CITATION: *City of Ottawa v. ClubLink Corporation ULC*, 2023 ONSC 5004
COURT FILE NO.: 19-81809
DATE: 2023/10/13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CITY OF OTTAWA Applicant	)	Kirsten T. Crain, Emma Blanchard, and Laura E. Robinson, for the Applicant
– and –	)	
CLUBLINK CORPORATION ULC Respondent	)	Matthew P. Gottlieb, Crawford G. Smith, John Carlo Mastrangelo, and Mark R. Flowers, for the Respondent
– and –	)	
KANATA GREENSPACE PROTECTION COALITION Intervener	)	Alyssa Tomkins, and Charles R. Daoust, for the Intervener
	)	**HEARD: September 13, 14, and 21, 2022**

REASONS FOR DECISION – INOPERATIVE PROVISIONS

LABROSSE J.

Background

[1] In 1981, Campeau Corporation ("Campeau") and the City of Kanata ("Kanata") entered into an agreement for the development of the Marchwood Lakeside Community (the "1981 Agreement"). That agreement called for the development to maintain forty percent (40%) of the development area as recreation and open space. Within that open space area, a golf course was a permitted use. The 1981 Agreement provided that a golf course would be operated in perpetuity, subject to other provisions of the Agreement. That golf course became the Kanata Lakes Golf and Country Club and would be situated on what was known as the golf course lands.

[2] As the development moved forward, Campeau and Kanata entered into three other agreements:

a) The 1985 Golf Club Agreement;

b) The 1988 40% Agreement;

c) The 1988 Golf Club Agreement.

[3] Ownership of the golf course lands changed over the decades. Genstar Development Company Eastern Ltd. ("Genstar") purchased the golf course lands from Campeau in 1989. Genstar then amalgamated with and became Imasco Enterprises Inc. ("Imasco"). Finally, in 1996, Imasco sold its interests in the golf course lands to Clublink Capital Corporation, which later became Clublink Corporation ULC. That same year, Imasco, Clublink, and Kanata entered into the Clublink Assumption Agreement (the "Assumption Agreement").

[4] In December 2018, ClubLink announced that it was pursuing options for alternative use of the golf course lands.

[5] In 2019, the City of Ottawa commenced this Application seeking the following relief:

a) a declaration that ClubLink's obligations in s. 3 of the Assumption Agreement and the underlying 40% Agreement remain valid and enforceable;

b) an order that ClubLink withdraw its planning applications, or convey the golf course lands to the City of Ottawa at no cost; and

c) a declaration that if the City accepts a conveyance of those lands, it is not obliged to operate them as a golf course pursuant to ss. 7 and 9 of the 1981 Agreement and ss. 10 and 11 of the Assumption Agreement.

[6] ClubLink opposed the City's relief because, among other things, the 1981 Agreement created contingent conveyance obligations respecting the subject lands that (a) violated the rule against perpetuities, and (b) could not be severed from the balance of Campeau's agreements with Kanata.

[7] This court held that the rule against perpetuities did not apply, and concluded that the 1981 Agreement continues to be a valid and binding contract (the "Application Decision").[1]

[8] In November 2019, the Court of Appeal for Ontario allowed ClubLink's appeal and held that ss. 5(4) and 9 create contingent property interests that are void for perpetuities. But the Court of Appeal declined to consider Clublink's request to declare all or part of the 1981 Agreement void as the invalid provisions could not be otherwise severed. Instead, it ordered that, absent agreement between the parties, this court would determine whether any other provisions of the 1981 Agreement, the 1985 Golf Club Agreement, the 1988 40% Agreement, the 1988 Golf Club Agreement, and the Assumption Agreement (the "Related Contracts") are affected by the invalidity and unenforceability of ss. 5(4) and 9 of the 1981 Agreement (the "Appeal Decision").[2]

[9] The parties did not agree on the impact of the Court of Appeal's decision on the provisions of these other agreements and have returned before this court to argue what is, if any, the impact of the Appeal Decision on the Related Contracts.

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[1] *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 1298.
[2] *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847, 159 O.R. (3d) 255.

Jurisdiction and Context

[10] When this court published the Application Decision and the resulting costs decision, it had spent its jurisdiction resulting from the Notice of Application. Accordingly, the only jurisdiction currently attributed to this court would be that which was provided to it in the Appeal Decision and potentially, but to a lesser extent, from the resulting order of the Court of Appeal taken out by the parties. I say to a lesser extent given that the order of the Court of Appeal is a document drafted by the parties, usually submitted on consent, and then signed by the registrar of the Court of Appeal. It is not a further adjudication by the panel hearing the appeal and as such the jurisdiction of this court must come principally from the Appeal Decision.

[11] The Order of the Court of Appeal states in part:

> 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.
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> 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.

[12] To understand exactly what the Court of Appeal decided in the Appeal Decision and what it allowed to return to the application judge, the court reproduces the following relevant paragraphs from the Appeal Decision:

> [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.
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> …
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> [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.
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> …

> [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.
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> [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.
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> [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.
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> [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.

[13] In addition to the findings of the Court of Appeal in respect of the rule against perpetuities, the Court of Appeal made reference to the Related Contracts and the related contracts principle. Where it is intended that each agreement form part of a larger composite whole, assistance in the interpretation of any particular agreement may be drawn from the related agreements.[3] Accordingly, they must read in light of each other to achieve interpretive accuracy and give effect to the parties' intentions.

[14] Furthermore, both parties relied on a number of findings of this court in the Application Decision which characterize the nature of the development scheme related to the 40% principle:

> [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

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[3] *3869130 Canada Inc. v. I.C.B. Distribution Inc*., 2008 ONCA 396, 45 B.L.R. (4th) 1, at para. 33.

> space. Within that open space would be a golf course, to be operated in perpetuity, subject to certain alternative scenarios.
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> …
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> [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.
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> [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.

Position of the Parties

[15] The most interesting part of the argument advanced by Clublink and the City is that neither requests severance and both allege that the other is effectively requesting severance. The City alleges that ClubLink is effectively requesting that this court applies the "blue pencil" approach to severance beyond ss. 5(4) and 9 of the 1981 Agreement to strike out any other section that relates to the golf course.[4]

[16] ClubLink advances that in seeking for the Related Contracts to be maintained, the City is effectively requesting to sever ss. 5(4) and 9 of the 1981 Agreement and maintain the rest.

[17] ClubLink argues that each of the Related Contracts must be declared invalid as a result of the Appeal Decision, namely that ss. 5(4) and 9 of the 1981 Agreement are void and unenforceable. ClubLink argues against the applicability of the doctrine of severance as those sections cannot be excised from the agreements governing the golf course without fundamentally altering the bargain

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[4] *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 383 D.L.R. (4th) 361, at para. 36.

reached between the parties in the 1980s. The result is that the Related Contracts are not enforceable to the extent that they apply to the golf course lands.

[18] Alternatively, ClubLink provides its interpretation of the direction of the Court of Appeal and that all provisions in the Related Contracts that deal with the golf course must also be declared void because they are part of one package which dealt with the ownership rights of the golf course and are integrally related to each other. The Related Contracts are so interconnected with and tainted by the unenforceability of ss. 5(4) and 9 of the 1981 Agreement that any provision related to the golf course must be declared inoperative.

[19] The City argues that as a result of the Court of Appeal's determination that ss. 5(4) and 9 are void and unenforceable, there is no further step required by this court. It was a narrow finding that does not affect the remaining provisions of the Related Contracts. This is because that finding simply means that those provisions in the 1981 Agreement are no longer enforceable and they are not actionable. Otherwise, the bargain as reached between the parties is maintained and there is no need to address enforceability.

[20] The City argues that severance is only applicable in the case of illegality and that it is only meant to cure a bargain that is found to be illegal. Although the Court of Appeal opened the door in the Appeal Decision for the matter to be sent back to this court, the City argues that the Court of Appeal did not authorize any type of procedure which would be equivalent to the blue pencil test known under the law of severance. There is no mechanism for this court to start declaring various provisions of the Related Contracts as being unenforceable beyond the specific sections dealt with by the Court of Appeal.

[21] In addition, the City argues that the remaining provisions of the Related Contracts maintain the agreement between the parties and any steps taken by this court in line with the ClubLink proposal would amount to rewriting the contract, something that courts have frowned upon for many years.

[22] Ultimately, the City advances that if ClubLink seeks to change anything related to the operation of the golf course, it must either utilize the remaining provisions of the Related Contracts or seek to negotiate new terms with the City.

[23] As for the Coalition, it argues that what ClubLink is really seeking is either severance or rectification and that ClubLink should have brought its own application seeking either of these remedies. The Coalition's factum argues in favour of severance in this case to the extent that severing ss. 5(4) and 9 of the 1981 Agreement keeps the bargain at the root of the agreements intact, as the operation of a golf course is but one of several means by which ClubLink or its successors can honour their commitment to preserving open space.

[24] In argument, the Coalition went even further and indicated that it did not object to severing all the provisions that related to the golf course provided that the overarching obligation to maintain the 40% principle remained intact. To do otherwise would result in ClubLink being unjustly enriched at the detriment of the Coalition's members if the golf course lands can be redeveloped without maintaining 40% of the total lands as open space.

[25] The Coalition also advanced the notion of estoppel by convention and argued that ClubLink is estopped from contesting the validity and enforceability of the Related Contracts establishing the 40% principle.

Jurisdiction

[26] I highlight the main points relating to my jurisdiction that guide my decision-making process:

a) The Court of Appeal found that the Related Contracts are related contracts which must be read in light of each other to achieve interpretive accuracy and give effect to the party's intentions.

b) The 40% principle was an important contractual feature that allowed Campeau to advance the development of property and further the Kanata's public policies.

c) When the agreements are read and interpreted as a whole and in the context of the factual matrix, the provisions of ss. 5(4) and 9 were intended to restrict or fetter the use that could be made of 40% of the property to further the City's open space development policy.

d) The Court of Appeal concluded that there was no basis to void myriad other provisions that are unrelated to the golf course and that have already been performed.

e) 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. This is the larger question that must be remitted to the application judge for determination.

[27] What this court interprets from the Court of Appeal's comments is that, clearly, the Court of Appeal did not agree with ClubLink's initial position that the Related Contracts must all be voided as the default position under the law of severance. Also, there is no need to disturb obligations that have already been performed, including the 40% principle which was incorporated in many other development agreements.

[28] One thing is clear from the direction of the Court of Appeal: provisions in the Related Contracts that apply to the conveyances contemplated by ss. 5(4) and 9 of the 1981 Agreement would clearly also be void and unenforceable as they simply restate the contingent interests that have been voided in the Appeal Decision. However, the do-nothing approach advanced by the City is certainly not in line with the direction of the Court of Appeal.

Severability

[29] The argument before this court dealt primarily with the applicability of the law of severance. As previously stated, both ClubLink and the City alleged that the opposing party was improperly relying on severance and encouraged the court not to change the terms of the bargain or to rewrite the Related Contracts for the parties. The Coalition claims that the void provisions, along with the other provisions relating to the golf course, can be severed as long as the requirement for 40% open space remains.

[30] The law of severance has no place in this decision. While there may be an open debate as to whether severance applies solely to illegal contracts as argued by the City or if severance also applies to provisions which have been declared void and unenforceable by statute, this is not a debate that the Court of Appeal directed this court resolve. The jurisdiction of this court must be focussed on paras. 69 and 70 of the Appeal Decision, which direct this court to identify which provisions of the Related Contracts *are so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative*.

Estoppel by Convention

[31] As part of its submission following the referral of this matter back to the application judge, the Coalition has raised the issue of estoppel by convention and seeks for this court to apply thelaw as established by the Supreme Court of Canada in *Ryan v. Moore*.[5] ClubLink objects to raising this argument at this point of the proceedings, and also states that the estoppel argument fails.

[32] Furthermore, the Coalition has raised the argument that ClubLink was effectively seeking rectification and that I should consider that issue.

[33] I have no jurisdiction for entertaining new arguments from the parties that go beyond the limited jurisdiction afforded to me by the Court of Appeal. The jurisdiction of this court is limited to determining which provisions of the Related Contracts are so interrelated to ss. 5(4) and 9 of the 1981 Agreement that they must necessarily be inoperative.

[34] To suggest at this point that ClubLink is estopped from making the arguments that the Court of Appeal stated should be made to the application judge flies in the face of that direction.

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[5] 2005 SCC 38, [2005] 2 S.C.R. 53.

[35] Furthermore, although ClubLink has made the primary argument that each of the remaining Related Contracts should be declared inoperative, that was not the preliminary view of the Court of Appeal and it is not the view of this court. The proper process is to consider the relevant provisions of the Related Contracts that ClubLink claims are interrelated to ss. 5(4) and 9.

[36] Finally, the Coalition has not demonstrated that it has met the three-part test from *Ryan v. Moore*, being (1) mutual assumption, (2) detrimental reliance, and (3) that it is unjust to allow one of the parties to resile from the mutual assumption. Firstly, there was never a mutual assumption that the 40% would be maintained forever. To the contrary, the Related Contracts included provisions to allow for the golf course lands to be redeveloped and deemed to still be part of the 40% open space requirement. Next, there can be no detrimental reliance when the Related Contracts always allowed for a path to discontinue the golf course operation and more than one path to redevelop the lands. Simply put, estoppel by convention is not made out in these circumstances.

Referral by Court of Appeal

[37] In interpreting the direction of the Court of Appeal relating to other provisions of the Related Contracts that may be affected by the determination that ss. 5(4) and 9 of the 1981 Agreement are void and unenforceable, I am of the view that this court must consider the original intent of the parties and the manner in which the Related Contracts were meant to evolve. The court must also seek to maintain, to the extent possible, the bargain of the parties and the impact on other agreements, while taking into consideration that the path to redevelopment of the lands has changed significantly.

[38] ClubLink has included as part of its factum copies of the Related Contracts that have been red-lined to identify which provisions of those contracts are so interrelated to ss. 5(4) and 9 of the 1981 Agreement that they must be declared inoperative. Essentially, ClubLink has indicated all provisions that deal with the golf course or the golf course lands.

[39] I am of the view that I must deal with each of those paragraphs individually. ClubLink's proposed red-line changes to the Related Contracts are attached as Schedule "A" to this decision (body of the related contracts only). There are 15 provisions in question, listed as follows:

a) Sections 3, 3(a), 4, 5, 9, and 10 (in part) of the 1981 Agreement;

b) Section 3 of the 1985 Golf Club Agreement;

c) Sections 2, 5, and 6(d) of the 1988 40% Agreement;

d) Section 4 of the 1988 Golf Club Agreement; and

e) Sections 5, 7, 10, and 11 of the Assumption Agreement.

[40] The analysis returns to the words of the Court of Appeal whereby this court must consider which provisions of the Related Contracts are so interrelated to ss. 5(4) and 9 and the void contingent interests in land that they must necessarily be inoperative. This does not in my view mean any provision that is related to the golf course. There must be an interrelated link to the void contingent interest.

[41] Next, this court must remind itself of the nature of the void contingent interest.

[42] In s. 5(4), Campeau had the right to decide to discontinue the operation of a golf course after seeking another person to acquire or operate it, and it would then be obligated to convey the golf course lands to the City at no cost. The City would then be obligated to operate the land as a golf course.

[43] In s. 9, after the provisions of s. 5(4) were fulfilled, if the City, as owner, proposed to cease to use land for recreation and natural environmental purposes, the City was required to reconvey those lands to Campeau at no cost.

The Interrelated Link

[44] As determined in the Application Decision, I am of the view that the sections of the 1981 Agreement were negotiated and arrived at to allow for the City to give effect to its policies (notably the 40% principle) and to allow for a process of evolution for the lands in question. That evolution involved the operation of the golf course by Campeau, by the City, or by a third-party operator. Furthermore, it allowed for Campeau to sell the lands to a third-party operator, transfer the lands to the City, or redevelop the lands. It was never the intent of the parties that a golf course would be operated on the golf course lands in perpetuity without Campeau having specific rights to effect change.

[45] I disagree with the City in its argument that change can still now be affected with the right of first refusal in s. 5(3) of the 1981 Agreement, by ClubLink giving the land to the City, or by attempting to renegotiate with the City for a possible redevelopment. These are not options that, in my view, maintain the intent and purpose of the Related Contracts.

[46] It was neither the intent nor the effect of the Related Contracts to create a permanent and unconditional obligation on Campeau or its successors to operate a golf course in perpetuity. While that language is used in s. 5(1) of the 1981 Agreement, it was certainly not the intent when the remaining provisions of s. 5 and then s. 9 of that Agreement are put into play.

[47] As identified in the Application Decision, the 1981 Agreement represented a series of integrally related provisions that provided for not only the establishment of the 40% open space principle, but also the establishment of a golf course use over an important portion of that 40% open space area. The 1981 Agreement was meant to allow the area of the golf course lands to evolve over time beyond its intended original ownership and use as a golf course. It was also to ensure that if the golf course lands were ever redeveloped, Campeau or its successors would have the first opportunity to do so.

[48] Both ss. 5(4) and 9 of the 1981 Agreement are the essential provisions for the evolution and potential redevelopment of the golf course lands. The impact of determining that those sections are void and unenforceable fundamentally changes the bargain that the parties had negotiated. As a result, there is a profound effect on various provisions of the Related Contracts which form part of the anticipated evolution of the golf course lands. Failing to recognize this effect would require that the golf course lands remain a golf course in perpetuity and without the essential path to development which could be triggered by ClubLink's decision to discontinue the golf course use.

[49] Given that ss. 5(4) and 9 of the 1981 Agreement created contingent interests in land that had not vested during the perpetuity period, the finding that they are void closes the door on the intended path for the evolution of the land which was negotiated by the parties.

[50] It is under that understanding that I consider the specific provisions raised from the Related Contracts.

Specific Provisions in Question

1981 Agreement

Section 5

[51] Starting with s. 5 of the 1981 Agreement, this provision is essentially tied to the evolution of the lands as identified by the parties. Sections 5(4) and 9 are the provisions that give effect to the redevelopment path by firstly allowing for discontinuance of the golf course operation, the possible transfer of the lands to the City for the continued operation of the golf course, the possible redevelopment of the lands under s. 5(5), or the return of the lands to Campeau when no longer used for recreation and natural environment.

[52] The obligation to maintain the golf course use in perpetuity in s. 5(1) was never a stand-alone obligation that could have been binding on Campeau and its successors indefinitely. The provisions identified by the City during the original application as integral "off-ramps" to the perpetual operation of the golf course are integrally linked together and operate as a whole. One cannot extricate ss. 5(4) and 9 of the 1981 Agreement while maintaining the structure of provisions

that allowed for the perpetual operation of a golf course in the context of the ongoing evolution of the golf course lands.

[53] The 1981 Agreement was not an agreement to operate a golf course in perpetuity and this is contrasted by other agreements which have been acknowledged by the courts as creating perpetual obligations.[6] The 1981 Agreement clearly identified that the golf course lands would be operated by Campeau as a golf course in perpetuity, but this was subject to various other provisions of the 1981 Agreement which allowed for a discontinuance of that use. Importantly, the Related Contracts provided for redevelopment and the 40% principle being deemed to be maintained.

[54] With s. 5(4) of the 1981 Agreement now being void an unenforceable, there is no provision in any of the Related Contracts allowing ClubLink to discontinue the operation of the golf course. The right to discontinue was an essential mechanism which allowed Campeau to commence the process of evolution and possible redevelopment of the golf course lands. Without it, the only way Campeau gets out of the operation of a golf course is if it sells to a third party who would also be saddled with the same obligations to operate in perpetuity.

[55] This was not a narrow path to redevelopment as described during argument. This was an essential path allowing for evolution of the golf course lands that ensured that if, at the end of the line, the lands were eventually redeveloped, Campeau or its successors would have the first opportunity to do so. If s. 5(1) remains operative, the result transforms the 1981 Agreement into a perpetual agreement to operate a golf course which cannot be discontinued. This is a fundamental change to the 1981 Agreement which is directly linked to s. 5(4) having been declared void. Section 5(1) and the obligation to operate a golf course in perpetuity is therefore inoperative.

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[6] *Conseil Scolaire Catholique Franco-Nord v. Nipissing Ouest (Municipalité)*, 2021 ONCA 544, 158 O.R. (3d) 332; *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517, 424 D.L.R. (4th) 588.

[56] Section 5(2) allows for Campeau to sell the golf course provided that a new owner agrees to operate a golf course in perpetuity. This section is intimately linked to the obligation to operate a golf course in perpetuity without a right to discontinue. Section 5(2) is necessarily inoperative for the same reasons as s. 5(1).

[57] Section 5(3) is the right of first refusal. This section allowed Campeau to receive an offer to purchase and allow Kanata to purchase on the same terms and conditions. However, this section is still linked to s. 5(2), which only allows Campeau to sell upon an undertaking by the purchaser to operate a golf course in perpetuity. This would also have applied under s. 5(3) as Kanata could only exercise the right of first refusal on the same terms and conditions. Kanata would have been saddled with the same perpetual obligation that was required in any sale agreement. Section 5(3) must also be declared inoperative as it is tainted with the same obligation to operate in perpetuity.

[58] To complete s. 5 of the 1981 Agreement, the ability to discontinue the operation of the golf course allowed Campeau to redevelop the lands in accordance with the *Planning Act*[7] under s. 5(5) in the event that the City did not accept the conveyance under s. 5(4). Interestingly, this section includes the words *notwithstanding anything to the contrary contained in this agreement* [emphasis added]. Those words necessarily exclude the 40% principle and confirm that it was the intention that if the golf course lands were redeveloped under s. 5(5), those lands would not be subject to the 40% open space requirement. This notion was further confirmed in s. 11 of the Assumption Agreement. The only restriction was that a redevelopment of the golf course lands had to be done in accordance with the *Planning Act*. Section 5(5) is an integral part of the path to redevelopment and is inoperative as a result of the declaration that s. 5(4) is void.

Section 4

[59] Section 4 of the 1981 Agreement is simply a provision that requires the parties to agree on the location of the golf course lands. This obligation has been fulfilled and formed part of the establishment of a golf course as it existed back then and as was further particularized in the 1988

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[7] R.S.O. 1990, c. P.13.

Golf Club Agreement. This provision is not impacted by the determination that ss. 5(4) and 9 are void for perpetuities. It is not an ongoing obligation that conflicts with s. 5 of the 1981 Agreement.

Sections 3 and 10

[60] I turn now to ss. 3 and 10 of the 1981 Agreement, which confirm the principle that approximately 40% of the total development area shall be left as open space for recreation and natural environmental purposes. These are two of the myriad of other provisions referred to at para. 69 of the Appeal Decision that have already been performed and the obligations of which continue to form part of numerous other valid agreements. Also, the 40% principle and the 1988 40% Agreement are registered on title of every residential lot in Kanata Lakes. Their application goes well beyond the golf course lands and they have been incorporated in numerous development agreements. There is no basis to declare every provision that relates to the golf course lands inoperative nor every provision that relates to the 40% principle.

[61] However, as highlighted under s. 5(5), and as shall later be seen in s. 11 of the Assumption Agreement, the 40% principle was not meant to apply to a redevelopment of the golf course lands that complies with the *Planning Act*. Accordingly, the text struck out in ClubLink's proposed red-line changes to ss. 3 and 10 of the 1981 Agreement (attached as Schedule "A") is inoperative, but only to the extent that the text would apply to a redevelopment by Campeau or its successors. Otherwise, those provisions remain in effect to the extent that they impact other lands beyond the golf course lands.

1985 Golf Club Agreement

Section 3

[62] The 1985 Golf Club Agreement identifies the location, size, and standards for Campeau's golf course under s. 5 of the 1981 Agreement. It references the broader arrangement between the parties: that 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.

[63] Section 3 of the 1985 Golf Club Agreement is another provision that relates to the golf course but it is not affected by the determination that ss. 5(4) and 9 of the 1981 Agreement are void.

[64] This provision relates to the manner that the golf course will be operated both during the golf season and during the winter season. It is not a stand-alone obligation to operate the golf course or make the lands available for community use in the winter in perpetuity. It continues to apply for so long as the operation of the golf course continues. This provision is not affected by the Appeal Decision.

1988 40% Agreement

Section 2

[65] The 1988 40% Agreement is an amendment to the 1981 Agreement that removes excess lands from its ambit, and ensures that the obligations under the 1981 Agreement are binding on successors in title of Campeau. It is also registered on title to every residential lot in Kanata Lakes[8].

[66] This is another provision that has application beyond the golf course lands and which has been performed in other development agreements touching upon the total development area. There is no basis to declare it void and potentially impact those other agreements. However, insofar as this provision seeks to have the 40% principle apply to the golf course lands after that use is discontinued, it must necessarily be declared inoperative.

Section 5

[67] Section 5 of the 1988 40% Agreement essentially restates the obligation set out in s. 5(2) of the 1981 Agreement to require assumption agreements by future purchasers but applies it to the totality of the "Current Lands" (excluding the sale of individual lots or blocks). The Current Lands are legally described in Schedule "A" to the 1988 40% Agreement. The Current Lands go beyond

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[8] Application Record, p. 1707.

the golf course lands. This is another provision that is directly affected by the Appeal Decision, but only insofar as it relates to the golf course lands. It is therefore declared inoperative to the extent that it relates to the golf course lands.

Section 6(d)

[68] Similar to s. 3 of the 1985 Golf Club Agreement, s. 6(d) of the 1988 40% Agreement creates obligations during the continued operation of the golf course. It does not extend beyond that and would no longer apply to the golf course lands after the golf course use has been discontinued. This provision remains operative.

1988 Golf Club Agreement

Section 4

[69] The 1988 Golf Club Agreement is an amendment to the 1985 Golf Club Agreement that similarly excludes "excess lands" and ensures that the obligations under the Golf Club Agreement in respect of the Current Lands are binding on Campeau's successors in title.

[70] Once again, this is a restatement of s. 5(2) of the 1981 Agreement and has a similar fate. It is directly affected by the Appeal Decision. This section is intimately linked to the obligation to operate a golf course in perpetuity without a right to discontinue. Section 4 of the 1988 40% Agreement is necessarily inoperative.

Assumption Agreement

Section 5

[71] The purpose of the Assumption Agreement is for ClubLink to assume all of Campeau's right, title, interest, and obligations under the 1981 Agreement and the Golf Club Agreement, in a manner compliant with the City's right of first refusal.

[72] Section 5 of the Assumption Agreement restates the validity of s. 5(3) of the 1981 Agreement and confirms that the right of first refusal continues to apply. I have already determined that s. 5(3) of the 1981 Agreement is inoperative as it is tainted by the obligation to operate in perpetuity, this section suffers from the same issue. Section 5 of the Assumption Agreement is inoperative.

Section 7

[73] This provision is simply a confirmation of obligations as at the date of entering into the Assumption Agreement. It could also continue to apply for as long as the 1981 Agreement is in effect and portions of that agreement will continue to apply beyond the discontinuance of the golf course use. It applies to ongoing obligations, to the extent that they have not been otherwise declared inoperative.

Section 10

[74] Section 10 of the Assumption Agreement is a restatement of the City's obligation to reconvey under s. 9 of the 1981 Agreement and, in such an event, creates an obligation to convey to Imasco. As s. 9 of the 1981 Agreement is void and unenforceable, s. 10 of the Assumption Agreement is directly affected and as such is inoperative.

Section 11

[75] Section 11 of the Assumption Agreement restates the 40% principle from s. 3 of the 1981 Agreement and that the golf course lands continue to form part of the 40% space for recreation and natural environmental purposes. This decision has confirmed that the 40% principle is inoperative to the extent that it would apply to a redevelopment of the golf course lands. It remains otherwise in effect. The same applies to the first sentence of s. 11 of the Assumption Agreement.

[76] However, s. 5(5) of the 1981 Agreement is relevant when considering the intent of the parties. That section confirms that the golf course lands can be redeveloped under the *Planning Act*, notwithstanding anything to the contrary (which would include the 40% principle.) Section

11 of the Assumption Agreement adopts this same principle in the case of a change of use done with the agreement of the City.

[77] I am of the view that s. 11 of the Assumption Agreement contemplates that the golf course lands will be deemed part of the 40% principle provided that a change of use meets the requirements of the *Planning Act*. The fact that the City never dealt with the ClubLink development proposal (which was submitted to the City and ultimately approved by the Ontario Land Tribunal) supports this conclusion. The City did not make a decision on ClubLink's development application in time and the authority to make that decision was then appealed to the Ontario Land Tribunal.[9]

[78] As part of the *Planning Act* approval process, ClubLink's applications were appealed to the Ontario Land Tribunal without the City deciding whether it agreed to the change of use proposal within the timeframe set out in the *Planning Act*. Accordingly, it would only make sense to interpret s. 11 of the Assumption Agreement as including a situation where a development proposal that changes the use of the golf course lands is ultimately approved pursuant to the *Planning Act*.

[79] Section 11 of the Assumption Agreement clearly contemplates that a potential change in use as part of ClubLink exercising its contingent interest in land under s. 9 of the 1981 Agreement would have allowed for the redevelopment of the golf course lands without offending the 40% principle. Clearly, this is a very real and negotiated term of the contingent interest in land that existed at the time the Assumption Agreement was signed.

[80] Although the Assumption Agreement was only between three parties, the 40% principle was incorporated in several other development agreements and those development agreements continue to apply. Accordingly, the second sentence of para. 11 is an important provision to acknowledge that the redevelopment of the golf course lands *with the agreement of the City or in*

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[9] *ClubLink Corporation ULC v. Ottawa (City)*, 2022 CanLII 23501 (Ont. Land Tribunal), at para. 1.

accordance with the Planning Act does not otherwise impact the 40% principle as those lands are deemed to continue to be included as part of the 40% principle.

[81] I would therefore maintain the second sentence of s. 11 of the Assumption Agreement with the confirmation that this provision does not restrict the redevelopment of the golf course lands done in accordance with the *Planning Act*. However, in the event that my interpretation of the second sentence of para. 11 is incorrect, that second sentence would still otherwise be inoperative as it is intimately linked to ClubLink's right to redevelop if the lands were returned to ClubLink under the contingent interest in land found in s. 9 of the 1981 Agreement.

Conclusion

[82] The findings of this court in this decision should allow for the parties to identify how the Related Contracts are affected by the Appeal Decision. If there is a dispute on how to interpret the findings in this decision, the parties may write to me to resolve the dispute. Otherwise, the parties can forward a draft order incorporating the terms of this decision.

Costs

[83] 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*.[10]

Justice Marc R. Labrosse

Released: October 13, 2023

[10] R.R.O. 1990, Reg. 194.

SCHEDULE "A"

1981 40% Agreement

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.

1981 40% Agreement

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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

1985 Golf Club Agreement

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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: Marianne Wilkinson
Mayor

PER: Frank Nolan
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

1988 40% Agreement

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

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~~

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

1988 Golf Club Agreement

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

CITY OF KANATA

CAMPEAU CORPORATION

Per: _____ Jean E. Martineau Senior Vice President

Per: _____

DANIEL LATREILLE VICE-PRESIDENT

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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:

[redacted]

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

[redacted]

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~~

[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.~~

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

[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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Name: Justin Connidis
Title: Vice-President and Secretary

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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

[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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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:_____
Name: ANNA LAPOINTE
Title: CITY CLERK

I/We have authority to bind the Corporation

Schedule "A" - Golf Course Lands

[redacted]

CITATION: *City of Ottawa v. ClubLink Corporation ULC*, 2023 ONSC 5004
COURT FILE NO.: 19-81809
DATE: 2023/10/13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION COALITION

Intervener

REASONS FOR DECISION - SEVERANCE

Labrosse J.

Released: October 13, 2023