Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

FACTUM OF CLUBLINK CORPORATION ULC

February 18, 2020

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PART I - INTRODUCTION

1. This application requires the Court to determine the validity and enforceability of a contract entered into in 1981 by the former City of Kanata and Campeau Corporation. The City of Ottawa (the "City") and ClubLink Corporation ULC are successors to the original parties.

2. The contract purports to require ClubLink to either operate a private 18-hole golf course "in perpetuity" or find a purchaser who is willing to do so. If ClubLink desires to discontinue operating the golf course at any time, the contract purportedly requires ClubLink to convey the golf course to the City at no cost.

3. This agreement is not enforceable. For three independent reasons the contract is invalid as a matter of law:

(a) it is contrary to the *Perpetuities Act*, which enshrines the rule against perpetuities in Ontario;

(b) it was *ultra vires* the powers of Kanata when it entered into the agreement; and

(c) it was the result of an improper fettering of municipal council discretion on the part of both Kanata and the former Regional Municipality of Ottawa-Carleton (the "Region").

4. ClubLink cannot be compelled to comply with an invalid contract. For decades, the City (and formerly Kanata and the Region) has received whatever benefit the operation of this private golf course brings to it and its residents. It is neither permissible nor equitable to require ClubLink to either operate a golf course *forever* or be stripped entirely of the value of the land based on an invalid agreement.

PART II - SUMMARY OF FACTS

(i) Campeau's Development Proposal

5. In 1979, Campeau owned 1400 acres of largely undeveloped land in Kanata. It consisted of a nine-hole golf course and farmer's fields. Campeau proposed to develop most of the land for residential use.

> Affidavit of Donald Kennedy, dated October 25, 2019 (**"Kennedy Affidavit"**, at paras. 9, 11) **(AR, Vol. VI, Tab 6, p. 1572)**

6. At the time, Kanata was a lower-tier municipality situated within the Regional Municipality of Ottawa-Carleton. Both Kanata and the Region had official plans that addressed permitted land uses for the area. Campeau needed both official plans to be amended in order to pursue its development plans.

> Kennedy Affidavit, at paras. 3, 10 **(AR, Vol. VI, Tab 6, pp. 1571-1572)**

7. In 1980, Campeau began meeting with the councils for both Kanata and the Region to gain support for its development concept. Part of Campeau's proposal was that it would preserve up to 40% of the "attractive portions" of its land as open green space. This was far more than Kanata or the Region were entitled to. While municipalities were permitted to obtain a conveyance of land for park purposes as a condition of approving a plan of subdivision, the *Planning Act*, both then and now, restricted the size of the conveyance to a maximum of 5% of the total land being subdivided for low-density residential purposes.

Kennedy Affidavit, at para. 15 **(AR, Vol. VI, Tab 6, p. 1574)**

Campeau Master Script, dated May 13, 1980, attached as Exhibit "B" to the Kennedy Affidavit **(AR, Vol. VI, Tab 6B, p. 1586)**

Planning Act, R.S.O. 1980, c. 379, s. 36(5)(a)

Planning Act, R.S.O. 1990, c. P. 13, s. 51.1(1)

8. Campeau advised Kanata and the Region that there were several conditions precedent to its willingness to preserve up to 40% of the land as open green space. One condition was that the regional official plan be amended "immediately".

Kennedy Affidavit, at para. 18 **(AR, Vol. VI, Tab 6, pp. 1574-1575)**

(ii) Kanata Lobbies Region for Amendment

9. Kanata agreed to amend its official plan for Campeau's development, and did so. It also encouraged the Region to take similar action. On January 27, 1981, Kanata council passed a resolution supporting Campeau's application for an Official Plan Amendment ("OPA") to the Region's official plan.

January 28, 1981 Certified Copy of Resolution of Kanata Council **(AR, Vol. VI, Tab 14 p. 1824)**

10. Regional staff did not support the proposed OPA. Planning staff delivered a report to the Regional Planning Committee in which it recommended against approval of the OPA.

> January 15, 2020 cross-examination of Donald Kennedy ("Kennedy Cross"), at p. 5, q. 16 **(AR, Vol. VI, Tab 12, p. 1793)**

11. Despite staff's views, Kanata urged the Regional Planning Committee to recommend approval of the OPA anyway. The mayor of Kanata, Marianne Wilkinson, was also a member of Regional council and sat on the Regional Planning Committee. As Kanata urged, the Committee rejected staff's recommendation and instructed staff to revise its report to support the OPA.

> Kennedy Cross, at pp. 3-5, qq. 2-4, 7-10, 16-19 **(AR, Vol. VI, Tab 12, pp. 1791-1793)**

12. The Planning Committee met to discuss the matter on April 28, 1981. The Regional Chairman noted that the proposal to operate the golf course "in perpetuity" was a "major selling point", and that he was not in favour of committing to the OPA until there was a "resolution or quid pro quo arrangement which would ensure that the community interests were protected."

> Minutes of April 28, 1981 Meeting of Planning Committee, attached as Exhibit "A" to the November 27, 2019 Affidavit of Paul Henry ("Henry Affidavit") **(AR, Vol. VI, Tab 7A, pp. 1637-1638)**

13. The Planning Committee recommended approval of the OPA, on the *condition precedent* that Campeau and Kanata "conclude an agreement that provides for approximately 40% open space in the area of Marchwood-Lakeside Communities and the agreement be concluded prior to the By-law being approved by Regional Council".

> Minutes of April 28, 1981 Meeting of Planning Committee, attached as Exhibit "A" to the Henry Affidavit **(AR, Vol. VI, Tab 7A, p. 1639)**

14. On May 26, 1981, Campeau and Kanata executed the agreement required by the Region (the "40% Agreement"). Regional council voted in favour of the OPA promptly thereafter, permitting the development of residential uses on most of Campeau's lands.

40% Agreement, attached as Exhibit "F" to the October 24, 2019 affidavit of Eileen Adams-Wright ("Adams-Wright Affidavit") **(AR, Vol. I, Tab 1F)**

Kennedy Cross, at p. 6, qq. 22-25 **(AR, Vol. VI, Tab 7A, p. 1794)**

(iii) The 40% Agreement

15. In the 40% Agreement, Campeau confirmed the "principle" that "approximately forty (40%) percent of the total development area… shall be left as open space for recreation and natural environmental purposes", which would include a proposed 18-hole golf course.

40% Agreement, para. 3 **(AR, Vol. I, Tab 1F, p. 50)**

16. The 40% Agreement provides that the land to be used for the golf course "shall be operated by Campeau as a golf course in perpetuity". The agreement permits a sale of the land only if the purchaser agrees to operate the golf course in perpetuity.

40% Agreement, paras. 5(1), (2) **(AR, Vol. I, Tab 1F, p. 51)**

17. The 40% Agreement compels Campeau to "convey the golf course (including lands and buildings) to Kanata at no cost" if Campeau "desires to discontinue the operation of the golf course and it can find no other persons to acquire or operate it". The conveyance comes with a condition. If Kanata accepts the conveyance, it "shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9."

40% Agreement, para. 5(4) **(AR, Vol. I, Tab 1F, p. 51)**

18. Paragraph 9 addresses the circumstance where Kanata ceases to use any of the land transferred to it pursuant to the 40% Agreement for the intended purposes. If the land "ceases to be used for recreation and natural environmental purposes by Kanata", then Kanata "shall reconvey it to Campeau at no cost".

40% Agreement, para. 9 **(AR, Vol. I, Tab 1F, p. 52)**

19. If Kanata refuses to accept a conveyance of the golf course, then Campeau "shall have the right to apply for development of the golf course lands".

40% Agreement, para. 5(5) **(AR, Vol. I, Tab 1F, p. 51)**

20. On December 20, 1988, Campeau and Kanata entered into an agreement (the "1988 Agreement") identifying the specific lands to which the 40% Agreement applied.

December 20, 1988 Agreement, attached as Exhibit "J" to the Adams-Wright Affidavit **(AR, Vol. I, Tab 1J)**

(iv) ClubLink Acquires the Golf Course

21. Campeau transferred the golf course lands to Genstar Development Company Eastern Ltd. in March 1989. Genstar assumed all of Campeau's liabilities and obligations under the 40% Agreement as part of that transaction.

March 30, 1989 Tripartite Assumption Agreement, attached as Exhibit "L" to the Adams-Wright Affidavit **(AR, Vol. II, Tab 1L, p. 377)**

22. Genstar subsequently changed its name to Imasco Enterprises Inc., and then transferred the golf course lands to ClubLink Capital Corporation in January 1997. ClubLink Capital

assumed all of Imasco's liabilities and obligations under the 40% Agreement as part of that transaction.

> ClubLink Assumption Agreement, attached as Exhibit "S" to the Adams-Wright Affidavit **(AR, Vol. III, Tab 1S, p.787)**

23. In 2001, Kanata and a number of other former municipalities, including the Region, were dissolved, and replaced with the City of Ottawa, the current applicant.

> October 24, 2019 Affidavit of Derrick Moodie ("Moodie Affidavit"), at para. 13 **(AR, Vol. VI, Tab 4, pp. 1276-1277)**

24. In 2005, ClubLink Capital amalgamated with several other companies to form ClubLink Corporation, which subsequently changed its name to ClubLink Corporation ULC, the current respondent.

> January 1, 2005 Articles of Amalgamation, attached as Exhibit "T" and Application to Change Name, attached as Exhibit "U", to the Adams-Wright Affidavit **(AR, Vol. III, Tabs 1T and 1U, pp. 797 & 856)**

(v) Declining Popularity of the Golf Club

25. ClubLink has owned and operated the Kanata Golf and Country Club (the "Golf Club") since 1997. It is a private club. To use the facilities, whether for golf or otherwise, one must either be a member, a guest of a member, or be part of a pre-arranged booking such as a corporate event.

> December 13, 2019 Affidavit of Brent Deighan ("Deighan Affidavit"), at paras. 2-3 **(AR, Vol. VI, Tab 9, pp. 1699-1700)**

26. The Golf Club enjoyed its peak of popularity in 2005. Since then, membership levels and entrance fees have fallen. As of November 2019, membership is at approximately 70% of capacity. Entrance fees have fallen from a height of $22,500 in 2005 to only $9,000 – the lowest

since ClubLink acquired the Golf Club. Even at the $9,000 figure, programs to reduce the cost have been in place to attract new members, so no person has paid the full $9,000 since 2017.

Deighan Affidavit, at paras. 4-5 **(AR, Vol. VI, Tab 9, p. 1700)**

27. There are 21 other golf courses within a 35 km drive of the Golf Club, including 6 public courses, 8 semi-private courses and two other ClubLink courses.

Deighan Affidavit, at para. 7 **(AR, Vol. VI, Tab 9, pp. 1700-1701)**

28. There is limited use made of the Golf Club in the winter for cross-country skiing. Approximately 5 people per day use the lands for cross-country skiing. There are much larger sites for cross-country skiing nearby which are more popular.

Deighan Affidavit, at para. 11 **(AR, Vol. VI, Tab 9, p. 1702)**

December 13, 2019 Affidavit of Beth Henderson ("Henderson Affidavit"), at paras. 9-11 **(AR, Vol. VI, Tab 10, pp. 1719-1720)**

(vi) ClubLink Explores Redevelopment Options

29. In December 2018, ClubLink announced that it would "pursue options for alternative use of the golf course lands." ClubLink noted the declining interest in golf and the fact that golf courses across the country were struggling.

December 14, 2018 ClubLink Press Release, attached as Exhibit "F" to the Moodie Affidavit **(AR, Vol. V, Tab 4F, p. 1426)**

30. On January 24, 2019, the City Solicitor wrote to ClubLink's former counsel. The City advised that it had "not received notice from your clients with respect to either a proposed sale of the golf course or notice that Clublink desires to discontinue the operation of the golf course".

The City requested that ClubLink provide formal notification if ClubLink should later "determine" to discontinue operating the golf course.

> January 24, 2019 letter from Rick O'Connor to Ursula Melinz, attached as Exhibit "H" to the Moodie Affidavit **(AR, Vol. V, Tab 4H, p. 1431)**

31. ClubLink submitted planning applications for a zoning by-law amendment and approval for a plan of subdivision on October 8, 2019 to permit the redevelopment of the Golf Club lands for residential and open space purposes. The City confirmed that the applications were "complete" on October 17, 2019.

> Moodie Affidavit, at paras. 29-32, 35 **(AR, Vol. V, Tab 4, pp. 1280-1281)**

32. The City has not yet rendered a decision on either of the planning applications. In the meantime, ClubLink has not decided to cease operating the Golf Club. It is continuing to operate the Golf Club and is preparing for the 2020 golf season. ClubLink has *never provided notice to the City* that it desires to discontinue the operation of the Golf Club.

> Deighan Affidavit, at para. 12 **(AR, Vol. VI, Tab 9, p. 1702)**

(vii) The Proposed Redevelopment

33. ClubLink's planning applications envision the redevelopment of the Golf Club lands for single-family homes, townhouses and other medium-density housing, as well as significant amounts of new, permanent publicly accessible green space - much more than is currently available to the public.

> Henderson Affidavit, at paras. 3-4 **(AR, Vol. VI, Tab 10, p. 1718)**

34. Specifically, the redevelopment proposal includes a large neighbourhood park (8.6 acres), two parkettes (0.98 and 1.01 acres), five stormwater management ponds surrounded by green space and a variety of other open green spaces.

Henderson Affidavit, at para. 6 **(AR, Vol. VI, Tab 10, p. 1718)**

35. The parks will be able to accommodate a variety of different public uses, such as play structures, splash pads, trails and dog parks. None of these facilities are present at the Golf Club, a private club that generally operates from April through October each year.

Henderson Affidavit, at para. 7 **(AR, Vol. VI, Tab 10, pp. 1718-1719)**

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

36. The 40% Agreement — and specifically, the provisions requiring that ClubLink operate the golf course in perpetuity or convey the lands to the City at no cost — are invalid and unenforceable as a matter of law on three independent grounds:

(a) it is contrary to the rule against perpetuities;

(b) it was *ultra vires* the powers of Kanata when it was entered into; and

(c) it was the result of an improper fettering of municipal council discretion on the part of both Kanata and the Region.

A. THE 40% AGREEMENT CREATES INTERESTS IN PROPERTY THAT ARE VOID FOR PERPETUITIES

37. Paragraph 5(4) of the 40% Agreement requires ClubLink to convey the golf course lands to the City if ClubLink desires to discontinue the operation of the golf course. Paragraph 9 requires the City to reconvey the lands if the City ceases to use them as a golf course. These

provisions are invalid as contrary to the rule against perpetuities. This is because they create contingent interests in land which have not vested within the 21-year period prescribed by the *Perpetuities Act*.

(i) The Perpetuities Act Applies to Interests in Land

38. The rule against perpetuities limits the duration of contingent interests in property. An interest is "contingent" if it has not yet vested, but will vest if and when a future event occurs. The rule prohibits property from being "tied up in trust, subject to restricted use, or otherwise held subject to any contingency, for longer than twenty-one years after the death of a person who is alive at the time of the disposition and whose life is relevant to the validity of the disposition".

> *Sutherland Estate v. Dyer* (1991), 4 O.R. (3d) 168 (Gen. Div.), 1991 CarswellOnt 689, at paras. 11-13 **(ClubLink's BOA, Tab 1)**
>
> Law Reform Commission of Nova Scotia, "The Rule Against Perpetuities", Final Report – December 2010, at p. 4 **(ClubLink's BOA, Tab 2)**

39. In order to comply with the rule against perpetuities, a property interest must vest within the perpetuity period. Pursuant to ss. 3 and 4(1) of the *Perpetuities Act*, if an interest does not vest within that time, it becomes void.

> *Perpetuities Act*, R.S.O. 1990, c. P.9, ss. 3 and 4(1).

40. The perpetuity period expires 21 years following the death of the "lives in being" — i.e. the living individuals mentioned in the instrument (either expressly or by implication) who are "implicated in the contingency". If the contingency does not implicate any specific individuals,

the perpetuity period runs for 21 years from the time the interest was first created. Corporations are not "lives" for the purpose of the rule against perpetuities.

> *Re Roberts*, 1978 CarswellOnt 513, at para. 14 (H.C.), citing Megarry and Wade, *The Law of Real Property*, 3rd. ed. (1966), pp. 224-226 **(ClubLink's BOA, Tab 3)**
>
> *Perpetuities Act*, R.S.O. 1990, c. P.9, ss. 6(1) and (3)

41. The rule against perpetuities applies to interests in land, but not merely contractual rights of a personal nature. This dichotomy is critical in determining whether the rule against perpetuities applies. An option to purchase land is an interest in land, whereas a right of first refusal ("**ROFR**") is a personal right.

> *Canadian Long Island Petroleums Ltd. et al. v. Irving Industries Ltd.*, [1975] 2 S.C.R. 715, at p. 735 **(ClubLink's BOA, Tab 4)**

42. The Ontario Court of Appeal recently considered this dichotomy in *2123201 Ontario Inc. v. Israel Estate*. The seller of land had a "first option to repurchase" the lands for $1 once the buyer had determined, in its sole discretion, that all of the gravel on the land had been removed. Justice Laskin considered whether this right was an option or a ROFR and concluded that it did not fit precisely into either category. Justice Laskin held that it was necessary to focus on the language of the contract to determine whether the parties had intended to give the vendor an interest in land or merely a personal right.

> *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, at paras. 25-27, 31 **(ClubLink's BOA, Tab 5)**

43. Justice Laskin concluded that the parties intended to create an interest in land. The language of the contract and the context in which it was made indicated something more than a mere personal right. The fact that the vendor did not have control over the exercise of the right

did not change this intent. The rule against perpetuities therefore applied. Because the seller's repurchase right was not exercised within 21 years after the execution of the contract, the interest was void.

2123201 Ontario Inc. v. Israel Estate, at paras. 36-38 **(ClubLink's BOA, Tab 5)**

(ii) The 40% Agreement Creates Future Interests in the Golf Course Lands that are Subject to the Perpetuities Act

44. As in *Israel Estate*, paras. 5(4) and 9 of the 40% Agreement create contingent interests in land, not mere personal rights. A careful reading of the 40% Agreement, the 1988 Agreement and consideration of the context make this clear.

45. First, the language of the contracts underscores that these obligations were meant to be tied to the land, not just the contracting parties. Paragraph 12 of the 40% Agreement specifies that the 40% Agreement "shall be registered against the lands". In the preamble to the 1988 Agreement, the parties provided that there were "*lands* intended to be governed by the Forty Percent Agreement" (emphasis added), rather than simply *persons* governed by the agreement. Paragraph 7 of the 1988 Agreement states that the 40% Agreement "shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community." The 40% Agreement was, in fact, registered on title to the golf course lands and other lands in the area. Notably, the Coalition agrees that the 40% Agreement was intended to create an interest in land.

Coalition Factum, at para. 43

46. Second, paras. 5(4) and 9 of the 40% Agreement describe the conveyancing obligations using mandatory terms — "shall convey" and "shall reconvey", respectively — and provide that the conveyances are to occur "at no cost" to the recipient. The conveyances were to occur

automatically upon changes in the use made of the lands, rather than anything personal to the parties. The intention was for these provisions to govern the ownership of the land, and not simply to define the set of positive obligations as between the parties. The City's claim for specific performance in these circumstances underscores the proprietary nature of the interest it claims.

47. Third, these conveyancing obligations are distinct from the ROFR set out in para. 5(3) of the 40% Agreement. In drafting para. 5(3), the parties clearly intended to create a ROFR — they even used that phrase. Paragraphs 5(4) and 9 are different. They do not use the ROFR language. Like in *Israel Estate*, they are different from traditional ROFRs as they do not involve third parties. The parties' decision to use different language to describe the interests in paras. 5(4) and 9 indicates that they did not intend to create additional ROFRs.

48. The possibility of the City refusing the conveyance under para. 5(4) in no way negates the property interest that it enjoys thereunder. People are always free to refuse a conveyance. For example, a will that stipulates that land will be conveyed to the deceased's daughter, and thereafter to the deceased's granddaughter, gives the granddaughter a future interest in the land. Obviously the granddaughter is free to refuse the conveyance, but that does not mean that she never had an interest to begin with. Indeed, in *Israel Estate*, the interest holder was entitled to choose whether to regain the lands upon the removal of all gravel. The Court of Appeal nonetheless held that the contract created an interest in land, not a personal right.

> *Re, Metcalfe*, 1972 CarswellOnt 396, at paras. 11-12 **(ClubLink's BOA, Tab 6)**
>
> *Biderman v. R.*, 2000 CarswellNat 215 (F.C.A.), at para. 11 **(ClubLink's BOA, Tab 7)**

49. In addition to *Israel Estate*, further appellate case law supports ClubLink's interpretation of the 40% Agreement. In *City of Halifax v. Vaughan Construction Co.*, the Supreme Court of Canada considered a contract for the sale of land between a municipality and a developer that provided the municipality with a right to repurchase the land if the developer failed to construct a building within a certain period. The Supreme Court found that the builder acquired the fee simple of the land "subject to an equitable interest" on the part of the municipality, and that the municipality's repurchase right was not "solely contractual". This is despite the fact that it was entirely up to the builder whether the interest ever vested.

> *City of Halifax v. Vaughan Construction Co.*, [1961] S.C.R. 715, at pp. 719-720 **(ClubLink's BOA, Tab 8)**

50. The Supreme Court of Canada applied the reasoning in *City of Halifax* to the rule against perpetuities in *Weinblatt v. Kitchener (City)*, which had nearly identical facts to *City of Halifax*. The Supreme Court held that the appellant municipality's right of repurchase was void for perpetuities because it constituted "an interest in the property to arise at a future date" that did not vest within the perpetuity period.

> *Weinblatt v. Kitchener (City)*, [1969] S.C.R. 157, at p. 161 **(ClubLink's BOA, Tab 9)**

51. Finally, in *Jain v. Nepean*, the Ontario Court of Appeal confirmed that *City of Halifax* and *Weinblatt* remain good law despite subsequent jurisprudence treating rights of first refusal as personal rights not subject to the rule against perpetuities. Importantly, Carthy J.A. explained that control over the exercise of a conditional option "is not a factor" when considering if it creates an interest in property.

> *Jain v. Nepean (City)* (1992), 9 O.R. (3d) 11 (C.A.), at para. 22 **(ClubLink's BOA, Tab 10)**

Loblaw Properties v. Town of Smiths Falls, 2016 ONSC 5943, at para. 35 **(ClubLink's BOA, Tab 11)**

52. The conditional entitlements provided for in paras. 5(4) and 9 of the 40% Agreement are analogous to the interests of the respective municipalities in *City of Halifax, Weinblatt* and *Jain*: they provide for the conveyance of land to an interested party upon the happening of a condition solely within the control of the transferee. These provisions therefore create contingent interests in land that must vest within the perpetuity period in order to be valid.

53. Interpreting paras. 5(4) and 9 of the 40% Agreement as creating interests in land is also consistent with the policy goals of the rule against perpetuities. The rule is meant to prevent land from being tied up or subject to restricted use for lengthy periods of time by indirect restraints upon its alienation. If the City's position is correct, this land must remain a golf course *forever* unless neither ClubLink nor the City are willing to operate a golf course. It is against public policy to allow an almost 40 year old agreement negotiated by predecessors to the current parties to control the use of this land in perpetuity.

Taylor v. Scurry-Rainbow Oil (Sask) Ltd., 2001 SKCA 85, at para. 52 **(ClubLink's BOA, Tab 12)**

(iii) The Contingent Interests in paras. 5(4) and 9 of the 40% Agreement are Void as they Did Not Vest Within the 21-Year Perpetuity Period

54. Neither para. 5(4) nor para. 9 of the 40% Agreement impose time limits within which the applicable condition must be satisfied. Nor do they identify a life in being to which they are tied. The perpetuity period for each interest is therefore 21 years.

55. Since the 40% Agreement was executed in 1981, the perpetuity period expired in 2002 — long before ClubLink began exploring the potential for a redevelopment of the golf course lands. Even if the 1988 Agreement or the ClubLink Assumption Agreement in 1996 could possibly

refresh the perpetuity period (which they cannot as a matter of law), 21 years have passed since these agreements as well. The perpetuity period has passed and, thus, these provisions are invalid and of no effect.

(iv) The Void Provisions Cannot Be Severed from the 40% Agreement

56. Paragraphs 5(4) and 9 are integral to the 40% Agreement, and cannot be severed from the balance of the contract. The removal of these provisions fundamentally disrupts the bargain struck by the parties. The result is the failure of the 40% Agreement as a whole.

57. The doctrine of severability allows for unenforceable terms in a contract to be "cut off" from the rest of an otherwise valid agreement. Courts may sever offensive provisions from the remainder of a valid contract as an alternative to setting aside the entire contract. If severance is not appropriate, the appropriate remedy is to void the contract, in whole or in part.

> *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, at para. 35 **(ClubLink's BOA, Tab 13)**

58. The doctrine of severance is invoked sparingly "given the concern that enforcing the agreement after excising the term may work an unfairness on the party that inserted the term". The Supreme Court of Canada has noted that the removal of terms from an agreement "will often fundamentally alter the consideration associated with the bargain and do violence to the intention of the parties", resulting therefore in the courts "making a new agreement for the parties". The parties' right to "freely contract and choose the words that determine their obligations and rights" means that courts must "be restrained in their application of severance".

> *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, at paras. 28 and 30 **(ClubLink's BOA, Tab 14)**

> *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] 1 S.C.R. 157, at para. 32 **(ClubLink's BOA, Tab 15)**

59. Courts will expunge part of a contract from the rest *only if* the remaining obligations "can fairly be said to be a sensible and reasonable obligation in itself such that the parties would unquestionably have agreed to it without varying any other terms of the contract or otherwise changing the bargain". Severance is therefore inappropriate where the remaining obligation *cannot* be sensibly enforced, or is not such that the parties would *unquestionably* have agreed to it without varying other terms.

> *Canadian American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C.C.A.), at para. 48 **(ClubLink's BOA, Tab 16)**

60. In the case at hand, severing the conveyancing obligations in paras. 5(4) and 9 of the 40% Agreement would fundamentally alter the core of the original parties' bargain.

61. A careful reading of the 40% Agreement indicates that the parties did not reasonably expect that the golf course lands would be used for that purpose indefinitely. Campeau had the ability to cease operating the golf course, but would have to convey the lands to Kanata as a consequence. Likewise, the parties understood that the recreational and open-space lands transferred to Kanata may not be used for that purpose forever, and that such lands would be reconveyed back to Campeau in such an event. These provisions, along with para. 5(5) of the 40% Agreement, constitute an important counter-weight to the owner's onerous obligations.

62. Severing paras. 5(4) and 9 from the balance of the contract destabilizes these reasonable expectations. The result would be to saddle ClubLink with a perpetual obligation to run a golf course (or find a buyer willing to do the same) with no escape mechanism. The City would be under no express obligation to return the lands if it ceased to use them as a golf course. A

contract in which ClubLink is compelled to operate a golf course in perpetuity but the City is free to cease using lands for their agreed upon purposes is far from the original bargain. It cannot be said that either party would "unquestionably" have agreed to such a deal. Indeed, there is no evidence that they would have. Severance is thus inappropriate, and the entire 40% Agreement is unenforceable.

63. This result accords with the purpose of the rule against perpetuities: preventing land from being tied-up for excessively long periods of time. While the City and its residents have received whatever benefit the golf course lands provide them for nearly 40 years, the public policy of ensuring lands be put to their highest and best use must factor into the analysis after the expiry of the perpetuity period.

64. As the 40% Agreement created contingent interests in land that did not vest within 21 years, the agreement is void as contrary to the rule against perpetuities. It cannot be enforced by the City.

B. THE 40% AGREEMENT WAS *ULTRA VIRES* THE POWERS OF KANATA WHEN ENTERED INTO

65. In 1981, there was no statutory power authorizing Kanata to enter into the 40% Agreement. Kanata did not possess a general power to contract, and there was no statutory provision authorising an agreement of this nature. Kanata did not have the power to enter into a contract that required Campeau to operate a golf course in perpetuity. The 40% Agreement was thus *ultra vires* Kanata's powers and is *void ab initio*. It cannot be enforced 39 years later.

(i) *No Power in the* Municipal Act *Permitted the 40% Agreement*

66. Municipalities are not natural persons. They are corporations created by statute and may only exercise the powers granted to them by legislation. A municipality "must be able to identify an express statutory power to enter into a contract or establish that such power must be necessarily implied from a statute in order to enable it to carry out its statutory functions". Absent such authority, any contract a municipality enters into is *ultra vires* and thus unlawful.

> *First City Development Corp. v. Durham (Regional Municipality)*, [1989] O.J. No. 87 (Sup. Ct.) ("*First City*"), at paras. 73, 77 **(ClubLink's BOA, Tab 17)**
>
> *R. v. Greenbaum*, [1993] 1 S.C.R. 674, at p. 687 **(ClubLink's BOA, Tab 18)**

67. At the time the 40% Agreement was executed, Kanata derived its powers from the version of the *Municipal Act* as it was in May 1981. Since 2001, the *Municipal Act, 2001* has imbued municipalities with "the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority", including the power to enter into contracts. But no such power existed in May 1981, in 1988, or any other time until 2001. Instead, municipalities could only enter into contracts that the *Municipal Act* or other legislation either expressly provided for or necessarily implied.

> *Municipal Act*, S.O. 1980, c. 302 ("*Municipal Act* 1980")
>
> *Municipal Act, 2001*, S.O. 2001, c. 25, s. 9

68. Part XVII of the *Municipal Act* (1980) detailed, in considerable specificity, the powers of a municipality to pass by-laws. Paragraphs 1-9 of s. 208 expressly set out the powers of a municipality in relation to "Agreements and Contracts". None of those paragraphs authorized the execution of a contract like the 40% Agreement. Other paragraphs permitted agreements for

various matters, such as renting out the municipality's mechanical equipment (para. 23), borrowing things of historical interest (para. 24), offering rewards for information leading to a conviction of a person guilty of an offence (para. 30) and hiring municipal employees (para. 45). There were no provisions that permitted a municipality to enter into an agreement that required the operation of a private golf course by a private entity.

> *Municipal Act*, S.O. 1980, c. 302, s. 208 **(ClubLink's BOA, Tab 29)**

69. While paragraphs 208(51) – (56) of the *Municipal Act* (1980) granted powers in relation to public parks, including acquiring land for the purpose of a public park, none of those paragraphs authorized a by-law requiring a third party to do anything. No provision authorized a contract to require a third party to use land in a particular way.

> *Municipal Act*, S.O. 1980, c. 302, s. 208(51)-(56) **(ClubLink's BOA, Tab 29)**

70. Finally, s. 208(57) of the *Municipal Act* (1980) allowed a municipality to acquire, erect, alter, maintain, operate, manage or grant aid for a place of recreation. But there was nothing in this paragraph (or any other) that allowed the municipality to compel *others* to maintain or manage a place of recreation. This is not surprising. The legislature cannot have intended to give municipalities the power to compel private persons to operate a place of recreation.

> *Municipal Act*, S.O. 1980, c. 203, s. 208(57) **(ClubLink's BOA, Tab 29)**

71. This case has similarities to *First City*, in which a developer sought amendments to the local and regional official plans in order to permit a residential development in the hamlet of Brooklin. Brooklin had no sewer service at the time, with residents relying on septic systems. In 1981, the region and the developer entered into an agreement that required the developer to post

a letter of credit in the amount of $2.15 million to be used for constructing sewers and water mains. The Minister did not fully approve the desired OPAs, but the region refused to return the letter of credit, leading to litigation.

72. The court found that the agreement to post the letter of credit was *ultra vires* the region and thus *void ab initio*. The region was able to impose financial demands on a developer in certain circumstances, but only with approval of the Ontario Municipal Board. The *Planning Act* permitted municipalities to secure financial guarantees from developers as part of a subdivision agreement, but not as part of an OPA. In the absence of any express or implicit statutory authority for the agreement, the court declared it void.

First City, at paras. 78-83 **(ClubLink's BOA, Tab 17)**

(ii) No Power in the* Planning Act *Permitted the 40% Agreement

73. As noted in *First City*, the *Planning Act* did not permit a municipality to enter into an agreement with a developer in conjunction with an OPA at the time of the 40% Agreement. The same is true of the current *Planning Act*: although it contemplates agreements in conjunction with subdivision, site plan, zoning and other approvals, it does not contemplate agreements in conjunction with OPAs or as standalone contracts unconnected to a particular planning approval. The absence of express provision for agreements in conjunction with OPAs, when there are express provisions for agreements in conjunction with other planning approvals, indicates that the legislature did not intend for municipalities to enter into agreements in connection with OPAs. This is the operation of the "implied exclusion" rule of statutory interpretation.

University Health Network v. Ontario (Minister of Finance), 2001 CanLII 8618 (Ont. C.A.), at paras. 30-32 **(ClubLink's BOA, Tab 19)**

74. The City appears to argue that the 40% Agreement is an agreement entered into as a condition of subdivision approval, which would have been permitted pursuant to s. 29(25) of the *Planning Act* at the time of the 40% Agreement. If this is actually the City's position, it is clearly untenable, factually and legally.

75. Section 29 of the *Planning Act* (1980) dealt with subdivisions. Section 29(25) empowered municipalities to "enter into agreements imposed as a condition to the giving of a consent" for the subdivision of land. The 40% Agreement was not entered into as a condition to the giving of a consent for the subdivision of land. As set out above, the 40% Agreement was an express condition precedent to an OPA, not a plan of subdivision. Indeed, consents for plans of subdivision were granted later, and subdivision agreements were entered into as a condition of approval of those subsequent plans. The facts cannot support the City's new position regarding the basis for the 40% Agreement.

Planning Act, S.O. 1980, c. 379 ("*Planning Act* (1980)"), s. 29(25)

76. Further, the definition of "consent" in s. 29(1)(a) of the *Planning Act* (1980) provides that the consent in issue must come from one of the committee of adjustment, land division committee or Minister. None of these entities granted any approval in connection with the 40% Agreement. By contrast, as clearly stated in the preamble of the 40% Agreement, the approval granted in exchange for the 40% Agreement was an OPA from the Region.

77. Indeed, in prior proceedings, at the urging of the City, the Ontario Municipal Board (now the Local Planning Appeal Tribunal) determined that the 40% Agreement is a "private agreement", and not an agreement imposed under the *Planning Act*. The Ontario Municipal Board held that it had no jurisdiction to interpret the 40% Agreement, although it certainly has

jurisdiction to interpret and impose requirements for subdivision agreements on appeals of subdivision applications.

> September 26, 2005 decision of the Ontario Municipal Board, pp. 7 and 12, attached as Exhibit "A" to the Deighan Affidavit **(AR, Vol. VI, Tab 9A, pp. 1710 & 1715)**

78. The *Planning Act* (1980) did not empower Kanata to enter into the 40% Agreement. It is not a valid exercise of powers under that statute.

(iii) Health and Safety Power Not Applicable

79. As there was no express power that authorized Kanata to enter into the 40% Agreement, the City may seek to rely on s. 104 of the *Municipal Act* (1980), which allowed municipalities to "pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient". However, the Courts have interpreted this power narrowly. A contract requiring the perpetual operation of a private golf course cannot be said to be made for the "health, safety, morality and welfare" of the public.

> *Municipal Act*, S.O. 1980, c. 302, s. 104

80. In *Noble v. Brantford*, the municipality passed a by-law declaring that all applications for severance of land would be deemed premature unless the applicant agreed to pay a severance fee, which fee would be used to pay for development costs that would otherwise fall on the municipality. The by-law was challenged as being *ultra vires*. The municipality relied on the power to pass by-laws for the health, safety, morality and welfare of the public. The court rejected the argument. Relying on prior jurisprudence, the court held that the provision conferred "very limited powers which are of little practical utility." A prior case had similarly remarked

that the power to pass by-laws for the "welfare" of the public "may mean so much that it probably does mean very little."

> *Noble v. Township of Brantford*, [1963] 2 O.R. 393 (H.C.J.), at paras. 24-26 **(ClubLink's BOA, Tab 20)**
>
> *Morrison v. Kingston (City)*, [1937] 4 D.L.R. 740 (Ont. C.A.), at para. 14 **(ClubLink's BOA, Tab 21)**

81. In *Greenbaum*, the City of Toronto passed a by-law that restricted the ability to sell merchandise from sidewalks. The by-law was challenged as *ultra vires*. The City of Toronto defended the by-law on several bases, including the general power to pass by-laws for the health, safety, morality and welfare of the public. The Supreme Court of Canada found the by-law to be *ultra vires*. The Court held that there were "many limits" on this power, including that it did not apply to any subject that was dealt with by more specific provisions of the *Municipal Act*. The Court affirmed prior jurisprudence, finding that "[v]ery few subjects falling within the ambit of local government are left to the general provisions". As other provisions of the *Municipal Act* dealt with obstructions on the sidewalk, the by-law could not be authorized by the general health and safety provision.

> *Greenbaum*, at pp. 693-694 **(ClubLink's BOA, Tab 18)**

82. As detailed above, paragraphs 1-9 of s. 208 of the *Municipal Act* (1980) expressly deals with "agreements and contracts". Other paragraphs deal with public parks and areas of recreation. As these subjects were "specifically provided for" by the legislation, the general power in s. 104 had no application *vis-à-vis* the 40% Agreement.

83. Even if s. 104 was *available* to authorize the execution of the 40% Agreement, the 40% Agreement is not aimed at the "health, safety, morality and welfare of the public". Rather, it

mandates the continued operation of a private golf course. A private golf course does not contribute to the health, safety, morality or welfare of the public. Neither does a provision requiring a landowner to transfer land to the municipality for free if it ceases to operate a private golf course on its lands. The public is not made healthier, safer or more moral as a result of a private, for-profit golf course operating nearby.

84. Kanata, as a creature of statute, lacked the authority to enter into the 40% Agreement. Nothing in the *Municipal Act* (1980), the *Planning Act* (1980) or elsewhere permitted such a contract. The 40% Agreement was void *ab initio*, and cannot be enforced against ClubLink.

C. THE 40% AGREEMENT IS AN UNLAWFUL FETTERING OF MUNICIPAL COUNCIL DISCRETION

85. Even if there was a statutory power that authorized Kanata to enter into the 40% Agreement, it was unlawful for Kanata to enter into it. Kanata and the Region agreed to adopt OPAs on the condition that Campeau leave approximately 40% of total area as open space and expand the existing golf course. This "*quid pro quo*" was an improper fettering of municipal council discretion. Rather than evaluate the application for an OPA on the basis of proper planning considerations, Kanata and the Region agreed to them in *exchange* for benefits otherwise unobtainable. The result of this improper fetter on council's discretion is the invalidity of the entire 40% Agreement.

(i) Municipalities Cannot Exercise Planning Discretion for Consideration

86. The Supreme Court of Canada has held that "municipalities cannot zone in exchange for amenities without some specific statutory authority for such arrangements". The rule is not

concerned with the *type* of consideration being offered – it is not focused on improper bribes – but any agreement by a municipality to exercise its discretion in exchange for a *quid pro quo*.

> *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 ("*Pacific National*"), at paras. 49, 57 **(ClubLink's BOA, Tab 22)**

87. In *Pacific National*, a developer was the successor to a development agreement with the City of Victoria. The developer planned to construct a mixed residential and commercial development and purchased lands from a Crown corporation for that purpose. The city passed the required zoning by-law and the developer moved forward with portions of the development. Five years later, the developer presented its plan for the balance of the development. The public objected, desiring to keep the area as a quiet parkland. In response, the city changed the zoning, preventing the balance of the development. The developer sued, alleging that there was an implied contractual term that the city would keep in place the zoning necessary for the intended development.

88. The trial judge found in favour of the developer, holding that there was indeed an implied term that the city would maintain favourable zoning. The Supreme Court of Canada did not deny that such a term existed, but denied the developer any remedy on the basis that such an agreement was an illegal fettering of municipal council discretion. Absent express statutory authority, municipalities "cannot sell zoning". They must remain free to change zoning based on properly exercised discretion in the future. In the result, although the developer had purchased the land at a price that assumed it could be profitably developed, it was left without a remedy in contract.

> *Pacific National*, at para. 57 **(ClubLink's BOA, Tab 22)**

89. Similarly, in *Loucks*, a First Nations band objected to trucks passing through its community as they went to and from a mining operation. The mining company proposed to the city that it would build a new road at its own expense, away from the First Nations band, so long as the city would include additional parcels of land within the permitted mining area. The city agreed and passed a by-law for that purpose. Ratepayers challenged the validity of the by-law.

> *Loucks v. Abbotsford (City)*, 2006 BCSC 1859 ("*Loucks*")
> **(ClubLink's BOA, Tab 23)**

90. The court declared the by-law to be invalid. It noted that the terms of the agreement and its history made clear that the city had agreed to change its by-laws in exchange for the mining company building a road at its own expense. Following *Pacific National*, such an agreement was an invalid fettering of council discretion.

> *Loucks*, at paras. 99-105 **(ClubLink's BOA, Tab 23)**

91. This principle does not apply only to agreements that fetter the discretion of *future* councils. In *Southgate*, the plaintiff agreed to purchase a building from the township. As part of the agreement, the township agreed to rezone the property to permit 12 single-family apartments. The township failed to actually rezone the property and the transaction did not close. The purchaser sued for breach of contract. The township argued that the agreement was an unenforceable fettering of council discretion.

> *Doherty v. Southgate (Township)* (2006), 46 R.P.R. (4th) 41 (Ont. S.C.) ("*Southgate*") **(ClubLink's BOA, Tab 24)**

92. The court agreed that the township's commitment to rezone the property was an unenforceable fettering of council discretion, even though it applied only to the current council. The court held that:

> . . . I do not think that the fact that the Council approval was intended to effect a change to the zoning by-law during the term of the current Council, rather than to bind future Councils, is meaningful. As mentioned, the public policy issue is still raised in connection with the final approval to be given by the Council after the public hearing required under the *Planning Act*. Similarly, the fact that a future Council could revoke the zoning amendment is not meaningful as a practical matter, given that the respondent would have completed renovations on the Property by the time of any such revocation.
>
> *Southgate*, at paras. 51, 54 **(ClubLink's BOA, Tab 24)**
>
> See also *Galt-Canadian Woodworking Machinery Ltd. v. Cambridge (City)* (1983), 41 O.R. (2d) 544 (C.A.) **(ClubLink's BOA, Tab 25)**

93. These principles directly apply to the instant case. Kanata and the Region agreed to amend the official plans on the express condition that Campeau expand the golf course, agree to operate it in perpetuity and leave approximately 40% of the development area as open space. The Regional Chairman expressly described this as a necessary "*quid pro quo*" that must be offered if the OPA was to be approved. Campeau's offers were described as "major selling points". Based on this consideration, the Region disregarded the objective views of its own planning staff. The 40% Agreement was an invalid selling of Kanata's and the Region's planning discretion and is thus unenforceable.

(ii) Part Performance of the 40% Agreement is Not Relevant

94. The fact that the 40% Agreement has been partly performed does not remedy its unenforceability. In *Ontario Mission for the Deaf v. Barrie*, the applicant wished to sever its land and transfer a piece of it to a third party. Following negotiations, the city agreed not to oppose that request and promised to place use limitations on certain parcels of land by way of zoning, so long as the applicant submitted a plan of subdivision for the balance of the land and deeded to the city all land within that plan which a future study identified as environmentally protected.

The requested severance was granted, but the applicant later withdrew its plan of subdivision and sought site plan approval for a different development. The city refused to grant approval unless the applicant completed its obligations under the agreement. The applicant sought a declaration that the agreement was unenforceable.

> *Ontario Mission for the Deaf v. Barrie (City)* (2003), 64 O.R. (3d) 55 (S.C.) **(ClubLink's BOA, Tab 26)**

95. The court held that the agreement was an unenforceable fettering of council discretion. In response to the city's argument that the applicant cannot receive the benefit of the agreement and then claim it to be unenforceable, the court held that:

> …the argument that part performance of a contract with a municipality should militate toward enforcement of the contract as a matter of good business sense, cannot prevail where the contract is *ultra vires* and fettering of the municipality's legislative capability.
>
> *Ontario Mission for the Deaf v. Barrie*, at para. 13 **(ClubLink's BOA, Tab 26)**

96. This holding is in keeping with the Supreme Court's ruling in *Pacific National*. In that case, the purchase price for the land was determined based on the understanding that it could be developed for profitable use. When the city prevented the development from going forward, the developer was left without a remedy despite having greatly overpaid for the land. The Court recognized that some may believe the result to be harsh, but held that it could not sanction a municipality purporting to exercise powers that it did not possess. Further, the Court held that any sophisticated entity should be aware that contracting with a municipality brings "special legal and political risks" not present when dealing with regular corporations.

> *Pacific National*, at paras. 67-74 **(ClubLink's BOA, Tab 22)**

97. The fact that the OPAs were approved and Campeau was able to proceed with its development is no response to the unenforceability of the 40% Agreement. Indeed, the result in this case is not nearly as harsh as in *Pacific National*. While Campeau may have benefitted from the 40% Agreement, ClubLink did not. It does not and has never owned any of the land that was developed for residential use. It is a mere successor to the 40% Agreement, purportedly bound by its obligations but the recipient of no benefits.

98. Further, despite its impropriety, the City has had the "benefit" of the 40% Agreement for 39 years. The golf course was expanded and has been operating for decades. The lands that were supposed to be conveyed to the City were in fact conveyed. The City suffers no real hardship as a result of the 40% Agreement being declared unenforceable. Indeed, it is difficult to understand what benefit the City receives from the continued operation of a for-profit, private golf club with sagging membership levels.

D. CITY NOT ENTITLED TO A CONVEYANCE OF THE GOLF COURSE LANDS

99. As set out above, the 40% Agreement does not compel ClubLink to continue operating a golf course because it is contrary to the rule against perpetuities, was *ultra vires* the powers of Kanata and was an unenforceable fettering of Kanata's and the Region's discretionary powers under the *Planning Act*. Accordingly, there is no circumstance in which the golf course lands can be conveyed to the City.

100. If the Court should find that the 40% Agreement is enforceable in full, the City is nonetheless not entitled to an order compelling ClubLink to convey the golf course lands to the City. Paragraph 5(4) of the 40% Agreement provides that such conveyance only occurs in "the

event that Campeau desires to discontinue the operation of the golf course". The evidence is clear that ClubLink has not decided to discontinue the operation of the golf course.

101. The Director of Operations for the Golf Club has testified that ClubLink has "not decided to cease operating the Golf Club" and is "currently taking active steps to maintain the property in its current condition and to prepare the Golf Club for the 2020 season." ClubLink has *never* said that it will no longer operate the golf course. This evidence was unchallenged by the City and Coalition.

Deighan Affidavit, at para. 12 **(AR, Vol. VI, Tab 9, p. 1702)**

102. ClubLink is exploring a potential redevelopment of the golf course lands and has submitted planning applications to that end. But this does not mean that ClubLink has decided to cease operating the golf course. On cross-examination, City witness Derrick Moodie agreed that it was currently unknown whether the development would ever proceed. Even if the planning applications are approved, it will be up to ClubLink to decide whether it actually moves forward with the proposal.

January 15, 2020 Cross-Examination of Derrick Moodie ("Moodie Cross"), at p. 6, qq. 13-16 **(AR, Vol. VI, Tab 13, p. 1803)**

103. While para. 5(4) mandates that the conveyance to the City is to occur if ClubLink "desires" to discontinue operating the golf course, this word must be interpreted as requiring a *decision* to discontinue operating the golf course, not a subjective hope or wish. This is the appropriate interpretation for several reasons.

104. First, a corporation (whether Campeau or ClubLink) has no "desires". It merely acts pursuant to the decisions of its directing minds. It is meaningless to ask whether a corporation "wants" to do something that it has not decided to do.

105. Second, even if a corporation could be said to have desires, the parties to the 40% Agreement cannot have intended to rely on such things to trigger para. 5(4). Desires, as opposed to decisions or plans, are near impossible to prove. It would be foolish to condition the conveyance of valuable land on the presence or absence of a subjective mental state.

106. Third, even if corporations had desires that were susceptible of proof, desires are too fleeting and variable to serve as the basis of contractual rights. If a desire to cease operating the golf course triggered para. 5(4), rather than a decision to do so, ClubLink could be compelled to convey the golf course merely because it fruitlessly wished that it could use the space for a theme park. Further, ClubLink may desire to use the lands for a shopping mall one day, and then go back to being happy with the golf course the next. It would be commercially absurd to use desires, rather than decisions, as the trigger for para. 5(4).

107. Fourth, the "desire" condition is paired with a second condition: that ClubLink "can find no other persons to acquire or operate" the golf course. The existence of this second condition demonstrates two things: (i) that para. 5(4) will only come into play once ClubLink has taken active steps toward ending its operation of the golf course; and (ii) after ClubLink has determined that there is no third party that can take on that operation. Paragraph 5(4) is a method of allowing ClubLink to cease operating the golf course while still allowing the City to ensure it continues operating. This requires a *decision* by ClubLink, not a mere desire.

108. The City argues that a desire to discontinue operations is different than actually ceasing operations. ClubLink agrees. This does not mean that the submittal of a planning application triggers the operation of para. 5(4). Paragraph 5(1) requires the perpetual operation of the golf course. Paragraph 5(4) provides that if ClubLink does not want to operate the golf course, it will be conveyed to the City *if* the City agrees to operate the golf course. Paragraph 5(4) is triggered when ClubLink has *decided* to cease operating the golf course, rather than when it has actually ceased to operate the golf course, in order to preserve the operations of the course. Based on the 40% Agreement, ClubLink is not free to unilaterally cease operating the golf course. This is why para. 5(4) is triggered prior to ClubLink ceasing to operate the course. It still requires a firm decision, rather than a subjective desire or potential plan.

109. Because ClubLink has not decided to cease operating the golf course, there is no basis for an order compelling it to convey the golf course to the City. If the Court should determine that ClubLink is bound to comply with all provisions of the 40% Agreement, ClubLink is free to continue operating the golf course or attempt to locate a third party to do so.

110. In the alternative, if the Court should conclude that ClubLink triggered para. 5(4) by submitting the planning applications (which, respectfully, would be unsupported by the evidence), the appropriate remedy is to require ClubLink to withdraw the planning applications - which is the primary ground of relief that the City seeks. Compelling ClubLink to transfer the golf course lands for free if it is willing to continue operating the golf course would be a draconian and unnecessary remedy.

E. PARAGRAPH 5(4) OF THE 40% AGREEMENT REQUIRES THE CITY TO OPERATE A GOLF COURSE

111. The City argues that, in the event it accepts a conveyance of the golf course lands pursuant to para. 5(4) of the 40% Agreement, it is not required to operate or cause to be operated a golf course on those lands. Instead, the City says it merely has to use the golf course lands for recreation and natural environment purposes.

112. The City's position rests on a misreading of the 40% Agreement. In the event of a conveyance pursuant to para. 5(4), the City must operate a golf course or cause one to be operated.

113. The plain language of para. 5(4) states that "if Kanata accepts the conveyance, Kanata *shall* operate or cause to be operated the lands as a golf course" (emphasis added). There is no ambiguity to this provision. Kanata does not have discretion in how it uses the golf course lands.

114. The City's argument rests on the fact that the obligation in para. 5(4) to operate a golf course is "subject to the provisions of paragraph 9". Paragraph 9 reads as follows:

> In the event that any of the land set aside for open space for recreation and natural environmental purposes ceases to be used for recreation and natural environmental purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no cost unless the land was conveyed to Kanata as in accordance with Section 33(5)(a) or 35b of The Planning Act.

115. This provision has to be read in the context of the 40% Agreement. Aside from the golf course lands, the 40% Agreement required Campeau to convey three categories of land to Kanata: land for a storm water management system (para. 6); lands for natural environmental areas (para. 7) and lands for park purposes (para. 8). Paragraph 9 provides that if Kanata ceases

to use any of the lands conveyed to it for the intended purposes, they are to be reconveyed to Campeau.

116. The City misunderstands the relationship between paras. 5(4) and 9. The City argues that para. 9 qualifies para. 5(4) so as to permit the City to use the golf course lands for *any* "recreation and natural environmental purposes". In the City's argument, it could use the golf course lands for a park, unmaintained natural space, a swimming pool or an athletics complex and still be compliant with the 40% Agreement.

117. The City's argument violates the principle of contractual interpretation that all provisions are to be given meaning. If the City's argument was correct, then the mandatory language of para. 5(4) – "Kanata *shall* operate or cause to be operated a golf course" – would have no meaning at all. Kanata would be completely free to ignore this mandatory language, close the golf course and use the lands for any other recreational or natural environmental purpose. A key portion of para. 5(4) would be superfluous. This is not a proper way to read the 40% Agreement.

118. The City's interpretation of para. 5(4) also fails to make sense of para. 5(5). Paragraph 5(5) provides that if the City "will not accept the conveyance of the golf course *as provided for in sub-paragraph (4) above*", then ClubLink is entitled to apply for development of the golf course lands. Two aspects of this provision require attention.

119. First, para. 5(4) requires the City to operate the golf course as a condition of the conveyance, and so a refusal to accept the conveyance on that basis entitles ClubLink to apply to develop the lands as per para. 5(5). If the City could agree to operate the golf course, and then change its mind the following day and use the lands for an unmaintained natural space, ClubLink's rights in para. 5(5) would be illusory.

120. Second, para. 5(5) carefully differentiates between the "golf course" and the "golf course lands". If the City does not accept conveyance of the "golf course", then ClubLink is entitled to apply for redevelopment of the "golf course lands". The City must accept the golf course itself – not just the land upon which it is situated. If it will not, ClubLink can apply to redevelop the *land*, rather than simply regain control of the golf course. But if the City was free to use the land for *any* recreational or natural environmental purpose, this emphasis on accepting a conveyance of the "golf course" would be meaningless.

121. Rather than completely absolving the City of the obligation to operate a golf course, para. 9 sets out the consequence if the City decides to *cease* operating the golf course: if it reconveys the land back to ClubLink. But for para. 9, if the City accepted a conveyance of the golf course lands pursuant to para. 5(4), it would be bound to continue operating the golf course forever. To avoid this absurd result, para. 9 permits the City to cease operating the golf course – to go back on its original decision – so long as it returns the land to ClubLink. This interpretation gives meaning to all provisions in the 40% Agreement, explains why para. 5(4) is "subject to" para. 9 and respects the difference between the "golf course" and the "golf course lands."

F. THE 40% AGREEMENT DOES NOT CREATE A RESTRICTIVE COVENANT

122. The Coalition argues that para. 3 of the 40% Agreement, in conjunction with the 1988 Agreement, creates a restrictive covenant which prevents ClubLink from developing the golf course lands.

123. The Coalition's argument is superfluous to this proceeding. If the 40% Agreement is invalid or unenforceable, as argued above, then para. 3 has no effect and there can be no restrictive covenant. On the other hand, if the 40% Agreement is enforceable, then ClubLink is

required to either continue operating the golf course or offer the golf course lands to the City. The restrictive covenant argument does not impact the outcome of the proceeding in any event.

124. Even if it was relevant, the Coalition's argument is wrong as a matter of law. The *Aquadel* decision, which the Coalition references, is a complete response to the argument.

> *Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 **(Coalition's BOA)**

125. In *Aquadel*, Robert Whitlam owned four adjacent parcels of land. One contained a golf course. He sold the other three parcels and, as part of the sale, agreed to solely use the remaining parcel as a golf course. The agreement was registered on title as a restrictive covenant.

126. Whitlam transferred the golf course land to a company he owned. When he died, the company came to be owned by his widow and brother. More than 20 years later, in the face of declining interest in golf, the widow and brother proposed to redevelop the land for residential use. They applied for an order cancelling the registration on the basis that the agreement was not a restrictive covenant.

127. The British Columbia Court of Appeal granted the order. It found that an agreement to operate a golf course is a positive covenant and thus cannot be a restrictive covenant. The respondents argued that there were separate provisions in the agreement: one restricted the land from being used as anything other than a golf course, while a second mandated the owners to operate a golf course. They argued that the former provision was a valid restrictive covenant, even if the positive obligation to operate a golf course was not.

128. The Court of Appeal rejected the argument and held that it was improper to read the provisions in isolation from one another:

> The covenants to maintain a golf course on Whitlam's land, to keep it in repair, and to give preferential rates to certain golfers, are consistent with, and only with, Whitlam's obligation to use the land as a golf course. If the first paragraph were interpreted to mean that Whitlam did not have to use the lands as a golf course, and could allow it to return to wilderness, the remaining paragraphs of the Agreement would be meaningless and unenforceable. Whitlam could hardly maintain the golf course in a proper and acceptable manner and give preferential rates to certain golfers for its use if he failed to use the land as a golf course at all.
>
> The provisions in the Agreement are clearly interrelated and should not be read in isolation. The law requires that the Agreement be read as a whole, and when it is it can be seen that it creates a positive obligation on the covenantor. Its language is far from the clear and unambiguous language necessary to show an intention to create an interest in land in favour of the covenantee.
>
> *Aquadel*, at paras. 18-19 **(Coalition's BOA)**

129. The Coalition's argument fails for precisely the same reason. It argues that para. 3 of the 40% Agreement merely requires the golf course lands to be "left as open space", which is a negative covenant separate and apart from the positive obligation in para. 5(1) to operate a golf course on the same lands. The provisions cannot be read in isolation from one another. There is no doubt that the 40% Agreement was intended to require the perpetual operation of a golf course. It does not and cannot create a restrictive covenant.

130. Further, neither the 40% Agreement nor the 1988 Agreement can create a restrictive covenant because neither document clearly identifies or adequately describes the "dominant tenement" meant to receive the benefit of the covenant. The dominant tenement must be clearly

described in the very instrument that creates the covenant, and the wording of the covenant in this regard is to be "strictly construed".

> *Mohawk Square Developments Ltd. v. Suncor Energy Inc.*, 2007 CanLII 38569 (Ont. S.C.), at paras. 54-60 **(ClubLink's BOA, Tab 27)**

131. The 40% Agreement does not identify any dominant tenement at all. Even the 1988 Agreement (which does not itself contain the covenant upon which the Coalition relies, and is thus irrelevant) refers only to the "Kanata Marchwood Lakeside Community". No definition is provided of Kanata Marchwood Lakeside Community. The use of the word "community" suggests that this term refers to *people*, rather than plots of land. Further, neither the 40% Agreement nor the 1988 Agreement clearly identify the precise land which would be included in the "Kanata Marchwood Lakeside Community". Because no dominant tenement is properly identified, there can be no restrictive covenant.

G. THE ALLEGED JANUARY 1997 RESTRICTIVE COVENANT IS NOT BEFORE THIS COURT

132. The Coalition also argues that ClubLink is bound by a restrictive covenant created by the ClubLink Assumption Agreement in 1997. The alleged restrictive covenant prohibits ClubLink from altering the grading of the golf course lands or constructing buildings in a manner that "materially adversely affects" a storm water management plan that was in place in November 1996.

133. This issue is outside the scope of this application. There is no mention of it in the Notice of Application. There was no mention of it in the affidavits filed by the parties. The declaratory relief sought by the Coalition in this regard is not sought in the Notice of Application. The law is

clear that an intervener cannot add new issues to a proceeding or seek new relief, a principle that was confirmed by MacLeod J. when he permitted the Coalition to intervene.

> *Hydro-One Networks Inc. v. Ontario Energy Board*, 2019 ONSC 3763, at para. 24 **(ClubLink's BOA, Tab 28)**
>
> *City of Ottawa v. ClubLink Corporation ULC*, 2019 ONSC 7470, at para. 26 **(Coalition's Authorities)**

134. Even if the issue was properly before the Court, there is no evidence that the alleged restrictive covenant has been or is in any danger of being breached. Indeed, the Coalition concedes, at para. 51 of its factum, that the issue of whether ClubLink's proposed redevelopment will breach the provision is "not before the Court". The provision purports to prohibit any grading or construction that "materially adversely affects" a particular storm water management plan. The storm water management plan is not in evidence. There is no evidence that anything that ClubLink has done or has proposed doing would result in any impact to that plan. There is no evidentiary basis for the relief the Coalition seeks.

PART IV - ORDER REQUESTED

135. ClubLink respectfully requests that the application be dismissed in its entirety, with costs in favour of ClubLink.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February, 2020.

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John Carlo Mastrangelo / Mark R. Flowers

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sutherland Estate v. Dyer* (1991), 4 O.R. (3d) 168 (Gen. Div.)

2. Law Reform Commission of Nova Scotia, "The Rule Against Perpetuities", Final Report – December 2010

3. *Re Roberts*, 1978 CarswellOnt 513, at para. 14 (H.C.)

4. *Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd.*, [1975] 2 S.C.R. 715

5. *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409

6. *Re, Metcalfe*, 1972 CarswellOnt 396

7. *Biderman v. R.*, 2000 CarswellNat 215 (F.C.A.)

8. *City of Halifax v. Vaughan Construction Co.*, [1961] S.C.R. 715

9. *Weinblatt v. Kitchener (City)*, [1969] S.C.R. 157

10. *Jain v. Nepean (City)* (1992), 9 O.R. (3d) 11 (C.A.)

11. *Loblaw Properties v. Town of Smiths Falls*, 2016 ONSC 5943

12. *Taylor v. Scurry-Rainbow Oil (Sask) Ltd.*, 2001 SKCA 85

13. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152

14. *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249

15. *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6

16. *Canadian American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C.C.A.)

17. *First City Development Corp. v. Durham (Regional Municipality)*, [1989] O.J. No. 87 (Sup. Ct.)

18. *R. v. Greenbaum*, [1993] 1 S.C.R. 674

19. *University Health Network v. Ontario (Minister of Finance)*, 2001 CanLII 8618 (Ont. C.A.)

20. *Noble v. Township of Brantford*, [1963] 2 O.R. 393 (H.C.J.)

21. *Morrison v. Kingston (City)*, [1937] 4 D.L.R. 740 (Ont. C.A.)

22. *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64

23. *Loucks v. Abbotsford (City)*, 2006 BCSC 1859

24. *Doherty v. Southgate (Township)* (2006), 46 R.P.R. (4th) 41 (Ont. S.C.)

25. *Galt-Canadian Woodworking Machinery Ltd. v. Cambridge (City)* (1983), 41 O.R. (2d) 544 (C.A.)

26. *Ontario Mission for the Deaf v. Barrie (City)* (2003), 64 O.R. (3d) 55 (S.C.)

27. *Mohawk Square Developments Ltd. v. Suncor Energy Inc.*, 2007 CanLII 38569 (Ont. S.C.)

28. *Hydro-One Networks Inc. v. Ontario Energy Board*, 2019 ONSC 3763

29. *Municipal Act*, S.O. 1980, c. 302, s. 208

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Perpetuities Act*, R.S.O. 1990, c. P.9, ss. 3, 4(1), 6(1) and 6(3):

Possibility of vesting beyond period

3 No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

Presumption of validity and "Wait and See"

4 (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

Measurement of perpetuity period

6 (1) Except as provided in section 9, subsection 13 (3) and subsections 15 (2) and (3), the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.

Idem

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

Idem

(3) Where there is no life satisfying the conditions of subsection (1), the perpetuity period is twenty-one years.

2. *Municipal Act, 2001*, S.O. 2001, c. 25, s. 9:

Powers of a natural person

9 A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

3. *Municipal Act*, S.O. 1980, c. 302, ss. 104, 208:

104 Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law, and for governing the proceedings of the council, the conduct of its members and the calling of meetings.

Section 208 reproduced in ClubLink's Brief of Authorities

4. *Planning Act*, S.O. 1980, c. 379, ss. 29(1)(a), 29(25):

29.—(1) In this section, "consent" means, (a) in the case of land situate in a municipality that forms part of a county for municipal purposes or situate in a municipality that is within a metropolitan, regional or district municipality,

(i) a consent given by the committee of adjustment of such municipality under subsection 49 (3), if such committee was constituted prior to the 15th day of June, 1970, or by such committee constituted on or after the 15th day of June, 1970, if the municipality has an official plan approved by the Minister, or

(ii) where there is no committee of adjustment referred to in subclause (i), a consent given by the land division committee constituted under section 31, or

(iii) where there is no committee of adjustment referred to in subclause (i), and no land division

committee referred to in subclause (ii), a consent given by the Minister;

(25) Every municipality and the Minister may enter into agreements imposed as a condition to the giving of a consent and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the Registry Act and the Land Titles Act, any and all subsequent owners of the land.

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF CLUBLINK CORPORATION ULC

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