zoning By-Law, and its expiry did not result in anything more than a loss of a few hundred dollars paid in fees. Furthermore, Viceversa has not proved that the enactment of the Amended Zoning By-Law would have had any real value.

[92] Accordingly, I would provisionally award Viceversa damages in the sum of $1,000, representing the approximate amount of fees paid by it to the City in connection with its development application and requests for extension.

(e) Viceversa has failed to act reasonably in mitigation of any damages it may have suffered

[93] Viceversa was under a duty to act reasonably in mitigation of any damages it may have suffered.

[94] Had I found Viceversa to have suffered a loss, I would also have found it to have failed in its duty to mitigate. As I have already noted, Mr. Wintrup and Mr. Janzen, both expert planners, testified that the property is suitable for rezoning and development as commercial property under the current zoning by-law. Mr. Ferguson testified that the Property is in a desirable location for commercial development. The Property is developable, although developing it will be a challenge for all of the reasons identified above.

[95] In the face of a duty to act reasonably, Viceversa has done nothing except to prosecute this litigation. It has taken no steps to make a fresh application for development of the Property, nor has it taken any steps to list the Property for sale. In these circumstances, doing nothing is unreasonable. I would therefore discount Viceversa's provisional loss of $1,000 by 50%.

Interest

[96] Viceversa submits it ought to be entitled to interest at a rate higher than the ordinary pre-judgment rate. It has proposed a rate of 2.5%, compounded annually. Had

I found it was entitled to damages, I would not have acceded to this argument. I see no basis for awarding interest at any rate other than the usual rate prescribed by ***The Court of Queen's Bench Act***, C.C.S.M. c. C280.

Conclusion

[97] Viceversa's claim is dismissed with costs in favour of the City. If the parties are unable to resolve the issue of costs by agreement they may make arrangements for further submissions to me to resolve that issue, either in writing or in person.

_____ J.