

MEMO / NOTE DE SERVICE



To / Destinataire	Mayor & Members of Finance and Economic Development Committee	File/N° de fichier:
From / Expéditeur	M. Rick O'Connor, City Clerk and Solicitor	
Subject / Objet	Kanata Lakes Golf & Country Club	Date: 9 May 2019

PURPOSE

This memo is to advise Members of the Finance and Economic Development Committee of the legal steps that I intend to take with respect to the matter of the Kanata Lakes Golf & Country Club. This update is pursuant to Section 8 of Schedule "C", City Clerk and Solicitor Department, Delegation of Authority By-law, being By-law No. 2018-397 and Sections 29 and 30 of the 2018-2022 Terms of Reference for the Finance and Economic Development Committee, "Legal Services".

DISCUSSION

The Kanata Lakes Golf & Country Club operates on lands (the "Golf Course Lands") owned by ClubLink Corporation ULC ("ClubLink"). The Golf Course Lands are the subject of certain agreements which were entered into in the 1980's by the City of Kanata and the original developer of the Golf Course Lands. (the "Agreements"). In short the Agreements provided that the golf course was established as part of a larger plan to preserve open space in connection with the development of this area of Kanata. Among other things, the Agreements:

1. Create a right of first refusal in favour of the City upon receipt of an offer for the sale of the golf course. If this right is not exercised by the City, ClubLinks is obligated to ensure that the purchaser enters into an agreement with the municipality providing for the operation of the golf course in perpetuity;
2. Give the City the ability to acquire the golf course lands at no cost in the event that ClubLinks desires to discontinue the operation of the golf course and is unable to find another person to acquire or operate it. If this were to occur, it is possible the City may have to operate or "cause to be operated" the golf course;

3. Establish requirements for the construction, expansion and operation of the golf course; and;
4. Provide for the reconveyance of the Golf Course Lands (and other lands reserved for open space uses) to the original owner in the event that they cease to be used for their intended purpose by the City.

When ClubLink purchased the Golf Course Lands in 1996, the City of Kanata consented to the purchase and ClubLink entered into an agreement to assume the obligations of the previous owner of the golf course pursuant to the Agreements.

On December 14, 2018, ClubLink announced its intention to pursue options for alternative use of the Golf Course Lands, together with its partners Minto Communities and Richcraft Homes. Based on communications from representatives from ClubLink, Minto and Richcraft, the City expects ClubLink to file applications for rezoning and subdivision of the Golf Course Lands in order to permit the redevelopment of the Golf Course Lands as a residential subdivision.

The filing of these applications, will be a further and continuing reflection of ClubLink's demonstrated intention to cease operating the Golf Course and its position that it does not consider itself to be bound by the Agreements.

While it is not known exactly why ClubLink does not consider itself to be bound by the Agreements, it is anticipated that ClubLink believes that it is no longer restrained by certain obligations contained in the Agreements by operation of what is known as the "rule against perpetuities," the application of which is governed by the *Perpetuities Act* of Ontario.

There are many nuances and exceptions in the application of the rule against perpetuities in Ontario. At a high level, the rule applies to certain interests which run with title to land, otherwise known as equitable interests, and which are intended to bind future owners of land. At its most fundamental essence, the rule dictates that certain equitable interests will become void if they are not exercised within 21 years from the date of their creation. In this instance, it is possible that ClubLink will argue that the perpetuity period limitation applies and that the agreements are not enforceable against them.

The City has obtained a legal opinion from Borden Ladner Gervais LLP, the City's external legal counsel, with respect to this issue. Having reviewed the Agreements and the opinion, Staff have determined that there are reasonable grounds to conclude that the Agreements are enforceable.

INTENDED ACTION

Given the divergence of views with respect to the enforceability of the Agreements, in accordance with the authority delegated to the City Clerk and Solicitor pursuant to the Delegation of Authority By-law, Schedule C, section 3, an Application will be made to the Superior Court of Justice for a determination of the parties' respective rights under the Agreements should an application for draft subdivision approval and/or a zoning amendment to permit residential development on the Golf Course Lands be made. This process will clarify the path forward and the City's options with respect to the Golf Course Lands.

It is anticipated that the Application, which is expected to require a one or two day hearing, could be before the Courts within 6 to 7 months from the date when an Application is commenced, though this will depend on the Courts' schedule.

It is the opinion of Legal Services and the City's external legal counsel that there are not significant facts in dispute in this matter. However, were the Court to determine that there are significant facts at issue, then it may not be possible to proceed by way of Application and the more fulsome Court process involving discoveries, mediation and trial court be required. Were that the case, then a much longer time period than 6 to 7 months would be required.

On the basis that there are not significant facts in dispute, Legal Services is of the view that the estimated cost of this proceeding is \$100,000 to \$150,000. Should the City be successful, it would likely be awarded one-third to one half of its legal costs. In the event that the City were unsuccessful, one-third to one-half of ClubLinks legal costs would likely be awarded against the City.

Upon receipt of the decision of the Superior Court, Legal Services would submit a report to Committee and Council.

M. Rick O'Connor
City Clerk and Solicitor

c.c. - Members of Council
City Manager
Senior Leadership Team
David White, Deputy City Solicitor
Tim Marc, Senior Legal Counsel