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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**COUNSEL:**
MANFRED ANDREAS PFLUG and ILSE HANSCH PFLUG, Applicants, - and - THE CITY OF WINNIPEG, Respondent.	For the Applicants: Robert L. Tapper, Q.C. For the Respondent: Denise A.M. Pambrun Judgment delivered: May 10, 2017

Application Under: ***The City of Winnipeg Charter***, S.M. 2002, c. 39

KROFT J.

I. INTRODUCTION

[1] The applicants wish to have an unenclosed in-ground swimming pool (Pool) constructed on a portion of their riverside property designated as a floodway area. The respondent declined to issue a permit for the construction of the Pool, relying on provisions in ***The City of Winnipeg Charter***, S.M. 2002, c. 39 (***Charter***), prohibiting the construction of works, other than public service works, within a designated floodway area.

[2] The applicants dispute the respondent's interpretation of the ***Charter*** and seek a declaration that, when properly interpreted, the ***Charter*** permits the construction of their Pool. They ask this court to order the respondent to issue the necessary permit.

[3] For the reasons that follow, I am dismissing the application.

II. FACTS

[4] The applicants own 293 Christie Road, Winnipeg, Manitoba (Property), a river lot on the banks of the Red River.

[5] One portion of the Property lies within what is known as a designated floodway area (Floodway), and the other portion lies within what is known as a designated floodway fringe area (Fringe). These areas were designated in 1980, pursuant to the Canada-Manitoba Flood Damage Reduction Agreements. The Floodway protects the City of Winnipeg by providing capacity for water flow during flooding events.

[6] In 2004, the applicants built a home on the Fringe. In 2012, the applicants began contemplating the Pool, and in 2015, they hired a pool contractor. The Pool would be dug in the Floodway.

[7] On February 5, 2016, the contractor applied to the respondent's Planning, Property and Development Department (PPD) for a permit to construct the Pool. By letter dated March 14, 2016, the PPD denied the permit on the basis that section 158(2) of the ***Charter*** prohibits the

construction of works, other than public service works, within the Floodway. According to the PPD, the term "works" includes the Pool.

[8] The applicants appealed the PPD's decision to the Standing Policy Committee on Property and Development, Heritage and Downtown Development (SPC). The appeal took place on May 10, 2016. The SPC upheld the PPD's decision to not issue a permit for the construction of the Pool. It is the Province of Manitoba who has the authority to move the Floodway line. The transcript of the SPC hearing reflects that the Province supported the PPD's decision, having itself previously interacted with the applicants relative to the Pool.

[9] Although section 189(7) of the ***Charter*** provides that the SPC's decision is final, the present application seeks judicial review of the SPC's administrative decision and, more particularly:

- a declaration that the Pool may be constructed on the Property;
- an order of *mandamus* requiring the respondent to issue a permit for the construction of the Pool on the Property;
- in the alternative, an order of *mandamus* requiring the respondent to issue an order pursuant to section 158(7) of the ***Charter*** and section 10(2) of the ***Designated Floodway Fringe Area Regulation***, Man. Reg. 266/91 (***Regulation***),

to vary the floodproofing criteria for the construction of the Pool on the Property.

III. ANALYSIS

A. Standard of Review: Correctness or Reasonableness?

[10] The applicants submitted that the applicable standard of review is correctness whereas the respondent submitted that it is reasonableness. In my opinion, the applicable standard in this case is reasonableness though my disposition of the application would not change were I to apply a correctness standard.

[11] This case involves the interpretation of section 158(2) of the ***Charter***, the respondent's home statute.

[12] A reasonableness standard is presumed when an administrative body is interpreting its own statute or statutes closely connected to its function. The deference implicit in the reasonableness standard respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. It also fosters access to justice to the extent the legislature chose to delegate matters to a knowledgeable tribunal positioned to provide parties with a quicker and less costly form of decision making: ***Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.***, 2016 SCC 47 at paras. 22-23.

[13] The applicants argued that because this matter involves a question of law, the correctness standard must apply. The case law does not support that position. As noted in ***Edmonton (City)*** at paras. 23-24, and ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at paras. 55-62, [2008] 1 S.C.R. 190, reasonableness does not give way to correctness until the legal question is of central importance to the legal system and beyond the expertise of the administrative decision maker, involves the division of powers under the constitution, relates to the jurisdiction of the administrative body, or relates to jurisdictional lines between two or more competing tribunals. The legal question in this case is not of this nature.

[14] The applicants also asked me to distinguish ***Dunsmuir*** on the basis that that case arose in a labour and employment context. I do not make that distinction in this case. The framework enunciated in ***Dunsmuir*** relating to the standards of judicial review was intended to be applied, and has been applied, in many other administrative law contexts, including those pertaining to municipalities. See e.g. ***Edmonton (City)***; ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5. The ***Dunsmuir*** framework applies here resulting in my finding that the appropriate standard of review is reasonableness.

B. Was the decision to not issue a permit for the construction of the Pool reasonable?

[15] As noted, it is my opinion that the decision to not issue a permit was both reasonable and correct.

[16] The applicants concede that the Pool would be dug in the Floodway.

[17] Section 158 of the ***Charter*** governs construction in the Floodway and the Fringe. It provides:

> **Regulations by Lieutenant Governor in Council**
> 158(1) The Lieutenant Governor in Council may make regulations
>
> (a) designating areas of the city as designated floodway areas or designated floodway fringe areas;
> (b) establishing floodproofing criteria for buildings constructed in designated floodway areas and designated floodway fringe areas;
> (c) designating buildings or classes of buildings that are exempt from complying with floodproofing criteria; and
> (d) respecting the circumstances in which an order under subsection (6) to vary floodproofing criteria may be made and the extent to which those criteria may be varied.
>
> **Restricted construction in floodway areas**
> 158(2) Subject to subsection (3), no person shall construct, and the city shall not issue a permit for construction of, *works* within a designated floodway area unless the works are public service works. [Emphasis added.]
>
> **Exception for construction in floodway area**
> 158(3) If, immediately before a regulation designating a designated floodway area came into force, a person was entitled to a permit for the construction of a building on land within the area,
>
> (a) the city may issue a permit to the person for construction of a building on the land;
> (b) the person may construct the building in conformity with the permit; and

(c) all construction done under the permit is subject to all restrictions applicable in a designated floodway fringe area.

Restricted construction in floodway fringe areas
158(4) Subject to subsection (6), no person shall construct, and the city shall not issue a permit for construction or occupancy of, a building within a designated floodway fringe area unless the building complies with floodproofing criteria.

Permit for superstructure
158(5) The city shall not issue a permit for construction of the superstructure of a building in a designated floodway area or a designated floodway fringe area until

(a) the foundation of the building is completed; and
(b) a surveyor's certificate, or similar document approved by a designated employee, is filed with the city showing that the elevation of the foundation complies with floodproofing criteria.

Variation of floodproofing criteria
158(6) Subject to the regulations, an owner of land within a designated floodway fringe area may apply to a designated employee for an order varying the floodproofing criteria in respect of proposed construction of a building on the land.

Order varying floodproofing criteria
158(7) Subject to the regulations, on receiving an application under subsection (6), a designated employee, if reasonably satisfied that it is impossible or impractical to comply with the floodproofing criteria, may make an order varying the floodproofing criteria in respect of

(a) a new building to be constructed on one of a small number of remaining building sites or the only remaining building site, or on a newly subdivided building site, in an area that is almost fully developed with buildings;
(b) proposed construction in respect of an existing building; or
(c) the replacement of a building that has been destroyed by fire or other peril.

Conditions respecting flood protection
158(8) An order under subsection (7) may be made subject to terms and conditions that are prescribed in the regulations and that the designated employee considers necessary or desirable, including a prohibition of any payment by the city for flood protection assistance or flood damage assistance.

> **Province to receive order**
> 158(9) The city must file with the minister, or a person designated by the minister, a copy of every order made under subsection (7).

[18] Section 158(2) is quite clear that, subject to the grandfathering provisions of section 158(3), no permit is to issue with respect to the construction of non-public service "works" within the Floodway. No argument was made that the proposed Pool falls into the public service or grandfathering exceptions. The question to resolve is whether the construction of the Pool falls within the definition of "works" and is therefore prohibited.

[19] The term "works" is defined in the ***Charter***:

> **"works"** *includes* buildings, walls, bridges, trestlework, dams, waterworks, water control works, canals, locks, tunnels, subways, railways, tramways, wharfs, piers, ferries, viaducts, aqueducts, conduits, watercourses, embankments of watercourses, vaults, mines, wells, streets, pavements, pedestrian decks or tunnels, street railways, harbours, docks, booms, *excavations*, fabrics and the towers, poles, lines, and equipment of transportation or transit systems or the construction of any of them; [Emphasis added.]

[20] The respondent submitted that the Pool is an "excavation" and therefore falls within one of the structures specifically enumerated in the definition of "works". The respondent also submitted that the list of prohibited building activities is not exhaustive, evidenced, in part, by the legislators' use of the word "includes".

[21] The applicants submitted that the ***Charter*** does not prohibit building the Pool in the Floodway. They argued that the term "excavations" does not include in-ground swimming pools. Had legislators intended to prohibit pools, a specific reference would appear in the definition of "works" as was done with wells, streets and pavements which might also be considered excavations. In further support of that position, the applicants pointed to the ***Regulation*** and the exemption of unenclosed swimming pools from the class of "structure" (a defined term) requiring a permit. Conflating the Floodway and the Fringe into a single "regulation area", the applicants submitted in their brief that since an unenclosed swimming pool is not a structure, a permit should issue and the Pool can be built without meeting floodproofing requirements.

[22] I will first deal with the interpretation of the ***Charter*** and then turn to the ***Regulation***.

1. Interpretation of the *Charter*

[23] Words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament. This approach to interpretation applies equally to regulations although the statute enabling the regulations must form part of the context: ***Zacharias v. Zurich Insurance Co.***, 2012 ONSC 4209 at paras. 26, 34,

111 O.R. (3d) 611; ***Bell ExpressVu Inc. v. Winnipeg (City)***, 2010 MBQB 26 at para. 26, 250 Man. R. (2d) 57. Any residual presumptions, which the law might otherwise recognize, come into play only when the ordinary principles do not resolve the issue: ***Bell ExpressVu Inc.*** at para. 26; ***Zacharias*** at para. 29; ***MacDonald v. Halifax (Regional Municipality)*** (1997), 162 N.S.R. (2d) 214 at para. 14, 1997 CanLII 1100 (N.S.S.C.). The applicants submitted that one such presumption is that statutes purporting to fetter ownership rights in land should be construed strictly, and if there is ambiguity, in favour of the owner: ***Tollak Place (Canada) Ltd. v. Selkirk and District Planning Area Board***, 2005 MBQB 229 at para. 15, 196 Man. R. (2d) 270; ***MacDonald*** at para. 13.

a. Intention / Object of the *Charter*

[24] Neither party filed what could be called a legislative history or authorities speaking directly to the legislative intent behind the relevant provisions of the ***Charter***. However, I note the following:

- Section 5 of the ***Charter*** includes among the purposes of the respondent city, the promotion and maintenance of the health, safety, and welfare of its inhabitants.

- Section 6 of the ***Charter*** indicates that the powers given thereby are stated generally so as to give broad authority to council to govern in whatever way council considers appropriate. That section also provides that if the ***Charter***

confers a specific power which comes within a more general power, the ***Charter*** is not to be construed such that the specific power limits the more general power.

- Part 5, division 1 of the ***Charter*** sets out the respondent's spheres of jurisdiction over all aspects of its operations. Construction in the Floodway and the Fringe is one such sphere. Others include, but are not limited to, health and safety, streets, buildings, water and waste, and emergency services.

- Exhibit "E" referred to in the affidavit of Martin Grady affirmed August 24, 2016, is the transcript of the SPC hearing, dismissing the applicants' appeal. At page 11, lines 7 to 10, and at pages 19 to 20 of Exhibit "E", Andree Kirouac, Branch Head of the Land Drainage and Flood Protection Branch of the Engineering Division of the Water and Waste Department of the respondent, explains that the Floodway represents the hydraulic capacity calculated to accommodate floodwaters, which capacity must be protected and not easily dismissed. In her affidavit sworn January 16, 2017, Ms. Kirouac further explains that the Floodway is determined through a hydraulic modeling exercise with the

> main factors being river hydraulics, river cross-sections and ground elevations of the river properties.

[25] In my opinion, the ***Charter*** reflects not only a general legislative objective of granting broad authority to the respondent city to make decisions and regulate within the designated spheres of jurisdiction, but also, in the case of the Floodway, a specific objective of ensuring full use of the Floodway with minimal risk to property and people. In their written submissions at paragraph 21, the applicants conceded that the ***Charter*** was created to protect community interests and that floodway planning and protection is an important purpose and benefit.

b. Meaning of the Words in Context

[26] It is within this context that I must consider the ordinary and grammatical meaning of the words in section 158(2) of the ***Charter***. There is no disagreement that the section prohibits the construction of "works". The central question is whether "works" includes the Pool.

[27] "Works" is a defined term. The definition has already been reproduced in paragraph 19 of these reasons. While the definition refers to "excavations", it does not specifically refer to in-ground swimming pools. The term "excavation" is not defined in the ***Charter***. In its ordinary and grammatical meaning, is a pool an excavation?

[28] A dictionary definition of "excavation" is relevant. ***Webster's New World College Dictionary***, 3rd ed., defines "excavation" as:

> "1 an excavating or being excavated
> 2 a hole or hollow made by excavating
> 3 something unearthed by excavating"

[29] ***Webster's*** defines "excavate" as:

> "1 to make a hole or cavity in, as by digging; hollow out
> 2 to form by hollowing out; dig
> 3 to uncover or expose by digging; unearth
> 4 to dig out"

[30] An in-ground swimming pool is in essence a hole or hollow made by digging. It is an excavation according to the dictionary. However, this does not end the inquiry. The inclusion of a pool in the definition of "excavation", and hence "works", must also make sense in the context of the ***Charter***. The applicants submitted that it does not.

[31] In support of that position, the applicants argued that had the drafters intended to prohibit pools, the definition of "works" would refer specifically to them just as it does "wells" and "streets", which, according to the applicants, also could be categorized as excavations. In further support of that position, the applicants pointed out that a specific exemption of unenclosed swimming pools does occur in the ***Regulation*** discussed below.

[32] I do not agree with the applicants' position. It was reasonable for the SPC to conclude that under the ***Charter***, the Pool is an excavation. As previously noted, the Pool is a hole made by digging and, as such, is an excavation according to the dictionary definition. I find as well that an in-ground swimming pool is an excavation in the natural and ordinary sense of the word. Recognizing pools as "excavations", and hence "works", also is consistent with the objectives of the ***Charter*** referenced in paragraphs 24 and 25 of these reasons. When the meaning of "excavation" advanced by the respondent is considered in the context of the broad authority granted by the ***Charter*** and the importance of flood protection to the citizenry as a whole, the fact that pools are not specifically referenced does not alter my view. I am mindful that it is not for the courts to fix deficient legislation: ***Bell ExpressVu Inc.*** at para. 64. I do not consider this to be a case of legislative deficiency.

[33] The respondent argued that the definition of "works" is an inclusive one (i.e., "'works' includes …"). As such, the word includes not only those structures enumerated in the definition clause but also those that the word "works" would ordinarily and naturally encompass: ***Rex v. B.C. Fir & Cedar Lbr. Co., Ltd.***, [1932] 2 W.W.R. 153 at 159, [1932] 2 D.L.R. 241 (P.C.). While I am inclined to agree that after applying the aforementioned principles of interpretation (including consideration of the enumerated items), the word "works" ordinarily and naturally encompasses the digging of an in-ground swimming pool, it is

unnecessary to decide the point given my conclusion that it was reasonable for the SPC to find that the Pool constitutes an "excavation", and hence "works", under the ***Charter***.

[34] Given that conclusion, is there a remaining role in this analysis for a presumption against fettering property rights referenced in paragraph 23 of these reasons? As no residual ambiguity remains after applying the ordinary rules of interpretation, it is my opinion that the presumption does not come into play in this case: ***Bell ExpressVu Inc.*** at para. 26; ***Zacharias*** at para. 29; ***MacDonald*** at para. 14.

2. The *Regulation*

[35] In respect of the ***Regulation***, the respondent submitted that subject to one exception (and consistent with the ***Regulation***'s title), it applies to the Fringe, not the Floodway. Section 2 of the ***Regulation*** provides:

> **Application**
> 2 This regulation applies in The City of Winnipeg to the *designated floodway fringe area and to parcels of land in the designated floodway area that meet the criteria set out in section 494.3(3) of the Act*. [Emphasis added.]

[36] The applicants submitted that there is an inconsistency between the ***Regulation***'s reference to section 494.3(3) and the ***Charter***, as the ***Charter*** contains no section 494.3(3), rendering it impossible to know the criteria for ascertaining whether the Property falls within the ***Regulation***. This particular submission was based on the applicants'

assertion that the word "Act" in the ***Regulation*** means the ***Charter***. In fact, the ***Regulation*** defines the word "Act" to mean ***The City of Winnipeg Act***, S.M. 1989-90, c. 10, as amended by ***The City of Winnipeg Amendment Act***, S.M. 1991-92, c. 15, s. 17 (***Old Act***), the precursor to the ***Charter***. The ***Old Act*** included the following provisions, among others, in respect of the Floodway:

> **No construction in designated floodway area**
> 494.3(2) Subject to subsection (3), no person shall construct a building or perform any construction, other than a public service, in a designated floodway area.
>
> **Right to permit in designated floodway area**
> 494.3(3) Where the owner of a parcel of land within a designated floodway area
>
> > (a) is, before the designation of the parcel as a designated floodway area, entitled to a building permit in respect of the parcel; and
> > (b) would, except for the designation of the parcel as a designated floodway area, continue to be so entitled;
>
> the parcel is deemed to be part of a designated floodway fringe area for the purpose of an application for a building permit and, where a building permit is issued, is subject to the provisions of this Part applicable to a building permit issued in respect of construction in a designated floodway fringe area.

[37] The ***Old Act*** did contain a section 494.3(3). It is clear from a review of that section that the exception to the prohibition against construction in the Floodway applied when a permit had issued prior to the land being designated as the Floodway. In other words, section 494.3(3) of the ***Old Act***, like section 158(3) of the ***Charter***, was the grandfathering provision. As already mentioned, there has been no

suggestion that the Property is grandfathered under the ***Charter*** or would have been grandfathered under the ***Old Act***.

[38] In my opinion, the ***Regulation*** does not apply to the facts of this case and does not support the applicants' submission that the Pool can be dug in the Floodway without a permit or otherwise meeting floodproofing requirements. It also does not support the applicants' alternative claim ordering the respondent to vary floodproofing criteria under section 10(2) of the ***Regulation*** and related section 158(7) of the ***Charter***, so as to permit the construction of the Pool.

C. Other Pools in the Floodway—Unfair?

[39] One week prior to the hearing, the applicants filed the affidavit of Kim White-Nichol sworn January 10, 2017, attaching images from Google Maps, showing eleven properties along the Red River that appear to have pools. With the exception of one property, the images do not demark the Floodway and the Fringe. Instead, the images show the distance, in meters, of the pools from the river. While this evidence received little attention during the applicants' submissions, presumably it was tendered to suggest unfair treatment of the applicants by the respondent.

[40] On the day of the hearing, in response to Ms. White-Nichol's affidavit, the respondent filed Ms. Kirouac's affidavit sworn January 16, 2017, attesting that the Floodway is not determined by distance from the

river, attaching the relevant Flood Protection Level maps, and stating that more time would be required for the respondent to reply in a meaningful way to Ms. White-Nichol's affidavit. Following the hearing, I reviewed the White-Nichol and Kirouac affidavits, heard further brief submissions from counsel, and determined that a reply affidavit from the respondent was appropriate.

[41] On February 24, 2017, the respondent filed the affidavit of Geoff Patton, Manager of the Engineering Division of the Water and Waste Department of the respondent, affirmed February 23, 2017. A transcript of the cross-examination of Mr. Patton was filed in court on April 6, 2017. The essence of Mr. Patton's evidence is that six of the pools referenced by Ms. White-Nichol are located in the Fringe, not the Floodway; one pool is in the Floodway but was approved in 1962 prior to the designation of the Floodway; two pools are located in the Floodway but no permit applications were received by the respondent in respect thereto; and one pool (actually, a pond) is in the Floodway in contravention of the express wording of a home construction permit. Mr. Patton's affidavit references one further pool in the Floodway where, although there was no initial permit application received, years later a permit application for a deck surrounding the pool was approved on a misapprehension by the PPD that the deck and pool would be in the Fringe.

[42] Based on the evidence, it appears that to the extent pools were dug in the Floodway areas identified in the affidavits, the construction occurred either prior to the Floodway designation, without seeking a permit, or, in breach of an existing permit.

[43] The evidence does not establish, on a balance of probabilities, that by refusing to issue a permit to the applicants for the construction of the Pool, the respondent treated them unfairly or inconsistently relative to others.

IV. CONCLUSION

[44] In the circumstances, the application is dismissed.

[45] The respondent is entitled to party and party costs calculated in accordance with the Queen's Bench tariff.

[46] If costs cannot be agreed to, the parties shall come back before me.

_____J.