

THE QUEEN'S BENCH

WINNIPEG CENTRE

IN THE MATTER OF: City of Winnipeg By-Law 127/2016, as amended and passed on October 26, 2016, *The City of Winnipeg Charter* S.M. 2002, c. 39 and Subsections 92(2) and (9) of the *Constitution Act, 1867*.

BETWEEN:

URBAN DEVELOPMENT INSTITUTE (MANITOBA
DIVISION) and MANITOBA HOME BUILDERS'
ASSOCIATION INC.,

applicants,

- and -

CITY OF WINNIPEG,

respondent.

APPLICATION UNDER RULE 14.05 AND RULE 68 OF THE COURT OF
QUEEN'S BENCH RULES

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing before a judge, on _____, February ____, 2017 at _____ a.m., at the Law Courts, Broadway and Kennedy, Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January __, 2017

Issued by _____
Registrar
Court of Queen's Bench -
Winnipeg Centre
408 York Avenue
Winnipeg, MB R3C 0P9

TO: CITY OF WINNIPEG
c/o City Clerk's Department
510 Main Street
Winnipeg, MB R3B 1B9

AND TO: Attorney-General of Canada
c/o Department of Justice Canada
301 – 310 Broadway
Winnipeg, MB R3C 0S6

AND TO: Attorney-General of Manitoba
c/o Director, Constitutional Law
Department of the Attorney General
1205 – 405 Broadway
Winnipeg, MB R3C 0V8

APPLICATION

1. The applicants make application for:
 - (a) An Order of Certiorari directed to the respondent for the return to this Honourable Court of By-Law No. 127/2016, as amended, and passed on October 26, 2016 (“By-Law”) and an Order that the respondent do forthwith forward to the Registrar of the Court of Queen’s Bench, all things touching upon the passing of the By-Law, including, but not restricted to, the 2005 Hemson report received by the respondent and requests sent by representatives of the respondent to the Province of Manitoba to amend *The City of Winnipeg Charter* S.M. 2002, c. 39 (the “Charter”) to allow for the imposition of charges contemplated in the By-Law (“Growth Charges”) or charges similar to Growth Charges;
 - (b) A determination that the By-Law, or parts of the By-Law, and the resolutions of council of the respondent (“Council”) in relation to the

By-law passed at a meeting of Council held October 26, 2016 (the “Resolutions”), or parts of the Resolutions, are *ultra vires*, invalid, unenforceable or null and void and a corresponding Order setting aside or quashing the By-Law or such parts of the By-Law and setting aside or quashing the Resolutions or such parts of the Resolutions as the Honourable Court deems just;

- (c) A determination that the *Charter* does not authorize the respondent to enact the By-Law, nor, by extension, the Resolutions, and collect the charges referenced in the By-Law and the Resolutions or any one or more of those charges;
- (d) A determination, in the alternative, that the charges sought to be levied through the By-Law, at the amount as may be set by the amended recommendation of the Executive Policy Committee (“EPC”) of Council numbered 3.A. referred to in section 3 of the Resolutions or at all, or any one or more of those charges are an indirect tax and the respondent does not have the jurisdiction to enact a By-Law which seeks to impose and levy an indirect tax, nor, by extension, does it then have the jurisdiction to pass the Resolutions;
- (e) A determination, in the alternative, that there is not a reasonable connection between the revenue generated by the By-Law and the

cost of the service in respect of which the revenue is purported to be collected, or to the fund (the "Reserve Fund") as may be established by the amended recommendation of EPC numbered 5. referred to in section 3 of the Resolutions ;

- (f) A determination, in the alternative, that the Growth Charge is not a valid regulatory charge and there is no connection between the amount of the fee collected and the cost of administering any such purported regulatory scheme;
- (g) A determination, in the alternative, that the implementation of any purported regulatory charge that does not have a reasonable connection between the amount collected and the cost of administering the scheme is beyond the constitutional jurisdiction granted to the Province of Manitoba under subsections 92(2) and (9) of the *Constitution Act, 1867* and is therefore beyond the powers capable of being delegated to the respondent by the Province of Manitoba;
- (h) A determination, in the alternative, that the *Charter* does not authorize the type of discrimination contemplated in the By-Law and as may be imposed by the amended recommendations of EPC numbered 2., 3. and 4.A. referred to in section 3 of the Resolutions;

- (i) A determination, in the alternative, that the Growth Charges sought to be levied by the By-Law constitute unlawfully discrimination and therefore ultra vires the powers of the respondent;
- (j) An Order of restitution requiring the respondent to refund to the persons having paid the Growth Charges to the respondent, any Growth Charges paid by those persons which are found to be unauthorized or invalid;
- (k) An Order requiring payment of interest on refunds of Growth Charges to the date of payment;
- (l) Costs; and
- (m) Such further and other relief as the applicants may advise and this Honourable Court permit.

2. The grounds for the application are:

- (a) The applicants rely on Rule 14.05 and Rule 68;
- (b) This application seeks a determination of rights which depends on the interpretation of *The City of Winnipeg Charter*, S.M. 2002, c. 39, and it is unlikely there will be any material facts in dispute;

- (c) The applicants represent a number of persons affected by the By-Law and have an interest in the issues in this Application;
- (d) The respondent has exceeded its jurisdiction under the *Charter*;
- (e) The Growth Charges under the By-Law constitute an indirect tax;
- (f) The Growth Charges under the By-Law do not constitute a valid user fee, licence fee or regulatory charge;
- (g) There is no reasonable connection between the imposition and collection of the Growth Charges, or between the use of any funds paid into the Reserve Fund, and the costs of administration;
- (h) No decision has been made as to the specific expenditures which will benefit from the Growth Charges or from the the monies collected and paid into the Reserve Fund;
- (i) *The Constitution Act, 1867* provides for separate powers of the federal and provincial governments. Subsections 92(2) and (9) restrict the powers of the Province of Manitoba to imposing direct taxes and licencing fees. As such, the respondent cannot have any delegated jurisdiction under the *Charter* to impose an indirect tax and fees that are not licencing fees;

- (j) The discrimination in the By-Law, and as may be set out by the amended recommendations of EPC numbered 2., 3. and 4.A. referred to in section 3 of the Resolutions, is not authorized by the *Charter*;
- (k) Such further and other grounds as may be disclosed in the record and as counsel may advise and this Honourable Court may allow.

3. The following documentary evidence will be used at the hearing of the application:

- (a) Certified copy of the By-Law;
- (b) An Affidavit to be filed on behalf of the applicant, Urban Development Institute (Manitoba Division);
- (c) An Affidavit to be filed on behalf of Manitoba Home Builders' Association Inc.;

- (d) Such further and other evidence as counsel may advise and this Honourable Court will allow.

January 24, 2017

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File No. _____

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QUEEN'S BENCH RULES

NOTICE OF APPLICATION

Hearing Date: _____ day, the ____ day of February, 2017 at 10:00 a.m.

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
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Winnipeg MB R3B 3L3
(Matter No. 0120744 JDS/AFH)
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