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

\- and -

KANATA GREENSPACE PROTECTION COALITION

Intervenor

REPLY OF THE INTERVENOR KANATA GREENSPACE PROTECTION COALITION

February 21, 2020

CAZA SAIKALEY S.R.L./LLP
Lawyers | Avocats
350-220 Laurier Ave West
Ottawa, ON K1P 5Z9

T: 613-565-2292
F: 613-565-2087

Alyssa Tomkins (LSO #54675D)
atomkins@plaideurs.ca
Charles R. Daoust (LSO #74259H)
cdaoust@plaideurs.ca

Counsel for the Intervenor
Kanata Greenspace Protection Coalition

TO: **BORDEN LADNER GERVAIS LLP**
World Exchange Plaza
100 Queen St., Suite 1300
Ottawa, ON K1P 1J9

T: 613-237-5160
F: 613-230-8842

Kirsten Crain
kcrain@blg.com
Emma Blanchard
eblanchard@blg.com
Neil Abraham
nabraham@blg.com

Lawyers for the Applicant
City of Ottawa

AND TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
145 King St. W., Suite 2750
Toronto, ON M5H 1J8 Canada

T: 416-598-1744
F: 416-598-3730

Matthew Gottlieb
mgottlieb@lolgl.ca
James Renihan
jrenihan@lolg.ca

DAVIES HOWE LLP
The Tenth Floor
425 Adelaide St. W.
Toronto, ON M5V 3C1

T: 416-263-4513
F: 416-977-8931

Mark R. Flowers
markf@davieshowe.com

Lawyers for the Respondent
ClubLink Corporation ULC

A. Introduction

1. In 1988, Campeau chose to impose a burden on some of its land in Kanata Lakes for the purpose of marketing premium lots. The burden consisted of a clear restriction: these lands were to be left undeveloped as open space for recreational and natural environmental purposes. This burden was intended for the benefit of other lands in the area, some of which were then owned by homebuilders and some homeowners. To formalize it, Campeau registered the restriction of the titles to its now burdened lands.

2. A portion of Campeau's burdened land comprises the Beaver Pond and Kizell drain, and the Trillium Woods. Another part of the burdened land is now the golf course of which ClubLink is the current owner. ClubLink was aware that the burden existed when it purchased the golf course. In fact, it expressly consented to honour the burden running with the land. The 1996 ClubLink Assumption Agreement is again clear: even if operation of the golf course is discontinued, the land is to remain undeveloped as open space land.

3. ClubLink raises three (3) main arguments to show why it should not be obligated to continue operating a golf course. Respectfully, these arguments miss the point. If ClubLink wishes to develop the land, it must either: 1) wait until the restrictive covenant registered on title to its land expires; or 2) apply for it to be modified or discharged. Until either of these occur, ClubLink's land must remain as open space, whether as a golf course or otherwise.

B. ClubLink Mischaracterizes the 1981 and 1988 Agreements

4. ClubLink mischaracterizes the "40% Agreement" solely as an invalid contract intended to require perpetual operation of a golf course.[1] ClubLink is seemingly conflating the 1985 Golf Club Agreement with the 1981 Agreement. It is the Golf Club Agreement which relates to the operation of

[1] See e.g. Factum of the Respondent, ClubLink Corporation ULC ["**ClubLink Factum**"] at paras. 123, 129.

the golf course – not the 1981 Agreement.

5. The 1981 Agreement reflects the 40% Principle as a restriction on how land may be developed. It applies to what is now ClubLink's land but also to many other lands it does not own. That the parties had more than a golf course in mind when establishing the principle is clear from the second paragraph of the 1981 Agreement's preamble: "*Campeau has proposed to designate approximately forty (40%) percent of the development area as recreation and open space [...]*." This principle relating to recreation and open space is confirmed in the agreement's first substantive clause at section 3, which confirms the 40% Principle and identifies the uses by which the land may be kept as undeveloped open space, such as parks and storm water management areas.

6. ClubLink also seeks to cast the 1988 Agreement as irrelevant to the restrictive covenant.[2] To the contrary, it is the 1988 Agreement which crystalized and codifies the 40% Principle as applying to precisely defined pieces of land.[3] It is also in this agreement where the parties state that the restriction shall run with and bind the burdened land for the benefit of the other land in Marchwood-Lakeside.[4]

7. That ClubLink would misconstrue the meaning of the 40% Principle is all the more puzzling in light of its own Assumption Agreement. Indeed, the preamble to the Agreement makes clear that the 'Forty Percent Agreement' (defined as the 1981 and 1988 Agreements) and the 'Golf Club Agreement' (defined as the original 1985 and1988 agreements) are separate and distinct.[5] Section 11 moreover contemplates the termination of the operation of the golf course and confirm that, in such a case, the land would be left as open space for recreational and natural environmental purposes. ClubLink agreed to all of this.

---

[2] See ClubLink Factum at para. 131.
[3] Schedule "A", 1988 Agreement, Exhibit "J" of Affidavit of Eileen Adams-Wright sworn October 24, 2019 ["**Adams-Wright October Affidavit**"], Application Record of the Applicant, City of the Ottawa ["**AR**"], Vol. I, Tab 2.
[4] S. 7, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 307.
[5] Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 789-90. See also s. 3*b*) of the Assumption Agreement.

C. The Agreements Were within the City's Jurisdiction

8. The Agreements are not void *ab initio* as an *ultra vires* exercise of the City's powers. The following provisions of the *Municipal Act* of 1980 may be invoked to justify the City's ascent to the 1981 and 1988 Agreements: sections 208(13) relating to drainage and watercourses, 208(51) relating to public parks, 208(57) relating to recreational areas and 104 relating to maintaining the welfare of a municipality's inhabitants. Again, the Agreements do not "*require a third party to use land in a particular way*,"[6] namely to operate a golf course. Rather, the Agreements establish and implement a principle by which the City can pursue its statutory objectives to, for example, maintain proper drainage and enable the creation of green recreational areas for the benefit of the municipality's inhabitants.

D. The City Did Not Fetter its Discretion

9. ClubLink conflates a situation where the developer, Campeau, fettered its discretion by contract with one where the municipality improperly fetters its legislative powers. In this case, the municipality has at all times retained its legislative discretion as required by law. *Pacific National*,[7] upon which ClubLink relies extensively, is the inverse of the present situation. In that case, the municipality agreed by contract to exercise its legislative powers in the future in a certain way in exchange for the developer undertaking works. In the case at bar, the City required the developer to agree by contract to limit its ability to otherwise proceed with a development in accordance with the *Planning Act*.

10. ClubLink's argument also conflates the fettering of legislative powers (impermissible) with the fettering of statutory powers (which is permitted).[8] The City has in no way tied its own hands with respect to its legislative authority. The Coalition maintains that the 40% Principle is enshrined in the

---

[6] ClubLink Factum at para. 69.
[7] *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, Book of Authorities of the Respondent, ClubLink Corporation ULC ["**ClubLink BoA**"], Tab 22.
[8] See e.g. *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58 at paras. 56-59, Book of Authorities of the Intervenor, Kanata Greenspace Protection Coalition ["**KGPC BoA**"], Tab 14.

Official Plan as a matter of policy and not contract.[9] Moreover, section 9 of the 1981 Agreement allows the City to stop using the area as greenspace, thereby preserving its legislative discretion on planning matters. The Coalition acknowledges that the restrictive covenant is subject to this eventuality. The only hands that are tied in this case are those of the proposed developer.

E. <u>The Restrictive Covenant Can Exist Independently from the Golf Course Provisions</u>

11. The Coalition supports and adopts the City's arguments relating to the rule against perpetuities. In the alternative, to the extent that any of the obligations relating to the golf course are deemed void, the Coalition submits that any part of section 5 of the 1981 Agreement relating to the golf course and which offends the rule may be severed so that the rest of the Agreement remains valid and enforceable.

i. Severance is appropriate in this case

12. Where part of a contract is unenforceable because enforcement would be contrary to statute or the common law, rather than setting aside the entire contract, courts may sever the offending provisions while leaving the remainder of the contract intact.[10] For example, in *Proto Manufacturing Ltd.*[11] a lease contained an option to purchase. The option was not made subject to the *Planning Act*, resulting in a violation of the Act. The Court found that this did not affect the validity of the lease because the option could be severed from the agreement. Similarly, in *Dyer Estate*,[12] the Court stated that a positive requirement, e.g. one necessitating the expenditure of money, may be severed from what is otherwise a negative covenant, e.g. a prohibition against storage of materials. The same applies here: the obligations relating to ClubLink's operating of the golf course may be severed so that only the restriction that the land stay open space remains.

---

[9] In this regard, ClubLink's development would require an amendment to the Official Plan, which it has thus far failed to seek.
[10] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152 at paras. 35-36, ClubLink BoA, Tab 13; see also *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, ClubLink BoA, Tab 14.
[11] *Proto Manufacturing Ltd. v. Deutsch* (1982), 37 O.R. (2d) 528 (H.C.J.), KGPC BoA, Tab 15.
[12] *Dyer Estate v. Tozer* (2008), 78 R.P.R (4th) 111 (Ont. S.C.J.) at para. 28, KGPC BoA, Tab 6.

ii. Severance keeps the bargain intact

13. ClubLink's argument to the effect that severing the provisions relating to the golf course would "*fundamentally disrupt the bargain struck by the parties*" and "*do violence*" to their intention is contradicted by their own statement as regards what underpins the entire agreement. The Coalition agrees with ClubLink's description of the bargain at paragraph 13 of its Factum:

> *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 concluded prior to the By-law being approved by Regional Council".*

14. Indeed, the *qui pro quo* is a) a Planning Committee recommendation, in exchange for b) an undertaking by the developer that 40 percent of the area in Marchwood-Lakeside remain open space. The essence of the bargain as described by ClubLink itself has nothing to do with the operation of a golf course. The open space obligation (or restriction) was to be honoured by four (4) ways, including but not limited to the "*<u>proposed</u> 18 hole golf course*."[13] Open space is the core of the parties' intention and severing the golf course provisions does not impact it.

15. In addition, if the entire agreement were declared void, that would result in ClubLink being unjustly enriched whereas severance allows the bargain to be maintained as much as possible.

F. <u>Conclusion</u>

16. Last, in complete response to ClubLink's assertion that the Agreements do not create a restrictive covenant, the Coalition directs this Honourable Court to paragraphs 25 to 46 of its Factum.

---

[13] S. 3, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 50.

February 21, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

____

CAZA SAIKALEY S.R.L./LLP

Alyssa Tomkins
Charles Daoust

SCHEDULE "A"

LIST OF AUTHORITIES

I. <u>Case Law</u>

1. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152
2. *Dyer Estate v. Tozer* (2008), 78 R.P.R. (4th) 111 (Ont. S.C.J.)
3. *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation*, 2019 BCCA 58
4. *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64
5. *Proto Manufacturing Ltd. v. Deutsch* (1982), 37 O.R. (2d) 528 (H.C.J.)
6. *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

REPLY OF THE INTERVENOR

CAZA SAIKALEY S.R.L./LLP
Lawyers | Avocats
350-220 Laurier West
Ottawa, ON K1P 5Z9

Alyssa Tomkins (LSO# 54675D)
Charles R. Daoust (LSO# 74259H)

Tel: 613-565-2292
Fax: 613-565-2087
ATomkins@plaideurs.ca
CDaoust@plaideurs.ca

Lawyer for the Intervenor,
Kanata Greenspace Protection Coalition