



## T14- Mixed Use Housing Projects: Structuring and Tax



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# Our Goals

- Contextual framework for not-for-profit organizations (“NPO”) and registered charities
- Structuring Challenges
- Case Studies

If you have questions, please do not hesitate to ask

# Contextual Framework

- Not-for-profit
  - generic industry term
  - no legal definition
- Charitable (philanthropic) element in broadest sense
- Implies organization that operates for public good and not private gain

# Contextual Framework

- **Myth:** NPOs do not pay tax
- **Reality:**
  - Only NPOs that meet the criteria in the Income Tax Act are exempt from paying tax
  - Charities that are registered by the Canada Revenue Agency (“CRA”) are exempt from paying tax
  - NPOs may and registered charities must file tax returns

# Contextual Framework

- Registered charities and NPOs are “not-for-profit” but legally distinct in several ways:
  - different permissible purposes
  - different tax treatment and rules
  - different fundraising models
  - different rules for business income
  - different filings
  - different public perception
- Mutually exclusive definitions – can’t be both!

# Contextual Framework: NPO

- Income Tax Act does not require registration of an NPO
- NPO status tested every year
- Can be an NPO for tax one year and lose it another year
- Change in status has tax consequences

# Contextual Framework: NPO

- Income Tax Act does not define what is an NPO
- Income Tax Act specifies criteria for NPO to qualify for tax exemption
  - Need to understand the definition
  - Need to understand what CRA thinks about elements of definition
    - Interpretation Bulletin 496R Non-Profit Organization (August 2, 2001)
    - Technical Interpretations
- Definition largely unchanged since 1918

# Contextual Framework: NPO

- #1 Not a charity in the opinion of the Minister (of National Revenue)
  - More about what is a charity later
  - If organization organized and operated for exclusively charitable purposes, not an NPO
    - 2009-0329991C6, October 9, 2009
    - Only tax exempt if a registered charity
- #2 organized exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit



# Contextual Framework: NPO

- # 3 operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit
  - What has it done?
- #4 no part of the income payable or otherwise available for personal benefit of member etc.

# Contextual Framework: NPO

- Watch payments – to whom, relationship, how much, is there a profit element?
- Social housing context: watch leasehold improvements where property leased from member, etc.

# Contextual Framework: NPO

- #5 organized and operated for any purpose **except profit**
- Profit = positive difference between the revenue and expenses to earn revenue
  - Used to support not for profit purposes
- CRA is focussed on issue
- Fair number of court cases

# Contextual Framework: NPO

- Why worry about profit in an NPO?
- NPOs look to generate revenue from other sources in light of reduced government grants and declining grants from other sources
- Income Tax Act requirement – must be operated exclusively for purpose other than profit

# Contextual Framework: NPO

- Profit = positive difference between the revenue and expenses to earn revenue
  - Depreciation
  - Ongoing current expenses
  - Future capital projects?
- Profit vs. intention to earn a profit
  - Profit must be incidental
  - Profit must be unanticipated

# Contextual Framework: NPO

- Existence of reserves may be a problem
- Document how board and management determined reserve to be reasonable
  - Accounting records
  - Notes to financial statements
  - Board minutes
- Be able to demonstrate that funds **used** for purpose!

# Contextual Framework: Charity

- Registered Charity – charity registered by CRA
- Benefits of charitable registration status:
  - Income exempt from tax
  - Ability to issue charitable donation receipts
- Must meet requirements of the Income Tax Act
  - must devote its resources to charitable purposes and activities
  - only certain registered charities can carry on a business and even then only a certain type of business

# Contextual Framework: Charity

- Must meet definition of charity at common law
- First, purposes must be exclusively and legally charitable
  - Fall within one of four categories of charity set out in *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*, [1891] A.C. 531 (H.L.)
  - (1) Relief of poverty, (2) Advancement of religion, (3) Advancement of education, (4) Other purposes beneficial to the community (Healthcare, Arts and culture, Environmental, Helping vulnerable populations)



# Contextual Framework: Charity

- Relief of poverty
  - CRA Policy Statement CSP-P03
    - To bring relief to the poor
      - Poor – lacking essential amenities available to the general population
    - Food banks, soup kitchens, low-cost rental housing, clothing, furniture and appliances
- Other purposes beneficial to the community
  - Helping vulnerable populations

# Contextual Framework: Charity

- Can a charity conduct business?
  - Charitable organizations and public foundations can conduct business activities provided they constitute a related business
    - CPS-019 What is a Related Business?
  - Private foundations are prohibited from any business activities
- Risk of losing registration
  - Lose ability to issue charitable donation receipts
  - Lose tax exempt status

# Contextual Framework: Charity

- CRA Policies regarding social housing:
  - CG-022 – Housing and Charitable Registration (February 7, 2014)
  - CPS-006, Registered Charities making Improvements to Property Leased from Others (October 11, 1994)
  - CPS-019, What is a Related Business?
  - CPS-024, Guidelines for Registering a Charity: Meeting the Public Benefit Test (March 10, 2006)

# Contextual Framework: Charity

- Housing and the relief of poverty
- Providing comfortable, modest (no more than required to relieve that need) homes to the poor can relieve poverty
  - Needy, necessitous, underprivileged, low-income, of small/limited means
- Other associated services may be provided: meals, basic utilities, clothing, furniture, counselling
- Issue: Does below-market housing meet the requirement to relieve poverty?

# Contextual Framework: Charity

- Organization must assess eligibility at least annually:  
consider income, assets, liabilities
- Organization must establish and adhere to reasonable policies and procedures where persons no longer qualify

# Contextual Framework: Charity

- Registered charities can provide specially adapted facilities for those with disabilities or the aged
- No requirement:
  - to assess income or other financial criteria
  - housing be assessed at less than fair market value – any benefits must be incidental: necessary, reasonable, not disproportionate to public benefit

# Contextual Framework: Charity

- If rent housing to individuals who are not eligible beneficiaries of charitable relief, must either:
  - Qualify as investment property income generating a fair market value return; or
  - Meet the related business provisions of the Income Tax Act
- Must be incidental or ancillary to furthering the charity's purposes

# Structural Considerations

- Low income housing
- Below market housing
- Program space – shelter, food bank, social services
- Church space
- Market housing
- Retail



# Structural Considerations

- Ownership of the land
  - Assume that NPO/Charity owns the land vs leasing the land
- Financing of development
- Inflexible statutory framework
- Other taxes
  - GST
  - PTT

# Structural Considerations

|                           | Registered Charities  | NPO   |
|---------------------------|---|---|
| <b>Charitable purpose</b> | Charity only if registered charity  | No  |
| <b>Business</b>           | Only if related (linked and subordinate) to charitable purpose; private foundation cannot carry on a business | Must be organized for any purpose except profit     |
| <b>Gift</b>               | Only to another charity;  | If make a gift, may be a surplus, may be a problem. |

# Structural Considerations

|                   | Registered Charities   | NPO   |
|-------------------|--|---|
| <b>Surplus</b>    | Disbursement quota = 3.5% of property not used in charitable activities                      | Surplus suggests a purpose is profit              |
| <b>Investment</b> | Yes; however, there are restrictions on share ownership, investments in limited partnerships | Long-term investments suggest a purpose is profit |

# Structural Considerations

|   | Charities  | NPO                           |
|---|--|-------------------------------|
| <b>Sell property</b>                    | Transaction must be at fair market value, arm's length terms             |                               |
| <b>Investment in for profit company</b> | Yes but there may be restrictions depending on the status of the charity | Depends on size of investment |

# Structural Considerations

| Type of Housing          | Charities | NPO      |
|--------------------------|-----------|----------|
| Housing for impoverished | ✓         | Maybe    |
| Seniors                  | ✓         | Maybe    |
| Disabilities             | ✓         | Probably |
| Below market housing     | ✗         | Probably |

# Structural Considerations

| <b>Activity</b> | <b>Charities</b>                       | <b>NPO</b> |
|-----------------|--|------------|
| Retail space    | Yes, if related to charitable activity | No         |

# Structural Considerations

- Insertion of for profit entity
  - Taxes payable (26% - 49.67%\*\* depending on source)
  - Charitable donation deductions capped at 75% of income
    - > Depending on investment by charity may be 5-year delay in being able to deduct charitable donations
- A portion is refundable on payment of dividends

# Case Studies

## Oakridge Lutheran Church, Vancouver

### Key issues:

- Who is undertaking the development
- Market retail component
- Ownership of below market rental housing
- PTT/GST liability





# Case Studies

## Oakridge Lutheran Church, Vancouver

- Four air parcels
- Church (charity); Catalyst (NPO), Church Housing Society (NPO); For profit co. owns retail
- Development undertaken by Joint Venture
- Managed by Catalyst
- PTT paid on initial land transfer
- Catalyst as GST operator

|   |  |
|---|--|
| 6 | <b>Airparcel A:</b><br>OLC Housing Society<br>(23 Residential Units) |
| 5 |  |
| 4 | <b>Airparcel B:</b><br>Catalyst<br>(23 Residential Units)            |
| 3 |  |
| 2 | <b>Airparcel C</b><br>OLC Church                                     |
| 1 | <b>Airparcel D:</b><br>Retail Opco                                   |

# Case Studies

## St Andrews United, Port Moody

### Key issues:

- Who is undertaking the development
- Development of program NPO space
- Ownership of below market rental housing
- PTT/GST liability



# Case Studies

## St Andrews United, Port Moody

- Church (charity); Church Housing Society; Catalyst (NPO);
- Development is undertaken by JV of Catalyst and Church Society
- Church receives new Church
- NPO purchaser of program space
- Church Society and Catalyst end up with housing
- PTT paid on initial land transfer
- Catalyst as GST operator





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