Court File No. CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KANATA GREENSPACE PROTECTION COALITION and BARBARA RAMSAY

Applicants/Responding Parties

and

CLUBLINK CORPORATION ULC

Respondent/Moving Party

MOTION RECORD

March 15, 2023

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Kanata Greenspace Protection Coalition and Barbara Ramsay

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KANATA GREENSPACE PROTECTION COALITION and BARBARA RAMSAY

Applicants/Responding Parties

and

CLUBLINK CORPORATION ULC

Respondent/Moving Party

NOTICE OF MOTION

The Respondent/Moving Party, ClubLink Corporation ULC, will make a Motion to a Judge on a date to be set by the Registrar, or as soon after that time as it can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard by video conference at a Zoom link to be provided.

THE MOTION IS FOR:

(a) An order dismissing or staying the Application as *res judicata* and/or an abuse of process pursuant to rules 14.09, 21.01 and/or 25.11 of the *Rules of Civil Procedure* and this Court's inherent jurisdiction;

(b) In the alternative, an order requiring the Applicant/Responding Party, the Kanata Greenspace Protection Coalition, to pay security for ClubLink's anticipated costs for this Application in the amount of $200,000, pursuant to Rule 56.01 of the *Rules of Civil Procedure*;

(c) The costs of this Motion; and,

(d) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE as follows:

BACKGROUND

(e) In 1979, Campeau Corporation owned approximately 1,400 acres of largely vacant land in the former City of Kanata, including a 9-hole golf course. It proposed to develop these lands (the "**Marchwood-Lakeside Lands**") for predominantly residential uses.

(f) To gain support for its development plan, Campeau proposed reserving approximately 40% of the Marchwood-Lakeside Lands as open space for recreational and natural environmental purposes, which would include an expanded 18-hole golf course.

(g) On May 21, 1981, Campeau and Kanata entered into an agreement providing for the reservation of approximately 40% of the Marchwood-Lakeside Lands as open space for recreational and natural environmental uses (the "**1981 Agreement**"). The 1981 Agreement states that an 18-hole golf course will form part of these reserved lands, subject to certain provisions that contemplate an evolution in land use;

(h) The parties entered into several further agreements to implement the terms of the 1981 Agreement, including an agreement dated December 20, 1988 (the "**1988 Agreement**").

(i) In 1989, Campeau sold the golf course lands to Genstar Development Company Eastern Ltd., which sold these lands in 1996 to the corporate predecessor of ClubLink. ClubLink is bound by Campeau's obligations under the 1981 and 1988 Agreements pursuant to a separate assignment and assumption agreement dated November 1, 1996 (the "**Assumption Agreement**").

(j) In 2001, the City of Kanata was amalgamated into the City of Ottawa (the "**City**").

CLUBLINK'S PLANNING APPLICATIONS

(k) In October 2019, ClubLink submitted planning applications to the City for a zoning by-law amendment and approval for a plan of subdivision to permit the redevelopment of the golf course lands into a residential subdivision.

(l) ClubLink's planning applications envision the redevelopment of the golf course into a subdivision with single detached homes, townhomes and other medium density housing. They also provide for significant amounts of new, permanently-accessible greenspace that will be conveyed to the City—much more than what is currently accessible to the public on the private golf course lands.

THE CITY ISSUES AN APPLICATION AGAINST CLUBLINK; THE COALITION INTERVENES

(m) On October 25, 2019, the City commenced an expedited application seeking (among other things) a declaration as to ClubLink's obligations under the 1981, 1988 and Assumption Agreements and an order requiring ClubLink to either withdraw its planning applications or offer to convey the golf course lands to the City at no cost.

(n) On November 19, 2019, the Kanata Greenspace Protection Coalition (the "**Coalition**") served a motion for intervener status in the City's application. In its materials, the Coalition stated that it sought to determine the validity and enforceability of clauses in the 1981, 1988 and Assumption Agreements codifying the principle that approximately 40% of the total development area of the Marchwood-Lakeside Lands be left as open space for recreation and natural and environmental purposes. The Coalition specifically argued that these agreements impose contractual obligations on ClubLink in favour of the City and also create restrictive covenants in favour of surrounding homeowners. It also argued the existence of a restrictive covenant in a separate registration made the same day as the Assumption Agreement, in connection with grading and stormwater management facilities (the "**Grading Registration**").

(o) In seeking intervener status, the Coalition stated that it is an effective and efficient use of judicial resources for the specific arguments raised by the Coalition to be considered within the City's application. It also argued that its proposed intervention is an efficient use of court resources and avoids the risk of inconsistent findings flowing from the same agreements and surrounding circumstances.

(p) This Court granted the Coalition leave to intervene as a party to the City's application on December 23, 2019, subject to certain conditions.

(q) The City's application was heard by this Court in July 2020. The Coalition made oral and written submissions that:

(i) ClubLink's development plan is subject to a restrictive covenant running with and binding the Marchwood-Lakeside Lands pursuant to the 1981, 1988 and Assumption Agreements; and

(ii) ClubLink's development is also subject to a restrictive covenant registered on title relating to grading and stormwater management on the golf course.

(r) In support of its arguments, the Coalition filed an affidavit from its Chair, Barbara Ramsay, which was admitted into the record in the City's application.

(s) The Coalition's restrictive covenant arguments were fully briefed. ClubLink responded to these arguments and the Coalition exercised its right of reply.

(t) After the hearing of the City's application, the Coalition brought a motion to adduce fresh affidavit evidence relating to its restrictive covenant argument, and the affidavit was subsequently admitted into the record.

DECISION ON THE CITY'S APPLICATION

(u) On February 19, 2021, this Court allowed the City's application in part (the "**Decision**").

(v) Despite finding that the Coalition's arguments were superfluous to the issues, this Court considered them on their merits and found that they could not succeed due to shortcomings in the evidence. This Court held that the evidentiary record in relation to the claim for a restrictive covenant is lacking.

(w) ClubLink appealed the Decision. The Coalition did not participate in the appeal. It did not seek an order or direction from this Court that its restrictive covenant arguments proceed as part of a different hearing on a different evidentiary record. The Coalition did not commence this Application until one year later.

(x) ClubLink's appeal was allowed by order dated November 26, 2021. The City sought leave to appeal to the Supreme Court of Canada, which was dismissed in August 2022.

THE COALITION & MS. RAMSAY COMMENCE THIS APPLICATION

(y) On February 22, 2022, the Coalition and Ms. Ramsay commenced this Application. They seek, among other things, declarations that ClubLink's planning applications contravene restrictive covenants in the 1981, 1988 and Assumption Agreements, as well as the Grading Registration.

(z) Despite having been requested by ClubLink to do so, the Coalition has not served its application record.

(aa) In September 2022, at the return hearing of the City's application, counsel for the Coalition and for ClubLink jointly requested that Mr. Justice Labrosse case manage the Coalition's application and he agreed to do so. The Coalition has not requested a case conference with Justice Labrosse to set a timetable for this Application.

THE APPLICATION IS ISSUE ESTOPPED AND BARRED BY *RES JUDICATA*

(bb) Among the central issues in this Application are whether the 1981, 1988 and Assumption Agreements create a restrictive covenant, and if so, whether they are breached by ClubLink's planning applications.

(cc) The issues in this Application are substantially the same as those the Coalition raised, adduced evidence on, briefed, and argued as intervener in the City's application.

(dd) The Coalition elected to advance its arguments as intervener in the City's application and represented to the Court that proceeding in that manner would avoid the need for individual applications from its members.

(ee) The Coalition had full opportunity to advance its restrictive covenant argument, including by filing evidence and delivering oral and written argument. The Coalition does not argue any procedural unfairness in its participation in the City's application.

(ff) Ms. Ramsay's interests (and those of other homeowners) were represented by the Coalition in the City's proceeding. Neither ClubLink nor any homeowner or community member contested the Coalition's standing as an organization that represents its members, including Ms. Ramsay who founded the Coalition and serves as its Chair.

(gg) This Court dismissed the Coalition's arguments on their merits, holding that the evidentiary record in relation to the claim for a restrictive covenant was lacking. The Coalition did not prove the existence of a restrictive covenant on the evidence before the Court, including evidence it filed before the hearing and fresh evidence the Court admitted after the hearing.

(hh) Allowing the Coalition's application to proceed undermines finality, wastes judicial resources, and risks inconsistent findings with this Court's earlier Decision in the City's application.

(ii) There are no new circumstances or evidence that should allow the Coalition to re-litigate (and require ClubLink to respond to) the same arguments it advanced as intervener in the City's application.

THE APPLICATION IS AN ABUSE OF PROCESS

(jj) This Application renews the arguments concerning restrictive covenant that the Coalition made as intervener in the City's application, creating a multiplicity of proceedings against ClubLink concerning the same underlying facts and issues.

(kk) A new proceeding that asserts the same claims as an existing proceeding, and that would amount to re-litigating the same issues, constitutes an abuse of this Court's process, even where the strict requirements of *res judicata* and issue estoppel are not present.

(ll) The Coalition has not taken any meaningful steps to advance this Application. It has not sought to have it heard on an expedited basis. It has not served its application record for over one year. It has not scheduled a case conference with the Court to set a timetable.

(mm) The Coalition's failure to prosecute its application prejudices ClubLink. Since 2019, the golf course lands have been subject to ongoing litigation, and the delays associated with this Application create practical impediments to the land's re-development into its highest and best use, which the Ontario Land Tribunal found was in the public interest.

(nn) This Court has jurisdiction to stay or dismiss an application for abuse of process under rules 14.09, 21.01 and 25.11 of the *Rules of Civil Procedure*, and as part of its inherent jurisdiction to control its process.

IN THE ALTERNATIVE, CLUBLINK IS ENTITLED TO SECURITY FOR COSTS

(oo) This Court has jurisdiction under rule 56.01(1)(d) to make an order for security for costs where it appears that an applicant is a corporation and there is good reason to believe that it has insufficient assets in Ontario to pay the costs of the respondent.

(pp) The Coalition pleads in its Notice of Application that it is a not-for-profit corporation incorporated on July 11, 2019, specifically for the purpose of opposing ClubLink's development plans for the golf course.

(qq) The Coalition does not own any real property in Ontario.

(rr) The Coalition regularly holds fundraising activities to fund its ongoing operations, including its lawyers' fees. Its website states that donations are "crucial" for it to "continue battling ClubLink's proposed development".

(ss) The Coalition's "Go Fund Me" campaign, which began in February 2019, has not met its target of raising $135,000. According to the Coalition's Go Fund Me page, it has only raised $100,344 as of March 15, 2023.

(tt) In the summer of 2022, counsel for the Coalition indicated its intention to adduce expert evidence in this Application but has not served its application record.

(uu) In the City's application, costs were fixed on consent at $230,829.97, representing the partial indemnity of costs and disbursements incurred by the City from the commencement of its application in October 2019 up to and including the rendering of the decision in February 2021. Given the similarity in evidence and issues, ClubLink anticipates that it will incur similar costs defending the present Application.

GENERAL

(vv) Section 138 of the *Courts of Justice Act*;

(ww) Rules 14.09, 21.01, 25.11, 37, 39, 56 and 57.03 of the *Rules of Civil Procedure*; and

(xx) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The Coalition's Notice of Application, issued February 22, 2022;

(b) The affidavit of Ashley McKnight, sworn March 15, 2023; and

(c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 15, 2023

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KANATA GREENSPACE PROTECTION COALITION et al.
Applicants/Responding Parties

-and-

CLUBLINK CORPORATION ULC
Respondent/Moving Party

Court File No. CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

NOTICE OF MOTION

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ClubLink Corporation ULC

Court File No. CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KANATA GREENSPACE PROTECTION COALITION and BARBARA RAMSAY

Applicants

and

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF ASHLEY MCKNIGHT
(Sworn March 15, 2023)

I, Ashley McKnight, of the City of Oshawa, in the Regional Municipality of Durham, MAKE OATH AND SAY:

1. I am a Law Clerk at Lax O'Sullivan Lisus Gottlieb LLP ("**LOLG**"), co-counsel for the Respondent, ClubLink Corporation ULC ("**ClubLink**"). As such, I have knowledge of the matters contained in this Affidavit. Where I do not have first-hand knowledge, I state the source of my information and believe it to be true.

The City of Ottawa's Application Against ClubLink

2. On October 25, 2019, the City of Ottawa (the "**City**") commenced an application against ClubLink bearing the Court File Number 19-81809. A copy of the City's notice of application is attached as **Exhibit A**.

3. In support of its application, the City filed affidavits from Eileen Adams-Wright, a law clerk at the law firm Borden Ladner Gervais LLP, which acted for the City. In her affidavit, Ms. Adams-Wright attached a number of contracts, including:

(a) An agreement between Campeau Corporation and the Corporation of the City of Kanata, dated May 26, 1981 (the "**1981 Agreement**"), attached as **Exhibit B**;

(b) An agreement between Campeau Corporation and the Corporation of the City of Kanata, dated June 10, 1985, attached as **Exhibit C**;

(c) An agreement between Campeau Corporation and the Corporation of the City of Kanata, dated December 20, 1988 (the "**1988 Agreement**"), attached as **Exhibit D**;

(d) An agreement between Campeau Corporation and the Corporation of the City of Kanata, dated December 20, 1988, attached as **Exhibit E**;

(e) An agreement between Imasco Enterprises Inc., ClubLink Capital Corporation, and the Corporation of the City of Kanata, dated November 1, 1996 (the "**Assumption Agreement**"), attached as **Exhibit F**. The affidavit of Ms. Adams-Wright states that this agreement is dated November 1, 1997; and

(f) A registration in the Land Registry system, bearing number 1020194 and dated January 8, 1997, attached as **Exhibit G**.

4. On November 19, 2019, the Applicant, the Kanata Greenspace Protection Coalition (the "**Coalition**") served a motion to intervene in the City's application against ClubLink. Attached as **Exhibit H** is a copy of the Coalition's notice of motion. Attached as **Exhibit I** is a copy of the affidavit filed by Barbara Ramsay sworn November 19, 2019, in support of the Coalition's intervener motion, without exhibits.[1] Attached as **Exhibit J** is a copy of the Coalition's factum in that motion. Attached as **Exhibit K** is a copy of ClubLink's responding factum in that motion.

[1] The version of Ms. Ramsay's affidavit with attachments can be provided to the Court upon request.

5. The Superior Court granted the Coalition intervener status on December 23, 2019. Attached as **Exhibit L** is a copy of the Court's decision and reasons.

6. The City's application was heard by Mr. Justice Marc Labrosse of the Superior Court on July 13-15, 2020. Attached as **Exhibit M** is a copy of the City's factum in that application. Attached as **Exhibit N** is a copy of the Coalition's factum. Attached as **Exhibit O** is a copy of ClubLink's responding factum. Attached as **Exhibit P** is a copy of the City's reply factum. Attached as **Exhibit Q** is a copy of the Coalition's reply factum.

7. I am advised by John Carlo Mastrangelo, a lawyer at LOLG who acts for ClubLink, that the affidavit of Ms. Ramsay, sworn February 10, 2020, was admitted into evidence before the Superior Court in the City's application. A copy of Ms. Ramsay's February 2020 affidavit, without exhibits, is attached as **Exhibit R**.

8. The Superior Court rendered its decision on February 19, 2021 (the "**Application Decision**"). A copy of the Court's reasons for judgment is attached as **Exhibit S**. A copy of the Court's signed order is attached as **Exhibit T**.

9. The Ontario Court of Appeal allowed ClubLink's appeal from the Application Decision on November 26, 2021. A copy of the Court of Appeal's reasons is attached as **Exhibit U**. A copy of the Court of Appeal's order is attached as **Exhibit V**. A copy of the Supreme Court of Canada's order denying the City's application for leave to appeal is attached as **Exhibit W**. I am advised by Mr. Mastrangelo that the Coalition did not participate in the appeal to the Ontario Court of Appeal or the leave application to the Supreme Court of Canada.

The Application from the Coalition and Ms. Ramsay Against ClubLink

10. On February 22, 2022, the Coalition and Ms. Ramsay served a notice of application bearing the Court File Number CV-22-88630, a copy of which I attach as **Exhibit X**.

11. I am advised by Mr. Mastrangelo that the Coalition has not served its application record.

12. I am also advised by Mr. Mastrangelo that, in a September 2022 attendance before Justice Labrosse in the City's application, the Coalition and ClubLink jointly requested that Justice

Labrosse case manage the Coalition's application and that he agreed to do so. Mr. Mastrangelo advises that he is not aware of any steps taken by the Coalition to schedule a case conference before Justice Labrosse, or otherwise to set a schedule. I am not aware of any such steps either.

The Kanata Greenspace Protection Coalition

13. Attached as **Exhibit Y** is the Coalition's certificate of incorporation. Attached as **Exhibit Z** is the Coalition's corporation profile report.

14. On February 22, 2023, LOLG commissioned a real property search from Centro Legal Works to determine whether the Coalition owns any real property in the Ottawa area. The results of this search are summarized in the email exchange between Mr. Mastrangelo and Chris Giordano, attached as **Exhibit AA**.

15. Based on my review of the Coalition's website, it does not appear that the Coalition has any activities or holds any property elsewhere in Ontario outside the Kanata / Ottawa area.

16. Attached as **Exhibit BB** is a screenshot from the Coalition's website (at the URL https://ourkanatagreenspace.ca/frequently-asked-questions/), which I captured on March 15, 2023.

17. Attached as **Exhibit CC** is a screenshot from the Coalition's gofundme.com page (at the URL https://www.gofundme.com/f/4qsudd-save-our-kanata-greenspace), which I captured on March 15, 2023.

SWORN by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

JOHN CARLO MASTRANGELO

ASHLEY McKNIGHT

This is Exhibit “A” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

(Court Seal)

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

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

THIS APPLICATION will come on for a hearing on at , at 161 Elgin Street, Ottawa, ON K2P 2K1.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

2

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date OCT 2 5 2019 Issued by _____
Local Registrar

Address of court office: 161 Elgin Street
Ottawa, ON K2P 2K1

TO: ClubLink Corporation ULC
15695 Dufferin Street
King City, ON L7B 1K5

APPLICATION

1. The Applicant, the City of Ottawa, makes application for:

(a) A Declaration that the obligations of ClubLink Corporation ULC in s. 3 of the ClubLink Assumption Agreement (as defined below) and the underlying 40% Agreement (as defined below) remain valid and enforceable;

(b) An Order that within 21 days ClubLink Corporation ULC must either: 1) withdraw its Zoning By-law Amendment application and Plan of Subdivision application received by the City of Ottawa on October 8, 2019, or; 2) offer to convey the Golf Course Lands (as described below) to the City of Ottawa at no cost;

(c) A Declaration that pursuant to s. 7 & 9 of the 1981 40% Agreement and s. 10 & 11 of the ClubLink Assumption Agreement, if the City of Ottawa accepts a conveyance of the Golf Course Lands, it is not thereafter obliged to reconvey the Golf Course Lands to ClubLink Corporation ULC so long as it uses the Golf Course Lands as open space for recreation and natural environmental purposes, irrespective of whether it continues operation of the golf course;

(d) An Order that this application be heard on an expedited basis;

(e) In the alternative to (d) an order for interim or interlocutory injunctive relief if requested;

(f) The costs of this proceeding, plus all applicable taxes; and

(g) Such further and other relief as to this Honourable Court may seem just.

2. The grounds for the application are:

(a) In 1979, Campeau Corporation ("Campeau") owned 1400 acres of land in what was then the City of Kanata ("Kanata"), which consisted of two adjacent parcels of land, the so-called Marchwood lands and Lakeside lands ("Campeau Lands").

(b) Campeau's plan at that time was to develop the Campeau Lands, including by building homes and neighborhoods, and by expanding an existing 9-hole golf course into an 18-hole golf course.

(c) In order to obtain Kanata's support for the necessary applications for Official Plan Amendments, Campeau proposed that 40% of the Campeau Lands would be reserved as open space for recreation and natural environmental purposes, consisting of: natural environmental areas; lands to be dedicated for park purposes; a storm water management area, and; the proposed 18-hole golf course.

(d) Campeau and Kanata subsequently entered into an agreement dated May 26, 1981 to reserve 40% of the Campeau Lands as open space for recreation and natural environmental purposes ("1981 40% Agreement").

(e) Campeau and Kanata agreed in section 5(4) of the 1981 40% Agreement that, "In the event that Campeau desires to discontinue the operation of the golf course and it can find no other person to acquire or operate it, then it shall convey the golf course (including lands and buildings) to Kanata at no cost and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9."

(f) Section 9 of the 1981 40% Agreement provides that, "In the event that any of the land set aside for open space for recreation and natural environmental purposes ceases to be used for recreation and natural environmental purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no cost…".

(g) Pursuant to s. 9 of the 1981 40% Agreement, Kanata was not required to reconvey the lands so long as it continued to use the land for a golf course or otherwise as open space for recreational and natural environmental purposes.

(h) The 1981 40% Agreement also contemplates the potential sale of the golf course. The City obtained a contractual right of first refusal. Campeau also agreed that it if sold the golf course, the new owners would enter into an agreement with Kanata providing for the operation of the golf course in perpetuity.

(i) In subsequent agreements dated June 10, 1985 and December 29, 1988 between Campeau and Kanata, they confirmed the location of the golf course within the Campeau Lands (collectively "Golf Course Agreement").

(j) The legal description of the Golf Course Lands are attached as Appendix "A".

(k) The 1981 40% Agreement contemplated further study to determine with precision where within the Campeau Lands the open space lands for recreational and natural environmental purposes would be. Kanata and Campeau entered into a further agreement dated December 20, 1988 ("1988 40% Agreement") identifying the lands. Together the 1981 40% Agreement and 1988 40% Agreement are referred to as the "40% Agreement".

(l) Ownership of the Golf Course Lands has changed over the decades. Genstar Development Company Eastern Ltd. ("Genstar") purchased the Golf Course Lands from Campeau in 1989. ClubLink Capital Corporation purchased the Golf Course Lands from Genstar in 1996. Subsequent to a series of amalgamations, ClubLink Corporation ULC ("ClubLink") is the corporate successor to ClubLink Capital Corporation. ClubLink is the current owner of the Golf Course Lands.

(m) ClubLink entered into an agreement with Kanata and Imasco Enterprises Inc. (Genstar's successor) dated November 1, 1996 whereby it assumed Campeau's obligations under the 40% Agreement and the Golf Course Agreement ("ClubLink Assumption Agreement").

(n) On January 1, 2001, by operation of the *City of Ottawa Act, 1999*, SO 1999, c. 14, Sch. E, twelve municipalities including Kanata and the Regional Municipality of Ottawa Carleton were dissolved, and the Applicant the City of Ottawa ("City" or "Ottawa") was constituted. The City stands in the place of Kanata. All the assets and liabilities of Kanata, including all rights, interests, entitlements and contractual benefits and obligations became assets and liabilities of Ottawa.

(o) The public uses the Golf Course Lands for recreational purposes, including for cross-country skiing in the winter.

(p) ClubLink desires to discontinue the operation of the golf course. It intends to redevelop the Golf Course Lands with homes and roads. In furtherance of its redevelopment plans, on October 8, 2019 it submitted applications under the

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Planning Act for a Zoning By-law Amendment and Plan of Subdivision ("Planning Applications").

(q) ClubLink's obligation to offer to convey the Golf Course Lands and the City's entitlement to receive and accept such an offer is in the nature of a personal right that was properly assigned and assumed by ClubLink.

(r) ClubLink has failed to offer to convey the Golf Course Lands to the City at no cost in accordance with s. 5(4) of the 1981 40% Agreement, which was assumed by ClubLink in s. 3 of the ClubLink Assumption Agreement. Accordingly, ClubLink is in breach of its contractual obligations to the City. Alternatively, ClubLink's conduct constitutes anticipatory repudiation of its contractual obligations for which the City seeks specific performance.

(s) The 1981 40% Agreement was registered on title of the Campeau Lands. The 40% Agreement, Golf Course Agreement and ClubLink Assumption Agreement are all registered on title of the Golf Course Lands.

(t) Over the decades, the Campeau Lands have been subdivided and sold. They are now owned by hundreds of separate individuals, developers and other entities. Residential street, roadways, park space and other services are on the Campeau Lands, marking the area as a developed suburb on the western flank of Ottawa.

(u) One or both of the 40% Agreement and Golf Course Agreement are part of the subdivision agreements registered on the Golf Course Lands. As such, they are governed by the *Planning Act*, RSO 1990, c P. 13 and its predecessors. At all

relevant times, the *Planning Act* confirmed that such agreements are binding on current owners and all subsequent owners.

(v) Damages for ClubLink's breach of contract are an inadequate remedy. The consequence of its breach is that protections concerning the continued use of the Golf Course Lands as open space for recreation and natural environmental purposes will be lost. This loss will not only be borne by the City, but by the City's residents, in particular those residents who live or own homes adjoining or near the Golf Course Lands.

(w) Further, ClubLink's continuing breach is prejudicing the City in respect of the City's planning review process that has now been triggered by ClubLink's Planning Applications. Given widespread public opinion that ClubLink "cannot" develop the Golf Course Lands, the City will not be able to obtain meaningful public input about ClubLink's proposal within the time the City is statutorily obliged to make a decision under the *Planning Act* (by January 3, 2020 for zoning and by February 2, 2020 for the plan of subdivision). Public input is a valuable and necessary part of the review process. Further, the enforceability of the 40% Agreement is a critical issue that fundamentally impacts the City's consideration of the Planning Applications.

(x) If the City does not make a decision in these time periods, ClubLink has a direct and immediate right of appeal to the Local Municipal Planning Tribunal ("LPAT"). LPAT has taken the position in past cases that it has no jurisdiction to consider the enforceability private contractual obligations such as those arising from the 40%

Agreement, the Golf Course Agreement or the ClubLink Assumption Agreement. Further, in proceeding with the Planning Applications, the City will cause the community significant hardship and stress.

(y) Specific performance is the only adequate remedy. To cure its breach, ClubLink must either forthwith withdraw its Planning Applications or offer to convey the Golf Course Lands to the City of Ottawa at no cost.

(z) This application ought to be heard on an expedited basis.

(aa) *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 14.05, 38, 39, 57, 58.

(bb) *City of Ottawa Act, 1999,* SO 1999, c. 14, Sch. E.

(cc) *Planning Act*, RSO 1990, c P.13, ss. 2, 34, 50, 51.

(dd) *Planning Act*, RSO 1980, c. 379, s. 29.

(ee) *Planning Act*, SO 1983, c. 1, s. 50.

(ff) *Land Titles Act*, RSO 1990, c L.5, s. 71.

(gg) *Land Titles Act*, RSO 1980, c 230, s. 74.

(hh) *Courts of Justice Act*, RSO 1990, c C.43, s. 97 & 131.

(ii) Such further and other grounds as the lawyers may advise.

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

(a) Affidavit of Eileen Adams-Wright sworn October 24, 2019;

(b) Affidavit of Derrick Moodie sworn October 24, 2019;

(c) Affidavit of Donald Kennedy sworn October 25, 2019;

(d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

(Date of issue)

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Lawyers for the Applicant, City of Ottawa

APPENDIX "A"

CONSOLIDATION OF VARIOUS PROPERTIES BEING: FIRSTLY: BLOCK 69 ON PLAN 4M-510. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 1 ON 4R-5215 AS IN LT438339. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. SECONDLY: BLOCK 132 ON PLAN 4M-651. SUBJECT TO AN EASEMENT IN FAVOUR OF BELL CANADA OVER THAT PART OF PART 9 ON PLAN 4R-3747 LYING WITHIN THE LIMITS OF BLOCK 132 ON PLAN 4M-651 AS IN MH3493. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 21 ON 4R-6268 AS IN LT568246E. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. CITY OF KANATA. NOW CITY OF OTTAWA – PIN 04513-0489 (LT)

CONSOLIDATION OF VARIOUS PROPERTIES BEING FIRSTLY: BLOCK 126 ON PLAN 4M-651. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PARTS 3 AND 19 ON 4R-6268 AS IN LT568246E. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 20 ON 4R-6268 AS IN LT568247. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. SECONDLY: PART OF BLOCK 192 ON PLAN 4M-652, DESIGNATED AS PART 2 ON PLAN 4R-7259. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. THIRDLY: BLOCK 160 ON PLAN 4M-739. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 1 ON PLAN 4R-12477 AND PART 1 ON PLAN 4R-12479 AS IN LT1014950. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. FOURTHLY: BLOCK 76 ON PLAN 4M-828 SAVE AND EXCEPT THE LANDS LAID OUT BY PLAN 4M-925. SUBJECT TO AN EASEMENT IN FAVOUR OF BELL CANADA OVER PART 1 ON PLAN 4R-16180 AS IN LT1365034. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. FIFTHLY: BLOCK 1 ON PLAN 4M-881 SAVE AND EXCEPT THE LANDS LAID OUT BY PLAN 4M-925 AND PARTS 1 TO 6, INCLUSIVE ON PLAN 4R-12476. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PARTS 6 AND 10 ON 4R-6558 AS IN LT599218 AS TRANSFERRED TO THE REGIONAL MUNICIPALITY OF OTTAWA-CARLETON AS IN LT1082901. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PARTS 9 AND 10 ON 4R-6558 AS IN LT599219. SUBJECT TO AN EASEMENT IN FAVOUR OF KANATA HYDRO-ELECTRIC COMMISSION OVER PART 1 ON 4R-12475 AS IN LT1011768. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 1 ON 4R-12475 AND PARTS 1 AND 2 ON 4R-12480 AS IN LT1014950. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. (LT606425, LT606426, LT606427, LT606395 AND LT875985.) SIXTHLY: BLOCK 55 ON 4M-883. SUBJECT TO AN EASEMENT IN FAVOUR OF BELL CANADA AS IN LT866335. SUBJECT TO AN EASEMENT IN FAVOUR OF KANATA HYDRO-ELECTRIC COMMISSION AS IN LT924341. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. SEVENTHLY: BLOCK 56 ON PLAN 4M-883 SAVE AND EXCEPT PART 7 ON 4R-12476. SUBJECT TO AN EASEMENT IN FAVOUR OF BELL CANADA AS IN LT866335. SUBJECT TO AN EASEMENT IN FAVOUR OF KANATA HYDRO-ELECTRIC COMMISSION AS IN LT924341. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 8 ON PLAN 4R-12476 AS IN LT1014950. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. (LT606425, LT606426, LT606427, LT606395 AND LT875985.) CITY OF KANATA. NOW CITY OF OTTAWA. – PIN 04512-1126 (LT)

PCL 183-1, SEC 4M-652 ; BLK 183, PL 4M-652 , S/T LT607362 ; S/T LT568249,LT569968 KANATA TOGETHER WITH AN EASEMENT AS IN LT1020195 – PIN 04511-0214 (LT)

CONSOLIDATION OF VARIOUS PROPERTIES BEING FIRSTLY: PART OF BLOCK 184 ON PLAN 4M-652, DESIGNATED AS PART 2 ON 4R-7217. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. SECONDLY: BLOCK 185 ON PLAN 4M-652. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 21 ON 4R-6270 AS IN LT568250. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. THIRDLY: BLOCK 186 ON 4M-652. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 13 ON 4R-6270 AS IN LT568250. SUBJECT TO AN EASEMENT IN FAVOUR OF BELL CANADA OVER PART 24 ON PLAN 4R-6270 AS IN LT568251. SUBJECT TO A TEMPORARY EASEMENT IN FAVOUR OF CAMPEAU CORPORATION AS IN LT607362. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. FOURTHLY: BLOCK 76 ON PLAN 4M-741. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 1 ON 4R-8606 AS IN LT808272. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA OVER PART 1 ON 4R-12478 AS IN LT1014950. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. FIFTHLY: PART OF THE ROAD ALLOWANCE AS WIDENED BETWEEN LOTS 5 AND 6, CONCESSION 3, MARCH, KNOWN AS THAT PART OF BEAVERBROOK ROAD AND RICHARDSON SIDE ROAD (AS STOPPED AND CLOSED BY BY-LAW LT552228) DESIGNATED AS PART 4 ON PLAN 4R-6557. SUBJECT TO AN EASEMENT IN FAVOUR OF THE CORPORATION OF THE CITY OF KANATA AS IN LT607253. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. SIXTHLY: PART OF LOTS 5 AND 6, CONCESSION 3, MARCH, AND THAT PART OF THE ROAD ALLOWANCE BETWEEN LOTS 5 AND 6, CONCESSION 3, MARCH, DESIGNATED AS PART 2 ON PLAN 4R-7987. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. (LT606425, LT606426, LT606427, LT606395 AND LT875985). SEVENTHLY: PART OF LOT 6, CONCESSION 3, MARCH, DESIGNATED AS PART 1 ON PLAN 4R-7987. TOGETHER WITH AN EASEMENT OVER PART OF LOT 3, CONCESSION 2, MARCH, DESIGNATED AS PART 1 ON 4R-12474 AS IN LT1020195. (LT606425, LT606426, LT606427, LT606395 AND LT875985.) KANATA, NOW CITY OF OTTAWA - PIN 04511-1592 (LT)

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Ottawa

NOTICE OF APPLICATION

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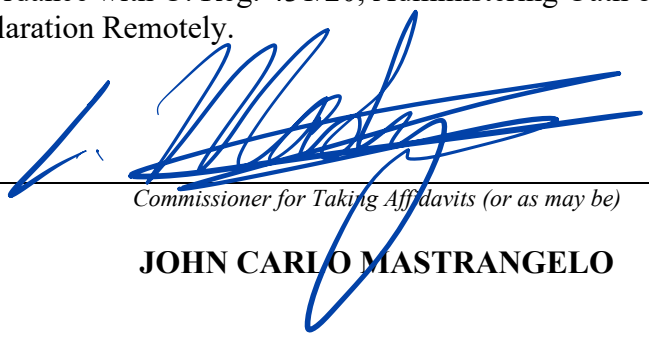
Lawyers for the Applicant, City of Ottawa

Box 368

This is Exhibit “B” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

THIS AGREEMENT made in triplicate this 26th day of May 1981.

BETWEEN:

CAMPEAU CORPORATION, a body corporate and politic, incorporated under the laws of the Province of Ontario, having its Head Office in the City of Nepean,

Hereinafter called "Campeau"

OF THE FIRST PART

AND:

THE CORPORATION OF THE CITY OF KANATA

Hereinafter called "Kanata"

OF THE SECOND PART

WHEREAS Campeau has applied to The Regional Municipality of Ottawa-Carleton (hereinafter called the "Region") to amend its Official Plan to permit the development of the 'Marchwood Lakeside Community' in the City of Kanata in accordance with the plans proposed by Campeau;

AND WHEREAS Campeau has proposed to designate approximately forty (40%) percent of the development area as recreation and open space and the parties are desirous of entering in this agreement to establish the principles relating to Campeau's offer;

AND WHEREAS the Region has agreed to amend its Official Plan in accordance with Campeau's request;

THEREFORE this agreement witnesseth that for and in consideration of One Dollar paid by Kanata to Campeau (receipt of which is acknowledged), and the mutual covenants contained herein:

1. This Agreement shall apply to the lands described in Schedule "A" attached hereto.

APPLICATION TO REGISTER
NOTICE OF AN AGREEMENT

140350

THE LAND TITLES ACT SECTION 78

TO: THE LAND REGISTRAR
FOR THE LAND TITLES DIVISION OF OTTAWA-CARLETON NO.4

I, THE CORPORATION OF THE CITY OF KANATA
being interested in the lands entered
as Parcel 6-1 and 5-1
in the Register for Section March-1 and March-2
or which CAMPEAU CORPORATION
is the registered Owner
hereby apply to have Notice of an Agreement dated the
26th day of May, 1981
made between CAMPEAU CORPORATION and THE REGIONAL MUNICIPALITY OF OTTAWA-CARLETON
entered on the parcel register.
The evidence in support of this Application consists of:

1. An executed copy of the said Agreement

This Application is not being made for any fraudulent or improper purpose.

My address for service is 150 Katimavik, Kanata, Ontario.

THE CORPORATION OF THE CITY OF KANATA

by its Solicitor
DOUGLAS KELLY

REGIONAL OFFICIAL PLAN

2. Campeau and Kanata mutually covenant and agree to support the application by the Region for approval of Official Plan Amendment No. 24 to the Official Plan of the Ottawa-Carleton Planning Area which is attached hereto as Schedule "B".

PRINCIPLE OF PROVISION OF 40% OPEN SPACE AREAS

3. Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:

(a) the proposed 18 hole golf course

(b) the storm water management area

(c) the natural environmental areas

(d) lands to be dedicated for park purposes.

4. (1) The location of the lands to be provided for the 18 hole golf course shall be mutually agreed between the parties;

(2) The lands set aside for the major storm water management area is shown generally as part of the Environmental Constraints Area on Schedule "2" of Official Plan Amendment No. 24, the exact boundaries of this area and the location and boundaries of the remainder of the storm water management system shall be mutually agreed between the parties.

(3) The lands set aside for the natural environmental areas are shown generally on Schedule "2" of the proposed Official Plan Amendment No. 24 attached as Schedule "B" hereto as Environmental Area Class 1 and 2 and part of the Environmental Constraint Area provided that the exact boundaries of these areas shall be mutually agreed between the parties.

(4) The lands to be dedicated for park purposes will be determined at the time of the development applications in accordance with The Planning Act.

METHODS OF PROTECTION

5. (1) Campeau covenants and agrees that the land to be provided for the golf course shall be determined in a manner mutually satisfactory to the parties and subject to sub-paragraphs 2 and 3 shall be operated by Campeau as a golf course in perpetuity provided that Campeau shall at all times be permitted to assign the management of the golf course without prior approval of Kanata.

(2) Notwithstanding sub-paragraph (1), Campeau may sell the golf course (including lands and buildings) provided the new owners enter into an agreement with Kanata providing for the operation of the golf course in perpetuity, upon the same terms and conditions as contained herein.

(3) In the event Campeau has received an offer for sale of the golf course it shall give Kanata the right of first refusal on the same terms and conditions as the offer for a period of twenty-one (21) days.

(4) In 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 and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9.

(5) In the event Kanata will not accept the conveyance of the golf course as provided for in sub-paragraph (4) above then Campeau shall have the right to apply for development of the golf course lands in accordance with The Planning Act, notwithstanding anything to the contrary contained in this agreement.

6. Campeau shall convey the lands set aside for the storm water management system to Kanata at no cost when the lands are capable of definition by Plans of Survey or Plans of Subdivision being developed in the vicinity of the storm water management system.

7. Campeau shall convey the natural environmental areas to Kanata at no cost when the lands are capable of definition by Plans of Survey or Plans of Subdivision being developed in the vicinity of the open space and natural environmental areas.

8. Campeau shall convey to Kanata at no cost the land for park purposes upon the development of lands in accordance with The Planning Act.

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

10. It is the intent of the parties that this agreement shall establish the principle as proposed by Campeau to provide 40% of the land in the 'Marchwood Lakeside Community' as open space, however, as development occurs and plans are finalized, further agreements concerning specific open space areas may be required to implement this principle and to provide for the construction of works in these areas.

11. This agreement shall be binding on the parties and have full force and effect when Official Plan Amendment No. 24 to the Official Plan of the Ottawa-Carleton Planning Area is approved by either The Minister of Housing or the Ontario Municipal Board.

12. This agreement shall be registered against the lands described in Schedule "A" provided that when any part of the lands are severed or approved for development in accordance with the Planning Act, Kanata at the request of Campeau shall provide a release of this agreement for those specific lands severed or approved for development provided that the specific lands do not contain any of the open space land designated by this agreement and provided further that the principles confirmed by the terms and conditions of this agreement are maintained.

13. It is agreed and declared that this agreement and covenants, provisos, conditions and schedules herein shall enure to the benefit of and be binding upon the respective successors or assigns of each of the parties hereto.

IN WITNESS WHEREOF, the Parties hereto have hereunto affixed their corporate seals, attested by the hands of their proper officers duly authorized in that behalf.

SIGNED, SEALED AND DELIVERED in the presence of

CAMPEAU CORPORATION

PRESIDENT

VICE-PRESIDENT AND SECRETARY

THE CORPORATION OF THE CITY OF KANATA

MAYOR

CLERK

SCHEDULE A

To An agreement, dated May 26, 1981, between CAMPEAU CORPORATION and the Corporation of the City of Kanata

FIRSTLY: All and singular that certain parcel or tract of land and premises, situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and being those parts of Lots 7, 8 and 9, Concession 3, in the original Township of March, County of Carleton, designated as parts 1, 3, 4, 7 and 8 of a plan of survey of record in the Land Registry Office for the Registry Division of Carleton (No. 5) on October 6, 1976 as No. 5R-2702.

SECONDLY: All and singular that certain parcel or tract of land and premises, situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and being compsed of those parts of Lot 6 and 7, Concession 3, in the original Township of March, County of Carleton, designated as parts 3, 4 and 6 on a plan of survey of record deposited in the Land Registry Office for the Registry Divison of Carleton (No. 5) on October 13, 1976 as No. 5R-2710.

THIRDLY: All and singular that certain parcel or tract of land and premises, situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and being composed of those parts of Lots 3, 4 and 5, Concession 3, in the said Township of March, designated as parts 7, 8 and 10 on a plan of survey of record deposited in the Land Registry Office for the Registry Division of Carleton (No. 5) on October 14, 1976 as No. 5R-2710.

FOURTHLY: All and singular that certain parcel or tract of land and premises, situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and Province of Ontario and being that part of Lot 5, Concession 2, in the said Township of March designated as parts 1, 2, 3, 4 and 5 on a plan of survey of record, registered on November 7, 1974 as No. 4R-1135 being the whole of parcel 5-1 in the Register of Section March-2.

FIFTHLY: All and singular that certain parcel or tract of land and premises, situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and being those parts of Lot 6 and 7, Concession 2, in the said Township of March designated as parts 1, 2 and 3 on a plan of survey of record numbered 4R-804, being the whole of parcel 6-1 in the Register of Section March-1.

SIXTHLY: All and singular that certain parcel or tract of land and premises situate, lying and being now in the City of Kanata formerly Township of March, in the Regional Municipality of Ottawa-Carleton and the Province of Ontario and being composed of parts of Lots 6, 7, 8 and 9, Concession 2 of the said Township of March, more particularly described as follows:-

Commencing at the point of intersection of the division line between the northwest and southeast halves of the said Lot 6 with the northeasterly limit of the Road Allowance between Concessions 1 and 2;

Thence northwesterly, along the said northeasterly limit of the Road Allowance between Concessions 1 and 2, a distance of 1015.15 feet to the most southerly angle of the said Lot 7;

Thence northwesterly, continuing along the said northeasterly limit of the Road Allowance between Concessions 1 and 2, 1981.18 feet to the most southerly angle of the said Lot 8;

Thence northwesterly and continuing along the said northeasterly limit of the Road Allowance between Concessions 1 and 2, a distance of 2888.4 feet, more or less, to the southerly limit of the lands of the Canadian National Railway as described in Registered Instrument No. 1081;

Thence easterly, along the said southerly limit of the lands of the Canadian National Railway, a distance of 4695 feet, more or less, to the westerly limit of the forced road crossing the said Lots 6, 7 and 8 (Goulbourn Road);

Thence southerly and following the said westerly limit of the forced road as at present fenced, a distance of 3630 feet, more or less, to the established division line bewtween the northwest and southeast halves of the said Lot 6;

Thence southwesterly, along the last mentioned division line, 2373 feet, more or less, to the point of commencement.

Subject to a 30-foot easement in favour of Bell Canada, crossing the said Lot 6 and more particularly described in Registered Instrument No. 3486;

SEVENTHLY: All and singular that certain parcel or tract of land and premises situate, lying and being now in the City of Kanata formerly the Township of March, in the Regional Municipality of Ottawa-Carleton and the Province of Ontario, and being composed of part of Lots 8 and 9, Concession 2 of the said Township, more particularly described as follows:-

Premising that all bearings are astronomic and are derived from the south from the southwesterly limit of the Road Allowance between Concessions 2 and 3 across Lots 8 and 9, having a bearing of north 41 degrees 24 minutes west;

Commencing at the point of intersection the established division line between the northwest and southeast halves of the said Lot 9 with the southwesterly limit of the Road Allowance between Concessions 2 and 3;

Thence south 41 degrees 24 minutes east, along the said southwesterly limit of the Road Allowance between Concessions 2 and 3, 2236.8 feet to the line of a post and wire fence defining the southeasterly limit of the lands described in Registered Instrument No. 5134 (Parcel 3);

Thence south 44 degrees 26 minutes west, and following the said fence, a distance of 165.4 feet to a jog in the said fence;

Thence on a bearing of north 45 degrees 34 minutes west, along the said jog, a distance of 14.7 feet to a fence corner;

Thence on a bearing of south 49 degrees 41 minutes west and following an existing fence, a distance of 469.1 feet to an angle in the said fence;

Thence on a bearing of south 8 degrees 56 minutes west, and following the line of the said fence, a distance of 371.5 feet to a point in the northerly limit of the lands of the Canadian National Railway, as described in Instrument No. 1081;

Thence westerly, along the last mentioned limit, to the northeasterly limit of the Road Allowance between Concessions 1 and 2;

Thence northwesterly, along the last mentioned limit, 31.1 feet, more or less, to the said established division line between the northwest and southeast halves of Lot 9;

Thence north 48 degrees 53 minutes east, along the last mentioned division line, 4258 feet, more or less, to the point of commencement.

EIGHTLY: ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and the Province of Ontario and being composed of Part of Lot 4, Concession 2 of the Township of March and being more particularly described as follows:

PREMISING that the north easterly limit of said Lot 4 has an astronomic bearing of north 41 degrees 53 minutes west as shown on Plan 5R-1749 and relating all bearings herein thereto;

COMMENCING at the most easterly angle of the said Lot 4;

THENCE north 41 degrees 53 minutes west along the north easterly limit of the said Lot, a distance of 1995.6 feet more or less to the division line between Lots 4 and 5;

THENCE south westerly along the said division line having the following courses and distances;

THENCE south 48 degrees 30 minutes west, a distance of 240.46 feet;

THENCE south 47 degrees 47 minutes 20 seconds west, a distance of 512.17 feet;

THENCE south 47 degrees 27 minutes 20 seconds west, a distance of 413.19 feet;

THENCE south 48 degrees 40 minutes 35 seconds west, a distance of 692.90 feet;

THENCE south 47 degrees 31 minutes 20 seconds west, a distance of 519.50 feet to the easterly limit of the Goulbourn Forced Road;

THENCE southerly along the said easterly limit of the Goulbourn Forced Road having the following courses and distances;

THENCE south 13 degrees 04 minutes 20 seconds east, a distance of 49.38 feet;

THENCE south 14 degrees 49 minutes 00 seconds east, a distance of 245.60 feet;

THENCE south 80 degrees 13 minutes 25 seconds west, a distance of 18.48 feet;

THENCE south 6 degrees 10 minutes 40 seconds east, a distance of 164.62 feet;

THENCE south 36 degrees 35 minutes 40 seconds east, a distance of 519.97 feet;

THENCE south 32 degrees 05 minutes 30 seconds east, a distance of 452.79;

THENCE south 24 degrees 26 minutes 35 seconds east, a distance of 366.62;

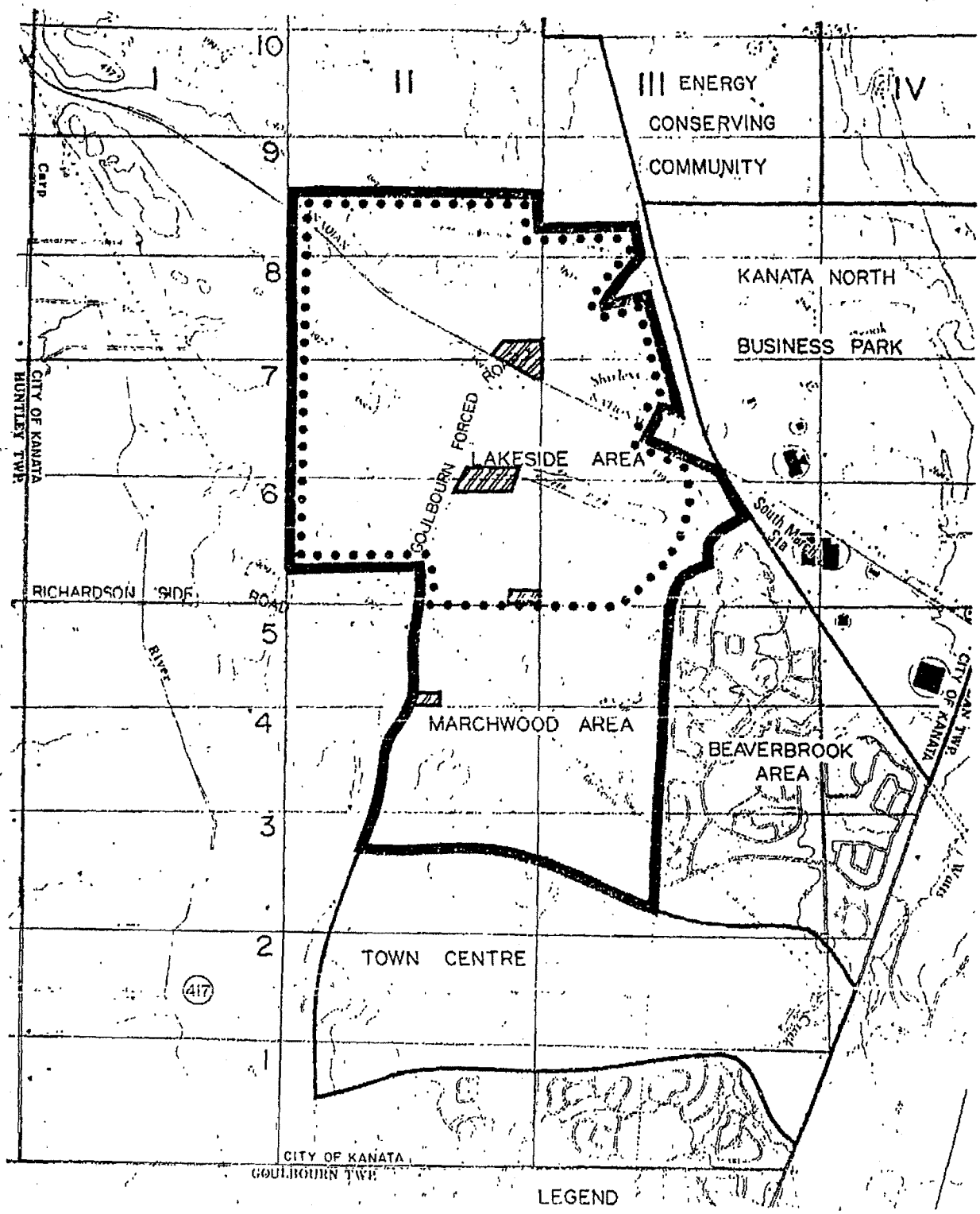
THENCE south 27 degrees 54 minutes 10 seconds east, a distance of 306.96 feet to the division line between Lots 3 and 4;

THENCE north 48 degrees 09 minutes east along the last mentioned division line 2965.1 feet more or less to the point of commencement.

THIS AGREEMENT SHALL APPLY TO THE LANDS SHOWN AS 'CAMPEAU PROPERTY' ON THIS SCHEDULE.

SCHEDULE "A"

REFERENCE MAP MARCHWOOD-LAKESIDE AREA 140350



LEGEND

- CAMPEAU PROPERTY INSIDE MARCHWOOD LAKESIDE
- TRANSMISSION LINE - TELEPHONE
- TRANSMISSION LINE - HYDRO
- AREA SUBJECT TO AMENDMENT
- PROPERTIES NOT OWNED BY CAMPEAU

SCALE 1:25,000

20

SCHEDULE "B"

140350

59

AMENDMENT 24

OFFICIAL PLAN OF THE OTTAWA-CARLETON PLANNING AREA

Purpose

The purpose of Amendment 24 is to redesignate certain lands in Lots 4 and 5, Concession I, Lots 3, 4, 5, 6, 7, 8 and the south half of Lot 9 in Concession II, and Lots 6, 7, 8 and the south half of Lot 9 in Concession III, City of Kanata, from "Special Study Area", "Agricultural Resource Area" and "Natural Environment Area Classes 1 and 2" to "Principal Urban Area" as shown on Schedule "1" attached and to extend the "Residential District" designation and add Natural Environment Area Classes 1 and 2 as shown on Schedule "2" attached.

Basis

The Regional Official Plan as approved by Council 9 Oct, 1974 did not envisage urban development on the lands described above and hence it is necessary to amend the Plan so that development may proceed. It is felt that several small forest areas will retain sufficient natural environment characteristics to warrant their preservation as part of the urban community.

The Amendment

1. Schedule "A" - Rural Policy Plan be amended as shown on Schedule "1" of this amendment.

2. Schedule "B" - Urban Policy Plan be amended as shown on Schedule "2" of this amendment.

3. Map "2" of "Appendix E" as introduced through Amendment 12 be amended as shown on Schedule "3" of this amendment.

4. Section 5.3.9 as introduced through Amendment 12 be amended by deleting the first two paragraphs; by deleting the first two words of the third paragraph and replacing them with "The first"; and by deleting the second word of the fourth paragraph and replacing it with "second".

5. Section 5.3.10 as introduced through Amendment 12 be amended by adding the phrase "except for that portion within the West Urban Community" after the phrase "the South March Highlands" in policy 15.

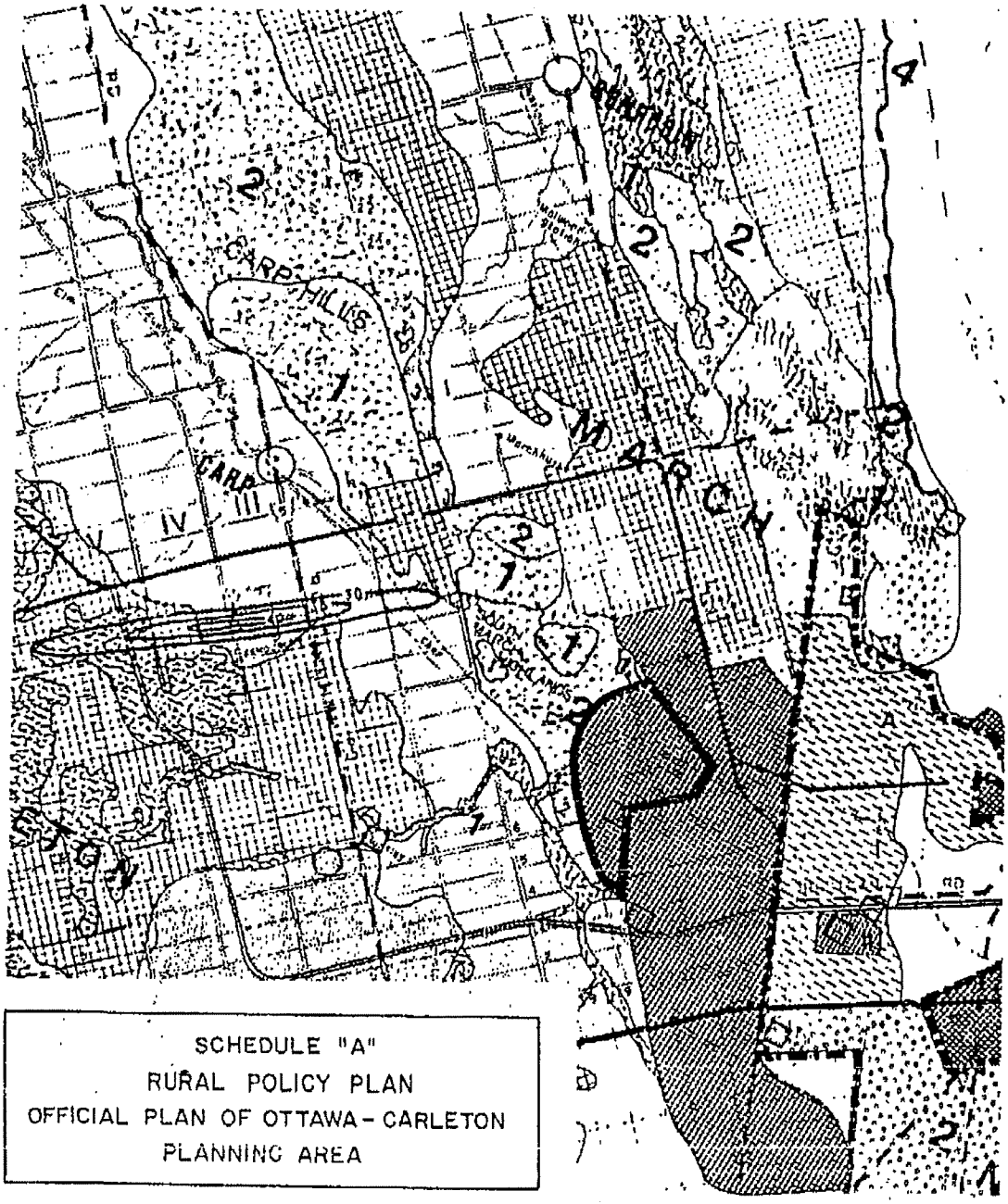
6. Section 5.3.10 as introduced through Amendment 12 be amended by deleting policy 19.

9

SCHEDULE "I" REGIONAL OFFICIAL PLAN AMENDMENT No.24

140350

60



SCHEDULE "A"
RURAL POLICY PLAN
OFFICIAL PLAN OF OTTAWA - CARLETON
PLANNING AREA

LEGEND

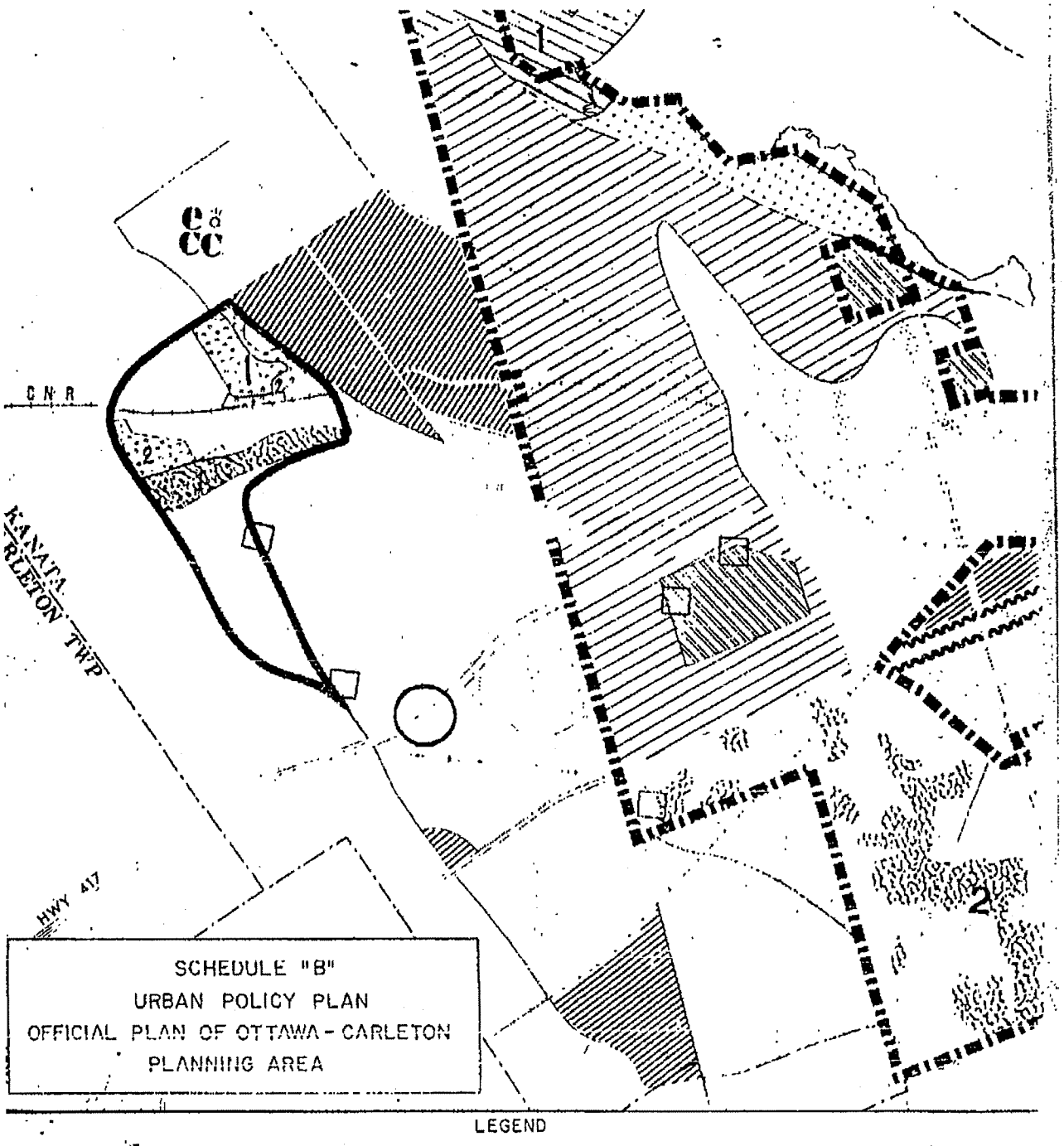
- ENVIRONMENTAL AREA CLASS 1
- ENVIRONMENTAL AREA CLASS 2
- ENVIRONMENTAL AREA CLASS 3
- WATER ACCESS AND WATER RECREATION AREA
- GEOMORPHIC OR GEOLOGICAL FEATURE
- AGRICULTURAL RESOURCE AREA
- MARGINAL RESOURCE AREA
- MINERAL RESOURCE AREA
- VILLAGE
- INTERIM RIVER CORRIDOR
- POTENTIAL SOLID WASTE DISPOSAL SITE
- AIRPORT NOISE
- ENVIRONMENTAL CONSTRAINTS AREA
- PRINCIPAL URBAN AREAS
- RESTRICTED INDUSTRY
- OTHER EXTENSIVE USE
- AREA SUBJECT TO AMENDMENT

SCALE: 1:100,000

1:10350

61

SCHEDULE "2" REGIONAL OFFICIAL PLAN AMENDMENT No.24



NS140350

DATED THE 26th day of May 1981

PROPERTY OF THE
LAND REGISTRY OFFICE

CAMPEAU CORPORATION

AND

THE CORPORATION OF THE CITY OF KANATA

A G R E E M E N T

The Regional Municipality of
Ottawa-Carleton
Legal Department
222 Queen Street
Ottawa, Ontario

DK:web File No: P.1.10.1.25

- Box-215 -

NS140350

'82 JAN -6 P2:34

IN THE LAND REGISTRY OFFICE
OTTAWA, ONTARIO

15

LAND PROPERTY #5

CK

Bk. 2 March
Bk-7

62

This is Exhibit "C" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

Province of Ontario

Document General

Form 4 — Land Registration Reform Act, 1984

DYE & DURHAM CO. LIMITED Form No. 996

D

FOR OFFICE USE ONLY

66425

'89 3 21 11 12

GAIL BOURSEAU
ASSISTANT DEPUTY LAND REGISTRAR

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 18 pages M.L.

(3) Property Identifier(s) Block Property Additional: See Schedule ☐

(4) Nature of Document: Application to Register Notice of an Unregistered Estate, Right, Interest or Equity - Section 74

(5) Consideration Dollars $

(6) Description

Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1 and 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 3-7 Section March-3, Part of Parcel 5-3 Section March-2, Parcel 5-1 Section March-2 and Part of Parcel 2-1 Section March-2, as described in the schedule annexed on pages 2 to 11 annexed.

New Property Identifiers Additional: See Schedule ☐

Executions Additional: See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☐ Other ☒

(8) This Document provides as follows:

The Corporation of the City of Kanata has an unregistered interest in the land registered in the name of Campeau Corporation in respect of the lands registered as Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1 and 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 3-7 Section March-3, Part of Parcel 5-3 Section March-2, Parcel 5-1 Section March-2 and Part of Parcel 2-1 Section March-2, as described in the schedule annexed on pages 2 to 11 annexed, and hereby apply under section 74 of the Land Titles Act for the entry of a Notice of an Agreement dated the 10th day of June, 1985, made between The Corporation of the City of Kanata and Campeau Corporation in the register for the said parcels.

Continued on Schedule ☐

(9) This Document relates to Instrument number(s)

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
THE CORPORATION OF THE CITY OF KANATA BY ITS SOLICITOR DAVID SILVERSON	David Silverson	1988	10	14

(11) Address for Service 150 Katimavik Road, Kanata, Ontario K2L 2N3

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
CAMPEAU CORPORATION				

(13) Address for Service 320 Bay Street, 6th Floor, Toronto, Ontario M5H 2P2

(14) Municipal Address of Property: Not Assigned

(15) Document Prepared by:
Margaret E. Hill
GOWLING & HENDERSON
160 Elgin Street, 26th Floor
Ottawa, Ontario
K1N 8S3

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	40.00
9 x Parcels	
Total	

10174 (12/84)

SCHEDULE

LEGAL DESCRIPTION

Parcel 69-1, Section 4M-510

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 69 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-510, being all of Parcel 69-1, Section 4M-510.

LEGAL DESCRIPTION

Parcel 126-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 126 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 126-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 132-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 132 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 132-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 183-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 183 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 183-1, Section 4M-652.

LEGAL DESCRIPTION

Parcel 185-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 185 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 185-1, Section 4M-652.

LEGAL DESCRIPTION

Parcel 186-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 186 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 186-1, Section 4M-652.

LEGAL DESCRIPTION

Part of Parcel 3-7, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF

FIRSTLY: Part of Lots 5, 6 and 7 in Concession 3 of the Township of March designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557;

SECONDLY: Part of Lots 3, 4 and 5 in Concession 3 of the Township of March designated as Parts 2, 3, 4, 5, 6, 7 and 8 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6558;

THE SAID PARCELS being Part of Parcel 3-7, Section March-3.

71

LEGAL DESCRIPTION

Parcel 5-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lot 5, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2, 3, 4 and 5 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-1135, being all of Parcel 5-1, Section March-2.

72

LEGAL DESCRIPTION

Part of Parcel 2-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the city of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 3 and 4, Concession 2 and that part of the Road Allowance between Concessions 2 and 3 of the Township of March (as stopped up and closed by By-Law 32-76 of the Corporation of the Township of March, registered as L.T. Instrument No. 278660 (243435) designated as Parts 1, 9, 10 and 11 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-6558.

THE SAID PARCEL being Part of Parcel 2-1, Section March-2.

LEGAL DESCRIPTION

Part of Parcel 5-3, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF Part of the Road Allowance as widened between Lots 5 and 6 in Concession 3 as stopped up and closed by By-law 16-88 of The Corporation of the City of Kanata registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. 552228 designated as Part 4 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557.

THE SAID PARCEL being Part of Parcel 5-3, Section March-2.

12

74

THIS AGREEMENT made in triplicate this 10 day of June , 1985.

BETWEEN:

CAMPEAU CORPORATION, a body corporate and politic, incorporated under the laws of the Province of Ontario,

Hereinafter called "Campeau"

OF THE FIRST PART

AND:

THE CORPORATION OF THE CITY OF KANATA

Hereinafter called "Kanata" or "the City"

OF THE SECOND PART

WHEREAS Campeau is desirous of developing its lands in Marchwood Community and Lakeside Community located in the City of Kanata which lands are more particularly described in Schedule 'A' (hereinafter referred to as the "Marchwood-Lakeside Lands".)

AND WHEREAS Campeau is the owner and operator of a golf course (hereinafter referred to as the "Kanata Golf Course".) located within the Marchwood-Lakeside Lands.

AND WHEREAS Kanata and Campeau have agreed that the Kanata Golf Course shall be improved and expanded in conjunction with the development by Campeau of the Marchwood-Lakeside Lands.

AND WHEREAS Campeau and Kanata wish to enter into this agreement for the purpose of defining the improvements and in particular the size, location and required safety measures for the Kanata Golf Course in the Marchwood-Lakeside Lands.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants hereinafter contained, the parties hereto agree as follows:

1. Campeau shall design and construct an 18-hole golf course by expanding the existing 9-hole golf course onto adjoining lands. Any relocation and construction required for the existing 9-hole golf course shall be completed in accordance with the timing set out in Amendment No. 11 to the City of Kanata Official Plan. During the period of construction, Campeau shall ensure that 9 playable holes are maintained for play at a similar standard to the existing 9 holes. The additional 9-hole golf course shall be designed and constructed

in accordance with the timing set out in Amendment No. 11 to the City of Kanata Official Plan.

2. (a) The golf course shall be designed by a professional Golf Course Architect and shall be constructed in accordance with generally accepted golf course standards as reasonably approved by Kanata and it is understood that the City may designate reasonable pedestrian and bikeway linkage access through the golf course to other community facilities such as public transportation, schools, parks and open space.

(b) Campeau shall be responsible for providing reasonable safety measures in the design and construction of the golf course as determined by the Golf Course Architect to the reasonable approval of the City and this shall include safety measures such as vegetation screening, fencing, berms and warning signs as determined by the Golf Course Architect to the reasonable approval of the City. Safety measures shall extend to the use and enjoyment of adjoining properties. Safety measures shall include as a minimum the standards and requirements set out by Thomas McBroom & Associates Ltd. in Schedule "B" hereto.

3. The Kanata Golf course shall be operated as a private community golf course with rules and regulations generally corresponding to those applicable to such clubs in the general Ottawa-Carleton area but it is understood that The Kanata Golf Course shall be made available for reasonable use by the public in the winter season for pedestrians, cross-country skiing, including motorized grooming of cross-country ski trails, and non-motorized winter activities which will not interfere with the primary use of the land.

4. All schedules annexed to or to be annexed to this agreement shall have the same force and effect as if the information contained therein was included in the body of this agreement.

5. The parties agree that there are no representations, warranties, covenants, agreements, collateral agreements or conditions affecting the Real Property or this agreement other than as expressed in writing in this agreement.

6. Except as herein expressly provided, this agreement shall extend to, be binding upon and enure to the benefit of the heirs, executors, successors and assigns of the parties hereto.

IN WITNESS WHEREOF Kanata has hereunto affixed its corporate seal duly attested to by the hands of its authorized signing officers in that behalf this 10 day of June, 1985.

THE CORPORATION OF THE CITY OF KANATA

PER: _____
Mayor

PER: _____
Clerk

IN WITNESS WHEREOF Campeau has hereunto affixed its corporate seal duly attested to by the hands of its authorized signing officers in that behalf this 10 day of June, 1985.

CAMPEAU CORPORATION

PER: _____
Senior Vice-President

PER: _____
Senior Vice-President

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SCHEDULE "A"

FIRSTLY:

All and singular those certain parcels or tracts of land and premises situate, lying and being in the geographic Township of March, now in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and being composed of that Part of Lot 5, Concession 2, in the said City of Kanata, designated as Parts 1, 2, 3, 4 and 5 on Reference Plan 4R-1135 filed in the Land Registry Office (No. 4) at Ottawa being the whole of Parcel No. 5-1 in the Register for Section March-2, and secondly subject to an easement, in perpetuity, in favour of the Bell Telephone Company of Canada over Parts 2 and 3 on Plan 4R-1135 as set out in Instrument No. 3483.

SECONDLY:

All and singular those certain parcels or tracts of land and premises situate, lying and being in the geographic Township of March, now in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and being composed of that Part of Lots, 2 3 and 4, Concession 2 and Part of Lots 2 and 3, Concession 3, and Part of the Original Road Allowance between Concession 2 and 3 in the said City of Kanata, designated as Parts 1, 2, 3, 4, 5, 6, and 7 on Reference Plan 4R-3697 filed in the Land Registry Office (No. 4) at Ottawa being the whole of Parcel No. 2-1, in the Register for Section March-2 and secondly subject to an easement, in perpetuity, in favour of the Bell Telephone Company of Canada over Part 2 on Plan 4R-3697 as set out in Instrument No. 3500 and thirdly subject to an easement, in perpetuity, in favour of the Bell Telephone Company of Canada over Part 5 on Plan 4R-1135 as set out in Instrument No. 3493.

THIRDLY:

All and singular those certain parcels or tracts of land and premises situate, lying and being in the geographic Township of March, now in the City of Kanata, in the Regional Municipality of Ottawa-Carleton, and being composed of Part of the Original Road Allowance between Lots 5 and 6 as closed by by-law 1989 and Part of the Original Road Allowance between Concessions 2 and 3 as closed by by-law 32-76 and Part of Lots 3, 4, 5, 6, and 7, Concession 3 in the said City of Kanata designated as Parts 6, 7, 8, 9, 10, 11 and 12 on Reference Plan 4R-3747 filed in the Land Registry Office (No. 4) at Ottawa being the whole of Parcel 3-7 in the Register for Section March-3 and secondly subject to an easement, in perpetuity, in favour of the Bell Telephone Company of Canada over part 9 on Plan 4R-3747 as set out in Instrument No. 3493.

SCHEDULE "B"

KANATA GOLF COURSE DESIGN STANDARDS

INTRODUCTION:

The design standards of the fairway envelopes are as set out below and illustrated on Figures 1, 2, and 3. They are in accordance with the Urban Land Institute's publication "Golf Course Communities" (Technical Bulletin #70, Jones and Rando, 1974), which is generally recognized as the standard golf course design in residential areas by the golf course design and construction industry. The standard will be augmented at a later date with respect to such matters as the relationships between the golf course and the open space, pedestrian/bike paths and storm water management systems; golf course maintenance and irrigation facilities; club house location, access and parking; and landscaping and safety features. The standards will be developed with due recognition of existing topography and vegetation and the proposed plans of sub-division.

DESIGN STANDARDS:

- Min. single-row fairway envelope width in the landing area, at 450' to 500' distance from the tee — 300 feet
- Min. single-row fairway envelope width behind the tee. — 150 feet
- Min. double-row fairway envelope width — 500 feet

The above fairway widths may be reduced where natural or man-made topographic and landscape features such as vegetation screens provide reasonable protection against golf balls leaving the fairway envelope.

To discourage the public from crossing the fairway other than between a green and following tee, the pedestrian bikeway system must be designed so that the public will be encouraged to use the designated routes. The design should utilize earth forms, shrubs and trees and rock formations in a subtle way to achieve the desired designated routes. Where the public path enters the fairway envelope and where the golfers cross the path from green to tee, warning signs should be placed urging the public not to enter the fairways. An example of how this can occur is illustrated in Figure 3.

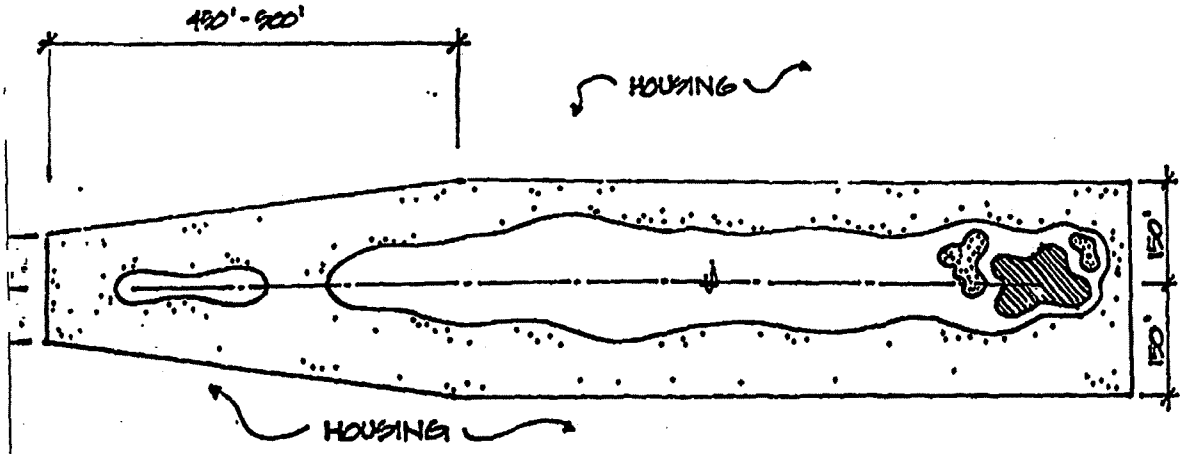


FIG. 1 SINGLE ROW FAIRWAY ENVELOPE

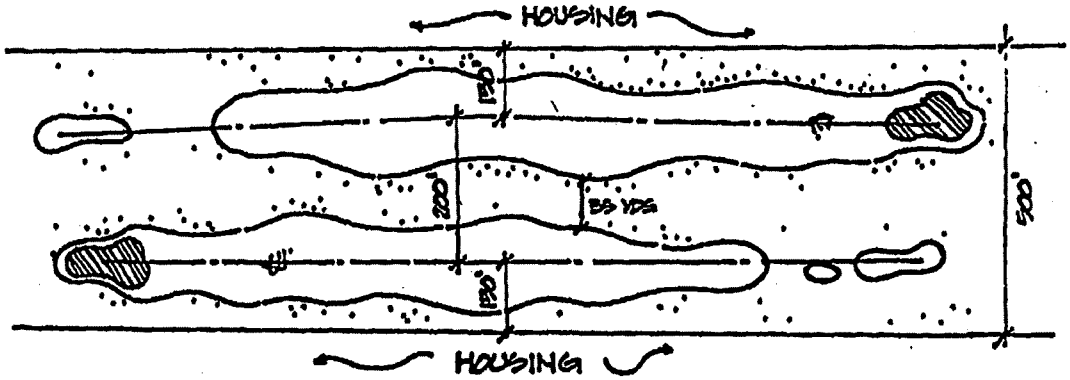


FIG. 2 DOUBLE ROW FAIRWAY ENVELOPE

Thomas McBroom Associates Ltd.

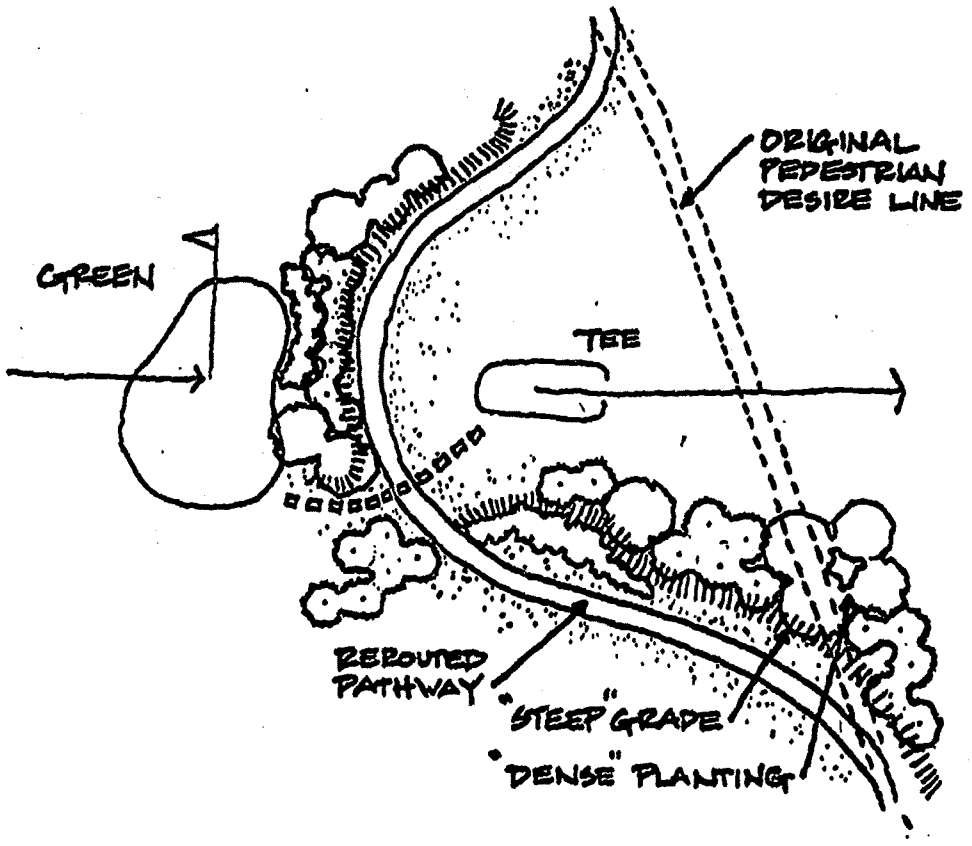
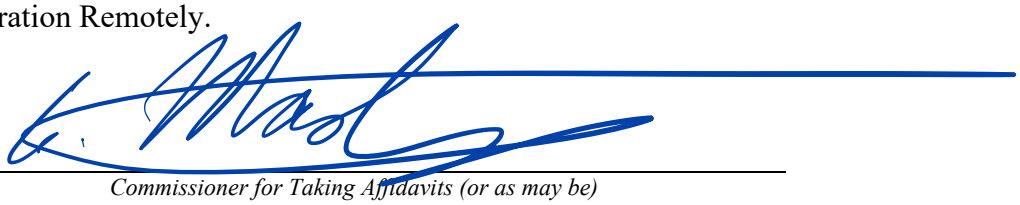


FIGURE 3 : PEDESTRIAN LINKAGE

This is Exhibit “D” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

Agreement") registered as Instrument No. LT606426 on March 21, 1989, attached hereto and marked as **Exhibit "I"**.

(e) Notice of an agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 40% Agreement", and together with the 1981 40% Agreement, the "40% Agreement") registered as Instrument Nos. N480080 & LT606427 on March 21, 1989, both attached hereto and marked as **Exhibit "J"**.

(f) A transfer of land from Campeau Corporation to Genstar Development Company Eastern Ltd. registered as Instrument No. LT607362 on March 30, 1989, attached hereto and marked at **Exhibit "K"**.

(g) Notice of a tripartite assumption agreement dated March 30, 1989, made between Campeau Corporation, Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata (the "Genstar Assumption Agreement") registered as Instrument No. LT607395 on March 30, 1989, attached hereto and marked as **Exhibit "L"**.

(h) Notice of an agreement, registered as Instrument No. LT660648 on February 28, 1990 in respect of a subdivision dated October 31, 1989 (the "1989 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plans 4M-738, 4M-739, and 4M-741, is attached hereto and marked as **Exhibit "M"**. The 1989 Subdivision Agreement appears on the Parcel Register for Parcel Identification

DYE & DURHAM CO LIMITED
Form No 985

Province of Ontario

Document General

Form 4 — Land Registration Reform Act, 1984

D

FOR OFFICE USE ONLY

'89 3 21 11:52

GAIL BOUNSALL
ASSISTANT DEPUTY LAND REGISTRAR

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 14 pages

(3) Property Identifier(s) Block Property Additional: See Schedule ☐

(4) Nature of Document: Application to Register Notice of an Unregistered Estate, Right, Interest or Equity - Section 74

(5) Consideration Dollars $

(6) Description

Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1 and 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 3-7 Section March-3, Part of Parcel 5-3 Section March-2, Parcel 5-1 Section March-2 and Part of Parcel 2-1 Section March-2, as more particularly described in Schedule "A" on pages 5 to 14 annexed.

New Property Identifiers Additional: See Schedule ☐

Executions Additional: See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☐ Other ☒

(8) This Document provides as follows:

The Corporation of the City of Kanata has an unregistered interest in the land registered in the name of Campeau Corporation in respect of the lands registered as Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1 and 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 3-7 Section March-3, Part of Parcel 5-3 Section March-2, Parcel 5-1 Section March-2 and Part of Parcel 2-1 Section March-2, as more particularly described in Schedule "A" on page 5 to 14 annexed and hereby apply under section 74 of the Land Titles Act for the entry of a Notice of an Agreement dated the 20th day of December, 1988, made between The Corporation of the City of Kanata and Campeau Corporation in the register for the said parcels.

Continued on Schedule ☐

(9) This Document relates to instrument number(s) Application to Register Notice of Unregistered Estate, Right, Interest or Equity - Instrument No.

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
THE CORPORATION OF THE CITY OF KANATA BY ITS SOLICITOR DAVID SILVERSON	David Silverson	1989	03	09

(11) Address for Service 150 Katimavik Road, Kanata, Ontario K2L 2N3

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
CAMPEAU CORPORATION				

(13) Address for Service 320 Bay Street, 6th Floor, Toronto, Ontario M5H 2P2

(14) Municipal Address of Property: Not Assigned

(15) Document Prepared by:
Margaret E. Hill
GOWLING & HENDERSON
160 Elgin Street, 26th Floor
Ottawa, Ontario
K1N 8S3

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	20 —
9 x Parcels	—
Total	20 —

10174 (12/84)

THIS AGREEMENT made in triplicate this 29th day of December, 1988

BETWEEN:

CAMPEAU CORPORATION,
a body corporate and politic
incorporated under the laws of
the Province of Ontario,

(hereinafter called "Campeau")

OF THE FIRST PART

AND:

THE CORPORATION OF THE CITY OF KANATA,

(hereinafter called "the City"

OF THE SECOND PART

WHEREAS Campeau and the City entered into an agreement dated the 10th day of June, 1985, the "Golf Club Agreement" governing the improvement and operation by Campeau of the Kanata Golf Course (as defined in the Golf Club Agreement) on certain lands owned by Campeau situated in the City of Kanata, described in Schedule "A" to the Golf Club Agreement (the "Original Lands");

AND WHEREAS lands in excess of the lands intended by the parties to be governed by the Golf Club Agreement were included in the Original Lands due to unavailability of precise legal descriptions;

AND WHEREAS the City and Campeau have now determined the approximate location on the Original Lands of existing and proposed Kanata Golf Club holes and other amenities;

AND WHEREAS Campeau and the City have agreed that the Golf Club Agreement should therefore now only apply to the lands described in Schedule "A" hereto, (the "Current Lands");

AND WHEREAS the Golf Club Agreement was registered against the Current Lands in the Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) on the 21 day of March, 1988 as Instrument No. 600425;

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 including the 18 hole golf course, (the "Concept Plan") a copy of which Concept Plan is retained in the offices of the Municipal Clerk of the City;

AND WHEREAS the City wishes to ensure that the obligations under the Golf Club Agreement in respect of the Current Lands are binding on successors in title of Campeau;

NOW THEREFORE this Agreement witnesseth that for and in consideration of the sum of Ten Dollars ($10.00) and the mutual covenants contained herein, the City and Campeau hereby agree as follows:

1. Effective as of the date of execution hereof, the Golf Club Agreement and this Agreement shall apply only to the Current Lands.

2. The City acknowledges and agrees that as the Golf Club Agreement shall no longer apply to that portion of the Original Lands not included in the Current Lands, (the "Excess Lands"), the City hereby releases the Excess Lands from the obligations under the Golf Club Agreement.

3. Except as may otherwise be agreed, the 18 hole golf course and amenities shall be constructed in accordance with the Concept Plan.

4. Any sale of the golf course (including lands and building) shall be subject to the purchaser entering into an agreement with the City providing for the operation of the golf course in perpetuity and for the assumption of all other obligations of Campeau under the Golf Club Agreement and this Agreement.

5. It is hereby agreed that the Golf Club Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.

IN WITNESS WHEREOF the City and Campeau have hereunto affixed their corporate seals, attested by the Lands of their authorized signing officers in that behalf.

SIGNED, SEALED & DELIVERED in the presence of:

THE CORPORATION OF THE CITY OF KANATA

Per: _____
Mayor

Per: _____
Clerk

CAMPEAU CORPORATION

Per: _____
Jean E. Martineau
Senior Vice President

Per: _____
DANIEL LATREILLE
VICE-PRESIDENT

SCHEDULE "A"

LEGAL DESCRIPTION

Parcel 69-1, Section 4M-510

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 69 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-510, being all of Parcel 69-1, Section 4M-510.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Parcel 126-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 126 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 126-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 132-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 132 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 132-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 183-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 183 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 183-1, Section 4M-652.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Parcel 185-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 185 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 185-1, Section 4M-652.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Parcel 186-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 186 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 186-1, Section 4M-652.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Part of Parcel 3-7, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF

FIRSTLY: Part of Lots 5, 6 and 7 in Concession 3 of the Township of March designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557;

SECONDLY: Part of Lots 3, 4 and 5 in Concession 3 of the Township of March designated as Parts 2, 3, 4, 5, 6, 7 and 8 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6558;

THE SAID PARCELS being Part of Parcel 3-7, Section March-3.

LEGAL DESCRIPTION

Part of Parcel 5-3, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF Part of the Road Allowance as widened between Lots 5 and 6 in Concession 3 as stopped up and closed by By-law 16-88 of The Corporation of the City of Kanata registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. ~~[illegible]~~ 552238 designated as Part 4 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557.

THE SAID PARCEL being Part of Parcel 5-3, Section March-2.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Parcel 5-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lot 5, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2, 3, 4 and 5 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-1135, being all of Parcel 5-1, Section March-2.

Schedule A (Cont'd)

LEGAL DESCRIPTION

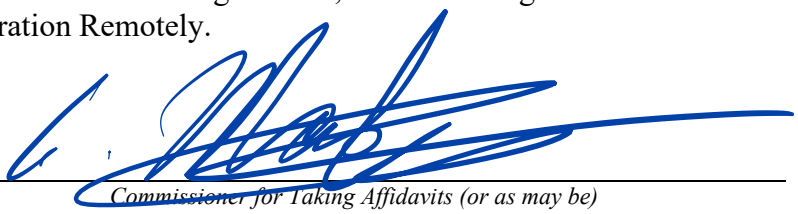
Part of Parcel 2-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the city of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 3 and 4, Concession 2 and that part of the Road Allowance between Concessions 2 and 3 of the Township of March (as stopped up and closed by By-Law 32-76 of the Corporation of the Township of March, registered as L.T. Instrument No. 278660) designated as Parts 1, 9, 10 and 11 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-6558.

THE SAID PARCEL being Part of Parcel 2-1, Section March-2.

This is Exhibit “E” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

Agreement") registered as Instrument No. LT606426 on March 21, 1989, attached hereto and marked as **Exhibit "I"**.

(e) Notice of an agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 40% Agreement", and together with the 1981 40% Agreement, the "40% Agreement") registered as Instrument Nos. N480080 & LT606427 on March 21, 1989, both attached hereto and marked as **Exhibit "J"**.

(f) A transfer of land from Campeau Corporation to Genstar Development Company Eastern Ltd. registered as Instrument No. LT607362 on March 30, 1989, attached hereto and marked at **Exhibit "K"**.

(g) Notice of a tripartite assumption agreement dated March 30, 1989, made between Campeau Corporation, Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata (the "Genstar Assumption Agreement") registered as Instrument No. LT607395 on March 30, 1989, attached hereto and marked as **Exhibit "L"**.

(h) Notice of an agreement, registered as Instrument No. LT660648 on February 28, 1990 in respect of a subdivision dated October 31, 1989 (the "1989 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plans 4M-738, 4M-739, and 4M-741, is attached hereto and marked as **Exhibit "M"**. The 1989 Subdivision Agreement appears on the Parcel Register for Parcel Identification

DYE & DURHAM CO. LIMITED Form No. 885

Province of Ontario

Document General

Form 4 — Land Registration Reform Act, 1984

D

FOR OFFICE USE ONLY

N480080

NUMBER / NUMÉRO
CERTIFICATE OF REGISTRATION
CERTIFICAT D'ENREGISTREMENT

'89 MAR 21 P12:10

OTTAWA CARLETON LAND REGISTRAR NO 5 OTTAWA

(1) Registry [X] Land Titles [ ] (2) Page 1 of 22 pages

(3) Property Identifier(s) Block Property Additional: See Schedule [ ]

(4) Nature of Document: Agreement

(5) Consideration: Dollars $

(6) Description
Part of the road allowance between Concessions 2 and 3 adjacent to Lots 6 and 7, Township of March, and Parts of Lots 6, 7, 8 and 9, Concession 2, Township of March as described in Schedule A on pages 7 and 8 annexed, City of Kanata, Regional Municipality of Ottawa-Carleton

New Property Identifiers — Additional: See Schedule [ ]

Executions MH1 5 NRA. — Additional: See Schedule [ ]

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch [ ] (b) Schedule for: Description [X] Additional Parties [ ] Other [X]

(8) This Document provides as follows:

See Agreement attached

Continued on Schedule [ ]

(9) This Document relates to instrument number(s) Agreement registered as Instrument NS-140350

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
THE CORPORATION OF THE CITY OF KANATA BY ITS SOLICITOR DAVID SILVERSON	David Silverson	1989	03	09

(11) Address for Service 150 Katimavik Road, Kanata, Ontario K2L 2N3

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
CAMPEAU CORPORATION				

(13) Address for Service 320 Bay Street, 6th Floor, Toronto, Ontario M5H 2P2

(14) Municipal Address of Property: Not Assigned

(15) Document Prepared by:
Margaret E. Hill
GOWLING & HENDERSON
160 elgin Street, 26th Floor
Ottawa, Ontario
K1N 8S3
133

FOR OFFICE USE ONLY — Fees and Tax

Registration Fee	201
Total	

10174 (12/84)

THIS AGREEMENT made in triplicate this 20thday of December , 1988

BETWEEN:

CAMPEAU CORPORATION,
a body corporate and politic
incorporated under the laws of
the Province of Ontario,

(hereinafter called "Campeau")

OF THE FIRST PART

AND:

THE CORPORATION OF THE CITY OF KANATA,

(hereinafter called "the City"

OF THE SECOND PART

WHEREAS pursuant to Campeau's request for an amendment to the Official Plan of The Regional Municipality of Ottawa-Carleton, Campeau and the City entered into an agreement dated the 26th day of May, 1981, governing the designation of certain lands within the "Marchwood Lakeside Community" as recreation and open space, which agreement was registered against title to the lands legally described in Schedule "A" therein (the "Original Lands") in the Registry Office for the Registry Division of Ottawa-Carleton (No. 5) on the 8th day of January, 1982 as Instrument No. CT140350 (now Land Titles No. LT286218 in respect of portions of the lands) and in the Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) on the same day as Instrument No. 277799, (the "Forty Percent Agreement");

AND WHEREAS lands in excess of the lands intended by the parties to be governed by the Forty Percent Agreement were included in the Original Lands due to unavailability of precise legal descriptions;

AND WHEREAS the City and Campeau have determined, in respect of other portions of the Original Lands, that the

obligations in the Forty Percent Agreement either no longer pertain or have been set out elsewhere in more specific subdivision agreements;

AND WHEREAS Campeau and the City have agreed that the Forty Percent Agreement should therefore now only apply to the lands described in Schedule "A" hereto, (the "Current Lands");

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;

AND WHEREAS certain obligations pertaining to works to be constructed on the Current Lands in accordance with the principles of the Forty Percent Agreement have been set out in the subdivision agreement between the City and Campeau registered against the lots and blocks on Plans 4M-651, 4M-652 and 4M-653, in the Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. 568244 (the "Subdivision Agreement");

AND WHEREAS the City wishes to ensure that the obligations under the Forty Percent Agreement and the Subdivision Agreement in respect of the Current Lands are binding on successors in title of Campeau;

NOW THEREFORE this Agreement witnesseth that for and in consideration of the sum of Ten Dollars ($10.00) and the mutual covenants contained herein, the City and Campeau hereby agree as follows:

3.

1. Effective as of the date of execution hereof, the Forty Percent Agreement and this Agreement shall apply only to the Current Lands.

2. Except as may otherwise be agreed pursuant to the subdivision approval process for the Current Lands, the Current Lands shall be developed in accordance with the Concept Plan, (including without limitation the 18 hole golf course, stormwater management and parks) and the land dedication and designation requirements of the Forty Percent Agreement and this Agreement shall be fulfilled in respect of the Current Lands in accordance with the Concept Plan.

3. Of the Original Lands not included in the Current Lands, (the "Excess Lands") the parties agree that Campeau has dedicated or designated or, in a separate subdivision agreement with the City agreed to dedicate or designate, open space lands as set out in Schedule "B" to this Agreement, and the City hereby acknowledges and agrees that:

(i) the City is fully satisfied with the said open space dedications and designations;

(ii) the City shall require no further open space dedications or designations in respect of the Excess Lands and hereby releases the Excess Lands and Campeau therefrom; and

(iii) the City shall forthwith upon request execute registerable releases of the Forty Percent Agreement against the Excess Lands.

4. Of the Current Lands, the City agrees that the open space dedications and designations located approximately on the

Concept Plan and as outlined by acreage on Schedule "C" annexed to this Agreement satisfy the remaining open space obligations contained in the Forty Percent Agreement.

5. In the event of any sale of the Current Lands (but excluding any sale of lots or blocks on registered plans of subdivision, to be developed for purposes other than a golf course hole) the purchaser shall enter into an agreement with the City providing for the assumption of obligations under the Forty Percent Agreement and this Agreement.

6. Campeau agrees to complete the following works on the Current Lands:

(a) as part of Phase 1 as defined by the Official Plan for the Marchwood/Lakeside Community, Kanata Pond Storm Water Management Works as shown on Oliver, Mangione, McCalla & Associates Limited Drawing Nos: 84-4286-SPI, 84-4286-1 to 84-4286-11 inclusive, 84-4286-S1 and 84-4286-S2, 84-4286-D1 to 84-4286-D5 inclusive;

(b) dredging of the Kanata Pond from its easterly end to Line 4 approximately; provided that Campeau may at its discretion dredge the pond to the Goulbourn Forced Road as shown on Drawing No. 84-4286-D6;

(c) to provide any off-site electrical distribution facilities deemed by Kanata Hydro to be required in order to provide a secure service to the existing and proposed development; and

(d) to permit cross country skiing and any necessary grooming of cross country ski trails on the golf

5.

course during the winter months to the satisfaction of Kanata.

7. It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.

IN WITNESS WHEREOF the City and Campeau have hereunto affixed their corporate seals, attested by the hands of their authorized signing officers in that behalf.

SIGNED, SEALED & DELIVERED in the presence of:

THE CORPORATION OF THE CITY OF KANATA

Per: _____
Mayor DES ADAM

Per: _____
Clerk
MAUREEN MEIKLE

CAMPEAU CORPORATION

Per: _____
Jean E. Martineau
Senior Vice-President

Per: _____
DANIEL LATREILLE
VICE-PRESIDENT

c/s

SCHEDULE "A"

LEGAL DESCRIPTION

Road Allowance between Concessions 2 and 3
Adjacent to Lots 6 and 7, Township of March

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF that part of the Road Allowance between Concessions 2 and 3 adjacent to Lots 6 and 7, Concession 2 and adjacent to Lots 6 and 7, Concession 3, Township of March (now within the limits of the City of Kanata) as closed and stopped up by By-law 22-81 [registered in the Land Registry Office for the Land Registry Division of Ottawa-Carleton (No. 5) as Instrument No. NS113415] and designated as Part 1 on a reference plan of survey deposited in the said Land Registry Office as Plan 5R-5055.

LEGAL DESCRIPTION

Parts of Lots 6, 7, 8 and 9, Concession 2
Township of March, now City of Kanata

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, (formerly in the Township of March), in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario,

BEING COMPOSED OF that part of North West Half of Lot 6, those parts of Lots 7 and 8, and that part of the South East Half of Lot 9, in Concession 2, all in the Township of March (now within the limits of the City of Kanata), designated as Parts 1, 2, 3, 4 and 5 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Registry Division of Ottawa-Carleton (No.5) as Plan 5R-10774.

SUBJECT TO AN EASEMENT as more particularly set out in Instrument Number MH 3486, in favour of Bell Canada, over along and upon the said Part 4 on Plan 5R-10774.

LEGAL DESCRIPTION

Parcel 69-1, Section 4M-510

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 69 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-510, being all of Parcel 69-1, Section 4M-510.

LEGAL DESCRIPTION

Parcel 126-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 126 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 126-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 132-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 132 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 132-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 183-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 183 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 183-1, Section 4M-~~650~~.

LEGAL DESCRIPTION

Parcel 185-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 185 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 185-1, Section 4M-652.

LEGAL DESCRIPTION

Parcel 186-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 186 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 186-1, Section 4M-652.

LEGAL DESCRIPTION

Part of Parcel 3-7, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF

FIRSTLY: Part of Lots 5, 6 and 7 in Concession 3 of the Township of March designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557;

SECONDLY: Part of Lots 3, 4 and 5 in Concession 3 of the Township of March designated as Parts 2, 3, 4, 5, 6, 7 and 8 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6558;

THE SAID PARCELS being Part of Parcel 3-7, Section March-3.

[redacted]

LEGAL DESCRIPTION

Part of Parcel 5-3, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF Part of the Road Allowance as widened between Lots 5 and 6 in Concession 3 as stopped up and closed by By-law 16-88 of The Corporation of the City of Kanata registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. 55228 designated as Part 4 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557.

THE SAID PARCEL being Part of Parcel 5-3, Section March-2.

LEGAL DESCRIPTION

Parcel 6-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 6 and 7, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-804, being all of Parcel 6-1, Section March-2.

LEGAL DESCRIPTION

Parcel 5-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lot 5, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2, 3, 4 and 5 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-1135, being all of Parcel 5-1, Section March-2.

LEGAL DESCRIPTION

Part of Parcel 2-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the city of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 3 and 4, Concession 2 and that part of the Road Allowance between Concessions 2 and 3 of the Township of March (as stopped up and closed by By-Law 32-76 of the Corporation of the Township of March, registered as L.T. Instrument No. 278660) designated as Parts 1, 9, 10 and 11 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-6558.

THE SAID PARCEL being Part of Parcel 2-1, Section March-2.

LEGAL DESCRIPTION

Part of Parcel 7-1, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Ottawa, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF:

FIRSTLY: all of those parts of Lots 7 and 8 in Concession 3, of the Geographic Township of March, designated as Parts 1 and 2 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R- 6556;

SECONDLY: Part of Lots 8 and 9 in Concession 3, of the Geographic Township of March, designated as Parts 1, 6, 13, 14, 20 and 21 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-3699;

THE SAID PARCEL being Part of Parcel 7-1, Section March 3.

SCHEDULE "B"

EXCESS LANDS DEDICATIONS

Parkland	5.120 acres
Natural Environment Area	9.610 acres
Open Space Buffers	28.870 acres
Walkway Links	1.114 acres
Total	44.714 acres

SCHEDULE "C"

CURRENT LANDS DEDICATION/DESIGNATION REQUIREMENTS

Parkland	53.139 acres
Golf Course	175.775 acres
Natural Environment Area	287.745 acres
Open Space Buffers	19.435 acres
Walkway Links	7.198 acres
Total	543.292 acres

82

Province of Ontario

Document General

Form 4 — Land Registration Reform Act, 1984

DYE & DURHAM CO. LIMITED Form No. 965

D

FOR OFFICE USE ONLY

'88 3 21 4:13:52

ASSISTANT DEPUTY LAND REGISTRAR

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 22 pages

(3) Property Identifier(s) Block Property Additional: See Schedule ☐

(4) Nature of Document: Application to Register Notice of an Unregistered Estate, Right, Interest or Equity - Section 74

(5) Consideration

Dollars $

(6) Description: Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1, 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 3 -7 Section March-3, Part of Parcel 5-3 Section March -2, Parcel 6-1 Section March-2, Parcel 5-1 Section March-2, Part of Parcel 2-1 Section March-2 and Part of Parcel 7-1 Section March-3 as described on Schedule "A" on pages 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 annexed.

New Property Identifiers — Additional: See Schedule ☐

Executions — Additional: See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☐ Other ☒

(8) This Document provides as follows:

The Corporation of the City of Kanata has an unregistered interest in the land registered in the name of Campeau Corporation in respect of the lands registered as Parcel 69-1 in the Register for Section 4M-510, Parcels 126-1, 132-1 in the Register for Section 4M-651, Parcels 183-1, 185-1 and 186-1 in the Register for Section 4M-652, Part of Parcel 30-7 Section March-3, Part of Parcel 5-3 Section March-2, Parcel 6-1 Section March-2, Parcel 5-1 Section March-2, Part of Parcel 2-1 Section March-2 and Part of Parcel 7-1 Section March-3 as more particularly described on Schedules A on pages 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 annexed and hereby apply under section 74 of the Land Titles Act for the entry of a Notice of an Agreement dated December 20, 1988.

Continued on Schedule ☐

(9) This Document relates to instrument number(s) ~~Notice of Agreement registered as Instrument Nos. LT286218 and 277799~~

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
THE CORPORATION OF THE CITY OF	David Silverson	1989	03	09
KANATA BY ITS SOLICITOR				
DAVID SILVERSON				

(11) Address for Service: 150 Katimavik Road, Kanata, Ontario K2L 2N3

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
CAMPEAU CORPORATION				

(13) Address for Service: 320 Bay Street, 6th Floor, Toronto, Ontario M5H 2P2

(14) Municipal Address of Property: Not Assigned

(15) Document Prepared by:
Margaret E. Hill
GOWLING & HENDERSON
160 Elgin Street, 26th Floor
Ottawa, Ontario
K1N 8S3

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	20-
9 x Pwcels	
Total	20-

10174 (12/84)

[redacted]

THIS AGREEMENT made in triplicate this 20th day of December , 1988

BETWEEN:

CAMPEAU CORPORATION,
a body corporate and politic
incorporated under the laws of
the Province of Ontario,

(hereinafter called "Campeau")

OF THE FIRST PART

AND:

THE CORPORATION OF THE CITY OF KANATA,

(hereinafter called "the City"

OF THE SECOND PART

WHEREAS pursuant to Campeau's request for an amendment to the Official Plan of The Regional Municipality of Ottawa-Carleton, Campeau and the City entered into an agreement dated the 26th day of May, 1981, governing the designation of certain lands within the "Marchwood Lakeside Community" as recreation and open space, which agreement was registered against title to the lands legally described in Schedule "A" therein (the "Original Lands") in the Registry Office for the Registry Division of Ottawa-Carleton (No. 5) on the 8th day of January, 1982 as Instrument No. CT140350 (now Land Titles No. LT286218 in respect of portions of the lands) and in the Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) on the same day as Instrument No. 277799, (the "Forty Percent Agreement");

AND WHEREAS lands in excess of the lands intended by the parties to be governed by the Forty Percent Agreement were included in the Original Lands due to unavailability of precise legal descriptions;

AND WHEREAS the City and Campeau have determined, in respect of other portions of the Original Lands, that the

obligations in the Forty Percent Agreement either no longer pertain or have been set out elsewhere in more specific subdivision agreements;

AND WHEREAS Campeau and the City have agreed that the Forty Percent Agreement should therefore now only apply to the lands described in Schedule "A" hereto, (the "Current Lands");

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;

AND WHEREAS certain obligations pertaining to works to be constructed on the Current Lands in accordance with the principles of the Forty Percent Agreement have been set out in the subdivision agreement between the City and Campeau registered against the lots and blocks on Plans 4M-651, 4M-652 and 4M-653, in the Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. 568244 (the "Subdivision Agreement");

AND WHEREAS the City wishes to ensure that the obligations under the Forty Percent Agreement and the Subdivision Agreement in respect of the Current Lands are binding on successors in title of Campeau;

NOW THEREFORE this Agreement witnesseth that for and in consideration of the sum of Ten Dollars ($10.00) and the mutual covenants contained herein, the City and Campeau hereby agree as follows:

1. Effective as of the date of execution hereof, the Forty Percent Agreement and this Agreement shall apply only to the Current Lands.

2. Except as may otherwise be agreed pursuant to the subdivision approval process for the Current Lands, the Current Lands shall be developed in accordance with the Concept Plan, (including without limitation the 18 hole golf course, stormwater management and parks) and the land dedication and designation requirements of the Forty Percent Agreement and this Agreement shall be fulfilled in respect of the Current Lands in accordance with the Concept Plan.

3. Of the Original Lands not included in the Current Lands, (the "Excess Lands") the parties agree that Campeau has dedicated or designated or, in a separate subdivision agreement with the City agreed to dedicate or designate, open space lands as set out in Schedule "B" to this Agreement, and the City hereby acknowledges and agrees that:

(i) the City is fully satisfied with the said open space dedications and designations;

(ii) the City shall require no further open space dedications or designations in respect of the Excess Lands and hereby releases the Excess Lands and Campeau therefrom; and

(iii) the City shall forthwith upon request execute registerable releases of the Forty Percent Agreement against the Excess Lands.

4. Of the Current Lands, the City agrees that the open space dedications and designations located approximately on the

4.

Concept Plan and as outlined by acreage on Schedule "C" annexed to this Agreement satisfy the remaining open space obligations contained in the Forty Percent Agreement.

5. In the event of any sale of the Current Lands (but excluding any sale of lots or blocks on registered plans of subdivision, to be developed for purposes other than a golf course hole) the purchaser shall enter into an agreement with the City providing for the assumption of obligations under the Forty Percent Agreement and this Agreement.

6. Campeau agrees to complete the following works on the Current Lands:

(a) as part of Phase 1 as defined by the Official Plan for the Marchwood/Lakeside Community, Kanata Pond Storm Water Management Works as shown on Oliver, Mangione, McCalla & Associates Limited Drawing Nos: 84-4286-SPI, 84-4286-1 to 84-4286-11 inclusive, 84-4286-S1 and 84-4286-S2, 84-4286-D1 to 84-4286-D5 inclusive;

(b) dredging of the Kanata Pond from its easterly end to Line 4 approximately; provided that Campeau may at its discretion dredge the pond to the Goulbourn Forced Road as shown on Drawing No. 84-4286-D6;

(c) to provide any off-site electrical distribution facilities deemed by Kanata Hydro to be required in order to provide a secure service to the existing and proposed development; and

(d) to permit cross country skiing and any necessary grooming of cross country ski trails on the golf

course during the winter months to the satisfaction of Kanata.

7. It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.

IN WITNESS WHEREOF the City and Campeau have hereunto affixed their corporate seals, attested by the hands of their authorized signing officers in that behalf.

SIGNED, SEALED & DELIVERED in the presence of:

THE CORPORATION OF THE CITY OF KANATA

Per: _____ Mayor

Per: _____ Clerk

CAMPEAU CORPORATION

Per: _____ Jean E. Martineau, Senior Vice-President

Per: _____ DANIEL LATREILLE, VICE-PRESIDENT

SCHEDULE "A"

LEGAL DESCRIPTION

Road Allowance between Concessions 2 and 3
Adjacent to Lots 6 and 7, Township of March

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF that part of the Road Allowance between Concessions 2 and 3 adjacent to Lots 6 and 7, Concession 2 and adjacent to Lots 6 and 7, Concession 3, Township of March (now within the limits of the City of Kanata) as closed and stopped up by By-law 22-81 [registered in the Land Registry Office for the Land Registry Division of Ottawa-Carleton (No. 5) as Instrument No. NS113415] and designated as Part 1 on a reference plan of survey deposited in the said Land Registry Office as Plan 5R-5055.

LEGAL DESCRIPTION

Parts of Lots 6, 7, 8 and 9, Concession 2
Township of March, now City of Kanata

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, (formerly in the Township of March), in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario;

BEING COMPOSED OF that part of North West Half of Lot 6, those parts of Lots 7 and 8, and that part of the South East Half of Lot 9, in Concession 2, all in the Township of March (now within the limits of the City of Kanata), designated as Parts 1, 2, 3, 4 and 5 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Registry Division of Ottawa-Carleton (No.5) as Plan 5R-10774.

SUBJECT TO AN EASEMENT as more particularly set out in Instrument Number MH 3486, in favour of Bell Canada, over along and upon the said Part 4 on Plan 5R-10774.

LEGAL DESCRIPTION

Parcel 69-1, Section 4M-510

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 69 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-510, being all of Parcel 69-1, Section 4M-510.

LEGAL DESCRIPTION

Parcel 126-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 126 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 126-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 132-1, Section 4M-651

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 132 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-651, being all of Parcel 132-1, Section 4M-651.

LEGAL DESCRIPTION

Parcel 183-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 183 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 183-1, Section 4M-652.

LEGAL DESCRIPTION

Parcel 185-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 185 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 185-1, Section 4M-652.

LEGAL DESCRIPTION

Parcel 186-1, Section 4M-652

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of Block 186 as shown on a plan registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4M-652, being all of Parcel 186-1, Section 4M-652.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Part of Parcel 3-7, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF

FIRSTLY: Part of Lots 5, 6 and 7 in Concession 3 of the Township of March designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557;

SECONDLY: Part of Lots 3, 4 and 5 in Concession 3 of the Township of March designated as Parts 2, 3, 4, 5, 6, 7 and 8 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6558;

THE SAID PARCELS being Part of Parcel 3-7, Section March-3.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Part of Parcel 5-3, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF Part of the Road Allowance as widened between Lots 5 and 6 in Concession 3 as stopped up and closed by By-law 16-88 of The Corporation of the City of Kanata registered in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Instrument No. ~~55228~~ designated as Part 4 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-6557.

THE SAID PARCEL being Part of Parcel 5-3, Section March-2.

LEGAL DESCRIPTION

Parcel 6-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 6 and 7, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2 and 3 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-804, being all of Parcel 6-1, Section March-2.

LEGAL DESCRIPTION

Parcel 5-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lot 5, Concession 2, of the Township of March (now within the limits of the City of Kanata) designated as Parts 1, 2, 3, 4 and 5 on a reference plan of survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-1135, being all of Parcel 5-1, Section March-2.

Schedule A (Cont'd)

LEGAL DESCRIPTION

Part of Parcel 2-1, Section March-2

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the city of Kanata, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF all of those parts of Lots 3 and 4, Concession 2 and that part of the Road Allowance between Concessions 2 and 3 of the Township of March (as stopped up and closed by By-Law 32-76 of the Corporation of the Township of March, registered as 243435 L.T. Instrument No. 278660) designated as Parts 1, 9, 10 and 11 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan No. 4R-6558.

THE SAID PARCEL being Part of Parcel 2-1, Section March-2.

LEGAL DESCRIPTION

Part of Parcel 7-1, Section March-3

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Ottawa, in the Regional Municipality of Ottawa-Carleton and in the Province of Ontario.

BEING COMPOSED OF:

FIRSTLY: all of those parts of Lots 7 and 8 in Concession 3, of the Geographic Township of March, designated as Parts 1 and 2 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R- 6556;

SECONDLY: Part of Lots 8 and 9 in Concession 3, of the Geographic Township of March, designated as Parts 1, 6, 13, 14, 20 and 21 on a Reference Plan of Survey deposited in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) as Plan 4R-3699;

THE SAID PARCEL being Part of Parcel 7-1, Section March 3.

SCHEDULE "B"

EXCESS LANDS DEDICATIONS

Parkland	5.120 acres
Natural Environment Area	9.610 acres
Open Space Buffers	28.870 acres
Walkway Links	1.114 acres
Total	44.714 acres

SCHEDULE "C"

CURRENT LANDS DEDICATION/DESIGNATION REQUIREMENTS

Parkland	53.139 acres
Golf Course	175.775 acres
Natural Environment Area	287.745 acres
Open Space Buffers	19.435 acres
Walkway Links	7.198 acres
Total	543.292 acres

This is Exhibit “F” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

Agreement") registered as Instrument No. LT606426 on March 21, 1989, attached hereto and marked as **Exhibit "I"**.

(e) Notice of an agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 40% Agreement", and together with the 1981 40% Agreement, the "40% Agreement") registered as Instrument Nos. N480080 & LT606427 on March 21, 1989, both attached hereto and marked as **Exhibit "J"**.

(f) A transfer of land from Campeau Corporation to Genstar Development Company Eastern Ltd. registered as Instrument No. LT607362 on March 30, 1989, attached hereto and marked at **Exhibit "K"**.

(g) Notice of a tripartite assumption agreement dated March 30, 1989, made between Campeau Corporation, Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata (the "Genstar Assumption Agreement") registered as Instrument No. LT607395 on March 30, 1989, attached hereto and marked as **Exhibit "L"**.

(h) Notice of an agreement, registered as Instrument No. LT660648 on February 28, 1990 in respect of a subdivision dated October 31, 1989 (the "1989 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plans 4M-738, 4M-739, and 4M-741, is attached hereto and marked as **Exhibit "M"**. The 1989 Subdivision Agreement appears on the Parcel Register for Parcel Identification

20

Numbers (PINs) 04512-1126 (Exhibit "B.1") and 04511-1592 (Exhibit "C.1"), comprising a portion of the Golf Course Lands.

(i) Notice of an agreement, registered as Instrument No. LT787451 on August 19, 1992 in respect of a subdivision dated July 8, 1992 (the "1992 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plan 4M-828, is attached hereto and marked as **Exhibit "N"**. The 1992 Subdivision Agreement appears on the Parcel Register for PIN 04512-1126 (Exhibit "B.1"), comprising a portion of the Golf Course Lands.

(j) Notice of an agreement, registered as Instrument No. LT891301 on June 23, 1994 in respect of a subdivision dated May 16, 1994 (the "1994 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plan 4M-883, is attached hereto and marked as **Exhibit "O"**. The 1994 Subdivision Agreement appears on the Parcel Register for PIN 04512-1126 (Exhibit "B.1"), comprising a portion of the Golf Course Lands.

(k) An application to amend the register in respect of the name of the owner of the Golf Course Lands, from Genstar Development Company Eastern Ltd. to Imasco Enterprises Inc. as a result of an amalgamation was registered as Instrument No. LT1020056 on January 7, 1997, a copy of which is attached hereto and marked as **Exhibit "P"**, and includes a copy of the Certificate of Amalgamation dated January 1, 1997 and Articles of Amalgamation evidencing that Imasco Enterprises

Inc. and Genstar Development Company Eastern Ltd. amalgamated under the *Canadian Business Corporations Act* and continued as and under the name Imasco Enterprises Inc.

(l) A transfer of land from Imasco Enterprises Inc. to Clublink Capital Corporation registered as Instrument No. LT1020193 on January 8, 1997 attached hereto and marked as **Exhibit "Q"**.

(m) An application by Clublink Capital Corporation to annex restrictive covenants registered as Instrument No. LT1020194 on January 8, 1997 is attached hereto and marked as **Exhibit "R"**.

(n) Notice of an agreement dated November 1, 1997, made between Imasco Enterprises Inc., ClubLink Capital Corporation and The Corporation of the City of Kanata (the "ClubLink Assumption Agreement") registered as Instrument No. LT1020197 on January 8, 1997 is attached hereto and marked as **Exhibit "S"**.

(o) An application to change name in respect of the Golf Course Lands, from ClubLink Capital Corporation to ClubLink Corporation was registered in the Land Registry Office of Ottawa-Carleton as Instrument No. OC423670 on January 12, 2005, a copy of which is attached hereto and marked as **Exhibit "T"**.

(p) An application to change name owner in respect of the Golf Course Lands from ClubLink Corporation to ClubLink Corporation ULC was registered in the Land Registry Office of Ottawa-Carleton as Instrument No. OC1231645 on May 5, 2011, a copy of which is attached hereto and marked as **Exhibit "U"**.

Province of Ontario

Document General

Form 4 — Land Registration Reform Act

SoftDocs® 8.11

(6)

FOR OFFICE USE ONLY

1020197

CERTIFICATE OF RECEIPT
RÉCEPISSÉ
OTTAWA-CARLETON (4)

'97 01 14

MONICA WASAG
CERTIFICATION OFFICER

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 10 pages

(3) Property Identifier(s) Block 04513 ~~04514~~ Property 0027 (LT) Additional: See Schedule ☒

(4) Nature of Document
APPLICATION TO REGISTER A NOTICE OF AN UNREGISTERED, ESTATE, RIGHT, TITLE OR EQUITY

(5) Consideration
Dollars $

(6) Description
Firstly:

Block 69, Plan 4M-510
City of Kanata, Regional Municipality of Ottawa-Carleton

continued on Schedule A attached

New Property Identifiers Additional: See Schedule ☐

Executions Additional: See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☒ Other ☒

(8) This Document provides as follows:

CLUBLINK CAPITAL CORPORATION, having an unregistered estate, right, interest or equity in the lands described herein,* hereby applies under Section 71 of the Land Titles Act for the entry of an Assumption Agreement between Imasco Enterprises Inc., ClubLink Capital Corporation and The Corporation of the City of Kanata in the register for the said lands.

* of which Clublink Capital Corporation is the registered owner.

Continued on Schedule ☒

(9) This Document relates to Instrument number(s) Agreement No. NS140350 RO, LT286218, LT277799, N480080 RO, LT606427, LT606425, LT606426 and LT607395

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y M D
IMASCO ENTERPRISES INC. (Assignor)		

(11) Address for Service 260-1130 Morrison Drive, Ottawa, Ontario K2H 9N6

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y M D
CLUBLINK CAPITAL CORPORATION (Assignee)	By:	1997 01 03
	Justin Connidis Vice-President and Secretary	
I have the authority to bind the Corporation		

(13) Address for Service c/o ClubLink Corporation, 15657 Dufferin Street, King City, Ontario L7B 1K5 (Attention: Justin Connidis)

(14) Municipal Address of Property
Not Assigned

I:\RBALEST\BRK\41579\00053\ASSUMP.APP

(15) Document Prepared by:
BLAKE, CASSELS & GRAYDON
Barristers and Solicitors
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9
(416) 863-2400
ATTENTION: (BRK) Box 101

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	60
Total	

style us corporation SoftDocs® 8.11 / TORONTO • CANADA

EC4004H 11/1992

[redacted]

Province of Ontario

Schedule

Form 5 — Land Registration Reform Act

Additional Parties and Information — Attached to Form 1

S

788

Additional Property Identifier(s) Block Property

(8) Additional Transferor(s) The transferor hereby transfers the land to the transferee [redacted]

Name(s)	Signature(s)	Date of Signature Y M D
THE CORPORATION OF THE CITY OF KANATA		

(9) Additional Consenting Spouses — Spouse(s) of Transferor(s) I hereby consent to this transaction.

Name(s)	Signature(s)	Date of Signature Y M D

(10) Additional Transferor(s) Address for Service

150 Katimavik Road, Kanata, Ontario K2L 2N3

(11) Additional Transferee(s)

	Date of Birth Y M D

(12) Additional Transferee(s) Address for Service

(13) Additional Transferor(s) The transferor verifies that to the best of the transferor's knowledge and belief, this transfer does not contravene section 50 of the Planning Act.

Signature	Date of Signature Y M D	Signature	Date of Signature Y M D
BRKM157900053\DOC\ASSUAGR8.ADD			

FOR OFFICE USE ONLY

[redacted]

150

CLUBLINK ASSUMPTION AGREEMENT

THIS AGREEMENT is made as of November 1, 1996.

BETWEEN:

IMASCO ENTERPRISES INC.

("Imasco")

- and -

CLUBLINK CAPITAL CORPORATION

(the "Purchaser")

- and -

THE CORPORATION OF THE CITY OF KANATA

(the "City")

A. Pursuant to the request from Campeau Corporation (**"Campeau"**) for an amendment to the Official Plan of The Regional Municipality of Ottawa-Carleton, Campeau and the City entered into an agreement dated May 26, 1981, governing the designation of certain lands within the Marchwood Lakeside Community as recreation and open space, which agreement was registered against title to lands legally described in Schedule "A" thereto in the Registry Office for the Registry Division of Ottawa-Carleton (No. 5) (the **"LRO"**) on January 8, 1982 as Instrument No. NS140350 (now Land Titles No. LT286218 in respect of portions of the lands) and in the Registry Office for the Land Titles Division of Ottawa-Carlton (No. 4) (the **"LTO"**) on the same day as Instrument No. LT277799 (the **"1981 Agreement"**).

B. Campeau and the City subsequently entered into a further agreement dated December 20, 1988 addressing issues in the 1981 Agreement, which agreement was registered against title to the lands described in Schedule "A" thereto in the LRO (No. 5) on March 21, 1989 as Instrument No. N480080 and in the LTO on March 21, 1989 as Instrument No. LT606427;

C. The agreements referred to in Recitals A and B above are herein collectively called the **"Forty Percent Agreement"**;

D. Campeau and the City entered into an agreement dated June 10, 1985 (the **"1985 Agreement"**) governing the improvement and operation by Campeau of the Kanata Golf Course (as defined in the 1985 Agreement) on certain lands owned by Campeau situated in the City of Kanata described in Schedule "A" to the 1985 Agreement. The 1985 Agreement has been registered against the lands described in Recital E below in the LTO on March 21, 1989 as Instrument No. LT606425;

E. Campeau and the City have subsequently entered into a further agreement dated December 20, 1988 addressing issues in the 1985 Agreement, which agreement has been registered against the lands described in Schedule "A" thereto on March 21, 1989 in the LTO as Instrument No. LT606426;

F. The agreements referred to in Recitals D and E above are herein collectively called the **"Golf Club Agreement"**;

[redacted]

G. Pursuant to an agreement of purchase and sale dated as of February 24, 1989, Campeau sold and assigned and Genstar Development Company Eastern Ltd. ("**Genstar**") purchased all of Campeau's right, title and interest in and to all of the lands which are subject to the Forty Percent Agreement and the Golf Club Agreement, which purchase was completed with the registration of a transfer/deed from Campeau to Genstar in the LTO on March 30, 1989 as Instrument No. LT607362;

H. Pursuant to the triparite assumption agreement (the "**Genstar Assumption Agreement**"), between Campeau, Genstar and the City registered in the LTO on March 30, 1989 as Instrument No. LT607395, Campeau assigned to Genstar and Genstar assumed the obligations of Campeau under:

(a) the Forty Percent Agreement; and

(b) the Golf Club Agreement,

and Genstar covenanted directly with the City in respect of the obligations assumed thereunder;

I. The City, in the Genstar Assumption Agreement, released Campeau from its obligations under the Forty Percent Agreement and the Golf Agreement, and waived its right of first refusal contained in Section 5(3) of the 1981 Agreement;

J. Pursuant to an asset purchase agreement dated as of August 6, 1996 (the "**Purchase Agreement**"), Genstar agreed to sell and assign and Clublink Properties Limited ("**Properties**") agreed to purchase, among other things, all of Genstar's right, title and interest in and to all of the lands forming the Kanata Lakes Golf & Country Club, which lands are more particularly described in the attached Schedule "A" (the "**Golf Course Lands**"). On closing, Properties directed that title to the Golf Course be taken by its subsidiary, the Purchaser;

K. The Golf Course Lands form part of the lands that are the subject of the Forty Percent Agreement and the Golf Club Agreement;

L. The Forty Percent Agreement and the Golf Club Agreement require that, on the sale of the lands against which those agreements are registered, the Purchaser shall execute an agreement with the City agreeing to be bound by the covenants and obligations therein;

M. The City has agreed to waive its right of first refusal contained in Section 5(3) of the 1981 Agreement subject to the Purchaser assuming such obligations;

N. Imasco and Genstar have amalgamated under the *Canadian Business Corprations Act* to continue as and under the name of Imasco pursuant to Articles of Amalgamation effective January 1, 1997 (the "**Amalgamation**"), notice of which was registered in the LTO on January 7th, 1997 as Instrument No. 102056; and

O. At the request of Imasco and the Purchaser, the City has agreed on or before June 30, 1997 to review the Forty Percent Agreement and the Golf Club Agreement to determine, acting reasonably, if the Purchaser's obligations to assume such agreements may be limited to the Golf Course Lands and if Imasco may be released for those obligations under such agreements that were assumed by the Purchaser.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of $10.00 and other good and valuable consideration now paid by each of the parties hereto to each of the other parties (the receipt and sufficiency of which is hereby acknowledged), the parties hereto covenant and agree as follows:

1. **Amalgamation:** Imasco assumes and agrees to be bound by and perform all of the covenants, liabilities and obligations of Genstar under the Forty Percent Agreement and the Golf Club Agreement and the parties hereto acknowledge that the Amalgamation has the effect of vesting in Imasco the rights and benefits arising out of the Forty Percent Agreement and the Golf Club Agreement and subjecting Imasco to all of the duties and covenants arising therefrom.

2. **Assignment:** Imasco hereby assigns, transfers and sets over unto the Purchaser, as of the date hereof, for its sole use and benefit, all of Imasco's right, title and interest in and to the Forty Percent Agreement and the Golf Club Agreement to the extent they relate to the whole or any part of the Golf Course Lands, together with all benefits and advantages to be derived therefrom and all covenants and agreements in connection therewith, save and except for the rights and benefits contained in Section 9 of the 1981 Agreement, to have and to hold the same to the Purchaser and its successors and assigns.

3. **Assumption:** The Purchaser hereby assumes, as of the date hereof, all of Imasco's liabilities and obligations under and in respect of the Forty Percent Agreement and the Golf Club Agreement. The Purchaser covenants and agrees with Imasco and the City:

   (a) to make payment or otherwise perform such liabilities and obligations in accordance with the provisions of the Forty Percent Agreement and the Golf Club Agreement; and

   (b) that from and after the date hereof, every covenant, proviso, condition and stipulation contained in the Forty Percent Agreement and the Golf Club Agreement shall apply to and bind the Purchaser in the same manner and to the same effect as if the Purchaser had executed the same in the place and stead of Campeau or Imasco.

4. **City Acknowledgement:** The City acknowledges and consents to the assignment and assumption herein contained and waives the right of first refusal contained in Section 5(3) of the 1981 Agreement (the **"Option"**) with respect to the sale to the Purchaser.

5. **Option:** The City consents to the transaction of purchase and sale provided for in the Purchase Agreement provided that nothing herein shall derogate from or cancel the City's Option upon any subsequent sale of the Golf Course by the Purchaser. The Purchaser acknowledges and confirms that the Option shall continue to be in effect, and shall bind the Purchaser on any subsequent sale by the Purchaser as aforesaid notwithstanding the City's consent to the transaction as aforesaid.

6. **Indemnity:** The Purchaser covenants with Imasco that the Purchaser will, at all times hereafter, well and truly save, defend and keep harmless and fully indemnified Imasco from and against all losses, costs, charges, damages and expenses which Imasco may, at any time or times suffer, be at or be put unto for or by reason or on account of any claims or demands whatsoever arising under, from or out of any breach of the Purchaser's covenants herein.

7. **Covenants of the City:** The City covenants with the Purchaser to perform all of the covenants and obligations of the City under the Forty Percent Agreement and the Golf Club Agreement. The City represents and warrants that as of the date hereof there is no default on the part of Imasco under the Forty Percent Agreement or the Gold Club Agreement.

8. **Supplementary Agreement:** Despite the assumption by the Purchaser and the lack of a release of Imasco in respect of the liabilities and obligations referred to in

Section 2 above, the City acknowledges that if Imasco reviews the 40% Agreement and the Golf Club Agreement in order to identify those liabilities and obligations that apply to the Golf Course Lands, and the Purchaser, acting reasonably, finds Imasco's identification to be acceptable, then the City will, acting reasonably and in good faith, review such identification, and upon being satisfied that those liabilities and obligations under those Agreements have been appropriately identified, will enter into a supplementary agreement with the Purchaser and Imasco prepared by the Purchaser and Imasco at their cost in which the Purchaser assumes only those liabilities and obligations so identified and Imasco is released from them as of the date of this Agreement.

The parties shall endeavour to proceed on the above basis expeditiously, with a view to concluding the supplemental agreement by no later than approximately June 30, 1997. Imasco and the Purchaser shall be responsible for any out-of-pocket costs of the City that the City requires to be paid in connection with the above up to a maximum of $2,500.00.

9. Golf Course: Imasco covenants and agrees with the City and ClubLink to insert in all agreements of purchase and sale for lots and blocks still owned by Imasco that adjoin any part of the Golf Course Lands or are within 100 metres of any limit of the Golf Course Lands the following:

(a) The Purchaser acknowledges that the property being purchased abuts or is in the vicinity of the golf course that is owned by ClubLink Corporation or an affiliate of it ("**ClubLink**") and the Purchaser for himself, his heirs, executors, administrators, successors and assigns covenants and agrees that he will not claim against or sue the City of Kanata, ClubLink or Imasco for any property damage or personal injury of any kind suffered by the Purchaser as a result of activities on the golf course by any users. Moreover, the Purchaser agrees to indemnify and save harmless the City, ClubLink and Imasco from all claims or suits brought against it for property damages or personal injury of any kind by any person or persons who sustain such damage or injury while on the property being purchased.

(b) The Purchaser acknowledges and agrees that the covenants and agreements made herein are for the benefit of the City of Kanata, ClubLink and Imasco and are actionable by the City, by ClubLink and by Imasco and their respective successors and assigns against the Purchaser, his heirs, executors, administrators, successors and assigns; and

(c) The Purchaser further covenants that in any further sale or transfer of the within lands, the transfer/deed shall contain the same acknowledgements, covenants or agreements by the new Purchaser or transferor as are hereby given by the Purchaser or transferor as are hereby given by the Purchaser including the agreement by the new Purchaser or transferor to exact the same acknowledgements, covenants and agreements from the new Purchaser.

10. Open Space Lands: If the City is required under Section 9 of the 1981 Agreement to reconvey any land (because, as provided for more particularly in such Section 9, such land ceases to be used for recreational and natural environmental purposes by the City), then the City shall notify the Purchaser of such conveyance prior to delivering it to Imasco or as Imasco may direct.

11. Open Space Lands: The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left as open space for recreation and natural environmental purposes (the "**Open Space Lands**") as referred to in Section 3 of the 1981 Agreement, so that the calculation of the Open

Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. 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.

12. **Successors and Assigns**: This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

13. **Counterparts:** This Agreement may be executed in any number of counterparts and all such counterparts shall for all purposes constitute one agreement, binding on the parties hereto, provided each party hereto has executed at least one counterpart, and each shall be deemed to be an original, notwithstanding that all parties are not signatory to the same counterpart.

IN WITNESS WHEREOF the parties hereto have executed this Agreement.

IMASCO ENTERPRISES INC.

By:_____
Name: James Hammermeister
Title: Authorized Signing Officer

By:_____
Name: Sharon Eyolfson
Title: Authorized Signing Officer

I/We have authority to bind the Corporation.

CLUBLINK CAPITAL CORPORATION

By:_____
Name: Justin Connidis
Title: Vice-President and Secretary

I have authority to bind the Corporation

THE CORPORATION OF THE CITY OF KANATA

By:_____
Name:
Title:

c/s

By:_____
Name:
Title:

I/We have authority to bind the Corporation

Schedule "A" - Golf Course Lands

0169082.02

[redacted]

Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. 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.

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IMASCO ENTERPRISES INC.

By:_____
Name: James Hammermeister
Title: Authorized Signing Officer

By:_____
Name: Sharon Eyolfson
Title: Authorized Signing Officer

I/We have authority to bind the Corporation.

CLUBLINK CAPITAL CORPORATION

By:_____
Name: Justin Connidis
Title: Vice-President and Secretary

I have authority to bind the Corporation

THE CORPORATION OF THE CITY OF KANATA

By:_____
Name:
Title:

c/s

By:_____
Name:
Title:

I/We have authority to bind the Corporation

Schedule "A" - Golf Course Lands

Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. 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.

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IN WITNESS WHEREOF the parties hereto have executed this Agreement.

IMASCO ENTERPRISES INC.

By:_____
Name: James Hammermeister
Title: Authorized Signing Officer

By:_____
Name: Sharon Eyolfson
Title: Authorized Signing Officer

I/We have authority to bind the Corporation.

CLUBLINK CAPITAL CORPORATION

By:_____
Name: Justin Connidis
Title: Vice-President and Secretary

I have authority to bind the Corporation

THE CORPORATION OF THE CITY OF KANATA

By: Pamela E Cripps
Name: Pamela E. Cripps
Title: Acting Mayor

c/s

By: [signature]
Name: ANNA LABBINTE
Title: CITY CLERK

I/We have authority to bind the Corporation

Schedule "A" - Golf Course Lands

0169082.02

[redacted]

Schedule "A"

In the City of Kanata, in the Regional Municipality of Ottawa-Carleton:

FIRSTLY: PIN 04513-0027 (LT)
Block 69, Plan 4M-510

SECONDLY: PIN 04512-0640 (LT)
Block 126, Plan 4M-651

THIRDLY: PIN 04513-0091 (LT)
Block 132, Plan 4M-651.

FOURTHLY: PIN 04511-0214 (LT)
Block 183, Plan 4M-652.

FIFTHLY: PIN 04511-0700 (LT)
Part Block 184, Plan 4M-652, being designated as Part 2 on Plan 4R-7217.

SIXTHLY: PIN 04511-0659 (LT)
Block 185, Plan 4M-652.

SEVENTHLY: PIN 04511-0658 (LT)
Block 186, Plan 4M-652.

EIGHTHLY: PIN 04512-0357 (LT)
Block 160, Plan 4M-739.

NINTHLY: PIN 04511-0779 (LT)
Block 76, Plan 4M-741.

TENTHLY: PIN 04512-0740 (LT)
Block 76, Plan 4M-828, save and except Plan 4M-925.

ELEVENTHLY: PIN 04512-0140 (LT)
Block 1, Plan 4M-881, save and except for (i) Plan 4M-925; and (ii) Parts 1, 2, 3, 4, 5 and 6, inclusive, on Plan 4R-12476.

TWELFTHLY: PIN 04512-0683 (LT)
Block 55, Plan 4M-883.

THIRTEENTHLY: PIN 04512-0676 (LT)
Block 56, Plan 4M-883, save and except for Part 7 on Plan 4R-12476.

FOURTEENTHLY: Part of PIN 04511-1007 (LT)
Part of Lots 5 and 6, Concession 3 and part of the road allowance between Lots 5 and 6, Concession 3 of the geographic Township of March designated as Part 2, Plan 4R-7987.

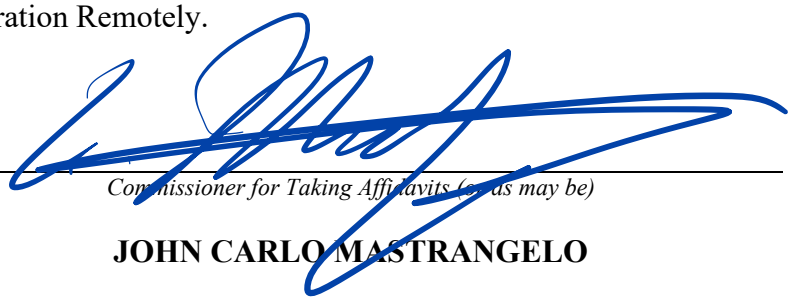
FIFTEENTHLY: Part of PIN 04511-1003 (LT)
Part of Lot 6, Concession 3, designated as Part 1, Plan 4R-7987.

SIXTEENTHLY: PIN 04511-1002 (LT)
Part road allowance as widened between Lots 5 and 6, Concession 3 of the geographic Township of March, being that part of Beaverbrook Road and Richardson Side Road (as stopped up and closed by LT552228) being designated as Part 4, Plan 4R-6557.

SEVENTEENTHLY: PIN 04512-0358 (LT)
Part Block 192, Plan 4M-652, designated as Part 2, Plan 4R-7259.

10

This is Exhibit "G" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

AFFIDAVIT OF EILEEN ADAMS-WRIGHT
sworn October 24th, 2019

I, **Eileen Adams-Wright**, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am a law clerk specializing in real estate employed by Borden Ladner Gervais LLP, lawyers for the Applicant. My regular duties include reviewing, preparing and registering instruments in the Ontario Land Registry system. As such, I have knowledge of the matters contained in this Affidavit.

2. The legal description of lands comprising the golf course commonly known as the Kanata Golf and Country Club is contained in **Exhibit "A"** attached hereto. I refer to these lands throughout my affidavit as the "Golf Course Lands."

3. The Golf Course Lands are described in four (4) separate parcel registers, which are attached hereto, each together with a highlighted Service Ontario index map, and marked as **Exhibits "B.1", "B.2", "C.1," "C.2", "D.1", "D.2", "E.1", and "E.2"**.

4. As of the date of this Affidavit, ClubLink Corporation ULC is identified as the registered owner of the Golf Course Lands on the above described parcel registers.

5. Based on my review of the above described parcel registers, I have prepared the following non-exhaustive list of the instruments registered on title to the Golf Course Lands as of October 16, 2019:

(a) Notice of an agreement dated May 26, 1981, made between Campeau Corporation and The Corporation of the City of Kanata ("the 1981 40% Agreement") registered as Instrument Number NS140350 on January 8, 1982, attached hereto and marked as **Exhibit "F"**.

(b) Notice of an agreement dated June 10, 1985, made between Campeau Corporation and The Corporation of the City of Kanata (the "1985 Golf Club Agreement") registered as Instrument No. LT606425 on March 21, 1989, attached hereto and marked as **Exhibit "G"**.

(c) Notice of an agreement, registered as Instrument Number LT568244 on July 8, 1988 in respect of a subdivision agreement dated March 2, 1987 (the "1987 Subdivision Agreement") made between Campeau Corporation and The Corporation of the City of Kanata, together with subdivision plans 4M-651, 4M-652 and 4M-653, attached hereto and marked as **Exhibit "H"**.

(d) Notice of an agreement dated December 29, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 Golf Club Agreement", together with the 1985 Golf Club Agreement, the "Golf Club

Agreement") registered as Instrument No. LT606426 on March 21, 1989, attached hereto and marked as **Exhibit "I"**.

(e) Notice of an agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata (the "1988 40% Agreement", and together with the 1981 40% Agreement, the "40% Agreement") registered as Instrument Nos. N480080 & LT606427 on March 21, 1989, both attached hereto and marked as **Exhibit "J"**.

(f) A transfer of land from Campeau Corporation to Genstar Development Company Eastern Ltd. registered as Instrument No. LT607362 on March 30, 1989, attached hereto and marked at **Exhibit "K"**.

(g) Notice of a tripartite assumption agreement dated March 30, 1989, made between Campeau Corporation, Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata (the "Genstar Assumption Agreement") registered as Instrument No. LT607395 on March 30, 1989, attached hereto and marked as **Exhibit "L"**.

(h) Notice of an agreement, registered as Instrument No. LT660648 on February 28, 1990 in respect of a subdivision dated October 31, 1989 (the "1989 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plans 4M-738, 4M-739, and 4M-741, is attached hereto and marked as **Exhibit "M"**. The 1989 Subdivision Agreement appears on the Parcel Register for Parcel Identification

20

Numbers (PINs) 04512-1126 (Exhibit "B.1") and 04511-1592 (Exhibit "C.1"), comprising a portion of the Golf Course Lands.

(i) Notice of an agreement, registered as Instrument No. LT787451 on August 19, 1992 in respect of a subdivision dated July 8, 1992 (the "1992 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plan 4M-828, is attached hereto and marked as **Exhibit "N"**. The 1992 Subdivision Agreement appears on the Parcel Register for PIN 04512-1126 (Exhibit "B.1"), comprising a portion of the Golf Course Lands.

(j) Notice of an agreement, registered as Instrument No. LT891301 on June 23, 1994 in respect of a subdivision dated May 16, 1994 (the "1994 Subdivision Agreement") made between Genstar Development Company Eastern Ltd. and The Corporation of the City of Kanata, together with subdivision plan 4M-883, is attached hereto and marked as **Exhibit "O"**. The 1994 Subdivision Agreement appears on the Parcel Register for PIN 04512-1126 (Exhibit "B.1"), comprising a portion of the Golf Course Lands.

(k) An application to amend the register in respect of the name of the owner of the Golf Course Lands, from Genstar Development Company Eastern Ltd. to Imasco Enterprises Inc. as a result of an amalgamation was registered as Instrument No. LT1020056 on January 7, 1997, a copy of which is attached hereto and marked as **Exhibit "P"**, and includes a copy of the Certificate of Amalgamation dated January 1, 1997 and Articles of Amalgamation evidencing that Imasco Enterprises

Inc. and Genstar Development Company Eastern Ltd. amalgamated under the *Canadian Business Corporations Act* and continued as and under the name Imasco Enterprises Inc.

(l) A transfer of land from Imasco Enterprises Inc. to Clublink Capital Corporation registered as Instrument No. LT1020193 on January 8, 1997 attached hereto and marked as **Exhibit "Q"**.

(m) An application by Clublink Capital Corporation to annex restrictive covenants registered as Instrument No. LT1020194 on January 8, 1997 is attached hereto and marked as **Exhibit "R"**.

(n) Notice of an agreement dated November 1, 1997, made between Imasco Enterprises Inc., ClubLink Capital Corporation and The Corporation of the City of Kanata (the "ClubLink Assumption Agreement") registered as Instrument No. LT1020197 on January 8, 1997 is attached hereto and marked as **Exhibit "S"**.

(o) An application to change name in respect of the Golf Course Lands, from ClubLink Capital Corporation to ClubLink Corporation was registered in the Land Registry Office of Ottawa-Carleton as Instrument No. OC423670 on January 12, 2005, a copy of which is attached hereto and marked as **Exhibit "T"**.

(p) An application to change name owner in respect of the Golf Course Lands from ClubLink Corporation to ClubLink Corporation ULC was registered in the Land Registry Office of Ottawa-Carleton as Instrument No. OC1231645 on May 5, 2011, a copy of which is attached hereto and marked as **Exhibit "U"**.

Province of Ontario

Document General

Form 4 — Land Registration Reform Act

DYE & DURHAM CPB POLARIS INC. (3) D

782

FOR OFFICE USE ONLY

1020194

CERTIFICATE OF RECEIPT
RECEPISSÉ
OTTAWA-CARLETON (4)

'97 01 8 14 18

MONICA WASAG
CERTIFICATION OFFICER

(1) Registry ☐ Land Titles ☒ (2) Page 1 of 3 pages

(3) Property Identifier(s) Block 04513, 04512 Property 0027(LT), 0640(LT) Additional: See Schedule ☒

(4) Nature of Document APPLICATION TO REGISTER RESTRICTION AND COVENANTS (Subsection 119(1) of the Act)

(5) Consideration Dollars $

(6) Description

In the City of Kanata, in the Regional Municipality of Ottawa-Carleton:

FIRSTLY: Block 69, Plan 4M-510

SECONDLY: Block 126, Plan 4M-651

As continued on Schedule "A" attached hereto.

New Property Identifiers Additional: See Schedule ☐

Executions Additional: See Schedule ☐

(7) This Document Contains: (a) Redescription New Easement Plan/Sketch ☐ (b) Schedule for: Description ☒ Additional Parties ☐ Other ☒

(8) This Document provides as follows:

CLUBLINK CAPITAL CORPORATION, the registered owner of the land described in Box (6) of this Document General, HEREBY REQUESTS you to register as annexed to the aforesaid land the restrictions and covenants set out in the attached Schedule "B"

Continued on Schedule ☐

(9) This Document relates to Instrument number(s)

(10) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D
CLUBLINK CAPITAL CORPORATION	Per:	1997	01	
(owner)	Name: Justin A. Connidis			
I have authority to bind the Corporation	Title: Vice President & Secretary			

(11) Address for Service c/o ClubLink Corporation, 15675 Dufferin Street, King City, Ontario, L7B 1K5 Attn: Justin A. Connidis

(12) Party(ies) (Set out Status or Interest)

Name(s)	Signature(s)	Date of Signature Y	M	D

(13) Address for Service

(14) Municipal Address of Property

7000 Campeau Road
Kanata, Ottawa

(15) Document Prepared by:

276

WEIR & FOULDS
Suite 1600, Exchange Tower
2 First Canadian Place
Toronto, Ontario M5X 1J5
(Attn: R. Wayne Rosenman)

FOR OFFICE USE ONLY

Fees and Tax	
Registration Fee	
Total	

[redacted]

Additional Property Identifier(s) and/or Other Information

Schedule "A"

In the City of Kanata, in the Regional Municipality of Ottawa-Carleton:

THIRDLY: PIN 04513-0091 (LT)
Block 132, Plan 4M-651.

FOURTHLY: PIN 04511-0214 (LT)
Block 183, Plan 4M-652.

FIFTHLY: PIN 04511-0700 (LT)
Part Block 184, Plan 4M-652, being designated as Part 2 on Plan 4R-7217.

SIXTHLY: PIN 04511-0659 (LT)
Block 185, Plan 4M-652.

SEVENTHLY: PIN 04511-0658 (LT)
Block 186, Plan 4M-652.

EIGHTHLY: PIN 04512-0357 (LT)
Block 160, Plan 4M-739.

NINTHLY: PIN 04511-0779 (LT)
Block 76, Plan 4M-741.

TENTHLY: PIN 04512-0740 (LT)
Block 76, Plan 4M-828, save and except Plan 4M-925.

ELEVENTHLY: PIN 04512-0140 (LT)
Block 1, Plan 4M-881, save and except for (i) Plan 4M-925; and (ii) Parts 1, 2, 3, 4, 5 and 6, inclusive, on Plan 4R-12476.

TWELFTHLY: PIN 04512-0683 (LT)
Block 55, Plan 4M-883.

THIRTEENTHLY: PIN 04512-0676 (LT)
Block 56, Plan 4M-883, save and except for Part 7 on Plan 4R-12476.

FOURTEENTHLY: Part of PIN 04511-1007 (LT)
Part of Lots 5 and 6, Concession 3 and part of the road allowance between Lots 5 and 6, Concession 3 of the geographic Township of March designated as Part 2, Plan 4R-7987.

FIFTEENTHLY: Part of PIN 04511-1003 (LT)
Part of Lot 6, Concession 3, designated as Part 1, Plan 4R-7987.

SIXTEENTHLY: PIN 04511-1002 (LT)
Part road allowance as widened between Lots 5 and 6, Concession 3 of the geographic Township of March, being that part of Beaverbrook Road and Richardson Side Road (as stopped up and closed by LT552228) being designated as Part 4, Plan 4R-6557.

SEVENTEENTHLY: PIN 04512-0358 (LT)
Part Block 192, Plan 4M-652, designated as Part 2, Plan 4R-7259.

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[redacted]

Schedule "B"

RESTRICTIONS AND COVENANTS

1. To the intent that the burden of these covenants and restrictions shall run with each and every part of the Golf Lands (as hereinafter defined) and to the intent that the benefit of these covenants and restrictions may be annexed to and run with each and every part of the Benefited Lands (as hereinafter defined), ClubLink Capital Corporation covenants and agrees with Imasco Enterprises Inc. and its successors and assigns that ClubLink Capital Corporation and its successors and assigns entitled from time to time of all or any portion of the lands described in Box (6) will keep, observe, perform and comply with the stipulations, provisions and covenants set forth in this Schedule.

2. The following definitions shall apply for the purposes of this Schedule:

   (a) **"Benefited Lands"** means all or any portion of the lands and premises described in Schedule 1 hereto;

   (b) **"Golf Lands"** means all or any portion of the lands and premises described in Box (6) of the Form 4 Document General to which this Schedule is annexed;

   (c) **"Transferor"** means Imasco Enterprises Inc. and its successors and assigns; and

   (d) **"Transferee"** means ClubLink Capital Corporation and any transferee of any of the Golf Lands affected by these restrictions and covenants and their respective heirs, administrators, executors, successors and assigns.

3. **Each and every part of the Golf Lands shall be subject to the following restrictions and covenants:**

   (i) The Transferee agrees that:

      (a) it shall not alter the grading of the Golf Lands or any of the storm water management facilities on or serving the Golf Lands; and

      (b) there should be no construction of any buildings, structures or other improvements on any of the Golf Lands which may cause surface drainage from the Golf Lands to be discharged, obstructed or otherwise altered,

   in a manner that materially adversely affects the Transferor's or the City of Kanata's storm water management plan in respect of the Transferor's Benefitted Lands as such plan exists as at November 1, 1996. Without limiting the generality of the foregoing, the Transferee in respect of the Golf Lands shall comply with all applicable municipal agreements, by-laws and regulations affecting the Golf Lands with respect to grading and storm water management.

   (ii) The Transferee acknowledges that the Transferor as the owner of the Benefitted Lands, which Benefitted Lands are intended primarily for residential development, may require from time to time access to and the use of parts of the Golf Lands for the purpose of providing underground water drainage, sewage and other water management and municipal services and utilities serving the Benefitted Lands. The Transferee agrees to act reasonably in considering any such request from the Transferor on its behalf or on behalf of any governmental authority for such access and use and in granting any such access and use the Transferee, acting reasonably, may impose appropriate conditions including, without limitation, that such access and use does not materially interfere in any way with the playing of golf on the Golf Lands or otherwise materially interfere with the business carried on by the Transferee

of the ownership, operation and management of a golf club, that any damage caused by the Transferor's activities be promptly repaired to the Transferee's satisfaction, acting reasonably, and that the Transferee be indemnified by the Transferor against all costs and damages relating to such access and use. The Transferor agrees that it shall not enter on or install any of the services or utilities referred to above on or under any part of the Golf Lands except in accordance with the prior written agreement of the Transferee obtained in accordance with the provisions of this Schedule.

(iii) To the extent that any of the restrictions and covenants contained in this Schedule may create an interest in the Golf Lands, such interest shall be effective only if the subdivision control provisions of the *Planning Act*, R.S.O. 1990, Chap. P.13 as amended, are complied with. The Transferor shall be responsible for obtaining at its expense any required consent under the said *Planning Act* and the Transferee shall cooperate with and assist the Transferor in obtaining any such required consent and the Transferor shall reimburse the Transferee for any reasonable costs incurred by the Transferee in so doing in favour of an arm's length third party. Without limiting the generality of the foregoing, the Transferor at its expense shall be responsible for preparing any necessary descriptions required to implement and confirm the rights granted by this Schedule.

(iv) The Transferee covenants and agrees that it shall not sell, encumber, transfer or lease any portions of the Golf Lands unless it shall obtain from any such purchaser, transferee, encumbrancer or tenant a covenant in favour of the Transferor to comply with all of the restrictions and covenants contained in this Schedule, including without limiting the generality of the foregoing, a covenant to obtain a similar covenant from any subsequent purchaser, transferee, encumbrancer or tenant.

(v) The Transferor and the Transferee from time to time at the request and at the expense of the other party and without further consideration shall execute and deliver such other documents and take such further steps as the other party may reasonably require to more effectively implement the intent of this Schedule.

(vi) If any covenant or restriction contained herein, or the application thereof, to any person, corporation, partnership, trustee or unincorporated organization or circumstance shall, to any extent be invalid or unenforceable, the remainder of the covenants and restrictions or the application of such covenants and restrictions to persons, corporations, partnerships, trustees or unincorporated organizations or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each such covenant and restriction contained herein shall be separately valid and enforceable to the fullest extent permitted.

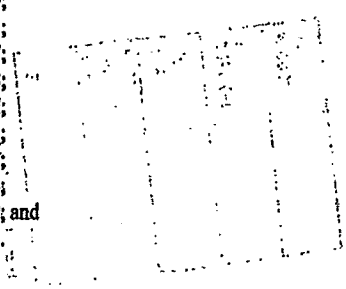
Schedule 1 to Schedule "B"

BENEFITTED LANDS

In the City of Kanata, in the Regional Municipality of Ottawa-Carleton:

FIRSTLY: All lots and blocks on each of the following plans of subdivision:

(a) Plan 4M-510;
(b) Plan 4M-651;
(c) Plan 4M-652;
(d) Plan 4M-653;
(e) Plan 4M-739;
(f) Plan 4M-741;
(g) Plan 4M-827;
(h) Plan 4M-828;
(i) Plan 4M-847;
(j) Plan 4M-881;
(k) Plan 4M-883;
(l) Plan 4M-884;
(m) Plan 4M-909; and
(n) Plan 4M-925.



SECONDLY: Those portions of the following lands registered in the name of Genstar Development Company Eastern Ltd. as of November 1, 1996:

(a) Part of Lot 5, Concession 3 of the geographic Township of March;
(b) Part of Lot 6, Concessions 2 and 3 of the geographic Township of March;
(c) Part of Lot 7, Concessions 2 and 3 of the geographic Township of March;
(d) Lot 8, Concessions 2 and 3 of the geographic Township of March; and
(e) Part of Lot 9, Concessions 2 and 3 of the geographic Township of March.

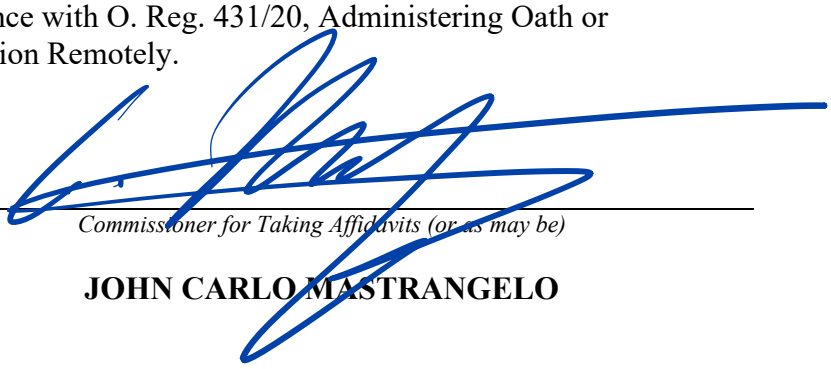
THIRDLY: Part of Block 1, Plan 4M-881, designated as Parts 1, 2, 3, 4, 5 and 6, inclusive, Plan 4R-12476.

FOURTHLY: Part of Block 56, Plan 4M-883, designated as Part 7, Plan 4R-12476.

FIFTHLY: Part Lot 3, Concession 2 and 3 of the geographic Township of March.

5

This is Exhibit “H” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant/
Responding Party on Motion

- and -

CLUBLINK CORPORATION ULC

Respondent/
Responding Party on Motion

- and -

KANATA GREENSPACE PROTECTION COALITION

Proposed Intervenor/
Moving Party

NOTICE OF MOTION

The Proposed Intervenor will make a Motion to the Court on December 16, 2019 at 9:00 a.m. or as soon after that time as the Motion can be heard at the Ottawa courthouse at 161 Elgin Street, Ottawa, Ontario, K2P 2K1.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[ ] in writing under Subrule 37.12.1(1)

[ ] in writing as an opposed motion under Subrule 37.12.1(4);

[X] orally.

THE MOTION IS FOR:

(a) An Order pursuant to Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 granting the Kanata Greenspace Protection Coalition ("**Coalition**") leave to intervene as an added party in the proceeding bearing Court File No. 19-81809.

(b) The Coalition will not seek costs for its intervention and asks that no costs be ordered against it.

THE GROUNDS FOR THE MOTION ARE:

(a) On October 25, 2019, the City of Ottawa issued a Notice of Application bearing Court File No. 19-81809 ("**City's Application**");

(b) The City's Application relates to a proposed development by the Respondent ClubLink Corporation ULC and the status of various agreements entered into by the Respondent and its predecessors in title;

(c) The City's Application seeks, *inter alia*, declarations relating to the validity and enforceability of the obligations set out in the 40% Agreement (as defined in the City's Application) and the ClubLink Assumption Agreement (as defined in the City's Application);

(d) The Coalition is a not-for-profit corporation formed to preserve and protect Kanata's green spaces and promote the value of its natural environment, including through opposition to the development at issue in the City's Application;

(e) The Coalition represents homeowners and community members who have a direct interest in the subject matter of the proceeding;

(f) Homeowners and community members represented by the Coalition may be adversely affected by a judgment in the proceeding;

(g) There exists between homeowners and community members represented by the Coalition and one or more of the parties to the proceeding a question of law or fact common with one or more of the questions in issue in the proceeding;

(h) It is efficient and an effective use of judicial resources to have the Coalition represent the interests of individual homeowners and community members;

(i) The Coalition can make a useful and distinct contribution to the resolution of the application;

(j) The Coalition's intervention will not unduly delay or prejudice the determination of the rights of the parties to the proceeding;

(k) The Coalition will seeks introduce one affidavit in the proceeding, of which the draft form is attached as **Tab "C"** to the Motion Record;

(l) The Coalition undertakes not to duplicate the evidence or submissions of the City of Ottawa;

(m) Rule 13.01 and Subrule 37.02(2) of the *Rules of Civil Procedure*; and

(n) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The Pleadings exchanged in this proceeding;

(b) The Applicant City of Ottawa's Application Record, dated October 25, 2019;

(c) The affidavit of Barbara Ramsay, sworn November 19, 2019; and

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

November 19, 2019

CAZA SAIKALEY S.R.L./LLP
Lawyers | Avocats
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Ottawa, ON K1P 5Z9

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

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Charles R. Daoust (LSO# 74259H)
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Lawyers for the Proposed Intervenor,
Kanata Greenspace Protection Coalition

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Lawyers for the Applicant,
City of Ottawa

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Mark R. Flowers
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Lawyers for the Respondent,
Clublink Corporation ULC

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

NOTICE OF MOTION

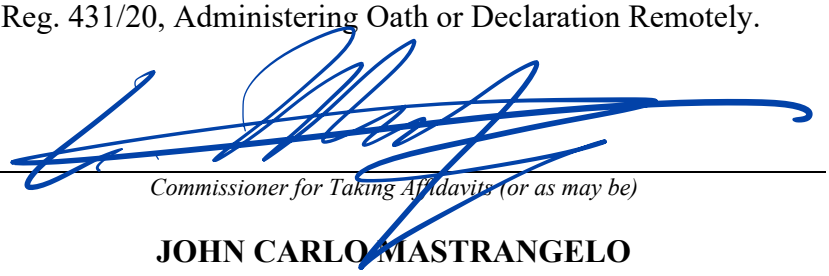
CAZA SAIKALEY S.R.L./LLP
Lawyers | Avocats
350-220 Laurier West
Ottawa ON K1P 5Z9

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

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

Lawyer for the Proposed Intervenor,
Kanata Greenspace Protection Coalition

This is Exhibit “I” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant/
Responding Party on Motion

- and -

CLUBLINK CORPORATION ULC

Respondent/
Responding Party on Motion

- and -

KANATA GREENSPACE PROTECTION COALITION

Proposed Intervenor/
Moving Party

AFFIDAVIT OF BARBARA RAMSAY
(Motion pursuant to Rule 13.01 of the *Rules of Civil Procedure*)

I, **Barbara Ramsay**, OF THE CITY OF OTTAWA, IN THE PROVINCE OF ONTARIO, MAKE OATH AND SAY, AS FOLLOWS:

1. I am Chair of the Board of the Kanata Greenspace Protection Coalition ("**Coalition**") and make this affidavit in support of the Motion for Leave to Intervene as an Added Party pursuant to Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The Notice of Motion dated November 14, 2019 is included as **Tab "A"** of the Motion Record.

2. The Coalition seeks leave to lead evidence in the form of a further affidavit from me, the proposed contents of which are included as **Tab "C"** of the Motion Record.

PROCEDURAL HISTORY

3. On October 25, 2019, Applicant City of Ottawa ("**City**") filed a Notice of Application seeking, *inter alia*, an Order enjoining Respondent ClubLink Corporation ULC ("**ClubLink**") to either withdraw its zoning by-law amendment application and plan for subdivision application in relation to the Kanata Golf & Country Club ("**Golf Course Lands**"), or convey the Lands to the City at no cost. Attached as **Exhibit 1** is a copy of the Notice of Application.

4. The City is also seeking a determination on the validity and enforceability of an agreement dated May 26, 1981 and its subsequent amendments between the City and the owner of the Golf Course Lands (title to which is currently held by ClubLink) stipulating that 40 percent of the original Marchwood Lakeside community land be reserved for open space dedicated to recreation and natural environment purposes ("**40% Agreement**") of which the Golf Course Lands comprise approximately 32 percent.

5. ClubLink wishes to discontinue the current operation of the golf course, and intends to redevelop the Golf Course Lands with homes, roads and water retention lagoons.

6. Particularly important to this proceeding is the interpretation and application of section 7 of the Notice of an Agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata, marked as Exhibit "J" of the Affidavit of Eileen-Adams Wright sworn October 24, 2019 submitted as part of the City's Application Record. Section 7 reads as follows:

> **7.** It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.

7. The Coalition represents the interests and/or rights of the community members and homeowners who make up the Kanata Marchwood Lakeside Community, including those who live in the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood

and Nelford Court. Marked as Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019 included in the City's Application Record, are maps detailing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods.

8. The Coalition moves to intervene in the proceeding as an added party in order to represent the interests and/or rights of community members and homeowners whose homes are adjacent to and in the vicinity of the Golf Course Lands, as the outcome of this proceeding may adversely impact the value of these homes and thereby their owners' interests and/or rights.

9. The Coalition also seeks to intervene in order to represent the interests and/or rights of community members and homeowners who live in proximity to the Golf Course Lands and who derive enjoyment and other benefits therefrom. This outcome in this matter may adversely affect the interests and/or rights of this community.

MY BACKGROUND, MY HOME AND GREENSPACE IN KANATA LAKES

10. By way of background, I retired in early 2018 following a 40-year career as a community pharmacist. For over 19 years, I owned and operated four (4) pharmacy franchises in the Ottawa area. I have also had the opportunity to contribute to the broader community by taking on leadership roles with organizations such as the Distress Centre, United Way, CHEO and Hospice Care Ottawa. I also served on several public boards, including that of the Ottawa Board of Trade and the Ottawa Hospital. Moreover, I have been fortunate to receive several awards recognizing my contributions, among them "Employer of the Year in the City of Nepean" as well as the "Business Person of the Year, City of Ottawa, Capital Ward".

11. My husband and I moved to Kanata in 2010 in order to be closer to our adult children who have settled in the West end of Ottawa. Our home in Kanata Lakes was specifically chosen because of its direct access and view to the open greenspace of the Golf Course Lands. We paid a premium for this location and understood upon purchasing the property that this open space was protected 'in perpetuity' by the 40 % Agreement. Both my husband and I appreciate and enjoy the natural environment which is integrated throughout the

neighbourhood. We purposely chose to live close to nature in order to enjoy its simple but important health benefits. It is a priority in our lives.

12. Indeed, my husband and I walk the uninterrupted open greenspaces of the Golf Course Lands and its connected network of trails at least twice daily, 365 days a year, with our two (2) dogs. I garden in the summer months, and I enjoy watching and painting the seasons as they change around us. My husband is a ClubLink member, and he plays golf and walks 18 holes most days from course opening in April to close in October. Many of his rounds are played on the Kanata Golf & Country Club course. During the wintertime, we snowshoe and enjoy the space as our younger neighbours skate on the pond and toboggan on hills. We feed and take care of the wildlife, particularly by monitoring the rabbits, chipmunks, ducks, herons, geese, foxes and coyotes that make the greenspace their home. Attached as **Exhibit 2** is photograph of the Golf Course Lands during winter showing the pond area converted into a skating and hockey rink.

13. The benefits of urban greenspaces are well documented and include significant health benefits for residents and the community. The World Health Organization (WHO) has issued a report which confirms that urban greenspace is a necessary component for delivering healthy, sustainable and liveable cities, and that such spaces can deliver positive health, social and environmental outcomes for all population groups. A copy of this report, of which Appendices 1 to 3 are omitted, is attached as **Exhibit 3** to my affidavit.

CLUBLINK PLANS FOR REDEVELOPMENT AND COMMUNITY REACTION

14. The catalyst for my involvement in this cause occurred in mid-December 2018, when there were media reports that ClubLink, the owner and operator of the Golf Course Lands, was planning to redevelop the Lands in concert with their Ottawa collaborators, Richcraft Homes and Minto Communities. Attached as **Exhibit 4** to this Affidavit is the press release issued by ClubLink as well as an article published by the *Ottawa Citizen*. Both are dated December 14, 2018.

15. ClubLink's redevelopment announcement was met with overwhelming opposition and concern among members of the surrounding community. I reached out to my Ward 4

Kanata North Councillor, Jenna Sudds, who was rallying neighbours and other community actors to discuss the future of the Golf Course Lands' greenspace.

16. On December 16, 2018, in response to ClubLink's announcement, the Kanata Beaverbrook Community Association ("**KBCA**") and the Kanata Lakes Community Association ("**KLCA**") created the Kanata Lakes Golf Club ("**KLGC**") Greenspace Facebook page in order to promote and support community dialogue, and express our grave concerns regarding the fate of our beloved green and open space. The online page was also intended to help garner donations in order to fund a campaign against ClubLink's proposal. Ultimately, 155 donations totaling $21,400.00 were received through fundraising as of the end of March 2019.

17. In addition to the 4500 households and approximately 100 members of the KLCA, and the 2500 households and 650 members of the KBCA, four (4) other smaller community associations from the Kanata Lakes area rallied to the KLGC Greenspace cause: 1) Country Club Estates Association; 2) Catherwood Court Homeowners' Association; 3) Nelford Court Homeowners' Association; and 4) Co-operative Condominium Association CCC575.

18. In January 2019, we became more organized. The associations formed the Kanata Greenspace Steering Committee ("**KGSC**"), which would operate as a sub-committee of the KBCA. The KGSC's efforts were directed at strategic planning, website development, volunteer recruitment and fundraising to oppose ClubLink's proposed redevelopment of the Golf Course Lands. The KGSC also promoted community engagement by developing a lawn sign campaign, where homeowners "purchased" lawn signs in support of the committee's efforts for $25.00. By late May 2019, after an organized door-to-door canvas of area neighbourhoods, over 1200 lawn signs were distributed and KLGC Greenspace's supporter base expanded to over 1100 names. Attached as **Exhibit 5** are photographs of our lawn sign campaign, a press release explaining the success of our lawn sign campaign as well as an example of a promotional door hanger.

BIRTH OF THE COALITION

19. In June 2019, the KGSC elected to move forward with the creation of a not-for-profit corporation in order to ensure it had the necessary authority to act in the interests of the community members and homeowners, and to assure its volunteers that it was able to acquire and provide adequate insurance for the activities the KGSC undertook.

20. The Kanata Greenspace Protection Coalition was incorporated on July 11, 2019 with a Board of seven (7) members with limited and staggered terms of office: 1) myself as Chair; 2) Geoff McGowan as President; 3) Peter Chapman as Treasurer; and 4) Kevin McCarthy, David McNairn, Greg Sim and Tom Thompson as Members-at-Large. The remaining members of the KGSC formed a Leadership Committee to support the Board with the management of key sub-committees, such as those dedicated to communications and event-planning. Attached hereto and marked as **Exhibit 6** to this Affidavit are letters of confidence signed by the representatives of the KBCA, the Country Club Estates Co-Tenancy Committee, the Nelford Homeowners' Services Association and the Ottawa-Carleton Condominium Corporation (CCC575).

21. Officially, the Coalition's purpose is to "preserve and protect Kanata's greenspaces and promote the value of its natural environment". Attached as **Exhibit 7** is a copy of the Coalition's Certificate of Incorporation dated July 11, 2019.

22. Among the Coalition's most recent initiatives was the inaugural "STOP CLUBLINK" community meeting held at Earl of March Secondary School on November 5, 2019. The meeting was attended by more than 650 community members and homeowners, and was viewed by 500 others via Facebook Live. Attached as **Exhibit 8** is a press release about the November 5, 2019 event.

23. Furthermore, as of November 2019, the Coalition has raised more than $75,000.00 to fund its grassroots efforts in opposition to ClubLink's redevelopment plans. The Coalition's newsletter reaches 977 recipients as of November 11, 2019. These recipients make up only part of the over 1200 who have signed up as supporters of the Coalition. Attached as **Exhibit 9** is an example of our newsletter for the month of September 2019. Further,

marked as **Exhibit 10** are examples of letters of support that we have received from community members and homeowners.

24. The Coalition and its activities have also attracted much media attention. Attached as **Exhibit 11** to the Affidavit is a copy of one of the more recent articles published by CBC in relation to ClubLink's redevelopment proposal as well as an opinion piece by Jamie Portman which appeared in the *Ottawa Citizen* on November 9, 2019.

LOSS OF GREENSPACE AND THREAT TO VALUE OF HOMES

25. The Coalition has also consulted with reputable realtors regarding the consequences of the greenspace's redevelopment by ClubLink.

26. Geoff McGowan has informed me, and I verily believe to be true, that based on his experience, the redevelopment of the Golf Course Lands into homes, paved roads and water retention lagoons will have an important adverse impact on the value of the homes in the vicinity.

27. Mr. McGowan has been a licensed realtor for 35 years, ten (10) of them as the owner/operator of a multi-office Re/MAX franchise with 80 realtors. In order to conduct an initial estimate of the potential effects of ClubLink's proposal on the value of homes surrounding the Golf Course Lands, Mr. McGowan convened a panel of four (4) top realtors in the Kanata North area. In addition to himself, the panel members are: 1) Christine Hauschild; 2) Joan Smith; and 3) Anna Ostapyk. They tackled the following question: "Based on their experience and knowledge of the local real estate market, what will be the impact on real estate values in the event that this redevelopment plan is approved?"

28. The consensus opinion was that home valuations could realistically decrease by 5 (five) to 15 percent upon the redevelopment of the greenspace land. There are approximately 7000 homes in the Kanata Lakes and Beaverbrook communities.

NECESSITY OF INTERVENTION

29. It is imperative that the Coalition be granted leave to intervene in the proceeding. The Coalition is best suited to represent and advocate for the rights of community members and

homeowners whose interests will be affected by the judgment of this Honourable Court. The Coalition's position and contribution will be separate and distinct from that of the City, and it is in the interests of justice that this Honourable Court take into consideration the interests of community members and homeowners.

30. Moreover, I firmly believe that it is in interest of community members and homeowners to have the Coalition's submissions heard and the issues raised therein determined expeditiously. As such, the Coalition undertakes not to unduly delay the proceeding.

SWORN BEFORE ME at the City of Ottawa, this 14th day of November, 2019

Commissioner for taking Affidavits, etc.

LSO #74259H

BARBARA RAMSAY

16

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced in the City of Ottawa

AFFIDAVIT OF BARBARA RAMSAY

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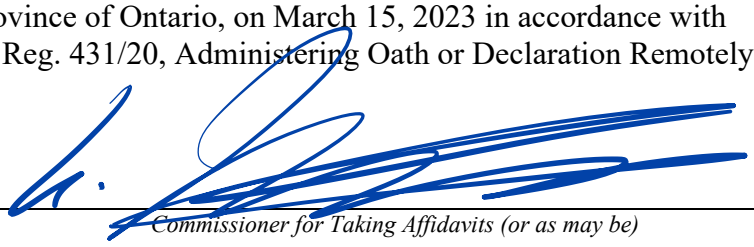
This is Exhibit “J” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant/
Responding Party on Motion

- and -

CLUBLINK CORPORATION ULC

Respondent/
Responding Party on Motion

- and -

KANATA GREENSPACE PROTECTION COALITION

Proposed Intervenor

FACTUM OF THE PROPOSED INTERVENOR

(Motion for Leave to Intervene as an Added Party
pursuant to Rule 13.01 of the *Rules of Civil Procedure*)

December 9, 2019

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I. OVERVIEW

1. This is a Motion for Leave to Intervene as an Added Party pursuant to Rule 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 brought forth by the Proposed Intervenor, the Kanata Greenspace Protection Coalition (the "**Coalition**").

2. At the heart of this matter is the proposed redevelopment of open green space lands in and around the Kanata Golf and Country Club currently owned and operated by the Respondent ClubLink Corporation ULC ("**ClubLink**"). The Applicant City of Ottawa (the "**City**") brought the underlying Application, seeking, *inter alia*, a determination of the validity and enforceability of the obligations of ClubLink pursuant to various agreements that would appear to preclude the redevelopment.

3. The Coalition represents the rights and interests of community members whose homes are adjacent to and in the vicinity of the open green space lands and may be adversely affected by the outcome of the Application. These persons would have the right to initiate individual proceedings to enforce the agreements themselves, pursuant to several exceptions to the doctrine of privity of contract.

4. In the interests of efficiency and judicial economy, community members formed the Coalition and are seeking to have these questions determined in the context of the City's Application, which has already raised the issue of the validity and enforceability of ClubLink's obligations. This approach also avoids the risk of inconsistent findings.

5. The Coalition brings a unique and distinct perspective to the Application. It proposes to specifically address the enforceability of provisions of the agreements that benefit the community as a whole, including the individuals and lands constituting the Kanata Marchwood Lakeside Community.

6. The Coalition has agreed to respect the timetable already agreed upon by the parties and proposes to limit the evidence it leads to the affidavit included as Tab "C" of its Motion Record. The Coalition has undertaken not to duplicate the submissions made by the City, thereby minimizing any prejudice to the parties.

7. Leave should therefore be granted to add the Coalition as a party to the proceeding.

II. FACTS

A. BACKGROUND

7. In 1979, Campeau Corporation ("**Campeau**") owned 1400 acres of land in what was then the City of Kanata ("**Kanata**") which consisted of two (2) adjacent parcels of land, the so-called Marchwood lands and Lakeside lands (the "**Campeau Lands**"). Campeau's plan at that time was to develop the Campeau Lands, including by building homes and neighbourhoods, and by expanding the existing nine-hole golf course into an 18-hole course.[1]

8. In order to obtain Kanata's support for the necessary applications for Official Plan (OP) amendments, Campeau proposed that 40 percent of the Campeau Lands be reserved as open space for recreation and natural environmental purposes, consisting of: natural environment areas, lands to be dedicated for park purposes, a storm water management area and the proposed 18-hole golf course.[2]

B. THE 40% AGREEMENT

9. Campeau and Kanata subsequently entered into an agreement in May 1981 to reserve 40 percent of the Campeau Lands as open space for recreation and natural environmental purposes, including the golf course (the "**1981 40% Agreement**").[3] In subsequent agreements, the parties confirmed the location of the said golf course within the bounds of the Campeau Lands (the "**Golf Course Agreement**").[4]

10. The 1981 40% Agreement was registered on the Campeau Lands. Over the decades, the Campeau Lands have been subdivided and sold. They are now owned by hundreds of

[1] Affidavit of Donald Kennedy sworn October 25, 2019 at para. 9; see also Affidavit of Derrick Moodie sworn October 27, 2019 at para. 8.
[2] See sections 3-4 of Exhibit "F" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019; see also Affidavit of Donald Kennedy sworn October 25, 2019 at para. 17.
[3] Exhibit "F" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.
[4] Exhibits "G" and "I" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.

separate individuals and other entities.[5] Residential street, roadways, park space and other services are on the Campeau Lands, marking the area as A developed suburb on the western flank of Ottawa.[6]

11. The 1981 40% Agreement is currently registered on title to 1775 parcels within the Campeau Lands.[7]

12. Campeau and Kanata entered into a further agreement in December 1988 (the "**1988 40% Agreement**") identifying with precision to which parcels of land the 40 percent principle would apply. Schedule "A" lists the "**Current Lands**", meaning the Campeau Lands subject to the 1988 40% Agreement. Moreover, section 4 and Schedule "C" of this Agreement indicates where within the Campeau Lands the open space lands for recreational and natural environmental purposes would be (the "**Open Space Lands**").[8]

13. Approximately 32 percent of the Open Space Lands is occupied by the golf course as previously specified in paragraph 10 of this Factum, i.e. one third of the entire 40 percent of the dedicated open green space is made up of the golf course ("**Golf Course Lands**").[9]

14. Of the provisions of the 1988 40% Agreement, section 7 is particularly important to the proposed intervention, as it designates the properties within the Current Lands which benefit from the restrictions of the 40 percent principle. Section 7 reads as follows:

> **7.** It is hereby agreed that the [1981] Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community. [Emphasis added.]

15. Ownership of the Golf Course Lands has changed over the decades. ClubLink purchased them in 1996 and is their current owner. In November 1996, ClubLink entered into an

[5] Affidavit of Derrick Moodie sworn October 27, 2019 at para. 14.
[6] Exhibit 1 to the Affidavit of Barbara Ramsay sworn November 19, 2019, MR at **TAB "B-1"**, p. 23.
[7] Affidavit of Eileen Adams-Wright sworn October 24, 2019 at para.7.
[8] Exhibit "J" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.
[9] Affidavit of Donald Kennedy sworn October 25, 2019 at para. 19; see also Exhibits "B.1" to "E.2", and Schedule "C" of Exhibit "J" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.

agreement with Kanata whereby it assumed Campeau's obligations under the 40 % Agreement (the "**ClubLink Assumption Agreement**").[10]

16. Specifically, section 11 of the ClubLink Assumption Agreement provides for the following:

> The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left as open space for recreation and natural environmental purposes (the "**Open Space Lands**") as referred to in Section 3 of the 1981 Agreement, so that the calculation of the Open Space Lands will continue to include the area of the Golf Course Lands… 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. [Emphasis in original]

17. The 1988 40% Agreement, Golf Course Agreement and ClubLink Assumption Agreement are also registered on title of the Golf Course Lands. The 1981 and 1988 40% Agreements and/or the Golf Course Agreement are also part of the subdivision agreements registered on the Golf Course Lands.[11]

18. In January 2001, by operation of the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sch. E, all assets and liabilities of Kanata, including all rights, interests, entitlements and contractual benefits and obligations became assets and liabilities of the City of Ottawa.[12]

C. GOLF COURSE LANDS REDEVELOPMENT PLANS AND THE COALITION

19. In December 2018, ClubLink publicly announced its wish to discontinue the current operation of the golf course and intent to redevelop the Golf Course Lands with homes, roads and water retention lagoons in concert with their Ottawa collaborators, Richcraft Homes and Minto Communities.[13] In October 2019, ClubLink submitted applications

[10] Exhibit "S" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.
[11] Affidavit of Affidavit of Eileen Adams-Wright sworn October 24, 2019 at para. 5.
[12] Affidavit of Derrick Moodie sworn October 27, 2019 at para. 13.
[13] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 14, Motion Record of the Proposed Intervenor [MR] at **TAB "B"**, p. 11; see also Affidavit of Derrick Moodie sworn October 27, 2019 at paras. 28-34.

under the *Planning Act*, R.S.O. 1990, c. P.13 for a Zoning By-law Amendment and Plan of Subdivision targeting the Golf Course Lands.[14]

20. ClubLink's redevelopment announcement was met with overwhelming opposition and concern among members of the surrounding community.[15]

21. In response, the Coalition was formed in June 2019. It is composed of the hundreds of members who made up the community organizations who had hitherto been fighting the proposed redevelopment of the Golf Course Lands. In effect, the Coalition's official purpose is to "preserve and protect Kanata's greenspaces and promote the value of its natural environment".[16]

22. Specifically, the Coalition represents the interests and/or rights of the community members and homeowners who make up the Kanata Marchwood Lakeside Community, as provided for in section 7 of the 1988 40 % Agreement and in section 11 of the ClubLink Assumption Agreement. This includes those who live in the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court.[17]

D. THE UNDERLYING APPLICATION

23. On October 25, 2019, the City filed a Notice of Application seeking, *inter alia*, an Order enjoining ClubLink to either withdraw its October 2019 Zoning By-law Amendment Application and Plan for Subdivision Application in relation to the Golf Course Lands, or convey the said Lands to the City at no cost.[18]

24. The City is also seeking a determination on the validity and enforceability of the two 40% Agreements and the ClubLink Assumption Agreement.

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[14] Exhibits "N" and "O" of the Affidavit of Derrick Moodie sworn October 27, 2019.
[15] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 15, MR at **TAB "B"**, p. 11.
[16] See Affidavit of Barbara Ramsay sworn November 19, 2019 at paras. 16-24, MR at **TAB "B"**, pp. 12-14.
[17] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 20, MR at **TAB "B**", p. 13; Marked as Exhibit "A" to the Affidavit of Derrick Moodie sworn October 27, 2019 included in the City's Application Record, are maps detailing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods; See also Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019.
[18] Exhibit 1 to the Affidavit of Barbara Ramsay sworn November 19, 2019, MR at **TAB "B-1",** pp. 19-21.

25. The City's Application is particularly concerned with the applicability of section 5(4) of the 1981 40% Agreement, which provides that, in the event that ClubLink desires to discontinue the operation of the golf course and can find no other person to acquire and operate it, then it shall convey the course to the City at no cost. Upon receiving the golf course, the City would operate the land as a golf course (or maintain it as open green space) or reconvey it to ClubLink at no cost pursuant to section 9 of the same Agreement.[19]

III. ISSUES

26. The Proposed Intervenor respectfully submits that the present Motion raises the following issues to be determined by this Honourable Court:

i. Does the proposed intervention meet the criteria of Rule 13.01(1)?

ii. Will the Proposed Intervenor make a useful and distinct contribution to the proceeding?

iii. Will any delay or prejudice caused by the proposed intervention, as the case may be, be undue as per the terms of Rules 13.01(2)?

iv. Is it an efficient and effective use of judicial resources to grant leave to the proposed intervention? and

v. What, if any, conditions should be applied to the intervention in the event that it is granted?

IV. ARGUMENT

27. The Coalition should be granted leave to intervene for the following reasons: **1)** as per the requirements of the Rule 13.01(1) the Coalition has a genuine interest in the outcome of the proceeding, members of the community which the Coalition represents may be adversely affected by a judgment in the proceeding, and there exists between members of the community and the Parties to the proceeding a question of law or fact in common with

[19] *Ibid.*

one or more of the questions in issue; **2)** the Coalition has a useful and distinct contribution to offer; **3)** the proposed intervention will not unduly delay or prejudice the determination of the Parties' rights; and **4)** the proposed intervention would be an effective and efficient use of judicial resources.

28. Before addressing each of these issues in detail, we set out the legal principles applicable to a Motion under Rule 13.01 below.

A. THE TEST FOR GRANTING LEAVE PURSUANT TO RULE 13.01

29. Generally, under Rule 13.01, an intervenor as an added party has the rights of a party to participate fully in the litigation. This can be distinguished from Rule 13.02, which provides that an intervenor may participate as a "friend of the court" who renders "assistance to the court by way of argument".[20]

30. The criteria for granting leave as an added party are explicitly set out in the wording of Rule 13.01:

> **13.01 (1)** A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> **(a)** an interest in the subject matter of the proceeding;
>
> **(b)** that the person may be adversely affected by a judgment in the proceeding; or
>
> **(c)** that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

31. The subrules of Rule 13.01 are disjunctive and only one of the grounds needs be satisfied to seek party intervenor status.[21] Moreover, the Rules do not require a party seeking leave

[20] *Halpern v. Toronto (City) Clerk*, 2000 CanLII 29029 at para. 12 (Ont. Div. Ct.), *per* Lang J (sitting alone), BOA at **TAB 2.**
[21] *Hydro One Networks Inc. v. Ontario Energy Board*, 2019 ONSC 3763 at para. 23 (Div. Ct.), *per* Thorburn J. (as she then was; sitting alone), BOA at **TAB 3.**

to intervene to have a direct interest in the issue to be determined.[22] The criterion found at Rule 13.01(1)(*a*) of an "interest in the subject matter of the proceeding" has been interpreted as including a public interest in the proceeding, to the extent that the party's interest is "over and above that of the general public".[23]

32. If the proposed intervenor establishes that it meets any of the criteria, this Court must then consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties" to the proceeding as per Rule 13.01(2). If this Court is satisfied that any such delay or prejudice "will not be undue", it may exercise its discretion to add the party and specify any such condition of added party status as it deems just.[24]

a) Useful and distinct contribution

33. Beyond the criteria established by the Rule, the proposed intervenor must also satisfy the Court that it can make a useful and distinct contribution to the proceeding.[25] Indeed, the party seeking leave must establish that it can articulate a perspective that is important as well as different from that of the other parties. As found recently by Thorburn J. (as she then was) in *Hydro One v. OEB*:

> A well-recognized group with special expertise and a broadly identifiable membership base may be better able to provide a useful and distinct contribution to the resolution of the matter. Intervention is especially helpful where the interest of the more vulnerable are at stake and the outcome will be beyond the private rights of parties: See *Reference re Workers' Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335, 1989 CanLII 23 (SCC) at paras. 11-12.[26]

34. The tendency is thus toward over- rather than under-inclusion. It has been recognized that courts prefer to have "all the relevant possibilities brought to [their] attention, including submissions on the impact of [their] judgment, not only on the parties, but on those not

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[22] *Hydro One* at para. 23, BOA at **TAB 3,** citing with approval *Bloorview Children Hospital Foundation v. Bloorview MacMillan Centre*, [2001] O.J. No. 1700 at paras. 17, 22 (S.C.J.), *per* Croll J., BOA at **TAB 5.**
[23] *Halpern* at para. 15, BOA at **TAB 2**.
[24] *Halpern* at para. 14, BOA at **TAB 2**.
[25] *Hydro One* at para. 27, BOA at **TAB 3**.
[26] *Hydro One* at para. 27, BOA at **TAB 3**; *Craft et al. v. City of Toronto et al.*, 2019 ONSC 1151 at para. 63 (Div. Ct.), *per* Thorburn J. (as she then was; sitting alone) BOA at **TAB 4**; see also *Reference re Workers' Compensation Act, 1983 (Nfld.)* (Application to intervene), [1989] 2 S.C.R. 335, *per* Sopinka J. (sitting alone), BOA at **TAB 6**.

before the court".[27] As noted by Thorburn J., this is true even where only certain aspects of the ultimate decision may bear on the rights at issue, and where the intervenor may bring only a slightly different perspective to be considered.[28]

b) Nature of the case and issues involved

35. Broader factors may also have a bearing on this Court's determination on a leave motion. For example, the nature of the case and the issues involved can be pertinent considerations.[29]

36. In terms of the nature of the case, though it is true courts have been more readily inclined to authorize interventions in constitutional matters rather than in more "conventional" cases, cases involving the determination of personal rights may nonetheless conducive to an intervention.[30] As held by Watt J.A. of the Ontario Court of Appeal, the type of issues which may arise in the context of a conventional or private litigation "fall along a continuum".[31] At one end, some issues may have no implications beyond the facts to which they are attached and concern none but the immediate parties. Conversely, other issues transcend the dispute between the immediate parties and have broader implications.[32] It is well established that cases involving an important public component or which may have an impact on a larger community cannot be considered purely private or conventional.

37. In granting leave to intervene in a matter which may also involve the determination of personal or private rights, the Court would attempt to minimize the possibility of injustice to the original litigants; injustice may result from the timing of the proposed intervention, or from the fact that the proposed intervenor seeks to augment the record established by

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[27] *Hydro One* at para. 28, BOA at **TAB 3**; *Craft* at para. 64, BOA at **TAB 4.**
[28] *Ibid*.
[29] *Hydro One* at para. 25, BOA at **TAB 3**; see also *Jones v. Tsige*, 2011 CanLII 99894 at para. 22 (Ont. C.A.), *per* Watt J.A. (in chambers), BOA at **TAB 7.**
[30] See *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2001] O.J. No. 2768 (C.A.), *per* McMurtry C.J. (in chambers), BOA at **TAB 8**.
[31] *Jones* at para. 24, BOA at **TAB 7.**
[32] *Ibid.*

the parties, rather than accept the record as established in accordance with the general rule (this rule applying specifically in the context of an appeal).[33]

c) Conditions and right to appeal

38. As provided for in Rule 13.01(2), one of the ways by which a court may elect to grant leave to intervene while ensuring no injustice is caused to other parties is to apply terms and conditions of added party status, such as page limits for written submissions and specific instructions as to costs.[34]

39. Ordinarily, an intervenor who has been granted leave should also be granted the right to appeal. On this point, Nordheimer J. (as he then was) determined that, in the "normal course" where an intervenor is given leave to intervene as an added party, the intervenor would enjoy the same rights of appeal as any other party, albeit restricted to the issue in which their interests are engaged. Indeed, as found by Nordheimer J., there is no reason "in principle" why the intervenor should be prohibited from appealing from an adverse determination of the issue in which they have the interest.[35]

B. THE COALITION SHOULD BE GRANTED LEAVE TO INTERVENE

1) The Coalition Meets the Requirements of Rule 13.01(1)

40. While a proposed intervenor need only meet one of the criteria of Rule 13.01(1), in this case, the Coalition meets all three.

[33] *Ibid.* at para. 26, BOA at **TAB 7.**
[34] See e.g. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (Ont. C.A.), *per* Dubin C.J., BOA at **TAB 9.**
[35] *North American Financial Group Inc. v. Ontario Securities Commission*, 2017 ONSC 2965 at paras. 8, 10, *per* Nordheimer J. (as he then was), BOA at **TAB 10**; see also *Massiah v. the Justices of the Peace Review Council*, 2017 ONSC 7100 at para. 19, *per* Kiteley J, BOA at **TAB 11**.

a) The Coalition has a genuine interest in the outcome of the proceeding

41. The Coalition represents the interests of the "Kanata Marchwood Lakeside Community,"[36] for whose benefit the 40 percent principle was expressly adopted. As provided above, section 7 of the 1988 40% Agreement indicates the following:

> **7.** It is hereby agreed that the [1981] Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community. [Emphasis added.][37]

42. The members of this community would be entitled to enforce the various agreements in their own right as third-party beneficiaries, pursuant to the principled exception to the doctrine of privity of contract.[38]

43. Members of the Coalition also fall within three other recognized exceptions to the doctrine of privity of contract, namely as parties to a collateral contract, owners of land subject to a restrictive covenant and beneficiaries to a charitable purpose trust. Indeed, members of the community would have been entitled to commence their own proceedings to enforce the agreements.

44. However, rather than commence a parallel proceeding, the Coalition has sought to be added as a party to the Application commenced by the City seeking an interpretation and determination as to the validity and enforceability of the obligations in these agreements.

45. The Coalition therefore represents the interests of community members having a genuine interest in the interpretation and enforceability of the 1981 40% Agreement, the 1988 40%

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[36] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 7, MR at **TAB "B"**, pp. 9-10: "The Coalition represents the interests and rights of the community members and homeowners who make up the Kanata Marchwood Lakeside Community, including those who live in the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court. Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019 included in the City's Application Record, includes maps showing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods".

[37] Exhibit "J" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.

[38] See *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, *per* Iacobucci J., BOA at **TAB 12**.

Agreement and the ClubLink Assumption Agreement, as third-party beneficiaries to those agreements.

46. Furthermore, though the City's Application is formulated as a request for the determination of personal contractual rights as between the it and ClubLink, the impact of such a determination reaches far beyond the interests of the Parties. The validity of the 40 percent principle will have a marked effect on the properties of the Current Lands and on the neighbourhood and its inhabitants as a whole. Hence, this case is one of public importance.

b) Members of the community may be adversely affected by a judgment in the proceeding

47. The Coalition seeks to intervene in order to represent the interests of community members who live in proximity to the Golf Course Lands and who derive enjoyment and other benefits therefrom.[39]

48. The benefits of urban greenspaces are well documented and include significant health benefits for residents and the community.[40] Community members regularly walk the uninterrupted open greenspaces of the Golf Course Lands and cross-country ski on the trails in the winter, which ClubLink is currently required to maintain.[41]

49. The loss of this greenspace pursuant to a decision in this proceeding would therefore adversely affect community members.

50. The Coalition also represents homeowners whose homes are adjacent to and in the vicinity of the Golf Course Lands. The outcome of this proceeding may also adversely impact the value of these homes and thereby their owners' interests and/or rights.[42]

[39] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 9, MR at **TAB "B"**, p. 10.
[40] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 13, MR at **TAB "B"**, p. 11.
[41] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 12, MR at **TAB "B"**, p. 10; see also section 6 of Exhibit "J" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019
[42] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 8, MR at **TAB "B"**, p. 10.

c) There also exists between members of the community and the Parties to the proceeding a question of law or fact in common with one or more of the questions in issue

51. As noted above, the Coalition represents the interests of persons who are third-party beneficiaries of the 1981 40% Agreement, 1988 40% Agreement and ClubLink Assumption Agreement.

52. The issues framed by the City in its Notice of Application are very broad and generally seek a declaration from the court that ClubLink's obligations contained in the above-listed agreements are valid and enforceable.

53. The Coalition proposes to address the enforceability of those clauses that are specifically to the benefit of the community.

54. In particular, the Coalition seeks to determine the validity and enforceability of the clauses codifying the principle that approximately 40 percent of the total development area of the Kanata Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes.

55. This principle, initially set out at sections 3 and 4 of the 1981 40% Agreement, is subject to other sections of that agreement and then refined and affirmed in the 1988 40% Agreement. ClubLink's assumption of those obligations and covenants in its own name are set out in sections 3 and 11 of the ClubLink Assumption Agreement, registered on title of the Golf Course Lands in 1997.[43]

56. The Coalition also seeks a determination of the validity and enforceability of the restrictive covenant registered on title on January 8, 1997 pursuant to the application by ClubLink to annex restrictive covenants whereby ClubLink covenanted not to alter grading or any storm water management facilities on the Golf Course Lands in a manner that materially adversely affects storm water management plan(s) in place in 1996.[44] The Coalition

[43] Affidavit of Eileen Adams-Wright sworn October 24, 2019 at para. 5.
[44] Section 3 of the Exhibit "R" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.

represents the interests of property owners of the "Benefited Lands", as set out at Schedule 1 to that agreement.

57. The interpretation of these provisions requires this Court to interpret the various agreements as a whole and in a manner consistent with the surrounding circumstances known to the parties at the time of formation of the contracts.[45] Accordingly, there are issues of fact and law in common with the questions in issue in the City's Application.

2) The Coalition Has a Useful and Distinct Contribution

58. While the Coalition supports the City's position in relation to the validity of section 5(4) of the 1981 40% Agreement, this is a clause that is for the City to enforce.

59. The perspective that the Coalition proposes to advance flows from clauses in the agreement that only its members could enforce. In particular, the Coalition represents the interests of the property owners and community members who benefit from or whose land benefits from the 40 percent principle, as set out in the various agreements.

60. The Coalition takes the position that these obligations give rise restrictive covenants and/or a charitable purpose trust.

61. With respect to the restrictive covenant, the Coalition represents, *inter alia*, the interests of the property owners in the Kanata Marchwood Lakeside Community whose lands are benefitted by the restrictive covenants noted above and uniquely positioned to seek a determination of their enforceability.

62. The Coalition also takes the position that the various agreements give rise to a charitable purpose trust beneficial to the community, providing public recreation grounds and community facilities, as well as promoting health.[46] Again, the Coalition is uniquely positioned as a representative of the community to seek the court's determination on the enforceability and scope of these obligations.

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[45] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 47, *per* Rothstein J, BOA at **TAB 13**.
[46] See e.g. *Save the Heritage Simpson Covenant Society v. City of Kelowna*, 2008 BCSC 1084, BOA at **TAB 14**.

63. Finally, even in the event that section 5(4) were to be held as being void on account of the rule against perpetuities, the Coalition takes the position that ClubLink remains bound by the personal covenants given in the ClubLink Assumption Agreement.[47] Redevelopment of the land would therefore constitute a breach of these obligations.

64. These are important perspectives that ought to be before the Court.

65. Moreover, unless the Court can exclude the possibility that the actual decision of the Court will have impact only on the City as an Applicant, the Court, before making its decision on the correct result and on the appropriate reasons that support this result, should have all the relevant possibilities brought to its attention. This is so even if, at the end of the day, the Court should elect not to consider the intervenor's submissions to be of assistance.

66. Finally, the Ontario Court of Appeal has made clear that, in granting intervenor status, a court does not express any view on the ultimate merit of its position.[48]

3) The Coalition's Proposed Intervention Will Not Unduly Delay or Prejudice the Determination of the Rights of the Parties

67. The Coalition's intervention will not unduly delay the proceeding. The Coalition served its Notice of Motion, as well as its Motion Record, less than a month following the issuance of the City's Notice of Application.

68. The Coalition has also accepted to be bound by the timetable agreed upon by the Parties, and the intervention has already been built into the proposed timetable.

69. Moreover, the Coalition has undertaken not to duplicate evidence or arguments made by the City.[49] The Coalition has in fact already provided the Court and the Parties with a copy of the limited evidence it seeks to adduce in order to underpin its written submissions.[50]

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[47] See e.g. section5(1) of the 1981 40% Agreement and section 11 of the ClubLink Assumption Agreement, Exhibits "F" and "S" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019.
[48] *Louie v. Lastman*, 2001 CanLII 2843 at paras. 11-12 (Ont. C.A.), *per* Morden J.A., BOA at **TAB 15**.
[49] Affidavit of Barbara Ramsay sworn November 19, 2019 at para. 30, MR at **TAB "B"**, p. 15.
[50] MR at **TAB "C"**, p. 110 ff.

70. In the event that the intervention should cause some delay or added complexity to the proceeding, any such disruption is sufficiently counterbalanced by the Coalition's contribution on the issues at bar.[51]

4) The Proposed Intervention Would be an Effective and Efficient Use of Judicial Resources

71. As noted above, property owners and community members could have commenced individual proceedings seeking a determination on the enforceability and validity of the 40 percent principle, as set out in the various agreements.

72. Instead, the community has come together and created the Coalition to represent its interests. As evidenced by the Affidavit of Barbara Ramsay, Chair of the Coalition, the Coalition is composed of members of various other community organizations, has the support of those organizations and benefits from wide support among members of the community at large.[52]

73. It is therefore an effective and efficient use of judicial resources to allow the Coalition to advance the interests of individual homeowners and community members who are third-party beneficiaries to the agreements at issue in the City's Application.

74. Similarly, it is an effective and efficient use of judicial resources for the specific arguments raised by the Coalition to be considered within the City's Application. Consistent with the principles underlying rules relating to joinder and consolidation, the proposed intervention is both an efficient use of court resources and avoids the risk of inconsistent findings flowing from the same agreements and surrounding circumstances.

V. ORDER SOUGHT

75. The Coalition respectfully requests that this Honourable Court grant it leave to intervene as an added party in the proceeding bearing Court File No. 19-81809.

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[51] See *Halpern* at para. 20, BOA at **TAB 2.**
[52] Affidavit of Barbara Ramsay sworn November 19, 2019 at paras. 20, 23, MR at **TAB "B"**, p. 13.

76. The Coalition also respectfully requests that the following conditions be applied to its intervention:

1) That the Coalition be entitled to submit a factum of no more than twenty-five (25) pages on the application proper;

2) That the Coalition be entitled to submit the affidavit of Barbara Ramsay, to be sworn,[53] in support of its written submissions;

3) That the Coalition be granted permission to make oral submissions at the hearing on the application proper of no more than 90 minutes;

4) That the Coalition be granted the right to appeal of any judgement or determination of this Honourable Court on the application proper;

5) That the Coalition be granted the right to cross-examine any affiants proffered by the Respondent Clublink in their Motion Record on the application proper; and

6) That the Coalition agrees not to seek costs and that the other Parties to the proceeding be barred from seeking costs against it.

77. The Coalition does not seek its costs on this Motion, and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of December, 2019.

Alyssa Tomkins
Charles Daoust

[53] See the draft form as **TAB "C"** of the MR, p. 110 ff.

VI. LIST OF AUTHORITIES

1. *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2001] O.J. No. 2768 (C.A.)
2. *Bloorview Children Hospital Foundation v. Bloorview MacMillan Centre*, [2001] O.J. No. 1700 (S.C.J.).
3. *Craft et al. v. City of Toronto et al.*, 2019 ONSC 1151 (Div. Ct.)
4. *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.
5. *Halpern v. Toronto (City) Clerk*, 2000 CanLII 29029 (Ont. Div. Ct.)
6. *Hydro One Networks Inc. v. Ontario Energy Board*, 2019 ONSC 3763 (Div. Ct.)
7. *Jones v. Tsige*, 2011 CanLII 99894 (Ont. C.A.).
8. *Louie v. Lastman*, 2001 CanLII 2843 (Ont. C.A.)
9. *Massiah v. the Justices of the Peace Review Council*, 2017 ONSC 7100.
10. *North American Financial Group Inc. v. Ontario Securities Commission*, 2017 ONSC 2965.
11. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (Ont. C.A.).
12. *Reference re Workers' Compensation Act, 1983 (Nfld.)* (Application to intervene), [1989] 2 S.C.R. 335.
13. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.
14. *Save the Heritage Simpson Covenant Society v. City of Kelowna*, 2008 BCSC 1084

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE PROPOSED INTERVENOR

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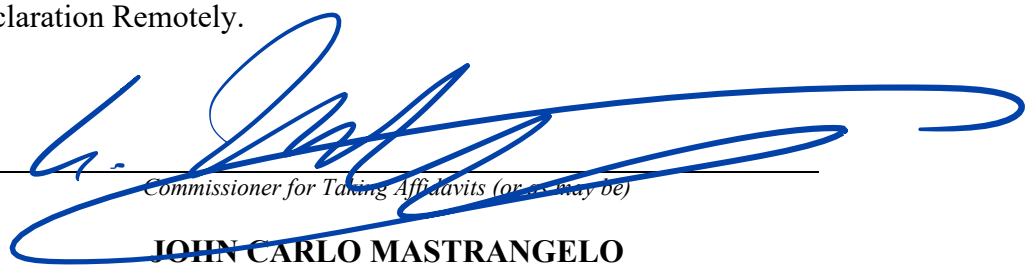
Lawyer for the Proposed Intervenor,
Kanata Greenspace Protection Coalition

This is Exhibit "K" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

FACTUM OF THE RESPONDENT RE MOTION TO INTERVENE

December 13, 2019

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Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

FACTUM OF THE RESPONDENT RE MOTION TO INTERVENE

PART I - INTRODUCTION

1. ClubLink Corporation ULC and the City of Ottawa are the only parties to private agreements concerning ClubLink's operation of a private golf course. The City alleges that ClubLink is in breach of the agreements, and seeks declaratory and injunctive relief intended to enforce their provisions.

2. The Kanata Greenspace Protection Coalition seeks leave to intervene in the Application. It is not a party to any of the relevant agreements. The Coalition was formed earlier this year by a group of residents who live near the golf course for the purpose of opposing any attempt by ClubLink to stop operating the golf course. Its position on the Application is the same as the City's. Its involvement is animated by a concern that a redevelopment of the golf course might lower their property values.

3. The Coalition's motion ought to be dismissed. This is private litigation concerning the interpretation and application of agreements that the Coalition is not party to. Further, this Application **will not** determine whether or not the golf course is redeveloped. ClubLink has submitted planning applications to the City for that purpose, and the Coalition is fully entitled to participate in that planning process and voice its opinions – indeed, it has already been actively doing so.

4. The Coalition does not have a useful or unique contribution to make in this proceeding. Indeed, its factum makes clear that it intends to seek new relief and raise arguments that are not relevant to the Application. The parties to the agreements will raise all arguments needed to allow the Court to consider the enforceability and/or application of the agreements. Adding another party to echo the City's arguments is neither necessary nor proper.

PART II - SUMMARY OF FACTS

(i) The Planning Applications

5. ClubLink owns and operates the Kanata Golf & Country Club and the lands upon which the golf course is situated (the "**Lands**"). ClubLink or its predecessors have owned the Lands since 1997.

> November 19, 2019 Affidavit of Barbara Ramsay ("**Ramsay Affidavit**"), at paras. 3-4 (**Coalition Record, at Tab B, p. 9**)

6. In December 2018, ClubLink announced that it would pursue options for alternative use of the Lands. Contrary to the assertion in paragraph 19 of the Coalition's factum, ClubLink did not "publicly [announce] its wish to discontinue the current operation of the golf course …".

> December 14, 2018 Press Release, attached as Exhibit "4" to the Ramsay Affidavit (**Coalition Record, at Tab B4, pp. 62-63**)

7. In October 2019, ClubLink submitted planning applications to the City for a zoning by-law amendment and approval of a plan of subdivision. ClubLink has proposed that the Lands be rezoned to permit residential uses and subdivided into separate lots and blocks which could be sold to new home buyers.

> October 24, 2019 Affidavit of Derrick Moodie ("**Moodie Affidavit**"), at paras. 29-32 (**Supp. Coalition Record, at Tab 2**)

8. The City is required to conduct public consultation as part of its review of ClubLink's planning applications. The objective of this process is to receive the public's input on all facets of the proposed redevelopment and assess whether the applications adequately address the public interest and specific requirements of people who will live in and adjacent to the proposed subdivision. One statutory public meeting was held by the City on November 25, 2019 and a second is scheduled for January 20, 2020.

> Moodie Affidavit, at paras. 40, 47 and 54 (**Supp. Coalition Record, at Tab 2**)

(ii) The 40% Agreement

9. The Lands were previously owned by Campeau Corporation. On May 26, 1981, Campeau entered into a contract with the then Corporation of the City of Kanata, frequently referred to as the 40% Agreement.

> 40% Agreement, attached as Exhibit "F" to the October 24, 2019 Affidavit of Eileen Adams-Wright ("**Adams-Wright Affidavit**") (**Supp. Coalition Record, at Tab 3F**)

10. Section 5(4) of the 40% Agreement states:

> In 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 and if Kanata accepts the

> conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9.
>
> 40% Agreement, s. 5(4), attached as Exhibit "F" to the Adams-Wright Affidavit (**Supp. Coalition Record, at Tab 3F**)

11. In December 1988, Campeau and Kanata entered into a further contract (the "1988 Agreement"), section 7 of which states:

> It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.
>
> December 1988 Agreement, s. 7, attached as Exhibit "J" to the Adams-Wright Affidavit (**Supp. Coalition Record, at Tab 3J**)

12. Campeau transferred the Lands to Genstar Development Company Eastern Ltd. in 1989. Genstar changed its name to Imasco Enterprises Inc. in 1997 and transferred the Lands to a predecessor to ClubLink in the same year. ClubLink, Imasco and Kanata entered into an agreement titled the ClubLink Assumption Agreement in which ClubLink assumed all of Imasco's "liabilities and obligations under and in respect of the Forty Percent Agreement".

> March 29, 1989 Transfer/Deed of Land between Campeau Corporation and Genstar Development Company Eastern Ltd., attached as Exhibit "K" to the Adams-Wright Affidavit (**Supp. Coalition, at Tab 3K**)
>
> January 7, 1997 Application to Amend the Register of Imasco Enterprises Inc., attached as Exhibit "P" to the Adams-Wright Affidavit (**Supp. Coalition, at Tab 3P**)
>
> January 7, 1997 Transfer/Deed of Land between Imasco Enterprises Inc. and ClubLink Capital Corporation, attached as Exhibit "Q" to the Adams-Wright Affidavit (**Supp. Coalition, at Tab 3Q**)
>
> ClubLink Assumption Agreement, attached as Exhibit "S" to the Adams-Wright Affidavit (**Supp. Coalition, at Tab 3S**)

13. In 2001, Kanata amalgamated with other former municipalities to form the current City of Ottawa, and the City assumed Kanata's rights and responsibilities under the 40% Agreement.

Moodie Affidavit, at para. 13 **(Supp. Coalition, at Tab 2**)

(iii) The City's Application

14. The City commenced this Application on October 25, 2019. It seeks, among other things, an order that within 21 days ClubLink must either withdraw its planning applications or offer to convey the Lands to the City at no cost.

Notice of Application of the City, attached as Exhibit "1" to the Ramsay Affidavit (**Coalition Record, at Tab B1, p. 17**)

15. As set out in the Notice of Application, the City's Application is based on its interpretation of the 40% Agreement. The City's position is that ClubLink is required to offer to convey the Lands to the City at no cost pursuant to s. 5(4) of the 40% Agreement (reproduced above), and is currently in breach of that obligation.

Notice of Application of the City, s. 2(r), attached as Exhibit "1" to the Ramsay Affidavit (**Coalition Record, at Tab B1, p. 23**)

16. The City's Application will not and cannot result in the approval of the proposed redevelopment. The planning applications must be processed and approved by the City, or the Local Planning Appeal Tribunal ("LPAT") in the event of an appeal, pursuant to the *Planning Act* for the proposed redevelopment to be able to proceed.

(iv) The Coalition

17. The Coalition was incorporated five months ago, on July 11, 2019. Its board is comprised of seven people. Its stated purpose is to "preserve and protect Kanata's greenspaces and promote

the value of its natural environment." It was formed specifically to oppose the proposed redevelopment of the Lands. 1200 people have signed up as supporters of the Coalition.

> Ramsay Affidavit, at paras. 18-23 (**Coalition Record, at Tab B, pp. 12-13**)

18. The Coalition's opposition to the proposed redevelopment stems from its belief that the redevelopment will negatively impact property values for existing homes in the area. As the chair of the Coalition puts it, residents made "major investment decisions based on the existence of the 40 Percent Agreement".

> Ramsay Affidavit, at paras. 8, 25-28 (**Coalition Record, at Tab B, pp. 10, 14**)
>
> Coalition Press Release, attached as Exhibit "5" to the Ramsay Affidavit (**Coalition Record, at Tab B5, p. 71**)

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

19. The City's Application is based on an alleged breach of the 40% Agreement. The City seeks declaratory and injunctive relief concerning the provisions of the 40% Agreement.

20. The 40% Agreement is a private agreement between ClubLink and the City. The Coalition is not a party to it. It has no rights or obligations under the 40% Agreement. It does not propose to (and cannot) offer any evidence concerning the factual matrix within which the 40% Agreement was concluded.

21. At most, the Coalition has an remote interest in the **outcome** of the Application. It hopes that ClubLink's proposed redevelopment does not go forward. If the City's Application is successful, ClubLink will be unable to proceed with the redevelopment.

22. The law is clear that an interest in the outcome of a case is not sufficient to justify intervener status. While the Coalition no doubt hopes that the City is successful, this is not a basis for granting it leave to intervene in a private dispute.

23. Further, the Coalition cannot make any useful or unique contribution to the Application. It is a contract dispute. Like the City, the Coalition's position is that ClubLink is in breach of the 40% Agreement. In an effort to suggest that it will make a useful and "distinct" contribution, the Coalition suggests that it will seek new forms of relief not sought by the City in the Application and advance entirely new issues. Interveners are not permitted to seek new forms of relief. Far from being a "useful" contribution, the Coalition's proposed involvement to introduce new issues in the case is impermissible.

24. There is a different and proper forum in which the Coalition can air its views on the proposed redevelopment of the Lands. The proposed redevelopment cannot proceed unless the planning applications are approved. The Coalition has the ability to fully participate in the City's planning process and voice its concerns, as it is currently doing. Similarly, in the event of an appeal of the planning applications to LPAT, the Coalition will have an opportunity to fully participate in that process. That is the appropriate forum for the Coalition's involvement, and not a court proceeding concerning the application of a private agreement.

A. THE TEST FOR INTERVENTION

25. The Coalition seeks to intervene as an added party pursuant to Rule 13.01. To do so, it must show:

(a) an interest in the subject matter of the proceeding;

(b) that it may be adversely affected by a judgment in the proceeding; or

(c) that there exists between it and one of the parties a question of law or fact in common with one or more of the questions in issue in the proceeding.

Rule of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 13.01(1)

26. Even if one of these tests is met, the Court has discretion not to grant leave to intervene. In exercising that discretion, it is appropriate to consider:

(a) the nature of the case;

(b) the issues which arise; and

(c) the likelihood of the person being able to make a useful contribution without causing injustice (delay, expense) to the parties.

Loy-English v. The Ottawa Hospital, 2017 ONSC 6533, at para. 10 **(ClubLink BOA, Tab 1)**

27. When the underlying case is a private dispute, caution is to be exercised before granting intervener status. As MacPherson J. (as he then was) put it, there is a "benchmark of caution for granting intervenor status in private litigation." The Court of Appeal has said that the standard to be met by a proposed intervener in private litigation is "more onerous or more stringently applied".

Peixeiro v. Haberman (1994), 20 O.R. (3d) 666 (Gen. Div.), at para. 10 **(ClubLink BOA, Tab 2)**

Jones v. Tsige, 2011 CanLII 99894 (Ont. C.A.), at para. 23 **(Coalition BOA, Tab 7)**

28. The Coalition cannot meet any of the tests contained in Rule 13.01, and the factors that guide the Court's discretion do not favour the grant of intervener status.

B. THE COALITION HAS NO INTEREST IN THE SUBJECT MATTER OF THE PROCEEDING

29. The subject matter of the Application is the interpretation and application of the 40% Agreement. The Coalition is not a party to that agreement. It has no interest in the subject matter.

30. The case is similar to *Whirlpool Canada*, in which the court refused leave to intervene in a contract dispute, holding:

> In my opinion the subject matter of the Application is properly characterized as a determination of the rights and obligations of the parties to the Purchase Agreement and the Indemnity Agreement.
>
> The Proposed Intervenors are not parties to either the Purchase Agreement or the Indemnity Agreement. Based on the analysis contained earlier in these reasons I am satisfied that Proposed Intervenors have no direct, commercial, or other substantial interest in that subject matter of the Application
>
> *Whirlpool Canada Co. v. Chavila Holdings Limited,* 2015 ONSC 2080 (Master), at paras. 89-90 **(ClubLink BOA, Tab 3)**
>
> See also *Andrews v. Ontario*, 2012 ONSC 3146 (Master), at para. 8 **(ClubLink BOA, Tab 4)**

31. An interest in the subject matter of a proceeding is different than an interest in its outcome. In *Steeves*, an application was commenced to appeal an arbitral award. The arbitration had arisen out of the bankruptcy of a company and the trustee for the company was a party to the arbitration. A group of individuals that had not been party to the arbitration sought to intervene in the application, on the basis that the trustee had commenced proceedings against them which rested on identical or overlapping issues in the arbitration.

32. The court dismissed the motion. In doing so, it concluded that while the proposed interveners "may have an interest in the outcome or the result of the Application, they do not have any interest in the subject matter of the proceedings." They were concerned only "with the ramifications, if any, that the Decision may have with respect to their respective cases."

> *Steeves v. Doyle Salewski Inc.*, 2016 ONSC 2223, at paras. 32-33 **(ClubLink BOA, Tab 5)**

33. Similarly, in *Goldentuler Estate*, the defendants' defence was struck. The defendants changed counsel and commenced a separate action against their prior counsel for damages resulting form his negligence. Meanwhile, the plaintiff estate moved for default judgment. The defendants' original lawyer sought to intervene in that motion, asserting that he had an interest in the quantification of damages in the action, given the related claim against him. The court dismissed the motion, finding that the lawyer's interest was "in the outcome, the quantum of the damages and not the subject matter of the proceeding."

> *The Estate of Henry Goldentuler v. Crosbie*, 2016 ONSC 989, at para. 45 **(ClubLink BOA, Tab 6)**

34. The Coalition claims to be a third-party beneficiary of the 40% Agreement, and thus have an interest in the subject matter of the Application. This position rests on a misinterpretation of s. 7 of the 1988 Agreement.

35. Third-party beneficiaries have standing to enforce a contract to which they are not a signatory, by way of the "principled exception" to the doctrine of privity. To determine whether the principled exception applies, courts apply a two-part test:

(a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision?; and

(b) are the activities performed by the third party the very activities contemplated as coming within the scope of the contract in general or contractual provision in particular?

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., [1999] 3 S.C.R. 108, at para. 32 **(Coalition BOA, Tab 12)**

36. The Coalition cannot satisfy the first part of the test because, properly interpreted, the 1988 Agreement does not evidence any intention to extend benefits to any third party. Indeed, the 1988 Agreement does not actually identify any third party. While s. 7 states that the 40% Agreement shall run with the "Current Lands" for the benefit of the "Kanata Marchwood Lakeside Community", the Kanata Marchwood Lakeside Community is not and has never been a legal person and does not own any land.

37. Further, section 7 of the 1988 Agreement is too vague to allow the Court to know which persons are included in its ambit and which are not. The agreement provides no definition of the "Kanata Marchwood Lakeside Community". The geographic boundaries of this area are not identified. It is not clear whether the "Community" would include only residents who own their homes, or also renters of property, landlords, non-residents who frequent the area or corporations doing business in the area. The vagueness of the phrase "Kanata Marchwood Lakeside Community" demonstrates that the parties did not intend to create third-party beneficiaries. If they had intended to do so, it would have been easy to draft language that accomplished that intent.

38. Interpreting s. 7 of the 1988 Agreement as creating third-party beneficiaries would be commercially unreasonable. It could theoretically allow for thousands of third-party beneficiaries, all with an equal claim to standing to sue on the 40% Agreement. Parties to a

private agreement would never intend for an undefined class of thousands of strangers to have the right to sue on that agreement.

39. Further, the language of the 40% Agreement as a whole does not support the argument that the parties intended to create third-party beneficiaries. Third-party beneficiaries typically receive the benefit of a particular contractual provision, such as indemnity or limitation of liability. If the grantor of the benefit refuses to honour the commitment, and the other party to the contract does not bother to enforce the agreement, the third-party beneficiary requires standing to obtain the specific benefit intended for it. The 40% Agreement is entirely different. There are no particular benefits for any third party. Instead, there is a framework in which the City has certain right and options that it is free to exercise or not exercise. There is no need or purpose in granting any third party standing to enforce the provisions of the 40% Agreement.

40. For example:

(a) Section 5(2) of the 40% Agreement provides that the owner may sell the golf course if the new owners enter into an agreement with the City that provides for the operation of the golf course. If ClubLink sold the golf course without providing for such an agreement, it would be for the City to decide whether to allege a breach. It would be absurd for a third party to sue on the basis that the City had not received the benefit of an agreement.

(b) Section 5(3) of the 40% Agreement gives the City certain rights if there is an offer for sale of the golf course. It is solely for the City to decide whether it wants to exercise these rights. Only the City could properly determine whether to seek to enforce them.

(c) Section 5(4) of the 40% Agreement provides that if the owner desires to discontinue the operation of the golf course and can find no other person to acquire or operate the golf course, it shall convey the golf course to the City at no cost, and the City shall operate or cause to be operated the Lands as a golf course. It is for the City to decide whether it wants to receive a conveyance of the golf course. It would be absurd for a third party to sue to force ClubLink to convey the Lands to the City.

(d) Section 11 of the ClubLink Assumption Agreement contemplates the possibility of ClubLink and the City agreeing between them to terminate the use of the Lands as a golf course or open space. But if the Coalition was correct, the City and ClubLink could not come to any such agreement – they would be at risk of being sued by thousands of individuals. The ClubLink Assumption Agreement makes clear that such a result was never intended.

41. There are no provisions in the 40% Agreement that provide benefits to a person other than the City. There is no circumstance in which it would be appropriate for somebody other than the City to sue to enforce the 40% Agreement.

42. Because the 1988 Agreement does not actually identify a real third party that can be defined with any precision, and because the 40% Agreement does not extend any benefits that could reasonably be enforced by anybody other than the City, the parties to the 40% Agreement and 1988 Agreement cannot have intended to create any third-party beneficiaries. The Coalition is not a third-party beneficiary and has no interest in the subject matter of the Application.

C. THE COALITION WILL NOT BE ADVERSELY AFFECTED BY THE APPLICATION

43. The Coalition claims that it may be adversely affected by a judgment in the Application in two respects: diminution in property values and loss of the benefits of urban greenspace.

44. These arguments suffer from at least three flaws: (i) this Application will not determine whether the proposed redevelopment occurs; (ii) the evidence does not establish any potential harm; and (iii) the alleged harms are irrelevant to the Application.

(i) The Application Will Not Determine Whether the Redevelopment Occurs

45. For the proposed redevelopment to take place, the planning applications must be approved. This Application will not result in the proposed redevelopment being approved. The Coalition is entitled to participate in the separate public planning process and is doing so. That is the proper forum for determining the impact on neighbouring landowners of the proposed redevelopment, not two-party litigation concerning a private agreement.

46. The courts have held that a proposed intervener is not adversely affected by a judgment in a proceeding if it remains free to assert its rights in another forum. In *Goldentuler Estate*, the lawyer seeking to intervene argued that he would be adversely affected by a damage award in the default proceedings, because it was likely that the defendant would claim that sum against him. The court rejected this argument, noting that the lawyer would be free to argue the damages issue in the proceedings against him. A similar conclusion was reached in *Steeves*, where the court concluded that the proposed interveners would not be adversely affected by a judgment in the

application because they remained free to argue the relevance of that judgment in their own proceedings.

Goldentuler Estate, at paras. 52-53 **(ClubLink BOA, Tab 6)**

Steeves, at paras. 37-40 **(ClubLink BOA, Tab 5)**

47. The interpretation and application of the 40% Agreement does not determine whether the proposed redevelopment occurs. The Coalition's position is properly advanced in the context of the planning applications.

(ii) The Evidence Does Not Establish a Risk of Adverse Effect

48. The Coalition's evidence does not support its claims of harm. In asserting that home values may diminish if the proposed redevelopment takes places, the Coalition relies on a one-sentence summary of a panel discussion involving four realtors consulted by the Coalition, with one of the realtors being the Coalition's President. The evidence is hearsay and inadmissible opinion evidence. The Court has no details as to exactly what the realtors' opinions were, what assumptions they made, why they hold those opinions, what their backgrounds are or what their motivations in providing the opinions were. None of them has sworn an affidavit, filed a report or acknowledged the duties that an expert witness has to the Court – nor is it even clear that they could be qualified to give expert opinion evidence. The evidence is inadmissible and unreliable.

49. The suggestion that the Coalition will be harmed by the loss of the benefits provided by urban greenspace is similarly unsupported by the evidence. In Ramsay's affidavit, she claims that urban greenspaces deliver "significant health benefits" that are "well documented." The only basis provided for these broad statements is a report from the World Health Organization. While this report (which is hearsay) makes reference to *other* reports that consider the health effects of

urban greenspace, the report attached to Ramsay's affidavit does not do this. Nowhere does it explain the health or other benefits of any form of urban greenspace, let along a private golf club. There is simply no evidence that the golf club provides any health or other benefits to the Coalition that would be lost if the Lands were to be redeveloped.

(iii) The Alleged Adverse Effects are Irrelevant to the Application

50. The harms relied upon by the Coalition are irrelevant to the Application. Even if it was true that the proposed redevelopment had the potential to depress property values and/or deprive residents of the benefits of urban greenspace, neither of these considerations have any relevance to the interpretation or Application of the 40% Agreement. The Coalition should not be granted intervener status on the basis of considerations that are irrelevant to the Application.

D. THERE IS NO QUESTION OF LAW OR FACT IN COMMON BETWEEN THE COALITION AND THE PARTIES TO THIS APPLICATION

51. Because the Coalition is not a party to the 40% Agreement, which is the subject of this Application, it cannot have a question of law or fact in common with any issue in the Application. The rights and interests of the Coalition, whatever they may be, are not engaged by this Application, which is concerned only with the interpretation and application of agreements which the Coalition is not party to.

Whirlpool Canada, at paras. 94-95 **(ClubLink BOA, Tab 3)**

E. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT INTERVENOR STATUS

52. Because the Coalition cannot satisfy any of the three branches of the intervention test, the *Rules* do not provide a basis for the proposed intervention. Even if one of the branches was met,

the Court should still dismiss the motion, because the factors relevant to the exercise of discretion do not support the Coalition.

(i) The Nature of the Case

53. The Application is private litigation between parties to a private contract. In *Peixeiro*, MacPherson J. considered the nature of the case and, noting that it was a private dispute rather than a matter of constitutional law, determined that the nature of the case militated against granting the request for intervention.

Peixeiro, at paras. 9-10 **(ClubLink BOA, Tab 2)**

Andrews, at para. 11 **(ClubLink BOA, Tab 4)**

54. Given the private nature of the Application, there is a heavier onus the Coalition must meet to obtain intervener status. Although the test is flexible in the context of constitutional litigation, the same flexibility does not exist in private litigation. The Coalition cannot meet this onus.

(ii) The Issues Which Arise

55. The City seeks declaratory and injunctive relief arising from its interpretation of the 40% Agreement. The Court will need to interpret the 40% Agreement, apply it to the facts of this case and, if it finds a breach, determine the appropriate remedy.

56. These are not issues which engage the Coalition. The actions of the Coalition and its members are irrelevant. The Coalition has nothing to offer as regards the factual matrix in which the 40% Agreement was entered into. It has no relevant evidence. The issues which arise in this case do not support the Coalition's intervention.

(iii) The Coalition Cannot Make a Useful Contribution

57. Critically, the Coalition has not identified a single way in which its position in this Application would differ from that of the City. It appears to fully support the City's interpretation of the 40% Agreement. It seeks the same relief. The Court will not be in a better position to interpret or apply the 40% Agreement as a result of having an additional set of counsel arguing in favour of the City's position.

58. This case is similar to *Steeves*, where the Court found that the proposed interveners would simply be duplicative:

> From the Court's perspective, the proposed submissions of the Proposed Intervenors' would not provide a useful contribution to the resolution of the appeal. It would provide a contribution, but the Court does not see how it will be useful. Furthermore, in the Courts' view granting leave to the Proposed Intervenors will cause injustice if they are allowed to participate. The Court finds that their involvement in the proceedings will duplicate the Applicants' position and will serve no useful purpose.
>
> *Steeves*, at para. 42 **(ClubLink BOA, Tab 5)**

59. As in *Whirlpool Canada*, it is very difficult for a stranger to a contract to usefully contribute to a case about that contract:

> …if I were satisfied that CPR qualified to be Intervenors under rule 13.01, I would have some difficulty seeing how the CPR Entities can make any useful contribution to the question of the proper interpretation of the documents in question. This determination is normally made by the judge on examination of the documents and on hearing submissions as to the context in which the documents were produced and delivered. CPR was a stranger to that process.
>
> *Whirlpool Canada*, at para. 102 **(ClubLink BOA, Tab 3)**
>
> See also *Andrews*, at paras. 13-15 **(ClubLink BOA, Tab 4)**

60. There is no benefit to be gained from granting a non-party to a contract leave to duplicate arguments about the proper interpretation of that contract. It is an unnecessary use of judicial resources and unfair to ClubLink, who will artificially be faced with two opponents even though it has but a single contractual counterparty.

Loy-English, at para. 12 **(ClubLink BOA, Tab 1)**

61. In an effort to portray itself as offering a useful contribution, the Coalition raises two issues that are entirely foreign to the Application: (i) the "validity and enforceability" of a restriction on changing the grade of the lands, contained in a document registered against the Lands in 1997; and (ii) the allegation that the "various agreements" referenced in the City's material "give rise to a charitable purpose trust". The introduction of these issues is improper and would fundamentally alter the nature of the proceedings.

62. First, an intervener "cannot introduce new issues or claim new relief". The Coalition's statement that it "seeks a determination of the validity and enforceability" of provisions not referenced in the Notice of Application demonstrates the impropriety of its motion. The same is true of an effort to establish a charitable purpose trust. A proposed intervener does not provide a useful contribution by coming up with entirely new forms of relief which are not contained in any originating process.

Hydro-One Networks Inc. v. Ontario Energy Board, 2019 ONSC 3763, at para. 24 **(ClubLink BOA, Tab 7)**

63. Second, these new forms of relief sought by the Coalition could not be addressed in the timeline contemplated by the parties and possibly not by way of an application at all. There is no evidence before the court about the grade of the Lands or whether the proposed redevelopment would "materially adversely affect" the City's storm water management plan, as required by that

agreement. Any suggestion that the 40% Agreement creates a charitable purpose trust would significantly expand the evidence required to determine the issues. These issues simply do not form part of the Application and cannot be added to it.

PART IV - ORDER REQUESTED

64. ClubLink respectfully requests that the motion be dismissed, with costs.

65. In the event that the Court grants the Coalition's motion, ClubLink requests that the intervention be on following terms:

(a) the Coalition's evidence in the Application will be limited to a sworn copy of the draft Ramsay affidavit included at Tab C of its motion record;

(b) the Coalition will be limited to a ten-page factum, the City will be limited to the standard twenty-page factum and ClubLink will be permitted to file a factum of thirty pages;

(c) at the hearing of the Application, the City and Coalition will share between them an amount of time equal to the amount of time provided to ClubLink;

(d) the Coalition will have no right of reply, either in evidence or argument; and

(e) the Coalition shall have no right to appeal a decision of the Application unless one of the City or ClubLink does so first.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2019.

Matthew P. Gottlieb/James Renihan/
Mark R. Flowers

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Loy-English v. The Ottawa Hospital*, 2017 ONSC 6533

2. *Peixeiro v. Haberman* (1994), 20 O.R. (3d) 666 (Gen. Div.)

3. *Whirlpool Canada Co. v. Chavila Holdings Limited,* 2015 ONSC 2080 (Master)

4. *Andrews v. Ontario*, 2012 ONSC 3146 (Master)

5. *Steeves v. Doyle Salewski Inc.*, 2016 ONSC 2223

6. *The Estate of Henry Goldentuler v. Crosbie*, 2016 ONSC 989

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

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 13.01:

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE RESPONDENT RE MOTION TO INTERVENE

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Lawyers for the Respondent

This is Exhibit "L" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

CITATION: City of Ottawa v. Clublink Corporation ULC, 2019 ONSC 7470
COURT FILE NO.: CV-19-81809
DATE: 2019/12/23

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE

RE: City of Ottawa, Applicant (Responding Party on Motion)

AND:

Clublink Corporation ULC, Respondent (Responding Party on Motion)

AND:

Kanata Greenspace Protection Coalition, Proposed Intervenor (Moving Party)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: Alyssa Tomkins and Charles Daoust, for the Proposed Intervenor

Matthew Gottlieb and James Renihan, for the Respondent Clublink

HEARD: December 19, 2019

DECISION AND REASONS

[1] This is a motion in connection with a pending Application between City of Ottawa ("the City") and Clublink Corporation ULC ("Clublink"). In the Application, the City alleges that the proposal by Clublink to convert the Kanata Golf and Country Club and other lands into residential housing is a violation of a series of agreements originally signed between Campeau Corporation and the former City of Kanata ("the 40% agreements"). The City seeks enforcement of the agreements.

[2] Kanata Greenspace Protection Coalition ("the Coalition") is a corporation established as a vehicle for residents of the community who are opposed to the proposed redevelopment and are said to be beneficiaries of the 40% agreements. The Coalition seeks to intervene in the Application and brings this motion pursuant to Rule 13 of the *Rules of Civil Procedure*.[1] The City takes no position on intervention. Clublink opposes it. This was the point of the motion.

[3] As I explained to the members of the public who attended the hearing, the question before me is a procedural one. In simplest terms, I have to decide whether it will assist the process to have three sets of lawyers arguing the application or only two. In other words, is the participation of the Coalition necessary to ensure justice is done or is advocacy best left to the Applicant and

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

the Respondent? This is not a judgment on the merits of the Application one way or another. Nor, if the application is denied is it a limit on the rights of the community members or the Coalition to advance their position or their legal, moral or political rights in any other forum.

[4] Although the Coalition asks to intervene as a party, it does not ask to file affidavit material or introduce new evidence. I have concluded that a restricted intervention is warranted along the lines proposed. It may be necessary for the precise role of the Intervenor to be further refined after the positions of the parties have been crystalized. That may take place through the case management process or by the exercise of discretion by the Application judge.

Background

[5] The factual background is detailed and complex but for purposes of this motion, a brief outline will suffice. The Golf Course lands and the surrounding community are located on lands assembled and developed by Campeau Corporation in the 1980s. At that time, planning approval and amendments to the Official Plans involved two tiers of municipal government and other actors. In obtaining approval for this development, Campeau proposed to allocate 40% of the Campeau lands for open and green space to include an 18 hole golf course.

[6] According to the evidence in the City's application record, the Regional Municipality of Ottawa Carleton required Campeau Corporation to enter into a contract with the City of Kanata as a condition of amending the Official Plans. That contract and subsequent amendments are collectively referred to as the 40% agreement and form the subject matter of the Application.

[7] As discussed earlier, the Application is brought by the City to uphold and enforce the 40% agreement. It is the City's position and that of the Coalition that the agreement was intended to preserve 40% of the development lands as green or open space for the benefit of the Kanata Marchwood Lakeside Community and to provide for a golf course within the green space. Clublink is a successor in title to Campeau Corporation with respect to the Golf Course lands and of course the amalgamated City of Ottawa is a successor to the rights and obligations of the former City of Kanata.

[8] The Application was triggered by an application by Clublink, to rezone the golf course and for approval of a plan of subdivision. Clublink proposes to convert the golf course to residential housing. The City contends that even although the Golf Course remains in operation, the application for planning approval is a breach of the 40% agreement which remains binding on Clublink. One of the provisions of that agreement requires the owner of the Golf Course lands to convey them to the City for a nominal amount if the owner no longer wishes to operate the golf course. The original agreement was registered against the Campeau lands. That agreement and other restrictive covenants were registered against the Golf Course lands and against each of the lots on which individual homes were subsequently constructed. According to the affidavit evidence, this affects approximately 1700 homes.

[9] The coalition is a not for profit corporation created on July 11, 2019 for the stated purpose of preserving and protecting Kanata's green spaces and to promote the value of its natural environment. It purports to represent the interests and/or rights of the community members and homeowners who make up the Kanata Marchwood Lakeside Community including the neighbourhoods identified in the City's application record. The coalition purports to be an umbrella group with the support of various community and neighbourhood associations and with

over 1200 signed up supporters. It is clear from the affidavit in support of the motion that its principle activity is to oppose the development and the resultant loss of green space.

[10] Although the corporation does not itself own land, it is a vehicle adopted by the community to advocate for the rights of the community members. The Respondent opposes intervention but it does not challenge the standing of the Coalition to bring this motion.

Analysis & Decision

[11] Intervention is governed by Rule 13. Rule 13.01 permits the court to grant leave to a person to be added as a party. Rule 13.02 permits the court to permit intervention as a friend of the court. In either case the court may make the order on terms and may make such other order as is just. [2] This permits the judge to impose conditions or restrictions on the manner in which the intervenor may participate.

[12] As the rules make clear, granting of leave is discretionary and may be granted if the proposed intervenor meets one or more of certain conditions. The applicable sub-rules read as follows:

> **LEAVE TO INTERVENE AS ADDED PARTY**
>
> **13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).
>
> **LEAVE TO INTERVENE AS FRIEND OF THE COURT**
>
> **13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

[13] In this case the intervenor seeks party status. It does so on the basis that it meets the test in Rule 13.01 (1) and also that the individual members of the community have rights of action which could be exercised individually or, one supposes, as a class proceeding. The intervenor

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[2] Rule 37.13 (1) and Rule 13.01 (2)

argues that it is more efficient and just to permit intervention. It agrees to respect the existing timetable and not to delay the hearing of the application. Clublink opposes intervention in the first instance but if it is granted, proposes strict limitations.

[14] Clublink argues that intervention should rarely be granted in a dispute over interpretation of a private contract. While it is true that the application is technically about an agreement structured as a contract between the City and the owner, it is not accurate to characterize the 40% agreement as solely a private contract. The requirement that Campeau enter into a written contract with Kanata was a term of a larger agreement reached with the late Regional Municipality of Ottawa Carleton and the former City of Kanata. The development proposal which included the reservation of 40% of the lands as open space required amendments to both the Regional and Local Official Plans as well as other planning documents. The agreement was a condition of approval. There is a public aspect of this agreement because it affects all of the former Campeau lands. The case is unlike *Peixeiro v. Haberman* and more like *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre.*[3]

[15] In addition, I agree with the Coalition that the agreement specifically states it is for the benefit of the Kanata Marchwood Lakeside Community. I disagree with Clublink that this is a vague term. The community is the community located on the development lands formerly owned by Campeau and the subject of the original rezoning and development proposal. It certainly includes residents of the neighbourhoods identified by the City in its application record. The beneficiaries of the 40% agreement include the lands surrounding the golf course. In fact, many of those properties have the agreement registered on title. It is entirely possible that these landowners have individual or collective rights of action. I need not determine the validity or extent of those rights for purpose of this motion. Nor need I determine whether the City and Clublink could amend or terminate the agreement without consulting the owners of the lands represented by the Coalition. Clearly the members of the coalition have an interest in this matter independent of the interest of the City. They purport to be the members of the Kanata Marchwood Lakeside Community referenced in the 40% agreement.

[16] In any event the homeowners who live in the area clearly have an interest in the maintenance of the 40% agreement and the retention of green space in their neighbourhood. Clublink objects that the evidence of potential reduction in property values and health benefits of green space is not properly before me but those objections in the context of this motion are unfounded. I need not accept the accuracy of the reports to accept that the homeowners have a basis to be concerned about diminution of property values and loss of green space. In addition, in my view, it is sufficient that the homeowners stand to lose the benefit of 40% green space which they believe was guaranteed. The impact on the nature and character of the neighbourhood if the development proceeds would obviously be profound.

[17] Although the proposed intervenor is a recently created corporate vehicle and not a well recognized organization, there is no doubt that it has wide support in the community and is well placed to represent its members. Those members have a direct and substantial interest in the

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[3] See *Piexeiro v. Haberman,* (1994) 20 OR (3d 666, 33 CPC (3d) 388 (Gen. Div.) and *Bloorview Children's Hospital Foundation v. Bloorview MacMillan Centre,* 2001 CarswellOnt 1542, [2001] O.J. No. 1700 & 1701

subject matter of the application. The interest is specific to the community that benefits from the 40% agreement and is not simply an interest in common with all citizens of Ottawa.

[18] The criteria in Rule 13.01 (1) are easily met in my view.

[19] The more difficult question is whether or not I should exercise discretion to grant intervenor status and on what terms. It is difficult because the jurisprudence establishes criteria for the exercise of discretion which are not entirely consistent. I do not intend to review all of the cases cited by counsel still less all of those contained in the extensive briefs of authorities but I make the following general observations.

[20] Firstly, judges are given discretion so that they may tailor remedies to the particular facts they are faced with and to make orders and decisions that appear just in all of the circumstances. Discretion should not be exercised arbitrarily or whimsically, and the exercise of discretion should be guided by accepted principles. Nevertheless, it is a mistake to regard examples of principles applied in other cases as a straitjacket. The exercise of discretion necessarily means approaching the question on a case by case basis.

[21] Secondly, many of the cases cited by counsel are cases concerned with intervention at the appellate level, Judicial Review proceedings or on motions such as summary judgment motions. While the test under Rule 13 is the same, the considerations and the nature of the proposed intervention in these proceedings may be considerably different. For example, leave to appeal at the Court of Appeal or the Supreme Court of Canada may be sought by organizations more concerned with the development of the law and changes in critical jurisprudence than the outcome of a particular piece of litigation. Considerations in constitutional cases or *Charter* cases may be different than in private litigation.[4]

[22] Intervention is not a shortcut to avoid the necessity of commencing a separate proceeding. It is a narrow right for the intervenor to add its voice to a matter that is already before the court. The cases establish that an intervenor cannot add new issues to the litigation. At the same time, their contribution must be more than saying "me too". That is, it is not useful to the court or fair to the parties simply to have an intervenor repeat the same arguments as one of the existing parties.[5]

[23] Intervention, even intervention as a party, is quite different from commencing a separate proceeding with common issues and asking that the two be heard together. It is different in nature from joinder as a necessary party under Rule 5.03. That rule provides for the addition of parties whose participation is deemed necessary. Rule 13, by contrast, is a rule providing for the addition of a party who shares an interest in the proceeding and whose participation is deemed useful. Although an intervenor may be given rights almost as broad as a full party, their participation should be restricted to its proper purpose. If the intervenor wishes broader rights which would add new issues or complexity, the better approach is to commence a separate proceeding.

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[4] See *Bedford v. Canada,* 2009 ONCA 669 (CanLii)

[5] See for example the review of the law in *Steeves v. Doyle Salewski Inc,* 2016 ONSC 2223 (CanLii) and the test as outlined in *Hydro One Networks Inc. v. Ontario Energy Board,* 2019 ONSC 3763 (CanLii) (Div. Ct.)

[24] Although the rules governing intervention in other courts or other jurisdictions may differ from the Ontario rule, the common thread in the exercise of discretion appears to be that an intervenor must have an interest in the proceeding, must have a different and useful perspective and the intervention must not complicate the proceeding or drive up the costs of the existing litigants.[6] In Ontario the test remains the test enunciated in *Peel v. Great Atlantic & Pacific Co. of Canada Ltd.*[7] The factors are the nature of the case, the issues that arise in the case and the likelihood that the proposed intervenor will be able to make useful contribution to the resolution of the matter without injustice to the immediate parties.

[25] I am of the view that those criteria are satisfied in the present case. The Coalition does not propose to add any affidavit material except the affidavit of Barbara Ramsay which identifies the Coalition and who it represents. While the Coalition believes its members have independent legal rights, there is no right or remedy sought by the Coalition other than the findings already sought by the City.

[26] The Coalition will wish to draw documents to the attention of the application judge such as restrictive covenants and grading plans already contained in the application record and may wish to submit that the residents themselves have rights as third party beneficiaries of the 40% agreement. They cannot add new issues to the application. It will be up to the application judge to determine if the submission that the agreement creates a charitable purpose trust is a new issue or simply a submission relevant to the issues already before the court.

Conclusion

[27] In conclusion, leave is granted to the Coalition to intervene as a party since they do not approach this matter with the neutrality one would expect of a friend of the court. Despite being granted intervenor party status, however, the Coalition may not file additional evidence other than the Ramsay affidavit. The Coalition may attend and ask questions on any cross examinations, may file a factum and may present argument on the hearing of the application. But the coalition will not have an independent right of appeal. If there is an appeal, the Coalition may participate subject to directions from the appellate court.

[28] The Respondent asked that I place limits on the length of the factums. I agree that is appropriate, but I consider it premature. This application is case managed and the application date has been set for the week of February 24th, 2020. Once all the affidavits have been served and any cross examinations completed the parties should either agree on the lengths of the factums and a timetable for their exchange or request a case conference if they are unable to do so. I will also provide further direction if required.

Costs

[29] The parties advised they may be able to agree on costs of this motion and I encourage them to do so. The Coalition had indicated they would not seek costs of the Application and also asked to be insulated from a costs award but as I indicated at the hearing, I consider it inappropriate to

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[6] See for example, *Workers Compensation Act, 1983 Reference,* [1989] 2 SCR 335

[7] (1990) 74 OR (2d) 164 (CA) – although that case dealt with intervention in an appeal, the criteria have been widely applied.

grant a prophylactic costs award. The applications judge will have to determine if the participation by the Coalition drove up the costs of either of the parties and how to respond if that proves to be the case.

[30] In the event counsel are unable to resolve the costs of the motion, they may advise me of that fact within the next 30 days and I will provide further direction as to how the issue will be resolved.

C. MacLeod J.

Mr. Justice C. MacLeod

Date: December 23, 2019

CITATION: City of Ottawa v. Clublink Corporation ULC, 2019 ONSC 7470
COURT FILE NO.: CV-19-81809
DATE: 2019/12/23

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: City of Ottawa, Applicant (Responding Party on Motion)

AND:

Clublink Corporation ULC, Respondent (Responding Party on Motion)

AND:

Kanata Greenspace Protection Coalition, Proposed Intervenor (Moving Party)

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: Matthew Gottlieb and James Renihan, for the Respondent Clublink

Alyssa Tomkins and Charles Daoust, for the Proposed Intervenors

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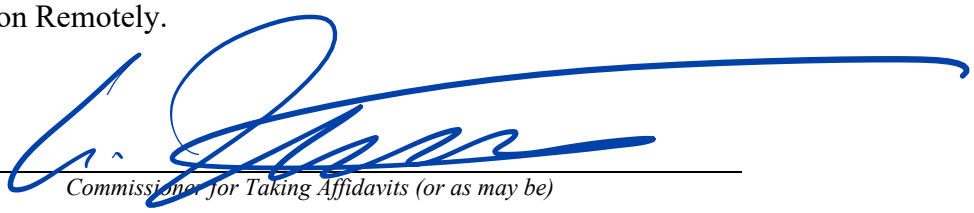
DECISION AND REASONS

Mr. Justice Calum MacLeod

Released: December 23, 2019

This is Exhibit “M” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

FACTUM OF THE APPLICANT, CITY OF OTTAWA

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– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

FACTUM OF THE APPLICANT, CITY OF OTTAWA

PART I - OVERVIEW

1. This case is about the enforcement of a contract. In 1981, Campeau Corporation ("Campeau") and The Corporation of the City of Kanata ("Kanata") struck a bargain to permit the development of approximately 1400 acres of greenspace and farm land for residential subdivisions ("Campeau Lands"). In order to secure Kanata's support for its proposal, Campeau offered to designate 40% of the Campeau Lands as open and recreational space. The Regional Municipality of Ottawa Carleton (the "Region") and Kanata insisted that Campeau's commitment be formalized in a written contract. It was.

2. The contract (referred to as the 40% Agreement), provided that 40% of the Campeau Lands, being 560 acres, would be designated for open, natural and recreational purposes. Of that land, 175 acres would be used for a golf course.

3. Campeau agreed that in the event it "desires to discontinue" the golf course on the Golf Course Lands and can find no other person to acquire or operate it, then it "shall convey the golf course (including lands and buildings) to Kanata at no cost…".

4. Over the years, the Campeau Lands have been subdivided, developed and sold, always subject to the 40% Agreement. The 40% Agreement has been incorporated in subdivision agreements registered on the Campeau Lands and has been incorporated onto official plans and other planning instruments directing the use of land in the City.

5. Campeau's contractual obligations have also been assigned to and assumed by all successive purchasers without exception, including ClubLink when it purchased the Golf Course Lands.

6. Kanata's rights and obligations became the City of Ottawa's upon amalgamation. [1]

7. Time has passed. ClubLink no longer desires to continue operating a golf course. It plans to develop the Golf Course Lands as a residential subdivision. In October of 2019, it filed applications for subdivision approval and zoning amendments under the *Planning Act* in support of these plans.

8. ClubLink has not complied with its contractual obligation to offer to convey the Golf Course Lands to the City. It is ignoring its obligations in pursuit of a financial windfall from its planned development. The court should hold ClubLink to its bargain.

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[1] Affidavit of Derrick Moodie sworn October 24, 2019 ("Moodie October Affidavit"), para. 13, Application Record, Vol. 5, Tab 4, p. 1276-1277; *City of Ottawa Act*, 1999, SO 1999, c 14, Sched E.

PART II - SUMMARY OF FACTS

A) A Contract is Born: The Surrounding Circumstances

9. ClubLink Corporation ULC ("ClubLink") owns and operates the Kanata Golf and Country Club, which includes an 18-hole golf course on 175 acres of land ("Golf Course Lands").[2] The contractual obligations at issue flow from 1981, when Campeau owned the lands.

10. In the 1970s, there was very little residential development in what was then Kanata. Kanata's population was around 18,000. Purchasers were induced to buy homes in remote and rural Kanata with "pioneer bonuses" (cash incentives) and the lure of a 9-hole golf course surrounded by farmers' fields.[3]

11. By 1979, Campeau had assembled 1400 acres of farm land and greenspace in Kanata, including the 9-hole golf course (the "Campeau Lands") with a view to creating a residential development called the Marchwood-Lakeside Community.[4]

12. The proposal could not proceed unless the Region and Kanata agreed to significant amendments to the Regional Official Plan, the local official plan, secondary plans and a zoning by-law and without the approval of draft plans of subdivision.[5] For their parts, the Region and Kanata wanted to ensure that a golf course and other open space and natural areas would be preserved.

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[2] Affidavit of Brent Deighan sworn December 13, 2019 ("Deighan Affidavit"), para. 1, Application Record, Vol. 6, Tab 9, p. 1699; Affidavit of Eileen Adams-Wright sworn October 24, 2019 ("Adams-Wright October Affidavit"), para. 4, Application Record, Vol. 1, Tab 2, p. 18; Moodie October Affidavit, paras. 5, 7-8, Application Record, Vol. 5, Tab 4, p. 1275; Map of Kanata, Exhibit A to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4A, p. 1289; The Golf Course Lands are described on 4 parcel registers Ref: Adams-Wright October Affidavit, paras. 2-3, Application Record, Vol. 1, Tab 2, p. 17.

[3] Affidavit of Donald Kennedy sworn October 25, 2019 ("Kennedy Affidavit"), paras. 1-2, Application Record, Vol. 6, Tab 6, pp. 1570-1571.

[4] Kennedy Affidavit, para. 9, Application Record, Vol. 6, Tab 6, p. 1572.

[5] Kennedy Affidavit, para. 10, Application Record, Vol. 6, Tab 6, p. 1572.

13. Campeau made an offer: in exchange for the Region and Kanata satisfying certain conditions, it would designate 40% of the Campeau Lands as recreation and open space.[6] Andrew Haydon, then-regional Chair of Ottawa Carleton, required Campeau to put its 40% commitment into a contact. The Minutes from the Planning Committee meeting of April 28, 1981 record:

> 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.[7] [Emphasis added]

14. Campeau agreed to enter into a contract. Within two weeks, the Minutes for the May 12, 1981 Planning Committee meeting record that a "rough draft" agreement was tabled. The Region, Kanata and Campeau were "fundamentally in agreement" that the golf course, "...would be operated, in perpetuity, by Campeau or by others as a golf course; otherwise it would be conveyed to Kanata at a nominal cost."[8]

15. Two weeks later, Campeau and Kanata entered into an agreement dated May 26, 1981 ("1981 40% Agreement") formalizing the 40% Offer.[9]

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6 Kennedy Affidavit, paras. 10, 12 & 18, Application Record, Vol. 6, Tab 6, pp. 1572-1574.

7 Regional Planning Committee Minutes of Meeting dated April 28, 1981, Exhibit A to the Affidavit of Paul Henry sworn November 27, 2019 ("Henry Affidavit"), Application Record, Vol. 6, Tab 7A, pp. 1636-1639.

8 Regional Planning Committee Minutes dated May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, p. 1643.

9 Kennedy Affidavit, para. 20, Application Record, Vol. 6, Tab 6, p. 1575; The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, pp. 48-62.

B) Key Terms of the Contract

16. S. 3 of the 1981 40% Agreement outlines the benefit that Kanata received:

> Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:
>
> (a) the proposed 18 hole golf course
>
> (b) the storm water management area
>
> (c) the natural environmental areas
>
> (d) lands to be dedicated for park purposes.[10]

17. S. 5 of the 1981 40% Agreement sets out agreed-upon "Methods of Protection" for ensuring that the Golf Course Lands would remain open space as a golf course "in perpetuity."[11]

18. S. 5(1) provides that the Golf Course Lands "shall be operated by Campeau as a golf course in perpetuity provided that Campeau shall at all times be permitted to assign the management of the golf course without prior approval of Kanata."[12]

19. S. 5(2) provides that:

> ...Campeau may sell the golf course (including lands and buildings) provided the new owners enter into an agreement with Kanata **providing for the operation of the golf course in perpetuity**, upon the same terms and conditions as contained herein.[13] [Emphasis added]

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[10] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 50.

[11] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[12] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[13] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

20. S. 5(3) entitles Kanata to a right of first refusal.[14]

21. The critical provision for this Application is S. 5(4). It provides that:

> **In 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** and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of para 9.[15] [Emphasis added]

22. The 1981 40% Agreement also contemplates a scenario where Campeau be permitted to apply for development approvals under the *Planning Act* in respect of the Golf Course Lands. This would only be permitted **if** Kanata were to refuse to accept a conveyance of the Golf Course Lands. S. 5(5) provides that, "...**in the event Kanata will not accept the conveyance...then Campeau shall have the right to apply for development of the golf course lands** in accordance with the Planning Act.".[16]

23. S. 9 of the 1981 40% Agreement sets out what the parties agreed would occur if Kanata does not use any of the 40% lands in its possession, including the Golf Course Lands to the extent they are conveyed pursuant to Section 5(4), for recreation and natural environmental purposes:

> In the event that any of the land set aside for open space for recreation and natural environmental purposes ceases to be used for recreation and natural environmental purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no

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[14] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[15] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

[16] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 51.

> cost unless the land was conveyed to Kanata in accordance with Section 33(5)(a) or 35b of The Planning Act.[17]

24. The 40% Agreement was and remains the cornerstone of the development scheme for the Campeau Lands.[18]

C) The Parties Enter into Related Agreements

25. The 1981 40% Agreement cemented Campeau's commitment to designating 40% of the Campeau Lands as recreation and open space. It did not identify in detail all of the parcels to be so designated. The agreement contemplated further study to determine where within the Campeau Lands the open space lands would be situated.[19]

26. As development of the Campeau Lands progressed and plans of subdivision began receiving draft plan approval and being registered, on December 20, 1988 Kanata and Campeau entered into another agreement by which they identified the land that was to be set aside to meet the 40% commitment ("1988 40% Agreement").[20] Together the 1981 40% Agreement and the 1988 40% Agreement are referred to as the "40% Agreement".

27. Campeau and Kanata were also parties to two agreements specifically addressing where the Golf Course Lands would be situated. The earlier agreement dated June 10, 1985 ("1985 Golf Club Agreement") was the initial attempt to identify the precise lands to be used.[21] The latter

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[17] The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, p. 52.

[18] Kennedy Affidavit, para. 19, Application Record, Vol. 6, Tab 6, p. 1575; Official Minutes of the Regional Planning Committee Meeting, April 28, 1981, Exhibit A to the Henry Affidavit, Application Record, Vol. 6, Tab 7A, pp. 1636-1639; Official Minutes of the Regional Planning Committee Meeting, May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, pp. 1640-1646.

[19] Kennedy Affidavit, para. 21, Application Record, Vol. 6, Tab 6, p. 1575.

[20] The 1988 40% Agreement, Exhibit J to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2J, pp. 302-345; Moodie October Affidavit, para. 10, Application Record, Vol. 5, Tab 4, p. 1276.

[21] The 1985 Golf Club Agreement, Exhibit G to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2G, pp. 63-80.

agreement dated December 29, 1988 ("1988 Golf Club Agreement") set out the precise description of the Golf Course Lands given the availability of legal descriptions and finalized plans.[22] Collectively, these agreements are referred to as the "Golf Club Agreement".[23]

28. The 1981 Agreement is registered on title to all of the Campeau Lands.[24] It was intended to govern the development scheme for the entire area. The Golf Club Agreement is registered on title to the Golf Course Lands.

29. Starting in 1985, portions of the Campeau Lands were developed as residential subdivisions through the registration of plans of subdivision. As a condition of subdivision approval granted under the *Planning Act*, subdivision agreements implementing first the 1981 40% Agreement, and later the 40% Agreement as a whole and incorporating by reference the 40% Agreement and the Golf Club Agreement were also registered.

30. The Golf Course Lands are included in plans of subdivision registered in 1985, 1988 and 1990 and are subject to subdivision agreements incorporating the 40% Agreement. For example, Schedule "P" to three of the Subdivision Agreements registered on title to the Golf Course Lands provides:

> In conjunction with the Concept Plan approval, the **City of Kanata and the Owner shall agree as to the amount of land included in the plan which shall be dedicated to the City** as the parkland dedication **in accordance with** Section 50(5) of The Planning Act, and **the 40% Agreement entered into by the Owner and the City of Kanata**.[25] [Emphasis added]

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[22] The 1988 Golf Club Agreement, Exhibit I to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2I, pp. 288-301.

[23] Adams-Wright October Affidavit, para. 5(d), Application Record, Vol. 1, Tab 2, pp. 18-19.

[24] Adams-Wright October Affidavit, para. 5(a), Application Record, Vol. 1, Tab 2, p. 18.

[25] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 258; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application

31. Schedule "P" to the remaining subdivision agreement provides:

> **The Owner agrees that parkland be dedicated to the City in accordance with the Agreement dated May 26, 1981 between Campeau Corporation and the City of Kanata and registered as NS140350** in the Lands Title Division Office of Ottawa Carleton No. 4 and that the 5% lands as per The Planning Act shall be dedicated in another area of the Kanata Lakes project. This shall be to the satisfaction of the City of Kanata.[26] [Emphasis added]

32. Schedule "P" to all four of these subdivision agreements that apply to the Golf Course Lands also provides that the owner of the lands will agree that:

> Cross country skiing and any necessary grooming of cross country ski trails shall be permitted on the golf course during the winter months to the satisfaction of the Director of Parks and Recreation.[27]

33. Three subdivision agreements registered on title to portions of the Campeau Lands being developed by KNL Developments Inc. identify compliance with the 40% Agreement as a condition that must be fulfilled prior to the enactment of a part-lot control by-law for the lands in question.[28]

34. Many homes back onto the Golf Course Lands.[29] In addition to members who golf, the general public enjoys the Golf Course Lands for walking and cross-country skiing.[30] These public entitlements are enshrined in registered subdivision agreements. The Golf Course Lands are not

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Record, Vol. 2, Tab 2M, p. 545; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 648.

[26] The 1985 Subdivision Agreement, Exhibit A to the Affidavit of Eileen Adams-Wright sworn November 27, 2019 ("Adams-Wright November Affidavit"), Application Record, Vol. 4, Tab 3A, p. 1195.

[27] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 254; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, p. 547; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 649; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, p. 1196.

[28] Moodie October Affidavit, paras. 16-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278.

[29] Kennedy Affidavit, para 23, Application Record, Vol. 6, Tab 6, p. 1576.

[30] Kennedy Affidavit, para 23, Application Record, Vol. 6, Tab 6, p. 1576.

only a significant physical element of the present-day Campeau Lands, but are also knitted into the fabric of the community.

D) Chain of Ownership of the Golf Course Lands

35. 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 later amalgamated with Imasco).[31] Genstar, Campeau and Kanata entered into an agreement dated March 30, 1989 ("Genstar Assumption Agreement").[32] Pursuant to s. 2 of the Genstar Assumption Agreement, Genstar assumed Campeau's obligations under "the Forty Percent Agreement".[33]

36. ClubLink purchased the Golf Course Lands in 1997 from Imasco Enterprises Inc. ("Imasco").[34] As part of its purchase of the Golf Course Lands, ClubLink entered into an agreement with Imasco and Kanata dated November 1, 1997 ("ClubLink Assumption Agreement"), which was registered on title at the time of the transfer on January 8, 1997.[35]

37. Pursuant to s. 3 of the ClubLink Assumption Agreement, Clublink agreed to the following:

> Assumption: [ClubLink] hereby assumes, as of the date hereof, all of Imasco's liabilities and obligations under and in respect of the Forty Percent Agreement and the Golf Club Agreement.
>
> (a) to make payment or otherwise perform such liabilities and obligations in accordance with the provisions of the Forty Percent Agreement and the Golf Club Agreement; and

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[31] Adams-Wright October Affidavit, para. 5(k), Application Record, Vol. 1, Tab 2, pp. 20-21.
[32] Adams-Wright October Affidavit, paras. 5(f), 5(g), Application Record, Vol. 1, Tab 2, p. 19-20.
[33] The referenced "Forty Percent Agreement" comprises the 1981 40% Agreement" and the 1988 40% Agreement", Ref: The Genstar Assumption Agreement, Exhibit L to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2L, p. 395.
[34] Adams-Wright October Affidavit, para. 5(l), Application Record, Vol. 1, Tab 2, p. 21.
[35] Adams-Wright October Affidavit, paras. 5(l), 5(n), Application Record, Vol. 1, Tab 2, p. 21.

> (b) that from and after the date hereof, every covenant, proviso, condition and stipulation contained in the Forty Percent Agreement and the Golf Club Agreement shall apply to and bind the [ClubLink] in the same manner and to the same effect as if the [ClubLink] had executed the same in the place and stead of Campeau or Imasco.[36]

38. By agreeing to s. 3 of the ClubLink Assumption Agreement, ClubLink bound itself to the original terms of the 1981 40% Agreement.

39. S. 10 of the ClubLink Assumption Agreement specifically echoes s. 9 of the 1981 40% Agreement. It provides:

> Open Space Lands: If the City is required under Section 9 of the 1981 Agreement to reconvey any land (because, as provided for more particularly in such Section 9, such land ceased to be used for recreational and natural environmental purposes by the City), then the City shall notify the Purchaser of such conveyance prior to delivering it to Imasco or as Imasco may direct.[37]

40. ClubLink's role with respect to the Golf Course Lands has always been limited to owning and operating a golf course. In the event that the City were to accept the conveyance of the Golf Course Lands, and then cease to use the Golf Course Lands for recreational and natural environmental purposes, the City would be obliged to deliver the land to Imasco (and not ClubLink).

41. The parcel registers for the Golf Course Lands disclose a Charge/Mortgage (with a principal amount of $80 Million) and an Assignment of Rents from ClubLink in favour of Maxium Financial Services Inc. The Charge/Mortgage is security for a $80M promissory note and also lists

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[36] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 791.

[37] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 792.

a host of lands that it secures, including Diamondback Golf Club, Caledon Woods Golf Club and Eagle Ridge Golf Club.[38]

E) ClubLink Desires to Discontinue Operating the Golf Course

42. On December 14, 2018, ClubLink publically announced it was pursuing options for alternative use of the lands, and that it had entered into a partnership with developers Minto Communities Canada and Richcraft Homes, "to assist with ... redevelopment plans for the property".[39]

43. In 2019, ClubLink conducted soil sampling.[40] In March of 2019, it requested a pre-consultation meeting with the City's Planning Department, which is required by the City before it will receive applications for significant development approvals under the *Planning Act*.

44. ClubLink has never offered to convey the Golf Course Lands to the City.[41] Despite this, in a clear breach of its obligations under s. 5(4) and s. 5(5) of the 1981 40% Agreement, on October 8, 2019, ClubLink filed applications for a zoning by-law amendment and for approval of a proposed plan of subdivision, both pursuant to the *Planning Act*.[42]

45. The applications would permit the development of Golf Course Lands as a residential subdivision including 545 detached dwellings, 586 townhouse dwellings, and 371 apartment dwellings.[43]

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[38] Charge/Mortgage, Exhibit B to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3B, p. 1202-1239.
[39] Moodie October Affidavit, para. 18, Application Record, Vol. 5, Tab 4, p. 1278.
[40] Moodie October Affidavit, para. 21, Application Record, Vol. 5, Tab 4, p. 1279.
[41] Moodie October Affidavit, para. 39, Application Record, Vol. 5, Tab 4, p. 1282.
[42] Moodie October Affidavit, paras. 29-32, Application Record, Vol. 5, Tab 4, p. 1280-1281.
[43] Moodie October Affidavit, para. 32, Application Record, Vol. 5, Tab 4, p. 1281.

46. Although obtaining planning approval does not require an applicant to proceed with a development, the resources required to put forward a proposed plan of subdivision of the magnitude being advance by ClubLink for the Golf Course Lands[44] show that ClubLink "desires to discontinue" operating the golf course.

47. The submission of planning applications triggers statutory timelines for a decision from the approval authority—in this case, the City. Under the *Planning Act* timelines, since the City has not made a decision in respect of either application, ClubLink now has the right to appeal directly to the Local Planning Appeal Tribunal ("LPAT") in respect of its applications.[45]

48. If LPAT approves the planning applications, then subject to its satisfaction of any conditions, ClubLink could begin selling lots.[46]

PART III - ISSUES

49. There are three issues:

i. Is ClubLink in breach of s. 5(4) of the 1981 40% Agreement and s. 3 of the ClubLink Assumption Agreement?

ii. If there is a breach, is specific performance the appropriate remedy?

iii. If the Golf Course Lands are conveyed to the City, what are the City's obligations pursuant to s. 9 of the 1981 40% Agreement?

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[44] Moodie October Affidavit, paras. 28, 33-34, Application Record, Vol. 5, Tab 4, pp. 1280-1281; ClubLink's Handout from pre-consultation meeting, Exhibit M to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4M, pp. 1455-1466; Planning Rationale dated September 2019, Exhibit P to the Moodie October Affidavit, Application Record, Vol. 5, Tab 4P, pp. 1494-1561.

[45] Moodie October Affidavit, para. 38, Application Record, Vol. 5, Tab 4, p. 1282; Affidavit of Derrick Moodie sworn November 27, 2019 ("Moodie November Affidavit"), para. 3, Application Record, Vol. 5, Tab 5, p. 1567.

[46] Moodie October Affidavit, para. 61, Application Record, Vol. 5, Tab 4, p. 1287.

PART IV - LAW & AUTHORITIES

ISSUE 1: BREACH OF CONTRACT

A) The Rights and Obligations in Issue are Contractual

50. The rights and obligations in issue in this Application flow between ClubLink and the City by virtue of the ClubLink Assumption Agreement. They are personal rights.

B) Principles of Contractual Interpretation

51. 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.[47]

52. The framework for contract interpretation was confirmed by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.* In *Sattva*, the Supreme Court held, "… the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction".[48]

53. The approach was recently summarized by the Ontario Court of Appeal in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*.[49] The reader is to:

(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;

(iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract; and

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[47] *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633, at para. 47 ("*Sattva*").
[48] *Sattva*, at paras. 47-48, 57-58.
[49] 2017 ONCA 1007, 77 BLR (5th) 175 ("*Weyerhaeuser*").

(iv) read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.[50]

54. While the context of the surrounding circumstances informs contract interpretation, this factual matrix "must never be allowed to overwhelm the words" of the contract. 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**" (emphasis added).[51] The interpretative force of the factual matrix is limited to how the pertinent circumstances would have reasonably shaped the parties' understanding of the words chosen.[52]

55. The court may consider evidence of the parties' post-contractual conduct as "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at an earlier date." However, the Court of Appeal has recently cautioned that subsequent conduct is an unreliable guide and evidence should only be admitted "if the contract remains ambiguous after considering its text and its factual matrix".[53]

C) ClubLink's Contractual Obligations are Clear

56. ClubLink's contractual obligations are clear and unambiguous. Under s. 3 of the ClubLink Assumption Agreement, ClubLink agreed that it would assume "as of the date hereof, all of Imasco's liabilities and obligations under and in respect of the Forty Percent Agreement".[54] Imasco

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[50] *Weyerhaeuser*, at para. 65.
[51] *Sattva*, at para. 57.
[52] *Sattva*, at para. 58.
[53] *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, at para. 63, 424 DLR (4th) 588 ("*Thunder Bay*").
[54] ClubLink Assumption Agreement, Exhibit S to the Adams-Wright October Affidavit, Application Record, Vol. 3, Tab 2S, p. 791.

had assumed all of Campeau's obligations under the 1981 40% Agreement by virtue of the Genstar Assumption Agreement and Imasco's subsequent amalgamation with Genstar.

57. Therefore, the parties to the ClubLink Assumption Agreement intended ClubLink to assume all of the obligations on Campeau set out in the 1981 40% Agreement. What then were the obligations under the 1981 40% Agreement?

58. The 1981 40% Agreement sets out a straightforward roadmap for the use and ownership of the Golf Course Lands. The starting point is that ClubLink must operate the golf course "in perpetuity" (s. 5(1)) subject to certain "off-ramps". The "off-ramps" include: a sale of the lands (s. 5(2)); an offer for the lands is received (s. 5(3)), and; a situation where ClubLink "desires to discontinue" the operation of the golf course but does not have a buyer or operator lined up (s. 5(4)). In that event it "shall convey" the land to the City "at no cost".

(i) The meaning of "in perpetuity" in s. 5(1)

59. S. 5(1) provides that the lands "shall be operated by Campeau as a golf course **in perpetuity**..." [emphasis added]. As confirmed recently by the Ontario Court of Appeal, it would be erroneous to interpret the intentions of the contracting parties without acknowledging those parties' choice to use the phrase "in perpetuity."[55]

60. Reading the 1981 40% Agreement as a whole, it is clear that the intention of the parties was that the Golf Course Lands would always be operated as a golf course while in private hands, unless or until: 1) the City refused a conveyance of the land, or 2) after accepting a conveyance the City stopped using the land for recreation and natural environmental purposes.

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[55] *Thunder Bay*, at para. 46.

61. This interpretation is reinforced by and consistent with the factual matrix within which the two sophisticated parties (a developer and a planning authority) were operating in at the time they entered into the contract.

62. A key element of the factual matrix is the statutory land use planning context that informed (and continues to inform) the subdivision of the Campeau Lands for residential development.[56] The "in perpetuity" language of the 1981 40% Agreement reflects the applicable statutory scheme at the time the agreement was struck. S. 29(25) of the *Planning Act*, RSO 1980, c 379 provided that agreements tied to subdivision approval would be enforceable against "any and all subsequent owners of the land".[57]

63. The terms of the 1981 40% Agreement and ClubLink Assumption Agreement are clear and unambiguous. The plain text reading of s. 5(4) is bolstered when one considers the broader scheme and purpose of the agreement, as well as the factual matrix. Therefore, it is not necessary for this Honourable Court to consider evidence of post-contract conduct.

64. In the event the court considers post-contract conduct, then the City has consistently abided by the principles and terms of the 1981 40% Agreement. The terms of the 1981 40%

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[56] Kennedy Affidavit, paras. 10, 20, Application Record, Vol. 6, Tab 6, pp. 1572, 1575; Regional Planning Committee Minutes dated May 12, 1981, Exhibit B to the Henry Affidavit, Application Record, Vol. 6, Tab 7B, p. 1640-1646; The 1981 40% Agreement, Exhibit F to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2F, pp. 48-62; Moodie October Affidavit, para. 10, Application Record, Vol. 5, Tab 4, p. 1276.

[57] *Planning Act*, RSO 1980, c 379, s. 29(25): "Every municipality and the Minister may enter Agreements into agreements imposed as a condition to the giving of a consent and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land".

Agreement have been and continue to be incorporated into applicable subdivision agreements registered under the *Planning Act*.[58]

65. If the Court does not enforce ClubLink's contractual obligations, there could be an unravelling effect impacting parts of the Campeau Lands owned by other developers, who have been abiding by the principles of the 40% Agreement.[59]

66. In sum, the incorporation of the phrase "in perpetuity" within s. 5 of the 1981 40% Agreement was intentional, and was consistent with the land use planning objectives that informed the 1981 40% Agreement and the governing statutory provisions. S. 5(4) is one of the tools laid out in the original agreement that secures those long-term objectives by ensuring that private owners are precluded from developing the Golf Course Lands for purposes other than as recreational open space unless and until the municipality refuses to accept the conveyance of the Golf Course Lands for open space and recreational purposes.

(ii) The meaning of "desires to discontinue" in s. 5(4)

67. S. 5(4) provides that "in 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…". [emphasis added]

68. The agreement does not specify all of the circumstances that would constitute a "desire to discontinue". However, two things are clear. First, this is something different from actually

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[58] Moodie November Affidavit, para. 6, Application Record, Vol. 5, Tab 5, p. 1568; Moodie October Affidavit, paras. 16-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278; The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, p. 258; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, p. 545; The 1992 Subdivision Agreement, Exhibit N to the Adams-Weight October Affidavit, Application Record, Vol. 2, Tab 2N, p. 648; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, p. 1195.

[59] Moodie October Affidavit, paras. 14-17, Application Record, Vol. 5, Tab 4, pp. 1277-1278.

discontinuing operation of the golf course (or the section would have simply said, "In the event Campeau discontinues the operation of the golf course").

69. Second, making an application under the *Planning Act* is a "desire to discontinue". When s. 5(4) is read together with s. 5(5), it is clear that ClubLink does not have the right to make an application under the *Planning Act* unless it has offered to convey the Golf Course Lands to the City at no cost, and the City has not accepted the conveyance.

(iii) The meaning of "at no cost" in s. 5(4)

70. S. 5(4) provides that Campeau shall convey the land "at no cost". This should be interpreted to mean that the land shall be conveyed free and clear of any mortgages, charges or encumbrances.

71. The Golf Course Lands are treated in the same way that the "natural environmental areas" and the "and for park purposes" are treated in ss. 7 and 9 of the 1981 40% Agreement – they are to be conveyed "at no cost" to Kanata.

72. The conveyance of the Golf Course Lands to the City without the discharge/release of the Charge/Mortgage in favour of Maxium Financial Services Inc. would defeat the intended purpose of a "no cost" conveyance. ClubLink could simply burden the Golf Course Lands to such a degree that the City would not accept a conveyance.

73. In any event, since the City is only permitted to keep the land if it is used for recreational and natural environmental purposes, it would be a commercial absurdity if the City were obliged

to assume financial responsibility for ClubLink's business by providing security for a promissory note issued to ClubLink.[60]

74. Accordingly, "at no cost" means that ClubLink is required to offer to convey the Golf Course Lands to the City free and clear of the Charge/Mortgage and the Assignment of Rents in favour of Maximum Financial Services Inc.

D) The *Planning Act* Endows the 40% Agreement with Special Status

75. The particular contractual rights and obligations in question have a special status by operation of the *Planning Act*.

76. The Ontario *Planning Act* provides that agreements entered into as conditions of subdivision approval are enforceable against "any and all subsequent owners of the land". [61]

77. The 40% Agreement is the cornerstone of the development scheme established for the Campeau Lands. The implementation of the 40% Agreement as well as the maintenance of the Golf Course Lands as a recreational area for the public and as a golf course is enshrined in subdivision agreements which are registered on title to the Golf Course Lands as well as the portions of the Campeau Lands developed for residential purposes over time. [62]

78. This creates certainty for future owners of lands in the subdivision that the development scheme put in place for the subdivision will carry on into the future as lots are sold and property

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[60] Charge/Mortage, Exhibit B to the Adams-Wright November Affidavit, paras. 5, 6(b) and 9, Application Record, Vol. 4, Tab 3, pp. 1206-1208, 1210.

[61] Section 29(25) of the *Planning Act*, RSO 1980, c 379; Section 51 (26) of the *Planning Act*, 1990, c. P. 13.

[62] The 1987 Subdivision Agreement, Exhibit H to the Adams-Wright October Affidavit, Application Record, Vol. 1, Tab 2H, pp. 81-287; The 1989 Subdivision Agreement, Exhibit M to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2M, pp. 399-555; The 1992 Subdivision Agreement, Exhibit N to the Adams-Wright October Affidavit, Application Record, Vol. 2, Tab 2N, pp. 556-652; The 1985 Subdivision Agreement, Exhibit A to the Adams-Wright November Affidavit, Application Record, Vol. 4, Tab 3A, pp. 1054-1201.

changes hands. These provisions create a statutory exception to the common law rule that positive covenants or contractual obligations do not bind freehold successors in title. As stated by the Ontario Court of Appeal in *Amberwood*, "the burden of positive covenants made in favour of public bodies can run with the land under the provisions of the *Planning Act*.[63]

79. The fact that Kanata required both the execution of assumption agreements upon the conveyance of the Golf Course Lands and incorporated the 40% Agreement by reference into agreements entered into as conditions of subdivision approval for the Campeau lands demonstrates the municipality's commitment to ensuring that the obligation to maintain these lands as recreational open space was preserved in perpetuity, or until the municipality ceases to use them for this purpose.

E) ClubLink is in Breach: It Should be Held to the Terms of the Bargain It Struck

80. The provisions that govern ClubLink's obligations—s. 3 of the ClubLink Assumption Agreement and s. 5(4) of the 1981 40% Agreement—are clear and unambiguous. ClubLink has breached its obligations. It cannot file an application under the *Planning Act* unless and until it has offered to convey the Golf Course Lands to the City at no cost, and the City has refused the conveyance.

81. The Supreme Court has emphasized the importance of holding parties to their contracts. In *Pacific National Investments Ltd. v Victoria (City),*[64] the unanimous court held:

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[63] *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, 211 DLR (4th) 1, 2002 CarswellOnt 850, at para. 51 (ONCA) ("*Amberwood*"). While *Amberwood* concerns positive covenants, the permissive language of section 51(26) is not limited to positive covenants.

[64] 2004 SCC 75, [2004] 3 SCR 575 ("*Pacific National*").

> The general rule, of course, is that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract.[65]

82. Parties can agree to be bound by long-term or even perpetual obligations. In *Thunder Bay (City) v. Canadian National Railway Company*, the Ontario Court of Appeal expressly upheld the application judge's finding that an agreement that imposes a perpetual obligation will be enforced and cannot be terminated unilaterally.[66]

83. Parties should be held to their bargains even where there are changes to the market that render a bargain unprofitable. The Supreme Court univocally held in the 2018 *Churchill Falls (Labrador) Corporation Limited v. Hydro-Quebec*[67] case that the court will not disregard the terms of the contract by intervening to reshape the contract and reallocate benefits.[68]

84. If ClubLink is dissatisfied with the deal it made because its business model has changed, its remedy is to ask the City and Imasco if they are willing to renegotiate. It is not this Court's role to ignore the plain words of a contract and to craft a new agreement. Contracts would be meaningless if they were unenforceable.

ISSUE 2: SPECIFIC PERFORMANCE

A) The City is entitled to specific performance of ClubLink's obligation under s. 5(4)

85. Specific performance is a discretionary equitable remedy. In deciding whether to grant specific performance, the court will consider three factors: (1) the nature of the property involved;

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[65] *Pacific National,* at para. 31.
[66] *Thunder Bay,* at para. 49.
[67] 2018 SCC 46, [2018] 3 SCR 101 ("*Churchill Falls*").
[68] *Churchill Falls*, at paras. 136-138.

(2) the inadequacy of damages as a remedy and (3) the behaviour of the parties, having regard to the equitable nature of the remedy.[69]

B) Nature of the property—there is no meaningful substitute

86. The Supreme Court has confirmed that an entitlement in a contract without a readily available substitute can be enforced through specific performance.[70]

87. No substitute is available in this case. The entitlement captured in s. 5(4) of the 1981 40% Agreement, and carried through subsequent assumption agreements, was in furtherance of the contract's purpose to ensure that the Golf Course Lands would be kept as open space. The City's entitlement to have the Golf Course Lands offered for conveyance so that they remain open space cannot be cured by any substitute.

88. There is no other land that ClubLink could offer to convey that would fulfill the purpose of s. 5(4): to guarantee that the Golf Course Lands in this particular residential setting would remain open space. A collection of smaller and separate open spaces is also not a responsive substitute, given that the original bargain concerns the mass of contiguous lands comprising the Golf Course Lands together. There is no available substitute for those lands within the borders of the Campeau Lands and additional development will only reduce the quantity of open space.

C) Damages are inadequate

89. If ClubLink is able to halt operation of the golf course and redevelop the Golf Course Lands without offering to convey them to the City, the City's damages cannot be quantified, or

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[69] *Matthew Brady Self Storage Corp v InStorage Limited Partnership,* 2014 ONCA 858, at paras. 29 & 32 ("*InStorage*").

[70] *Semelhago v Paramadevan*, [1996] 2 SCR 415 at para 22, 136 DLR (4th) 1.

compensated by money. The City would loose the ability to preserve the lands to be used for recreational and natural environmental purposes. The cost will also be borne by non-parties to the contract – the residents of the community surrounding the Golf Course Lands and those who use the lands for recreational purposes. No amount of money will afford the City an adequate or complete remedy for the loss of this unique tract of open recreational space in the City.

D) The City is entitled to an equitable remedy in this case

90. As an equitable remedy, specific performance is only available where the equities in the specific case favour that outcome.[71] The City makes its request with clean hands.

91. If a breach of s. 5(4) does not necessitate specific performance, ClubLink will be able to proceed in a manner that is fundamentally at odds with the words and objectives of the 1981 40% Agreement. The 1981 40% Agreement was not meant as a tool for creating a windfall for the landowner. It was explicitly meant to guarantee the protection of the Golf Course Lands as open space. Specific performance is the only remedy that will actually honour the bargain struck. Other remedies will eviscerate the protective purpose of the 1981 40% Agreement.

ISSUE #3: INTERPRETATION OF S. 9

A) The City May Keep the Golf Course Lands for Recreational and Natural Environmental Purposes

92. The City seeks a Declaration that if it accepts a conveyance of the Golf Course Lands, it is not thereafter obliged to reconvey the Golf Course Lands so long as it continues to use the land for recreational and natural environmental purposes, irrespective of whether it continues operation of the golf course. If the City were to accept a conveyance of the land, then its obligations are set out

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[71] *InStorage*, at para. 40.

in s. 9 of the 1981 40% Agreement and s. 10 of the ClubLink Assumption Agreement. There is no obligation that the Golf Course Lands must be operated as a golf course by the City.

PART IV - ORDER REQUESTED

93. The City seeks the relief set out in s. 1 (a), (b) and (c) of the Notice of Application, together with its costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2020.

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SCHEDULE "A"

LIST OF AUTHORITIES

1.	*Amberwood Investments Ltd. v Durham Condominium Corp. No. 123*, 211 DLR (4th) 1
2.	*Churchill Falls (Labrador) Corp. v Hydro-Quebec*, 2018 SCC 46
3.	*Matthew Brady Self Storage Corporation v InStorage Limited Partnership*, 2014 ONCA 858
4.	*Pacific National Investments Ltd. v Victoria (City)*, 2004 SCC 75
5.	*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53
6.	*Semelhago v Paramadevan*, [1996] 2 SCR 415
7.	*Thunder Bay (City) v Canadian National Railway Company*, 2018 ONCA 517
8.	*Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2017 ONCA 1007

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

29(25) Every municipality and the Minister may enter Agreements into agreements imposed as a condition to the giving of a consent and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the Registry Act and the Land Titles Act, any and all subsequent owners of the land

***Planning Act*, RSO 1990, c P 13**

51(26) A municipality or approval authority, or both, may enter into agreements imposed as a condition to the approval of a plan of subdivision and the agreements may be registered against the land to which it applies and the municipality or the approval authority, as the case may be, is entitled to enforce the provisions of it against the owner and, subject to the Registry Act and the Land Titles Act, any and all subsequent owners of the land.

***City of Ottawa Act*, 1999, SO 1999, c 14, Sched E**

5(1) The following municipalities are dissolved on January 1, 2001:

1. The Regional Municipality of Ottawa-Carleton.
2. The City of Cumberland.
3. The City of Gloucester.
4. The Township of Goulbourn.
5. The City of Kanata.
6. The City of Nepean.
7. The Township of Osgoode.
8. The City of Ottawa.
9. The Township of Rideau.
10. The Village of Rockcliffe Park.
11. The City of Vanier.
12. The Township of West Carleton. 1999, c. 14, Sched. E, s. 5 (1).

5(2) The city stands in the place of the old municipalities for all purposes. 1999, c. 14, Sched. E, s. 5 (2).

5(3) Without limiting the generality of subsection (2),

(a) the city has every power and duty of an old municipality under any general or special Act, in respect of the part of the municipal area to which the power or duty applied on December 31, 2000; and

(b) all the assets and liabilities of the old municipalities on December 31, 2000, including all rights, interests, approvals, status, registrations, entitlements and contractual benefits and obligations, become assets and liabilities of the city on January 1, 2001, without compensation. 1999, c. 14, Sched. E, s. 5 (3).

CITY OF OTTAWA	and	CLUBLINK CORPORATION ULC	and	KANATA GREENSPACE PROTECTION COALITION
Applicant		Respondent		Intervener

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Ottawa

FACTUM OF THE APPLICANT, CITY OF OTTAWA

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This is Exhibit "N" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

- and -

CLUBLINK CORPORATION ULC

Respondent

- and -

KANATA GREENSPACE PROTECTION COALITION

Intervenor

FACTUM OF THE INTERVENOR KANATA GREENSPACE PROTECTION COALITION

February 11, 2020

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PART I - OVERVIEW

1. This case is about whether commitments made by a developer in order to secure municipal approval of its residential development must be honoured by its successor in interest which freely and voluntarily assumed those commitments. As part of securing planning approval for its proposed development in the Marchwood Lakeside community of Kanata (now known as "Kanata Lakes"), Campeau Corporation ["**Campeau**"] signed an agreement with the former City of Kanata ["**Kanata**"] in 1981 premised on the principle that 40 percent of the total development area would remain as open space for recreational and environmental purposes ["**40% Principle**"]. The 18-hole Kanata Lakes golf course formed a substantial part of that open space.

2. Thousands of people later became homeowners in this new development relying on the promise that the 40% Principle would be respected, and they would be able to reside in a community with 40 percent greenspace.

3. ClubLink bought the Kanata Lakes golf course in 1996, assumed the commitments made by the original developer and operated the course for over 20 years. Now, in blatant disregard of the commitments it assumed, ClubLink is attempting to develop the golf course and replace the 175 acres of open space with 1,500 houses. The proposed development would drastically change the nature of the Kanata Lakes community, deprive landowners of their cherished greenspace, violate the 40% Principle and frustrate the intent of the original parties.

4. The Kanata Greenspace Protection Coalition ["**Coalition**"] supports and adopts the position of the City of Ottawa [the "**City**"] that the contractual obligations assumed by ClubLink Corporation ULC ["**ClubLink**"] in relation to the operation of the golf course are valid and enforceable.

5. In addition to the contractual obligations relating to the golf course, the Coalition submits that the development is also subject to a restrictive covenant running with the land which requires that the 40% Principle remain intact. In facts remarkably similar to the seminal case of *Tulk v. Moxhay*,[1] equity should intervene again in this case to enforce a covenant to maintain property as open space where a developer seeks to disregard its common law obligations.

6. The Coalition also seeks a determination from the Court as to the validity and enforceability of another restrictive covenant registered on title by ClubLink relating to grading and stormwater management on the golf course lands. This question is addressed at the end of the Factum as a separate issue.

PART II - FACTS

A. 1981 Agreement

7. The 40% Principle was first set out and codified in the 1981 Agreement between Campeau and Kanata relating to the development of the "'Marchwood Lakeside Community' in the City of Kanata."[2]

8. The Coalition represents the interests of many of the landowners in what was known as the Kanata Marchwood Lakeside Community, which now includes the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court.[3]

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[1] [1848] 41 E.R. 1143 (Eng. Ch. Div.).
[2] Preamble, 1981 Agreement, Exhibit "F" of the Affidavit of Eileen Adams-Wright sworn October 24, 2019 ["**Adams-Wright October Affidavit**"], Application Record of the Applicant, City of the Ottawa ["**AR**"], Vol. I, Tab 2 at p. 48.
[3] Exhibit 1 of the Affidavit of Barbara Ramsay sworn February 10, 2020 ["**Ramsay February Affidavit**"], AR, Vol. VI, Tab 11 at p. 1774; see also Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019 ["**Kennedy October Affidavit**"], AR, Vol. VI, Tab 6 at p. 1595, which includes maps detailing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods.

9. Section 3 of the 1981 Agreement codifies the 40% Principle:[4]

> *3. Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:*
>
> *(a) the proposed 18 hole golf course*
> *(b) the storm water management area*
> *(c) the natural environmental areas*
> *(d) lands to be dedicated for park purposes*

10. Section 4 of the 1981 Agreement provides that the exact boundaries and location of the areas referred to in section 3 are to be mutually agreed upon by the parties.[5]

11. Section 5 of the 1981 Agreement relates to the "Methods of Protection" of the 40% Principle and is specific to the golf course and its operations. Subsections 5(4) and 5(5) address the situation whereby Campeau wishes to discontinue the operation of the golf course:

> *(4) In 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 and if Kanata accepts the conveyance, Kanata shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9.*
>
> *(5) In the event Kanata will not accept the conveyance of the golf course as provided for in sub-paragraph (4) above then Campeau shall have the right to apply for development of the golf course lands in accordance with The Planning Act, not withstanding anything to the contrary in this agreement.*[6]

12. As can be seen, the 1981 Agreement does provide a mechanism by which Campeau would have the right to apply to develop the golf course lands, subject to the *Planning Act*, notwithstanding anything else in the Agreement.

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[4] S. 10 of the 1981 Agreement also states that *"[i]t is the intent of the parties that this agreement shall establish the principle as proposed by Campeau to provide 40% of the land in the 'Marchwood Lakeside Community' as open space…*", Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 52.
[5] S. 4, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 50.
[6] Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 51.

13. The mechanism, however, includes a condition precedent by which Campeau would need to first try to find other persons to acquire the golf course or operate it, be unable to do so, then offer to convey the golf course to Kanata at no cost and finally have Kanata refuse the conveyance. It is only upon the occurrence of these four (4) events that the owner's right to apply to develop the golf course may be triggered.

14. Section 9 provides that if Kanata is the owner of any of the land set aside for open space for recreation and natural environmental purposes and this land ceases to be used for such purposes, Kanata is required to reconvey the land to Campeau at no cost.[7] As with section 5, the discretion in relation to the continued protection of greenspace is with the municipality.

B. 1988 Agreement

15. The original 40 percent agreement of 1981 suggested that further study would be required to determine exactly where open space was to be dedicated. Once this was done, the parties entered into the 1988 Agreement.[8]

16. The 1988 Agreement effectively adopts and amends the 1981 Agreement (which it refers to as the "Forty Percent Agreement") to limit the application of the 40% Principle to the lands described at its Schedule "A", which the Agreement defines as the ["**Current Lands**"]. Schedule "A" includes the legal description for these lands.[9]

17. Section 4 of the Agreement incorporates by reference the concept plan submitted by Campeau and approved by Kanata City Council for the development of area known as Marchwood

[7] S. 9, 1981 Agreement, Exhibit "F" of the Adams-Wright October Affidavit, AR, Vol. 1, Tab 2 at p. 52.
[8] Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 302.
[9] Schedule "A", 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 308.

Lakeside ["**Concept Plan**"].[10] The Concept Plan indicates where within the Current Lands that the open space lands for recreational and natural environmental purposes would be [the "**Open Space Lands**"].[11] Approximately 32 percent of the Open Space Lands is occupied by the previously specified golf course, i.e. one third of the entire 40 percent of the dedicated open greenspace is comprised of the golf course ["**Golf Course Lands**"].[12]

18. The preamble of the 1988 Agreement also states that "the City wishes to ensure that the obligations under the Forty Percent Agreement and the Subdivision Agreement in respect of the Current Lands are binding on successors in title of Campeau."[13] In this regard, section 7 of the 1988 Agreement expressly provides:

> *7. It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.*[14] [Emphasis added]

19. The 1988 Agreement is registered on title of every residential lot in Kanata Lakes.[15]

C. ClubLink Assumption Agreement

20. On November 1, 1996, ClubLink agreed to be bound by the covenants and obligations set out in the 1981 and 1988 Agreements [the "**ClubLink Assumption Agreement**"].[16] Those obligations had previously been assigned to Genstar Development Company Eastern Ltd., which

[10] Exhibit "C" of the Kennedy October Affidavit, AR, Vol. VI, Tab 6 at p. 1595.
[11] Exhibit "J" of the Adam-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 304.
[12] Kennedy October Affidavit at para. 19, AR, Vol. VI, Tab 6 at p. 1575; see also Exhibits "B.1" to "E.2", and Schedule "C" of Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 29-61, 323.
[13] Preamble, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 302.
[14] S. 7, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 307.
[15] OMB Decision, Exhibit "A" to the Affidavit of Brett Deighan sworn December 13, 2019, AR, Vol. VI, Tab 9 at p. 1704; see also Exhibit "V" to the Adams-Wright October Affidavit, R, Vol. III, Tab 2 at p. 869; which is a parcel register for a residential lot adjacent to the Golf Course Lands. The parcel register confirms that both the 1981 and 988 Agreements are registered on title.
[16] Preamble, para. "L", ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 790.

later amalgamated with Imasco Enterprises Inc. ["**Imasco**"].

21. At section 3 of the ClubLink Assumption Agreement, ClubLink covenanted and agreed that from that date, every covenant, proviso, condition and stipulation contained in the Forty Percent Agreement (defined as both the 1981 and 1988 Agreements) would "*apply and bind [ClubLink] in the same manner and to the same effect as if [ClubLink] had executed the same in the place and stead of Campeau or Imasco*."[17]

22. At section 9, Imasco covenanted that it would insert a clause into all agreements of purchase and sale for lots still owned by Imasco that are within 100 metres of the Golf Course Lands requiring homeowners to agree that they will not claim against the City, ClubLink or Imasco for any property damage or injury suffered as a result of activities on the golf course.[18]

23. Section 11 of the ClubLink Assumption Agreement addresses the 40% Principle expressly:

> *11. **Open Space Lands**: The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left as open space for recreation and natural environmental purposes (the "Open Space Lands") as referred to in Section 3 of the 1981 Agreement, so that the Open Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. 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.*

24. The 1996 ClubLink Assumption Agreement was registered on title to the Golf Course

[17] S. 3(b), ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 791.
[18] S. 9, ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 792.

Lands on January 8, 1997.[19]

PART III - LAW AND ARGUMENT

A. The 40% Principle is a Restrictive Covenant that Binds the Golf Lands for the Benefit of the Lands in the Kanata Marchwood Lakeside Community

i. A restrictive covenant is an exception to the doctrine of privity of contract

25. Property law principles permit restrictive covenants relating to land to be enforced despite the lack of privity of contract.[20] In this case, the Coalition represents the interests of many of the landowners whose land is benefited by the covenant in question.

ii. Requirements for a restrictive covenant and their application in this case

26. The Coalition submits that the 1988 Agreement creates a restrictive covenant requiring that 40 percent of the total development area for the Kanata Marchwood Lakeside Community, including the golf course, be left as open space for recreation and natural environmental purposes. The covenant was assumed, restated and then registered on title by ClubLink in the 1996 ClubLink Assumption Agreement.

27. The requirements for a restrictive covenant are well-established.[21] We identify each of them and address their application to the present case below.

a) The covenant must be negative in substance and constitute a burden on the covenantor's land analogous to an easement.

28. The restrictions originally set out at section 3 of the 1981 Agreement and incorporated into the 1988 Agreement provides that 40 percent of the total development area for the Kanata

[19] P. 1, ClubLink Assumption Agreement, Exhibit "S" of the Adams-Wright October Affidavit., AR, Vol. III, Tab 2 at p. 787.
[20] See e.g. *2129152 Ontario Inc. v. Pliamm et al.*, 2017 ONSC 4451 at para. 57.
[21] See e.g. Victor Di Castri, *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2013, release 1), ch. 10 at pp. 10-4, 10-5; s. 119 of the *Land Titles Act*, R.S.O. 1990, C. L.5.

Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes.

29. This covenant meets the requirement of being negative in nature. To constitute a positive covenant, the agreement must do more than just restrict the use of the applicant's property; it must also require them to engage in positive acts in order to fulfill its terms. While some covenants may be expressed in positive language, when analyzed, they are really negative in nature.[22] Indeed, a covenant to maintain property as a garden free of buildings was found to be a negative covenant in the seminal case of *Tulk v. Moxhay*.[23] The Coalition submits that the covenant at issue in this case is similar and should be treated in the same way.

30. It must be acknowledged that covenants providing for the operation of a golf course have generally been deemed to be positive in nature.[24] The distinguishing factor in this case, however, is that the golf course is simply one of the means by which the 40% Principle can be respected. This can be contrasted with the situation in *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, where the B.C. Court of Appeal held that "*[i]f the first paragraph were interpreted to mean that Whitlam did not have to use the lands as a golf course, and could allow it to return to wilderness, the remaining paragraphs of the Agreement would be meaningless and unenforceable*."[25]

31. The opposite is true in this case: the 40% Principle is not dependent on the use of the lands as a golf course. Only section 5 of the 1981 Agreement specifically addresses the operation of a golf course. Other provisions in the Agreements refer only to the use of the land as open space for

[22] *4348037 Manitoba Ltd. v. 2804809 Manitoba Ltd.*, 2003 MBQB 123 at para. 12.
[23] *Supra* note1.
[24] See e.g. *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd*., 2009 BCCA 5.
[25] *Ibid.* at para. 18.

recreation and natural environmental purposes. Moreover, section 10 of the 1996 ClubLink Assumption Agreement confirms that, in the event the use of the golf course is terminated with the consent of the City, the lands shall be deemed to be and remain Open Space Lands.

32. The other question that arises under this prong is whether or not the purported covenant actually imposes a burden on the lands. More specifically, because subsections 5(4) and 5(5) of the 1981 Agreement contemplate a scenario whereby Campeau can develop the property irrespective of anything in the Agreement, is there actually a burden?

33. The Coalition submits that there is indeed a burden in the sense that there is a condition precedent requiring ClubLink to try to find another person to acquire or operate the golf course, give the City an opportunity to purchase the lands and have the City decline before this possibility even arises. This provides an important measure of protection to the benefited lands. The fact that this possibility exists does not undermine its status as a burden to the lands.

b) The covenant must be one that touches and concerns the land, i.e. it must be imposed for the benefit of or to enhance the value of the benefited land.

34. A restrictive covenant much touch and concern land.[26] The requirement that 40 percent of the Current Lands be maintained as open space for recreation and natural environmental purposes benefits and enhances the value of the remaining 60 percent of the lands.

35. It is well-established that the benefit and enhanced value of a covenant can be inferred. In one case, the B.C. Court of Appeal adopted as "*unassailable*" the conclusion of the trial judge that "*[t]he restrictive covenants and building schemes have practical benefits to the respondents […]. These benefits include increased privacy, low density housing, and the quality of life which flows*

[26] *Canada Safeway Ltd. v. Thompson (City)* (1996), 112 Man. R. (2d) 94 (Q.B.) at para. 27, *per* Clearwater J., aff'd (1997) 118 Man. R. (2d) 34 (C.A.).

from those two factors."[27]

36. In the case at bar, the intangible benefits from urban greenspace are well-documented and have an obvious impact on property values.[28] As was found by Justice MacLeod in the context of the Intervention Motion in this case, "*it is sufficient that the homeowners stand to lose the benefit of 40% green space which they believe was guaranteed. The impact on the nature and character of the neighbourhood if the development proceeds would obviously be profound*."[29]

c) The benefited as well as the burdened land must be defined with precision in the instrument creating the restrictive covenant.

37. For a restrictive covenant to be enforceable, the deed itself must so define the land to be benefited as to make it easily ascertainable.[30]

38. The 1988 Agreement provides that the 40% Principle applies to the Current Lands, for which the relevant legal descriptions are provided in Schedule "A".[31] Section 4 of the Agreement incorporates by reference the Concept Plan, which indicates the Open Space Lands and specifies where the lots would be. [32] The Open Space Lands are the burdened lands, while the remaining lands within the Current Lands are the benefited lands.

39. The preamble and section 3 of the 1988 Agreement also incorporate by reference the Subdivision Agreement registered on title as Instrument No. 568244.[33] The Subdivision Agreement describes the location of the subdivision surrounded by the Open Space Lands (the

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[27] *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 at paras. 23-25 (C.A.).
[28] Ramsay February Affidavit at paras. 8, 12-13, AR, Vol. VI, Tab 11 at p. 1776.
[29] 2019 ONSC 7470 at para. 16.
[30] *Dyer Estate v. Tozer* (2008), 78 R.P.R. (4th) 111 at para. 35, *per* Wood J. (Ont. S.C.J.), citing *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639 at p. 653.
[31] Schedule "A", 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit AR, Vol. I, Tab 2 at p. 308.
[32] Exhibit "C" of the Kennedy October Affidavit.
[33] Preamble, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, Vol. I, Tab 2 at pp. 303-04.

burdened lands).[34]

d) The conveyance or agreement should state the covenant is imposed on the covenantor's land for the protection of specified land of the covenantee.

40. In this case, section 7 of the 1988 Agreement expressly provides that it "*shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community*."[35] The preamble of 1988 Agreement referentially incorporates the definition of the "Marchwood Lakeside Community" as being that as set out in the 1981 Agreement at Schedule "A", without the excess lands included in the former agreement.

41. In other cases, terms referring to people such as "*not only for the residents of Itaska but for all members of the public*"[36] were held to be insufficiently precise to specify the land of the covenantee. In this case, the "Marchwood Lakeside Community" has been repeatedly defined as incorporating land, as opposed to people.

e) Unless the contrary is authorized by statute, the titles to both the benefited land and the burdened land are required to be registered.

42. Both the titles to the benefited and burdened lands are registered.[37]

43. It is also important to note that, while subsection 119(4) of the *Land Titles Act* does not require it,[38] the 1981 Agreement, 1988 Agreement and 1996 ClubLink Assumption Agreement are all registered on title of the burdened lands.[39] The 1981 and 1988 Agreements are also registered on title to the benefited lands. It is thus clear that it was the parties' intention to create an interest

[34] See Instrument No. 56844, Subdivision Agreement, Exhibit "H" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 266, 285-87.
[35] S. 7, 1988 Agreement, Exhibit "J" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at p. 307.
[36] *Thierman v. Itaska Beach (Summer Village),* 2002 ABQB 343 at paras. 22-24.
[37] Exhibits "B" to "E" of the Adams-Wright October Affidavit, AR, Vol. I, Tab 2 at pp. 29-61.
[38] S. 119(4), *Land Titles Act*, R.S.O. 1990, c. L.5.
[39] See e.g. Exhibit "V" of the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 869.

in land, i.e. a restrictive covenant, which binds and runs with the land.[40]

f) The covenantee must be a person other than the covenantor

44. In this case, the covenantor is Campeau/ClubLink. The covenantees are the eventual landowners of the Marchwood Lakeside Community.

45. In 1996, when the covenant was restated and registered by ClubLink, the covenantees were Imasco and the homeowners who had purchased lots within the Current Lands.

g) Conclusion

46. The Coalition submits that all of the requirements for a restrictive covenant are met, such that the Current Lands should be held to be subject to a restrictive covenant (the 40% Principle).

B. <u>The Restrictive Covenant Registered on Title in January 1997 is Valid and Enforceable</u>

i. Restrictive Covenant Relating to Grading

47. On the same day that the ClubLink Assumption Agreement was registered, ClubLink also registered a further list of covenants and restrictions it agreed would run with and bind the Golf Course Lands (referred to as the "Golf Lands" in the ClubLink Assumption Agreement).[41]

48. Schedule 1 to Schedule "B" describes the "Benefited Lands" to which the restrictive covenant is to attach.[42] The legal description of the properties in question confirm that they are largely the lots comprising the "Current Lands."

49. The additional covenants relate to the grading and storm water management facilities on

[40] See *Qureshi v. Gooch*, 2005 BCSC 1584 at para. 21, citing *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* (1988), 48 D.L.R. (4th) 175 at pp. 176-77, *per* McLachlin J.A. (as she then was) (B.C. C.A.).
[41] See Exhibit "R" to the Adams-Wright October Affidavit, AR, Vol. III, Tab 2 at p. 782.
[42] *Ibid*. at p. 786. Paragraph 3(ii) of Schedule "B" notes that the "Benefitted Lands" are the lands owned by Imasco that were primarily intended for residential development.

the Golf Course Lands. In particular, ClubLink agreed as follows:

> *3. Each and every part of the Golf Lands shall be subject to the following restrictions and covenants:*
>
> *(i) [ClubLink] agrees that:*
>
> *(a) it shall not alter the grading of the Golf Lands or any of the storm water management facilities on or serving the Golf Lands; and*
>
> *(b) there should be no construction of any buildings, structures or other improvements on the Golf Lands which may cause surface drainage from the Golf Lands to be discharged, obstructed or otherwise altered,*
>
> *in a manner that materially adversely affects [Imasco]'s or the City of Kanata's storm water management plan in respect of [Imasco's]Benefitted Lands as such plan exists as at November 1, 1996.* [Emphasis added]

ii. Validity and Enforceability of the Covenant

50. ClubLink has not advised of any basis upon which the above-listed covenant would not be valid and enforceable.

51. The Coalition seeks a declaration from this Honourable Court that section 3(i) of Schedule "B" of the instrument LT1020194 is valid and enforceable. The question of whether ClubLink's proposed development breaches this covenant is not before the Court and would need to be determined at a later time.

52. Instrument LT1020194 clearly complies with the requirements for a restrictive covenant: **1)** the restriction is both negative and a burden on the Golf Course Lands; **2)** the covenant touches and concerns land (dealing specifically with grading and stormwater management); **3)** the burdened lands are expressly identified in Box (6) of the Form 4 Document General and the benefited lands are legally described at Schedule 1 to Schedule "B"; **4)** section 1 of Schedule "B" expressly provides that the covenant is intended to benefit the Benefitted Lands; and **5)** the title to the Golf Course Lands is registered, and the covenantor (ClubLink) is a person other than the covenantee

(Imasco and the owners of the lots comprising the Benefitted Lands).

PART IV - ORDER SOUGHT

53. The Kanata Greenspace Protection Coalition requests that this Honourable Court:

i. Declare that the Current Lands are subject to a restrictive covenant requiring that 40 percent of the total development area for the Kanata Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes;

ii. Declare that the restrictive covenant set out at s. 3 of instrument LT1020194 remains valid and enforceable;

iii. Such further and other relief as counsel may advise and this Honourable Court may order.

February 11, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

CAZA SAIKALEY S.R.L./LLP

Alyssa Tomkins
Charles Daoust

SCHEDULE "A"

LIST OF AUTHORITIES

I. Case Law

1. *2129152 Ontario Inc. v Pliamm et al.*, 2017 ONSC 4451
2. *4348037 Manitoba Ltd. v. 2804809 Manitoba Ltd.*, 2003 MBQB 123
3. *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd*., 2009 BCCA 5
4. *Canada Safeway Ltd. v. Thompson (City)* (1996), 112 Man. R. (2d) 94 (Q.B.), aff'd (1997) 118 Man. R. (2d) 34 (C.A.)
5. *City of Ottawa v. Clublink Corporation ULC*, 2019 ONSC 7470
6. *Dyer Estate v. Tozer* (2008), 78 R.P.R. (4th) 111 (Ont. S.C.J.)
7. *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639
8. *Gubbels v. Anderson* (1995), 8 B.C.L.R. (3d) 193 (C.A.)
9. *Nylar Foods Ltd. v. Roman Catholic Episcopal Corp. of Prince Rupert* (1988), 48 D.L.R. (4th) 175 (B.C. C.A.).
10. *Qureshi v. Gooch*, 2005 BCSC 1584
11. *Thierman v. Itaska Beach (Summer Village),* 2002 ABQB 343
12. *Tulk v. Moxhay*, [1848] 41 E.R. 1143 (Eng. Ch. Div.)

II. Secondary Sources

1. Victor Di Castri, *Registration of Title to Land* (Toronto: Thomson Reuters, 1987) (loose-leaf updated 2013, release 1), ch. 10.

SCHEDULE "B"

STATUTES, REGULATIONS AND BY-LAWS

LAND TITLES ACT, R.S.O. 1990, C. L.5

CONDITIONS, RESTRICTIONS, COVENANTS, ETC.

Registration of conditions and restrictions, on application

119 (1) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a condition or restriction that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition or restriction running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (1).

Registration of conditions, restrictions and covenants, on transfer

(2) The land registrar may register as annexed to the land a condition, restriction or covenant that is included in a transfer of registered land that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other condition, restriction or covenant running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (2).

Registration of covenants, on application

(3) Upon the application of the owner of land that is being registered or of the registered owner of land, the land registrar may register as annexed to the land a covenant that the land or a specified part thereof is not to be built upon, or is to be or is not to be used in a particular manner, or any other covenant running with or capable of being legally annexed to land. R.S.O. 1990, c. L.5, s. 119 (3).

Idem

(4) A covenant shall not be registered under subsection (3) unless,

(a) the covenantor is the owner of the land to be burdened by the covenant;

(b) the covenantee is a person other than the covenantor;

(c) the covenantee owns land to be benefitted by the covenant and that land is mentioned in the covenant; and

(d) the covenantor signs the application to assume the burden of the covenant. R.S.O. 1990, c. L.5, s. 119 (4).

Notice and modification or discharge of covenants

(5) The first owner and every transferee, and every other person deriving title from the first owner, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant. R.S.O. 1990, c. L.5, s. 119 (5).

Covenants or conditions running with land

(6) The entry on the register of a condition or covenant as running with or annexed to land does not make it run with the land, if such covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land. R.S.O. 1990, c. L.5, s. 119 (6).

Subsequent transfers

(7) Where a condition or covenant has been entered on the register as annexed to or running with land and a similar condition is contained in a subsequent transfer or a similar covenant is in express terms entered into with the owner of the land by a subsequent transferee, or vice versa, it is not necessary to repeat the condition or covenant on the register or to refer thereto, but the land registrar may, upon a special application, enter the condition or covenant either in addition to or in lieu of the condition or covenant first mentioned. R.S.O. 1990, c. L.5, s. 119 (7).

Removal of entry of condition or covenant from register

(8) Where a condition or covenant has been entered on the register as annexed to or running with land for a fixed period and the period has expired, the land registrar may, at any time after ten years from the expiration of the period, remove the entry from the register. R.S.O. 1990, c. L.5, s. 119 (8).

Condition, etc., expires after 40 years

(9) Where a condition, restriction or covenant has been registered as annexed to or running with the land and no period or date was fixed for its expiry, the condition, restriction or covenant is deemed to have expired forty years after the condition, restriction or covenant was registered, and may be deleted from the register by the land registrar. R.S.O. 1990, c. L.5, s. 119 (9).

Effect of conditions and restrictions

(10) Where a condition or restriction has been registered as annexed to land, the condition or restriction is as binding upon any person who becomes the registered owner of the land or a part thereof as if the condition or restriction had been in the form of a covenant entered into by the person who was the registered owner of the land at the time of the registration of the condition or restriction. R.S.O. 1990, c. L.5, s. 119 (10).

Exceptions

(11) The following provisions do not apply to a covenant or easement established under the *Agricultural Research Institute of Ontario Act*:

1. Clause (4) (c).

2. The rule with respect to modification and discharge of covenants in subsection (5). 1994, c. 27, s. 7.

Same

(12) The following provisions do not apply to a covenant or easement entered into or granted under the *Conservation Land Act* or under clause 10 (1) (c) or section 37 of the *Ontario Heritage Act*:

1. Clause (4) (c).

2. The rule with respect to modification and discharge of covenants in subsection (5).

3. Subsection (9). 2006, c. 23, s. 33; 2009, c. 33, Sched. 11, s. 4.

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF THE INTERVENOR

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Kanata Greenspace Protection Coalition

This is Exhibit "O" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

FACTUM OF CLUBLINK CORPORATION ULC

February 18, 2020

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Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

FACTUM OF CLUBLINK CORPORATION ULC

PART I - INTRODUCTION

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

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

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

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

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

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

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

PART II - SUMMARY OF FACTS

(i) Campeau's Development Proposal

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

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

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

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

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

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

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

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

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

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

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

(ii) Kanata Lobbies Region for Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The 40% Agreement

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

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

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

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

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

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

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

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

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

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

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

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

(iv) ClubLink Acquires the Golf Course

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

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

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

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

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

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

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

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

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

(v) Declining Popularity of the Golf Club

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

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

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

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

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

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

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

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

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

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

(vi) ClubLink Explores Redevelopment Options

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

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

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

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

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

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

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

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

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

(vii) The Proposed Redevelopment

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

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

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

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

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

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

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

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

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

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

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

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

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

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

(i) The Perpetuities Act Applies to Interests in Land

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Coalition Factum, at para. 43

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Health and Safety Power Not Applicable

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Municipalities Cannot Exercise Planning Discretion for Consideration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART IV - ORDER REQUESTED

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

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

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John Carlo Mastrangelo / Mark R. Flowers

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SCHEDULE "A"

LIST OF AUTHORITIES

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

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

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

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

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

6. *Re, Metcalfe*, 1972 CarswellOnt 396

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Possibility of vesting beyond period

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

Presumption of validity and "Wait and See"

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

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

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

Measurement of perpetuity period

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

Idem

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

Idem

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

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

Powers of a natural person

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

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

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

Section 208 reproduced in ClubLink's Brief of Authorities

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

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

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

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

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

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

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

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

FACTUM OF CLUBLINK CORPORATION ULC

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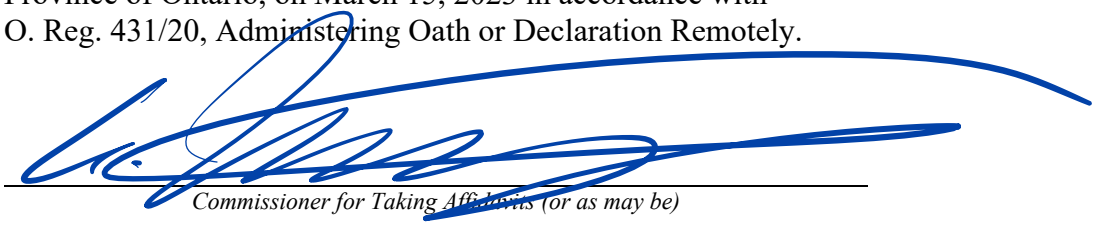
This is Exhibit "P" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondents

and

KANATA GREENSPACE PROTECTION COALITION

Intervenor

REPLY FACTUM OF THE APPLICANT, CITY OF OTTAWA

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Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondents

and

KANATA GREENSPACE PROTECTION COALITION

Intervener

REPLY FACTUM OF THE APPLICANT

PART I - STATEMENT OF LAW & AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART II – ORDER REQUESTED

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

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

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

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SCHEDULE "A"

LIST OF AUTHORITIES

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

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Municipal Act, RSO 1980, c 302

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

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

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

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

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

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

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

[...]

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

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

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

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

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

36(6) Every municipality and the Minister may enter into agreements imposed as a condition to the approval of a plan of subdivision and any such agreement may be registered against the land to which it applies and the municipality or the Minister, as the case may be, shall be entitled to enforce the provisions thereof against the owner and, subject to the provisions of the *Registry Act* and the *Land Titles Act*, any and all subsequent owners of the land.

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

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

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

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

CITY OF OTTAWA	and	CLUBLINK CORPORATION ULC	and	KANATA GREENSPACE PROTECTION COALITION
Applicant		Respondent		Intervener

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Ottawa

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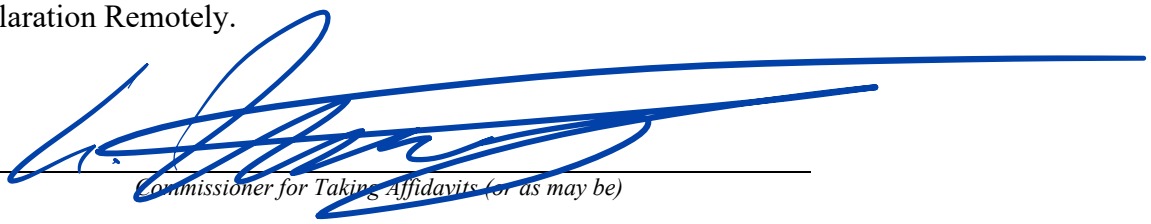
This is Exhibit "Q" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

- and -

CLUBLINK CORPORATION ULC

Respondent

- and -

KANATA GREENSPACE PROTECTION COALITION

Intervenor

REPLY OF THE INTERVENOR KANATA GREENSPACE PROTECTION COALITION

February 21, 2020

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A. Introduction

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

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

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

B. ClubLink Mischaracterizes the 1981 and 1988 Agreements

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

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

the golf course – not the 1981 Agreement.

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

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

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

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

C. The Agreements Were within the City's Jurisdiction

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

D. The City Did Not Fetter its Discretion

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

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

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

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

E. The Restrictive Covenant Can Exist Independently from the Golf Course Provisions

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

i. Severance is appropriate in this case

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

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

ii. Severance keeps the bargain intact

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

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

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

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

F. Conclusion

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

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

February 21, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

CAZA SAIKALEY S.R.L./LLP

Alyssa Tomkins
Charles Daoust

SCHEDULE "A"

LIST OF AUTHORITIES

I. Case Law

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

CITY OF OTTAWA
Applicant

- and -

CLUBLINK CORPORATION ULC
Respondent

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

REPLY OF THE INTERVENOR

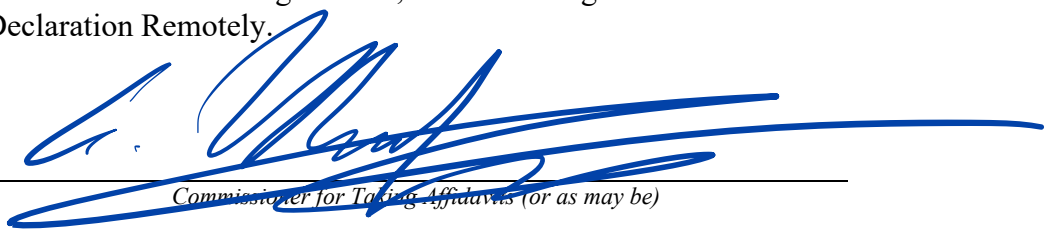
CAZA SAIKALEY S.R.L./LLP
Lawyers | Avocats
350-220 Laurier West
Ottawa, ON K1P 5Z9

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

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

Lawyer for the Intervenor,
Kanata Greenspace Protection Coalition

This is Exhibit “R” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant/
Responding Party on Motion

- and -

CLUBLINK CORPORATION ULC

Respondent/
Responding Party on Motion

- and -

KANATA GREENSPACE PROTECTION COALITION

Proposed Intervenor

AFFIDAVIT OF BARBARA RAMSAY

I, **BARBARA RAMSAY**, OF THE CITY OF OTTAWA, IN THE PROVINCE OF ONTARIO, MAKE OATH AND SAY, AS FOLLOWS:

1. I am Chair of the Board of the Kanata Greenspace Protection Coalition ("**Coalition**"). As such, I have knowledge of the matters contained in this affidavit.

PROCEDURAL HISTORY

2. On October 25, 2019, Applicant City of Ottawa ("**City**") filed a Notice of Application seeking, *inter alia*, a determination on the validity and enforceability of an agreement dated May 26, 1981 and its subsequent amendments between the City and the owner of the Golf

Course Lands, as defined in the City's Application (title to which is currently held by Respondent ClubLink Corporation ULC ("**ClubLink**"), stipulating that 40 percent of the Lands be reserved for open space dedicated to recreation and natural environment purposes ("**40% Agreement**").

3. ClubLink wishes to discontinue the current operation of the golf course and intends to redevelop the Golf Course Lands with homes, roads and water retention lagoons.

4. Particularly important to the Coalition is section 7 of the Notice of an Agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata, marked as Exhibit "J" of the Affidavit of Eileen-Adams Wright sworn October 24, 2019 submitted as part of the City's Application Record. Section 7 reads as follows:

> **7.** It is hereby agreed that the Forty Percent Agreement and this Agreement shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community.

5. The Coalition represents the interests and/or rights of the community members and homeowners who make up what was known as the Kanata Marchwood Lakeside Community, including those who live in the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court. Marked as Exhibit "C" to the Affidavit of Donald Kennedy sworn October 25, 2019 included in the City's Application Record, are maps detailing the Kanata Marchwood Lakeside Community as encompassing these neighbourhoods.

6. The Coalition also represents the interests and/or rights of community members and homeowners whose homes are adjacent to and in the vicinity of the Golf Course Lands, as well as those who live in proximity to the Golf Course Lands and who derive enjoyment and other benefits therefrom.

MY BACKGROUND, MY HOME AND GREENSPACE IN KANATA LAKES

7. By way of background, I retired in early 2018 following a 40-year career as a community pharmacist. For over 19 years, I owned and operated four (4) pharmacy franchises in the Ottawa area. I have also had the opportunity to contribute to the broader community by

taking on leadership roles with organizations such as the Distress Centre, United Way, CHEO and Hospice Care Ottawa. I also served on several public boards, including that of the Ottawa Board of Trade and the Ottawa Hospital.

8. My husband and I moved to Kanata in 2010 in order to be closer to our adult children who have settled in the West end of Ottawa. Our home in Kanata Lakes was specifically chosen because of its direct access and view to the open greenspace of the Golf Course Lands. We paid a premium for this location and understood upon purchasing the property that this open space was protected by the 40% Agreement.

9. Both my husband and I appreciate and enjoy the natural environment which is integrated throughout the neighbourhood. The benefits of urban greenspaces are well-documented and I believe they provide important health benefits.

CLUBLINK'S PLANS FOR REDEVELOPMENT AND COMMUNITY REACTION

10. The catalyst for my involvement in this cause occurred in mid-December 2018, when there were media reports that ClubLink, the owner and operator of the Golf Course Lands, was planning to redevelop the Lands in concert with their Ottawa collaborators, Richcraft Homes and Minto Communities.

11. ClubLink's redevelopment announcement was met with overwhelming opposition and concern among members of the surrounding community.

12. Along with the potential loss of the intangible benefits set out above, concerns were raised about property values.

13. Geoff McGowan has informed me, and I verily believe to be true, that based on his experience, the redevelopment of the Golf Course Lands into homes, paved roads and water retention lagoons will have an adverse impact on the value of the homes in the vicinity. Mr. McGowan has been a licensed realtor for 35 years, ten (10) of them as the owner/operator of a multi-office Re/MAX franchise with 80 realtors.

14. On December 16, 2018, in response to ClubLink's announcement, the Kanata Beaverbrook Community Association ("**KBCA**") and the Kanata Lakes Community Association

("**KLCA**") created the Kanata Lakes Golf Club ("**KLGC**") Greenspace Facebook page in order to promote and support community dialogue, and express our grave concerns regarding the fate of our beloved green and open space.

15. In addition to the 4500 households and approximately 100 members of the KLCA and the 2500 households and 650 members of the KBCA, four (4) other smaller community associations from the Kanata Lakes area rallied to the KLGC Greenspace cause: 1) Country Club Estates Association; 2) Catherwood Court Homeowners' Association; 3) Nelford Court Homeowners' Association; and 4) Co-operative Condominium Association CCC575.

16. In January 2019, we became more organized. The associations formed the Kanata Greenspace Steering Committee ("**KGSC**"), which would operate as a sub-committee of the KBCA. In June 2019, the KGSC elected to move forward with the creation of a not-for-profit corporation in order to ensure it had the necessary authority to act in the interests of the community members and homeowners, and to assure its volunteers that it was able to acquire and provide adequate insurance for the activities the KGSC undertook.

17. The Kanata Greenspace Protection Coalition was incorporated on July 11, 2019 with a Board of seven (7) members with limited and staggered terms of office: 1) myself as Chair; 2) Geoff McGowan as President; 3) Peter Chapman as Treasurer; and 4) Kevin McCarthy, David McNairn, Greg Sim and Tom Thompson as Members-at-Large. The remaining members of the KGSC formed a Leadership Committee to support the Board with the management of key sub-committees, such as those dedicated to communications and event-planning. Attached hereto and marked as **Exhibit 1** to this Affidavit are letters of confidence signed by the representatives of the KBCA, the Country Club Estates Co-Tenancy Committee, the Nelford Homeowners' Services Association and the Ottawa-Carleton Condominium Corporation (CCC575).

18. Officially, the Coalition's purpose is to "preserve and protect Kanata's greenspaces and promote the value of its natural environment". Attached as **Exhibit 2** is a copy of the Coalition's Certificate of Incorporation dated July 11, 2019.

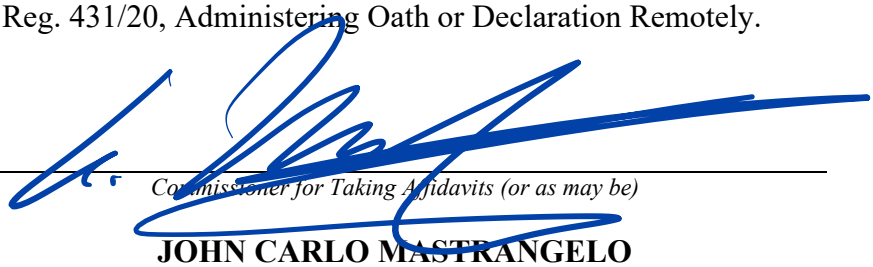
SWORN BEFORE ME at the City of Ottawa, this 10th day of February, 2020

Commissioner for taking Affidavits, etc.

BARBARA RAMSAY

Geneviève Therrien,
a Commissioner, etc., Province of Ontario, for Caza Saikaley s.r.l./LLP, Barristers and Solicitors.
Expires October 22, 2022.

This is Exhibit “S” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

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."

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[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

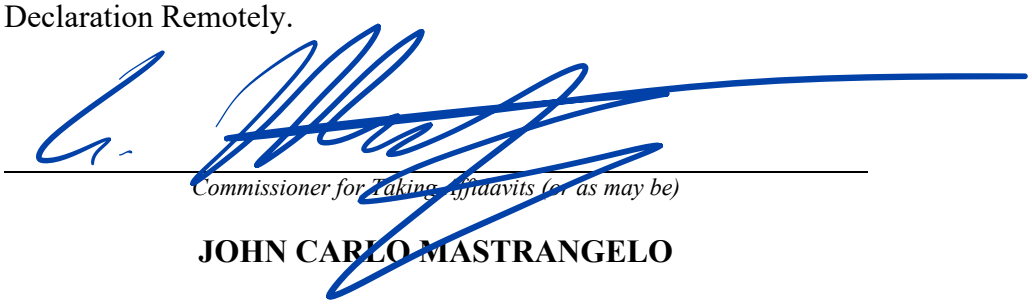
Intervener

REASONS FOR DECISION

Labrosse J.

Released: February 19, 2021

This is Exhibit "T" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 19TH
	)	
JUSTICE MARC LABROSSE	)	DAY OF FEBRUARY, 2021

B E T W E E N:

(Court Seal)

Electronically issued:
Délivré par voie électronique
Ottawa

CITY OF OTTAWA

Applicant

and

CLUBLINK CORPORATION ULC

Respondent

and

KANATA GREENSPACE PROTECTION COALITION

Intervener

JUDGMENT

THIS APPLICATION was made by the Applicant for declaratory and other relief set out in the Notice of Application, dated October 25, 2019, including:

(a) a declaration that the obligations of ClubLink Corporation ULC ("ClubLink") in: (i) s. 3 of an agreement between ClubLink, the City of Kanata and Imasco Enterprises Inc., dated November 1, 1996 (the "ClubLink Assumption Agreement") and (ii) the underlying "40% Agreement", consisting of contracts between Campeau Corporation and the City of Kanata, dated May 26, 1981 (the "1981 Agreement") and December 20, 1988 (the "1988 Agreement"), remain valid and enforceable;

(b) an order that, within 21 days, ClubLink must either: 1) withdraw its Zoning By-law Amendment application and Plan of Subdivision application received by the City of

Ottawa on October 8, 2019, or; 2) offer to convey the lands described at Appendix A to the Notice of Application (the "Golf Course Lands") to the City of Ottawa at no cost; and

(c) a declaration that pursuant to ss. 7 and 9 of the 1981 Agreement and ss. 10 & 11 of the ClubLink Assumption Agreement, if the City of Ottawa accepts a conveyance of the Golf Course Lands, it is not thereafter obliged to reconvey the Golf Course Lands to ClubLink so long as it uses the Golf Course Lands as open space for recreation and natural environmental purposes, irrespective of whether it continues operation of the golf course.

THIS APPLICATION was heard on July 13-15, 2020 by videoconference.

ON READING the application record, the factums and the books of authorities of the parties, and on hearing the submissions of the lawyer(s) for the parties,

1. **THIS COURT ORDERS AND ADJUDGES** that the application is granted in part.

2. **THIS COURT DECLARES** that the 1981 Agreement continues to be a valid and binding contract, and the obligations of ClubLink in the 40% Agreement remain valid and enforceable.

3. **THIS COURT DECLARES** that while the City of Ottawa ("City") is required by s. 5(4) of the 1981 Agreement to operate a golf course or cause a golf course to be operated on the Golf Course Lands, it is not required to 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.

4. **THIS COURT DISMISSES** the application for an order that within 21 days ClubLink must either: 1) withdraw its Zoning By-law Amendment application and Plan of Subdivision application received by the City of Ottawa on October 8, 2019, or; 2) offer to convey the Golf Course Lands to the City of Ottawa at no cost.

ENTERED AT OTTAWA
INSCRIT A OTTAWA
ON/LE 8 April, 2021
DOCUMENT # 0411
IN BOOK NO. 73-13
AU REGISTRE NO. 73-13

(Signature of judge, officer or registrar)

CITY OF OTTAWA
Applicant

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

JUDGMENT

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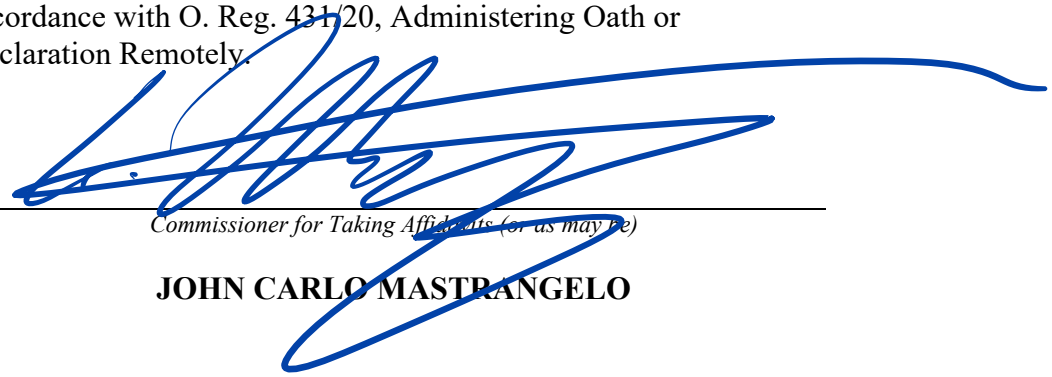
Lawyers for the Respondent

This is Exhibit "U" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

COURT OF APPEAL FOR ONTARIO

CITATION: Ottawa (City) v. ClubLink Corporation ULC, 2021 ONCA 847
DATE: 20211126
DOCKET: C69176

Juriansz, Tulloch and Roberts JJ.A.

BETWEEN

City of Ottawa

Applicant
(Respondent on Appeal)

and

ClubLink Corporation ULC

Respondent
(Appellant)

and

Kanata Greenspace Protection Coalition

Intervener

Matthew P. Gottlieb, James Renihan, Mark R. Flowers and John Carlo Mastrangelo, for the appellant

Kirsten Crain, Emma Blanchard, Kara Takagi and Tamara Boro, for the respondent

Heard: June 17, 2021 by video conference

On appeal from the judgment of Justice Marc R. Labrosse of the Superior Court of Justice, dated February 19, 2021, with reasons reported at 2021 ONSC 1298.

L.B. Roberts J.A.:

A. OVERVIEW

[1] This appeal involves the application of the rule against perpetuities. At its core, this appeal turns on whether the contractual terms in issue create an interest in land or a mere contractual right to acquire property.

[2] The rule against perpetuities is not controversial. Of ancient origin, the rule arises out of the public policy against the fettering of real property with future interests dependent upon unduly remote contingencies. It applies to extinguish an interest in land if the interest does not vest within 21 years. The rule does not apply to a contractual right that does not create an interest in land. It serves only to invalidate contingent interests in land that vest too remotely. See: *Canadian Long Island Petroleums Ltd. et al. v. Irving Industries Ltd.*, [1975] 2 S.C.R. 715, at pp. 726-27, 732-33; *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641 at para. 20; *London and South Western Railway Co. v. Gomm* (1882), 20 CH. D. 562 (C.A.), at pp. 580-82.

[3] In January 1997, the appellant, ClubLink Corporation ULC ("ClubLink"), acquired property subject to various historical land development agreements affecting its use, which were made in 1981, 1985, and 1988 between Campeau Corporation ("Campeau") and the former City of Kanata ("Kanata") ("the Agreements"). ClubLink assumed the former owners' rights and obligations under the Agreements ("the Assumption Agreement"). In issue are the provisions contained in ss. 5(4) and 9 of the agreement entered into on May 26, 1981 ("the

1981 Agreement") that: Campeau, or its successors and assigns, must operate a golf course on the property in perpetuity ("the golf course lands"), failing which, the golf course lands are to be conveyed at no cost to Kanata, now part of the respondent, the City of Ottawa ("the City"); and, if the golf course lands are conveyed, the City is obliged to continue using the golf course lands for recreation or natural environmental purposes, failing which, they are to be reconveyed to Campeau.

[4] ClubLink has operated the golf course for over 24 years. Due to declining membership, ClubLink started exploring the possibility of developing the golf course lands for residential and open space purposes. To that end, in October 2019, ClubLink submitted planning applications for a zoning by-law amendment and approval of a plan of subdivision and publicly accessible green space on the golf course lands.

[5] The City brought an application for an order requiring ClubLink to withdraw its applications; alternatively, it claimed that ClubLink's applications triggered its right to demand conveyance of the golf course lands and it sought conveyance of the golf course lands to the City at no cost. The City requested a declaration that ClubLink's obligations remain valid and enforceable. It also sought a declaration that if the golf course lands were conveyed to the City, the City would not be required to reconvey the golf course lands if it ceased to operate them as a golf

course, so long as it used the golf course lands for recreation and natural environmental purposes.

[6] ClubLink resisted the City's application because the City's right to call on a conveyance had not vested within the 21 years following the 1981 Agreement. Therefore, ClubLink argues, the provisions requiring the operation of a golf course in perpetuity are void as contrary to the rule against perpetuities.

[7] The application judge interpreted the 1981 Agreement and allowed the City's application in part. Importantly, he determined that the parties did not intend to create an interest in land because they never intended for the conveyances to materialize. He declared that the 1981 Agreement continues to be a valid and binding contract and that ClubLink's obligations remain enforceable. ClubLink is therefore required to operate the golf course in perpetuity or convey the golf course lands to the City if it ceases to do so. However, he declared that in the event the golf course lands were conveyed to the City, the City is not required to operate the golf course in perpetuity so long as it uses the lands for recreation and natural environmental purposes. The application judge dismissed the City's application for an order requiring ClubLink to withdraw its zoning bylaw amendment and plan of subdivision applications or alternatively to offer to convey the golf course lands to the City at no cost.

Issues and the Parties' Positions

[8] ClubLink submits that the application judge made several reversible errors. In my view, ClubLink's first argument that the application judge erred in finding that ss. 5(4) and 9 of the 1981 Agreement are not void for perpetuities disposes of the appeal. It is therefore not necessary to consider the other issues.

[9] ClubLink submits that in determining whether the parties to the 1981 Agreement intended to create a contingent interest in land, the application judge made extricable errors of law. It argues the application judge erred in three principal ways. First, he did not correctly consider the parties' intentions as set out in ss. 5(4) and 9 of the 1981 Agreement. Second, he did not interpret the 1981 Agreement in light of the agreement dated December 20, 1988 ("the December 20, 1988 Agreement"), which expressly states that the 1981 Agreement runs with the land. Third, he did not apply binding jurisprudence that suggests control over exercise of the option and the expectation that the contingent interest holder will acquire the land are not determinative of whether the parties intended to create an interest in land.

[10] The City submits that the application judge made no reversible errors in his analysis: he properly focused on the parties' intentions, considering "control" over the conveyance as only one factor, and correctly determined that the intent of the 1981 Agreement was to ensure that 40% of the parcel of land that the original

owner wished to develop would be set aside in perpetuity as open space for recreation and natural environmental purposes ("the 40% principle"). Further, while he referred to subsequent agreements, he correctly identified the limits of using post-contractual conduct in contractual interpretation. As a result, the City argues, the application judge correctly found ss. 5(4) and 9 serve as mere contractual mechanisms for safeguarding the 40% principle and do not create interests in land.

[11] For the reasons that follow, I agree with ClubLink that the application judge erred in his analysis of ss. 5(4) and 9 of the 1981 Agreement. Specifically, the application judge erred in his determination that because the parties never intended the rights to the conveyances to "crystallize", there was no intention to create an interest in land. In my view, when the correct legal principles are applied, in the context of all the Agreements, the plain language of ss. 5(4) and 9 creates a contingent interest in land. Sections 5(4) and 9 are therefore void and unenforceable as being contrary to the rule against perpetuities because the City's right to call upon a conveyance of the golf course lands did not vest during the perpetuity period. I would therefore allow the appeal.

B. ANALYSIS

[12] This case is about contractual interpretation and the application of the rule against perpetuities. As such, the application judge was required to consider the factual matrix to "deepen [his] understanding of the mutual and objective intentions

of the parties as expressed in the words of the contract": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57.

[13] Accordingly, I start my review of the application judge's decision with a summary of the factual matrix that the application judge considered and that is not in dispute. I shall then analyze the application judge's decision in light of the determinative issues on this appeal.

(i) The Agreements and Factual Matrix

[14] In 1981, Campeau applied to the then Regional Municipality of Ottawa-Carleton ("the Region") to amend its Official Plan to permit the development of a property described as the "Marchwood Lakeside Community" in Kanata. Campeau proposed to designate approximately 40% of the development area as recreation and open space.

[15] To that end, Campeau and Kanata entered into the 1981 Agreement, which was registered on title to the property under development. The key provisions respecting the uses that can be made of the property for the purpose of this appeal are contained in ss. 3, 5, and 9.

[16] Section 3 sets out the provisions enshrining the 40% principle and the particular uses that can be made of the open space areas, as follows:

> 3. Campeau hereby confirms the principle stated in its proposal that approximately forty (40%) percent of the total development area of the 'Marchwood Lakeside

> Community' shall be left as open space for recreation and natural environmental purposes which areas consist of the following:
>
> (a) the proposed 18-hole golf course
>
> (b) the storm water management area
>
> (c) the natural environmental areas
>
> (d) lands to be dedicated for park purposes.
>
> [Emphasis added.]

[17] Under the title, "Methods of Protection", s. 5 prescribes the use in perpetuity of the land to be provided for the golf course:

> 5. (1) Campeau covenants and agrees that the land to be provided for the golf course shall be determined in a manner mutually satisfactory to the parties and subject to sub-paragraphs 2 and 3 shall be operated by Campeau as a golf course in perpetuity provided that Campeau shall at all times be permitted to assign the management of the golf course without prior approval of Kanata.
>
> (2) Notwithstanding sub-paragraph (1), Campeau may sell the golf course (including lands and buildings) provided the new owners enter into an agreement with Kanata providing for the operation of the golf course in perpetuity, upon the same terms and conditions as contained herein.
>
> (3) In the event Campeau has received an offer for sale of the golf course it shall give Kanata the right of first refusal on the same terms and conditions as the offer for a period of twenty-one (21) days.
>
> (4) In 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 and if Kanata accepts the conveyance, Kanata

> shall operate or cause to be operated the land as a golf course subject to the provisions of paragraph 9.
>
> (5) In the event Kanata will not accept the conveyance of the golf course as provided for in sub-paragraph (4) above then Campeau shall have the right to apply for development of the golf course lands in accordance with The Planning Act, notwithstanding anything to the contrary contained in this agreement.
>
> [Emphasis added.]

[18] Section 9 provides for the circumstances under which Kanata would be required to reconvey the land to Campeau at no cost:

> 9. In the event that any of the land set aside for open space for recreation and natural environmental purposes ceases to be used for recreation and natural environmental purposes by Kanata then the owner of the land, if it is Kanata, shall reconvey it to Campeau at no cost unless the land was conveyed to Kanata as in accordance with Section 33(5)(a) or 35b [*sic*] of The Planning Act. [Emphasis added.]

[19] Sections 4 and 10 expressly contemplate that further agreements concerning specific open space areas may be required to designate the golf course lands and to implement the agreed upon 40% principle.

[20] Section 12 stipulates that the 1981 Agreement "shall be registered against the lands".

[21] By agreements dated June 10, 1985 and December 29, 1988, both of which were registered on title, Campeau and Kanata defined the improvements and, in particular, the size, precise location, and required safety measures for the golf

course. Both agreements contain provisions providing that the agreement shall extend to, be binding upon and enure to the benefit of Campeau and Kanata and their successors and assigns.

[22] Finally, in the December 20, 1988 Agreement, which was registered on title, Campeau and Kanata amended the 1981 Agreement to provide that the 1981 and December 20, 1988 Agreements would apply only to the "Current Lands" as designated in the Schedules to the December 20, 1988 Agreement, including the golf course lands.

[23] Section 7 of the December 20, 1988 Agreement stipulates that the 1981 and 1988 Agreements "shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community" (emphasis added).

[24] On March 30, 1989, Campeau transferred the land to Genstar Development Company Eastern Ltd. ("Genstar"). Genstar assumed all of Campeau's rights and obligations under the Agreements.

[25] Genstar, which later amalgamated with Imasco Enterprises Inc., and ClubLink entered into an asset purchase agreement dated August 6, 1996 by which, among other things, ClubLink agreed to purchase the golf course lands. On January 8, 1997, Imasco transferred the property to ClubLink.

[26] Under s. 3 of the Assumption Agreement, dated November 1, 1996, ClubLink agreed that all of its predecessors' assumed liabilities and obligations under the Agreements would "apply to and bind [ClubLink] in the same manner and to the same effect as if [ClubLink] had executed the same in the place and stead of Campeau or Imasco."

[27] Section 11 of the Assumption Agreement stipulates as follows:

> The parties to this Agreement acknowledge and agree that nothing in this Agreement alters the manner in which approximately 40% of the total development area of the "Marchwood Lakeside Community" is to be left as open space for recreation and natural environmental purposes (the "Open Space Lands") as referred to in Section 3 of the 1981 Agreement, so that the calculation of the Open Space Lands will continue to include the area of the Golf Course Lands including, without limitation, any area occupied by any building or other facility ancillary to the golf course and country club located now or in the future on the Golf Course Lands. 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. [Emphasis added.]

[28] On January 1, 2001, by operation of the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sched. E, twelve municipalities, including Kanata and the Region, were dissolved and the City of Ottawa was constituted. As a result, the City stands in the place of Kanata. All of Kanata's assets and liabilities, including all rights, interests, entitlements, and contractual benefits and obligations under the

Agreements and the Assumption Agreement, became the assets and liabilities of the City: *City of Ottawa Act*, s. 5(3)(b).

(ii) Interpretation of the 1981 Agreement

Standard of Review

[29] It is common ground that the application judge's interpretation of the Agreements attracts a deferential standard of appellate review: *Sattva,* at paras. 50-52. Contractual interpretation is a question of mixed fact and law requiring the application of principles of contractual interpretation to the words of a contract and its factual matrix: *Sattva*, at para. 50. Absent an extricable question of law, which courts should be cautious in identifying, or palpable and overriding error, appellate intervention is not warranted: *Sattva*, at paras. 53-54.

[30] An extricable question of law includes a legal error made in the course of contractual interpretation such as the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor: *Sattva*, at para. 53.

[31] Respectfully, I am of the view that the application judge made an extricable error of law in his interpretation of ss. 5(4) and 9 of the 1981 Agreement. As I shall explain, it was an extricable error of law to conclude that contracting parties must intend a contingent interest in land to materialize in order to create a contingent interest in land.

The Application Judge's Interpretation of the 1981 Agreement

[32] According to the application judge, ss. 5(4) and 9 were intended only as "off ramps" that served as "safeguards which preserve the true intent of maintaining the 40% principle". The "true intent of the 1981 Agreement", according to the application judge, "does not involve Kanata ever becoming the owner of the Golf Course (lands and buildings)." The application judge explained that, as the parties never expected, nor intended for, the interest in land to "crystallize", they had no intention to create an interest in land. Sections 5(4) and 9 were mere contractual provisions. The application judge summarized his conclusions at para. 104 of his reasons, as follows:

> • 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....
>
> [Emphasis in original.]

[33] Respectfully, the application judge erred in using the expectation that a contingency would materialize as a factor to distinguish between an intent to create an interest in land and a contractual right. As earlier noted, the rule against perpetuities applies only to *contingent* interests in land that vest too remotely. Whether the *contingent* interest in ss. 5(4) and 9 was intended to materialize is not the question; it is the nature of all contingent interests that they may never materialize. Moreover, the lack of control over the triggering of the conveyances does no more here than emphasize the contingent nature of the interests in issue.

[34] The governing case law establishes that a contingent interest in land can be created without the intention that it will one day "crystallize" and that control over the triggering event is not determinative.

[35] In *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,[1] and *Jain v. Nepean (City)* (1992), 9 O.R. (3d) 11 (C.A.), leave to appeal refused, [1992] S.C.C.A. No. 473, three decisions that are factually similar to the present case, the

---

[1] Some have argued that there are inconsistencies between *Canadian Long Island Petroleums*, *Halifax*, and *Weinblatt*: Paul M. Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interest in Land" (1991) 70:1 Can. Bar. Rev. 1. However, this court in *Jain* largely resolved these issues and found that the holdings in *Halifax* and *Weinblatt* are still good law despite the reasoning in *Canadian Long Island Petroleums:* see *Jain*, at p. 19.

courts found an interest in land even though there was no expectation that the interest would "crystallize". Like here, the contractual provisions in issue allowed the municipalities to control development and were not intended to ensure the land would one day be conveyed to the municipalities. In all three cases, the conveyance of the properties to the municipalities was contingent on the owners failing to fulfil their core contractual obligations. As here, the owners' default, which triggered the right to conveyance, was not in the interest holders' control. While the rule against perpetuities was not found to be infringed in these cases, they establish that an expectation that the interest will "crystallize" is not required to create an interest in land.

[36] In *Halifax*, the Supreme Court interpreted an agreement between the City of Halifax and the Maritime Telegraph and Telephone Company. The latter made certain covenants, which were later assumed by Vaughan Construction Company Limited upon purchasing the property, to either build within a reasonable time or reconvey the property for a specific sum if it decided not to build. The deed provided that the covenant would run with the lands until the construction of the building. The court affirmed that the City of Halifax held an equitable interest even though it was not the holder of an option that it could exercise at any time. Importantly, the court held that Vaughan had no uncontrolled right to determine whether it would reconvey; unless it complied with the building covenants within a reasonable time, the City of Halifax could have enforced a reconveyance.

Therefore, the City of Halifax had an interest in the land because the construction company could not prevent the exercise of the City of Halifax's right under the covenant by doing nothing; they had to build the building or reconvey the property.

[37] Similarly, in *Weinblatt*, the parties entered into an agreement that provided for the reconveyance of property to the City of Kitchener for the purchase price if the purchaser failed to commence construction of a seven-story building within a specified period. The builder applied to construct a two-story building instead but was refused. Weinblatt then purchased the property from the builder but his proposal to erect a building was also not in conformity with the agreement and was likewise rejected. The City of Kitchener's claim for reconveyance of the property was successful. The court held that the City of Kitchener had a contingent interest in property that ran with the land because the covenant provided that Weinblatt had to meet the building conditions under the agreement or reconvey the property.

[38] Finally, this court's decision in *Jain* is apposite. In issue was the interpretation of a contract that contained a condition, which was included in the deed, designed to ensure development: the City of Nepean would be entitled to repurchase the property for a particular amount if Jain did not start constructing a building of a specific size within 12 months of registration of the transfer. The court found the City of Nepean had an equitable interest in the land that always existed even though the right of reconveyance was contingent on the default of the

development conditions. In this case, the mortgagee took its interest with notice of the City's equitable interest in the property.

[39] The application judge adverted to *Halifax*, *Weinblatt*, and *Jain* in his review of relevant case law but only as examples of "[t]he more traditional circumstances where a right to repurchase has been found to create a contingent interest in land". These decisions, in which the circumstances are almost identical to those of the present case, found an interest in land arose notwithstanding the absence of an expectation that the right to the reconveyance would crystallize and the lack of the municipalities' control over triggering the reconveyance. The trial judge's conclusion that there was no contingent interest in land because there was no expectation the right to the reconveyance would crystallize constitutes an error of law: *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2016 ONCA 246, 130 O.R. (3d) 418, at para. 41, aff'd 2017 ONCA 293, 135 O.R. (3d) 241, leave to appeal to refused, [2016] S.C.C.A. No. 249.

[40] The City submits that *Halifax*, *Weinblatt*, and *Jain* are distinguishable from the present appeal because all three cases involve provisions for a re-conveyance of property to the original vendor. The argument follows that since Kanata never owned the golf course lands, this is not the case of a landowner who is controlling the use of their land after they have sold it. I disagree that this factual difference distinguishes these cases. Whether the municipalities were the original vendors does not change the nature of the right: the municipalities were able to control

development of the land through a covenant that ran with the land. The contingent interest fettered the land by controlling development, regardless of whether the interest holder was a former owner.

[41] The application judge applied the Superior Court decision in *Loyalist (Township) v. The Fairfield-Gutzeit Society*, 2019 ONSC 2203, relied on by the City, for the proposition that no interest in land arises where there is no expectation that the right to repurchase will crystallize. He determined that the court in *Loyalist (Township)* used this factor to distinguish this court's decision in *2123201,* put forward by ClubLink. In *2123201*, this court concluded that an option to repurchase was an equitable interest in land; the court in *Loyalist (Township)* characterized the right to repurchase as a contractual right. The application judge explained at para. 72 of his reasons that in *2123201*, "there was an expectation that the option to repurchase would crystallize at some point (i.e., once the gravel was removed)"; whereas, in *Loyalist (Township)*, there was no such expectation: "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 ... [t]hus, there was no expectation that the right to repurchase would crystallize". As a result, the application judge reasoned that the 1981 Agreement was similar to the agreement in *Loyalist (Township)* and distinguishable from the agreement in *2123201* because Kanata did not expect its right to call for a conveyance of the golf course lands would "crystallize".

[42] As I earlier explained, a contingent interest in land may never materialize. Moreover, I do not read *Loyalist (Township)* as standing for the proposition relied upon by the application judge: the expectation that a contingent interest would materialize was simply "[a] distinguishing feature" noted by the court in *Loyalist (Township)* between that case and *2123201*, and not a determining factor in the court's analysis: at para. 35. Notably, the court in *Loyalist (Township)* made no reference to *Halifax*, *Weinblatt*, and *Jain*. Moreover, the court's determination in *Loyalist (Township)* that the right in question was a contractual right and not an interest in land flowed from the court's conclusion that the agreement creating the right did not purport "to impose rights that would attach to the land": at para. 36.

[43] The court's reasoning in *Loyalist (Township)* reflects the well-established distinction that a contingent interest in land differs from a mere contractual right insofar as the agreement giving rise to the rights purports to attach the rights to the land, such as the right to call for a conveyance, which affect the landowner's rights to freely use, manage, develop or dispose of its property: *Gomm*, at pp. 580-82; *Loyalist (Township)*, at para. 36.; *Manchester Ship Canada Company v. Manchester Racecourse Company*, [1901] 2 Ch. 37 (C.A.), at pp. 50-51.

[44] A return to the public policy underpinning the rule against perpetuities further assists in distinguishing between a contingent interest in land and a mere contractual interest. The public policy attempts to prevent "the grasp of the dead hand to be kept on the hand of the living" in the form of restrictions on the

subsequent landowner's ability to use or dispose of its property that run with the land: Thomas Edward Scrutton, *Land in Fetters*, (Cambridge: Cambridge University Press, 1896), at p. 108; *Canadian Long Island Petroleums,* at pp. 726-27. As stated in *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir. 1936), at p. 808, and affirmed by the Supreme Court in *Canadian Long Island Petroleums*, at p. 732:

> The rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.

[45] In consequence, a contingent interest in land "fetters" real property, excluding it from "commerce and development" and working "an indirect restraint upon alienation". It is this "public evil" that the rule against perpetuities targets by imposing a 21-year limitation. A mere contractual right is "within neither the purpose of nor the reason for the rule" because it does not forestall or "restrain free alienation" and is therefore not objectionable: *Weber*, at p. 808; *Canadian Long Island Petroleums*, at pp. 732-733.

[46] As there were extricable errors of law in the application judge's construction of the contractual provisions of the 1981 Agreement, his decision is not entitled to deference and must be set aside: *Sattva*, at para. 53.

[47] I shall now consider afresh the contractual provisions in issue.

The parties intended to create contingent interests in land

[48] As I shall explain, I am of the view that the parties intended by ss. 5(4) and 9 of the 1981 Agreement to create contingent interests in the golf course lands.

[49] The dispute centres on the characterization of the provisions for the conveyance of the property, ss. 5(4) and 9, either as creating contingent interests in land or contractual rights. It is common ground that if the conveyance provisions create an interest in land, the rule against perpetuities applies and the provisions are void because the conveyance did not occur within the 21-year perpetuity period. Alternatively, if they give rise to a contractual right, the rule against perpetuities does not apply and, subject to the other issues raised on this appeal, the provisions remain valid and enforceable.

[50] Contractual provisions do not always fit neatly within the common dichotomy, which is found in many of the perpetuity cases, of an option to purchase that creates a contingent interest in land and a right of first refusal that does not. Accordingly, the fact that the language in s. 5(4) (or s. 9) of the 1981 Agreement may not be typical of the language used to define an option to purchase, as the application judge noted, is not determinative.

[51] This classification difficulty was recognized in *2123201*. Rather than attempting to impose a rigid classification scheme, this court clarified in *2123201*, at paras. 38 to 41, that the issue is one of basic contract interpretation to determine

the true intent of the parties at the time the agreement is made. As such, the analysis should focus on whether the parties intended to create an interest in land or a mere contractual right. The indicia of that intention include the purpose and terms of the agreement and the context in which it was made: *2123201*, at paras. 38-43.

[52] As the application judge rightly stated, the basic rules of contract interpretation require the determination of the intention of the parties in accordance with the ordinary and grammatical words they have used, in the context of the entire agreement and the factual matrix known to the parties at the time of the formation of the contract, and in a fashion that corresponds with sound commercial principles and good business sense: *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 65, rev'd on other grounds, *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, 444 D.L.R. (4th) 77.

[53] Here, to ascertain the parties' intentions, it is necessary to read all the Agreements. The City submits that the December 20, 1988 Agreement was concluded at a different time and for a different purpose. However, the subsequent agreements were expressly contemplated in the 1981 Agreement and the four agreements, read together, give effect to the parties' intentions. Moreover, ClubLink assumed the rights and obligations of its predecessors not simply under the 1981 Agreement but under all the Agreements.

[54] As a result, the related contracts principle is also engaged in the interpretative process here. Under the related contracts principle, where more than one contract is entered into as part of an overall transaction, the contracts must be read in light of each other to achieve interpretive accuracy and give effect to the parties' intentions: *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 239 O.A.C. 137, at paras. 33-34; *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279, at para. 16; *Fuller v. Aphria Inc.*, 2020 ONCA 403, 4 B.L.R. (6th) 161, at para. 41, 51; *Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, 150 O.R. (3d) 449, at para. 50.

[55] I start with the overall purpose and nature of the Agreements.

[56] The Agreements formed a development contract that allowed Campeau to develop its own land but subject to certain limits to further the City's public policies, most notably, the 40% principle.

[57] There is no question that the 40% principle was an important contractual feature that allowed Campeau to advance the development of property and further the City's public policies. The City wanted to ensure that 40% of the property to be developed would remain as open space to be used in certain ways. One of the ways was the operation in perpetuity of a golf course. That said, the 40% principle, by itself, does not determine the issue of whether the parties intended to give

Kanata (and its successors and assigns) an interest in land or a contractual right to protect the 40% principle.

[58] In my opinion, when the Agreements are read and interpreted as a whole, and in the context of the factual matrix, the provisions in ss. 5(4) and 9 were intended to restrict or "fetter" the use that could be made of 40% of the property in order to further the City's open space development policy. As such, I see the rights created by the Agreements as indistinguishable in substance and effect from the contingent property interests created in *Halifax*, *Weinblatt*, and *Jain*, earlier reviewed, where restrictions were used to control development.

[59] In *Halifax*, *Weinblatt*, and *Jain*, the municipal right holder did not hold an option that it could exercise at any time and the right to the conveyance only arose if the landowner did not develop or use the lands according to the agreements. Once the triggering event occurred, for example development did not commence within the agreed upon time, the landowners were obligated to reconvey the properties to the holder of the right. The juridical nature of this right of conveyance was determined to be an interest in land.

[60] The rights in issue in the present case are indistinguishable. As in *Halifax*, *Weinblatt*, and *Jain*, the Agreements here impose rights that expressly run with the land and were registered on title. The conveyance to the City would occur only if and when Campeau or its successors and assigns ceased to use the land as a

golf course and could not find someone to take over its operation. Other than determining whether to use the land as a golf course, Campeau had no discretion over the conveyance. If it chose to stop using it as a golf course and could not find someone to continue this use, then it had to convey the property to the City. The automatic transfer of ownership triggered by the contingency of a future event creates a contingent property interest.

[61] The conveyance provisions under ss. 5(4) and 9 of the 1981 Agreement fall squarely within the public policy purpose of the rule against perpetuities, namely, to prevent contingent property interests from vesting too remotely. The conveyance provisions purport to control in perpetuity the use that can be made of the golf course lands: if the owner ceases to use the golf course lands as a golf course, the lands will be conveyed to the City.

[62] The parties' intention to create an interest in land also manifests in the plain and explicit language of the Agreements. According to the "cardinal presumption" of contract interpretation, the parties intended what they wrote: *Weyerhaeuser*, at para. 65. For example:

> i. The 1981 Agreement uses clear conveyance language with respect to the contingent interests created under s. 5(4) ("convey" and "conveyance") and s. 9 ("reconvey" and "conveyed"). I contrast this conveyance language with the contractual "right of first refusal" that appears in s. 5(3).
>
> ii. Section 12 of the 1981 Agreement stipulates that the Agreement shall be registered on the title to the entire

> property, including the golf course lands. All four Agreements were registered on the title to the property.
>
> iii. Section 7 of the December 20, 1988 Agreement expressly states that the 1981 and 1988 Agreements "shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community" (emphasis added).

[63] While each of these examples taken in isolation may not be determinative, I view them, together with the factors that I have just reviewed, as demonstrating the parties' intention to create contingent interests in land. Similarly, I read the requirement under s. 5(2) that subsequent owners must contractually assume the obligations under the Agreements, as simply a mechanism to ensure compliance. It does not, by itself, derogate from the parties' intention to create contingent interests in land as provided for in ss. 5(4) and 9 of the 1981 Agreement.

[64] In summary, the parties intended by the clear language and purpose of their Agreements to create contingent interests in the golf course lands under ss. 5(4) and 9 of the 1981 Agreement that ran with and fettered the land: under s. 5(4) of the 1981 Agreement, the City's interest in the golf course lands was contingent on Campeau (or its successor or assign in title) ceasing to operate the golf course; and under s. 9, the reconveyance was contingent on, first, the conveyance under s. 5(4), and, second, the City ceasing to use the lands as prescribed.

[65] The owners have operated the golf course for more than 21 years. Neither the City's right to a conveyance nor ClubLink's right to a reconveyance have vested within the perpetuity period. As a result, these contingent interests in the golf course lands are now void.

Is all or part of the 1981 Agreement void?

[66] ClubLink renews here the argument that if the rule against perpetuities applies, then ss. 5(4) and 9 cannot be severed from the 1981 Agreement and all or part of the 1981 Agreement fails. As noted in para. 146 of his reasons, the application judge did not consider this issue given his conclusion that the 1981 Agreement continues to be valid and enforceable.

[67] ClubLink argues that ss. 5(4) and 9 are integral to the 1981 Agreement and that severing ss. 5(4) and 9 from the balance of the contract fundamentally changes the 1981 Agreement with the result that ClubLink would be saddled with a perpetual obligation to run a golf course (or find a buyer willing to do the same) with no escape mechanism. According to ClubLink, there is no evidence the parties would have agreed to this bargain. ClubLink submits that severance is therefore inappropriate and, as a result, the appropriate remedy is to void the 1981 Agreement in whole, or, alternatively, all the provisions related to the golf course lands.

[68] In my view, this court is not in a position to consider ClubLink's argument.

[69] First, ClubLink did not identify which provisions of the 1981 Agreement are so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative. Further, there is no basis to void myriad other provisions in the 1981 Agreement that are unrelated to the golf course and that have already been performed.

[70] Moreover, the focus of the submissions before this court was on the validity and enforceability of ss. 5(4) and 9 of the 1981 Agreement. We do not have the benefit of the application judge's findings on the larger question raised by ClubLink. And, in my opinion, the determination that ss. 5(4) and 9 of the 1981 Agreement are void and unenforceable may affect provisions of not simply the 1981 Agreement but also the 1985 and 1988 Agreements, as well as the Assumption Agreement. In my view, if the parties cannot agree, this larger question should be remitted to the application judge for determination.

Disposition

[71] Accordingly, I would allow the appeal. Sections 5(4) and 9 of the 1981 Agreement are void and unenforceable.

[72] By letter dated June 22, 2021, the parties advised of their agreement that the successful party is entitled to costs of the appeal in the amount of $59,000, all inclusive. Accordingly, I would award costs of the appeal to ClubLink in this amount.

[73] If the parties cannot agree on the disposition of costs for the application below, I would allow them to make brief written submissions of no more than two pages, plus a costs outline, within five days of the release of these reasons.

Released: NOV 2 6 2021

"L.B. Roberts JA"

"I agree J.A."

"I agree, Tomlinson J.A."

This is Exhibit "V" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No. C69176

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE JURIANSZ)	FRIDAY, THE 26TH
THE HONOURABLE JUSTICE TULLOCH)	
THE HONOURABLE JUSTICE ROBERTS)	DAY OF NOVEMBER, 2021

B E T W E E N:

CITY OF OTTAWA

Applicant
(Respondent on Appeal)

and

CLUBLINK CORPORATION ULC

Respondent
(Appellant)

ORDER

THIS APPEAL by the Appellant, ClubLink Corporation ULC, that the Judgment of the Honourable Justice Labrosse (the "**Application Judge**") dated February 19, 2021 be set aside and the application of the City of Ottawa be dismissed, was heard by videoconference on June 17, 2021 at Osgoode Hall, 130 Queen Street West, Toronto, ON, M5H 2N5, with judgment being reserved until this day.

ON READING the Factum, Appeal Book and Compendium, Exhibit Book, and Book of Authorities filed by the Appellant, and the Factum, Book of Authorities, and Respondent's Compendium filed by the Respondent, City of Ottawa, and on hearing the submissions of the lawyers for the parties:

1. **THIS COURT ORDERS** that the appeal is allowed.

2. **THIS COURT FURTHER ORDERS** that sections 5(4) and 9 of the agreement between Campeau Corporation and the City of Kanata, dated May 26, 1981, are void and unenforceable.

3. **THIS COURT FURTHER ORDERS** that, if the parties cannot agree, the Application Judge should determine the issue of whether any other provision(s) of the agreements between Campeau Corporation and the City of Kanata—dated May 26, 1981; June 10, 1985; December 20, 1988; and December 29, 1988—or the agreement between Imasco Enterprises Inc., Clublink Capital Corporation and the Corporation of the City of Kanata dated November 1, 1996, is affected by Paragraph 2 of this Order.

4. **THIS COURT FURTHER ORDERS** that costs are awarded to the Appellant in the amount of $59,000.00, all inclusive.

THIS ORDER BEARS INTEREST at the rate of 2.00 percent per year commencing on November 26, 2021.

Svetlana MacBain
Registrar
Court of Appeal for Ontario

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAR 14 2022

PER / PAR:

CITY OF OTTAWA -and- CLUBLINK CORPORATION ULC		
Applicant (Respondent on Appeal)	Respondent (Appellant)	Court File No. C69176

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Ottawa

ORDER

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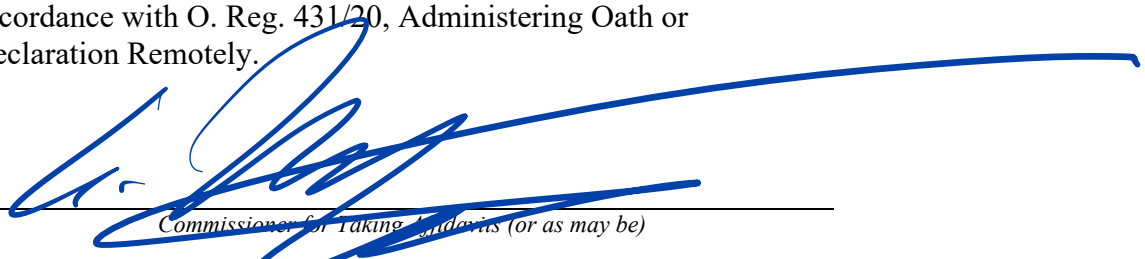
Lawyers for the Applicant (Respondent on Appeal)

File Number: 304995/000525

RCP-F 4C (September 1, 2020)

This is Exhibit "W" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

No. 40036

August 4, 2022

BETWEEN:

City of Ottawa

Applicant

- and -

ClubLink Corporation ULC

Respondent

JUDGMENT

The application for leave to appeal and the conditional application for leave to cross-appeal from the judgment of the Court of Appeal for Ontario, Number C69176, 2021 ONCA 847, dated November 26, 2021, are dismissed with costs to the respondent, ClubLink Corporation ULC.

Le 4 août 2022

ENTRE :

Ville d'Ottawa

Demanderesse

- et -

ClubLink Corporation ULC

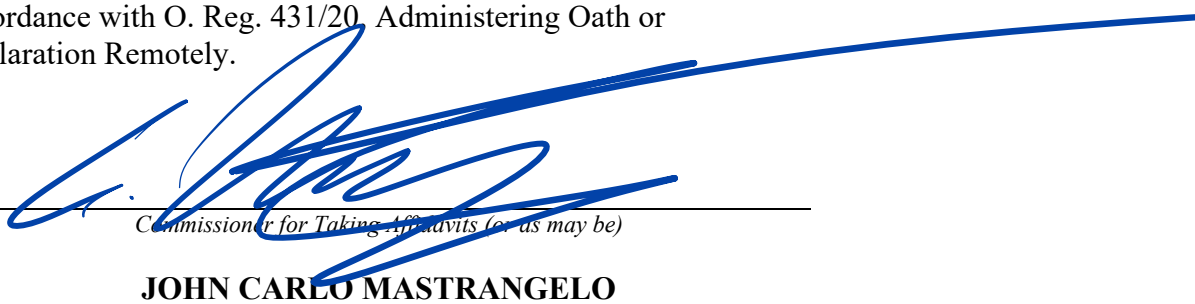
Intimée

JUGEMENT

La demande d'autorisation d'appel et la demande d'autorisation d'appel incident de l'arrêt de la Cour d'appel de l'Ontario, numéro C69176, 2021 ONCA 847, daté du 26 novembre 2021, sont rejetées avec dépens en faveur de l'intimée, ClubLink Corporation ULC.

C.J.C.
J.C.C.

This is Exhibit "X" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Court File No.: CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KANATA GREENSPACE PROTECTION COALITION and BARBARA RAMSAY

Applicants

- and -

CLUBLINK CORPORATION ULC

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

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

THIS APPLICATION will come on for a hearing:

☒ In person

☐ By telephone conference

☐ By video conference

at the following location: Ottawa Courthouse,161 Elgin St., 2nd Floor, Ottawa, ON K2P 2K1, on a day to be set by the registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it,

with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date ..... February 22, 2022

Issued by ..... "Electronically issued"
Local registrar

Address of
court office .....

.....

TO:

ClubLink Corporation ULC
15675 Dufferin Street
King City, ON L7B 1K5

APPLICATION

1. The applicants make application for:

   (a) An Order pursuant to Rule 14.05(3)(*d*) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 declaring that section 3(i) of Schedule "B" of instrument LT1020194 is a valid and enforceable restrictive covenant;

   (b) An Order declaring that the respondent ClubLink Corporation ULC's proposed Zoning By-law Amendment and Draft Plan of Subdivision for 7 Campeau Drive, Kanata, Ontario K2T 0A3 dated October 8, 2019 (and subsequent versions thereof) contravene section 3(i) of Schedule "B" instrument LT1020194;

   (c) On Order pursuant Rule 14.05(3)(*d*) of the *Rules of Civil Procedure* declaring that the Notice of Agreement dated December 20, 1988, made between Campeau Corporation and The Corporation of the City of Kanata, including the documents incorporated by reference thereto, constitute a valid and enforceable restrictive covenant requiring that 40% of the land be left as open space for recreation and natural environmental purposes;

   (d) An Order declaring that the respondent ClubLink Corporation ULC's proposed Zoning By-law Amendment and Draft Plan of Subdivision for 7 Campeau Drive, Kanata, Ontario K2T 0A3 dated October 8, 2019 (and subsequent versions thereof) contravene the restrictive covenant requiring that 40% of the land be left as open space for recreation and natural environmental purposes;

   (e) The costs of this proceeding, plus all applicable taxes; and

   (f) Such other and further relief as counsel may advise and this Court permit.

2. The grounds for the application are:

Parties

(a) The applicant, Kanata Greenspace Protection Coalition (the "**Coalition**"), is a not-for-profit corporation incorporated pursuant to the *Canada Not-For-Profit Corporations Act*, S.C. 2009, c. 23 on July 11, 2019;

(b) The Coalition represents the interests of many of the landowners in what was known as the Kanata Marchwood Lakeside Community, which now includes the Kanata Lakes neighbourhood, Country Club Estates, CCC575, Catherwood and Nelford Court;

(c) The Coalition's purpose is to preserve and protect Kanata's greenspaces and promote the value of its natural environment;

(d) The applicant, Barbara Ramsay, owns the property known municipally as 7 Nelford Court, Kanata, Ontario K2K 2L8 and is therefore a homeowner in the lands collectively known as the Kanata Marchwood Lakeside Community;

(e) The respondent, ClubLink Corporation ULC ("**ClubLink**"), owns, operates, and develops golf courses in Canada. Its corporate head office is in King City, Ontario. ClubLink is the current owner and operator of the Kanata Golf & Country Club, 7 Campeau Drive, Kanata, Ontario K2T 0A3 ("**Golf Course Lands**");

The Golf Course Agreements

(f) In 1979, Campeau Corporation ("**Campeau**") owned 1,400 acres of land in what was then the City of Kanata ("**Kanata**"), which consisted of two adjacent parcels of land, the so-called Marchwood land and Lakeside lands ("**Campeau Lands**");

(g) Campeau's plan at that time was to develop the Campeau Lands, including by building homes and neighborhoods, and by expanding an existing 9-hole golf course into an 18-hole golf course;

(h) In order to obtain Kanata's support for the necessary applications for Official Plan Amendments, Campeau proposed that 40% of the Campeau Lands would be reserved as open space for recreation and natural environmental purposes, consisting of: natural environmental areas, lands to be dedicated for park purposes, a storm water management area and the proposed 18-hole golf course;

(i) The above is referred to as the "**40% Principle**;"

(j) Campeau and Kanata subsequently entered into an agreement dated May 26, 1981 to reserve 40% of the Campeau Lands as open space for recreation and natural environmental purposes (the "**1981 Agreement**");

(k) The 1981 Agreement contemplated further study to determine with precision where within the Campeau Lands the open space lands for recreational and natural environmental purposes would be. Kanata and Campeau entered into a further agreement dated December 20, 1988 (the "**1988 Agreement**") identifying the lands that would be subject to the 40% Principle;

(l) Genstar Development Company Eastern Ltd. ("**Genstar**") purchased the Golf Course Lands from Campeau in 1989;

(m) ClubLink Capital Corporation purchased the Golf Course Lands from Genstar in 1996. Subsequent to a series of amalgamations, ClubLink is the corporate successor to ClubLink Capital Corporation;

(n) ClubLink entered into an agreement with Kanata and Imasco Enterprises Inc. (Genstar's successor) dated November 1, 1996 whereby it assumed Campeau's obligations under the 1981 and 1988 Agreements (the "**ClubLink Assumption Agreement**");

(o) In 2001, Kanata was dissolved and was replaced with the City of Ottawa ("**Ottawa**") pursuant to the *City of Ottawa Act, 1999*, S.O. 1999, c. 14, Sch. E. Ottawa stands in the place of Kanata, and all the assets and liabilities of Kanata, including all rights, interests, entitlements and contractual benefits and obligations became assets and liabilities of Ottawa;

(p) The 1981 Agreement was registered on title on all the Campeau Lands;

(q) The 1988 Agreement is registered on title of every residential lot in the Kanata Lakes neighbourhood;

(r) The 1981 and 1988 Agreements, Golf Course Agreement and ClubLink Assumption Agreement are all registered on title of the Golf Course Lands;

(s) ClubLink is the current owner of the Golf Course Lands;

ClubLink's Development Applications

(t) ClubLink applied on or around October 8, 2019 for a Zoning By-law Amendment and a Draft Plan of Subdivision to permit the redevelopment of the Golf Course Lands (collectively referred to as the "**Development Applications**");

(u) The proposed redevelopment would consist of approximately 1,480 new dwelling units being developed on the Golf Course Lands;

(v) Ottawa failed to make a decision on the Development Applications within the time prescribed by the *Planning Act*, R.S.O. 1990, c. P.13;

(w) ClubLink appealed the Ottawa's failure to make a decision on the Development Applications;

(x) The appeals of the Zoning By-law Amendment and a Draft Plan of Subdivision are currently before the Ontario Lands Tribunal, and bear file numbers PL200195 and PL200196 respectively;

The Restrictive Covenant Concerning Greenspace

(y) The restrictions originally set out at section 3 of the 1981 Agreement and incorporated into the 1988 Agreement provide that 40% of the total development area for the Kanata Marchwood Lakeside Community be left as open space for recreation and natural environmental purposes (40% Principle);

(z) Section 7 of the 1988 Agreement states that the 1981 and 1988 Agreements "shall enure to the benefit of and be binding upon the respective successors and assigns of Campeau and the City and shall run with and bind the Current Lands for the benefit of the Kanata Marchwood Lakeside Community;"

(aa) The 40% Principle, as enshrined in the 1981 and 1988 Agreements, is a valid and enforceable restrictive covenant:

i. The covenant is negative in substance and constitutes a burden on the covenantor's land;

ii. The covenant is one that touches and concerns the land;

iii. The land to be benefited is defined in the 1988 Agreement and the documents incorporated by reference thereto, so as to be easily ascertainable. In the event that the Court finds the deed ambiguous, recourse to extrinsic evidence confirms the definition of the benefitted and burdened land is easily ascertainable;

iv. Section 7 of the 1988 Agreement states that the covenant is imposed on the land for the benefit and protection of the lands constituting the Marchwood Lakeside Community;

v. Titles to the benefitted and burdened lands are registered; and

vi. The covenantee (the eventual landowners of the Marchwood Lakeside Community) is a person other than the covenantor (Campeau/ClubLink);

The Restrictive Covenant Concerning Stormwater Management

(bb) On the same day that the ClubLink Assumption Agreement was registered, ClubLink also registered a further list of covenants and restrictions it agreed would run with and bind the Golf Course Lands (referred to as the "Golf Lands" in the ClubLink Assumption Agreement);

(cc) Schedule 1 to Schedule "B" describes the "Benefited Lands" to which the restrictive covenant is to attach. The legal description of the properties in question confirm that they are largely the lots comprising the "Current Lands;"

(dd) The additional covenants relate to the grading and storm water management facilities on the Golf Course Lands. In particular, ClubLink agreed as follows:

3. Each and every part of the Golf Lands shall be subject to the following restrictions and covenants:
(i) [ClubLink] agrees that:

(a) it shall not alter the grading of the Golf Lands or any of the storm water management facilities on or serving the Golf Lands; and
(b) there should be no construction of any buildings, structures or other improvements on the Golf Lands which may cause surface drainage from the Golf Lands to be discharged, obstructed or otherwise altered,
in a manner that materially adversely affects [Imasco]'s or the City of Kanata's storm water management plan in respect of [Imasco's]Benefitted Lands as such plan exists as at November 1, 1996.

(ee) The above covenant ("**SWM Covenant**") is valid and enforceable;

(ff) ClubLink's proposed development (Development Applications) would materially adversely affect the City of Kanata's (now the City of Ottawa) storm water management plan in respect of the benefitted lands, rendering it contrary to the SWM Covenant;

General

(gg) Rules 14.05, 38, 39, 57 and 58 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194;

(hh) S. 71 and 119(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5; and

(ii) S. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

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

(a) The Affidavit of Barbara Ramsay, to be sworn;

(b) The Affidavit of Douglas Nuttall, to be sworn; and

(c) Such further and other evidence as counsel may advise and this Court may permit.

February 22, 2022

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Ottawa, ON K1P 5Z9

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Lawyers for the Applicants,
Kanata Greenspace Protection Coalition and Barbara Ramsay

KANATA GREENSPACE PROTECTION COALITION ET AL. - and - **CLUBLINK CORPORATION ULC**
Applicants Respondent

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

NOTICE OF APPLICATION

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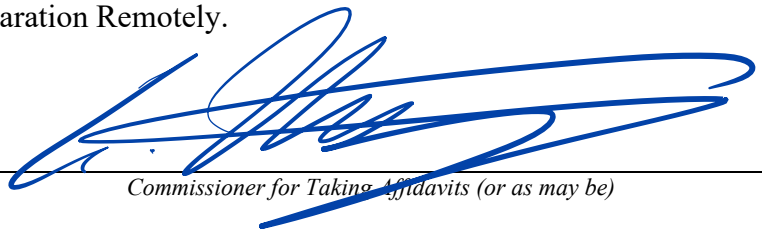
Lawyers for the Applicants

484

This is Exhibit "Y" referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Innovation, Science and Economic Development Canada
Corporations Canada

Innovation, Sciences et Développement économique Canada
Corporations Canada

Certificate of Incorporation

Canada Not-for-profit Corporations Act

Certificat de constitution

Loi canadienne sur les organisations à but non lucratif

Kanata Greenspace Protection Coalition

Corporate name / Dénomination de l'organisation

1151033-9

Corporation number / Numéro de l'organisation

I HEREBY CERTIFY that the above-named corporation, the articles of incorporation of which are attached, is incorporated under the *Canada Not-for-profit Corporations Act*.

JE CERTIFIE que l'organisation susmentionnée, dont les statuts constitutifs sont joints, est constituée en vertu de la *Loi canadienne sur les organisations à but non lucratif*.

R Edwards

Raymond Edwards

Director / Directeur

2019-07-11

Date of Incorporation (YYYY-MM-DD)
Date de constitution (AAAA-MM-JJ)

Canada

This is Exhibit “Z” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Innovation, Science and Economic Development Canada
Corporations Canada

Innovation, Sciences et Développement économique Canada
Corporations Canada

Corporations Canada
C. D. Howe Building
235 Queen St
Ottawa ON K1A 0H5

Corporations Canada
Édifice C.D.Howe
235 rue Queen
Ottawa ON K1A 0H5

Corporate Profile / Profil corporatif

Date and time of Corporate Profile (YYYY-MM-DD)	2023-02-22 4:24 PM	(AAAA-MM-JJ) **Date et heure du Profil corporatif**

CORPORATE INFORMATION / RENSEIGNEMENTS CORPORATIFS

Corporate name		**Dénomination**
	Kanata Greenspace Protection Coalition	
Corporation number	1151033-9	**Numéro de société ou d'organisation**
Business number	781409339RC0001	**Numéro d'entreprise**
Governing legislation		**Régime législatif**
	Canada Not-for-profit Corporations Act (NFP Act) - 2019-07-11	
	Loi canadienne sur les organisations à but non lucratif (Loi BNL) - 2019-07-11	
Status		**Statut**
	Active	
	Active	

REGISTERED OFFICE ADDRESS / ADRESSE DU SIÈGE

106-1002 Beaverbrook Road
Ottawa ON K2K 1L1
Canada

ANNUAL FILINGS / DÉPÔTS ANNUELS

Anniversary date (MM-DD)	07-11	(MM-JJ) **Date anniversaire**
Filing period (MM-DD)	07-11 to/au 09-09	(MM-JJ) **Période de dépôt**

Status of annual filings / **Statut des dépôts annuels**

Not due	2023	N'est pas dû
Filed	2022	Déposé
Filed	2021	Déposé

Date of last annual meeting (YYYY-MM-DD)	2022-08-04	(AAAA-MM-JJ) **Date de la dernière assemblée annuelle**

Type	**Type**
Soliciting	
Ayant recours à la sollicitation	

DIRECTORS		ADMINISTRATEURS
Minimum number	3	**Nombre minimal**
Maximum number	7	**Nombre maximal**
Current number	7	**Nombre actuel**

Kevin McCarthy	18 Tiffany Crescent, Kanata ON K2K 1W2, Canada
Barbara Ramsay	7 Nelford Court, Kanata ON K2K 2L8, Canada
Peter Chapman	42 Pentland Crescent, Kanata ON K2K 1V5, Canada
Geoff McGowan	11 Pentland Crescent, Kanata ON K2K 1V4, Canada
Susan Dodge	124 Robson Court, Kanata ON K2K 2W1, Canada
David McNairn	201 Knudson Drive, Kanata ON K2K 2C2, Canada
Greg Sim	40 Sherk Crescent, Ottawa ON K2K 2L3, Canada

CORPORATE HISTORY / HISTORIQUE CORPORATIF

Corporate name history (YYYY-MM-DD) (AAAA-MM-JJ) **Historique de la dénomination**

2019-07-11 to present / à maintenant	Kanata Greenspace Protection Coalition

Certificates issued (YYYY-MM-DD) (AAAA-MM-JJ) **Certificats émis**

Certificate of Incorporation	2019-07-11	Certificat de constitution en société

Documents filed (YYYY-MM-DD) (AAAA-MM-JJ) **Documents déposés**

By-laws received	2019-09-26	Règlement reçu

The Corporate Profile sets out the most recent information filed with and accepted by Corporations Canada as of the date and time set out on the Profile.

Le Profil corporatif fait état des renseignements fournis et acceptés par Corporations Canada à la date et à l'heure indiquées dans le profil.

This is Exhibit “AA” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

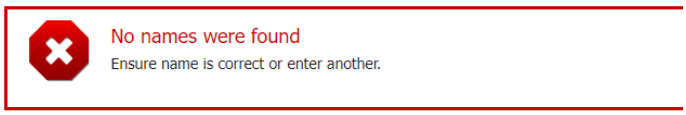
JOHN CARLO MASTRANGELO

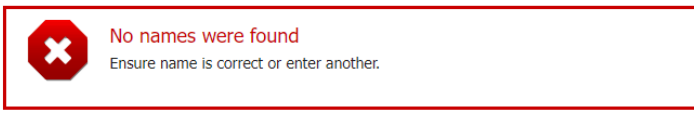
From: Searches | Centro Legal Works
To: John Carlo Mastrangelo
Subject: RE: Searches on non-profit organizations
Date: February-22-23 4:52:42 PM
Attachments: image002.png
image003.png
image004.png
Kanata Greenspace Protection Coalition-FED-PR.pdf

Hi John – nice talking to you as well!

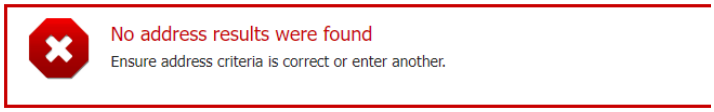
As discussed, please see Federal profile report attached, confirming that their jurisdiction is Ottawa. Kanata is covered by Ottawa in terms of the LRO.

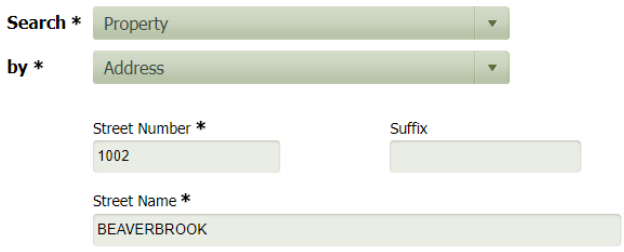
The search came back clear, as outlined below. I also tried to shorten the name to broaden the search, but also no hits there either. As such this entity is not listed on any property in Ottawa.





I also tried to run a search on the address listed on the profile, which is also coming up clear:





I also wanted to run a search on just "KANATA" to see any alternatives, which is outlined below. Please let me know if you'd like to see further details for any of these, or if there's anything else you require.

Name: KANATA
Number of Names Found: 23

NAME
KANATA BAPTIST CHURCH INC.
KANATA BAPTIST PLACE INCORPORATED
KANATA CAR LAND LTD.
KANATA CENTRE PREMIUM RENTALS INC.
KANATA CO-OPERATIVE HOMES INC.
KANATA COMMONS INC.
KANATA COMMUNITY CHRISTIAN REFORMED CHURCH INC.
KANATA ENTERTAINMENT HOLDINGS INC.
KANATA HYDRO-ELECTRIC COMMISSION
KANATA MONTESSORI SCHOOL
KANATA MUSLIM ASSOCIATION
KANATA NORTH REGIONAL INC.
KANATA PROPERTIES INC.
KANATA RESEARCH PARK CORPORATION
KANATA RESEARCH PARK RESIDENTIAL INC.
KANATA RETIREMENT GROUP LTD.
KANATA ROAD INC.
KANATA SHOPPING CENTRES LIMITED
KANATA SOUTH PROFESSIONAL SERVICES LTD.
KANATA UTILITIES HOLDINGS LTD.
KANATA WEST CENTRE INC.
KANATA WOODS INC.
KANATA-MARCH MONTESSORI SCHOOL

Thank You,

Chris Giordano | Executive Assistant
416.599.4040 | 1.877.239.6616
search@centrolegalworks.com
www.centrolegalworks.com

CENTRO LEGAL WORKS

From: John Carlo Mastrangelo <jmastrangelo@lolg.ca>
Sent: Wednesday, February 22, 2023 4:41 PM
To: Searches | Centro Legal Works <search@centrolegalworks.com>
Subject: Searches on non-profit organizations

Good afternoon, Chris:

As we just discussed by telephone, I would like you conduct a real property search for a non-profit corporation called the Kanata Greenspace Protection Coalition. I understand you need to limit this search to an Ontario jurisdiction and I would like that jurisdiction to be the Greater Ottawa Area / National Capital Region, as long as that region is large enough to include Kanata, Ontario.

I would like you to tell me what real property, if any, the Coalition owns in that jurisdiction. I would also like you to look for the Coalition's registered address, and tell me who is on title.

Thank you, Chris.
John Carlo

John Carlo Mastrangelo (he/him)
Direct 416 956 0101
Cell 647 981 9207
jmastrangelo@lolg.ca

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King St W
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
www.lolg.ca

This is Exhibit “BB” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

Frequently Asked Questions

WHAT IS THE KGPC'S MISSION?

To preserve and protect Kanata's green spaces and promote the value of our natural environment.

The KGPC is focused on increasing public awareness about the importance of greenspace preservation. Urban greenspace has numerous mental and physical health benefits and is key to the liveability of our Kanata North neighbourhoods.

Our goal is to raise funds and public support for the City of Ottawa efforts to ensure that the 40% Agreement is enforced.

WHY ARE YOU RAISING MONEY?

To pay for legal counsel for the ongoing battle against ClubLink, Richcraft Homes and Minto Communities. We continue to retain lawyers that specialize in litigation to defend the 40% Agreement. We are also taking ClubLink to court over two Restrictive Covenants that limit how the land can be used.

Previously, we've hired experts in planning, storm water management and the environment to highlight the important role our greenspace plays in our community. Their papers and opinions have been shared with the City of Ottawa, the Province of Ontario, the Federal Government, the National Capital Commission, and the Mississippi Valley Conservation Authority to inform them about the disastrous impact the proposed development would have on our community and encourage their support of our fight.

We continue to engage expertise as needed on issues pertaining to our greenspace.

Some of our minor expenses include: advertising, accounting and web services. **Our financial reports** are posted on the web site. If you have any questions about our financials, please contact info@ourkanatagreenspace.ca

WHAT HAVE YOU ACCOMPLISHED SO FAR?

- We fought and won Intervenor Status in Ontario's Superior Court
- We argued alongside the City of Ottawa to defend the 40% Agreement
- We won the 40% Agreement court decision – only two clauses were overturned on appeal
- We returned to court with the City of Ottawa to uphold the validity of the 40% Agreement that states that the golf course lands are to remain greenspace

- We participated in the Ontario Land Tribunal hearing, to confirm the serious stormwater management and environmental concerns related to the proposed development
- We filed a legal action against Clublink to stop the development by citing two Restrictive Covenants on the land

WHAT IS THE NEXT STEP?

We wait for Justice Labrosse to determine what, if any, impact the Ontario Court of Appeal ruling has on the 40% Agreement. Only two clauses in the five-page 40% Agreement were declared invalid, not the entire agreement as sought by ClubLink.

We work ahead. The KGPC has filed a notice of application in Ontario Superior Court to have the court declare that two Restrictive Covenants are enforceable and limit how the land can be used.

The first, is about the preservation of greenspace due to the 40% Agreement in principle which states that 40 percent of the original development area, which includes the golf course, Trillium Woods and Kizell Wetlands, remain as greenspace.

The second, concerns stormwater management and stems from an agreement ClubLink signed when it acquired the golf course lands in November 1996. It specifically restricts the (re)grading of the land and the altering of its inherent stormwater management function.

WHAT IS YOUR FUNDRAISING GOAL?

Our 2023 Greenspace Defence Fund target is $100,000; to continue to engage our legal experts to defend the 40% Agreement and pursue legal action related to the Restrictive Covenants. It will also allow us to obtain any other expertise needed to help protect and preserve our greenspace.

It's important that our supporters understand that a win for ClubLink will dramatically impact the environment, health and safety of our community. As well, property values in Kanata Lakes and Beaverbrook could drop by 5-15%, depending on location.

HOW CAN I MAKE A DONATION?

Donations can be made by cheque, e-transfer or credit card. You can **donate now**. Thank you for helping Save Our Kanata Greenspace!

WHAT WILL HAPPEN TO THE FUNDS IF THEY'RE NO LONGER NEEDED TO FIGHT CLUBLINK?

The KGPC will distribute our assets to recipients that the corporation deems appropriate. We will consult broadly with our donors to ensure any funds stay in the community and are in line with our mission to preserve and protect Kanata's green spaces.

HOW IS THE KGPC RUN?

We started out as the Kanata Greenspace Steering Committee. A group of concerned citizens who wanted to raise funds and awareness to support the City of Ottawa's efforts to defend the 40% Agreement. Following the huge success of our lawn sign campaign, we initiated the process to become a not for profit corporation and changed our name to the Kanata Greenspace Protection Coalition. By becoming a corporation in July 2019, we were able to assure that the money raised is assigned and managed in accordance with the objectives of the corporation and the law. It also allowed us to engage in legal action to support the City of Ottawa in the 40% Agreement fight. In December 2019, we were successful in winning leave to intervene as a party in the matter of the 40% Agreement, allowing us to argue the rights and interests of our community.

There are no owners or shareholders. The corporation is governed by members, officers and directors. They are all concerned citizens who are providing their time and expertise on a voluntary basis.

CAN I GET A CHARITY RECEIPT?

Unfortunately, we are not able to provide a charity receipt as our mandate does not meet the requirements to be eligible for charitable registration.

WHY DO YOU SELL MERCHANDISE?

All of our sales are fundraisers. We only sell items that will be profitable. We are required to charge and submit HST on any items we sell, in accordance with CRA requirements.

Tweets from @OurKanatasGreen

Kanata Greenspa...

E... · Mar 11

Tomorrow at 2 pm. Join us!

🌲🌳🌲

1 16

K... · Mar 1

.@ONgov already had enough land designated to build two million new homes – more than its overall goal of 1.5 million over the next decade – before it decided to release parts of the protected #Greenbelt.

theglobeandmail....

Ontario has enough land for two millio...

1

Kanata Greenspa...

· Feb 12

BREAKING: So @fordnation received almost $600,000 in

Search

developers. In return did they

Archives

#Greenbelt? Think it's time for the

January 2023

November 2022

October 2022

September 2022

August 2022

May 2022

April 2022

March 2022

February 2022

January 2022

November 2021

October 2021

September 2021

July 2021

May 2021

April 2021

March 2021

February 2021

January 2021

November 2020

October 2020

September 2020

August 2020

July 2020

May 2020

March 2020

February 2020

January 2020

December 2019

November 2019

October 2019

September 2019

May 2019

April 2019

March 2019

February 2019

January 2019

December 2018

This site is managed by the **Kanata Greenspace Protection Coalition,** formed in July 2019 as a not-for-profit corporation by committed community representatives and Kanata residents to ensure the protection of and access to the open and green spaces that exist throughout our neighbourhoods as well as ensure that the longstanding 40 Percent Agreement is honoured by its signatories, ClubLink and the City of Ottawa.

About Us | Contact Us

A DodgeInk Website

This is Exhibit “CC” referred to in the Affidavit of Ashley McKnight sworn by Ashley McKnight of the City of Oshawa, in the Regional Municipality of Durham, before me at the City of Toronto, in the Province of Ontario, on March 15, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

JOHN CARLO MASTRANGELO

SAVE OUR KANATA GREENSPACE

Barbara Ramsay is organizing this fundraiser on behalf of Treasurer Kanata Greenspace Protection Coalition.

Read more

Donate Share

$100,344 raised of $135,100 goal

419 donations

Share

Donate now

Anonymous
$2,825 • 16 d

Anonymous
$100 • 1 mo

Gwen Wigglesworth
$150 • 1 mo

Chong He
$10 • 1 mo

Anonymous
$100 • 1 mo

See all See top donations See top

Organizer and beneficiary

Barbara Ramsay
Organizer
Kanata, ON

Treasurer Kanata Greenspace Protection Coalition
Beneficiary

Contact

Words of support (56)

Please donate to share words of support.

Federation of Citizens' Association...
$50 • 1 mo

Our sincerest condolences for you at this time. You have our deepest sympathy and unwavering support. Wishing you peace, comfort, courage, and lots of love at this time of sorrow. The Federation of Citizens' Association Board

Alyssa A Tomkins
$250 • 1 mo

For Mike

Chris Beal
$100 • 1 mo

In honor of Mike Sheppard

Sydney Hall
$100 • 10 mos

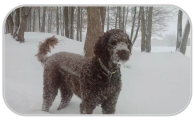
If we lose this greenspace then I lose so much of the values that I looked for when I moved here many years ago - space, the clean air, the peace that is felt in nature, the green growth, trees, the birds and little wild animals, the quietness that... Read more

Eva Pinto
$100 • 12 mos

This is a wonderful neighborhood, let's keep it that way!

Donald Thibault
$100 • 12 mos

I donated because this space is my winter haven. Helps me get through the winter more than I can express.



Patrick Wang
$100 • 15 mos

Protect the green space for the community and our children!

Adele Zhang
$100 • 15 mos

Keep the green for our future!

Otto van Breemen
$200 • 17 mos

Preserve healthy greenspace for Canadians living in urban and suburban environments.

Joan Smith
$500 • 28 mos

Thank you for all your hard work. The Joan Smith Real Estate Family

Show more

Created February 12, 2019 • Community

Report fundraiser

Your easy, powerful, and trusted home for help

Easy **Powerful** **Trusted**

Donate quickly and easily.

Send help right to the people and causes you care about.

Your donation is protected by the GoFundMe Giving Guarantee.

gofundme

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- Memorial
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- Nonprofit
- Crisis Relief
- Coronavirus fundraising

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- Supported countries
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- Help center
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- Press center
- Careers
- About
- More resources

United States · English

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Download on the App Store

KANATA GREENSPACE PROTECTION COALITION et al.
Applicants

-and-

CLUBLINK CORPORATION ULC
Respondent

Court File No. CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

AFFIDAVIT

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DAVIES HOWE LLP
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Mark R. Flowers LSO#: 43921B
markf@davieshowe.com
Tel: 416 263 4513

Lawyers for the Respondent/Moving Party,
ClubLink Corporation ULC

KANATA GREENSPACE PROTECTION COALITION et al.
Applicants/Responding Parties

-and-

CLUBLINK CORPORATION ULC
Respondent/Moving Party

Court File No. CV-22-88630

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

MOTION RECORD

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ClubLink Corporation ULC