

City Found in Contempt of Court

On August 6, 2019, a Manitoba Queen's Bench judge found the City of Winnipeg in contempt of a Court Order in 6165347 Manitoba Inc. et al. v. The City of Winnipeg et al. 2019 MBQB 121.

The contempt order arose out of the developers' 2018 application for an order to compel (mandamus) the City to hear a secondary plan application (required as a condition of a land exchange approval), and a zoning application at a certain committee meeting in relation to a proposed redevelopment of land that was part of a 2009 land exchange with the City.

While an order for mandamus is an extraordinary remedy, the courts will grant such an order when:

1. there is a public duty to act;
2. the duty is owed to the applicant;
3. there is a clear right to performance of that duty: examples include where:
 - a. all conditions precedent have been fulfilled; or
 - b. there has been a demand for performance of the duty, a reasonable amount of time has passed to fulfill the duty, and a refusal to perform the duty has been expressed or implied (i.e. by unreasonable delay); and
4. no other adequate remedy is available;
5. the order will have practical benefit to the applicant; and
6. "on a balance of convenience" it is fair and equitable to grant the order.

It is clear that a court will not compel a public entity to exercise its discretion in a certain way, but it can compel the public entity to make a decision or have an application heard where there has been unreasonable delay.

In the City of Winnipeg case, the developers argued unreasonable delay, alleging that, by applying a statutory bylaw process, their application was being treated differently than other applications of similar nature, which were processed

pursuant to a less rigorous non-statutory policy process. The evidence was that the City had initially communicated to the developers that the application would be processed pursuant to a non-statutory policy decision, but then changed its requirements. The City presented evidence that it phased out the use of non-statutory policies for secondary plans, and argued that it was proceeding with the application in good faith and in accordance with one of the processes available to it. The court held that there was no statutory or other requirement for a secondary plan to be implemented by bylaw, and that the application could proceed by way of a non-statutory policy process. The Court further held that the requirements for an order of mandamus were met because:

1. the applicants had a clear legal right to have the applications heard;
2. the City had a corresponding duty to deal with the applications; and
3. the applicants demanded that the applications be heard, and the City refused.

It was noted that the City had discretion on whether to proceed by a bylaw or policy process, but that its discretion must be exercised fairly. The court found that delay had been caused by both parties, but that the City did not provide adequate explanations for its delays, and did not identify for the developers a timeline for the hearing and completion of the applications. Further, the court noted that, while in principle, the City's change in approach in the process to be used in relation to the secondary plan may be appropriate, given the time and resources that had been incurred by the parties, the fairness of a mid-process change was questionable. Consequently, the court ordered that the City's committee hear the applications at a certain meeting and take all steps necessary to have the required material in relation to the application available for consideration by the committee.

The parties appeared before the court again in relation to the developers' application for an order that the City was in contempt of court on a number of grounds, including

that the secondary plan application was considered pursuant to a statutory bylaw approach, rather than a policy approach.

Contempt is a discretionary remedy that is an enforcement power considered to be of last, rather than first resort. The test for contempt is:

1. the order breached must state clearly and unequivocally what should and should not be done;
2. the party must have actual knowledge of the order; and
3. the party must have intentionally done the act prohibited by the order or failed to do the act required by the order.

The court found that the City did not comply with the letter or spirit of its order to proceed pursuant to the policy approach, and held that the test for contempt was met. The court relied on several prior cases (involving the City of Toronto) as authority that a court may make a finding of contempt against government bodies. Consequently, the court set aside the decisions of the City in relation to the developers' applications and ordered that the contempt be purged by the City.

This case is a reminder to local governments and other public entities of the importance of transparency and consistency regarding the procedural requirements selected. It also highlights the importance of complying with both the letter and intent of court orders.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.



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Adrienne brings over 24 years of legal experience in litigation and dispute resolution representing local governments and other public

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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