

SUPREME COURT OF NOVA SCOTIA

Citation: *The Municipality of the District of East Hants v. Lively Properties Holdings Limited*, 2026 NSSC 247

Date: 20260729

Docket: Hfx No. 537199

Registry: Halifax

Between:

The Municipality of the District of East Hants

Applicant

v.

Lively Properties Holdings Limited

Respondent

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: October 2, 2025, in Halifax, Nova Scotia

Counsel: Nathan Sutherland and Ren Henderson, for the Applicant
C. Gavin Giles, K.C. and Dashawn Smith, articled clerk, for the
Respondent

By the Court:

INTRODUCTION

[1] A Notice of Application in Chambers was filed on behalf of The Municipality of the District of East Hants (the “Applicant” or the “Municipality”) against Lively Properties Holdings Limited (the “Respondent” or “Lively Properties”) on October 2, 2024.

[2] A Notice of Contest was filed on behalf of the Respondent on December 6, 2024. An Amended Notice of Contest was subsequently filed on February 19, 2025, followed by a Second Amended Notice of Contest on March 12, 2025.

OVERVIEW

[3] The Municipality seeks to enforce the buy-back provisions of a Buy-Back and Right of First Refusal Agreement (the “Buy-Back Agreement”) that forms part of an Agreement of Purchase and Sale (the “APS”) it entered into with Lively Properties on January 28, 2019.

[4] Under the APS, the Municipality agreed to sell Lively Properties a property described as Block U, Richard John Drive, Mount Uniacke, Hants County, Nova Scotia (P.I.D. No. 45357449) (the “Property”). The sale of the Property was made conditional on Lively Properties executing the Buy-Back Agreement. The Buy-Back Agreement was signed by Lively Properties on February 1, 2019.

[5] Prior to entering into the APS, an application to Purchase the Property was submitted to the Municipality by Lively Properties. It was signed by the President of Lively Properties, Mr. Arni Lively, on January 4, 2019.

[6] In addition to setting out the proposed purchase price of \$46,000.00, the Application to Purchase stipulated the Type/Nature of Business Proposed for the lot being applied for as “Maintenance Garage, Office, Construction Yard” and confirmed that “Upon Completion, the assessed value of the property (land and Buildings) is expected to meet or exceed ... \$130,434 /acres (Uniacke).” This level of assessment was a condition for the sale of a lot in the Uniacke Business Park.

[7] The Application to Purchase was accompanied by a deposit of \$2,000.00 which was credited towards the purchase price at the time of closing.

[8] The Application to Purchase was incorporated into the APS and attached as Schedule B. The APS also included a description of the property that Lively Properties agreed to purchase. The legal description of the property was attached as Schedule A. Also attached to the APS, and marked Schedule C, was a form Buy-Back Agreement.

[9] As indicated previously, the APS was signed by Mr. Lively on behalf of Lively Properties on January 28, 2019. On January 29, 2019, the Municipality's CAO, Connie Nolan, signed the APS on behalf of the vendor.

[10] Under cover of correspondence, dated February 1, 2019, legal counsel for the Municipality sent the executed Warranty Deed and Statement of Adjustments to the then legal counsel for Lively Properties. They were sent in escrow pending receipt of the following:

1. Your firm cheque in the amount of \$44,060.00 payable to the Municipality of the District of East Hants;
2. HST Indemnity Certificate executed by your client; and
3. Buy-Back and Right of First Refusal Agreement executed by your client and your undertaking to register same as a first charge against the above-noted property.

[11] Legal counsel for Lively Properties promptly replied to the Municipality's legal counsel by correspondence dated February 1, 2019, in which he stated:

“With regard to the above closing, please find enclosed the following:

1. Our firm trust cheque in the agreed-upon balance to close made payable to the Municipality of the District of East Hants;
2. Our client's Statutory Declaration re: HST;
3. Signed Buy-Back and Right of First Refusal Agreement

[12] The letter also contained the following paragraph:

“I undertake to register the Buy-Back and Right of First Refusal Agreement as a first charge against the above-noted property.”

[13] Based on the copy of the Buy-Back Agreement attached to counsel's correspondence, it was signed by Mr. Arni Lively in his capacity as President of Lively Properties on February 1, 2019. A copy of the Buy-Back Agreement as

registered in the Land Registration System and signed by each of the parties in this litigation is attached to the affidavit of Graham Scott, the Manager of Economic & Business Development for the Municipality, which was filed in support of the application on January 21, 2025.

[14] According to the affidavit of Mr. Scott, “The Municipality seeks to develop business parks as a source of employment and commercial property tax revenue.”

[15] Mr. Scott further states, in his affidavit, that “In order to encourage business to purchase and develop properties within the business parks, the Municipality pays for a number of development-related steps, to make the properties “development ready” upon purchase. Among other things, the Municipality pays for land surveying, subdividing, land-planning and zoning, engineering, and road construction in the Business Parks.”

[16] According to Mr. Scott, “The Municipality therefore strives to sell properties in the Business Parks to business that will build on the land. The Municipality wants to know that businesses (sic) will operate out of the Business Park, and thereby (it is hoped) create jobs.”

[17] He goes on to suggest that “...when businesses develop the land within the Business Parks, it also generates increased tax revenue, due to the increase in the property’s value with development.”

APPLICATION TO PURCHASE

[18] The requirement to develop the lands in the Uniacke Business Park was listed as a condition of sale in the Application to Purchase signed by Mr. Lively on behalf of Lively Properties on January 4, 2019. Under the heading “Conditions of East Hants Business Park Lot Sales”, clause 3 stipulates that:

3 The Purchaser commits to a site development with a minimum assessed value (land & building) of \$300,000/acre in the Elmsdale Business Park or \$300,000/ 2.3 acre in the Uniacke Business Park.

[19] Clause 6 of the Application to Purchase further stipulates that:

6 Construction shall be commenced for the entire Development no later than twelve (12) months after the date of closing (“commencement of construction” shall mean the pouring of the footings and foundation for the Development) and construction of the entire Development, including landscaping, paving and curbing,

and fencing as required, shall be completed no later than twenty-four (24) months from the date of closing.”

[20] Clause 8 of the Application to Purchase refers specifically to a buy-back option. It states:

8. East Hants may exercise a buy-back option if:
 - (a) Construction is not commenced within 12 months of the purchase date; or
 - (b) Construction is not completed within 24 months of the purchase date.

[21] Clause 9 of the Application to Purchase states that:

9. If East Hants exercises the buy-back option for either (a) or (b) as noted above, the price paid for the lot will be equivalent to the purchase price less administration costs to return the lot to its original condition. The costs as mentioned above shall be determined by the Municipality.

[22] The conditions captured by clauses 10 and 11 are relevant to the issues now before the court and will be reproduced in their entirety. Clause 12 requires the Purchaser to give a right of first refusal to the Municipality for any future sale of the property based on a *bona fide* offer from some other purchaser. It need not be reproduced as it has no bearing on the Application that brings this matter before the Court.

[23] Clauses 10 and 11 state the following:

10. At the option of either the Municipality or the property owner, the owner may retain ownership of the land. In lieu of MCH exercising the buy-back option for either (a) or (b) above by paying a fee equal to the sum of all commercial taxes levied on a property values at \$300,000 in the same location. This fee will be imposed every 13 months until the conditions of the purchase and sale agreement have been met or the buy-back option has been exercised (reviewed every 12 months against the conditions set out above). Payment will be due within 30 days of receiving notice from East Hants of the buy-back option being exercised. This payment will be over and above any taxes levied on the property in accordance with the *Municipal Government Act* and will constitute a lien on the property.

11. The purchaser may apply to be released from the terms of the buy-back provisions once the development is roof tight (as confirmed by an East Hants building Inspector).

THE BUY-BACK AND RIGHT OF FIRST REFUSAL AGREEMENT

[24] The sale of the Property to Lively Properties was subject to a number of conditions. One of the conditions was the execution of the Buy-Back Agreement prior to closing. A form Buy-Back Agreement was attached as Schedule C to the APS.

[25] The relevant provisions of the Buy-Back Agreement include the following:

2. The Development shall result in a total assessed value of all land and buildings on the Property of at least:
 - a) \$300,000 per acre purchased in the Elmsdale Business Park, and
 - b) \$130,434 per acre purchased in the Uniacke Business Park, based on the number of acres purchased. For example, the purchase of 3 acres in the Elmsdale Business Park will require a total development value of \$900,000.
3. The Development shall be in accordance with the provisions of the Land Use By-Laws of the Municipality. Any changes to the proposed Development shall be approved in writing by the Municipality.
4. Commencement of Construction shall occur no later than twelve (12) months from Closing.
5. Construction of the Development, including landscaping, paving and curbing, and fencing as required, shall be completed no later than twenty-four (24) months from Closing.
6. If, no earlier than twenty-four (24) months from Closing, the Purchaser has not complied with the provisions of Clauses 2, 3, 4 or 5 of the Agreement, the Municipality may buy-back the Property.
7. If the Municipality elects to buy-back the property, the purchase price shall be the same price paid to the Municipality by the first purchaser that purchased the Property from the Municipality, less a) the cost of reinstating the Property to its condition at Closing if the Municipality, in its sole discretion, decides not to accept the Property in its condition on the date that the Municipality decides to exercise its right to buy-back the Property, b) the Municipality's legal fees incurred to buy-back the Property, and c) the Municipality's legal and administration costs shall be determined by the Municipality in its sole discretion.
8. If the Development is substantially complete to the roof-tight construction stage as confirmed by a Municipality building inspector the Purchaser shall be entitled to request a release of this Agreement from the Municipality and the Municipality shall provide same to the Purchaser and the Purchaser shall be responsible for its registration.
9. If, within twenty-four (24) months of Closing the Purchaser has not complied with the provisions of Clauses 2, 3, 4 or 5 of this Agreement, the Municipality may, instead of buying back the Property pursuant to Clause 6 and in its sole discretion,

permit the Purchaser to retrain ownership of the Property upon paying a fee to the Municipality (the “Fee”).

10. The Fee shall be an amount equal to the total annual commercial real property taxes levied on a commercial property valued at \$300,000, per acre if the Property is in the Elmsdale Business Park and \$130,434 per acre if the Property is in the Uniacke Business Park, less any annual property tax levied on the lot. The Purchaser shall pay the Fee retroactively from the date twenty-four (24) months after Closing to the date that the Municipality elects to impose the Fee. The Purchaser shall continue to pay the Fee every twelve (10) months thereafter until either (i) the provisions of Clause 5 have been complied with and construction of the Development is complete, or (ii) the Municipality elects to buy-back the Property pursuant to Clause 6.
11. If the Municipality elects to buy-back the property before a subsequent twelve (12) month period has expired, the Purchaser shall pay the Fee on a pro-rated basis based on the date the Municipality elects to exercise its right to buy-back the Property pursuant to Clause 6.
12. The Fee will be determined based on the prevailing commercial real property tax rate for the Municipality at the time that the Municipality elects to impose the Fee. Thereafter, the Fee shall be based on the prevailing commercial real property tax rate of the Municipality at the time the Municipality issues its invoice for the Fee.
13. The Fee shall be in addition to any real property taxes levied on the Property.
14. As an example of how the Fee is determined, if the Purchaser buys three (3) acres in the Elmsdale Business Park, thirty (30) months after Closing Commencement of Construction has not occurred, the Municipality elects to permit the Purchaser to retain ownership of the Property by paying the Fee, the Fee to be paid will be equal to the commercial real property taxes levied on a commercial property valued at \$900,000 for six (6) months, based on the commercial real property tax rates applicable at that time, less any annual property tax levied on the lot. The Municipality will invoice the Purchaser every twelve (12) months thereafter at the prevailing tax rates until either (i) Clause 5 has been complied with and construction of the Development is complete, or (ii) the Municipality elects to buy-back the property pursuant to Clause 6. If the Municipality elects to buy-back the property before a subsequent twelve (12) month period has expired, the Purchaser shall pay the Fee on a pro-rated basis based on the date the Municipality elects to exercise its right to purchase the Property pursuant to Clause 6.
15. The Municipality may, in its sole discretion, elect to buy-back the Property, pursuant to Clause 6, at any time after it has elected to impose the Fee, and the Purchaser shall be obligated to pay the Fee pro-rated to the date the Municipality elects to buy-back the Property.

[26] The provisions in the Buy-Back Agreement relating to the Municipality’s Right of First Refusal in the event Lively Properties received a *bone fide* offer from

some other prospective purchaser are not triggered by the facts of this case and, as previously stated, I see no reason to reproduce them here.

[27] The following definitions set out in the Buy-Back Agreement do have relevance and consequently are reproduced as follows:

Agreement of Purchase and Sale means the Agreement of Purchase and Sale between the Purchaser and the Municipality dated **January 28th, 2019**.

Commencement of Construction means the pouring of the footings and foundations for the Development.

Development means the buildings and other infrastructure the Purchaser intends to build on the Property as set out in an Application to Purchase dated **January 4th, 2019** or such other development approved in writing by the municipality.

[28] There is consistency in the contents of the Application to Purchase and the Buy-back Agreement that was eventually signed by Lively Properties' President on February 1, 2019.

PROCEDURAL HISTORY OF APPLICATION

[29] The initial hearing of the Application occurred on February 26, 2025. Unfortunately, due to inadvertence, a copy of the Rebuttal Affidavit of Graham Scott, that had been filed on February 21, 2025, had not been received by the Respondent's counsel prior to this first appearance. This necessitated an adjournment and the hearing was rescheduled to April 23, 2025.

[30] Before the re-start of the hearing on April 23, 2025 counsel for the Applicant asked the Court to deal with the objections to the admissibility of portions of the Arni Lively Affidavit, filed on February 19, 2025, which were first identified in the Rebuttal Brief of the Applicant filed on February 24, 2025.

[31] By correspondence, dated March 12, 2025, counsel for the Applicant proposed to have his client's objections dealt with by way of a Motion by Correspondence should the Court so permit. As an alternative, counsel suggested that the objections could be dealt with prior to the rescheduled hearing of the Application on April 23, 2025 if the Court was able to find time in its busy docket to accommodate counsel's request. As a further alternative, counsel also suggested that the Court might be amenable to hear the arguments regarding admissibility in the morning of the day on which the rescheduled hearing was set to proceed with the

hope that the Court would not only hear counsel's objections but also be ready to give its ruling prior to the commencement of the hearing later that afternoon.

[32] Counsel's correspondence also indicated that his client had agreed to allow the Respondent to file a Second Amended Notice of Contest (referred to earlier as being filed on March 12, 2025) provided opposing counsel would not object to a request to allow him to file supplemental written submissions "to address new issues raised in the amended pleading." If the Court allowed the proposed supplemental submissions to be filed, counsel asked to have until March 28, 2025 to do so.

[33] By correspondence to counsel dated March 16, 2025, the Court advised that, due to its busy docket, counsel's request for an early date to deal with the objections to some of the contents of the Arni Lively Affidavit could not be accommodated. The Court did, however, agree to commence the hearing at 10:30 o'clock in the morning instead of 2:00 o'clock in the afternoon on April 23, 2025.

[34] The Court also granted permission to counsel to file supplemental written submissions on behalf of the Applicant by the proposed date of March 28, 2025. A Supplemental Brief and Supplemental Book of Authorities were filed in compliance with this deadline. Unfortunately, due to my unavailability, the hearing scheduled for 10:30 a.m. on April 23, 2025 could not proceed. By email dated April 22, 2025 counsel were apprised of this development. After considerable back and forth between the Court and counsel for the two parties, the matter was set over to Wednesday, July 2, 2025 at 2:00 p.m. I advised counsel that I was only prepared to deal with the objections to the admissibility of parts of the Arni Lively Affidavit that had been previously identified by counsel for the Applicant. I alerted counsel that I would hear their oral submissions and then adjourn to reflect on their arguments before rendering my ruling. Only then, would I be prepared to set a further date and time to hear the Application on the merits.

[35] The hearing to deal with counsel's objections to the Arni Lively Affidavit took up the entire afternoon of July 2, 2025. After hearing counsels' submissions, I reserved my ruling releasing it in writing on August 25, 2025 in advance of the final hearing which by then had been scheduled for 11:00 o'clock on the morning of Thursday, October 2, 2025. The matter proceeded as scheduled concluding at 4:05 p.m.

THE MUNICIPALITY'S POSITION AND EVIDENCE IN SUPPORT

[36] The Municipality's position is that Lively Properties failed to develop the Property in accordance with the Buy-Back Agreement. It did not commence construction within "...twelve (12) months from Closing" [see Clause 4 of the Buy-Back Agreement] nor did it complete construction "...no later than twenty-four (24) months from Closing" [see clause 5 of the Buy-Back Agreement].

[37] The Municipality points out that "Commencement of Construction" is defined in the Buy-Back Agreement to mean "...the pouring of the footings and foundations for the Development." It further states that the only work carried out by Lively Properties was to clear some trees, drain part of the Property, transport fill onto the land, and do some levelling, grading and ditching. This position is supported by the affidavit of Graham Scott filed on January 21, 2025. [See paragraphs 22 to 36]

[38] In order to satisfy the requirement of complete construction of the Development "...no later than twenty-four (24) months from Closing" as set out in Clause 5 of the Buy-Back Agreement, Lively Properties would have to meet its obligation to develop the Property by constructing a maintenance garage, which in the Application to Purchase, it estimated would be 5000 square feet and have an estimated value of \$350,000.

[39] Development is defined in the Buy-Back Agreement to mean:

...the buildings and other infrastructure the Purchaser intends to build on the Property as set out in an Application to Purchase dated _____, 20____ or such other development approved in writing by the Municipality.

[40] The Buy-Back Agreement also provided the Municipality the discretion to impose a fee on Lively Properties should the Property not be developed in accordance with clauses 2, 3, 4 or 5. Clauses 9 and 10 of the Buy-Back Agreement are found under the general heading: "F. Fee Payment as an Alternative to Buy-Back". These two clauses were previously reproduced herein under the heading: "The Buy-Back and Right of First Refusal Agreement." Clause 9 gives the Municipality the discretion to "instead of buying back the Property pursuant to Clause 6, and in its sole discretion, permit the Purchaser to retain ownership of the Property upon paying a fee to the Municipality (the "Fee")."

[41] Clause 10 sets out how the "Fee" is to be calculated and applied and if "the Municipality elects to impose the Fee" ...the "Purchaser shall continue to pay" it "every twelve (12) months thereafter until either (i) the provisions of Clause 5 have

been complied with and construction of the Development is complete, or (ii) the Municipality elects to buy-back the Property pursuant to Clause 6.”

[42] Clause 15 of the Buy-Back Agreement (which has already been reproduced) allows the Municipality “in its sole discretion” to “elect to buy-back the Property, pursuant to Clause 6, at anytime after it has elected to impose the Fee, and the Purchaser shall be obligated to pay the Fee pro-rated to the date the Municipality elects to buy-back the Property.”

[43] The Municipality argues that the Fee is a temporary remedy that does not prevent it from exercising its right to buy back the Property in the event of default by the Purchaser. This is exactly what the Municipality eventually did. According to the Affidavit of Kim Ramsay, the Municipality’s Chief Administrative Officer (“CAO”), a letter was sent to Arni Lively / Lively Properties Holdings Limited to notify him that “East Hants is exercising the fee option, and an invoice is attached for the full amount.” A copy of this correspondence and attached invoice for \$11,887.09 is appended to the Ramsay affidavit as Exhibit 3. It is dated November 24, 2022. A copy of the same letter and invoice is attached to the affidavit of Graham Scott and marked Exhibit 8. According to Mr. Scott he was asked to contact Mr. Lively in advance to let him know that the letter was going to be sent to him. At para. 44 of his affidavit, Mr. Scott stated: “I contacted Mr. Lively to inform him that the Municipality was implementing the “fee option” at that time, instead of the buy-back option.”

[44] He goes on to state: “In response, Mr. Lively told me that he would sue the Municipality.” According to Mr. Scott this conversation occurred sometime in October of 2022.

[45] In the affidavit sworn to and affirmed by Arni B. Lively, filed on February 19, 2025 (later heavily redacted based on my preliminary ruling of August 25, 2025), Mr. Lively denied having ever received either the letter or the invoice. He also denied receiving an advance telephone call from Mr. Scott telling him about the letter that Ms. Ramsay proposed sending.

[46] Some months went by and as the Fee was not paid, the Municipality decided to exercise its right to buy-back the Property. The decision to enforce this provision in the Buy-Back Agreement was made during an in-camera discussion at a Municipal Council meeting held on March 19, 2024. Both Ms. Ramsay and Mr. Scott were in attendance at this meeting (see para. 19 of the Ramsay affidavit and para. 47 of the Scott affidavit).

[47] The Municipality's CAO instructed Mr. Scott to initiate the process. He, in turn, instructed counsel to give the Respondent notice of the intended action. The Municipality's legal counsel – Mr. Marc L. Dunning of Burchell Wickwire Bryson, LLP – wrote to Mr. Arni B. Lively in his capacity as President of Lively Properties Holdings Limited by correspondence dated May 7, 2024. Mr. Dunning's letter notified the Respondent that the Municipality was exercising its right to buy-back the Properties in accordance with the Buy-Back Agreement based on Lively Properties failure to develop the property within 24-months from closing. An Agreement of Purchase and Sale was enclosed which indicated a purchase price of \$44,160.00 and a proposed closing date of May 31, 2024.

[48] By correspondence dated July 31, 2024, Lively Properties' legal counsel advised Mr. Dunning that "the suggested buy-back is rejected." It further indicated that members of Mr. Dunning's firm had previously "represented Mr. Lively and many of his business interests for many years" and, due to the "firm's conflict of interest" it could no longer continue to act on the Municipality's behalf.

[49] On or about August 22, 2024, Mr. Lively applied for a building permit to develop the Property. He followed up with a voicemail message for Mr. Scott the following day. Mr. Scott then sent an email to Mr. Lively later the same day indicating that: "The Municipality of East Hants will not be issuing a building permit for the property ...and will be initiating legal proceedings to buy back the property where you have refused to consent to the buy-back."

[50] In response to the new allegations raised in the Respondent's Second Amended Notice of Contest, the Municipality, while not conceding that exercising its right to repurchase the Property was, in fact, an exercise of discretion, but even if it was, then the Municipality did not breach an implied duty of good faith. It was simply acting precisely in keeping with the purpose of the Buy-Back Agreement and while doing so, it had not acted capriciously, arbitrarily, or outside the agreement as alleged by the Respondent.

[51] The Municipality challenges Lively Properties' contention that the fallout from Covid 19, the Texas Freeze, and the Suez Canal crisis rendered it impossible or "commercially impracticable" to perform its obligations under the Buy-Back Agreement.

[52] The Municipality contends that Lively Properties has failed to present any evidence to establish impossibility of performance or "commercial impracticability" in its performance of the agreement. It further points out that the Respondent was

obligated to commence construction of the “development” within 12-months of closing (*i.e.*, by January 31, 2020). The Province first declared a state of emergency on March 22, 2020. By then, the Municipality alleges that Lively Properties was already in breach of the Buy-Back Agreement.

[53] The Municipality points to the affidavit of Arni B. Lively, filed on February 19, 2025, where at para. 59, he stated:

59 Covid-19 restrictions and limitations, and the effects of these restrictions and limitations on the Respondent’s ability to carry on business continued, in one form or another, until on or about, March of 2022.

[54] The Municipality notes that while the Respondent was already in breach of the Buy-Back Agreement by March of 2022, it did not give notice to buy back the Property until May of 2024. As such, they contend that Lively Properties had ample time to develop the Property after Covid 19 restrictions ended but failed to do so.

[55] Finally, to address the Respondent’s allegation that the Municipality, through its actions or inactions, waived its right to enforce the Buy-Back Agreement or is estopped from enforcing it, the Municipality argues there is no legal principle requiring a party to continuously communicate its non-waiver of its rights under a contract or risk losing them. On the contrary, the Municipality argues the law requires a “conscious and unequivocal” intention to waive or an “unequivocal promise” neither of which exist in this case. The Municipality goes on to say that whereas the Respondent might have assumed the Municipality did not intend to enforce the Buy-Back Agreement, no express or implied representation of this nature was ever made.

[56] The Municipality asks the Court to enforce what the parties agreed to in 2019. As a result of Lively Properties failure to develop the Property according to the specific deadlines set out in the Buy-Back Agreement, the Municipality claims to be entitled to not only buy back the Property but to also collect fees for the breach of the fee option clause of the Agreement together with the Municipality’s on-going losses arising from that failure.

LIVELY PROPERTIES’ POSITION AND EVIDENCE IN SUPPORT

[57] The evidence of the Respondent is contained in the affidavit of Arni B. Lively (the “Lively Affidavit”) filed on the 19th day of February, 2025. The Lively Affidavit was the focus of the hearing to address the numerous objections to admissibility

made by counsel for the Municipality on July 2, 2025. In all, twenty-nine of the eighty-two paragraphs of the affidavit were objected to (either in full or in part) based on lack of relevance, hearsay, speculation, or what amounted to submissions or inadmissible opinion evidence (or some combination thereof).

[58] After considering the written submissions of counsel for the Municipality which were set out in the Rebuttal Brief filed on February 24, 2025 and after hearing the oral submissions of counsel for both parties and after allowing counsel for the Municipality time to file post-hearing rebuttal submissions in response to the arguments advanced by counsel for Lively Properties (Counsel for the Respondent did not file written submissions prior to the hearing, relying instead on oral arguments), the Court reserved its ruling.

[59] In a written decision released on August 25, 2025, the Court struck twenty-two full paragraphs and partially redacted portions of two others out of the twenty-nine objected to by opposing counsel. [For my complete ruling see: *The Municipality of the District of East Hants and Lively Properties Limited*, 2025 NSSC 274]

[60] Counsel for Lively Properties disagrees with the position advanced on behalf of the Municipality that his client failed to develop the Property in accordance with the terms of the Buy-Back Agreement. He argues that Clause 6 of the agreement only requires Lively Properties to fulfill one of the disjunctive conditions set out in clauses 2 to 5 in order to satisfactorily meet the performance requirements “to thwart any buy-back attempt by ...the Municipality.” Counsel’s position is that Clauses 2 to 5 of the Buy-Back Agreement are not cumulative and that the use of the word “or” in Clause 6 assists his client in avoiding the Municipality’s buy-back option as long as just one of the provisions in Clause 2, 3, 4, or 5 have been met. He also suggests that if there is any ambiguity in the wording of this clause then it should be interpreted in favour of Lively Properties.

[61] It all comes down to a simple exercise of interpretation of a term of the agreement which will be addressed later in my decision.

[62] Lively Properties argues that the work carried out to introduce fill to level the Property and to make the land more useable for the proposed development satisfies the requirement to increase the total assessed value to \$130,434 per acre as set out in Clause 2 of the Buy-Back Agreement. The nature and extent of the work carried out on the Property by the Respondent is contained in para. 43 of the redacted Lively Affidavit. The affiant does not provide any costing details or a suggested method of estimating the value of the work other than “...work was undertaken internally,

using materials and equipment owned and operated by some of my other business interests, and using employees who might otherwise have been on lay-off.” [See para. 49 of the redacted Lively Affidavit]

[63] There were additional issues raised by the Respondent in its’ Pre-Hearing Brief that were not pleaded or, at least, not adequately pleaded in the Notice of Contest (Application in Chambers) filed on December 6, 2024 and the Amended Notice of Contest (Application in Chambers) filed on February 19, 2025. These shortcomings were addressed in the Second Amended Notice of Contest (Application in Chambers) filed on March 12, 2025 with the consent of counsel for the Applicant. Counsel’s consent was given provided he be allowed to file a supplemental brief addressing the new issues raised in either the Brief of the Respondent or the Second Amended Notice of Contest.

[64] Counsel for Lively Properties argued that the Municipality failed to mitigate its losses in regard to the payment of the fee charged to Lively Properties to allow the company to retain ownership of the Property despite its failure to comply with Clauses 2, 3, 4, or 5 of the Buy-Back Agreement. The provisions pertaining to “Fee Payment as an alternative to Buy-Back” are contained in Clauses 9 to 16 of the Buy-Back Agreement. It should be noted that Clause 15 states:

15. The Municipality may, in its sole discretion, elect to buy-back the Property, pursuant to Clause 6, at any time after it has elected to impose the Fee, and the Purchaser shall be obligated to pay the Fee pro-rated to the date the Municipality elects to buy-back the Property.

[65] Lively Properties also asserts that its ability to fulfill the terms of the agreement was frustrated and made commercially impractical due to the impact of Covid 19 and the resultant effects on the building industry in Nova Scotia along with certain other global events such as the “Texas freeze” (so-called) in February, 2021 and the “Suez Canal blockade” in March of the same year. No evidence of what the specific impacts that led to the Respondent’s inability to complete the development within the time frames set out in the Buy-Back Agreement was provided.

[66] Counsel for Lively Properties also argues that the Applicant would be unjustly enriched if it was allowed to collect the fee to be compensated for the loss of property tax revenues and still be allowed to buy back the Property. Counsel for the Municipality, in his Rebuttal Brief, points out that unjust enrichment constitutes a claim, not a defence, and Lively Properties has not filed a claim. He also points out

that based on the Supreme Court of Canada decision in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, ("*Garland*"), at para. 30:

The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment.

[67] There is little, if any, admissible evidence to show any enrichment on the part of the Municipality nor any corresponding deprivation suffered by the Respondent. He also argues that the existence and valid exercise of the buy-back provisions of the existing agreement between the parties provides a recognized category of juristic reason. [See *Garland, supra*, at para. 44] As he states in the Rebuttal Brief: "It is hardly 'unjust' to hold parties to the bargain they made." [Rebuttal Brief, para. 49]

[68] Several other issues were raised in the Respondent's Second Amended Notice of Contest which counsel for the Municipality addressed in the Supplemental Brief of the Applicant. These issues are:

- a) Whether the Municipality breached an obligation to exercise discretion under the Buy-Back Agreement reasonably;
- b) Whether the Municipality waived its right to enforce the Buy-Back Agreement and is, hence, estopped from enforcing it.

[69] The Respondent points to the Municipality's failure to express any concerns about the Respondent's failure to develop the Property until well after the deadline to, not only, commence the construction (*i.e.* no later than twelve (12) months from Closing as per Clause 4 of the Buy-Back Agreement, but to also have the work completed (*i.e.* no later than twenty-four (24) months from Closing as per Clause 5 of the Buy-Back Agreement). It was not until sometime in August, 2022 that the Municipality's CAO – Kim Ramsay – decided to exercise the Fee Option and another three months after that to communicate the decision to Mr. Lively by letter dated November 24, 2022 with invoice attached. The Municipality's decision to buy back the Property was first communicated to Mr. Lively by its legal counsel by correspondence dated May 7, 2024.

[70] Counsel for Lively Properties, in his Pre-Hearing Brief, stated: "This could not possibly be considered as any form of a good faith approach to closing business." He further states that: "..., the Moving Party consistently conducted itself in its dealings with the Respondent in manners which implied that the Moving Party was

not concerned with the enforcement of any rights it might have, or might have had, as arising out of the Buy-Back Agreement.”

ISSUES

[71] The issues that this Court must decide are as follows:

- (i) Has Lively Properties breached the Buy-Back Agreement by failing to develop the Property in accordance with its’ provisions thus permitting the Municipality to buy the Property back?
- (ii) Has the Municipality breached a duty of honest performance or otherwise failed to act in good faith?
- (iii) Is the Municipality entitled to specific performance?
- (iv) Is the Municipality entitled to damages in addition to specific performance?

[72] The suggestion made by counsel for the Respondent that his client was prevented from developing the property due to unforeseen and unavoidable circumstances such as Covid 19, the Texas freeze, and the Suez Canal crisis resulting in the Agreement being frustrated along with the added suggestion that the Municipality should be estopped from attempting to enforce the buy back and fee option provisions of the agreement will be dealt with as part of the discussion pertaining to the four issues listed above.

DISCUSSION AND ANALYSIS

Issue (i): Has Lively Properties breached the Buy-Back Agreement by failing to develop the Property in accordance with its provisions thus permitting the Municipality to buy the Property back?

[73] The parties disagree on the proper interpretation of the Buy-Back Agreement. Counsel for Lively Properties submits that Clause 6 of the Buy-Back Agreement is clear and the use of the disjunctive “or” in that clause means that fulfillment of “...any one of the Clauses 2 – 5 by the Respondent will be sufficient performance to thwart any buy-back attempt by the Moving Party.”

[74] Counsel for the Municipality counters by stating that the use of the disjunctive “or” in Clause 6 “...simply means that the Municipality had the right to buy-back the Property if Lively failed to meet any of Clauses 2, 3, 4, or 5” and “...cannot be interpreted to say – that if Lively complies with any of Clauses 2, 3, 4, or 5 the Municipality does not have the right to buy back the Property.”

[75] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 45 the Supreme Court of Canada confirmed the approach to contractual interpretation at para. 47:

47 ...[T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding." [citations omitted] To do so, a decision-maker 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 of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning...

[76] When one applies “...a practical, common-sense approach...” to the interpretation of Clause 6 of the Buy-Back Agreement there is only one logical result. Lively Properties had twenty-four months to comply with the requirement to develop the property and if either of Clauses 2, 3, 4, or 5 had not been fulfilled then the Municipality had the discretion to buy-back the Property.

[77] The Municipality also had the right to elect to buy-back the Property pursuant to Clause 6 at anytime after it has elected to impose the Fee. [See Clauses 9 and 15 of the Buy-Back Agreement]

[78] Clearly, Lively Properties failed to comply with Clauses 4 and 5 of the Agreement. Other than to perform some in-filling and levelling of the Property nothing else was done to develop the land. Indeed, nothing has been done to comply with this requirement – there has been no development. The Respondent has breached the terms of the Application to Purchase and the Buy-Back Agreement both of which were incorporated as part of the Agreement of Purchase and Sale.

[79] In addition to failing to comply with Clauses 4 and 5 of the Buy-Back Agreement, the Respondent has also failed to satisfy Clause 2 which states that “The Development shall result in a total assessed value of all land and buildings on the Property of at least:

- a) ...
- b) \$130,434 per acre purchased in the Uniacke Business Park, based on the number of acres purchased”

[80] As counsel for the Municipality aptly points out in his Rebuttal Brief: “There is no ‘Development’ whatsoever”.

[81] Any modest improvements made to the Property by the Respondent by in-filling and levelling might have increased the value of the land somewhat but there was no evidence presented to even attempt to determine by how much. But, in any event, this work does not involve the pouring of the footings and foundations for the Development nor does it pertain to the buildings and other infrastructure the Respondent undertook to build as set out in the Application to Purchase signed by Mr. Lively as President of Lively Properties and submitted to the Municipality on January 4, 2019.

[82] Similar to the Plaintiff in *Alva Construction Limited v. Wilsons Cove Estates Inc.*, 2023 NSCA 54, any work put into the Property by Lively Properties while failing to meet its primary contractual obligations was “on its dime”, so-to-speak, and does not constitute unjust enrichment by the Municipality. The Municipality is within its rights to elect to buy-back the Property.

Issue (ii): Has the Municipality breached a duty of honest performance or otherwise failed to act in good faith?

[83] The Municipality clearly abided by the terms of its agreement with Lively Properties. The suggestion by Lively Properties that the Municipality failed to act in good faith is without merit. Despite the fact that the Development should have been completed within twenty-four months after the closing on February 1, 2019, the Municipality did not immediately seize upon the moment to demand the Fee nor to elect to buy-back the Property. Notice that the Municipality was exercising the fee option was not sent to the Respondent (although Mr. Lively denies receiving it and at para. 6 of his affidavit goes so far as to say: “No such letter was ever sent to me”) until Kim Ramsay, the Municipality’s CAO, sent correspondence dated November 24, 2022. And, the letter was preceded, according to the affidavit of Graham Scott, Manager of Economic & Business Development for the Municipality, by a telephone call (which Mr. Lively denies receiving) to Mr. Lively to tell him that the

Municipality was implementing the fee option at that time instead of the buy-back option. [See para. 44 of the Graham Scott affidavit filed on January 21, 2025]

[84] It is also interesting to note that Mr. Lively, at para. 8 of his affidavit states:

8. No such Fee Option Invoice was ever sent to me, and if any such invoice had been in fact sent to me, it would have been paid immediately.

[85] It would appear that Mr. Lively understood his obligations under the Buy-Back Agreement but unfortunately did not follow through on his legal commitments as he should have. To now suggest that his company's efforts to comply with the various provisions in the several agreements he signed as President of Lively Properties were frustrated by events such as Covid 19, the Texas "freeze", and the Suez Canal blockade – events that took place after the expiration of the initial twelve-month period after closing when construction was supposed to have started – is not established by the evidence offered and lacks merit.

[86] The Municipality has acted in good faith throughout. The same cannot be said about Mr. Lively.

**Issues (iii) and (iv): Is the Municipality entitled to specific performance?
 Is the Municipality entitled to damages in addition to
 specific performance?**

[87] I will deal with these two related issues together.

[88] Firstly, the Municipality is entitled to specific performance under the terms of the Buy-Back Agreement. Lively Properties has failed to develop the Property according to the time lines clearly set out in Clauses 4 and 5 of the agreement. Furthermore, the Municipality is entitled to be paid the Fee for the period from February 1, 2021 to May 7, 2024 (the date that notice of the buy-back option was communicated to Lively Properties by the Municipality's lawyer) along with an additional amount representing lost commercial property taxes it would have earned on the fully developed Property from May 7, 2024 to the date of this decision. It will be left to the Municipality to calculate the total amount owing and if the parties cannot agree on the total they can submit their respective positions to me, in writing, no later than August 21, 2026 and I will decide what the appropriate amount should be.

CONCLUSION

[89] The Municipality of the District of East Hants is entitled to specific performance requiring Lively Properties Holdings Limited to reconvey the Property described as Block U, Richard John Drive, Mount Uniacke Business Park, Mount Uniacke, Hants County, Nova Scotia (P.I.D. No. 45357449) to the Municipality.

[90] The Municipality is further entitled to be paid the fee representing lost commercial property taxes it would have earned on the fully developed property from February 1, 2021 to the date of this decision. Lively Properties Holdings Limited shall have until August 21, 2026 to provide the executed deed of reconveyance and to make payment of the amount calculated for lost commercial property taxes. If the parties cannot reach agreement on the calculation of this amount they will have until August 21, 2026 to file written submissions so I can decide the appropriate amount.

[91] I will leave it to the parties to try to reach an agreement on costs of the Application. If an agreement cannot be reached this, too, should be addressed in their written submissions due on August 21, 2026.

Glen G. McDougall, J.