Estate No. 31-2693094

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD GP INC., CORPORATIONS INCORPORATED UNDER THE ONTARIO *BUSINESS CORPORATIONS ACT*, AND 33 LAIRD LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP FORMED UNDER THE ONTARIO *LIMITED PARTNERSHIPS ACT*

FACTUM
OF THE CITY OF TORONTO

Objection to proposed deletion and expungement of s. 114 of the *City of Toronto Act* site plan agreement in Vesting Order

DATED: June 9, 2021

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PART I – OVERVIEW

1. Should this Court delete a land use planning agreement entered into by the City in its capacity as the regulator for the public interest on a variety of subjects, including the environment, heritage preservation, public safety, accessibility for the disabled, and protection of public infrastructure, and which is secured on title in priority to other interest, over the City's objection?

2. The debtor in this motion is seeking to delete by vesting Order a site plan agreement, which is a land use regulatory agreement entered into pursuant to s. 114 of the *City of Toronto Act* that runs with title. This provision creates an exemption to the common law rule that positive covenants do not bind subsequent owners. The base obligations in the agreement are the standard form used hundreds of times a year by the City, and ensure that obligations intended to protect the public interest in matters addressed in the City's *Official Plan* cannot be evaded by conveying land to a new owner. The relief sought, if granted, would create unacceptable "gaps" in the protection provided by the site plan agreement, which is both contrary to the statutory scheme relating to site plan approval, and would interfere with the City's ability to ensure the property is built and/or maintained in accordance with various matters of public interest in the *Official Plan.*

3. The debtor's proposal fails each step of the test to delete an instrument via vesting order as set out by the Court of Appeal in *Third Eye Capital.* Most importantly, the equities do not favour deleting the instrument; if the purchaser does not wish to develop in accordance with the plans attached site plan agreement, it doesn't have to. It can simply not proceed to develop in accordance with the approved drawings, or it can apply to the City for amendments to the existing approval, with a statutory right of appeal if it and the City disagree that its amendments are appropriate.

4. The City has been clear to counsel for the parties for weeks that their attempt to attack the City's land use regulatory instrument was unacceptable and would be opposed. While it may be more convenient and profitable for the prospective purchaser to obtain title clear of regulatory interests intended to protect the public interest, that provides no basis to interfere with the City's ability to regulate land use development.

PART II – FACTS

Overview of Statutory Scheme Regarding Site Plan Approval and Site Plan Agreements

5. The *Planning Act*, R.S.O. 1990[1], and *City of Toronto Act, 2006*[2] (the "*City of Toronto Act*") both permit the City to, by by-law, designate all or part of the City of Toronto as subject to site plan control. The site plan sections of the two statutes are functionally identical. Where land is subject to site plan control, an applicant cannot obtain a building permit unless they have obtained site plan approval. The City has passed such a by-law, namely § 415-43 of the *Toronto Municipal Code* which states that "All land within the City of Toronto boundaries is designated a site plan control area" (subject to certain exceptions to this general rule which do not arise in this case).[3]

6. Site plan control is the last step in the statutory scheme whereby the City regulates the permissible use of land to ensure land is development in a manner that protects the public interest. Other "levels" or "layers" of the regulation of land development -- in order from their most conceptual and generalizable, to the most detailed or "granular" -- are:

(a) the *Planning Act*;

(b) provincial policies enacted pursuant to the *Planning Act*, such as the *Provincial Policy Statement* and various regional *Growth Plans*;

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[1] *Planning Act*, R.S.O. 1990, c. P.13, s. 41.
[2] *City of Toronto Act, 2006*, S.O. 206, c. 11. Sch. A., s. 114.
[3] *Chapter 415 – Development of Land* of the *Toronto Municipal Code*, § 415-43.

(c) the City's *Official Plan*;

(d) any geographic or subject matter specific *Secondary Plans*;

(e) land use zoning by-laws, concerning acceptable land use and built form; and

(f) site plan approval.

Reported cases interpreting site plan approval have explained this relationship as follows, "In Ontario, the *Planning Act* imposes a hierarchical system; broad land use matters are controlled by an *Official Plan*; more detailed regulations are controlled by zoning; and finally, the most detailed physical layout by site plan control ... A site plan comes at the end of the planning process."[4]

7. Site plan control involves two related but different components for the purpose of this motion; the first is site plan approval, and the second are site plan agreements.

8. Site plan approval is municipal approval of architectural, landscaping, and servicing plans prior to an owner's ability to obtain a building permit. Section 114(5) of the *City of Toronto Act* prescribes a variety of matters in the public interest which may be required to be included in site plan plans and drawings, including accessibility for the disabled, built form, public access, environmental protection (including storm water and solid waste management), traffic management, and the protection of the public infrastructure:

> 1. Plans showing the location of all buildings and structures to be erected and showing the location of all facilities and works to be provided in conjunction therewith and of all facilities and works required under clause (11) (a), including facilities designed to have regard for accessibility for persons with disabilities.
>
> 2. Drawings showing plan, elevation and cross-section views for each building to be erected, except a building to be used for residential purposes containing fewer than 25 dwelling units, which drawings are sufficient to display,
>
> i. the massing and conceptual design of the proposed building,

[4] *Reemark Holdings No. 12 v. Burlington (City),* [1991] O.M.B.D. No. 68, City's Brief of Unreported Authorities

ii. the relationship of the proposed building to adjacent buildings, streets, and exterior areas to which members of the public have access,

iii. the provision of interior walkways, stairs, elevators and escalators to which members of the public have access from streets, open spaces and interior walkways in adjacent buildings,

iv. matters relating to exterior design, including without limitation the character, scale, appearance and design features of buildings, and their sustainable design, but only to the extent that it is a matter of exterior design, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the City,

v. the sustainable design elements on any adjoining highway under the City's jurisdiction, including without limitation trees, shrubs, hedges, plantings or other ground cover, permeable paving materials, street furniture, curb ramps, waste and recycling containers and bicycle parking facilities, if an official plan and a by-law passed under subsection (2) that both contain provisions relating to such matters are in effect in the City, and

vi. facilities designed to have regard for accessibility for persons with disabilities. 2006, c. 11, Sched. A, s. 114 (5); 2017, c. 23, Sched. 3, s. 18 (2, 3).[5]

These matters in s. 114(5) of the *City of Toronto Act* are not regulated directly under the *Building Code Act*, therefore the site plan approval process also them to be considered and secured outside the building permit and inspection regime, and the approved site plan drawings become "applicable law" for the purpose of building permit issuance.[6]

9. In addition to the approval of plans themselves, s. 114(11) of the *City of Toronto Act* provides that as a condition of approval, the City may require the owner of the land enter into agreements to secure, provide, and maintain numerous other matters that are in the public interest ***on an ongoing basis***, including accessibility for the disabled, public safety (via mandatory lighting

[5] *City of Toronto Act, 2006,* S.O. 206, c. 11. Sch. A., s. 114(5).
[6] S. 1.4.1.3 of the *Building Code*, O. Reg. 332/12

requirements and snow and ice clearing), environmental protection (including storm water and solid waste management), traffic management, and the protection of public infrastructure. The *City of Toronto Act* sets out a number of permissible conditions:

(a) provide to the satisfaction of and at no expense to the City any or all of the following:

(i) subject to subsection (12), widenings of highways that abut on the land,

(ii) facilities to provide access to and from the land such as access ramps and curbings and traffic direction signs,

(iii) off-street vehicular loading and parking facilities, either covered or uncovered, access driveways, including driveways for emergency vehicles, and the surfacing of such areas and driveways,

(iv) walkways and walkway ramps, including the surfacing thereof, and all other means of pedestrian access,

(iv.1) facilities designed to have regard for accessibility for persons with disabilities;

(v) facilities for the lighting, including floodlighting, of the land or of any buildings or structures thereon,

(vi) walls, fences, hedges, trees, shrubs or other groundcover or facilities for the landscaping of the lands or the protection of adjoining lands,

(vii) vaults, central storage and collection areas and other facilities and enclosures for the storage of garbage and other waste material,
(viii) easements conveyed to the City for the construction, maintenance or improvement of watercourses, ditches, land drainage works, sanitary sewage facilities and other public utilities of the City on the land,

(ix) grading or alteration in elevation or contour of the land and provision for the disposal of storm, surface and waste water from the land and from any buildings or structures thereon;

(b) maintain to the satisfaction of the City and at the sole risk and expense of the owner any or all of the facilities or works mentioned in subclauses (a) (ii) to (ix), including the removal of snow from access ramps and driveways, parking and loading areas and walkways;

(c) enter into one or more agreements with the City dealing with and ensuring the provision of any or all of the facilities, works or matters mentioned in clause (a) or (e)

> *and the maintenance thereof as mentioned in clause (b) or with the provision and approval of the plans and drawings referred to in subsection (5);*
>
> *(d) enter into one or more agreements with the City ensuring that development proceeds in accordance with the plans and drawings approved under subsection (5);*
>
> (e) subject to subsection (13), convey part of the land to the City to the satisfaction of and at no expense to the City for a public transit right of way. 2006, c. 11, Sched. A, s. 114 (11); 2017, c. 23, Sched. 3, s. 18 (4). *[emphasis added]*[7]

The most relevant sub-sections for the purpose of this motion are (c) and (d), which provide for the authority to enter into site plan agreements to secure various matters which are set out in those provisions. As is discussed in more detail below, the obligations secured in the within site plan agreement reflect numerous obligations in relation to these public interest matters.

10. One of the reasons municipalities seek to enter into site plan agreements is that while certain conditions may require actions to be completed prior to the site plan approval being granted, such as the conveyance of road or lane widenings, and others may be related to ongoing obligations or matters that can only be completed and/or undertaken on an ongoing basis following construction of the development.

11. *Section 5.1.3 – Site Plan Control* of the City's *Official Plan* discusses in further detail the public interests sought to be secured and promoted through site plan approval and site plan agreements. The overall objective is to encourage "well-designed, functional, sustainable and universally accessible development in Toronto." These *Official Plan* policies reiterate, and in some cases expand and provide more detail upon the various subject matters set out in the *City of Toronto*

[7] *City of Toronto Act, 2006*, S.O. 206, c. 11. Sch. A., s. 114(5).

Act. The *Official Plan* explains the following as public interest objectives of site plan approval and site plan agreements include:

> (a) promotion of accessibility for the disabled through the adoption of *Accessibility Design Guidelines*, which guide the design, planning and construction of accessible facilities and the preparation of accessibility audits, including such issues as minimum width clearance for people in wheelchairs, signage, and handrails;
>
> (b) promoting environmentally sustainable exterior design features regarding air and water quality, greenhouse gas reduction such as tree and vegetation requirements, measures to promote passive heating and cooling, and measures to protect migratory birds by reducing the risk of bird collision with buildings;
>
> (c) sustainable design of streetscape improvements within the adjacent public boulevard, such as improved bicycle and pedestrian infrastructure;
>
> (d) the reduction of waste and litter through mandatory collection and storage of recycling and organics.[8]

12. When a land owner applies for site plan approval, City Planning coordinates the circulation to numerous City divisions (in particular, water, fire services, heritage preservation, transportation services, engineering and construction services, urban forestry) as well as certain non-City entities (such as the City's various school boards, the Toronto Transit Commission, and public utilities) for their review and comment on the various matters of public interest those that entities are engaged in.[9]

13. Applicable tribunal decisions discussing site plan agreements have held that municipalities, as the land use regulators, have "the singular and exclusive role … to act on behalf of all members of the public in this [site plan] process."[10] Site plan agreements are not a mere "set of financial

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[8] *Section 5.1.3 – Site Plan Control* of the City's *Official Plan*
[9] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1 & 1B, para. 4 & Ex. B.
[10] *1341665 Ontario Ltd. v. Toronto*, [2003] O.M.B.D. No. 1274, City's Brief of Unreported Authorities

commitments by the Laird Entities [to the City] in exchange for permission to build a specified development" as asserted by 33 Laird Inc., 33 Laird GP and 33 Laird Limited Partnership (the "Debtor"). The Ontario Court of Appeal has confirmed in *Brennan* that site plan agreements are a series of positive covenants, and a statutory exception to the common law rule that positive covenants do not run with the land.[11] The obligations are secured in the public interest, to be provided and maintained in perpetuity, subject to the right to seek a new or amended site plan agreement, and to exercise appeal rights in relation to that any such request.

14. Site plan agreements may be registered against land, and may be enforced against any subsequent owners through a variety of means, including the City seeking a mandatory injunction against the owner of the land at the time of the default, or the City doing the work on behalf of a defaulting property owner, and adding the costs to their property taxes, pursuant to ss. 114(14), 382 and 386 of the *City of Toronto Act*.[12]

15. The site plan agreement at issue was registered against the property municipally known as 33 Laird Drive (the "Property"), on September 23, 2019, or roughly two months after it was entered into.[13]

16. Further, the City's standard practice is to require that property owners obtain a postponement of other interests in land, so that the City's site plan agreement is in priority to those interests. That was done in this case, on the same day and time that the City's site plan agreement

[11] *Brennan v. Dole*, 2005 CanLii 33122 (Ont. C.A.) at 10.
[12] *City of Toronto Act, 2006*, S.O. 206, c. 11. Sch. A., s. 114(5), 382 & 386.
[13] Site Plan Agreement, Moving Party's Motion Record, Tab 2J, pg. 176.

was registered, Duca Financial Services Credit Union Ltd. ("Duca") agreed to postpone their mortgage so that the City's site plan agreement was in priority to it.[14]

17. Despite the City's site plan agreement being in priority to the Duca mortgage, the Debtor's motion record is clear that is recognizes Duca's claim as secured, while it tries to delete the City's interest.

Appeal Right Regarding Site Plan Approval and Agreements Which City Has Urged Prospective Purchaser to Follow

18. Counsel for the City have repeatedly advised counsel for 33 Laird Development Limited Partnership (the "Purchaser") that if it does not wish to build in accordance with the plans attached to the site plan agreement it should simply apply for a new site plan approval with new plans, or apply for an amendment to the existing approval.[15] Through that new application the Purchaser could seek approval of their desired development, and the City would impose new conditions to replace the existing ones – without gap or interruption -- thereby continuing to secure the orderly development of land and matters of public interest.

19. If the parties disagree about whether this new application or the conditions sought by the City are appropriate there is a right of appeal to the Ontario Land Tribunal (the "OLT"), formerly the Local Planning Appeal Tribunal ("LPAT") and Ontario Municipal Board (or "OMB"), a provincial quasi-judicial tribunal.[16] Neither the Debtor nor the Purchaser have explained to date

[14] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1 & 1D, para. 6 & Ex. D.
[15] Correspondence between Counsel, Moving Party's Motion Record, Tab 2K, pg. 194 & 197.
[16] *City of Toronto Act, 2006*, S.O. 206, c. 11. Sch. A., s. 114(15 & 15.1)

why following that route – which rather than seeking to delete a site plan agreement is what is contemplated by the statute – is unacceptable to them.[17]

20. By contrast, the Debtor seeks to fault the City by asserting in its supporting Affidavits that it had "yet to receive notice that the City would apply to the court for an order that the [site plan agreement] is not to be disclaimed" under its proposal to have the site plan agreement issue addressed via a Notice of Disclaimer under s. 65.11(3) of the *BIA*.[18] The Debtor's proposal to proceed via a Notice of Disclaimer was sent to the City on Friday, June 4 at 7:52 pm, and a Motion Record containing the statement that the City had not responded to it was sent on Friday, June 4 at 8:30pm, or 40 minutes later that same evening on a Friday night. The City responded the next business day, on Monday, and explained why the Debtor's proposal to proceed via s. 65.11 of the *BIA* was unacceptable. The Debtor agreed, and withdrew their proposal to proceed to attack the City's site plan agreement via this route.[19]

Site Plan Agreement At Issue and Application to the Property

21. The "base" of the site plan agreement which the Debtor is seeking to delete from title is in the City's standard form. Similar site plan agreements are entered into and are registered on title to run with land an estimated 150 times in 2020, by way of example. Attached to the "base" agreement are site-specific considerations and any conditions deemed appropriate and necessary that are determined on a site-by-site basis, and are included in schedules. There is nothing particularly unusual or uncommon from the City's perspective about the site-specific conditions in this agreement.[20]

[17] Correspondence between Counsel, Moving Party's Motion Record, Tab 2K, pg. 194 & 197.
[18] Affidavit, Moving Party's Motion Record, Tab 2, pg. 14.
[19] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1 & 1E, para. 8 & Ex. E.
[20] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1, para. 9.

22. The plans and drawings attached to this site plan agreement reflect that the City secured numerous public interest conditions on subjects matters that it was authorized to seek under s. 114(11) of *the City of Toronto Act*. The plans and drawings have again been reviewed by the City's Planning division, which has considered and explained in detail how the secured plans and drawings promote the public interest in several categories, including:

(a) accessibility for persons with disabilities;

(b) walkways and all other means of pedestrian access

(c) lighting**;**

(d) improvement of watercourses, drainage, storm water management, sanitary sewage facilities, other public utilities of the City on the land;

(e) walls, fences, hedges, trees, shrubs or other groundcover**;**

(f) facilities and enclosures for the storage of garbage and other waste**;**

(g) access to and from the lands, off-street vehicle loading and parking, including driveways for emergency vehicles;

(h) widenings of highways that abut the land.

All of the specific ways in which these objectives are furthered by the plans and drawings are too numerous and detailed to list here. By way of some examples, they range from entrances and walkways to accommodate the disabled which are wider than the otherwise legal minimum, improvements and widening to sidewalks which abut the property, locating driveway access to ensure safe and efficient movement to public roads, pavement markings throughout the parking lot to provide for safe pedestrian movements, and dedicated space for emergency vehicles.[21]

[21] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1, para. 11.

23. Beyond what is secured in the plans and drawings (which the City understands the Purchaser has no current intention to build), the site plan agreement contains numerous important ongoing provisions regarding at least two large City sewer pipes which run under the Property; 72 metres of a 450 mm diameter pipe, and 42 metres of a 1200 mm diameter pipe. Both are combined sanitary / storm sewers, and were both built on or about 1936. The two sewers combined collect sewage from a mix of industrial, commercial and residential properties over an area of 250 hectares. The sewage in these pipes contains a mixture of floatables, pathogenic microorganisms, suspended solids, oxygen-demanding organic compounds, nutrients, oil and grease, toxic contaminants and other pollutants. Damage to either sewer that could arise as a result of construction or abandonment could result in pollutants leaking into the environment.[22]

24. Both sewage pipes are relatively old and therefore are more vulnerable to construction activities, such as construction loads, vibrations, excavation work, or other rough operational activities. Based on a site inspection conducted on June 8, 2021, Toronto Water staff have observed a significant sinkhole near a maintenance hole associated with the sewage pipes, and pooled water from the site is flowing into the sinkhole and leaking into the maintenance hole. There is potential that sediment from the inflow to the maintenance hole could deposit in the maintenance hole and/or downstream sewer, and require cleaning or cause a blockage. In addition, if the sinkhole is left to increase in size it may structurally undermine the sewers or maintenance hole.[23]

25. The site plan agreement – which the Debtor is seeking to delete – contains numerous provisions to protect the public sewers, including the Debtor was required to post $500,000 in security for the 1200mm combined sewer, as well as provisions that apply on an ongoing basis

[22] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1, para. 12 - 14
[23] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1, para. 12 - 14

prohibiting interference and damage, requiring repair of any damage, the provision of technical drawings associated with any repair, access rights for the City to the Property in relation to the sewer, and insurance obligations (the "Sewer Protection Provisions").[24]

26. The Debtor obtained a building permit on or about October of 2019, and as the Debtor notes in their factum, the existing building at the Property has been gutted, foundation work has been done, and structural steel has been erected. Given the short notice for this motion the City has not been able to determine whether any damage has occurred to the sewer infrastructure. To provide only one example of the ongoing concerns for the site, the City has no way of knowing if the sewer pipes will be damaged by any change in site conditions that may occur in the future. These issues are of particular concern because the City was recently advised that the architects who were supervising the construction and site conditions – which is mandatory at law -- have resigned.[25]

27. In light of the foregoing, Toronto Water staff considers the Sewer Protection Provisions for the City in the site plan agreement to be imperative.[26]

28. There are a variety of other ongoing obligations in the site plan agreement that protect other matters in the public interest beyond what are secured in the plans, including:

[24] Site Plan Agreement, Moving Party's Motion Record, Tab 2J, pg. 184 - 192.
[25] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1 & 1H, para. 16 & Ex. H.
[26] Affidavit of Michelle Corcoran, City's Motion Record, Tab 1, para. 12 - 14

(a) the posting of securities to secure heritage conservation, and the requirement for approval by heritage consultant that the heritage conservation work had been completed appropriately before the funds are released;

(b) the requirement that ongoing adjacent traffic operations be maintained as set out in a professional traffic impact study, as well as certain prescribed site access, and traffic signage; and

(c) posting of securities to secure landscaping, and the ability for the City to draw on those securities if the work is not done.[27]

PART IV – LAW AND ARGUMENT

29. It appears the Debtor and/or the Purchaser are of the view that the site plan agreement imposes onerous obligations on a purchaser. The City does not agree, as follows:

(a) approximately half of the "site specific conditions" that are attached as Schedule C to the agreement, or 25 of 53 conditions, are "pre-approval conditions," i.e. they had to be satisfied prior to the City entering into the agreement and site plan approval being granted. How is it onerous for the Purchaser to step into an agreement where approximately half of the site-specific conditions had to be met by the Debtor more than two years ago?

(b) Para. 3 : while the owner of land has to agreement to maintain the "Project" in substantial conformity to approved plans and drawings, the "Project" is defined as the proposed new two-storey building. The motion materials indicate the Purchaser has no intention of building the "Project." How is it onerous to step into an obligation to maintain something that a person submits they do not intend to ever build?

[27] Site Plan Agreement, Moving Party's Motion Record, Tab 2J, pg. 188 - 191.

(c) Para. 4 : while there is a deadline to complete the "Project" (i.e. build the buildings), the primary consequence of missing that deadline is the City must grant a time extension. This section is primarily facilitative rather than mandatory, but with a condition in that it allows the approved construction within a fixed period of time, but does not allow the construction after the deadline without permission. Failure to abide by this condition would require the owner to extend the term of the agreement in order to continue the construction of the Project, something the Purchaser has said they have no intention of doing;

(d) Para. 5 – 7 : This section requires the posting of security, which the Debtor has already done, and relates to how the City can use the posted security, and how any secured funds not spent is to be returned;

(e) Para. 8 : This section gives the City the right to inspect the "Project" (i.e. the proposed buildings) to ensure they are in conformity to the Plans and Drawings. Again, the motion materials indicate the Purchaser has no intention of building the "Project";

(f) Para. 9 – 11 : while these sections do discuss the consequences of not constructing the buildings of the "Project," the bulk of the obligations concern construction not in accordance with the Plans, or partially commenced construction that is abandoned. The City has proposed "comfort language" to the Purchaser noting the City "will not take the position that if 33 Laird Inc. obtained title to the property, that it would be in default of those sections of the agreement by reason only of it not commencing "the Project."' The focus of these sections and the City's remedies is public interest and public space matters, such as heritage preservation, landscaping, and the protection of public infrastructure; the matters for which the City has received financial security. How is it onerous to the Purchaser if the City has a right to spend money posted by the Debtor to protect and promote the public interest and public infrastructure? While admittedly the wording of the agreement may be read as being broader than that primary focus, the City is obviously not

in the business of involuntarily building private buildings on private properties at the expense of property owners.

Prejudice to the City and the Public Interest Should the Site Plan Agreement be Deleted from Title

30. The Debtor's proposal to delete the site plan agreement via Vesting Order creates two distinct but related types of "gaps" in the statutory scheme, which are unacceptable to the City.

Deleting the Site Plan Agreement Creates a "Gap in Subject Matter"

31. Site plan approval is a permission to build a specified development on a site. It is a benefit to the land that is granted by the approval authority, subject to specified conditions. If the site plan agreement is deleted from title, any future owner will still have the right to develop by virtue of site plan approval, but without any of the associated obligations until a new site plan agreement is entered into, which may never even occur. That is because it is the approved site plan drawings are what gives rise to the entitlement to build, which is not what the Debtor is seeking to delete, instead, the Debtor is seeking to delete the site plan agreement securing the conditions of that approval.

32. The current site plan agreement contains rights and securities in favour of the City in relation to public infrastructure, in particular, the large sewer pipes that runs under the Property. The various Sewer Protection Provisions (including the posted security and insurance obligations) are contained in the site plan agreement which the Debtor is seeking to delete, as are the other obligations concerning ongoing obligations respecting heritage, traffic and landscaping. If the Debtor successfully deletes the site plan agreement, what rules or provisions will govern the City's ability, if any, to draw on the posted securities?

33. The City understands that the Purchaser intends to seek new site plan approval, and enter into a new site plan agreement, ***at some unknown point in the future***. However, if the current site plan agreement is deleted as requested, for how long will there be a "gap" until the public interest obligations currently in force in the existing site plan agreement is replaced? How long does the Purchaser think it will take to:

(a) decide what it intends to build;

(b) design plans;

(c) apply to the City for approval for those plans;

(d) the City to consult internally and externally on what requirements are appropriate;

(e) the Purchaser to satisfy all pre-approval conditions;

(f) the Purchaser to enter into a new site plan agreement with the City and/or exercise appeal rights if it considers necessary, with a subsequent right of a hearing, and until the adjudicated;

all before a new site plan agreement replaces the old one the Debtor is trying to delete? For how long will the Property remain in a state of partial construction / demolition, with public infrastructure unprotected by an agreement, without clear authority to draw down security, and other insurance, indemnity and access rights? The Purchaser has not said, nor can it say with any degree of certainty.

Deleting the Site Plan Agreement Creates a "Gap in Time"

34. The site plan agreement notes that the approval is to expire two years from the date of approval. This time limited approval is to ensure the timeliness of development, but also that the "granular" level of site plan review will be subject to the latest planning policies in the City. That

expiration is only contained in the site plan agreement, and if the site plan agreement is deleted from title, the approval itself may continue in perpetuity.

35. The City understands the Purchaser as currently constituted does not currently intend the build the "Project" as authorized. That is not the end of the issue. There are numerous ways the Property could be acquired via a still further owner, whether voluntarily (i.e. via sale), or involuntary (including power of sale, further insolvency proceedings), or the Purchaser's plans could change (including via corporate restructuring or reorganization). Its current intentions cannot bind a subsequent owner. Land use planning rights and obligations – including site plan obligations – are intended to run with the land so that the public interests rights which the City has secured cannot be escaped via a simple conveyance of title. That would represent structural and procedural unfairness to the City, to the public interest, and is contrary to the "good planning" objectives of the *Planning Act* and the *City of Toronto Act*. What one current owner currently intends to do with a property is of limited relevance in land use planning.

36. To contrast the respective prejudice of the parties: the prejudice to the City is the Debtor's attempt to bypass the statutory scheme by deleting the City's site plan agreement, paired with the uncertain enforceability of the Sewer Protection Provisions and other provisions to protect heritage, traffic and landscaping matters. This is contrasted with the limited prejudice to the Purchaser of following the process set out in the statutory scheme for site plan approval. That is, after obtaining title to the Property the Purchaser is welcome to apply for a new or amended site plan approval and a new site plan agreement, and if it and the City cannot agree that its new proposal is appropriate, the Purchaser can exercise its appeal rights to the OLT and have the matter adjudicated.

Application to Delete Site Plan Agreement Fails Applicable Legal Tests

37. The Debtor's proposal to delete the City's site plan agreement fails each element of the test set out by the Court of Appeal in *Third Eye Capital* to determine when a Court ought to exercise its discretionary authority to delete an interest via Vesting Order:

(a) nature of the interest: the City's site plan agreement is greater than a mere financial interest, and more like an easement (in that the Court of Appeal has confirmed that site plan agreements are statutory positive covenants that run with the land) which was provided as an example in *Third Eye Capital* as a kind of interest that should not be vested out. The Debtor incorrectly asserts that the obligations under the site plan agreement are secured by letters of credit only; this is wrong in law. As discussed above, City's site plan agreement rights and a property owner's resulting obligations are secured and can be enforced in perpetuity (until amended or replaced) including via an application in the nature of a mandatory injunction, or by the City doing any outstanding work at the property owner's expense and adding the charge to the property tax account, pursuant to ss. 114(14), 382 & 386 of the *City of Toronto Act*[28];

(b) reasonable expectation of the parties: the reasonable expectation at the time the site plan was entered into is it could not be extinguished based on the simple payment of money, but rather many obligations under it continue in perpetuity[29];

(c) consent – clearly the City does not consent to deletion of the site plan agreement, and never agreed to subordinate its interest under it. To the contrary, other parties, including the Debtor's secured mortgagee, agreed to subordinate the priority of its mortgage interest to the City's site plan agreement[30];

[28] *Third Eye Capital v. Ressources Dianor*, 2019 ONCA 508 at 104 ("*Third Eye Capital*").
[29] *Third Eye Capital* at 105
[30] *Third Eye Capital* at 106 - 109

(d) balance of the equities – as discussed above, the site plan agreement secures public interest rights and to protect public infrastructure. Unlike strictly financial instruments like mortgages and liens that can be fairly dealt with under paragraph 5 of the proposed Vesting Order (i.e. those claims attach to the proceeds of sale in the same priority as they currently do against land), the many of the obligations created by the site plan agreement cannot meaningfully be addressed in that manner. By contrast, the Purchaser is not materially prejudiced, as it can apply for a new or amended site plan agreement after the sale, and has a right of appeal under s. 114 of the *City of Toronto Act* if it is not able at first instance to obtain the amended site plan agreement that it seeks.[31]

38. Courts have consistently held that that the instruments of regulatory bodies – such as the City as it relates to land use development – should not be treated the same as other commercial and private entities under the *Bankruptcy and Insolvency Act* (or the *CCAA*). In the within case, the City acts as a regulatory body by entering into statutory agreements to regulate land use development. These regulatory agreements are distinct from private agreements the City could enter into in its commercial or private capacity. Regulatory instruments intended to protect the public interest should be respected. As the Supreme Court of Canada held in *Re AbitiBowater*:

> Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules.[32]

What the parties are seeking in the within motion by deleting the City's site plan agreement is analogous to what *AbitiBowater* stated is prohibited; they are requesting permission to disregard the statutory rules and regime that governs land use development. By contrast, the City is seeking

[31] *Third Eye Capital* at 110
[32] *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at 2.

to apply the statutory rules that govern land use development – that successors in title inherit responsibility for compliance with site plan agreements, in this case specifically related to the creation of risks that were contemplated in the site plan agreement, subject to a right of seek to amend and appeal, which the City has stated the Purchaser is welcome to exercise.

39. Similarly, the Supreme Court's decision in *Orphan Well Association* reflects that where a regulatory body is acting in the public interest and for the public good, it should be treated differently than a typical commercial creditor:

> …is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders … and that it is, therefore, not a creditor... It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them.[33]

Similarly, the City's site plan agreement – which regulates land use development public interest -- stands on a different footing than private, commercial interests. The public is the beneficiary of the City's site plan agreement, unlike the other private financial interests such as the other instruments which are sought to be deleted via Vesting Order, which are various *Personal Property Security Act* registrations, various financial charges, assignments of rent, construction liens, and commercial leases.

40. The Debtor's arguments that the City should not be concerned because the various parties intends to act good faith are not compelling: the shoe is on the wrong foot. The City as a public authority acts in good faith, and enforces its land use regulatory rights only when there is a need to do. By contrast, the Purchaser is a commercial corporation, and presumably profit-maximizing. It is not under supervision by the Trustee or the Court, it is the Debtor that is. If the Property is

[33] *Orphan Well Association v. Grant Thornton*, 2019 SCC 5 at 122.

vested to the Purchaser free from the City's site plan agreement, what is done with the Property or what situations or conditions could arise there into the indefinite future are things no one can predict with certainty. Regulating matters in the public interest which may arise at a Property in the indefinite future is precisely the point of the site plan agreement, which the Debtor is trying to delete.

41. The Debtor has *failed to cite a single authority* whereby a Court has vested out a statutory instrument or agreement of a regulatory body entered into to protect the public interest, either over the objection of the regulatory body, or at all. None of the Debtor's cases are analogous:

(a) *Nelson Education*, relied upon as authority for the proposition that vesting a property free and clear is "normal" concerned loans, which are not analogous to statutory instruments from a regulatory body. *Nelson* was clear that vesting properties with "permitted encumbrances" is the norm, which is how the City submits its site plan agreement should be treated, much like the five other City regulatory instruments which are registered on title and which the Debtor has proposed to be listed as "Permitted Encumbrances." The Debtor has not explained why it should be entitled to "pick and choose" which City of the City regulatory instruments registered on title it wants to keep, and which it thinks it should be able to delete[34];

(b) *Kuz* did not concern an attempt to vest away a *Planning Act* interest or any other regulatory interest, it concerned the partition of privately-owned property[35];

(c) *Merol* is similar to *Kuz*, and concerned competing private ownership interests asserted against a property, and an application to sever, and did not involve any public

[34] *Nelson Education Limited (Re)*, 2015 ONSC 3580 at 40.
[35] *Re Kuz and Kuz*, 1980 CanLii 1694.

authorities. Like *Kuz*, it turned on the ability to vest ownership of land without following the subdivision control provisions in the *Planning Act*, which is not at issue[36]*;*

(d) *Nobrega* concerned an attempt by private parties to cure inadvertent lot merger that arose due to an error made in settling an estate, but without following the lot severance procedure in the *Planning Act*. The Court ***refused*** the desired vesting order, finding it "*inappropriate to grant the vesting order in the absence of a full understanding of the concerns of the City*" which was not a party and did not appear at the hearing. In the within case, the City has set out repeatedly and in detail (mostly recently, in this factum) its concerns regarding the Debtor's proposal.[37]

42. The Debtor relies on *Hi-Rise* decision from the Court of for authority for the proposition that land use planning is not immutable. The City agrees; which is why the City has invited the Purchaser to submit a new application, and informed it of its appeal right should the proposed changes not receive the City's consent. An owner exercising its appeal right following a subsequent application and request to amend a site plan agreement is what is discussed in *Hi-Rise*.[38]

43. The City is not required to engage in a "give and take" as the Debtor asserts when it comes to its role as a regulatory body, none of the authorities it cites stand for that proposition. This is not a case where the City appears as simple creditor (in particular, an unsecured creditor, who must expect losses in an insolvency).

44. The Debtor's overarching argument seems to be that because it entered into an agreement of purchase and sale with that Purchaser that contemplates deleting the City's site plan agreement,

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[36] *724597 Ontario Inc. v. Merol Power Corporation*, 2005 CanLII 41537.
[37] *Nobrega and Elder v. Trustees of the Estate of M. Gasparovich*, 2018 ONSC 2901 at 5.
[38] *Hi-Rise Structures Inc. v. Scarborough (City)*, 1992 CanLII 7739 (ON CA).

the Court ought to give effect to their private contractual choice. What is known for certain from the Trustee's report is that the deletion of the City's site plan agreement was not a mandatory term of the transaction, rather, the parties purported to give the Purchaser an option of seeking to delete the site plan agreement, which clearly is the option the Purchaser chose. Why those parties thought they could contract away the City's regulatory rights and instruments, without notice to or consent from the City, is known only to them. No doubt it may be more convenient or profitable to them create a regulatory regime of their choosing to delete the City's regulatory instruments, rather than following the regulatory regime that actually exists. The same can likely be said of any private entity, but it provides no basis for the Court to authorize their request.

PART IV – ORDER SOUGHT

45. The City requests that the proposed Vesting Order sought by the Debtor be modified, such that item #8 under "Schedule B – Specific Claims to be deleted and expunged from title to Real Property" be moved to "Schedule C – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property."

46. The City also requests an Order for its costs, on a partial indemnity basis, for its response to this motion. The City is not a party to this proceeding or in a contractual relationship between the Debtor and Purchaser. The City should not have to incur legal costs to respond to attempts by private parties to "vest their way out of the law."

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2021.

CITY SOLICITOR
Per C. Henderson
Counsel to the City of Toronto

SCHEDULE A – AUTHORITIES CITED

Reemark Holdings No. 12 v. Burlington (City), [1991] O.M.B.D. No. 68

1341665 Ontario Ltd. v. Toronto, [2003] O.M.B.D. No. 1274

Brennan v. Dole, 2005 CanLii 33122 (Ont. C.A.)

Third Eye Capital v. Ressources Dianor, 2019 ONCA 508

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67

Orphan Well Association v. Grant Thornton, 2019 SCC 5

Nelson Education Limited (Re), 2015 ONSC 3580 a

Re Kuz and Kuz, 1980 CanLii 1694 (Ont. H. Ct. J.)

724597 Ontario Inc. v. Merol Power Corporation, 2005 CanLII 41537 (Ont. Sup. Ct. J.)

Nobrega and Elder v. Trustees of the Estate of M. Gasparovich, 2018 ONSC 2901 at 5.

Hi-Rise Structures Inc. v. Scarborough (City), 1992 CanLII 7739 (ON CA).

Estate File No: 31-2693094

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD GP INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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