

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

**URBANCORP (LESLIEVILLE) DEVELOPMENTS INC.,
URBANCORP (RIVERDALE) DEVELOPMENTS INC., &
URBANCORP (THE BEACH) DEVELOPMENTS INC.,**

Respondents

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

FACTUM OF THE CERTAIN CURZON PURCHASERS

June 6, 2019

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PART I - OVERVIEW

1. Purchasers of 30 units within Urbancorp's Leslieville development move for an order directing the Receiver to return \$471,994.39 which was improperly collected as extra charges on closing.
2. The Certain Curzon Purchasers are a group of individuals who had the misfortune of buying condominium units within Urbancorp's Leslieville development. After purchasing new townhouse condominiums beginning in 2011, they endured years of delayed closings and uncertainty, and subsequently many construction deficiencies including roof leaks and infestations of carpenter ants. They were obliged to pay an additional \$255,000 per unit – just for the privilege of being able to purchase the homes they had been waiting so long to move into. Then, on the day of closing, the Certain Curzon Purchasers learned for the first time that they needed to come up with an additional \$13,168.69 - \$16,766.78 each as extra charges on closing for a "Parks Levy", otherwise they would not be permitted to close the purchases of their homes.
3. The Receiver admits that no parks levy was paid because *Planning Act* requirements were satisfied through a transfer of land. The agreements of purchase and sale require purchasers to compensate the Receiver only for their share of "any parks levy". The agreements do not require purchasers to pay for the value of parkland transferred to the City. The Certain Curzon Purchasers therefore claim the Parks Levy was not a proper charge and seek to have this money returned.

PART II - FACTS

4. Beginning in 2011, purchasers began buying condominium units from Urbancorp Leslieville Developments Inc. ("UC Leslieville"). Two of the Certain Curzon Purchasers, Trisha Enriquez and Emil Calixterio ("Trisha" and "Emil"), bought suite 115 for \$597,000 on July 3, 2011. It is a 2,000 square foot townhouse with three bedrooms, two and a half bathrooms, a roof-top deck terrace and a finished basement.¹
5. Trisha and Emil bought into the Leslieville development with the expectation that they would move into it in 2013 and start a family (their first child was born in 2012). They selected the Leslieville site because it was near St. Joseph's School where they hoped their future children would attend.²
6. Unfortunately, notices about final occupancy from UC Leslieville were not really final. Trisha and Emil received over ten delay notices. They lived in temporary accommodation for years while waiting for their new home to be built. Harper, who was born in December 2012, was registered to attend St. Joseph's. However, their home was not ready by the time Harper started school, and Trisha and Emil were forced to send Harper to a different school.³

¹ Affidavit of Trisha Enriquez sworn May 8, 2019, para 2, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.1.

² Affidavit of Trisha Enriquez sworn May 8, 2019, paras 3-4, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.2.

³ Affidavit of Trisha Enriquez sworn May 8, 2019, paras 5-9, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 pp.2-3.

7. In 2016, UC Leslieville went into receivership. Trisha and Emil could not find an equivalent home in the Leslieville area at that time as housing prices had skyrocketed since their 2011 purchase.⁴
8. The Receiver was granted control over the Leslieville project. Lender Terra Firma brought a motion that would have prevented original purchasers from closing on the units they had spent five years waiting to move into.⁵
9. Some original purchasers retained counsel. The parties negotiated a settlement whereby original purchasers could complete the purchases of their respective townhomes provided they were prepared to pay an additional \$255,000, referred to as the "top-up" amount, and execute the Opt-In Leslieville Purchaser agreement of purchase and sale.⁶
10. The order approving the new form of APS, dated May 2, 2017, required Opt-In purchasers to formally opt-in no later than 5 p.m. on May 19, 2017.⁷
11. Executing the Opt-In Leslieville Purchaser agreement of purchase and sale was stressful for Trisha and Emil. They had already been waiting for six years to move into the Leslieville property and had not anticipated this additional cost. They had to come up with an extra \$255,000 which was challenging because Trisha was on maternity leave

⁴ Affidavit of Trisha Enriquez sworn May 8, 2019, para 10, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.3.

⁵ Agreed Statement of Fact, para 1c, 2, and 27.

⁶ Agreed Statement of Fact, para 30. Affidavit of Trisha Enriquez sworn May 8, 2019, para 12, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.4.

⁷ Para 7, order of Newbould J. dated May 2, 2017, Joint Document Brief Tab 15 p. 199;

with their second child and they had not planned on borrowing such a significant amount for their home. It was difficult to get additional financing on Emil's income alone.⁸

12. The following subsection 7(d)(iii) was included in both the original and the new "Opt-In" agreements of purchase and sale executed by all of the Certain Curzon Purchasers (the language did not change):

(d) The Purchaser shall, in addition to the Purchase Price, pay the following amounts to the Vendor on the Title Transfer Date:...

(iii) the amount of any parks levy or any charges pursuant to a Section 37 Agreement (pursuant to the Planning Act), levied, charged or otherwise imposed with respect to the Condominium, the Property or the Unit by any governmental authority, which is equivalent to the common interest allocation attributable to the Unit as set out in Schedule "D" to the Declaration;⁹

13. There were further delays. Trisha and Emil were finally granted occupancy of the Leslieville Property in April, 2018. They moved in immediately as they had just had their second child and needed the space. Unfortunately, the quality of the house was inferior and not at all like a new home: Harper's room had a leak in the ceiling and there were gaps in the doors that caused drafts throughout the house. The house was infested with carpenter ants and an exterminator was needed, which was not healthy for a newborn and a young child. Dealing with the builder was extremely frustrating and stressful as many calls went unanswered and things were never fixed properly. Trisha was suffering from post-partum depression at that time.¹⁰

⁸ Affidavit of Trisha Enriquez sworn May 8, 2019, para 12, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.4.

⁹ See sample Opt-In APS, Schedule C-1 to the order of Newbould J. dated May 2, 2017, Joint Document Brief Tab 15 p. 236; See Tarion standard conditions, Schedule C-1 to the order of Newbould J. dated May 2, 2017, Joint Document Brief Tab 15 p. 297;

¹⁰ Affidavit of Trisha Enriquez sworn May 8, 2019, para 14-15, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 pp.4-5.

14. On the day of closing, Trisha, Emil, and the other Certain Curzon Purchasers learned they would have to pay \$13,168.69 - \$16,766.78 for a "Parks Levy". The requirement to pay for a Parks Levy came as a complete surprise.¹¹
15. At no point during the development was it ever contemplated that a Parks Levy would be paid on behalf of the project.¹²
16. No Parks Levy was paid on behalf of the project.
17. Trisha and Emil had not expected this charge or budgeted for it. They could not come up with the money. They needed to close on their suite as they had a significant amount of money tied up in the deposit and had nowhere else to live. Trisha and Emil managed to get a brief extension of their closing date which gave them 48 hours to come up with the Parks Levy. They scrambled, borrowed money from family, and took out a line of credit. Although they managed to close their purchase, the closing was extremely stressful.¹³
18. The construction problems continue post-closing. The roof is leaking, the floors are damaged and there continue to be drafts in the house from the doors. When investigating the roof leak, Tarion cut three major holes in Trisha and Emil's ceiling – which are still there. Tarion has deemed the Receiver as unwilling and unable to finish the project. As a result, Trisha and Emil are forced to deal with Tarion for repairs. However, Tarion is not making repairs but instead it is only negotiating payouts for the deficiencies. Purchasers

¹¹ Affidavit of Trisha Enriquez sworn May 8, 2019, para 16, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.6. See Joint Document Brief, Tab 19.

¹² See history of Parks Levy calculations within the next section of this factum. The Receiver does not claim to have paid any Parks Levy.

¹³ Affidavit of Trisha Enriquez sworn May 8, 2019, paras 17-18, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.5.

have been left to retain contractors on their own to perform repairs – on their brand new homes. This has been an incredibly frustrating and stressful experience.¹⁴

THE PARKS LEVY

19. Section 42 of the *Planning Act* states that municipalities can require land for parks or other public recreational purposes be conveyed to the municipality as a condition of development or redevelopment of land:

42(1) As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes.¹⁵

20. As an alternative, a municipality may require cash in lieu to the value of land.¹⁶
21. UC Leslieville submitted an application to the city for approval of the Leslieville Project. The initial application proposed a transfer of parkland. The application was reviewed by the City of Toronto's Acting Supervisor, Development Applications, who prepared a December 2011 report which stated¹⁷:
 - (a) The proposed project, which has 56 dwelling units, required a parkland dedication of 696 m²;

¹⁴ Affidavit of Trisha Enriquez sworn May 8, 2019, para 19, Supplementary Motion Record of the Certain Curzon Purchasers, Tab 1 p.5.

¹⁵ Section 42(1) of the *Planning Act*, R.S.O. 1990, c. P.13, Factum of the Certain Curzon Purchasers, Schedule B.

¹⁶ Section 42(6) of the *Planning Act*, R.S.O. 1990, c. P.13, Factum of the Certain Curzon Purchasers, Schedule B.

¹⁷ Memorandum dated December 15, 2011, Joint Document Brief tab 1 p. 1.

- (b) The proposal included a parkland dedication of only 676.5 m², and therefore the 19.5 m² shortfall would be required to be satisfied with a cash-in-lieu payment; and
 - (c) Prior to the issuance of the first above-grade building permit, the Owner (UC Leslieville) was required to enter into an escrow agreement with the City regarding the conveyance of the parkland and the cash-in-lieu payment for the 19.5 m² shortfall.
22. An escrow agreement to secure parkland dedication from UC Leslieville to the City of Toronto was not signed.¹⁸ Instead, the City of Toronto took a letter of credit to secure the transfer of parkland. The letter of credit from UC Leslieville to the City of Toronto is dated February 12, 2013.¹⁹ The quantum of the Letter of Credit appears to be based on an estimate of the parks levy that would have been payable had the development not included a parkland transfer.²⁰
23. Subsequently, revised plans were submitted to the City of Toronto which increased the proposed parkland dedication to 700.09 m² – enough land to satisfy the entire parkland dedication requirement. A Notice of Approval of Conditions dated January 25, 2016 stated:
- (a) Prior to registration of the condominium, 700.09 m² must be conveyed to the City for parkland purposes;

¹⁸ Paragraph 19 of the Agreed Statement of Fact confirms that no executed Parkland Dedication could be located.

¹⁹ See Letter of Credit dated February 12, 2013, Joint Document Brief Tab 3.

²⁰ Letter from City of Toronto dated January 28, 2013 estimates any Parks Levy payable for the project would be \$769,280 – see Joint Document Brief Tab 2.

- (b) Prior to conveying the parkland to the City, a site assessment/remediation process was required to be completed;
 - (c) The City will not provide a credit for the extra 4.09 m² being conveyed (which land is in addition to the minimum required 696 m² parkland dedication); and
 - (d) The City acknowledges receipt of the Letter of Credit to secure the parkland dedication.²¹
24. The Site Plan Agreement between UC Leslieville and the City of Toronto was dated October 23, 2017. It confirms the transfer of 700.09 m² for parkland purposes, and there is no cash payment-in-lieu of parkland.²² Shortly after the Site Plan Agreement was executed, the project was formally approved by the City of Toronto.²³
25. The parkland dedication of 700.09 m² was conveyed to the City of Toronto on May 23, 2018.²⁴ The Letter of Credit to secure the parkland dedication was released on October 4, 2018²⁵.
26. No parks levy was ever paid with respect to the project.²⁶
27. Closings occurred between October 18 and October 25, 2018 – after the letter of credit had been returned to the Receiver.²⁷

²¹ See Notice of Approval of Conditions dated January 25, 2016 ss. 5 and 8 p. 3-5; Attachment 1 s. 10-11 p. 13; Joint Document Brief Tab 4.

²² See Site Plan Agreement, Schedule "C", para 26, and agreement generally; Joint Document Brief Tab 5.

²³ Refer to Statement of Approval from City of Toronto dated November 6, 2017.

²⁴ See Transfer dated May 23, 2018, AT4869377

²⁵ See letter from City of Toronto to CIBC dated October 4, 2018 with attachment.

²⁶ The requirement was satisfied through a parkland dedication. See paragraph 24 of the Agreed Statement of Fact.

28. The statements of adjustments prepared by the Receiver required purchasers to pay for true adjustments (such as adjustments of realty taxes) and required purchasers to pay additional charges described within and required by the agreements of purchase and sale.²⁸ One of the additional charges purchasers were required to pay was the Parks Levy.
29. On closing, each purchaser was charged, as an additional charge, a share of a notional Parks Levy. Because no Parks Levy was actually paid, the Receiver needed to come up with a way to calculate what it was going to charge purchasers. The Receiver decided to charge purchasers their proportionate share of the value of the letter of credit provided to the City of Toronto by Urbancorp to secure the transfer of parkland (which letter of credit had already been released).²⁹
30. All of the Certain Curzon Purchasers closed their purchase for the Leslieville Units and paid the additional charge for the so-called Parks Levy demanded of them. Counsel for several purchasers complained about the Parks Levy on closing.³⁰
31. In total, the Certain Curzon purchasers paid \$471,994.39 inclusive of HST on behalf of the Parks Levy.³¹
32. The Receiver did not collect the Parks Levy from all purchasers. The Receiver granted 13 Purchasers a "cap" on extra charges.³² In total \$665,348.63 was collected on behalf of the Parks Levy.³³ The value of the letter of credit was \$769,280.00.³⁴

²⁷ See Agreed Statement of Fact para 3 and Statement of Adjustments (Exhibit D to Affidavit of Trisha Enriquez sworn May 8, 2019, Supplementary Motion Record Tab 1D p. 176) which indicate that closings were scheduled to occur October 18 - 25, 2018.

²⁸ Ex D, Affidavit of Trisha Enriquez sworn May 8, 2019, Supplementary Motion Record Tab 1D.

²⁹ See paragraph 46 of the Agreed Statement of Fact.

³⁰ See paragraphs 4, 5, and 44-46 of Agreed Statement of Fact.

³¹ See Summary of parks levy fees paid by Certain Curzon Purchasers contained at Tab 19 of the Joint Document Brief.

PART III - ISSUES AND THE LAW

A. The Duties of the Construction Trustee

33. A court-appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under the control of the receiver.³⁵

B. The APS is a Contract of Adhesion Insofar as It Applies to the Matters in Issue

34. A "contract of adhesion" has been defined as a written contract having five characteristics:

- (a) Drafted by one party to the transaction;
- (b) On a form regularly used by the drafter;
- (c) Presented to the adherent on a take-it-or-leave-it basis;
- (d) One in which the adherent enters into relatively few such transactions as compared with the drafting party; and
- (e) One in which the principal obligation of the adherent is the payment of money.³⁶

35. The original and Opt-in APS were standard form contracts. All purchasers executed identical agreements of purchase and sale. The language at issue was identical in all agreements signed for the Leslieville Development, in all the original and in all Opt-In agreements. Consequently the purchase agreements are contracts of adhesion.

³² See paragraph 39 of the Agreed Statement of Fact.

³³ See paragraph 43 of the Agreed Statement of Fact.

³⁴ Joint Document Brief Tab 3.

³⁵ *Turbo Logistics Canada Inc. v. HSBC Bank Canada*, 2009 CanLII 55292 (ON SC), [2009] O.J. No. 4109 (S.C.J.) at para. 13, Book of Authorities of the Certain Curzon Purchasers, Tab 5.

³⁶ Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition at p. 222, Book of Authorities of the Certain Curzon Purchasers, Tab 9.

36. Any ambiguities in the provision in issue on this motion should be interpreted in favour of the purchasers.³⁷

C. What is a "Parks Levy"?

37. Pursuant to sections 42(1) and 42(3) of the *Planning Act*, as a condition of residential development of land, a council or local municipality may require land be conveyed to the municipality for park or other public recreation purposes an amount equivalent to up to five per cent of the land to be developed or at the rate of one hectare per 300 dwelling units.
38. Pursuant to 42(6) of the *Planning Act*, the council may require a payment in lieu of a conveyance, the value of the land otherwise required to be conveyed.
39. The City of Toronto enacted a By-law for parkland dedications and for collecting payment in lieu. The City collects parkland dedication and park levies under Article III of Chapter 415 of the *Toronto Municipal Code*, "Conveyance of Land for Park Purposes as a Condition of Development".
40. The Leslieville development is located in an area deemed by the City of Toronto to be a "parkland priority area"³⁸. Consequently the following provisions of the City of Toronto By-law apply to the site:

§ 415-23. Alternative rate.

Despite § 415-22A, as a condition of development of land for residential use in a parkland acquisition priority area, the owner of the land shall convey or cause to

³⁷ *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at para. 70. Book of Authorities of the Certain Curzon Purchasers, Tab 8.

³⁸ See Letter from the City of Toronto dated December 15, 2011, Joint Document Brief Tab 1 p.1.

be conveyed to the City, the greater of the amount set out in § 415-22A, or land at a rate of 0.4 hectares for each 300 dwelling units proposed provided that:

A. For sites less than one hectare in size, the parkland dedication will not exceed 10 percent of the development site, net of any conveyances for public road purposes.

41. The City of Toronto calculated that the parkland dedication requirement was 0.0746 hectares or 10.72% of the site. The cap therefore applies and the parkland dedication was capped at 696 m².³⁹

42. The City of Toronto By-law contemplates cash-in-lieu of a parkland dedication:

§ 415-24. Cash-in-lieu of land dedication.

A. Despite § 415-22, where the size, shape or location of land proposed for parkland dedication is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land.

Despite § 415-23, where the size, shape or location of land proposed for parkland dedication in parkland acquisition priority area is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land, provided: ...

43. The City of Toronto defines the term "Parks Levy" on its website. When the City of Toronto collects a payment of cash-in-lieu of parkland, it refers to this payment as a "Parks Levy":

In new developments, developers & builders will be required to either set aside a certain amount of land for parkland (parkland dedication) or in some circumstances, they may pay a fee in lieu of this. When they pay the fee in lieu of parkland dedication, the fee is called a Parks Levy Fee [emphasis added].⁴⁰

44. In *Gemterra Developments Corp. v. Toronto (City)*, 2017 ONSC 1776, Justice Perell confirms that the cash-in-lieu of parkland dedication is called a "Park Levy":

³⁹ See Letter from the City of Toronto dated December 15, 2011, Joint Document Brief Tab 1 p.1.

⁴⁰ Affidavit of Inderpreet Suri, Ex A, Supplementary Motion Record Tab 2A p. 185.

The City of Toronto has a Park Levy By-law. More particular, the City enacted Article III of Chapter 415 of the Toronto Municipal Code, "Conveyance of Land for Park Purposes as a Condition of Development" under which it charges park levies pursuant to s. 42 of the Planning Act.

Section 42 of the Planning Act empowers a municipality, by by-law, to require a developer of land to convey a portion of lands for parks or to require the developer to require a payment in lieu of a conveyance. This payment is commonly referred to as a "park levy."⁴¹ [emphasis added]

45. Accordingly, a "Parks Levy" is different from a parkland dedication. A "Parks Levy" is the payment a developer is required to make when it does not convey land to the City.
46. When the municipal by-law requirements are satisfied through a parkland dedication, no "Parks Levy" is payable or paid.

C. Was a Parks Levy imposed?

47. The City of Toronto did not at any point deem the proposed parkland as unsuitable for parks or public recreation purposes. The City of Toronto accepted the parkland dedication of 700.09 m² in satisfaction of the parkland dedication requirement.
48. The Receiver knew from the outset – before the Opt-In APS were signed – that municipal requirements were being satisfied through a parkland dedication and not payment of a Parks Levy. The Notice of Approval of Conditions clearly states that 700.09 m² of land at the northeast corner of the development site was being conveyed to the City for public parkland purposes.⁴² This notice was issued before the Receiver was appointed.
49. The Site Plan Agreement, executed after the Receiver was appointed, also makes it clear that municipal requirements were being satisfied by a parkland dedication:

⁴¹ *Gemterra Developments Corp. v. Toronto (City)*, 2017 ONSC 1776 at paras 7-9, Book of Authorities of the Certain Curzon Purchasers, Tab 1.

⁴² See Joint Book of Documents Tab 4 p. 10.

26. Prior to the release of the condominium for registration, the Owner shall convey a 700.09 m² portion of land at the northeast corner of the development site for public parkland purposes, in fee simple...

27. Prior to the Letter of Credit being released and the parkland being conveyed, the Owner shall be responsible for the use, maintenance and liability of the parkland, to the satisfaction of the General Manager, Parks, Forestry & Recreation.⁴³

50. If the Receiver intended to require purchasers to pay for the value of the parkland dedication as an extra charge on closing, the Receiver should have added such a provision into the Opt-In APS signed by all purchasers (and should have specified the valuation date because land values fluctuate). The Receiver did not so do.
51. The City took a letter of credit only to secure the transfer of parkland. It was never contemplated that the City would cash the letter of credit because the land for the parkland dedication had been set aside from the beginning. Once ownership of the parkland was transferred, the City of Toronto released the letter of credit in full.
52. No cash-in-lieu of land, or "Parks Levy", was ever paid in respect of the Leslieville Development.

C. Was the Parks Levy properly charged?

53. Subsection 7(d)(iii) of the Opt-In Leslieville Purchaser agreement of purchase and sale obligates the Certain Curzon Purchasers to pay "the amount of any parks levy...levied, charged or otherwise imposed with respect to the Condominium, the Property or the Unit by any governmental authority..."
54. The Receiver required the Certain Curzon Purchasers to pay their proportionate share of what it alleged to be a Parks Levy. Because no levy was ever paid, the Receiver had

⁴³ Joint Book of Documents, Tab 5, p. 35.

purchasers pay their proportionate share of the letter of credit that the developer paid to the City of Toronto to secure the parkland dedication.

55. Because no levy was paid, purchasers have no obligation to contribute to a Parks Levy.
56. The Certain Curzon Purchasers agree a letter of credit was called for – and returned to the Receiver/vendor. The letter of credit was neither a levy nor a charge. It was a bank guarantee as security to secure performance of the parkland dedication.
57. The letter of credit did not relate to a Parks Levy. It was related the *parkland dedication*.
58. Because the Receiver did not pay a Parks Levy, there was no Parks Levy cost to pass along to purchasers, and there was nothing for the Receiver to recover as extra charges on closing. The Receiver did not have the right to require the Certain Curzon Purchasers to pay a Parks Levy.
59. It is illogical to claim that the definition of a "any Parks Levy" can include the value of a letter of credit filed to secure the parkland dedication. A "Parks Levy" and "parkland dedication" are distinct and mutually exclusive concepts.
60. The Certain Curzon Purchasers deny there is any ambiguity with respect to the clause at issue. However, if this court finds the clause is ambiguous in any way, the rule of *contra proferentem* applies and this ambiguity should be interpreted against the drafter of the standard form Opt-In APS – that is against the Receiver.

61. Where purchasers understand that a particular cost is included within the purchase price for new homes, and there is ambiguity in the contract, the contract will be interpreted against the vendor/builder.⁴⁴
62. Therefore, if it is not clear whether the requirement to pay a "Parks Levy" includes a requirement to pay for a letter of credit which had already been returned, the court should interpret the clause in favour of the Certain Curzon Purchasers by finding that the value of a letter of credit to secure the delivery of the parkland is not included within the meaning of a "Parks Levy".
- D. If the Parks Levy was not properly charged, are the Certain Curzon Purchasers entitled to an order directing the Receiver to repay each of the Certain Curzon Purchasers their respective amounts of the Parks Levy, inclusive of HST and costs?**
63. When there is an error made in the statement of adjustments and it is discovered after the closing of a property sale transaction, courts have corrected the error and awarded the appropriate amount to the appropriate party.⁴⁵

⁴⁴ *Briarwood Estates (Tottenham) Ltd. v. Gordon et al*, 2017 ONSC 6330, Book of Authorities of the Certain Curzon Purchasers, Tab 7.

⁴⁵ *Handsaeme v. Dyck and All-West Construction Ltd.*, [1982] A.J. No. 1096, Book of Authorities of the Certain Curzon Purchasers, Tab 3; *Goldenwood Homes Ltd. v. MacDonald*, 2003 ABQB 991, Book of Authorities of the Certain Curzon Purchasers, Tab 2; *King Line Investments Inc. v. 973976 Ontario Ltd.*, [2009] O.J. No. 2747, Book of Authorities of the Certain Curzon Purchasers, Tab 4.

PART IV - ORDER REQUESTED

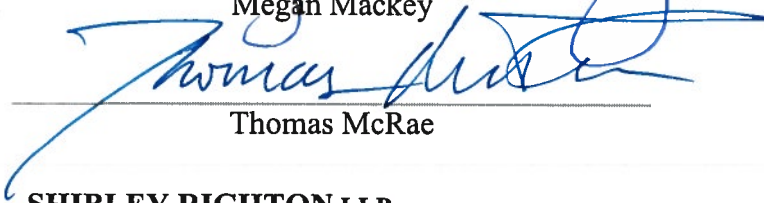
64. The Certain Curzon Purchasers request an order directing the Receiver to return the Parks Levy paid by each of them, plus interest at the post-judgment interest rate and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 6, 2019



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SCHEDULE A
LIST OF AUTHORITIES

1. *Gemterra Developments Corp. v. Toronto (City)*, 2017 ONSC 1776
2. *Goldenwood Homes Ltd. v. MacDonald*, 2003 ABQB 991
3. *Handsaeame v. Dyck and All-West Construction Ltd.*, [1982] A.J. No. 1096
4. *King Line Investments Inc. v. 973976 Ontario Ltd.*, [2009] O.J. No. 2747
5. *Turbo Logistics Canada Inc. v. HSBC Bank Canada*, 2009 CanLII 55292 (ON SC), [2009] O.J. No. 4109 (S.C.J.)
6. *Briarwood Estates (Tottenham) Ltd. v. Gordon et al.*, 2017 ONSC 6330
7. *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551
8. Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition

SCHEDULE B
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Article III of Chapter 415 of the Toronto Municipal Code, "Conveyance of Land for Park Purposes as a Condition of Development"

(Adopted 2007-12-13 by By-law No. 1420-200713; amended 2010-08-27 by By-law No. 1020-201014]

§ 415-21. Definitions.

As used in this article, the following terms shall have the meanings indicated:

....

BUILDING PERMIT APPLICATION-An application submitted to and accepted by the Chief Building Official for an above grade building permit that complies with the applicable zoning by-law and with all technical requirements of the Building Code Act, 1992 including payment of all applicable fees.

DEVELOPMENT

- A. The construction, erection or placing of one or more buildings or structures on land.
- B. The making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability of the building or structure.
- C. The redevelopment of land through the removal of one or more buildings or structures to permit such development.
- D. The laying out and establishing of a commercial parking lot.
- E. The conversion of a building or structure originally proposed for an exempted or nonresidential use, to another use.

....

§ 415-22. Conveyance of land for parks purposes.

As a condition of development of land the owner of the land shall convey or cause to be conveyed to the City, land for park or other public recreational purposes in the following manner:

- A. For residential uses, land equal to 5 percent of the land to be developed.
- B. For non-residential uses, land equal to 2 percent of the land to be developed.

C. Where the development of a single parcel of land is proposed for both residential uses and non-residential uses, the respective rates set out in §§ 415-22A, 415-22B and 415-23 will be allocated proportionally according to the floor space of the respective uses.

§ 415-23. Alternative rate.

Despite § 415-22A, as a condition of development of land for residential use in a parkland acquisition priority area, the owner of the land shall convey or cause to be conveyed to the City, the greater of the amount set out in § 415-22A, or land at a rate of 0.4 hectares for each 300 dwelling units proposed provided that:

A. For sites less than one hectare in size, the parkland dedication will not exceed 10 percent of the development site, net of any conveyances for public road purposes.

B. For sites one hectare to five hectares in size, the parkland dedication will not exceed 15 percent of the development site, net of any conveyances for public road purposes.

C. For sites greater than five hectares in size, the parkland dedication will not exceed 20 percent of the development site, net of any conveyances for public road purposes.

§ 415-24. Cash-in-lieu of land dedication.

A. Despite § 415-22, where the size, shape or location of land proposed for parkland dedication is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land.

B. Despite § 415-23, where the size, shape or location of land proposed for parkland dedication in parkland acquisition priority area is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land, provided:

(1) that the value of the cash-in-lieu does not exceed:

(a) **Ten percent of the value of the development site**, net of any conveyances for public road purposes, **for sites less than one hectare in size.**

(b) **Fifteen percent of the value of the development site**, net of any conveyances for public road purposes, **for sites one hectare to five hectares in size.**

(c) **Twenty percent of the value of the development site**, net of any conveyances for public road purposes, **for sites over five hectares in size.**

(2) In no case, will the residential parkland dedication, cash-in-lieu or combination thereof, be less than 5 percent of the development site or the value of the development site, net of any conveyances for public road purposes.

§ 415-25. Cash-in-lieu; allocation.

A. Any payment of cash-in-lieu of land in accordance with § 415-24A will be used for the acquisition of new parkland or the improvement of parks and recreational facilities in accordance with the following allocation and the cash-in-lieu allocation policy:

....

....

§ 415-27. Administrative authority.

The General Manager Parks, Forestry and Recreation is authorized to determine the specific combination of land and/or cash in lieu of land on a site specific basis in accordance with this article and the City's Official Plan policies.

§ 415-28. Timing of conveyance or payment.

The conveyance of land or payments required to be made under this article shall be made prior to the issuance of the first above-ground building permit for the land to be developed.

§ 415-29. Valuation of land.

A. All appraisals of land value shall be carried out under the direction of the Executive Director, Facilities and Real Estate and shall be determined in accordance with generally accepted appraisal principles.

B. The cost of any appraisal undertaken by the City shall be paid for by the owner.

C. The value of the land shall be determined as of the day before the day of issuance of the first building permit in respect of the development.

D. The conveyance of land or payment of cash in lieu of land shall be taken into consideration in determining an appropriate credit with respect to the amount of money or land which may be required in connection with the further development of the subject lands:

(1) Where land has been conveyed to the City for park or other public recreational purposes, exclusive of highways and floodplain lands;

(2) Where a payment of cash in lieu of such conveyance has been received by the City in accordance with this article; (3) Pursuant to the provisions of sections 42, 51.1 or 53 of the Planning Act.

Planning Act, R.S.O. 1990, c. P.13

Section 42(1) – As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other

cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes.

Section 42 (3) – Subject to subsection (4), as an alternative to requiring the conveyance provided for in subsection (1), in the case of land proposed for development or redevelopment for residential purposes, the by-law may require that land be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified in the by-law.

Section 42(6) – If a rate authorized by subsection (1) applies, the council may require a payment in lieu, to the value of the land otherwise required to be conveyed.

SCHEDULE C
DEFINED TERMS

1. Certain Curzon Purchasers – Sahand Pouladi, Susan Pouladi, Wan-Ming Shin, Howard Quinn, Keefe Lee, Robert Gill, Pravin Patel, Emil Calixterio, Trisha Enriquez, Fabian Gilbert, Linda Ing, Selina Nazim, Dan Shemesh, Shayna Segal, Kevin Chi-Kee Shin, Frederick Tang, Allan Chi-Lun Shin, Jimmy Wong, Le Luu, Robert J.D. Bryans, Y-Le Dao, Chen Fai Law, Adam Wright, Ashton Wright, Leona Savoie, Vipin Tiwari, Helen Tang, Dean S. Geggie (By Power of Attorney Jackson Geggie), Samantha S. Burrows (By Power of Attorney Jackson Geggie), Dana Ross, Guomei Pan, Russell S. Morris, Michelle Posner, Eun Lee, Jongho Park, Alvib Yu Bon Poon, Eric Kafka, Blake Smith, Joong Hyup Shin, Won-Mi Shin, Kandia Aird, Issa Guindo, Alison Montone-Lyon and Justin Armstrong
2. Construction Receiver – Alvarez & Marsal Canada Inc. as receiver and manager (in such capacity, the “Receiver”), pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, and as construction lien trustee (in such capacity, the “Construction Lien Trustee”, and together with the Receiver)
3. Original Leslieville Purchasers – the purchasers who had purchased units in 55 Leslieville prior to the appointment of the Construction Receiver on May 31, 2016
4. Project – UC Leslieville’s Curzon Street construction project
5. Terra Firma – Terra Firma Capital Corporation
6. UC Leslieville – Urbancorp (Leslieville) Developments Inc.

CANADIAN IMPERIAL BANK OF COMMERCE
Applicant

- and -

URBANCORP (LESLIEVILLE) DEVELOPMENTS
INC. et al.
Respondents

Court File No. CV-16-11409-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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