CITATION: *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298
COURT FILE NO.: 19-81809
DATE: 2021/02/19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CITY OF OTTAWA Applicant	Kirsten Crain, Emma Blanchard, and Neil Abraham, for the Applicant
– and –	
CLUBLINK CORPORATION ULC Respondent	Matthew P. Gottlieb, James Renihan, and Mark R. Flowers, for the Respondent
– and –	
KANATA GREENSPACE PROTECTION COALITION Intervener	Alyssa Tomkins, and Charles R. Daoust, for the Intervener
	HEARD: July 13-15, 2020

REASONS FOR DECISION

LABROSSE J.

OVERVIEW

[1] The rule against perpetuities (the "Rule") is a legal principle taught in law schools and rarely applied thereafter by those who studied it. The purpose of the Rule is to limit the time that title to a property can be controlled after a person is no longer the rightful owner. Thus, a contingent interest in land must vest within 21 years. The Rule remains good law today.

[2] In the early 1980s, development in the former City of Kanata ("Kanata") was slow. Kanata wanted to stimulate growth and entered into a series of agreements with a developer to permit residential development in an area which included natural environment lands. Those agreements required the developer to maintain and operate a golf course in perpetuity in the area of the residential development. The main question in issue is if the agreements entered into by Kanata and the developer continue to be binding on the developer and its successors in title beyond the 21-year vesting period.

[3] On this application, the City of Ottawa (the "City") asks the Court to confirm that the Rule does not apply and that the agreements remain in force and effect in order to prevent the current owner from redeveloping the golf course lands without first offering the lands to the City. The outcome on this application turns on the interpretation of a series of agreements related to the golf course lands and the surrounding area.

[4] Specifically, the City applies for a determination of rights with respect to contractual agreements dating back to 1981. The agreements gave rise to the development of the Kanata Lakes Golf and Country Club (the "Golf Course") and the surrounding residential developments.

[5] The early agreements were between the former landowner, Campeau Corporation ("Campeau"), and the former local municipality, Kanata. The initial intent was to allow for the development of Campeau's lands, while ensuring that 40% of the area remained as open space. Within that open space would be a golf course, to be operated in perpetuity, subject to certain alternative scenarios.

[6] Fast forward almost 40 years, the original lands have been subdivided by various developers, including Campeau, and the land on which the golf course is situated (the "Golf Course Lands") has changed ownership three times. ClubLink Corporation ULC ("ClubLink") is the current owner of those lands. In addition, Kanata has amalgamated with other local municipalities and all of its rights under the various agreements have passed to the City.

[7] This Court is asked to interpret these agreements to determine (a) whether ClubLink is currently in breach of the agreements and, if so, (b) whether it is required to convey the Golf Course Lands to the City at no cost or to withdraw several development applications currently under appeal at the Local Planning Appeal Tribunal ("LPAT").

[8] The Kanata Greenspace Protection Coalition ("Coalition") has been granted leave to intervene. The Court is asked to consider the parties' respective rights and obligations going forward to determine if the Golf Course Lands are subject to a restrictive covenant.

THE EVIDENCE

[9] In the 1970s, there was little residential development in the area of the former City of Kanata. Purchasers were induced, with cash incentives, to buy homes in remote and rural Kanata.

[10] By 1979, Campeau had assembled 1400 acres of farmland and green space in Kanata, including a 9-hole golf course (the "Campeau Lands"), with a view to creating a residential development. That development was to be called the Marchwood-Lakeside Community.

[11] Campeau's development could not proceed unless both the Regional Municipality of Ottawa-Carleton ("RMOC") and Kanata amended their respective Official Plans to allow for residential development. Campeau's development also required amendments to secondary plans and the Kanata zoning by-law, as well as the approval of draft plans of subdivision. For its part, Kanata had an interest to maintain open spaces and natural areas, including the golf course.

[12] In 1980, Campeau began meeting with the members of Council for both the RMOC and Kanata 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 the Campeau Lands as open green space. This percentage represented a greater portion of the Campeau Lands than the City could otherwise require be maintained as dedicated parkland pursuant to the registration of a plan of subdivision.

[13] Campeau's offer to designate 40% of the Campeau Lands as recreation and open space was conditional on the requisite amendments being made to the Official Plans of both the RMOC and Kanata.

[14] Set out below is a chronology of the events leading up to the first relevant agreement between Kanata and Campeau:

Jan. 1981 - Kanata passes a resolution supporting Campeau's application for an amendment to the RMOC Official Plan (the "OPA"). RMOC staff does not support the proposed OPA; staff delivers a report to the RMOC Planning Committee recommending against the approval of the OPA. At one point, the Mayor of Kanata at the time instructs staff to revise its report to support the OPA.

Apr. 1981 - Campeau's proposal comes before the RMOC Planning Committee. The Regional Chairman notes that the proposal to operate the golf course in perpetuity is a major selling point. He is not, however, in favour of committing to the OPA until Campeau and Kanata have a development agreement that ensures community interests are protected. The record from the April 1981 meeting includes the following comments from the Regional Chairman:

> The Regional Chairman, A.S. Haydon expressed his concern on what connotation might be ascribed to the expression 'to set aside lands for open space' as used by Mr. Kennedy. It was noted that a major selling point of the development concept was the understanding that the golf course and certain high profile environmental land areas were to be retained, in perpetuity, for public use. However, for more than 8 months, there had been no agreement or methods to be used to achieve this objective. Accordingly, the Regional Chairman indicated his reluctance to make a commitment for a Regional Official Plan Amendment until there was some resolution or quid pro quo arrangement which would ensure that the community interests were protected.

The Committee recommends approval of the OPA on the condition precedent that, prior to the relevant by-law being approved by RMOC Council, Campeau and Kanata conclude an agreement which provides for approximately 40% open space in the area of the Marchwood-Lakeside Community.

May 1981 - Within two weeks after the April 1981 RMOC Planning Committee Meeting, a rough draft of such an agreement is in place. On May 26, 1981, Kanata and Campeau enter into an agreement (the "1981 Agreement"). The RMOC then approves the OPA which, in turn, permits the development of the Campeau Lands.

[15] Given the significance of the 1981 Agreement, it is important to have a clear understanding of its terms.

The 1981 Agreement

[16] Section 3 of the 1981 Agreement confirmed that Campeau's proposal was that approximately 40% of the total development area "shall" be left as open space for recreation and natural environment purposes. These areas included:

a. The proposed 18-hole golf course;

b. The storm water management area;

c. The natural environment areas; and

d. Lands to be dedicated for park purposes.

[17] Of note is that none of these areas were specifically designated in the 1981 Agreement. For example, s. 4 provides that the area for the golf course was to be mutually agreed upon by the parties. As for the storm water management and natural environment areas, they were to be as generally shown in Schedule "2" of the OPA. The lands to be dedicated for park purposes were to be determined at the time of development applications in accordance with the *Planning Act*.

[18] Section 5 of the 1981 Agreement sets out agreed-upon "Methods of Protection" and deals specifically with the Golf Course Lands. It begins by stating that the golf course would be operated by Campeau "in perpetuity". The remainder of s. 5 deals with the following subjects:

a. That Campeau may assign the management of the golf course without the prior approval of Kanata (s. 5(1));

b. That Campeau may sell the golf course (including the lands and buildings) provided that the new owner enters into an agreement with Kanata providing for the operation of the golf course in perpetuity and on the same terms (s.5(2));

c. That Kanata would have a right of first refusal in the event that Campeau received an offer for sale of the golf course (s.5(3));

d. That if Campeau desires to discontinue the operation of the golf course and can find no other operator, it shall convey the golf course (including lands and buildings) to Kanata at no cost and if Kanata accepts the conveyance, Kanata will operate or cause the land to be operated as a golf course subject to s. 9 (s. 5(4));

e. If Kanata does not accept the conveyance of the golf course, Campeau will have the right to apply for development of the golf course lands in accordance with the *Planning Act* (s.5(5)).

[19] Sections 6 and 7 address the storm water system and the natural environment areas. Those sections provide for the transfer of these lands to Kanata when they are capable of being defined as part of the future surveys or plans of subdivision. Section 8 provides that park lands were to be determined at the time of development applications in accordance with the *Planning Act*.

[20] Section 9 provides that in the event the land set aside for open space for recreation and natural environment purposes ceases to be used for those purposes by Kanata, then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no cost.

[21] Section 10 of the 1981 Agreement highlights (a) the purpose of the 1981 Agreement as being to establish the principle proposed by Campeau to provide 40% of the Campeau Land as open space and (b) that as development proceeds, further agreements about the open space areas may be required for the 40% principle to be implemented.

[22] Section 11 provides that the 1981 Agreement is binding on the parties and has full effect when the OPA is finally approved.

[23] Section 12 requires that the 1981 Agreement be registered against the Campeau Lands. It also provides that upon subdividing part of the Campeau Lands, those areas can be released from the 1981 Agreement provided that those areas are not part of the open space lands.

Related Agreements

[24] The 1981 Agreement contemplated that additional agreements would be required to set out in detail the future development of the Campeau Lands and the precise location of the open space lands for, amongst other things, the golf course, storm water management, natural environment and parks.

[25] In 1985, Campeau and Kanata entered into an agreement in an attempt to identify the Golf Course Lands (the "1985 Golf Club Agreement"). On December 29, 1988, the parties entered into a second golf club agreement, which set out the precise description of the Golf Course Lands based on legal descriptions and plans available at the time.

[26] As the development of the Campeau Lands progressed and plans of subdivision began receiving draft plan approval and being registered, the parties were able to better delineate the open space areas. Initially, the 1981 Agreement was registered on all the Campeau Lands. On December 20, 1988, Campeau and Kanata entered into an agreement (the "1988 Agreement") by which they identified the land that was to be set aside to meet the commitment to 40% open space. The 1981 Agreement and the 1988 Agreement would now only apply to the lands described in Schedule "A" of the 1988 Agreement. The Golf Club agreements were registered only on the title to the Golf Course lands.

[27] Furthermore, the 1988 Agreement referenced a "Concept Plan" that was incorporated by reference, as it was retained in the offices of the Municipal Clerk of Kanata. This Concept Plan described "generally the proposal for designation and development of the lands" in accordance with the 1981 Agreement.

[28] By 1985, portions of the Campeau Lands were developed as residential subdivisions. As a condition of subdivision approval, subdivision agreements had to implement the requirements of the 1981 Agreement and, thereafter, the 1988 Agreement. Conditions included in subdivision agreements recognized the requirement to dedicate land to Kanata in accordance with the 1981 Agreement.

[29] Many homes in the subdivision back onto the Golf Course Lands. In addition to their use as a golf course, the Golf Course Lands are used for walking and cross-country skiing.

Ownership

[30] In 1989, Campeau sold the Campeau Lands, including the Golf Course Lands, to another real estate development company, Genstar Development Company Eastern Ltd. ("Genstar"). Genstar, Campeau and Kanata entered into an agreement dated March 30, 1989 (the "Genstar Assumption Agreement"). Pursuant to s. 2 of the Genstar Assumption Agreement, Genstar assumed Campeau's obligations under the 1981 Agreement and the 1988 Agreement. Genstar later amalgamated with Imasco Enterprises Inc. ("Imasco").

[31] ClubLink purchased the Golf Course Lands in 1997 from Imasco. As part of the purchase, ClubLink, Imasco and Kanata entered into an assumption agreement dated November 1, 1997 (the "ClubLink Assumption Agreement"). Pursuant to that agreement, ClubLink agreed to assume all of Imasco's liabilities and obligations in respect of the 1981 Agreement, the 1988 Agreement and the 1985 Golf Club Agreement.

[32] The ClubLink Assumption Agreement sets out that every covenant, proviso, condition and stipulation in the 1981 Agreement and 1988 Agreement apply to and bind ClubLink in the same manner and to the same effect as if ClubLink had executed those agreements in the place and stead of Campeau or Imasco.

[33] Section 10 of the ClubLink Assumption Agreement contains similar wording as in s. 9 of the 1981 Agreement. Section 10 confirms that if the City is required to reconvey the Golf Course Lands because they ceased to be used for recreational and natural environmental purposes, then the City was to notify ClubLink prior to delivering the land to Imasco.

[34] In 2001, Kanata and a number of local municipalities amalgamated with the RMOC to form one municipal government under the City of Ottawa.

[35] In 2005, ClubLink Capital amalgamated with several other companies to form ClubLink Corporation, which subsequently changed its name to ClubLink Corporation ULC.

[36] ClubLink has owned and operated the Golf Course since 1997. It is a private club. To use the facilities, whether for golf or otherwise, one must be a member, a guest of a member or part of a pre-arranged booking such as a corporate event.

[37] The Golf Course 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 high of $22,500 in 2005 to $9,000. There are 21 other golf courses within a 35 km drive of the Golf Course, including 6 public courses, 8 semi-private courses and two other ClubLink courses.

[38] Limited use is made of the Golf Club Lands in the winter for cross-country skiing. There are much larger sites for cross-country skiing nearby which are more popular.

ClubLink Explores Redevelopment Options

[39] On December 14, 2018, ClubLink announced that it was pursuing options for alternative use of the lands. ClubLink announced that it had entered into a partnership with developers Minto Communities Canada and Richcraft Homes to assist with redevelopment plans for the lands. When the announcement was made, ClubLink emphasized the declining interest in golf and the fact that golf courses across the country were struggling.

[40] On January 24, 2019, the City Solicitor wrote to ClubLink's former counsel. The City advised that it had not received notice from ClubLink (a) with respect to a proposed sale of the golf course or (b) to the effect that ClubLink desires to discontinue the operation of the golf course. The City requested that ClubLink provide formal notification if ClubLink should later "determine" that it would discontinue operating the golf course.

[41] On October 8, 2019, ClubLink submitted planning applications for a zoning by-law amendment and approval for a plan of subdivision. In those applications, ClubLink sought permission to redevelop the Golf Club Lands for residential and open space purposes.

[42] ClubLink's planning applications envision the redevelopment of the Golf Club lands for single family homes, townhouses and other medium-density housing. The redevelopment plans also include significant amounts of new, permanent, publicly accessible green space – much more than is currently available to the public. The applications, if granted, would permit the construction of 545 detached dwellings, 586 townhouse dwellings and 371 apartment dwellings.

[43] 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. The parks would accommodate a variety of different public uses, such as play structures, splash pads, trails and dog parks. None of these facilities exist at the Golf Course, a private club that generally operates from April to October each year.

[44] As of the date of this hearing, the City had not yet rendered a decision on either of the planning applications. In 2020, ClubLink appealed to LPAT the City's failure to make a decision on the planning applications.

[45] ClubLink maintains that it has never provided notice to the City that it desires to discontinue the operation of the Golf Club; ClubLink asserts that no such decision has been made.

Claim for Restrictive Covenant

[46] The Coalition has intervened in this proceeding. The Coalition seeks a declaration that the "Current Lands" (as defined in the 1988 Agreement) are subject to a restrictive covenant which requires that 40% of the total development area for the Kanata Marchwood-Lakeside Community remain as open space for recreation and natural environment purposes.

[47] The Coalition represents the interests of many landowners in what was known as the Kanata Marchwood-Lakeside Community. That community now includes the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court.

[48] The factual matrix on which the Coalition relies in support of the claim for a restrictive covenant is the following:

a. The 40% principle was set out in the 1981 Agreement and required further study to determine exactly where the open space land would be located;

b. The 1988 Agreement adopted and amended the 1981 Agreement to limit the application of the 40% principle to the lands "described as Schedule 'A'", which the 1988 Agreement defines as the "Current Lands";

c. The Current Lands were to be developed in accordance with a Concept Plan approved by Kanata by resolution, which was incorporated by reference into the 1988 Agreement. The Concept Plan described generally the proposal for designation and development of the lands in accordance with the 1981 Agreement;

d. Section 7 of the 1988 Agreement states that the 1981 Agreement and the 1988 Agreement shall run with and bind the Current Lands for the benefit of the Kanata Marchwood-Lakeside Community;

e. Pursuant to the ClubLink Assumption Agreement, ClubLink agreed to be bound by the covenants and obligations set out in the 1981 Agreement and 1988 Agreement;

f. Section 11 of the ClubLink Assumption Agreement includes the following:

> If the use of the Golf Course Lands as a golf course or otherwise as Open Space Lands is, with the agreement of the City, terminated, then for determining the above 40% requirement, the Golf Course Lands shall be deemed to be and remain Open Space Lands.

g. The 1988 Agreement is registered on title of every residential lot in Kanata Lakes.

Coalition's Motion to File Additional Evidence

[49] Following the argument of this application, and while the decision of the Court was under reserve, the Coalition filed a Motion Record for leave to introduce additional evidence. Specifically, the Coalition seeks to introduce into evidence the affidavit of Peter van Boeschoten, sworn November 25, 2020. A concept plan is attached as an exhibit to that affidavit.

[50] In his affidavit, Mr. van Boeschoten states that he participated in a 2005 hearing before the Ontario Municipal Board ("the 2005 OMB Hearing"). The evidence before the Board on that hearing is said to have included a concept plan for the Kanata Lakes development area prepared by Campeau Corporation and dated December 4, 1987 (the "December 1987 Concept Plan").

[51] The Coalition's Motion Record includes the Affidavit of Barbara Ramsay dated November 25, 2020. In her affidavit, Ms. Ramsay provides the explanation as to why the December 1987 Concept Plan was not found until now.

[52] In response to the Coalition's motion, ClubLink takes the position that it would be inappropriate to admit new evidence at this point, more than four months after the conclusion of the hearing. That position is set out in a letter from ClubLink's counsel and sent to the court.

[53] ClubLink states that the December 1987 Concept Plan has no bearing on the issues in this application. It does not, however, oppose the admission of that concept plan provided that the Court does not conclude that it is the same as the Concept Plan referred to in the 1988 Agreement. ClubLink submits that the Court is not in a position to reach a finding in that regard without a full contested hearing following the delivery of additional affidavit materials and, in all likelihood, cross-examinations on the additional affidavits.

[54] ClubLink relies on the preamble to the 1988 Agreement, wherein the Concept Plan is defined in the following way:

> AND WHEREAS the City, by Council Resolution has approved a concept plan submitted by Campeau describing generally the proposal for designation and development of the lands in accordance with the Forty Percent Agreement, (the "Concept Plan") a copy of which Concept Plan is retained in the offices of the Municipal Clerk of the City;

[55] The Concept Plan is not attached to the 1988 Agreement and there is no mention of the date of the Concept Plan in the 1988 Agreement.

[56] The Coalition's motion is dealt with as part of the analysis on the restrictive covenant.

THE ISSUES

[57] The issues to be determined on this application are as follows:

Issue 1: The Validity of the 1981 Agreement.

1(a): Does the 1981 Agreement create interests in land that are void for perpetuities?

1(b): Was the 1981 Agreement *ultra vires* the powers of Kanata when it was authorized by By-law?

1(c): Was the entering of the 1981 Agreement an unlawful fettering of Municipal Council Discretion?

Issue 2: If s. 5(4) and/or s. 9 of the 1981 Agreement are void for perpetuities, can they be severed from the 1981 Agreement so that the rest of the 1981 Agreement remains valid and binding?

Issue 3: Has ClubLink determined that it desires to discontinue the golf course use?

Issue 4: Is the City required to continue to operate a golf course on the Golf Course Lands?

Issue 5: Is ClubLink bound by a restrictive covenant which prevents it from redeveloping the Golf Course Lands?

Issue 1: The Validity of the 1981 Agreement

Interpretation of Contracts

[58] In determining what a party's contractual obligations are, the role for the reviewing court is to identify the shared intention of the parties at the time of contracting: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47. The Supreme Court of Canada in *Sattva* identified that the "interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction": at para. 47.

[59] The approach recommended in *Sattva* was applied by the Court of Appeal for Ontario in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, rev'd in part on other grounds *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60. The Court of Appeal described, as follows, the steps to be taken when interpreting a contract:

> (i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;

> (ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> (iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[60] The objective of considering the factual matrix is to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva*, at para. 57. The Supreme Court of Canada cautioned, however, about the use that can be made of the surrounding circumstances as part of the interpretive process. Surrounding circumstances cannot be used to deviate from the text so as to create a new agreement: *Sattva*, at para. 57.

[61] With respect to post-contractual conduct, the Court of Appeal for Ontario recognized that such conduct can be an unreliable guide to the parties' intent. As a result, evidence of post-contractual conduct should only be admitted if the contract remains ambiguous following consideration of its text and factual matrix: see *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, 424 D.L.R. (4th) 588, at para. 63, leave to appeal to S.C.C. refused, 38247 (March 28, 2019).

Issue 1(a): Does the 1981 Agreement create interests in land that are void for perpetuities?

Applicable Law

[62] The basic principles surrounding the application of the Rule Against Perpetuities are not in dispute in this proceeding. Simply put, a contingent interest in land is required to vest within a period of time known as the perpetuity period. In Ontario, that period is 21 years. For example, if a person has an option to purchase land and does not exercise it with the 21-year period, the option to purchase is void.

[63] The origins of the Rule were discussed in *Canadian Long Island Petroleums Ltd. et al. v. Irving Industries Ltd.*, [1975] 2 S.C.R. 715. At pp. 726-727, the Court quoted from G.C. Cheshire, *The Modern Law of Real Property*, 10th ed. (London: Butterworths, 1967), at pp. 234-235 and 240, in which the reasoning for the Rule is described as follows:

> The history of the rules whereby settlors have been prevented from limiting remote interests, is the history of a conflict between two antagonistic ideas. On the one hand there is the desire of the man of means to regulate the future enjoyment of his property for as long a period as possible. The right of making a settlement or a will is a potent weapon in the hands of a declining man, and unless human nature is transformed, the opportunity it offers of fixing the pecuniary destinies of the coming generations will not be neglected. A landowner, unless he gives thought to the fiscal consequences, is not always content to leave a large estate at the free disposal of a son. Old age especially, satisfied with its own achievements and often irritated by the apparent follies of a degenerate time, is inclined to restrain each generation of beneficiaries within close limits, and to provide for a series of limited interests. A landowner views the free power of alienation with complacency when it resides in his own hand, but he does not feel the same equanimity with regard to its transfer to others.
>
> …
>
> The perpetuity period is defined by Cheshire at p. 240:
>
> At common law, the vesting of an interest may be postponed during the lives of persons in being at the time when the instrument of creation takes effect, plus a further period of twenty-one years after the extinction of the last life. Any interest so limited that it may possibly vest after the expiration of this period is totally void.

[64] The Rule is intended to prevent an owner of land from exercising control over the land for too long after they are no longer the rightful owner. In most cases, the perpetuity period is 21 years following the death of the owner. It is well settled that corporations are not subject to the "extinction of the last life" criteria and that the 21 years begins to run from the date that the interest in question is created.

[65] In *Canadian Long Island*, the Supreme Court of Canada differentiated between an interest in land, such as an option to purchase, and a contractual right, such as a right of first refusal. A common feature of an option to purchase is that the optionee maintains control over the realization of the contingent event: at p. 732. A right of first refusal is a personal right because it is created by contract, it does not create an interest in land and it is not subject to the Rule: at p. 735.

[66] More recently, the Court of Appeal for Ontario considered the difference between an interest in land under an option to purchase and a contractual or personal right under a right of first refusal: *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641. The facts in *Israel Estate* are straightforward. In 1931, a landowner sold a gravel quarry to operators, who granted an option back to the vendor. The option allowed the vendor to reacquire the property once the gravel in the quarry was removed by the operators. Nearly 85 years later, after the gravel had been removed, the successors to the operators refused to honour the option to reacquire. The Court of Appeal applied the Rule and determined that the event allowing the owner to repurchase had to vest within 21 years after the death of the original owner. In *Israel Estate*, the 21-year period ended in 2001.

[67] The Court of Appeal was required to determine whether the option provided to the owner was an option to purchase or a right of first refusal. The Court described an option and a right of first refusal in detail at paras. 19-22 (footnote omitted):

> **(a) Options to Purchase**
>
> [19] An option to purchase gives the option holder the right but not the obligation to purchase land. In *Canadian Long Island Petroleums*, Martland J. succinctly defined an option to purchase and emphasized the option holder's control over the exercise of the option. In his words at p. 732: "the essence of an option to purchase 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." An option holder has an equitable interest in the land, contingent on the holder's election to exercise the option. Because an option to purchase creates an interest in land, it is specifically enforceable at the time the option is granted. But to remain valid the option must be exercised within the perpetuity period.
>
> [20] The perpetuity period is "not later than twenty-one years after some life in being at the creation of the interest": see, for example, *Sutherland Estate v. Dyer* (1991), 1991 CanLII 7120 (ON SC), 4 O.R. (3d) 168 (Gen. Div.), at p. 171. An interest that vests outside this period is void. As Killeen J. explained in *Sutherland Estate*, at p. 172, the rule against perpetuities is a rule invalidating interests that vest too remotely. And it is a rule that applies not just to owners of land, but also to holders of contingent interests, such as options to purchase.
>
> > It is stating the obvious to say that the central purpose of the rule was to prevent owners of property from exercising control over their property for too long a time after they ceased to be owners. However, the rule does not implement this purpose by restricting the duration of interests in trusts or other interest in property. Rather, the rule restricts the length of the interval which may elapse between the creation of a contingent interest and the vesting of that interest. Thus, the rule applies only to contingent interests and, to that extent, it has been said by many commentators that the rule should be really characterized as a rule against remoteness of vesting.

> [21] In the present case, the perpetuity period ended in 1952 (21 years after the Agreement was signed) or 2001 (21 years after Harold Israel died). It is unnecessary to decide which date is appropriate. If the Agreement is an option to purchase, which creates an interest in land, that interest still has not vested; therefore even if 2001 is the appropriate date, the option to purchase is void.
>
> **(b) Rights of First Refusal**
>
> [22] A right of first refusal is a commitment by the owner of land to give the holder of the right the first chance to buy the land should the owner decide to sell. Typically, where a land owner is prepared to accept an offer to purchase from a third party, the holder of the right of first refusal will be given an opportunity to match the offer; or, when an owner of land decides to sell and fixes the sale price, the holder of the right of first refusal will be given the first chance to buy at the fixed price. In these typical right of first refusal scenarios, the owner has an unfettered discretion whether to sell and when to sell.

[68] At para. 24, the Court of Appeal summarized the application of the Rule to both an option to purchase and a right of first refusal:

> [O]ptions to purchase create immediate interests in land; rights of first refusal do not. Options to purchase are specifically enforceable; rights of first refusal are not. And options to purchase are subject to the rule against perpetuities; rights of first refusal are not. Finally, according to *Canadian Long Island Petroleums*, options to purchase give the option holder control over the decision to effect a conveyance. Rights of first refusal give the land owner control over the decision to convey.

[69] The "first option to purchase" in *Israel Estate* led the Court of Appeal to conclude that the rights created were neither a pure option to purchase nor a pure right of first refusal. The operator did not have an unfettered discretion to decide if and when it would sell the land as one would expect in a pure right of first refusal. In addition, exercising the option was beyond the control of the original owner and the option could not be enforced when the agreement, which included the option, was made.

[70] The Court of Appeal analyzed the issue of control. The Court concluded that control is not determinative of whether an equitable interest in the land was created: *Israel Estate*, at para. 32. Rather than focus on the issue of control, it is better to focus on the true intent of the parties at the time the agreement was made: *Israel Estate*, at para. 38. Indicia of the intention of the parties include the purpose of the agreement, the context in which it was made, its terms and the conduct of the parties. Those indicia are factors that assist in determining whether an agreement gives rise to an immediate equitable interest in the land: *Israel Estate*, at para. 38.

[71] The more traditional circumstances where a right to repurchase has been found to create a contingent interest in land are seen in municipal reconveyance cases – those in which a municipality sells land to a developer with an obligation to develop the land within a certain timeframe: see *City of Halifax v. Vaughan Construction Company Ltd. and The Queen*, [1961] S.C.R. 715; *Weinblatt v. Kitchener (City)*, [1969] S.C.R. 157; and *Jain v. Nepean (City)* (1992), 9 O.R. (3d) 11 (C.A.).

[72] In the application before this Court, the City relies on *Loyalist (Township) v. The Fairfield-Gutzeit Society*, 2019 ONSC 2203, 4 R.P.R. (6th) 84. In that case, the subject agreement provided that the Township's ability to repurchase a historical property only materialized if and when the existing owner decided that it wished to sell the property to a buyer without a historical preservation mandate. In *Loyalist Township*, the Court distinguished the subject agreement from the agreement in *Israel Estate*. In the latter, there was an expectation that the option to repurchase would crystallize at some point (i.e., once the gravel was removed). In *Loyalist Township*, the right to repurchase arose only if the Society wished to dispose of its interest to an organization that had different objectives from those of the Society: *Loyalist Township*, at para. 35. Thus, there was no expectation that the right to repurchase would crystallize.

[73] The City also relies on *Pelham (Town) v. Fonthill Gardens Inc.*, 2019 ONSC 567, 85 M.P.L.R. (5th) 264, where Pelham brought an application seeking a declaration that Fonthill did not hold an option to purchase a certain block of land against which a Notice of Option to Purchase was registered. There were two properties in question. The parties agreed that Fonthill had an option to purchase on the first property. The agreement for the second property included an option to purchase in the event "the Town does not require the Town Lands for its own purposes": *Pelham*, at para. 48. At issue was whether the agreement for the second property included an interest in land or a personal right.

[74] The Court in *Pelham* followed the analysis in *Israel Estate* and concluded that (a) control, although a factor to be considered, is not determinative, and (b) one must look to the intent of the agreement: *Pelham*, at paras. 50-51. The limitations on when the option to purchase arose removed the right to purchase out of the realm of an option to purchase, as a result of which it was found to be a personal right: *Pelham*, at para. 47.

Analysis

True Intent

[75] I begin the analysis by highlighting the intent of the parties as expressed in s. 10 of the 1981 Agreement: *to establish the principle as proposed by Campeau to provide 40% of the Campeau Lands as open space*. Campeau, while abiding by the 40% principle, incorporated a golf course to be operated in perpetuity; in doing so, Campeau made productive use of a significant portion of the open space lands.

[76] While the overall intent of the parties to the various agreements is clearly relevant, it is also important to look at the specific paragraphs where contingent interests are created to determine if the true intent of those specific paragraphs was to create an interest in land.

[77] I turn first to s. 5(4) of the 1981 Agreement which requires Campeau to convey the Golf Course Lands to Kanata if it desires to discontinue the operation of the golf course. When interpreting s. 5(4), the context must be considered. This provision is clearly an alternative option should the principal objective of operating a golf course in perpetuity be discontinued by Campeau. It is a mechanism which prevents the lands from falling into a vacuum of uncertainty, should Campeau discontinue the operation of the golf course. Thus, even when the section is considered in isolation, the true intention is to allow the City to take over the Golf Course Lands and maintain the 40% open space requirement.

[78] The same can be said for s. 9 of the 1981 Agreement which requires Kanata to reconvey lands to Campeau should Kanata no longer wish to use a portion of the land set aside for open space for recreation and natural environment purposes. The intent here is to identify the limited circumstance where Kanata must reconvey part of the lands back to Campeau. Otherwise, Kanata retains ownership of the land conveyed under s. 5(4). This provision provides a mechanism for the use of the land to evolve beyond the open space purpose. However, the intention behind s. 9 is clearly for this provision only to apply (a) if Campeau discontinues the Golf Course and conveys the Golf Course Lands to Kanata and (b) if Kanata were no longer to maintain a part of the open space lands as open space for recreation and natural environment.

[79] Sections 5(4) and 9 of the 1981 Agreement are "off-ramps", intended only to apply if the original intent changes and the parties to the 1981 Agreement contemplate alternative scenarios for the use of the subject lands.

[80] By contrast, in *Israel Estate*, the Court of Appeal found that the true intent was to give Israel an interest in the land at the time the agreement was made. It was clear that the owner's expectation was that the lands would be returned to him once the removal of the gravel was complete. The absence of an element of control was less important because the true intent of the agreement called for the control to be in the hands of the gravel operator while waiting for the land to be returned to the vendor.

[81] The structure of the transaction in *Israel Estate* included that the land would be conveyed *when* the gravel was removed. It was not a question of *if* the gravel would be removed. There was clearly an expectation that the option would arise. The only uncertainties or issues were (a) the pace at which the gravel would be removed, and (b) whether the operator had reasonably exercised its discretion to determine when the removal of the gravel was completed: *Israel Estate*, at para. 27.

[82] In *Loyalist Township*, Mew J. distinguished from *Israel Estate*. In the latter case, there was clearly an expectation that the option to repurchase would crystallize at a certain point. Justice Mew contrasted the situation in *Loyalist Township* where the right to repurchase "would only arise in the event that the Society wished to dispose of its interest in the properties other than to an organization having similar objects to the Society": *Loyalist Township*, at para. 35. This was precisely the situation for Kanata under s. 5(4) of the 1981 Agreement. I find that Kanata did not have an expectation that the right to purchase would crystallize because the golf course was intended to operate in perpetuity.

[83] Kanata's situation is different from that of the original owner in *Israel Estate*, because the true intent of the 1981 Agreement does not involve Kanata ever becoming the owner of the Golf Course (lands and buildings). The potential for Kanata to become the owner of the Golf Course is nothing more than an "off-ramp" in the event that the operation of the golf course is not continued in accordance with the initial objective to operate the Golf Course in perpetuity.

[84] The heading at s. 5 of the 1981 Agreement is "Methods of Protection" and is instructive for this analysis. The provisions of the 1981 Agreement from s. 5 and onward do exactly what is described; they provide mechanisms to maintain the 40% principle and protect the open space lands. Section 5 and the subsequent sections are safeguards which preserve the true intent of maintaining the 40% principle.

[85] There is no doubt that both s. 5(4) and s. 9 of the 1981 Agreement create contingent interests. These potential conveyances are consequential events but do not form part of the true intent of maintaining the 40% open space principle. They are not interests in land created at the time the parties entered into the 1981 Agreement.

[86] In the case of s. 5(4), the contingent interest to Kanata gives Campeau the option to discontinue the golf course operation and maintain the 40% open space principle by allowing Kanata to take over the Golf Course operation. The continued operation of the Golf Course is essential to maintaining the 40% open space principle.

[87] Section 9 is also a provision that only applies following a change in circumstances which deviates from the initial intent. There is no expectation that Kanata will cease to maintain any of the land set aside for open space other than for recreation and natural environment purposes. This includes the Golf Course Lands following a conveyance under s. 5(4). This section makes it clear that so long as the open space lands continue to be used for recreation and natural environment purposes, Campeau has no right to a reconveyance. This ensures that the 40% principle will be maintained and limits the circumstances where a reconveyance could lead to a change of use. Once again, this provision acts as an "off-ramp" for an alternative scenario.

[88] Whether it is a conveyance of land to Kanata under s. 5(4) or a limited right to a reconveyance to Campeau under s. 9, these sections give effect to the true intended purpose: maintaining the 40% open space principle.

[89] I also find that the structure of the 1981 Agreement supports the conclusion that the true intent of the agreements did not include creating an interest in land in favour of Kanata. The 1981 Agreement is only binding on the parties (s. 11) and their respective successors or assigns (s. 13). It is not intended that the obligations of the parties, as set out in those agreements, shall be automatically binding on all future owners of the Golf Course Lands. For example, subsequent owners are required to sign assumption agreements, as did both Genstar and ClubLink. Thus, the binding nature of the 1981 Agreement is contractual. This is further indicia of the intention of the parties.

ROFR Language vs. Option Language

[90] ClubLink submits that the contingent interests created in s. 5(4) and s. 9 were intended to be interests in land. ClubLink argues that the difference in wording between s. 5(3) and s. 5(4) clearly demonstrates that s. 5(4) grants an interest in land. ClubLink also argues that the differences in wording among s. 6 (stormwater management lands), s. 7 (natural environment lands) and s. 8 (parklands) demonstrate that s. 9 grants an interest in land.

[91] Section 5(3) contains language associated with a right of first refusal, and those terms are used in the section. Section 5(4), on the other hand, does not use right of first refusal language. I fail to see how these differences in language are determinative of anything. It does not follow that because right of first refusal language is used in s. 5(3) that anything else must be intended to mean the opposite. The language in s. 5(4) is not typical of language used to define an option to purchase. As highlighted in *Israel Estate*, there is no standard language to grant either a right of first refusal or an option; the focus is on the intention of the parties.

[92] I agree with the City that ss. 6-8 of the 1981 Agreement do not create interests in land. The purpose of these sections is not to give Kanata a right to have these areas conveyed to it. In 1981, the areas described in ss. 6-8 of the 1981 Agreement were not capable of definition. The process of defining those areas was to be carried out at some future point, through other agreements or through the planning process in the case of the parkland.

[93] In the event of a breach of ss. 6-8 of the 1981 Agreement, Kanata's remedy lies in contract and likely not by way of specific performance. The latter remedy would not be available because the lands addressed in those sections had not been identified when the parties entered into the agreement.

[94] In summary, the wording of ss. 5(4) and 9 of the 1981 Agreement is not traditional option to purchase wording. Neither are they right of first refusal type wording. The wording of those sections does not, in itself, further the analysis.

Control

[95] Control, as a factor, while not determinative, is relevant to the outcome on Issue No. 1. It is one factor to consider in determining the nature of the interest being created in ss. 5(4) and 9 of the 1981 Agreement.

[96] It is well accepted that in the case of a right of first refusal, control lies with the owner. Only the owner may decide whether to offer the property for sale. Only the owner may decide to consider an unsolicited offer from a third party. In either case, the holder of the right has no control over the triggering event and thus the right is purely personal or contractual. In the case of the option to purchase, it is typically the option holder who has the right but not the obligation to purchase land.

[97] Under s. 5(4), the control rests with Campeau in the event it decides to discontinue the operation of the golf course. There is nothing Kanata can do to trigger a conveyance of the Golf Course. Under s. 9, the control rests with Kanata or such other owner, where any of the land set aside for open space ceased to be used for recreation and natural environment purposes. Once again, the control rests with the then owner of the land.

[98] I find that the elements of control, as set out in ss. 5(4) and 9, are indicative of the parties' intention of creating personal contractual rights as opposed to interests in land.

Registration

[99] Section 12 of the 1981 Agreement calls for the registration of the 1981 Agreement against the Campeau Lands. ClubLink submits that the City registered the 1981 Agreement and all other agreements because the City had an interest in the Golf Course Lands. In support of this position, ClubLink contends that in order to register the 1981 Agreement, s. 78 of the *Land Titles Act*, R.S.O. 1970, c. 234 ("*LTA*"), requires that one have an "interest in land" and that if it was not a property interest, there would no right to register although some may still succeed.

[100] Based on the decisions in *Pelham* and *Benzie v. Hania*, 2012 ONCA 766, 112 O.R. (3d) 481, I reject ClubLink's argument in that regard.

[101] In *Pelham*, Lococo J. found that even if the right in question was not an option to purchase, notice of a purchase right may still be registered. Justice Lococo relied on s. 71(1) of the *LTA* (previously s. 78 of the *LTA*) in concluding that any person interested in land may protect their interest by way of registration.

[102] In *Benzie v. Hania*, the Court of Appeal for Ontario held that, pursuant to s. 71(1) of the *LTA*, a right of first refusal was capable of being registered on the title to the land. The Court specifically held that registration rights are not limited to equitable interests in land: *Benzie*, at para. 76.

[103] I conclude that the registration of 1981 Agreement on title to the Campeau Lands is not an indicium of the true intention of the parties. It is merely notice to the public of a right or an interest affecting the land. At the same time, it is still a factor to be taken into consideration when determining the true intention of the parties.

Conclusion: The Rule Against Perpetuities

[104] I conclude that ss. 5(4) and 9 of the 1981 Agreement continue to be valid and enforceable. They are not void for perpetuities. The contingent interests to a conveyance granted in the 1981 Agreement are personal contractual rights and not interests in land. In summary,

- Section 5(4) was not intended to allow for Kanata to eventually own and operate the Golf Course. This section created nothing more than an "off-ramp" to ensure that the true intention of the 1981 Agreement – to maintain 40% open space within the Campeau Lands through the use of a golf course – was carried out;

- Section 9 also was not intended to create an interest for Campeau to regain possession of the lands no longer used for open space. The intent is to provide an alternative should Kanata no longer use the land for open space. It is to allow for an alternate use of the land should Kanata change the anticipated use.

- Both ss. 5(4) and 9 create contractual rights that may or may never crystallize. The question is not *when* the ownership changes but *if* the ownership changes;

- Support for this conclusion is also found in (a) the absence of any control given to Kanata to trigger the conveyance of the Golf Course Lands, and (b) the absence of any control to Campeau to trigger the reconveyance of open space lands;

- The difference in the language used in s. 5(3) (ROFR) and s. 5(4) does not influence the analysis of s. 5(4);

- The registration of the 1981 Agreement on title to the Campeau Lands is also not determinative of the creation of an interest in land. It is notice to the public.

Issue 1(b): Was the 1981 Agreement ultra vires the powers of Kanata when it was authorized by By-law?

[105] ClubLink also submits that in 1981, there was no statutory power authorizing Kanata to enter into the 1981 Agreement. Kanata did not possess a general power to contract, and there was no statutory provision authorizing an agreement of this nature which requires Campeau to operate a golf course in perpetuity. Thus, the 1981 Agreement was *ultra vires* Kanata's powers and is *void ab initio*.

[106] The parties agree that the authorization to enter into the 1981 Agreement would have been done by by-law but that actual by-law is not part of the evidence in this application. Its challenge to Kanata's authority is focussed solely on the aspect of the 1981 Agreement that compels Campeau to operate a golf course in perpetuity, failing which it must convey the land. ClubLink does not challenge the other provisions of the 1981 Agreement. Specifically, it does not challenge the parkland provisions or the provisions for the storm water management areas and the natural environment areas.

Applicable Law

[107] In 2001, the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "2001 Act"), resulted in a change to the approach to interpreting municipal powers. Pursuant to that statute, municipalities now have "the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act": s. 9. These powers include general powers to contract, except where specifically excluded in the statute.

[108] The determination of Issue (1)(b), however, is reached based not on the 2001 version of the statute, but on the version of that and other relevant statutes that were in force in the 1980s, when the agreements were authorized by the relevant municipal authority.

[109] At the time of execution of the 1981 Agreement, Kanata and the RMOC derived their authority from the *Municipal Act*, R.S.O. 1970, c. 284 (the "1970 Act").[1] In 1981, the interpretation of municipal powers was more restrictive. Municipalities were creatures of statute and they could only exercise the powers granted to them by legislation or otherwise necessarily or fairly implied: *R. v. Greenbaum*, [1993] 1 S.C.R. 674, at pp. 687-688; *R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668.

[110] It is well established that ClubLink has the onus to prove that the by-law approving and authorizing the 1981 Agreement was *ultra vires* the powers of Kanata: see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 21.

[111] Even before 2001 and the changes to the provincial legislation, the law with respect to the interpretation of municipal powers had evolved with the Supreme Court of Canada's decision in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342. The Court adopted a broad and purposive approach to delineating municipal jurisdiction: at para. 18. As a result, statutes in which municipal powers are prescribed are to be construed purposively – in their entire context and in light of the scheme of the act as a whole – with a view to ascertaining the legislature's true intent: at paras. 19-20.

[112] At para. 36 of *Nanaimo*, the Supreme Court of Canada cited with approval the following statement by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244: "Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the 'benevolent construction' which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication."

---

[1] The parties entered into the 1981 Agreement on May 26, 1981. However, the *Municipal Act*, R.S.O. 1980, c. 302, only came into force on August 1, 1981: see Ontario (1980), "Proclamation Bringing the Revised Statutes of Ontario, 1980 into Force," *Ontario: Revised Statutes:* Vol. 1980: Iss. 9, at p. 630.

The Benevolent Construction Approach

[113] ClubLink suggests that the "benevolent construction" approach to the interpretation of municipal by-laws has not been adopted by the Supreme Court of Canada and that the proper analysis is limited to a "broad and purposive" approach. ClubLink argues that the Court of Appeal for Ontario's decision in *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 329, did not properly apply the Supreme Court of Canada's analysis in *Spraytech*. Alternatively, ClubLink argues that the benevolent construction approach only applies to modern municipal statutes which have expanded municipal powers. I disagree with both suggestions.

[114] I firstly confirm my view that the "benevolent construction" analysis was endorsed by the Supreme Court of Canada in *Spraytech*, at para. 23. That decision involved the Town of Hudson's authority to pass a by-law which restricted the use of pesticides under the Town's general welfare powers.

[115] In *Spraytech*, the Supreme Court begins its analysis by referring to what is known as "Dillon's Rule" which confirms the long-standing principle that municipalities, as statutory bodies, may only exercise those powers expressly conferred by statute and those necessarily or fairly implied: at para. 18. Writing for the majority, L'Heureux-Dubé J. goes on to reference McLachlin J.'s (as she then was) dissenting statements in *Shell* (referenced above) as having been cited with approval in *Nanaimo*: at para. 23. The analysis moves on to cite Sopinka J. on behalf of the majority in *Shell*. Justice Sopinka enunciated the test of whether the municipal enactment was "passed for a municipal purpose": "to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government": at para. 26. Finally, L'Heureux-Dubé J. states that the provisions at issue in *Spraytech*, while benefiting from a *generosity of interpretation*, must have a reasonable connection to the municipality's permissible objectives: at para. 26.

[116] Thus, the "benevolent construction" analysis from *Shell* was followed in *Spraytech* where it was further described by Justice L'Heureux-Dubé as a "generosity of interpretation".

[117] Secondly, the interpretation of municipal statutes by using the benevolent construction approach has not solely been limited to modern municipal statutes such as the 2001 Act which expanded the scope of municipal powers in Ontario. In *Spraytech*, the benevolent construction approach was used to interpret a by-law passed in 1991 pursuant to the *Cities and Towns Act*, R.S.Q., c. C-19. Also, the Court of Appeal for Ontario applied the benevolent interpretation analysis in *Horton v. Sudbury (City)* (2004), 70 O.R. (3d) 768 (C.A.), at para. 16.

Specific Powers in the 1970 Act

[118] Against this backdrop, I consider the express powers set out in the 1970 Act. The parties have directed me to the following relevant sections:

> **1(11).** "land" includes lands, tenements and hereditaments, and any estate or interest therein, and any right or easement affecting them, and land covered with water;
>
> …
>
> **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. R.S.O. 1960, c. 249, s. 5.
>
> …
>
> **242.** 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. R.S.O. 1960, c.249, s.243.
>
> …
>
> **352(68).** 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 or any of the powers that are conferred on boards of park management by *The Public Parks Act*.
>
> **352(69).** 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.
>
> …

> **352(74).** For acquiring, erecting, altering, maintaining, operating or managing or granting aid for the acquisition, erection, alteration, maintenance, operation or management of monuments, memorial windows, tablets, parks, recreational areas, playgrounds, athletic fields, zoological or other gardens, natural history collections, observatories or works of art, or other places of recreation and amusement, arenas, auditoriums, health or community 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.
>
> …
>
> **352(74)(c).** Any such building may be established and equipped as a home or clubhouse for such persons or any class thereof or may be used for such purposes as the council considers proper.

Analysis

[119] The 1981 Agreement sets out various rights and obligations for Campeau and Kanata. They all relate to the principle of maintaining 40% of the Campeau Lands as open space for recreation and natural environment purposes. These include the Golf Course, parkland, stormwater management areas and natural environment areas. As stated in *Horton*, by-laws passed for a legitimate municipal purpose should be reviewed deferentially: at para. 16.

[120] With respect to the provisions involving the operation of the Golf Course, the authority to enter into such an agreement lies within the specific powers of the 1970 Act. Although not relevant to these proceedings, those portions of the 1981 Agreement which allow for the conveyance of lands for the stormwater management system and the natural environment areas find their authority within the general powers granted to a municipality.

[121] As previously stated, ClubLink only challenges those provisions of the 1981 Agreement that require Campeau to operate a golf course in perpetuity failing which it must convey the land to Kanata.

Specific Powers

[122] While the parties did not refer the Court to the specific Kanata by-law that authorized the signature of the 1981 Agreement, no issue was taken that the signature of the 1981 Agreement was

authorized by a by-law of the Council for the City of Kanata at some point. The focus is on Kanata's authority to enter into the 1981 Agreement.

[123] A number of the subsections in s. 352 address the power that Kanata had in 1981 to pass by-laws providing for public parks and recreation uses:

- Section 352(68) allows for by-laws to be passed for the acquisition and establishing of public parks;
- Section 352(69) allows for the accepting and taking charge of land dedicated as a public park for the use of the inhabitants of the municipality.
- Section 352(74) allows for the acquisition, maintenance, operation, management and granting of aid for the acquisition of parks, recreational areas, playgrounds, athletic fields and other places of recreation and amusement. Section 352(74)(c) specifically allows for the establishment of a clubhouse.

[124] Within the specific powers set out in s. 352(74) is the power to provide aid for the acquisition of recreation areas. The section contemplates that these powers can be exercised by contracting with third parties. The listed uses are left open by including "recreational areas" and "other places of recreation and amusement".

[125] The interpretation section of the 1970 Act defines the term "land" to include any right affecting land. Section 5 of the 1970 Act sets out that the power to acquire land includes "the power to acquire by purchase or otherwise". This wording demonstrates that the 1970 Act contemplates different methods of acquisition, including the right to re-acquire or to accept a conveyance at no cost (i.e., s. 5(4) of the 1981 Agreement). These sections support a finding that different methods of implementation of municipal powers were available to Kanata at the relevant time.

[126] ClubLink submits that golf courses are not specifically mentioned in the specific powers set out in the 1970 Act. In particular, ClubLink submits that the 1970 Act does not include the power to compel the operation of a golf course failing which the party must sell their land. The interpretation proposed by ClubLink runs contrary to the obligation to interpret the relevant provisions using a broad and purposive approach: *Nanaimo*, at para. 18.

[127] The analysis must focus on the purpose of the 1981 Agreement: to ensure that 40% remains as open space. Within that purpose, the 1981 Agreement allows for the use of the 40% open space lands for a golf course, for recreational uses and for natural environment uses. The by-law which authorized the 1981 Agreement was not enacted to impinge upon Campeau's civil or common law rights and nor did it have that effect. In agreeing to the 40% principle, Campeau wanted to operate a golf course. Kanata did not impose the golf course use but clearly wanted to ensure that the 40% principle was maintained. Thus, where Campeau stated that it would operate a golf course, it agreed to do so in perpetuity failing which Kanata would have that opportunity. When considering Kanata's power to pass by-laws under s. 352(74) and the other sections referenced above, I conclude that:

a. Kanata had the power to pass by-laws for the acquisition, operation and maintenance of recreational areas and other places of recreation. This included a golf course and to a minimum a golf course is fairly implied; and

b. Kanata had the power to pass by-laws where it contracted with third parties for the acquisition, operation and maintenance of recreational areas and other places of recreation. This included a golf course and to a minimum, a golf course is fairly implied.

[128] When those powers are considered in the context of a broad and purposive analysis, and by applying a "benevolent construction" or a "generosity of interpretation", the inclusion of a golf course as a recreational area is clear and obvious. This is confirmed by looking at the context of the 1970 Act which granted broad powers for the acquisition of land generally and particularly for the acquisition of lands for recreational purposes. The legislative intent is clear to allow for broad powers in the establishment of recreational areas.

[129] I disagree with ClubLink's contention that the municipal power must include the ability to *compel the operation of a golf course in perpetuity, failing which it must convey the land*. The term of the agreement does not impact the power over the subject matter. It is inconsequential if the term is for 5 years, 25 years or in perpetuity. It is simply a negotiated term that falls under the municipal power. This also applies to the obligation to convey the Golf Course Lands so that Kanata may have the right to operate and maintain the golf course if Campeau choses not to do so. This is also a negotiated term that falls under the authority granted by the 1970 Act.

[130] The list of uses in s. 352(74) is clearly not meant to be limited to narrowly circumscribed or enumerated uses given the words “recreational areas” and “or other places of recreation and amusement”. The potential list of recreational uses is left open-ended and thus a golf course is included or at least fairly implied.

[131] Applying the requisite broad and purposive approach to the wording of s. 352(74) and the other specific powers referenced above, it is difficult to imagine how this section could not be interpreted as allowing Kanata to enter into an agreement to preserve and maintain 40% of a large residential development as open space for recreation and natural environment. This was clearly done to further a municipal purpose. When considering Kanata’s permissible objectives under the 1970 Act, it leads to the unmistakable conclusion that the 1981 Agreement and the by-law that adopted it were *intra vires* Kanata’s powers and specifically the power to contract with a third party for the acquisition, maintenance and operation of a recreational area such as a golf course. The remaining details are simply negotiated terms that clearly fall under Kanata’s authority.

General Power

[132] Having concluded that the authority related to the golf course provisions is specifically provided for by the 1970 Act, there is no need to address the general power under s. 242 of the 1970 Act.

Issue 1(c): Was the entering of the 1981 Agreement an unlawful fettering of Municipal Council Discretion?

[133] The courts have intervened in agreements between municipalities and developers where the municipality effectively sells its zoning approval authority in exchange for some other benefit. In *Finney et al. v. Township of McKellar; Fenton (Cross-respondent)* (1982), 36 O.R. (2d) 47 (C.A.), at p. 55, the Court of Appeal for Ontario succinctly described the principle of fettering of municipal authority as follows:

> If the councillors are bound by the execution of the agreement and their discretion completely fettered in considering the submissions made to them at the statutorily required public hearing, then the agreement is contrary to public policy and the rules of natural justice.

[134] ClubLink relies on the public statements of the then Regional Chairman at a Regional Planning Committee meeting whereby the minutes reveal that the Regional Chairman indicated a reluctance to make a commitment for a Regional Official Plan Amendment until there was *some resolution or quid pro quo arrangement*. These words are suggested to be indicative of the fettering of the RMOC's authority.

[135] I disagree. The first and most obvious observation to make is that the RMOC is not a party to the 1981 Agreement. Also, the RMOC was not the approval authority for the OPA: the approval authority was the Minister of Housing. Next, it is well established that the words of an individual municipal councillor do not bind a municipality. Thus, the evidence of fettering would have to be found in the agreements.

[136] The 1981 Agreement does not include an undertaking by any municipal authority to approve a development application. While the preamble states that the RMOC had agreed to amend its official plan, this had already been expressed in the resolution of the planning committee dated April 28, 1981 stating that the agreement between Campeau and Kanata was a condition precedent to the committee's approval. Notably, the regional chair dissented on that resolution.

[137] It is also relevant to note that s. 11 of the 1981 Agreement delayed its binding nature until the OPA was approved by the Minister of Housing or the Ontario Municipal Board.

[138] Furthermore, the development proposal was one Campeau advanced as a mechanism to promote its development and obtain approval. The open space features of the 1981 Agreement were not a condition of development approval. At the time when Kanata passed a resolution supporting the Campeau proposal, that resolution made no mention of the 40% principle and simply highlighted the support for "significant natural features". Thus, Kanata provided its support to the Campeau proposal without any apparent indication that the support was tied to the 40% principle. Later, as part of the 1981 Agreement, Kanata and Campeau mutually covenanted to support the OPA.

[139] ClubLink contends that Kanata and the RMOC sold their official plan amendment powers in exchange for benefits that they were otherwise unauthorized to request. The notion that there is something inappropriate or nefarious in the provisions of the 1981 Agreement is without merit. The purpose behind the 1981 Agreement was considered many years later at the 2005 OMB Hearing. In its decision, the OMB made the following comments, at p. 11:

> These motions involve the jurisdiction of the Ontario Municipal Board and its authority to rule on the 40% Agreement. While the Board has no jurisdiction over the legislative competency of municipalities, it has supervisory jurisdiction over their municipal planning competence. In this case, however, the Board finds no linkage between the Official Plan and the 40% Agreement and it finds the Agreement to be a private agreement between two parties. The Board may hear and determine the matter in issue and settle and determine the requirements for site plan approval, but this does not include the private agreement between the City and KNL as successors to the private agreement that was enacted years ago. The Board finds that the City, in carrying out its function of acquiring and maintaining land, does so in the public interest and for the long-term sustainability and growth of a vibrant community. But in doing so, it may operate under myriad arrangements or official planning instruments to achieve those goals. One such arrangement may be a private agreement, such as the one before the Board. In such matters, the Board has no jurisdiction to prevent the municipality from entering into any contract with regard to a matter within its jurisdiction.
>
> The Board further finds that on this question of public interest, City Council, most knowledgeable with the local municipal conditions, i[s] best placed of all parties to determine what is or is not in the best public interest….

[140] In the context of the fettering of Municipal Council discretion argument, the observations of the OMB are relevant in that they acknowledge the myriad arrangements or official planning instruments used to achieve municipal goals.

[141] The circumstances of the 1981 Agreement are analogous to the agreement entered into between the plaintiffs and the regional municipality in *First City*. While ClubLink relies on this decision for its *ultra vires* argument, the City points to the nature of the agreement in question and how it was found to not represent a form of fettering of municipal decision-making. That agreement provided for the adoption of amendments to the local and regional official plans to permit residential, commercial and industrial development and the construction of a trunk sewer and water lines. Specifically, Durham covenanted and agreed that it "will immediately adopt Official Plan Amendment Numbers 54 and 12 and will submit them to the Minister of Housing for approval upon adoption and will use its best efforts to have them approved": *First City*, at p. 670.

[142] In *First City*, the Court noted that the regional municipality had exercised its planning jurisdiction over a long period of time, the entering of the agreement was considered in the public interest, the statutory process was complied with for the approval of an official plan amendment and no statutory rights of third parties came into question: *First City*, at pp. 691-692. All of these features are present surrounding the 1981 Agreement and the OPA process.

[143] The cases relied upon by ClubLink are all distinguishable on the facts. There is no evidence that the RMOC or Kanata abdicated their statutory duties, thereby acting in a manner which is contrary to public policy. The process followed for the approval of the OPA was a comprehensive public process that allowed for public input in accordance with the planning process in effect at the time.

[144] Finally, the 1981 Agreement arose out of the planning process. Campeau presented a proposal which required the OPA. Kanata provided its comments in support by way of resolution as part of the consultation process. The need for the 40% principle arose in public meetings where members of the public had the opportunity to be aware of the process leading to the OPA. The OPA was an official plan amendment and not a zoning by-law. The details of the zoning process were still to be determined, again through a public process, and Kanata made no commitments to approve any particular form of zoning.

[145] Neither the RMOC nor Kanata "sold" its official plan amendment approval; they simply supported Campeau's development proposal which included an agreement with Kanata.

Issue 2: If s. 5(4) and/or s. 9 of the 1981 Agreement are void for perpetuities, can they be severed from the 1981 Agreement so that the rest of the 1981 Agreement remains valid and binding?

[146] Given my conclusion that the 1981 Agreement continues to be a valid and enforceable agreement, there is no need to consider the severance issue.

Issue 3: Has ClubLink determined that it desires to discontinue the golf course use?

Relevant Evidence

[147] In December 2018, ClubLink announced its plans to pursue options for alternative use of the Golf Course Lands. On October 8, 2019, ClubLink filed planning applications to permit the redevelopment of the Golf Club Lands. The Court was advised during this hearing that in 2020, ClubLink appealed the City's failure to make a decision to the LPAT.

[148] Section 5(4) of the 1981 Agreement provides that "[i]n the event that Campeau desires to discontinue the operation of the golf course and it can find no other persons to acquire or operate it, then it shall convey the golf course (including lands and buildings) to Kanata at no cost".

[149] Section 5(5) of the 1981 Agreement provides that if the City does not accept the conveyance under s. 5(4), then Campeau shall have the right to apply for development of the Golf Course Lands in accordance with the *Planning Act*.

[150] ClubLink has provided evidence from its Director of Operations for the Golf Club that it has not decided to cease operating the Golf Club and that it was taking active steps to maintain the property for the 2020 season. On cross-examination, the City's witness agreed that even if planning applications are approved, ClubLink must still decide if it will move forward with the proposal.

[151] The City argues that making an application under the *Planning Act*, R.S.O. 1990, c. P.13, is clearly a desire to discontinue. Also, the City argues that s. 5(5) of the 1981 Agreement only permits development applications to be made if the City refuses the conveyance of the Golf Course lands under s. 9. This is not what the 1981 Agreement says. It would have been easy for the parties to specify that "otherwise, no other development applications will be made". This was not done.

Analysis

[152] While s. 5(5) of the 1981 Agreement provides for a situation where Campeau/ClubLink could apply for development of the Golf Course Lands, the agreement does not otherwise specifically prohibit development applications.

[153] The basic principles of corporate law state that a corporation merely acts pursuant to the decisions of its directing minds. Some corporate actions can be delegated to officers and directors, but they still must be derived from the Board of Directors: see: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662. Thus, for a decision to be made to discontinue the golf course operation, that decision must come from its directing minds.

[154] The action of making a development application under the *Planning Act* does not foreclose the continued operation of the Golf Club. In addition, the discontinuance of the golf course operations is not something that happens overnight, and it is apparent that the golf course operations continued throughout the 2020 golf season. It is likely for this reason that the phrase "desires to discontinue" was employed given the expectation that there would be advance notice to the membership of an upcoming discontinuance.

[155] If it was Kanata's intent that development applications could only be made following the procedure set out in s. 5(5), it should have specified it in the 1981 Agreement. Kanata and Campeau were two sophisticated parties. It is not for this Court to rewrite the agreement that was made. Words were chosen by the drafters and those words are expected to have meaning.

[156] I am of the view that the words "desires to discontinue" anticipate the need for some corporate action to give notice of a pending discontinuance. This is the commercially reasonable manner to interpret those terms given the principles associated with corporate decision-making.

[157] Finally, I specifically disagree that the filing of planning applications or appeals related thereto demonstrates a desire to discontinue. At this point, ClubLink has no idea how it may develop the Golf Course Lands. It would be difficult for it to commit to the discontinuance of the golf course without knowing the development potential of the Golf Course Lands or if development will be allowed at all.

Issue 4: Is the City required to continue to operate a golf course in perpetuity on the Golf Course Lands?

Analysis

[158] On this issue, ClubLink seeks to have the Court rewrite s. 9 of the 1981 Agreement. It was clearly not the intention of the signatories of the 1981 Agreement to require that the City be bound by the same obligations to operate the golf course in perpetuity. If that was the intent, the parties would have imported the same wording into s. 5(4) as is clearly set out in ss. 5(1) and 5(2) where clear reference is made to operating the golf course in perpetuity.

[159] While considering this issue, the Court specifically refers to the principles of contractual interpretation previously discussed from *Weyerhaeuser*, at para. 65.

[160] The analysis of this issue begins with s. 5(1) of the 1981 Agreement which introduces Campeau's agreement to operate the golf course in perpetuity subject to its right to sell the golf course (including lands and buildings) and Kanata's right of first refusal. The notion of the operation of the golf course in perpetuity is repeated in s. 5(2) of the 1981 Agreement.

[161] Section 5(4) then addresses Campeau's desire to discontinue the operation of the golf course and the obligation to convey the golf course (including lands and buildings) to Kanata at no cost. If Kanata accepts that conveyance, Kanata shall operate or cause to operate the land as a golf course, subject to s. 9. Notably, there is no mention of Kanata's obligation to operate the land as a golf course "in perpetuity". It was clearly not the intention of the parties to import the same obligations as those specifically imposed on Campeau.

[162] Moving on to s. 9, the wording changes and I conclude that this was intentional as parties are presumed to have intended what they have said. The first observation is that s. 9 is not triggered by the cessation of the golf course use. It applies to the cessation of recreation and natural environment purposes.

[163] Next, in s. 9, there is no mention of the golf course use or the golf course lands. Clearly, the intention of this section was meant to be broader than the conveyance contemplated in s. 5(4) which was specific to the golf course use and the golf course lands. Instead, it applies to all the open space lands and applies to a situation where the lands are no longer used for recreation and natural environment purposes.

[164] ClubLink seeks to have s. 9 interpreted as if the reference to "recreation and natural environmental purposes" is the equivalent to referring to the "intended use". However, when considering how the parties viewed the issue of reconveyance to Campeau (later Imasco) at the time of the ClubLink Assumption Agreement, s. 10 of that agreement imports the same language that such a reconveyance applied when the "land ceases to be used for recreational and natural environmental purposes by the City". This accords with an interpretation that the intention was not to trigger the reconveyance by the cessation of the golf course use by Kanata.

[165] As worded, s. 9 of the 1981 Agreement clearly allows for the City to continue using the Golf Course Lands for recreation or natural environment purposes, other than a golf course, without the need to reconvey the land back to Campeau. This interpretation is also the commercially reasonable interpretation given that Kanata was not in the business of operating golf courses. As such, it would likely have to find an operator. If Kanata was foreclosed from using the Golf Course Lands for recreational or natural environment purposes other than as a golf course, it would result in s. 5(4) being rewritten to create the obligation on Kanata to operate the golf club in perpetuity.

[166] I appreciate that a strict reading of s. 5(4) of the 1981 Agreement allows for Kanata to operate a golf course for one day and then be free to change the use. However, the election to accept the conveyance under s. 5(4) must still be *bona fide*. Otherwise, it would defeat the purpose of Campeau's right to keep the land if Kanata does not truly intend to operate the golf course or cause to have it operated as such. Kanata (now Ottawa) is a public entity and subject to a public process that would allow ClubLink to assess its decision under s. 5(4).

[167] This is the commercially reasonable interpretation that affords the most common sense with the intention to maintain 40% of the Campeau Lands as open space. While the City would have to operate or cause to be operated a golf course if it accepts conveyance of the golf course in a *bona fide* manner, it is not required to do so in perpetuity and it would later be available to it to continue owning the Golf Course Lands provided that the lands are used for recreation or natural environment purposes.

Issue 5: Is ClubLink bound by a restrictive covenant which prevents it from redeveloping the Golf Course Lands?

Concept Plan

[168] I begin the analysis of this issue by dealing with the concept plan submitted as part of the affidavit of Peter van Boeschoten. In that affidavit, Mr. van Boeschoten does not state that the concept plan attached to his affidavit is one and the same as the Concept Plan referred to in the 1988 Agreement. He only states that it formed part of the evidence at the 2005 OMB Hearing.

[169] I agree with the submission of ClubLink that while Mr. van Boeschoten's affidavit may be admitted as part of the record of this application, possibly for future reference, I am unable to conclude that the plan provided by Mr. van Boeschoten is one and the same as the Concept Plan incorporated by reference into the 1988 Agreement. The Coalition has advised that to accept the plan into evidence without a finding that it is one and the same as the Concept Plan from the 1988 Agreement would be an error.

Analysis

[170] ClubLink's submission on the restrictive covenant is that the declaratory relief requested by the Coalition is superfluous to the issues before the Court. If the City succeeds, the 1981 Agreement is valid. There is no need to determine if the 1988 Agreement creates a restrictive covenant requiring that 40% of the total development area for the Kanata Marchwood-Lakeside Community be left as open space for recreation and natural environment purposes.

[171] The Coalition highlights that if the City is successful and the 1981 Agreement is valid, the Court may find that a declaration on the restrictive covenant is no longer necessary as it does not settle a live controversy between the parties: see *Children's Aid Society of the Regional Municipality of Waterloo v. C.T.*, 2017 ONCA 931, [2018] 4 C.N.L.R. 31, at paras. 74-75. However, if ClubLink is successful and ss. 5(4) and 9 are severable, the Coalition seeks a declaration that the remainder of the 1981 Agreement and 1988 Agreement are valid and that they act together to create the restrictive covenant. If the remaining provisions of the 1981 Agreement are not severable, the claim for a restrictive covenant fails.

[172] Given my conclusion that ss. 5(4) and 9 of the 1981 Agreement remain valid and enforceable, there is no "live controversy" between the Coalition and ClubLink that requires adjudication.

[173] In addition, I am of the view that the evidentiary record in relation to the claim for a restrictive covenant is lacking. One of the requirements for a restrictive covenant is that the dominant tenement, which is meant to receive the benefit of the covenant, must be clearly described. The questions surrounding the Concept Plan continue to be unresolved. The 1981 Agreement was drafted at a time when the lands meant to benefit from the alleged restrictive covenant still had to be better defined. Even the 1988 Agreement refers to the "Kanata Marchwood Lakeside Community" and describes the Concept Plan as "generally the proposal for designation and development of the lands in accordance with the Forty Percent Agreement." The Concept Plan is identified as being "retained in the offices of the Municipal Clerk of the City."

[174] The Coalition's motion material to admit the Concept Plan includes a concept plan titled "Kanata Lakes Concept Plan" and stamped "Campeau Corporation". This plan is dated December 4, 1987, and the Coalition seeks a finding that it is the same concept plan as is referenced in the 1988 Agreement. I am unable to make such a finding as there is insufficient evidence to confirm that they are one and the same. The evidence filed on the motion states that this Kanata Lakes Concept Plan was an exhibit to an affidavit filed in the 2005 OMB Hearing. However, that originating affidavit was not produced to see how this exhibit was actually referred to.

[175] I am unable to conclude that the Kanata Lakes Concept Plan dated December 4, 1987 is likely one and the same as the Concept Plan attached to the 1988 Agreement. The Concept Plan referenced in the 1988 Agreement does not include the date or the full title "Kanata Lakes Concept Plan" in its description. Also, the Coalition seeks to rely on this Concept Plan to define the dominant tenement but there is no opinion evidence which properly interprets what is shown on the Concept Plan. I am unable to properly interpret it on my own. In particular, the legend refers to the Golf Course as "GC", but those initials are not actually found on the Kanata Lakes Concept Plan except in the list of abbreviations. These issues should be determined on a more fulsome evidentiary record.

[176] Consequently, the Coalition's motion to file the Kanata Lakes Concept Plan dated December 4, 1987 is denied.

[177] As previously stated, the issues surrounding the declaratory relief are superfluous to the issues as determined in this decision. Given that the 1981 Agreement continues to be a valid and enforceable contractual agreement between the parties, there is no need for a finding to be made on the claim for a restrictive covenant. Furthermore, there are shortcomings in the evidence surrounding that claim. The claim for a restrictive covenant should form part of a more fulsome hearing with better evidence to support the Coalition's claims.

CONCLUSION

[178] For the reasons stated herein, the Court concludes:

a. Issues #1-2: The 1981 Agreement continues to be a valid and binding contract and ss. 5(4) and 9 are not void as contrary to the rule against perpetuities. The 1981 Agreement was *intra vires* Kanata and the entering of the 1981 Agreement was not an unlawful fettering of Kanata's discretion. Consequently, the issue of severance is not relevant.

b. Issue #3: ClubLink has not determined that it desires to discontinue the golf course use.

c. Issue #4: While the City is required by s. 5(4) of the 1981 Agreement to operate the golf course, it must not do so in perpetuity. The City's obligations under s. 9 of the 1981 Agreement are not triggered if the City discontinues the golf course use provided that it continues to use the land for recreational and natural environment purposes.

d. Issue #5: The questions surrounding the restrictive covenant are superfluous to this application and should be decided on a more fulsome evidentiary record.

COSTS

[179] If the parties are unable to agree on the issue of costs, they may make written submissions on costs. Any party seeking an order for costs will have 30 days from the date of this decision to serve and file its written submissions and a party against whom a request for costs has been made will have 30 days thereafter to respond. Those submissions will not exceed three pages in length (excluding attachments) and will comply with Rule 4 of the *Rules of Civil Procedure*.

Justice Marc R. Labrosse

Released: February 19, 2021

CITATION: *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298
COURT FILE NO.: 19-81809
DATE: 2021/02/19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

REASONS FOR DECISION

Labrosse J.

Released: February 19, 2021