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

Respondents

and

KANATA GREENSPACE PROTECTION COALITION

Intervenor

REPLY FACTUM OF THE APPLICANT, CITY OF OTTAWA

February 21, 2019

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REPLY FACTUM OF THE APPLICANT

PART I - STATEMENT OF LAW & AUTHORITIES

A. Issue 1: Section 5(4) is a personal right and the rule against perpetuities does not apply

1. The rule against perpetuities has no application here. The rule originated as a common law solution to an ancient problem: how to loosen the "grasp of the dead hand" on the "hand of the living."[1] The purpose of the rule is "to prevent owners of property from exercising control over their property for too long a time after they [cease] to be owners" by restricting "the length of the interval which may elapse between the creation of a contingent interest and the vesting of that interest."[2]

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[1] *Irving Industries (Irving Wire Products Division) v Canadian Long Island Petroleums,* [1975] 2 SCR 715 at 727, 50 DLR (3d) 265 ("*Canadian Long Island Petroleums*"), Book of Authorities of the Respondent ("CL BOA"), Tab 4.
[2] *2123201 Ontario Inc. v Israel Estate*, 2016 ONCA 409 at para. 20 ("*Israel Estate*"), CL BOA, Tab 5.

2. The rule only applies to unvested equitable interests in land (e.g. options to repurchase land).[3] It has no application to personal contractual rights (e.g. rights of first refusal).[4]

3. Before applying the rule, a court must determine if the right at issue is an equitable interest in land. In doing so, the court's task is to determine whether the "true intent" of the parties was to give one party an interest in the land at the time the contract was made.[5]

4. The text of the 1981 40% Agreement and surrounding circumstances confirm that s. 5(4) creates a personal contractual right vested in the City and not an interest in land.

5. The language chosen by parties to the 1981 40% Agreement is inconsistent with an intention to create an equitable interest in land. Nothing in the 1981 40% Agreement suggests that s. 5(4) **by its nature** is intended to bind all future owners. The opposite is true. Section 11 of the 1981 40% Agreement states that the contract is only "**binding on the parties**." Section 13 clarifies that it is "binding upon the respective successors or assigns of each of the parties hereto." Future owners of the Golf Course Lands are neither successors nor assigns of Campeau.[6] The signing parties confined the obligations to themselves, which the Supreme Court has confirmed is inconsistent with an intention to create an equitable interest in land.[7] Any other interpretation disregards the express words of the agreement.

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[3] See e.g. *Halifax*, *Weinblatt*, *Jain & Loblaw* cited by the Respondent. These are all cases where a municipality sold land (usually to a developer) but maintained a right to repurchase if the developer did not do something within a certain time. In those cases the municipality was found to have an equitable interest in land.
[4] *Israel Estate* at para. 24, CL BOA, Tab 5.
[5] *Israel Estate* at para. 31, CL BOA, Tab 5.
[6] *Heritage Capital Corp. v Equitable Trust Co.*, 2016 SCC 19 at para. 47("*Heritage Capital Corp.*"), Supplemental Book of Authorities of the Applicant ("City's Supp. BOA"), Tab 5.
[7] *Heritage Capital Corp.* at para. 47, City's Supp. BOA, Tab 5.

6. Instead, s. 5(2) provides that future owners must enter into **new agreements** that reproduce the 1981 40% Agreement upon purchase of the Golf Course Lands. In fact, this is what all subsequent owners of the Golf Course Lands including ClubLink did.

7. The Respondent relies on terms in the 40% Agreement that refer to registration on title and agreements "running with the land" to suggest that the parties intended s. 5(4) to be an equitable interest in land. This is incorrect for three reasons.

8. First, references to "running with the land" only appear in the 1988 40% Agreement. This is consistent with that agreement, which addresses the identification of open space, including the Golf Course Lands, within plans of subdivision and construction within a subdivision.[8] This language reflects s. 36(6) of the *Planning Act*, 1980, which provides for agreements entered into as a condition of subdivision approval that are "registered" and enforceable against "all subsequent owners."

9. Second, merely registering a Notice of Agreement on title to land does not change the character of the obligations contained in the agreement. For example, registering joint use and maintenance agreements on title does not transform the contractual rights contained in such agreements into equitable interests.

10. Third, and in any event, the Supreme Court has held that the use of boilerplate language concerning land registration and covenants "running with the land" in an agreement does not confirm any intention to have all elements outlined in that agreement run with the land.[9]

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[8] The 1988 40% Agreement, Exhibit J to the Affidavit of Eileen Adams-Wright, sworn October 24, 2019 ("Adams-Wright October Affidavit"), Applicant's Record ("AR"), Vol. 1, Tab 2J, p. 302-345.
[9] *Heritage Capital Corp.* at para. 46, City's Supp. BOA, Tab 5.

11. The circumstances surrounding the execution of the 1981 40% Agreement are illuminating. Kanata never owned the Golf Course Lands. Kanata extended no "grasping" hand seeking to control property that it once owned. Campeau approached Kanata with an offer concerning lands Campeau owned. Kanata's interest was to preserve open space for recreational and natural environmental purposes (s. 3).[10] A golf course was particularized as one of the uses only because Campeau asked for it. Campeau saw a golf course as both a way to earn revenue and charge a premium for the houses it wanted to build and sell.[11]

12. The rule against perpetuities applies to certain **contingent** interests. The nature of the contingency is relevant to the application of the rule against perpetuities. For example, the essence of an option to purchase subject to the rule is that, "forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him".[12] This was the state of the law at the time the 1981 40% Agreement was signed and the parties are presumed to have been aware of it. The Court of Appeal recently held that the non-owner's control over an offer is relevant to (but not determinative of) whether the covenant is subject to the rule.[13]

13. The contracting parties did not describe the right conferred in s. 5(4) as an option. Kanata (and now the City) has no ability to control events that would trigger an offer to convey. The conveyance contemplated in s. 5(4) occurs only if ClubLink "desires to discontinue" operating the golf course and finds no willing buyer.[14] Unlike in *Israel Estate*, there is no expectation here that

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[10] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2F, p. 50.
[11] The Affidavit of Donald Kennedy, sworn October 25, 2019 ("Kennedy Affidavit"), para. 13, AR, Vol. 6, Tab 6, p. 1573.
[12] *Canadian Long Island Petroleums* at 732, CL BOA, Tab 4.
[13] *Israel Estate* at paras. 24, CL BOA, Tab 5.
[14] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2F, p. 51.

the right will ultimately crystallize because the contingency is not dependent on performance of the contract. ClubLink's discretion under s. 5(4) is entirely unfettered.[15]

14. This case is distinguishable from all of the municipal reconveyance cases relied on by ClubLink. The 1981 40% Agreement is analogous to the contracts considered by this Court in *Loyalist Township* and *Pelham Town*. In *Loyalist Township*, the Township's ability to purchase the historical property in question only materialized if and when the existing owner decided it wished to sell the property to a buyer without a historical preservation mandate. The landowner's discretion was unfettered.[16] Similarly, in *Pelham Town* the conveyance only crystallized once the landowner made a determination entirely within its own discretion.[17] This Court determined in both cases that there was no equitable interest in land subject to the rule against perpetuities.

15. In sum, the parties intended s. 5(4) to create a personal right not subject to the rule.

16. The Respondent argues that if s. 5(4) is unenforceable, the entire agreement is void. This argument has no legal foundation. If s. 5(4) is unenforceable due to the operation of the rule against perpetuities, the result is that the City's application for relief flowing solely from s. 5(4) will be dismissed. It has no bearing on the functioning or validity of the agreement as a whole.

B. Issue 2: Kanata had statutory authority to enter into the 1981 40% Agreement

17. Municipalities can exercise powers that are either expressly permitted by statute or fairly implied so as to enable a municipality to exercise its statutory functions.[18] Statutory powers are

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[15] *Israel Estate* at paras. 27-29, CL BOA, Tab 5.
[16] *Loyalist (Township) v The Fairfield-Gutzeit Society,* 2019 ONSC 2203 at paras. 34-36, City's Supp. BOA, Tab 6.
[17] *Pelham (Town) v Fonthill Gardens Inc.*, 2019 ONSC 567 at paras. 47-49, City's Supp. BOA, Tab 7. Note: this analysis concerns the second of two interests assessed in this decision.
[18] *Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13 at para. 17 ("*Rascal*"), City's Supp. BOA, Tab 8; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para. 18 ("*Spraytech*"), City's Supp. BOA, Tab 9.

afforded a "broad and purposive", "benevolent" or permissive interpretation[19] in deference to the municipal bodies serving the citizens that elected them.[20] Ultimately, "barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold".[21]

18. The objective of the 1981 40% Agreement is to provide for "open space for recreation and natural environmental purposes" (s. 3).[22] The provision of recreational areas and preservation of natural heritage and open space within municipalities, as well as the mechanism used by Kanata in this case to accomplish that objective, fall squarely within municipal jurisdiction, as set out in the *Municipal Act*, 1980.

19. For example, s. 208(51) of the *Municipal Act*, 1980 authorized municipalities to "acquire land for" and "establish and lay out" public parks. It also authorized municipalities to exercise powers conferred under the *Public Parks Act*, 1980 including the power to protect and regulate parks and receive the conveyance of park land upon conditions prescribed by a donor.[23] Similarly, s. 208(52) of the *Municipal Act*, 1980 authorized municipalities to "accept and take charge of land" dedicated as a park.

20. Furthermore, s. 208(57) authorized municipalities to carry out "Special Undertakings" including acquiring, erecting, altering, maintaining, operating and managing: parks, recreational areas, athletic fields, playgrounds, zoological or other gardens, natural history collections etc.

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[19] *Rascal* at paras. 18-20, City's Supp. BOA, Tab 8; *Croplife Canada v Toronto (City)*, 75 OR (3d) 357 at paras. 16-19 (ONCA) ("*Croplife*"), City's Supp. BOA, Tab 10; *R v Greenbaum,* [1993] 1 SCR 674 at 687-688, CL BOA, Tab 18.
[20] *Rascal* at para. 36, City's Supp. BOA, Tab 8.
[21] *Rascal* at para. 36, City's Supp. BOA, Tab 8.
[22] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2F, p. 50.
[23] *Public Parks Act*, RSO 1980, c 417, ss. 11(1), 12. Note: S. 3(4) of the *Public Parks Act* and ss. 208(57)(i,j) of the *Municipal Act*, 1980 confirm the municipality's authority over these matters under the *Public Parks Act*.

21. The plain purpose of the listed provisions is to give municipalities the ability to preserve certain lands for parks and recreation. This logically includes open space. The objective of the 1981 40% Agreement is entirely aligned with that statutory purpose.

22. The Respondent contends that the *Municipal Act*, 1980 does not provide jurisdiction for the 1980 40% Agreement because there is no explicit reference to such an instrument in the statute. This is fundamentally at odds with the required broad and purposive interpretation of the legislation. Even if the particular arrangement between Kanata and Campeau is not expressly referenced in the legislation, it is fairly implied that a municipality may need to enter into agreements with third parties to meet its statutory functions as described in the cited provisions.

23. Moreover, s. 5 of the *Municipal Act*, 1980 provides that where a municipality is authorized to acquire land (e.g. under s. 208), such powers include "the power to acquire by purchase **or otherwise**". The 1981 40% Agreement is an example. We note that this also responds to the Respondent's assertion that ss. 208(1-9) occupy the field in terms of the municipalities' contracting powers. They do not.

24. In the alternative, Kanata was authorized to enter into the 40% Agreement by virtue of its general authority under s. 104 of the *Municipal Act*, 1980 to provide for the "health, safety, morality and welfare of the inhabitants of the municipality".

25. The Supreme Court has confirmed that general provisions of this type apply in circumstances where matters going to the health and welfare of the public are not spoken for in other legislative provisions.[24] Section 104 allows municipalities to circumvent where appropriate

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[24] *Spraytech* at para. 22, City's Supp. BOA, Tab 9.

"the effect of the doctrine of *ultra vires*" so they can "respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation."[25]

26. Both the Supreme Court and the Court of Appeal have confirmed that efforts to manage the natural environment, which would include protecting open space for "natural environmental purposes", fall within a municipality's valid objective of addressing the health and welfare of its citizens as captured in provisions like s. 104.[26] Therefore, if the detailed provisions under s. 208 of the *Municipal Act*, 1980 do not contemplate the management of open space for environmental purposes, s. 104 does.

C. Issue 3: The 1981 40% Agreement does not fetter any municipal council as it is silent on planning outcomes and does not bind the planning authority

27. In 1981, Campeau recognized that the preservation of open space would be a fundamental consideration for the responsible planning authorities, and volunteered a proposal that would preserve a significantly larger area for this purpose than the Region or Kanata could have required as a condition of approval. This feature was the cornerstone of Campeau's proposal and was clearly relevant to the land use planning decision before the planning authorities.[27]

28. The Respondent's assertion that the 1981 40% Agreement impermissibly fetters the discretion of a municipal council is premised on a misrepresentation of the agreement and Campeau's proposal. The 40% Agreement was not entered into as a condition of approval of the Official Plan. When it was executed, the 1981 40% Agreement had no status under the *Planning*

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[25] *Spraytech* at paras. 18-19, City's Supp. BOA, Tab 9. Note: The SCC identifies s. 102 of the *Municipal Act*, 1990 as an analogous provision to the one at issue in *Spraytech*. Section 104 of the *Municipal Act*, 1980 is the predecessor to (and equivalent to) s. 102 of the later statute. ONCA confirmed in para. 2 of *Croplife* that *Spraytech* applies to s. 102.
[26] *Spraytech* at paras. 1, 27, City's Supp. BOA, Tab 9; *Croplife* at para. 72, City's Supp. BOA, Tab 10.
[27] Kennedy Affidavit at paras. 12, 15, 17, AR, Vol. 6, Tab 6, pp. 1573-1574.

Act.[28] This private agreement did not supplant the planning process. It confirms Campeau's commitment to create 40% open space, which was already part of the planning application before the planning authorities (s. 3).[29]

29. Under the 1981 40% Agreement, Kanata guaranteed no particular outcome with respect to the proposed planning amendment. In fact, it could not have done so because the Region was the ultimate planning authority **and not a party to the 1981 40% Agreement**. Furthermore, the contract does not commit future municipal councils to maintain any particular land use designation for the lands in question. Nothing in the agreement precludes council from reviewing its commitment to the agreement in general or proceeding with impactful amendments under the authority of the *Planning Act*. This is expressly contemplated in s. 5(5) of the agreement.[30]

30. The Respondent's reliance on statements by municipal officials does not assist. The subjective intentions of stakeholders are not probative for interpreting a contract.[31] Regardless, the pertinent minutes confirm that it was understood that the 40% open space requirement was a key consideration **of the planning approvals process**.[32]

PART II – ORDER REQUESTED

31. Accordingly, the Respondent's positions on the three identified issues ought to be rejected and the relief requested by the City granted.

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[28] Note: This status changed when the lands that were actually set aside for natural and recreational purposes on plans of subdivision and the principles first set out in the 1981 40% Agreement were incorporated into the 1988 40% Agreement and into subdivision agreements. At that point, obligations contained in the entire 40% Agreement had the status of obligations contained in an agreement contemplated by what was then s. 36(6) of the *Planning Act*, 1980.
[29] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2F, p. 50.
[30] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2F, p. 51.
[31] *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para. 59, Book of Authority of the Applicant, Tab 8.
[32] Exhibit A to the Affidavit of Paul Henry, sworn November 27, 2019, AR, Vol. 6, Tab 7A, pp. 1637-1639.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2020.

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SCHEDULE "A"

LIST OF AUTHORITIES

1	*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40
2	*2123201 Ontario Inc. v Israel Estate*, 2016 ONCA 409
3	*Croplife Canada v Toronto (City),* 75 OR (3d) 357
4	*Heritage Capital Corp. v Equitable Trust Co.,* 2016 SCC 19
5	*Irving Industries (Irving Wire Products Division) v Canadian Long Island Petroleums*, [1975] 2 SCR 715
6	*Loyalist (Township) v The Fairfield-Gutzeit Society*, 2019 ONSC 2203
7	*Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13
8	*Pelham (Town) v Fonthill Gardens Inc.*, 2019 ONSC 567
9	*R v Greenbaum,* [1993] 1 SCR 674
10	*Sattva Capital Corp. v Creston Moly Corp.,* 2014 SCC 53

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Municipal Act, RSO 1980, c 302

5 Where power to acquire land is conferred upon a municipal corporation by this or any other Act, unless otherwise expressly provided, it includes the power to acquire by purchase or otherwise and to enter on and expropriate.

103(1) Except where otherwise provided, the jurisdiction of every council is confined to the municipality that it represents and its powers shall be exercised by by-law.

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.

208 By-laws may be passed by the councils of all municipalities:

(51) For acquiring land for and establishing and laying out public parks, squares, avenues, boulevards and drives in the municipality or in any adjoining local municipality and, in respect of lands acquired for any of such purposes that are not under the general management, regulation and control of a board of park management, for exercising all of any of the powers that are conferred on boards of park management by the *Public Parks Act* [...].

(52) For accepting and taking charge of land, within or outside the municipality, dedicated as a public park for the use of the inhabitants of the municipality.

(57) For acquiring, erecting, altering, maintaining, operating or managing or granting aid for the acquisition, erection, alteration, maintenance, operation of management of monuments, memorial windows, tablets, parks, recreational areas, playgrounds, athletic fields, zoological or other gardens, natural history collections, observatories or works of arts, or other places of recreation and amusement, arenas, auditoriums, health or community recreation centres, stadia, museums, including public historical museums and similar buildings, within or outside the municipality that may or may not be in commemoration of the persons or any class thereof who served during any war in the armed forces of Her Majesty or Her Majesty's allies or in the auxiliary or ancillary services of such forces or in the merchant marine or any Corps of (Civilian) Canadian Fire Fighters for service in the United Kingdom.

[...]

(i) Members of a board of management appointed under this paragraph shall hold office at the pleasure of the council that appointed them and unless sooner remove shall hold office until the expiration of the term of the council that appointed them and until their successors are appointed and are eligible for reappointment.

(j) Where a member of a board of management appointed under this paragraph has been removed from office before the expiration of his term, the council may appoint another eligible person for the unexpired portion of his term.

***Municipal Act*, RSO 1990, c M.45**

102 General power.—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 and for governing the conduct of its members as may be deemed expedient and are not contrary to law.

***Planning Act*, RSO 1980, c 379**

36(6) Every municipality and the Minister may enter into agreements imposed as a condition to the approval of a plan of subdivision 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.

***Public Parks Act*, RSO 1980, c 417**

3(4) The council may by by-law appoint the board to manage, regulate and control any undertaking established under paragraph 57 of section 208 of the *Municipal Act* and thereupon the management, regulation and control thereof shall be vested in and exercised by the board, and the board has power to prescribe fees for admittance to or for the use of any such undertaking.

11(1) The board may pass by-laws for the use, regulation, protection and government of the parks, avenues, boulevards and drives, the approaches thereto, and streets connecting the same, not inconsistent with the provisions of this Act or of any law of Ontario.

12 Real and personal property may be devised, bequeathed, granted, conveyed or given to the municipal corporation for the establishment or formation of a park, or for the purpose of the improvement or ornamentation of any park of the municipality, and of the avenues, boulevards and drives and approaches thereto, and of the streets connecting therewith, and for the establishment and maintenance on park property of museums, zoological or other gardens, natural history collections, observatories, monuments or works of art, upon such trusts and conditions as may be prescribed by the donor.

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