THE MUNICIPAL BOARD OF MANITOBA

DECISION AND ORDER

DECISION DATE: November 9, 2021 Interim Order No. D-21-001
File No. 20D2-0001

MATTER: Airport Vicinity Protection Area ("AVPA") Referral
Amendment to Secondary Plan By-law No. 6378/94
The City of Winnipeg Charter, S.M. 1996, c.58, Section 270(1)

MUNICIPALITY: City of Winnipeg

BY-LAW NO: 48/2019

HEARING DATE: August 16, 2021

PANEL: Steven Lupky, Acting Chair
George Orle, Q.C., Member
Barry Todd, Member

PARTIES AND APPEARANCES:

for the Applicant
Kalyn Bomback, Legal Counsel, City of Winnipeg

for Winnipeg Airports Authority Inc.
Jim McLandress, Legal Counsel, Winnipeg Airports Authority Inc.
Greg Tramley, Legal Counsel, McCandless Tramley

for Cadillac Fairview Corporation Limited
Mark Newman, Legal Counsel, Filmore Riley LLP

for Shindico Realty Inc.
Justin Zarnowski, Legal Counsel

INTRODUCTION

This is a Referral by the City of Winnipeg (the "City") to The Municipal Board (the "Board") regarding the proposed City of Winnipeg By-law No. 48/2019 (the "Proposed By-law") amending Airport Vicinity Protection Area (the "AVPA") Secondary Plan By-law No. 6378/94 (the "Secondary Plan") pursuant to s.270(1) of *The City of Winnipeg Charter* (the "Charter").

BACKGROUND

As directed under Section 224 of the Charter, the City has a development plan, identified as 'Plan Winnipeg' which includes the establishment of the AVPA. In April, 2019 an application was made to the City of Winnipeg's Urban Planning and Design Division to amend the AVPA (the "Application"). The Application proposed to re-designate four parcels of land (the "Lands") in the Polo Park area of Winnipeg from Policy Area I to Policy Area II under the AVPA, to allow for multi-family, mixed use development. All lands contained under Policy Area I of the AVPA are prohibited from new multi-family residential development.

City Council gave first reading to the Proposed By-law on November 21, 2019, which proposed to amend the Secondary Plan.

On May 5, 2020, before second reading of the Proposed By-law, the Winnipeg Airports Authority Inc. (the "WAA"), as authorized representative of the Government of Canada, filed an objection to the amendments pursuant to s. 270 (1)(b) of the Charter.

On May 29, 2020, City Council laid over consideration of the Application and the Proposed By-law indefinitely. Subsequently, via letter dated June 23, 2020, the City referred the Proposed By-law to the Board pursuant to s. 270(1)(b) of the Charter.

On August 12, 2021, prior to the commencement of the Board hearing on the Proposed By-law, the Province of Manitoba (the "Province") passed Regulation 66/2021, the Airport Vicinity Protection Area Regulation (the "Regulation").

LEGISLATION

This Referral is made under Section 270(1) of the Charter, which provides:

> **Referral to Municipal Board**
> **270(1)** Where
>
> (a) a proposed secondary plan by-law deals with the airport vicinity protection area; and

> (b) a municipality, or the board of a planning district established under *The Planning Act,* that is adjacent to the area, or the Government of Canada or the Government of Manitoba objects to the proposed by-law by filing a notice of objection with the city clerk before the day of the meeting at which council is to consider the report of a committee of council or planning commission respecting the proposed by-law;
>
> the city must, before council gives second reading to the proposed by-law, refer the proposed by-law to The Municipal Board.

PRELIMINARY ISSUE

Legal counsel for the City, Cadillac Fairview Corporation Limited ("Cadillac Fairview") and Shindico Realty Inc. ("Shindico") put forward briefs in support of the position the Regulation renders the issues before the Board moot and, therefore, the matter be concluded without proceeding to a hearing.

PRESENTATIONS AND SUBMISSIONS

City of Winnipeg

Kalyn Bomback, Legal Counsel for the City, reviewed the chronology of the Application and put forward the City's position on the issue of mootness.

The AVPA is based on what can be called old science, as this was passed in 1994. There have been significant developments over the past quarter century in terms of technology. Following the Referral to the Board, on June 21, 2021, the Province posted for public consultation the Regulation under the Charter. The Regulation relied on findings in the Noise Exposure Forecast Study prepared for the Province in January 2021, which reviewed the science and whether the boundaries needed to be amended. The Regulation was open for public comment for 45 days, and, as of August 12, 2021, came into immediate effect.

Under the Regulation, the AVPA boundaries changed significantly and the Lands are no longer in Area I. The only part of the AVPA that now affects the Lands is Area II, which is the designation sought by the applicants in the first place.

The Regulation contains several sections that mandates the City to do certain things to reflect what the Province has passed. In particular, Sections 8, 9 and 10 of the Regulation are most relevant to the matter before the Board.

> **Plan Winnipeg by-law must be consistent with policies**
> **8** The Plan Winnipeg by-law must be consistent with the policies set out in sections 5 to 7.
>
> **Zoning by-laws**
> **9** Within six months after the coming into force of this regulation, council must enact a zoning by-law that ensures that the use of real property and development in the AVPA is consistent with the policies set out in sections 5 to 7.
>
> **Application**
> **10(1)** This section applies during the period that begins when this regulation comes into force and ends when council has amended Plan Winnipeg in accordance with section 3 and enacts a zoning by-law that complies with section 9.
>
> **10(2)** A decision on an application for subdivision or development on land within the AVPA must be made as if Plan Winnipeg had been amended and a zoning by-law had been enacted in accordance with this regulation.

In the City's view, the basis for the challenge by the WAA under s. 270 (1)(b) of the Charter, which was the foundation for the Referral to the Board, has been extinguished and the matters have become moot.

In accordance with the doctrine of mootness, the matters before the Board are no longer real or tangible and have become hypothetical. There is no longer a foundation for any controversy between the parties, and the recommendation sought would serve no practical purpose as the basis for seeking the recommendation no longer exists.

In reviewing case law, the comments on the doctrine of mootness are derived from the Supreme Court of Canada case of *Borowski v. Canada (Attorney General), 1989 CarswellSask 241,* ("Borowski"), which is viewed as a leading decision on the issue. Among other things, the Court held that where a challenged municipal by-law was repealed, the appealing party was rendered to have no interest in the outcome of the proceeding and the decision would have no effect on the parties and the matter would be moot.

Borowski has been cited in numerous subsequent decisions including a Saskatchewan Court of Appeal Decision in *Prince Albert Right to Life Association v. Prince Albert (City), 2020 CarswellSask 390* which sets out a number of items to consider when a live controversy has ceased to exist. These include:

a) when the tangible and concrete dispute has disappeared;

b) when the decision will or may no longer actually affect the rights of the parties;

c) where the practical relief sought is no longer available because of alterations in the factual or legal matrix of the case;

d) where the question before the court has ceased to exist or the substratum of the litigation has disappeared;

e) where a decision on the merits would have no practical effect on the parties' rights; and

f) where the question the hearing body is now being asked to resolve has been overtaken by post-decision events or a subsequent decision of a decision-maker.

Further, the Newfoundland and Labrador Court of Appeal decision in *Powers v. Mitchell, 2019 CarswellNfld 128* also cited Borowski and confirmed the repealing of legislation before a hearing is an example of a moot issue as there was no longer a live controversy.

In Manitoba, the Borowski decision has also been adopted as the leading decision on mootness as evidenced by the decision of the Manitoba

Labour Board in *CancerCare Manitoba and MAHCP, Re, 2013 CarswellMan 636.*

The City puts forward that:

a) the tangible and concrete dispute has disappeared;

b) any decision that could issue from the Board will or may no longer actually affect the rights of the parties;

c) the practical relief sought is no longer available because of alterations in the factual or legal matrix of the case, and specifically, the Regulation has nullified the very need for a proposed by-law amendment in the first place;

d) the question before the Board has ceased to exist and the basis for the dispute has disappeared;

e) a decision on the merits would have no practical effect on the parties' rights; and

f) the question the Board is now being asked to consider has been overtaken by the issuance of the Regulation.

The City puts forward that the matter before the Board is now moot and requests the Board conclude the proceedings without a hearing.

Winnipeg Airports Authority

Jim McLandress, Legal Counsel for the WAA, brought forward the position of the WAA. While the views on the underlying issue have not changed, the legal matrix has been fundamentally altered. The WAA position remains that the development should not proceed in the absence of a proper review of the Secondary Plan. What has happened is the opportunity for a review has disappeared with the Regulation. The WAA was looking for a recommendation from the Board that there be a proper review and the science be taken into account. The Regulation has removed any ability of the Board to make any ruling. At the very least this matter has become moot and there is nothing for the Board to deal with.

Cadillac Fairview Corporation Limited

Mark Newman, Legal Counsel for Cadillac Fairview, presented in support of the views of both The City and the WAA on the matter of mootness. A legal brief has been submitted to the Board on this matter on behalf of Cadillac Fairview and Shindico. It has been confirmed the Lands now fall within Area II, and therefore there is nothing left for the Board to determine and the proceedings should be brought to an end.

Shindico Realty Inc.

Justin Zarnowski, Legal Counsel for Shindico, confirmed support for the position brought forward by the other parties.

ANALYSIS AND RECOMMENDATION

The Board has carefully considered all of the evidence and arguments presented by the parties and concurs that the issue before the Board has become moot in light of the Regulation. In reaching this decision the Board considered the impact of the Regulation, as well as the various case law precedents cited by the parties.

The matter brought before the Board is pursuant to s. 270(1)(b) of the Charter, and is based on an objection by the WAA to the Proposed By-law which would amend the AVPA to re-designate the Lands from Area I to Area II. Prior to the Board hearing, on August 12, 2021 the Province enacted Regulation 66/2021. The Regulation alters the boundaries of Areas I and II, with the result being the Lands are now contained in Area II.

Sections 8, 9 and 10 of the Regulation are extremely relevant to the issue of mootness and these are prescriptive in nature. Specifically, the Regulation mandates the City to amend their development plan by-law, identified as Plan Winnipeg, to be consistent with the Regulation; the City must enact a zoning by-law that ensures that the AVPA is consistent with the Regulation within six months after coming into force; and in the interim, all decisions on applications for subdivision or development on

land within the AVPA must be made as if Plan Winnipeg had been amended and a zoning by-law had been enacted in accordance with the Regulation.

Borowski appears as the leading decision on the doctrine of mootness and is cited in numerous subsequent court and tribunal decisions. In reviewing the court precedents cited, the Board identified the following excerpts as relevant to the issue of mootness in this matter (underline emphasis added).

In *Borowski v. Canada, 1989, CarswellSask 241,* paragraph 15 reads:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or the proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the Court exercises its discretion to depart from its policy or practice.

Further, in *Prince Albert Right to Life Association v. Prince Albert (City), 2020 SKCA 96, 2020 CarswellSask 390*, paragraph 54 reads:

> Without attempting to define the term exhaustively, based on the foregoing, I conclude that a live controversy may cease to exist in the following circumstances: when the tangible and concrete dispute has disappeared; when the decision will or

> may no longer actually affect the rights of the parties; where the practical relief sought is no longer available because of alterations in the factual or legal matrix of the case; where the question before the court has ceased to exist or the substratum of the litigation has disappeared; where a decision on the merits would have no practical effect on the parties' rights; and where the question the court is now being asked to resolve has been overtaken by post-decision events or a subsequent decision of a decision-maker.

On the basis of the Regulation effectively moving the Lands from Area I to Area II as of August 12, 2021, the issue before the Board no longer exists and the matter is deemed moot. The Board therefore concludes the matter without proceeding to a hearing.

THEREFORE, THE BOARD ORDERS:

1. That the City of Winnipeg Referral to The Municipal Board under Section 270(1) of *The City of Winnipeg Charter* is concluded without proceeding to a hearing on the basis of mootness.

FOR THE MUNICIPAL BOARD

Nov 9, 2021
Date

Steven Lupky, Acting Chair

S Jensen
Shelley Jensen, Secretary