

Date: 20250213
Docket: CI 23-01-40012
(Winnipeg Centre)
Indexed as: 10058216 Manitoba Ltd. v.
TFG Lakewood Rentals Ltd.
Cited as: 2025 MBKB 19

2025 MBKB 19 (CanLII)

COURT OF KING’S BENCH OF MANITOBA

B E T W E E N:

10058216 MANITOBA LTD.,)	<u>Kenneth J. Muys</u>
)	<u>Cory A.M. Tokar</u>
plaintiff,)	for the plaintiff
)	
- and -)	
)	
TFG LAKEWOOD RENTALS LTD.,)	<u>Robert P. Sokalski</u>
)	<u>Brett A. Steidl</u>
defendant.)	for the defendant
)	
)	JUDGMENT DELIVERED:
)	February 13, 2025

LANCHBERY J.

INTRODUCTION

[1] I approved competing summary judgment applications to be heard at the same time. Each party requests I grant their summary judgment application and dismiss the opposing party’s summary judgment application. The net result will be that if I determine the evidence is sufficient to grant summary judgment to one party, my decision will be dispositive of both actions. The other option

before me is whether, based on the materials filed, this action is appropriate for summary judgment.

The Parties

[2] The plaintiff, 10058216 Manitoba Ltd. (100), is controlled by Daniel Serhal (Daniel).

[3] The defendant, TFG Lakewood Rentals Ltd. (TFG), is a corporation controlled by Richard and Karen Fulham.

[4] TFG is the owner of two lots of adjacent lands and premises commonly known as 1204 Sturgeon Road, Winnipeg, Manitoba, R2Y 0L3, and legally described as:

Certificate of Title No. 2969759/1 Parcel "A" Plan 26316 WLTO in RL 11 Parish of St. James and Certificate of Title No. 2617031/1 Parcel "B" Plan 26316 WLTO in RL 11 Parish of St. James (collectively the "Lands").

ISSUES

[5] This action relates to the sale of the Lands by TFG to 100 based on a written purchase and sale agreement (Agreement) between them.

[6] The issues before the court on this motion are:

- (I) Should certain paragraphs in Daniel's affidavit affirmed on March 4, 2024 be expunged or, in the alternative, given no weight?
- (II) Did 100 breach the Agreement?
- (III) If yes, what relief is TFG entitled to?
- (IV) If no, what relief is 100 entitled to?

- (V) Can issues III and IV be determined by way of summary judgment?

Underlying Issue

[7] The underlying issue is whether 100 exercised all reasonable efforts and good faith in its actions following the signing of the Agreement up until 100 abandoned the contract.

Issue I

[8] During the pre-trial process, counsel for 100 and TFG advised no expert evidence would be called. I approved the competing summary judgment applications based on that decision.

[9] TFG objects to the removal of certain paragraphs as set out in its motion to expunge those paragraphs or, in the alternative, to provide no weight to them. Daniel, on behalf of 100, argues he is one of a limited number of individuals who possesses special skill and knowledge in the area of property development. TFG submits part of Daniel's affidavit amounts to expert opinion and should be expunged as he cannot offer his own expert opinion.

[10] I disagree on both submissions. I accept Daniel does possess an elevated level of skill and knowledge to garner an opinion. This fact does not assist the court in its determination as to whether the Agreement was breached. Further, Daniel's evidence as to his skill and knowledge does not address any of the underlying issues I must decide.

[11] The approach I will take in assessing Daniel's evidence will be a question of weight. As will be discussed later, his elevated level of skill and knowledge will be one factor I must consider but will not be the only factor I consider.

Issue II

[12] The following summary of the background to the Agreement is undisputed. TFG never formally listed the Lands for sale although there were several offers received that were considered, none of which were accepted.

[13] TFG made prior applications for a zoning variance, but these were abandoned.

[14] The City of Winnipeg (the City) has discussed residential development in the area known as the Centre Port commercial development, but at the date of this Offer to Purchase no formal zoning plan was in place for the Lands.

[15] 100 approached TFG to purchase the Lands on November 2, 2021. 100 then submitted a formal written Offer to Purchase the Lands from TFG.

[16] The Offer to Purchase was accepted by TFG on November 8, 2021 (Exhibit B to the Affidavit of Janice Finnon affirmed on September 19, 2023). On that date, Michelle Constant, TFG's real estate agent, e-mailed 100's real estate agent, Bob Antymniuk, concerning conditions to be included in the "Counter Offer", which is at the heart of the underlying issue. The e-mail reads:

We restructured the Conditionality as follows:

The first 5 months for Purchaser to undertake all "discretionary" due diligence: i.e., Environmental (*as it was a garage - my guess is the phase1 will require a phase 11 so we allotted ample time for that*),

geotechnical, servicing and infrastructure matters with the City. The Purchaser is required to obtain all of its own reports on the Lands and be comfortable with such before the Vendor will provide the additional 7 months for the actual rezoning and finalizing development agreements and servicing agreements with City of Winnipeg. Although the Vendor is not adverse for the actual rezoning application to go in 90 days from when we have a conditional deal (*as the Purchaser stated in the email you forwarded*). The Purchaser may have been under the impression the Purchaser would have the benefit of a Geotech and Environmental reports when stating that. We did not want to assume the Purchaser would engage and pay for engineers and traffic studies without KNOWING the lands are clean. Note: I'm told by the Vendor that they are comfortable that the Lands are free of hazardous substances and they have so stated in the signed Counter Offer to Purchase attached.

(Exhibit A to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[17] The Counter Offer was accepted by 100 on November 8, 2021. (Exhibit B to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[18] The purchase price for the Lands was \$3,595,500.00.

[19] The Offer to Purchase was amended by way of Amendment to Offer to Purchase made on November 29, 2021. (Exhibit C to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[20] The vendor and purchaser, as defined in the Offer to Purchase, waived the "Mutual Conditions" as set out in section 6 of the Offer to Purchase, resulting in an initial deposit of \$50,000.00, noted in section 1(a) of the Offer to Purchase (the Initial Deposit), being due on Friday, December 3, 2021.

[21] The conditions in dispute are found at section 7 of the accepted Offer to Purchase, which states:

7. Purchaser's Conditions: The obligation of the Purchaser to complete the purchase of the Land is conditional upon satisfaction of the following conditions precedent on or before time periods specified below:

(a) Within five (5) months from the date both the Vendor and Purchaser waive their Condition as set out in Section 6 above, the Purchaser shall be satisfied, in its sole discretion, with regard to its due diligence investigations, including without limitation:

- (i) title searches (including, without limitation, review and approval of all caveats and other encumbrances registered against title to the Land);
- (ii) site dimensions and/ or site survey for the Lands;
- (iii) possibility of rezoning the Lands to RMF-M or RMF-L including the City's feedback on the Purchaser's "Development Pre Application" with the City of Winnipeg;
- (iv) site inspections of the Lands, including without limitation to the building and other investigations such as geotechnical, environmental soil investigations (Phase 1 and or Phase 2), availability and capacity of services, and feasibility of the development of the Land; and
- (v) with the documentation provided in paragraph 5 above.

Should the Purchaser waive/satisfy its Condition as set out in section 7. (a) above and should the Purchaser deliver to the Vendor's solicitor the second deposit as set out in 1. (b) above, then the Purchaser shall automatically be given an additional seven (7) months for rezoning the Lands to RMF-M or RMF-L.

The Conditions contained in this paragraph 7 (a) are conditions Inserted herein exclusively for the benefit of the Purchaser as conditions precedent to the Purchaser's obligation to complete the purchase of the Land and any one or more of them may therefore be waived by the Purchaser at any time in its absolute discretion, and this Offer to Purchase amended to delete same *ipso facto* accordingly. If any of the said conditions shall not be fulfilled or waived within the time limits set forth above, then, unless the parties hereto agree in writing, the agreement resulting from the acceptance of this Offer shall be at an end and the Purchaser and Vendor shall each be released from all obligation to each other under or pursuant to this Offer and the resulting agreement and the deposit, together with all interest earned thereon (if any) shall be paid to the Purchaser forthwith, without deduction.

(b) Within seven (7) months from the waiver of the Purchaser's Condition in 7. (a) above and receipt of the second deposit, the Purchaser shall obtain approval(s) from the City of Winnipeg to rezone the Lands to RMF-M or RMF-L (*or such other Zoning as the Vendor and Purchaser may agree, acting reasonably*) including but not limiting the generality of the

foregoing: applying for and receiving approvals for conditional use/variance(s) approvals, subdivision/amalgamation approvals, site access/egress approvals, servicing agreement approvals, signage approvals, and development agreement approvals. Once the City of Winnipeg approves the rezoning of the Lands to RMF-M or RMF-L including that all municipal/provincial appeal periods having expired, this Purchaser's Conditions in 7. (b) shall automatically be waived/satisfied (the "Rezoning Condition"), and the third deposit as set out in section 1. (c) shall be immediately payable to the Vendor's solicitor.

If any of the said conditions in 7(b) shall not be fulfilled or waived within the time limits set forth above, then, unless the parties hereto agree in writing, the agreement resulting from the acceptance of this Offer shall be at an end and the Purchaser and Vendor shall each be released from all obligation to each other under or pursuant to this Offer and the resulting agreement and the deposit(s), together with all interest earned thereon (if any) shall be paid to the Purchaser forthwith, without deduction.

[22] TFG submits the following terms in the Agreement shall be considered:

7.02 Purchaser's Covenants. The Purchaser makes the following covenants to the Vendor:

- a) To pay the Purchase Price on the Closing Date and to pay the deposit (s) in the manner specified herein and to otherwise observe, perform and comply with the terms and conditions contained herein which are the responsibility of the Purchaser;
- b) That all reports the Purchaser obtains on the Lands including but not limiting the generality of the foregoing: all engineers reports, servicing reports, traffic studies/reports, geotechnical reports environmental reports, shall be also addressed to the Vendor and the Vendor shall be given a copy of such reports when such reports are completed;
- c) The Purchaser shall provide to the Vendor when applicable copies of all applications or agreements for: rezoning, conditional use variances, zoning variances, access/egress points for the development, development agreements, servicing agreements pursuant to the Rezoning Condition as set out on Section 7 (b) and at all times on or before the date the Purchaser formally applies for such;
- d) Prior to waiver/satisfaction of the Purchaser's Conditions as set out in Section 7 (a), the Purchaser shall notify the Vendor in writing which exact Rezoning designation the Purchaser will be

applying for to the City of Winnipeg for the Lands pursuant to Section 7 (b);

- e) Provide upon written request by the Vendor updates on the progress of the Purchaser's due diligence including communication in advance of all variance/zoning hearings etc. all as the Vendor may reasonably require;
- f) The Purchaser acknowledges that it is aware that the Lands are Zoned "A" and that there is/was a garage on the Lands;
- g) The Purchase acknowledges that as of the date of this Offer there is only one caveat on the Lands (caveat # 499583/1) which shall be discharged in kind with Section 4 (a) (ii) above; and
- h) To exercise good faith and commercially reasonable efforts to satisfy the Purchaser's Conditions contained herein.

.....

16. In the event this Offer to Purchase is accepted by the Vendor then, following such acceptance and waiver of the Mutual Condition as set out in Section 6., the initial deposit, together with the additional deposits, if any, paid by the Purchaser in accordance with the terms of this Offer to Purchase, shall be held by the Vendor's solicitor in trust, in an interest bearing account, to be paid over to the Vendor as part of the Purchase Price, with all interest accruing to the benefit of the Purchaser, when it has carried out its entire obligation under this contract, but to be returned to the Purchaser should the Vendor fail to do so.

If the Purchaser fails to carry out its obligation under this Offer following its acceptance, the Vendor shall be entitled to retain the deposits as the Vendors' own property by virtue of the Purchaser's default and such retainer of deposits shall not itself constitute a termination of this Offer and shall not restrict the Vendor from exercising any other remedies which the Vendor may have by virtue of the Purchaser's default, including the right to claim damages from the Purchaser which the Vendor sustains in excess of the deposits.

[23] In the Amendment to Offer to Purchase signed on November 29, 2021

between TFG and 100, the following is added:

- 12. At the end of Section 7.02 a) the following wording shall be added "It shall be a condition in favour of the Vendor that the Purchaser has complied, in all material respects, with all of its covenants and obligations to be performed by the Purchaser at or before the Date of Closing."

[24] From the plain and ordinary meaning, I find sections 7(a) and (b) of the Offer to Purchase are conditions precedent. There were two separate conditions. The first condition was for 100 to perform its due diligence. 100 paid the Initial Deposit in the amount of \$50,000 which was a required condition. If 100 waived the condition, 100 was required to forward the second deposit in the amount of \$50,000, which 100 did.

[25] Section 7(b) created a “new” purchaser’s condition with a seven-month time period where 100 was to complete the zoning variance from Agriculture to RMF-M or RMF-L. The plain and ordinary meaning of section 7(b) is unless 100 was able to rezone the Lands to RMF-M or RMF-L within this time period and all appeal periods were expired, the condition would be satisfied.

[26] 100’s position is it was impossible for it to complete the zoning variance application and development process within the time periods agreed.

[27] Even if City Council approved the subdivision application, the application would not be complete until any appeal period expired. The evidence is 100 was advised the first community meeting to review its application was set for November 16, 2022. If the Community Committee approved the application, the next step was to have the full City Council review the application. Further, if the full City Council approved the application, any persons disagreeing with City Council’s decision could exercise their right to appeal. 100’s position was a final decision would not be made until after the seven-month period expired. The language in the Agreement required 100 to seek an extension, and the

Agreement provided this could only be accomplished if the parties agreed to an amendment. I find 100 requested TFG to agree to an amendment and TFG refused. TFG was well within its right to refuse the proposal. As 100's zoning variance application could never be approved without TFG granting the requested extension, 100 abandoned its zoning variance application.

[28] The remaining question is whether other sections in the Agreement may be of assistance to TFG.

Issues III and IV: The Agreement

[29] 100 and TFG disagree with the interpretation of the phrase "good faith" and "all reasonable commercial efforts".

[30] TFG argues 100 failed to act in good faith and with all reasonable commercial efforts and refers to the following paragraphs in support of its position. 100's position is the opposite:

- (a) TFG submits 100 failed in exercising good faith and did not take all reasonable commercial efforts in completing the zoning variance application prior to December 2, 2022;
- (b) TFG submits the following steps demonstrate bad faith and lack of all reasonable efforts on behalf of 100:
 - (i) 100 waited until May 13, 2022 to submit its application for a zoning variance; and
 - (ii) 100 ignored comments received from the City planners in the pre-application process.

[31] On May 30, 2022, Carlie Banmann, an employee with the City Planning department, e-mailed Daniel stating that the application was received, but was deemed "INCOMPLETE" as no Traffic Impact Study (TIS) was provided with the application. She requested further information and documents be provided and that the application would not proceed until further information and documents were provided to her. (Exhibit S to the Affidavit of Janice Finnson affirmed on September 19, 2023)

[32] On June 1, 2022, Daniel instructed Stephen Chapman of MORR Consulting to prepare a TIS.

[33] TFG submits the pre-application informed 100 of the requirements for a TIS if 100 acted in good faith and with all reasonable efforts. 100 submits it would not have waited until May 30, 2022 to instruct a TIS be prepared.

[34] TFG submits the pre-application form contemplated one additional access point onto Sturgeon Road, but 100 requested three additional access points onto Sturgeon Road, which delayed the process.

[35] TFG submits the pre-approval process suggested RMF-M zoning may be approved, but TFG submitted 100's zoning process application referenced an RMF-M or RMF-L zoning variance, which further delayed the process.

[36] The previous two issues were within 100's absolute discretion. As to the RMF-L variance request, this was authorized in the Agreement.

[37] Daniel forwarded the TIS to Carlie Banmann on August 19, 2022, and in separate e-mail, the balance of the required information.

[38] Once the November 16, 2022 public meeting was confirmed, where 100's zoning variance would be considered, the following e-mail exchanges occurred between Carlie Banmann and Daniel on August 29, 2022:

Thank you for the information. In order complete my zoning review and to deem this application "complete" for circulation, more information is required.

Provide revised plans containing the following to demonstrate compliance with the Zoning By-law and submission requirements:

- Separate plan of subdivision

A proposed plan of subdivision is required as part of the DASZ application. This will be separate from the site plan and will outline property dimensions, lot area(s) proposed lot name(s) (Proposed Lot 1, for example), and proposed zoning district. A Plan of Subdivision generally does not show the proposed development, only the proposed lot(s)

- Identify location and height of proposed fences on site plan
- Dimension balcony projection on site plan
- Show proposed pedestrian connection and anticipated City sidewalk on Sturgeon (this can be preliminary in nature)

Please note that Planning has confirmed that it's position that it is not in support of an RMF-L zoning district as outlined in Pre-application report PA 20 110564 has not changed. An RMF-M zoning district is the preference.

Reports requested by external departments in the Pre-application report should be directed to those departments. If this documentation is not received, these Departments may deem your application "incomplete" during their review process. Please contact the departments to discuss should you have any questions.

(Exhibit CC to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[39] On September 2, 2022, Daniel replied to Carlie Banmann's e-mail providing the information required. (Exhibit DD to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[40] On September 2, 2022, Daniel e-mailed Bob Antymniuk:

We are being told by the City that the soonest meeting for which we'll be eligible is November 16. Since this is an election year, there is a significant period in which there are no Council meetings. So the November meeting (being the first one back after the election) will be quite full and there's a risk that we'll get bumped to a later meeting.

If this timeline is a problem for the Vendor, we need to know right away as we are incurring significant costs relating to this rezoning application.

If the Vendor amenable, we would be grateful for a 3 month extension to accommodate this matter.

(Exhibit EE to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[41] On September 6, 2022, Carlie Banmann e-mailed Daniel requesting he resend the revised drawings that were inadvertently not attached to his September 2, 2022 e-mail. (Exhibit GG to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[42] On September 6, 2022, Daniel replied to Carlie Banmann's e-mail attaching the requested revised drawings. (Exhibit GG to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[43] On September 6, 2022, 100 sought an extension of time from TFG for the condition as set out in section 7(b) of the Offer to Purchase, which was refused by TFG that same day. The Offer to Purchase does not stipulate that TFG's refusal had to be reasonable, but nonetheless, I find it was reasonable based on the facts outlined herein.

[44] On September 8, 2022, Carlie Banmann sent an e-mail to Daniel, which states:

I see that the plans have adjusted the proposed zoning district to RMF-M, however the proposed density is still 550 sq. ft lot area per dwelling unit (based on 384 units). RMF-M permits a density of 800 sq. ft. lot area per dwelling unit (264 units).

The Development Procedures By-law 104/2020 (31) does not allow for a density variance of this extent in the RMF-M zoning district. The maximum density variance that is allowed for RMF-M is 720 sq. ft lot area per dwelling unit (294 units).

The number of units will need to be revised and it is recommended you discuss with Planning if you will seek a density variance. Otherwise, you can proceed with RMF-L without the support of the Public Service.

Let me know how you would like to proceed.

(Exhibit HH to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[45] On September 8, 2022, Bob Antymniuk e-mailed Daniel:

.....

As prior discussed, you can still likely be listed on the November 16 agenda and with that you would have a copy of the planner's report to this application. If there are no objections to the application at the public hearing then you will know the rezoning is very likely to receive third reading at City Council.

...

Are you presently on the agenda for the November 16 meeting? Did you endeavor to be on an earlier meeting?

I need to have something for the Vendor to attempt to justify an extension. One avenue may be that you are on the November 16 meeting and if approved then the extension would be granted – taking into account, appeals and City final reading.

(Exhibit II to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[46] On September 8, 2022, Daniel e-mailed Bob Antymniuk, which states, "As I've already outlined, it is impossible for us to proceed on this basis." (Exhibit JJ to the Affidavit of Janice Finnsen affirmed on September 19, 2023)

[47] I accept the City's planning process involves multiple administrative parties. The first steps are undertaken by employees of the City Planning department. This process is controlled by the planning department who is responsible to advise the applicant as to the best steps to obtain approval for an application. It is not until an application is submitted to City Council, after Community Committee approval, where the elected or appointed public members review the application.

[48] I find there were two delay factors in the application process that impacted the timing of 100's application. The first delay was zoning variance applications are required to be forwarded to the Community Committee, but that committee does not meet during the summer months. This reduced the available time to 100 by two months. The second delay was a statutory requirement that in an election year, the City, or any of its committees, are not permitted to meet. Therefore, the City and the Community Committee were unable to take steps during the month of October 2022.

[49] Once the election writ was dropped, 100's application was at a standstill. The next delay was, until the election is certified, nothing occurs until the City holds its first meeting of City Council following an election. This meeting is mandated to occur no later than two weeks following the election.

[50] At a first meeting following an election, the City Mayor and City Council appoint the necessary committees. Until that is complete, the public committee

required to review a zoning variance application, such as 100's, is not authorized to meet.

[51] The evidence confirms 100's application was to appear before the Community Committee on November 16, 2022, which would be after the election timelines noted above.

[52] The impact of the election-period restrictions caused 100's application to be on pause for six weeks, or one and one-half months.

[53] The total delay in having the variance request considered by the Community Committee was therefore three and one-half months, or fifty percent of the seven-month period for the second condition to be met. I find this delay was beyond the control of 100 or TFG.

[54] The significance of this date was explained when Daniel requested a three-month extension to complete 100's application. In an e-mail exchange between Daniel and Bob Antymniuk on September 2, 2022, Daniel wrote:

We are being told by the City that the soonest meeting for which we'll be eligible is November 16. Since this is an election year, there is a significant period in which there are no Council meetings. So the November meeting (being the first one back after the election) will be quite full and there's a risk that we'll get bumped to a later meeting.

If this timeline is a problem for the Vendor, we need to know right away as we are incurring significant costs relating to this rezoning application.

If the Vendor amenable, we would be grateful for a 3 month extension to accommodate this matter.

(Exhibit EE to the Affidavit of Janice Finson affirmed on September 19, 2023)

[55] On September 6, 2022, Daniel sent an e-mail to Bob Antymniuk:

Even if we are at the Community Committee hearing on November 16, 2022 (and are approved), such approval is NOT an "*approval from the City of Winnipeg*". The City of Winnipeg approval comes at a meeting of Council...which will inevitably be after November 30th.

If the extension is not granted, unfortunately, we will need to withdraw our offer as it will be impossible to fulfil this condition.

Please ask the Vendor to reconsider.

(Exhibit FF to the Affidavit of Janice Finnon affirmed on September 19, 2023)

[56] The requirement of any zoning variance is confirmed by Karen Fulham's Answers to Interrogatories Nos. 58-62. (Cross-Examination of Karen Rosemary Fulham dated August 22, 2024)

[57] I find TFG's basis that 100 acted in bad faith and did not pursue all reasonable commercial efforts to complete the purchase of the Lands is premised on an incorrect assumption. TFG's evidence is rooted in its perception 100 was required to take significant steps to complete the zoning variance application within the five-month due diligence period, as outlined in section 7(a) of the Agreement.

[58] This is confirmed in TFG's Motion Brief (at para. 92(1-6)). TFG highlights actions 100 did not complete and thereby acted in bad faith and did not exercise all reasonable efforts.

[59] In the five-month period after November 29, 2021, all 100 was required to do was perform its due diligence. TFG's Motion Brief (at para. 92(6)) acknowledged that 100, "...in its sole discretion, satisfied itself through due

diligence investigations, of the possibility of zoning the Lands to RMF-M or RMF-L, including obtaining the City's feedback, which it did, and waived the condition set out in paragraph 7. (a) of the Offer to Purchase".

[60] TFG then argues 100 should have completed a number of steps prior to waiving the condition in section 7(a) of the Agreement, such as suggesting 100 should have followed requirements the City outlined in TFG's 2020 pre-application.

[61] The Agreement reached between 100 and TFG has no connection to the 2020 pre-application process. The evidence is clear 100 was pursuing a different vision for development than TFG pursued in 2020.

[62] The suggestion by TFG that 100 should have requisitioned a TIS prior to completing its due diligence is incredible. Section 7(a) of the Agreement does not contemplate any report would be prepared in the first five-month period. A due diligence period was to determine if the inspections of the property demonstrated 100 "could" proceed with its vision.

[63] TFG relied on 100's real estate agent, Bob Antymniuk, asking him, out of curiosity, what prevented 100 from applying for zoning (see TFG Motion Brief at para. 93(3)). TFG suggested if 100 had applied during the due diligence period, it would not have run into time deadlines it could not meet. This is also incredible as 100 was not required to apply for a zoning variance in the due diligence period as described in section 7(b) of the Agreement.

[64] I also find the comments of the real estate agent are irrelevant to the legal issues before this court.

[65] TFG relies upon statements from the City Planning department that it would not approve the zoning variance application if certain conditions were not amended (Exhibit O, Daniel's affidavit). TFG submitted 100 should have abandoned its request for RMF-M or RMF-L zoning prior to September 2022. The Agreement permitted 100 to apply for either an RMF-M or RMF-L variance. The Agreement provided an additional seven months to complete the process. 100's decision as to the content of its zoning variance was not impacted by its decisions. 100's zoning variance application was only impacted by the unexpected three and one-half months delay in having its application considered, not how it filed its application as noted herein.

[66] TFG suggests the zoning variance application fee was never paid by 100. This suggestion is contained in TFG's Reply Brief filed October 4, 2024. That suggestion is in response to the reference in paragraph 131(j) of 100's Motion Brief. There is no evidence to support the suggestion that 100 actually paid the fee of over \$20,000 to the City for the zoning variance application. When one reads the entirety of Daniel's affidavit, one can see repeated references to the submission of an application, but at paragraph 48(a), Daniel deposed that 100 did not want to move forward with the application (which would involve payment of the fee) unless they knew the application would receive the support of both

the planning department and the ward councillor. Where the evidence is clear is on the fact the application did not have the support of the planning department.

[67] There were strenuous positions taken by both counsel during argument. I requested counsel provide proof confirming whether the zoning application fee was ever paid. 100 filed a Post-Hearing Supplemental Motion Brief on November 4, 2024 confirming the payment of the variance fee in the total amount of \$19,528.96.

[68] TFG's argument the fee was not paid is contrary to a common-sense inference this court may make about the City's planning process. The City requires fees before it will move forward with an application. There is ample evidence the City completed its portion of the zoning variance application by early September 2022. The City Planning department did not make any claim 100 was deficient in payment of the application fee.

[69] I find there is ample evidence before me 100 paid the zoning variance application fee as required.

[70] TFG suggested changes to the planning legislation and the City *Charter* may have impacted how 100's application proceeded. The evidence is clear the Lieutenant Governor proclaimed the amendments on October 29, 2021. The Agreement was signed after proclamation. Therefore, the issue raised by TFG is not credible.

[71] Turning to the arguments advanced by TFG on the extension; 100 requested a three-month extension and was denied by TFG. TFG was never

under an obligation to grant an extension, and it was well within its right to deny the extension. TFG's decision to deny the extension during the three-month time period, set in motion the resulting inability for 100 to rezone the Lands.

[72] There were several arguments advanced by TFG as to the steps 100 should have taken. Bob Antymniuk suggested to 100 that if Daniel provided a reason for the extension, it may have been possible for TFG to grant the extension. TFG points to the e-mail exchange between his agent, Bob Antymniuk, and Daniel on September 8, 2022, in which his agent expressly stated, "I need to have something for the Vendor to attempt to justify an extension. One avenue may be that you are on the November 16 meeting and if approved then the extension would be granted...". 100 failed to accept the advice of its agent. (Exhibit II, Affidavit of Janice Finnon affirmed September 19, 2023)

[73] By TFG denying the extension request, the die was cast. 100 was under no further obligation to continue with the zoning application as the deadlines imposed in section 7(b) could not be completed. 100, at all times, acted in good faith and with all reasonable efforts based on the evidence before me.

[74] Until 100 waived both conditions in section 7(a), there was a conditional agreement. I accept 100 believed the TIS could be completed within two weeks, but this is irrelevant. 100 needed to order the TIS when it waived the conditions in section 7(a). Once 100 waived the conditions, it needed to act in good faith and with all reasonable commercial efforts. Daniel may have been mistaken, but

he took the efforts necessary to obtain the TIS once the seven-month period began to run.

[75] Between May 16, 2022 and September 2, 2022, 100's zoning variance application was placed on the Community Committee's agenda for consideration.

[76] As discussed earlier, the seven-month period allotted for under the Agreement was effectively reduced to three and one-half months. I find the reason behind why the zoning variance was not complete within the seven-month period was directly related to an inability of the City to approve the zoning variance during the election period.

[77] Once TFG refused to provide the extension, 100 acted in good faith and with all reasonable commercial efforts. 100 abandoned the application as the application could not be completed by December 2, 2022. I find, based on the facts before me, but for the election period where the City was legally prevented from proceeding with business as usual, 100's application would have been before the City for approval within the seven-month period and 100 cannot be faulted for its inability to complete the zoning application within that period. Therefore, I find 100's steps to complete the variance application were performed in good faith and with all reasonable commercial efforts.

Issue V: Summary Judgment

[78] Summary Judgment is governed by the directions of the Court of Appeal in *Dakota Ojibway Child and Family Services v. MB*, 2019 MBCA 91. Burnett, J.A. stated:

The test for summary judgment may be briefly summarised as follows.

At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

[79] If those requirements are met, the responding party must meet its evidential burden of establishing, “the record, the facts, or the law preclude a fair summary disposition” (*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para. 32; *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187, at para. 22; see also *Stankovic*, at para. 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (*Hryniak v Mauldin*, 2014 SCC 7, at para. 56). If the responding party fails to do so, summary judgment will be granted.

[80] This analysis is contemplated by Karakatsanis J. in *Hryniak*:

...is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).

There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[81] The question is whether, based on the facts before me without any further fact-finding requirements, has either party satisfied me there is no genuine issue requiring a trial? I find I am able to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence.

[82] The evidence supports 100's position the Agreement provided for a first condition of a five-month period for due diligence. I accept 100's position all it was required to do was determine if it wished to proceed with the application. The evidence confirms 100 made that decision within the time limit.

[83] The second condition was to complete the zoning variance application. 100 filed its application within two weeks of waiving the first condition, and by September, the process was completed such that the City Planning department placed 100's application on the November 16, 2022 Community Committee agenda for approval.

[84] The evidence before me confirms, but for the City election and the summer recess, the necessary approvals could have been obtained within the seven-month period. There is no evidence to the contrary advanced by TFG. All that TFG provided was, at best, speculation.

[85] The Agreement provides in section 7(b) that if the variance application is not approved prior to December 2, 2022, unless waived by the parties in writing, the Agreement is at an end and 100 is entitled to the return of its two deposits. Although there were two timeline conditions, both deposits were to be returned

if 100 did not complete the zoning variance prior to December 2, 2022. By the facts before me, I find, as the zoning variance was not completed, 100 is entitled to the return of its two deposits.

[86] TFG was aware of these facts when it signed the Agreement. 100 requested an extension and TFG, within its rights under the Agreement, refused, thereby ending the Agreement.

[87] TFG failed to convince me its application for summary judgment is sufficient to grant it judgment based on the evidence before me. On the contrary, 100 convinced me its application for summary judgment should be granted as the documentary evidence before me supports 100's position.

[88] TFG failed in its motion for summary judgment, but 100, on the same facts, convinced me the evidence supports a finding that a trial is not required.

[89] As 100's summary judgment application is approved, there is no need to address TFG's position on mitigation of damages.

CONCLUSION

[90] I find, as this is what is referred to as a documents case, a trial is not required. 100 is granted summary judgment and is entitled to the return of its two \$50,000 deposits (a total of \$100,000) in accordance with the terms of the Agreement. 100's success is dispositive of TFG's motion. 100 is entitled to pre and post judgment interest at the statutory rate.

[91] In the event costs are not agreed to, the parties shall submit their written argument, including a Bill of Costs, for my consideration.

_____ J.