CITATION: CIBC v. Urbancorp Leslieville Developments Inc., 2019 ONSC 4971
COURT FILE NO.: CV-16-11409-00CL
DATE: 2019-10-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Canadian Imperial Bank of Commerce, Applicant

AND:

Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc., Respondents

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *M. Mackey* and *T. McRae*, for the Certain Curzon Purchasers

R.B. Bissell, for Terra Firma Capital Corp.

C. Burr and *C. McIntyre*, for Alvarez & Marsal Canada Inc., in its capacity as both Receiver and Manager, and Construction Lien Trustee of the Assets, Undertakings and Properties of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc.

HEARD: June 19, 2019

FURTHER SUBMISSIONS PROVIDED: July 25, 2019

ENDORSEMENT

Introductions

[1] The Certain Curzon Purchasers, identified in Schedule "A", brought this motion for an order declaring that Alvarez & Marsal Canada Inc., in its capacity as both Receiver and Manager, and Construction Lien Trustee of Urbancorp (Leslieville) Developments Inc. ("UC Leslieville"), Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc. (the "Receiver") has no right, title, or interest in the "parks levy" (defined below) that it demanded and received from the Certain Curzon Purchasers as a condition of closing the sales of their respective condominium units, and that the Certain Curzon Purchasers alone have the right, title, and interest in the "Parks Levy" that each of them paid on closing of their respective condominium units (the "Closings").

[2] The Certain Curzon Purchasers, the Receiver, and Terra Firma Capital Corporation ("Terra Firma") (collectively, the "Parties") filed the Agreed Statement of Facts attached as Schedule "B".

[3] Each of the Certain Curzon Purchasers purchased one or more condominium units from the Receiver in respect of UC Leslieville's construction project. Many of the Certain Curzon

Purchasers had entered into agreements of purchase and sale with UC Leslieville prior to its receivership. The original occupancy date for these units was February 2013.

[4] Occupancy was delayed by five years and in the interim the Receiver was appointed. The agreements of purchase and sale provided that the lenders would have priority over the purchase agreements.

[5] In the course of the receivership, the agreements of purchase and sale of the Certain Curzon Purchasers were renegotiated and the purchase price per unit was increased by approximately $255,000 per unit. The form of the renegotiated agreement of purchase and sale was court approved on May 11, 2017. The court-approved renegotiated agreements included (*inter alia*) the following adjustment, the wording of which is derived from the Tarion Condominium Form:

> a. the amount of any parks levy or other 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 "B" to the Declaration; [the "Parks Levy Clause"]

[6] As set out in paragraph 8 of the Agreed Statement of Facts, the Parties seek from the court a determination of the following issue (the "Issue for Determination"):

> Was the Parks Levy properly charged by the Construction Receiver to the Certain Curzon Purchasers, pursuant to the terms of their respective agreements of purchase and sale?

Position of the Certain Curzon Purchasers

[7] The Certain Curzon Purchasers submit that no "parks levy" was paid as the requirements of the *Planning Act*, R.S.O. 1990, c. P.13, 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 transfers to the City and, accordingly, the "parks levy" adjustment is not a proper charge.

[8] Section 42 of the *Planning Act* requires developers to convey land for parks or other public recreational purposes 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 or 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.

[9] As an alternative, as provided for in subsection 42(6), a municipality may require cash-in-lieu of land.

[10] A Site Plan Agreement between UC Leslieville and the City of Toronto dated October 23, 2017 confirmed the transfer of 700.09 sq. meters for parkland purposes and that there was no cash payment-in-lieu of a parkland conveyance.

[11] Closings occurred between October 18 and October 25, 2018. The Statement of Adjustments prepared by the Receiver required purchasers to pay for true adjustments (such as adjustments of realty taxes) and additional charges described within and required by the agreements of purchase and sale. One of the additional charges was the "parks levy".

[12] The Certain Curzon Purchasers contend that 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 charged purchasers a proportionate share of the value of the released letter of credit provided to the City of Toronto by UC Leslieville to secure the transfer of parkland.

[13] All of the Certain Curzon Purchasers closed their purchase and paid the additional charge for the "parks levy" demanded of them by the Receiver. Several purchasers complained about the "parks levy" on closing.

[14] The Certain Curzon Purchasers submit that the Receiver knew from the outset – before the Opt-In Leslieville Purchaser APS (as defined in the Agreed Statement of Facts) were signed – that municipal requirements had been satisfied through a parkland dedication rather than a payment of a parks levy. The Site Plan Agreement, executed after the Receiver was appointed, also makes it clear that municipal requirements were being satisfied by a parkland dedication.

[15] The Certain Curzon Purchasers submit that 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 Leslieville Purchaser APS signed by all purchasers. The Receiver did not do so.

[16] The Certain Curzon Purchasers submit that the Leslieville Purchaser APS obligates the Certain Curzon Purchases 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…". Because no Levy was paid, there is no "parks levy" cost to pass along to the Purchasers and there is nothing for the Receiver to recover as extra charges on closing.

[17] The Certain Curzon Purchasers further submit that there is no ambiguity with respect to the clause, but that if the court finds the clause to be ambiguous, the rule of *contra proferentem* applies and the ambiguity should be interpreted against the drafter – namely, the Receiver.

[18] The Purchasers cite *Briarwood Estates (Tottenham) Ltd. v. Gordon et al.*, 2017 ONSC 6330, for the proposition that where purchasers understand that a particular cost is included with the purchase price for new homes, and there is ambiguity in the contract, the contract will be interpreted against the vendor/builder.

[19] In sum, the Certain Curzon Purchasers contend that there was no contractual obligation and/or juridical reason upon which the Receiver could charge the purchasers an amount pursuant to a "parks levy", and that the Certain Curzon Purchasers are entitled to the return of the adjustment made for that purpose.

Position of the Receiver

[20] The Receiver takes the position that the "parks levy" was properly and correctly charged pursuant to the terms of the applicable agreement and that there is no legal or equitable basis for its return.

[21] The Receiver submits that the fundamental question in this case is how the Parks Levy Clause ought to be interpreted. Either ss. 7(d)(iii) includes the costs that the UC Leslieville Estate actually incurred in connection with conveying the parkland to the City, or it includes only the potential costs that the UC Leslieville Estate would have incurred if the City elected to take a cash payment-in-lieu of such a conveyance. The Receiver submits that the former interpretation is correct and that "parks levy" means both a conveyance of land and payment of cash-in-lieu.

[22] The Receiver submits that the Parks Levy Clause states in clear language that a "parks levy" will be assessed by the Construction Receiver as a purchase price adjustment. Further, the meaning of "parks levy" is equally clear, based on the language of the Opt-In Leslieville Purchaser APS and the legislation that gives rise to a developer's obligation to convey land or pay cash-in-lieu.

[23] The Receiver points out that nowhere in the applicable legislation is the word "levy" used. Rather, there is the concept of "conveyance", and the concept of "cash-in-lieu". Consequently, the only defensible interpretation of the term is that "parks levy" references both the conveyance of land and the payment of cash-in-lieu, as illustrated by the definition of "levy", the historical judicial interpretation of "levy", the City's own interpretation of "Parks Levy", and by the limited applicable jurisprudence on the issue.

[24] Black's Law Dictionary defines "levy" as:

> (1) The imposition of a fine or tax; the fine or tax so imposed. – Also termed tax levy. (2) The enlistment of soldiers into the military; the soldiers so enlisted. (3) The legally sanctioned seizure of sale and property; the money obtained from such a sale – Also in sense (3) *levy of execution.*

[25] The Receiver submits that this definition of "levy" is not limited to the payment of money and includes the seizure of property. The Receiver further submits that jurisprudence has clarified that the "sale" component of the third definition, above, is not a necessary element of a levy (see: *Mortimore v. Cragg* (1878), 3 C.P.D. 216; *Chambers v. Louis*, [1943] 1 W.W.R. 497 (Sask. C.A.); and *Bayview Estates Limited, Re*, 28 Nfld. & P.E.I.R. 225 (Nfld. S.C. (T.D.))).

[26] Accordingly, the Receiver submits that, by definition, a levy is the legal taking or seizure of property, including but not limited to money. This would include, for example, the taking of the parkland by the City.

[27] The Receiver points out that the Certain Curzon Purchasers state in their factum that the City defines "parks levy" on its website. In actuality, the Receiver submits, the City defines "Parks Levy Fee", and the distinction is critical:

> In new developments, developers and 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 a fee in lieu of parkland dedication, the fee is called a **Parks Levy Fee**.

[28] The Receiver submits that the City's interpretation of a "Parks Levy Fee" is consistent with its interpretation of the Parks Levy Clause. The Receiver agrees with the Certain Curzon Purchasers that a "Parks Levy Fee" describes only a payment-in-lieu. However, it submits that in order for the word "Fee" to have any meaning in the City's definition, it must alter the meaning of "Parks Levy". Hence, while "Parks Levy" by itself refers to both the conveyance of land and the payment-in-lieu, a "Parks Levy Fee" refers only to the latter.

[29] The Receiver acknowledges that s. 42 of the *Planning Act* has not received significant judicial consideration, and no court has had to rule on whether "parks levy" means both conveyance of land and payment of cash-in-lieu, or just payment of cash-in-lieu.

[30] The closest case appears to be *Gemterra Developments Corp. v. Toronto (City)*, 2017 ONSC 1776, 66 M.P.L.R. (5th) 102.

[31] *Gemterra* involved a developer who sought a refund from the City for what it alleged was an overpayment of cash-in-lieu in connection with the applicable parks levy. The issue to be determined was whether the development constituted one or two development sites because different levy rates applied based on the size and number of development sites. Perell J. wrote:

> 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."

[32] The Receiver notes that *Gemterra* was not a case where the distinction between the conveyance of parkland and the payment of cash-in-lieu was at issue and Perell J.'s observation therefore cannot be taken to mean that because the payment of cash-in-lieu is referred to as "parks levy", the term "parks levy" excludes the conveyance of parkland to a municipality. This was not in issue before the court.

[33] The Receiver submits, accordingly, that *Gemterra* is distinguishable and substantively irrelevant to the issue for determination.

[34] The Receiver submits that it is well-established that contracts should be interpreted so as to accord with sound commercial principles and good business sense, and to avoid commercial absurdity.

[35] The Receiver submits that its interpretation of the Parks Levy Clause is the only commercially reasonable interpretation.

[36] In support of its position, the Receiver submits that pursuant to the *Planning Act*, the City can elect to require either the conveyance of parkland or cash-in-lieu of the conveyance. In either case, there would be a material cost to the UC Leslieville Estate. The Receiver submits that it is only reasonable that the risk and cost of the City's choice be allocated in the same way, regardless of what the choice ultimately ended up being. The only reasonable interpretation of the Parks Levy Clause is that it uniformly allocates its risk, and that "Parks Levy" means both the value of the parkland conveyed and the payment of cash-in-lieu.

[37] The Receiver submits that it is not commercially reasonable that these Parties would agree to allocate the risk and cost of a parkland dedication to UC Leslieville and the risk and cost of the payment of cash-in-lieu to the purchasers, particularly when there was no way of knowing at the time how the City would elect to proceed. However, this result would follow from the interpretation of the Park Levy Clause proposed by the Certain Curzon Purchasers.

[38] Finally, the Receiver is of the view that there is no ambiguity in the Park Levy Clause. It is a clear contractual provision, in a document that was highly negotiated by sophisticated counsel on behalf of almost all of the Certain Curzon Purchasers, and then court approved.

The Position of Terra Firma

[39] Terra Firma is now the ranking creditor for repayment from Estate Funds. It supports the position of the Receiver that the "parks levy" was properly payable.

[40] Terra Firma submits, in addition, that there is a subsidiary issue to be determined, namely, whether the parks levy" adjustment paid by purchasers other than the Certain Curzon Purchasers was valid. On this issue, Terra Firma submits that all purchasers have been served with the Receiver's motion and the court should affirm the payment of adjustments by those purchasers who have not appeared on the motion.

[41] Terra Firma also raised a second subsidiary issue relating to an evidentiary objection. That issue was resolved by the Parties and is no longer before me.

Analysis

[42] At issue is whether there is anything in the legislation, the by-law, or the contract documents that would enable the developer, or in this case, the Receiver, to recover the notional value of the land required to be conveyed.

[43] Section 42 of the *Planning Act* addresses issues relating to the conveyance of land for park purposes. It sets out conditions for the development or redevelopment of land. The council of a local municipality may require land to be conveyed to the municipality for park or other public recreation purposes.

[44] Section 42(6) provides that council may require a payment-in-lieu.

[45] In this case, council required the conveyance of land.

[46] There is no evidence that the Certain Curzon Purchasers were involved in the section 42 determination.

[47] The Agreed Statement of Facts contains a number of references to the parkland dedication. In particular, paragraph 20, refers to the Project's Notice of Approval Conditions, dated January 25, 2016, in which reference is made at paragraph 5 to the parkland conveyance. The Project's Notice of Approval Conditions predated the approval of the Opt-In Leslieville Purchaser APS in May 2017.

[48] Although the conveyance of parkland had not been finalized at the time of approval of the Opt-In Leslieville Purchaser APS, the documents establish that the City was likely going to require a conveyance of parkland in order to comply with section 42 of the *Planning Act*.

[49] The language of subsection 7(d)(iii) of the Opt-In Leslieville Purchaser APS could have been drafted to expressly cover the conveyance of land scenario – but it was not.

[50] An additional hurdle for the Receiver to overcome is contained in Schedule "TA" which forms part of the Opt-In Leslieville Purchaser APS. Schedule "TA" is the Tarion Warranty Corporation Statement of Critical Dates and Addendum to Agreement of Purchase and Sale (collectively the "Tarion Addendum"). Schedule "B" to the Addendum addresses "Adjustments to Purchase Price" or Balance Due in Closing. Part II is titled "All Other Adjustments" – to be determined in accordance with terms of the Purchase Agreement. Paragraph 6 reads as follows:

> 6. Paragraph 6 (d) (iii) of the Purchase Agreement: The Purchaser shall be responsible for the amount of any parks levy or any charges pursuant 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.

[51] The language referenced in Schedule "B" is identical to subsection 7 (d) (iii) of the Opt-In Leslieville Purchaser APS. However, in the event of conflict between the provisions in the Addendum and the Opt-In APS, paragraph 13 of the Addendum provides that the provision in the Addendum is the controlling provision.

[52] Tarion provides new home warranty protection and serves new home buyers and owners. In essence, Tarion exists to protect consumers.

[53] It is well-established that the *Ontario New Home Warranties Plan Act* and its regulations constitute consumer protection and remedial legislation. O. Reg. 165/08, in particular, which mandates the inclusion of the Tarion Addendum in the APS, was the result of an independent review conducted by a special committee headed by The Honourable Frank Iacobucci. Among other things, the Committee's final report in 2007 recommended adjustments to the structural framework of relationships between new home developers/vendors and purchasers to better meet the objectives of the *Act* and its regulations: see *Reddy v. 1945086*, 2019 ONSC 2554, at paras. 20-23.

[54] The purpose of Schedule "B" is to assist buyers to calculate with certainty the final closing amount. Without Schedule "B", buyers would have to read and understand the entire Agreement of Purchase and Sale to try to ferret out what adjustments they would be faced with on closing.

[55] In my view, given the purpose of the schedule and in keeping with Tarion's mandate to protect Ontario's New Home Buyers, it follows that any price adjustments need to be clearly set out. The language in paragraph 6 of Schedule "B" does not, in my view, clearly state that the Certain Curzon Purchasers are responsible for "park levy" charges in circumstances where there has been a conveyance of land and not payment-in-lieu.

[56] Ultimately, this is a consumer contract that must be interpreted in accordance with the general principles of contractual interpretation.

[57] In *Reddy*, Penny J. considered the proper interpretation of an early termination provision in a pre-construction condominium APS that conflicted with the corresponding provisions of the Tarion Addendum. Although the facts of that case are distinguishable from those of the case at bar, paragraphs 28-29 offer a helpful summary of the applicable principles of contractual interpretation in this context:

> 28. While it is true that words in a contract are presumed to have meaning, this principle of contract interpretation is one of many, and must be placed in proper context. One of the well-accepted, more comprehensive formulations of contract interpretation is that a contract is to be interpreted:
>
> > (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
> >
> > (b) by determining the intention of the parties in accordance with the language they have used in the written document and base upon the cardinal presumption that they have intended what they said;
> >
> > (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and, to the extent there is any ambiguity in the contract,

> (d) in a fashion that accords with sound commercial principles and good business sense and that avoids a commercial absurdity.
>
> Ventas Inc. v. Sunrise Living Real Estate Investment Trust, [2007] O.J. No. 1083 (Ont. C.A.) at para. 24.
>
> 29. The Supreme Court of Canada considered the principles of contract interpretation in Creston Moly Corp. v. Sattva Capital Corp., 2014 SCC 53 (S.C.C.). The overriding concern is to determine the intent of the parties. To do so the court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own. No contract is made in a vacuum. Subjective evidence of intention, however, is not admissible in the guise of "surrounding circumstances."

[58] These principles require me to interpret the words of the contract as a whole, giving the words their ordinary and grammatical meaning; to consider the factual matrix at the relevant time; and to consider the principle of commercial efficacy.

[59] If an ambiguity remains after considering these principles of contractual interpretation, the *contra proferentem* rule may be used as a last resort: *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at pp. 667-668; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] S.C.R. 23, at para. 51.

[60] In this case, the critical part of the contract to be interpreted is the language in Schedule B, paragraph 6 which, as noted, is identical to subsection 7 (d) (iii) of the Opt-In Leslieville Purchaser APS. First, I must consider the plain and ordinary meaning of the contractual provision read in context with the rest of the contract. One consideration here, in addition to the dictionary definitions offered by the Parties, is the wording of the entire Parks Levy Clause. The Clause states that it is the "amount of" any parks levy, rather than, for example, the "value of" any parks levy that is to be the subject of an adjustment. In my view, this language is indicative of a payment of cash-in-lieu rather than a conveyance.

[61] The Receiver submits that the language clearly supports its position. The Certain Curzon Purchasers take the opposite view. The uncertainty could have been avoided if the contractual provisions squarely addressed the issue.

[62] With respect to the contract documents, I disagree with the Receiver that the Parks Levy Clause makes it clear that a "parks levy" applies to both a conveyance of land and a payment of cash-in-lieu.

[63] I do not find the language to be clear. While the plain meaning of the document provides for an adjustment where there has been a payment-in-lieu, it does not follow that there is to be an adjustment where there has been a conveyance of land.

[64] In light of the above, it seems to me that reading the words of the contract as a whole, giving the words their ordinary and grammatical meaning, does not provide a clear answer. A plain reading of the applicable provision does not clearly dispose of the issue at bar.

[65] In considering the factual matrix at the relevant time, it is necessary to focus on Schedule "B" of the Tarion Addendum and its purpose and to acknowledge Tarion's mandate to protect new home buyers. Any price adjustments need to be clearly set out. In this case, the proposed "park levy" adjustment is not clearly or expressly set out. This favours the position of the Certain Curzon Purchasers.

[66] Also relevant is the reasoning in *Reddy* where at paragraph 13, Penny J. stated: "Where there are two possible interpretations of circumstances under which a protection is to be extended, the one more favourable to the consumer should govern," *Opoku v. Pal*, [1999] O.J. No. 1777 (Ont. S.C.J.) at paragraph 38.

[67] In considering the principle of commercial efficacy, a result that favours the Certain Curzon Purchaser is, in my view, reasonable. While I accept that it is commercially reasonable for the developer to seek to recover the additional expense of the consideration paid to the City where there has been a payment-in-lieu in compliance with section 42, the developer does not incur additional costs where compliance has been achieved through the conveyance of land.

[68] The land is part of the project and is conveyed to the municipality for park or other public recreational purposes. There is no evidence of any additional costs which have to be recovered from the purchasers. In my view, this scenario is not commercially unreasonable. The result is neutral to the developer, or in this case, the Receiver. Conversely, the result urged by the Receiver could result in a windfall for the Receiver. A result that favours the Certain Curzon Purchaser is, in my view, reasonable.

[69] At best, the Receiver's position gives rise to an ambiguity in paragraph 6 of the Tarion Addendum and subsection 7 (d) (iii) of the Opt-In Leslieville Purchasers APS. In a consumer contract, the *contra proferentem* rule takes on added significance. See Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: Carswell, 2016), at pp. 181-182. In this case, to the extent that any ambiguity remains, the rule of *contra proferentem* applies and the ambiguity is to be interpreted against the drafter – that is, against the Receiver.

[70] I am in agreement with the position put forth by the Certain Curzon Purchasers. The Opt-In Leslieville Purchaser APS do not require the Certain Curzon Purchasers to pay for the notional value of parkland transfers to the City.

Disposition

[71] In the result, I conclude that the position of the Certain Curzon Purchasers prevails. An order shall issue declaring that the Receiver has no right, title, or interest to the Parks Levy that it received from the Certain Curzon Purchasers. The Receiver is to repay to each of the Certain Curzon Purchasers the amount of the Park Levy (inclusive of HST) that each of them paid at

Closing, together with interest calculated in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[72] With respect to the subsidiary issue raised by Terra Firma, namely whether the Parks Levy adjustment paid by purchasers other than the Certain Curzon Purchasers was valid, I make no comment other than to note that all purchasers were served with the Receiver's Motion Record and no other purchasers appeared on the return of the motion.

[73] The Certain Curzon Purchasers are entitled to their costs, which are fixed in the agreed upon amount of $50,000, inclusive of disbursements and taxes.

C.J.

Chief Justice Geoffrey B. Morawetz

Date: October 10, 2019

SCHEDULE "A"

JAMES VAN DER BORGH
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
ALSION MONTONE-LYON
JUSTIN ARMSTRONG
DELIA LAI

SCHEDULE "B"

1.1 OVERVIEW

1. The following parties (collectively, the "**Parties**") have agreed to this agreed statement of facts (the "**Agreed Statement of Facts**"):

   a. Terra Firma Capital Corporation ("**Terra Firma**");

   b. 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 (collectively, the "**Certain Curzon Purchasers**");

   c. 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, the "**Construction Receiver**"), pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, of all of the assets, undertakings, and property acquired for, or used in relation to the business of Urbancorp (Leslieville) Developments Inc. ("**UC Leslieville**").

2. On May 31, 2016, the Ontario Superior Court of Justice (the "**Court**") granted an order appointing the Construction Receiver over all of the assets, undertakings,

and property acquired for, or used in relation to the business of, among other parties, UC Leslieville (such proceedings, the "**Receivership Proceedings**").

3. Between October 18 and 25, 2018, the Construction Receiver closed the sale of residential condominium townhouse units (the "**Leslieville Units**") within UC Leslieville's Curzon Street construction project (the "**Project**") to purchasers, including thirty (30) Leslieville Units sold to the Certain Curzon Purchasers.

4. On closing, purchase price closing adjustments and other amounts were charged by the Construction Receiver to each of the Certain Curzon Purchasers.

5. The Certain Curzon Purchasers object to the Construction Receiver charging the purchase price amount referred to on each Certain Curzon Purchasers' statement of adjustments as the "**Parks Levy**".

6. The Construction Receiver and Terra Firma state that the Parks Levy was properly charged to the Certain Curzon Purchasers under the terms of their respective agreements of purchase and sale.

7. Pending the adjudication of the Issue for Determination (defined below), the Construction Receiver has said it will hold the total of $700,000 in reserve.

2.0 ISSUE FOR DETERMINATION AND ORDERS SOUGHT

8. The Parties seek from the Court a determination of the following issue (the "**Issue for Determination**"):

> Was the Parks Levy properly charged by the Construction Receiver to the Certain Curzon Purchasers, pursuant to the terms of their respective agreements of purchase and sale?

9. If the answer to the Issue for Determination is affirmative, the Parties agree that the Court should grant an order approving the Parks Levy.

10. If the answer to the Issue for Determination is negative, the Parties agree that the Court should grant an order directing the Construction Receiver to repay each of the Certain Curzon Purchasers their respective amounts of the Parks Levy, inclusive of HST, as set out in in Exhibit "19", together with interest at a rate of 2.0% per annum.

11. Each of the Parties reserves the right to seek a costs order.

3.0 AGREED STATEMENT OF FACTS

12. The Parties agree that the facts contained herein are to be admitted in this proceeding for the purpose of the Court determining the Issue for Determination, and for no other purpose. The Parties furthermore agree to the truth and authenticity of the documents contained as Exhibits in the joint brief of documents prepared in connection with this agreed statement of facts and filed herewith (the "**Joint Book of Documents**"). All references to Exhibits are as contained in the Joint Book of Documents.

13. Each of the Parties reserves the right to file additional evidence in this proceeding.

4.0 THE LESLIEVILLE PROJECT PARKLAND DEDICATION

14. Pursuant to section 42(1) of the *Planning Act* (Ontario), as a condition of development of land, a council or local municipality may require that land in an amount not exceeding, in the case of land proposed for residential purposes, 5 per cent of the land be conveyed to the municipality for park or other public recreation purposes.

15. Pursuant to 42(6) of the Planning Act, the council may also require a payment in lieu of a conveyance, to the value of the land otherwise required to be conveyed.

Correspondence Prior to Site Plan Approval

16. On December 15, 2011, an internal City of Toronto memorandum (the "**December Memorandum**") concluded that a parkland dedication of 696 m^2 would be required for the Project. A copy of the December Memorandum is attached hereto as Exhibit "1".

17. In or about late January of 2013, the City sent UC Leslieville a letter dated January 28, 2013, attached as Exhibit "2" (the "**January Letter**").

18. Shortly following receipt of the January Letter, UC Leslieville obtained letter of credit number SBGT752755, dated February 12, 2013 (the "**Parks LC**"), in the amount of $769,280. The named beneficiary of the Parks LC was the City of Toronto. A copy of the Parks LC is attached hereto as Exhibit "3".

19. The Parks LC furthermore provides that it is being delivered pursuant to a "Section 42 Parkland Dedication Agreement dated December 15, 2011". The Construction Receiver has advised Terra Firma and the Certain Curzon Purchasers that it has searched the UC Leslieville records available to it and has not been able to locate this agreement, and furthermore that it has made inquires to the City of Toronto about the agreement, and has been advised by a senior lawyer in the City of Toronto Legal Services division that a section 42 Planning Act parkland dedication agreement "wasn't entered into in this case". Terra Firma and the Certain Curzon Purchasers have no evidence to contradict the advice received by the Construction Receiver described in the foregoing sentence.

20. The Project's Notice of Approval Conditions, prepared by the City and dated January 25, 2016 (the "**NOAC**"), is attached as Exhibit "4".

Site Plan Approval

21. On October 23, 2017, UC Leslieville (by the Construction Receiver) and the City entered into a site plan agreement in respect of the Project (the "**Site Plan**"). A copy of the Site Plan is attached as Exhibit "5".

22. On October 26, 2017, the Construction Receiver sought and obtained an order of Mr. Justice Myers that, among other things, (a) approved the Construction Receiver executing the Site Plan on behalf of UC Leslieville, and (b) authorized the Construction Receiver to convey part of Lot 11, Concession 1 FTB (Geographic Township of York) Designated as Parts 2 and 3 on Plan 66R29585, City of Toronto (the "**Parkland**") to the City. A copy of Mr. Justice Myers' order is attached as Exhibit "6".

23. By letter dated November 6, 2017, the City advised that the UC Leslieville's application was approved, as set out in the NOAC. A copy of this November 6, 2017 letter is attached as Exhibit "7".

Parkland Conveyance

24. On May 23, 2018, the Parkland was conveyed to the City by the Construction Receiver. The square footage of the Parkland that was ultimately conveyed was 700.09 m^2. A copy of the Parkland transfer is attached as Exhibit "8".

25. On October 4, 2018, the City returned the Parks LC to the Construction Receiver for cancellation. A copy of the October 4, 2018 letter is attached as Exhibit "9".

5.0 HISTORY OF THE PURCHASE OF LESLIEVILLE UNITS

26. As of the date of the Construction Receiver's appointment on May 31, 2016, many of the 55 Leslieville Units had been sold by UC Leslieville pursuant to agreements of purchase and sale (the "**Original Leslieville Purchaser APS**") executed by UC Leslieville with each purchaser, each dated various months in

2011 (the "**Original Leslieville Purchasers**"). A sample of the Original Leslieville Purchaser APS is attached as Exhibit "10".

27. On July 15, 2016 Terra Firma served a motion (the "**Terra Firma Motion**") seeking a declaration, among other things, that the interests of the Original Leslieville Purchasers were subordinate to the interest of Terra Firma, and seeking an order vesting all of UC Leslieville's right title and interest in the Leslieville Project in Terra Firma – in effect, the Terra Firma motion would have prevented the Original Leslieville Purchasers from closing on Leslieville Units, if and when they were completed.

28. This Court deferred the hearing of the Terra Firma Motion in order to allow discussions to take place between Terra Firma and the key stakeholders, including a subset of forty-six (46) purchasers of the Leslieville Project, who were represented by Dickinson Wright LLP ("**Dickinson Wright**").

29. Based on the Notice of Appearance and Notice of Change of Lawyer filed by Shibley Righton on behalf of the Certain Curzon Purchasers, attached hereto as Exhibit "11", and a Notice of Application dated May 5, 2016 filed by Dickinson Wright attached hereto as Exhibit "12", thirty-four (34) of the Certain Curzon Purchasers were represented by Dickinson Wright.

30. These discussions resulted in an agreement enabling the Original Leslieville Purchasers to complete the purchases of their respective townhomes provided they were prepared to pay an additional $255,000, referred to as the "top-up" amount (the "**Settlement**").

31. The Settlement was approved by the Court pursuant to the order of Mr. Justice Newbould, dated May 2, 2017 (and amended on May 11, 2017), a copy of which is attached as Exhibit "13".

Opt-In Purchasers

32. The terms of the Settlement contemplated that the Original Leslieville Purchasers would be entitled to opt-in, including by paying the top-up amount, thereby becoming "**Opt-In Leslieville Purchasers**", and execute the Opt-In Leslieville Purchaser agreement of purchase and sale (each an "**Opt-In Leslieville Purchaser APS**"), A sample of the Opt-In Leslieville Purchaser APS is attached as Exhibit "14".

33. The following subsection 7(d)(iii) was included in each Opt-In Leslieville Purchaser APS executed by each Certain Curzon Purchaser (the "**Park Levy Clause**"):

> (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;

34. The form of Opt-In Leslieville Purchaser APS was approved by the Court in the Purchaser Package Approval Order, as amended (with such non-material amendments to the APS as the Construction Receiver may deem necessary or desirable), on May 2, 2017. A copy of the Purchaser Package Approval Order is attached hereto as Exhibit "15".

35. All of the Certain Curzon Purchasers purchased their Leslieville Units pursuant to Opt-In Leslieville Purchaser APSs, with the exception of one Certain Curzon Purchaser who bought one Leslieville Unit pursuant to an Opt-In Leslieville

Purchaser APS and one Leslieville Unit pursuant to a New Leslieville Purchaser APS (defined below).

36. Each Original Leslieville Purchaser APS contained at subsection 6(d)(iii) a clause identical to the Park Levy Clause cited above.

New Purchasers

37. In total, fifteen (15) of the fifty-five (55) Leslieville Units were purchased by non-Opt-In Leslieville Purchasers, with such purchasers referred to herein as "**New Leslieville Purchasers**". None of the Certain Curzon Purchasers are exclusively New Leslieville Purchasers, but one Certain Curzon Purchaser who is an Opt-In Leslieville Purchaser also signed a New Leslieville Purchaser APS for a second Leslieville Unit.

38. New Leslieville Purchasers executed New Leslieville Purchaser agreements of purchase and sale (each a "**New Leslieville Purchaser APS**"), a sample of which is attached as Exhibit "16".

39. New Leslieville Purchasers of thirteen (13) of Leslieville Units obtained a cap on certain purchase price closing amounts under paragraph 6(d)(iii) to 6(d)(ix) of their New Leslieville Purchaser APS. Total purchase price closing amounts for each New Leslieville Purchasers with caps were $8,000 plus HST per Leslieville Unit. An additional $200 was charged for title insurance, for a total purchase price adjustment of $8,200, plus HST.

40. Each of the New Leslieville Purchaser APS amendments documenting the caps, redacted to protect personal information of the New Leslieville Purchasers (who are not Certain Curzon Purchasers) are attached as Exhibit "17".

6.0 PURCHASE PRICE ADJUSTMENTS AND THE PARK LEVY

41. On the closing of the Leslieville Units, the Construction Receiver charged purchase price adjustments and other charges to the Certain Curzon Purchasers,

including the Parks Levy, set out in statements of adjustments sent to purchasers' counsel.

42. Attached as Exhibit "18" is a summary of all purchase price adjustments and other amounts charged in respect of the Leslieville Units, prepared by the Construction Receiver (the "**Adjustment Summary**"). Line 16 of the Adjustment Summary aggregates purchase price adjustments and other amounts charged, indicating that purchase price adjustments and other amounts charged in respect of the fifty-five (55) Leslieville Units were a total of approximately $1.3 million, inclusive of HST.

43. The Construction Receiver charged the forty-two (42) Leslieville Purchasers without caps on their purchase price amounts charged, on closing, a Parks Levy in the aggregate amount of $588,804.10 (plus $76,544.53 HST). The amounts paid towards the Parks Levy by Certain Curzon Purchasers, a total of $417,694.18 (plus $54,300.21 HST) is broken down by each Certain Curzon Purchaser in the chart summary attached as Exhibit "19".

44. The Construction Receiver's real estate counsel received complaints from counsel to several purchasers upon receipt of statements of adjustments, in each case specifically objecting to the Parks Levy (among other things). Attached as Exhibit "20" is an email exchange in October 2018 between the Construction Receiver and one of the Certain Curzon Purchasers (copying 3 other Certain Curzon Purchasers), reflecting the Certain Curzon Purchaser's concern about the Park Levy.

45. All of the Certain Curzon Purchasers closed their Leslieville Units and paid the Parks Levy set out in their applicable statement of adjustment.

46. The Construction Receiver has advised Terra Firma and Shibley Righton that the quantum of the Parks Levy was calculated by the Construction Receiver based on the face value of the Parks LC and allocated among the common interest allocation attributable to the applicable Leslieville Unit. Terra Firma and the

Certain Curzon Purchasers do not allege any miscalculations were made to any purchaser's proportionate interest/share paid, without prejudice to the Certain Curzon Purchaser's position that no Park Levy should have been charged at all.

7.0 DECLARATION AND OWNERSHIP PERCENTAGE

47. A copy of the Project's condominium declaration, receipted by the land registrar on September 7, 2018, is attached hereto as Exhibit "21".

48. The common interest allocation attributable to each of the Certain Curzon Purchasers is included in Exhibit "22".