

STAFF REPORT: Director of Special Projects (Sustainability)

REPORT TO: Council
MEETING DATE: June 27, 2011
REPORT NO.: SPS.11.7
SUBJECT: Community Land Trust/Housing Entity
PREPARED BY: Peter Tollefsen for
The Housing Committee

A. Recommendation

THAT Council receive Report No SPS.11.7 entitled "Community Land Trust/Housing Entity" dated June 27, 2011 from the Housing Committee and;

THAT Council request Staff to invite Mr. David Tang to a future meeting with Council.

B. Background

The Housing Committee has for a number of years been exploring ways to implement affordable and attainable housing opportunities for the citizens of The Blue Mountains. The publication of the draft Housing Needs Study emphasizes the need for an overall housing strategy and our committee agrees completely with this.

A report was prepared by Staff for the Housing Committee in August of last year (attached). It reviewed the different housing delivery structures listed in the recently completed Housing Needs Study and suggested the Community Land Trust model appeared appropriate for the Town of The Blue Mountains. At the August 30, 2010 meeting Council requested staff to prepare a report on a community Land Trust complete with legal advice to develop the land trust concept in more detail including recommendations on how to proceed prior to approval of the 2011 Budget and authorized the unbudgeted expenditure of approximately \$10,000. for the preparation of the report.

At the May 25, 2011 Council meeting Bruce Taylor, Chair of the Housing Committee appeared as a delegation requesting the Town to update the Committee's Terms of Reference. A related staff report was also on the agenda. Council adopted the mandate for the Housing Committee replacing the previous Terms of Reference dated Feb 16, 2004. Section 4 of the mandate states that – "The committee will work with Town Staff and Council towards the establishment of a housing entity for the purpose of acting independently in the field of attainable ownership housing."

A Request for a Proposal was prepared (and is attached). Mr. David Tang of Gowling Lafleur Henderson was retained to prepare a report. Staff and Housing Committee have been working with Mr Tang to draft the report, which is attached to this report for Council's information.

You will note in the Preliminary Discussion of the attached report it addresses the term "Community Land Trusts" and it is being suggested instead that we should look at incorporating a not-for-profit corporation as it leaves the most options open.

The report lists the primary objectives, organization conditions, charitable status, conclusion and next steps. A discussion about the options for how the entity could be established is set out in Appendix A. A discussion of who could own the land and the merits and disadvantages of these options are set out in Appendix B. How the land is to be owned can affect the choice of how the entity is to be established.

Council has requested Staff to prepare a report in more detail including recommendations on how to proceed, which has not been completed as of yet and will be done in the future along with suggestions from the Housing Committee. It is suggested though that Council receive the legal report now to enable a full understanding of the housing entity being investigated.

Part of the Terms of Reference included a meeting with the housing solicitor which is being recommended.

C. The Blue Mountains' Strategic Plan

A community land trust is aligned with the goal of – *Managing growth to ensure the ongoing health and prosperity of the Community.*

D. Environmental Impact

None at this time

E. Budget Impact

The work done to date is on budget and within the \$10,000 limit Council approved.

F. Attachment

1. Report No. SPS.10.12 Community Land Trust, August 30, 2010.
2. Request for a Proposal (for legal advice), dated October 26, 2010.
3. Letter from David Tang, Gowlings dated June 13, 2011.

Respectfully submitted,

Peter Tollefsen
Director of Special Projects (Sustainability)

For more information, please contact
Peter Tollefsen, Director of Special Projects (Sustainability)
ptollefsen@thebluemountains.ca
519-599-371-3131 ext. 247

STAFF REPORT: Director of Special Projects (Sustainability)



REPORT TO: Council
MEETING DATE: August 30, 2010
REPORT NO.: SPS.10.12
SUBJECT: Community Land Trust
PREPARED BY: Peter Tollefsen for
The Housing Committee

A. Recommendation

THAT Council receive Report No SPS.10.12 entitled “Community Land Trust” dated August 30, 2010 from the Housing Committee and;

THAT Council request Staff to prepare a report on a “Community Land Trust” complete with legal advice to develop the land trust concept in more detail including recommendations on how to proceed prior to approval of the 2011 Budget and;

FURTHER THAT Council authorize the unbudgeted expenditure of approximately \$10,000 for the preparation of the report.

B. Background

The Housing Committee has for a number of years been exploring ways to implement affordable and attainable housing opportunities for the citizens of The Blue Mountains. The publication of the draft Housing Needs Study emphasizes the need for an overall housing strategy and our committee agrees completely with this.

The Housing Needs Study states:

“In developing a housing strategy, we recommend the following overriding principles be considered:

- The resort area of the Town of The Blue Mountains is unique in Ontario, catering to the needs of vacationing affluent visitors, seasonal residents and empty nesters. However, the lack of community services and conflicts between the lifestyles of visitors and permanent residents make this area less suitable for families. For example, children living in the resort area and attending high school would be required to bus to Meaford, rather than Collingwood. Compared to the resort area, Thornbury offers a broader set of community services that are necessary to attract families and younger residents. We suggest that

initiatives aimed at developing affordable housing, with the exception of some employee housing and other specifically targeted groups, such as volunteer firefighters, be largely focused within the community of Thornbury

- Any strategy must work within the capabilities and capacities of the Town of The Blue Mountains.
- Any strategy should leverage the skills and participation of the private sector.
- The strategy should be multi faceted and flexible; and,
- The strategy must focus on longer term goals and objective. The possibilities for "quick fixes" are limited.

The strategy for affordable housing provided can be described in five basic but inter-related steps including;

- establish housing policies, including a sustainability framework, that is designed to achieve long and short term objectives;
- establish a housing delivery structure;
- establish funding mechanisms;
- establish housing programs: and,
- create a five year work program.”

About the Housing Delivery Structure the Housing Needs Study continues

“The Town of The Blue Mountains will need to determine what resources are required and how those resources will be deployed internally to administer and monitor the programs. There are several options to consider.

- Municipal Staff - housing initiatives of the Town could be managed through a designated Town staff person(s). The Town would have to determine whether this function could be undertaken within its existing staff complement or will require additional staff. The key advantage of this approach is that it provides maximum control. However, within a municipal structure, staff priorities and assignments, as well as spending and resources, can easily be shifted from year to year. Understanding that a long term approach is required to resolve the shortage of affordable housing options, it must be recognized that shifts in political, policy or time imperatives could be a significant threat to the

success of a housing program.

- Housing Corporation - a separate municipal corporation could be created by the Town with the mandate to create a supply of affordable housing. This would create an entity that has a clear focus and mandate to develop and operate an affordable housing inventory. However, a corporation such as this requires staffing and resources that may not be scalable to the needs of the community. It's likely that the overhead associated with a housing corporation would not be supportable unless significant funding and housing projects could be identified in the near-term.
- Community Housing land Trust - A land trust is a non-profit organization that assembles and manages land upon which affordable homes can be built and maintained. The homes are rented or sold but the underlying land is retained by the Trust. They act as long term stewards of land, protect affordability and preserve public grants, subsidies and donations. Our study recommends that Council consider the creation of a Town owned Community Housing land Trust, with support from municipal staff, which would hold lands provided to it through government transfers and future land acquisitions, in trust for perpetuity, for housing purposes. The land trust has several advantages:
 - land owned by a land trust is held in perpetuity for housing purposes;
 - A land trust can accept charitable donations and fundraise;
 - A land trust operates separately from the Municipality but can have direct reporting as a requirement to funding;
 - A land trust draws heavily from experienced volunteers.
- A business plan and legal advice are recommended to develop the land trust concept in more detail.
- The delivery structure could be composed of two or more of these vehicles but an overall co-ordinating role is required at the Town staff level.”

Independently the Housing Committee has been investigating a number of delivery models such as a Non Profit Housing group or a Housing Authority. A number of them require a larger critical mass or size of community to be cost effective and affordable for The Blue Mountains to operate. Our conclusions on the options mentioned in the Housing Needs Study for delivery systems areas follows:

Municipal Staff

With the demands placed on staff time and the budget restraints anticipated for many years it would be difficult to add sufficient staff to handle the issues related with managing attainable housing programs.

Housing Corporation

Housing Corporations or Authorities are typically established to build and manage housing stock primarily for social assisted rental. This approach tends to be found in larger communities where there is a larger stock of properties to be managed. Although there is demand for socially assisted rentals in The Blue Mountains we don't feel that this would be a sustainable approach until the population increases significantly.

Community Housing Land Trust

While land trusts go back to the 1800's the recent interest in Smart Growth initiatives has fostered an awareness of the Community Land Trust and the potential it holds for implementing Smart Growth and Sustainable Path objectives. Land trusts look at housing as a fundamental human right rather than a market good and create an environment that permits people to own or rent housing in an environment where housing would normally be beyond their means.

A Community Land Trust (CLT) is defined as "a private, non-profit corporation created to acquire and hold land for the benefit of a community in order to provide secure affordable access to land and housing for community residents. A CLT can provide a range of options from single-family, rental and special needs housing that are affordable, attainable, sustainable and are a result of community participation and ownership.

In addition to establishing a Community Land Trust as a delivery structure, an effective strategy will require updated housing policies and a process by which a regular supply of funds can be raised. Once these are addressed the Board of the CLT can address specific housing programs and develop a longer term work program. There would be an appointed Board of Directors including member(s) of Council.

We, the Housing Committee, believe that the community land trust model (CLT) is a solution to the problem of permanently creating and maintaining affordable and attainable housing in The Blue Mountains.

Items to be investigated include costs to set up and operate, who sits on the Board and how are they appointed, how to impose the Trust obligations in a way that they cannot be easily varied, sources of funding, types of by-laws, legal agreements and contracts required to set up a community land trust.

C. The Blue Mountains' Strategic Plan

A community land trust is aligned with the goal of – *Managing growth to ensure the ongoing health and prosperity of the Community.*

D. Environmental Impact

None at this time

E. Budget Impact

The initial investigation and report will require staff time as well as solicitor time to bring back a report to Council. This report should detail the anticipated budget impacts and possible funding vehicles in setting up and operate a Community Land Trust. This could cost approximately \$10,000 in legal fees and would be a 2010 unbudgeted expenditure.

Start up costs for a Land Trust in 2011 should include funds to cover office expenses, printing, communications plan, community engagement and legal fees all projected to be under \$15,000. Funds for land acquisition, staff support and related expenses for having programs will be required in the 2011 Budget and subsequent budgets.

F. Attachment

1. E-mail from Bill Chapman, December 3, 2009 re “Burlington Busts the Affordable Housing Debate” by Daniel Fireside.
2. E-mail message from solicitor David Tang, July 16, 2010

Respectfully submitted,

Peter Tollefsen
Director of Special Projects (Sustainability)

For more information, please contact
Peter Tollefsen, Director of Special Projects (Sustainability)
ptollefsen@thebluemountains.ca
519-599-371-3131 ext. 247

October 26, 2010

Mr. David Tang

Partner

Gowlings

100 King St. West, Suite 1600

Toronto, Ont. M5X 1G5

- Subject: Request for a Proposal

The Town of The Blue Mountains has for a number of years been exploring ways to implement affordable and attainable housing opportunities for the citizens of the Municipality. One of the themes of the recently completed Blue Mountains Sustainable Path is "Built Environment and Housing for All". In that regard one of the goals is to require a mix of housing types and uses to accommodate the need for attainable housing for all income groups.

The Town has also recently completed a Housing Needs Study. Section 10 contains a Housing Strategy that explains a number of Housing Delivery Structures, including a community housing land trust.

On August 30, 2010 the Town Housing Committee was before Council recommending the community land trust model as the best delivery structure. Council requested staff to prepare a report on a "Community Land Trust" complete with legal advice to develop the land trust concept in more detail including recommendations on how to proceed prior to approval of the 2011 Budget, which is the purpose of this request for proposal.

The Town requires advice on how to set up a community land trust; the legal steps, appropriate governance and a budget for your legal costs. We would like to know about the various models used to implement a land trusts and how those models can permit some municipal involvement. Would you please consider the following questions:

What is the Appropriate Structure of the Land Trust and what are the Governance Options – Please discuss incorporation versus a common law trust, jurisdiction and type of incorporation, appropriate Board of Directors/Trustees composition and size, reporting process options for Town Council, accountability process to stakeholders (we will advise who the stakeholders are), and who the members of the corporation should be. Please discuss what the best structure is for the Town and how the Board of the Land Trust would relate to the Town and Town Council. Please advise what your expectations are for Town input into your considerations.

What Processes are Available for Acquiring Land? Please consider the possibility of land being acquired from the Town, purchased using funds donated by the public and perhaps other charities. Please discuss the means by which special properties (eg. those owned by charities or subject to other trusts) would change hands? We will meet with you to describe the current possibilities for land acquisition and donations.

What Steps can the Town take to Facilitate Donation of Land or Funds, particularly service land which can be quickly constructed upon?

What is the Process for Building Houses? Who should initiate these projects? What is the relationship between the Land Trust, the Town and any Contractors or Developers? Discuss whether the Town needs to grant approvals and any special treatment the Town can provide to the Land Trust. Please discuss liability and impact on the Town and the individual directors/trustees. Please discuss with us whether there is any potential for private/public partnerships with for-profit developers.

Who would pay development charges, building permit fees?

How should the tenure of the Housing Units be structured? What are the considerations in deciding whether they should be owned by the residents, rented or subject to rent-to-own arrangements?

What models exist for the ongoing management, maintenance, establishment of financial reserves for capital improvements?

If a core objective is preservation of this housing stock as affordable, what structures are available to keep the units in the "affordable" system and the tenants/residents full time residents of the Town . How do we keep units from flipping or being "upgraded" out of their purpose. How do we ensure home goes to someone as their primary residence?

Please outline the process of setting up a community land trust. Discuss by-laws, agreements, registration and the sequence of steps. What would be the approximate costs of setting up a land trust and the annual cost to run.

Deliverables

To prepare a draft report answering the above questions. The report will be used for information as part of a future staff report to Council to enact a land trust.

Timelines -

1. To respond to this request for a proposal with estimate of legal fees to do this work (within 2 weeks)
2. Town responds with authorization to commence work (within 1 week)
3. Discussions and one meeting with staff about desired options and direction (within 1 month)
4. To draft a report and submit to the Town (within 1 month of meeting or 2 months from authorization)
5. Meet with the Housing Committee **to discuss draft report and answer questions** (within 1 month of draft report).

6. Finalize the Report and submit (within 1 month).

Thank you .

Yours Truly

Peter Tollefsen

Director of Special Projects (Sustainability).

June 13, 2011

VIA FACSIMILE AND E-MAIL

Mr. Peter Tollefsen
Town of The Blue Mountain
26 Bridge Street
P.O. Box 310
Thornbury, ON
N0H 2P0

David C.K. Tang
Direct (416) 862-3547
Direct Fax (416) 863-3547
Assistant (416) 862-5421
david.tang@gowlings.com
File No. T983524

Dear Mr. Tollefsen:

**Re: Options for an Entity to Facilitate Affordable Housing in the
Town of The Blue Mountains**

You have asked us to discuss what type of entity the Town of The Blue Mountains (the "**Town**") should establish in order to assist in the establishment of affordable housing in the Town. We have ignored the housing provider and house project options pursuant to the *Social Housing Reform Act, 2000* and any consideration of that Act's other requirements or opportunities, as there is no desire to engage in providing social housing. This letter discusses options for the establishment and structure of an entity which would own the land upon which the affordable housing would be constructed and the advantages and disadvantages to that entity becoming a registered charity.

**A Preliminary Discussion about the term
"Community Land Trusts"**

We understand that the term "community land trust" has been used in discussions and in the August, 25, 2010 Housing Needs Study and that a "community land trust" is generally considered the best option for providing affordable housing in the Town. Unfortunately, the term is slightly confusing because while it has a specific meaning in the United States, there is no corresponding meaning in Ontario. In the United States that term is well understood because funding was made available pursuant to legislation to organizations which met specific criteria¹. No such funding program or definition exists in Ontario. Adding to the confusion in Ontario, while the word "trust" is used in that term, most community land trusts in the United States are in fact not common law trusts, but not-for-profit corporations.

One characteristic all of the American community land trusts share is the retention of the land upon which affordable housing is constructed in perpetuity by the community land trust. We have been asked to consider how land contributed by the Town might potentially be returned to the Town at a later date. As you wished us to discuss other options which would not have been permitted under the

¹ See the Cranston-Gonzalez National Affordable Housing Act.

American legislation for a “community land trust”, we believe it is better not to use that term in this letter.

In this letter we use the term “affordable housing entity” or simply the “entity”. This permits us to discuss whether that entity should be a corporation or a (true) common law trust and arrangements which would not be possible for an American “community land trust”.

I. Summary and Conclusion

We recommend that a select group of persons, representing both the Town and the stakeholders, incorporate a not-for-profit corporation for the limited purposes of providing affordable housing in the Town. The specific purposes should be carefully defined, possibly incorporating some of the eligibility criteria for future residents. The constating documents of the corporation should be structured to restrict as much as possible the ability of the directors and members to change those purposes by way of supplementary letters patent.

That not-for-profit corporation would have members, which should include the Town itself and one representative of each of the other major stakeholders. If any of the other stakeholders are organizations that have a perpetual existence (eg. a corporation), the organization itself could become the member. Otherwise, except for the Town, the individual representatives would also become directors and there would be some mechanism created for the selection of a replacement representative by each of the stakeholders. If required, the Town could be given the right to elect more than one director.

We would not make a recommendation at this time as to whether the organization should seek charitable status as the eligibility criteria has not been discussed or determined.

We would recommend that the Town's ability to contribute land, services or assets and to waive taxes and development charges be facilitated by the County of Grey entering into a section 110 municipal capital facility agreement with the new entity. That agreement would need to provide for some benefit from the County to the entity. If required, the land could be transferred by the Town to the County so the County can agree to convey the land to the entity. The agreement would not need to set out all of the benefits the Town itself wishes to bestow on the entity. The Town cannot enter into such an agreement itself with the entity because it is not a “delivery agent under the *Ontario Works Act*, 1997 authorized to operate and manage housing projects under the *Social Housing Reform Act*, 2000”.

The primary advantages of utilizing a municipal capital facility agreement over either a community improvement plan or the incorporation of a municipal service corporation are the ability to not only provide assistance but to easily and clearly waive taxes and development charges and the ease with which that agreement can be drawn up and approved without the statutory process that those other options require. A municipal service corporation also suffers from the lack of a legislative or regulatory requirement that the housing provided must remain “affordable”. We also believe that a business corporation is not the ideal structure for an organization that would be community based, particularly since its use essentially precludes possibility of registering the entity as a charity.

II. Primary Objectives

From discussions with Town staff and community stakeholders, we have identified the following primary objectives of the Town's affordable housing initiative:

1. Establishment of a separate independent entity (the "entity" or the "affordable housing entity") from the Town, albeit one that accommodate some municipal input and influence. Some restrictions in membership are likely desired.*²
2. A perpetual existence for that entity.
3. Structures to ensure that the affordable housing purpose of the entity is preserved despite changes in the composition of Town Council and changes in public opinion or policy.
4. The ability to receive donations and issue charitable donations receipts, if possible.
5. Flexibility in the manner by which the entity will own and control the land and housing units. If possible, the entity would like the ability to choose between leasing the land from the Town, owning the land and possibly owning the housing units as well.*
6. Flexibility on the entity's part to partner with others to achieve its purposes. Those who may need to work with it would include other not-for-profit organizations, charities and for-profit entities, such as commercial builders or developers.
7. The structure and ongoing operation of the entity should not require significant Town involvement or monetary contributions, be relatively inexpensive to operate and not require any significant staffing.
8. The entity and the Town do not wish to become landlords to all or a significant portion of the affordable housing residents or to manage a large number of properties.
9. If reasonably possible, permit any lands which are contributed by the Town to the initiative to be returned at some date to the Town.*
10. The ability to screen residents by income, employment within the Town and other criteria (the "eligibility criteria").
11. Ensure that residents cannot sell or turn over the affordable housing units to those who do not meet the initiative's eligibility criteria.
12. Ensure that the housing remains affordable to future residents.
13. Some ability to change the eligibility criteria at a later date.*

² All criteria designated by an asterisk either clearly conflict with or possibly conflict with the American *Cranston-Gonzalez National Affordable Housing Act's* definition of a community land trust.

III. Organizational Conditions

We would expect that the Town would be entitled to appoint one or more of the directors/trustees. We would further expect that the Town would wish to fix the number of directors/trustees it was entitled to appoint and that the by-laws of the corporation or the trust documentation would guarantee the Town a minimum percentage of the directors/trustees. In all three structures the Town appointees could either be Town staff, councillors or members. One possible arrangement would be for the Town to have the right to appoint or determine all of the directors/trustees, some of which could or must be members of the public. The stakeholders would have to determine whether they were prepared to be involved in that type of situation.

The purposes of a not-for-profit corporation and its structure are more easily altered than would be the case with the common law trust, although the organizational by-law of the corporation could be structured to make that more difficult by requiring as much as a 100% approval by all of the members/stakeholders.

IV. Charitable Status

The new entity (unless incorporated as a business corporation) could seek charitable registration. If registered as a charity, the entity would have the following advantages:

- The ability to issue charitable donation receipts, increasing its ability to attract donations from the public.
- Ensures that the purposes of the entity would be charitable at all times.
- Changing the purposes of the entity would be more difficult to change as the approval of the Public Guardian And Trustee's Office and the Canada Revenue Agency would be required.
- It cannot easily dissolve while it retained any assets, although a disposition of its assets to the Town itself, a qualified donee, might be possible.
- Can receive funds and assets much more easily.
- Limits the ways in which it can partner with other entities to build the housing.
- Lowers risk that the anti-bonusing provisions of section 106 of the *Municipal Act, 2001* apply.

As the specific eligibility criteria that the Town or this entity would wish to impose on the residents have not been determined, we cannot offer any opinion as to whether the entity is capable of being registered as a charity. It must be noted that the ability to change eligibility criteria will likely be more limited if the entity is registered as a charity. Registration as a charity should be seen as a permanent decision. If charitable registration is seen as being

potentially desirable, that should be recognized at the outset and form the structure of the entity, how it acquires land and cooperates with others for the construction of the housing units.

V. Appendices

A discussion about the options for how the entity could be established is set out in Appendix A. A discussion of who could own the land and the merits and disadvantages of those options are set out in Appendix B. How the land is to be owned can affect the choice of how the entity is to be established.

VI. Conclusion and Next Steps

If our recommendation for the incorporation of a not-for-profit corporation is followed the Town, the stakeholders will need to identify at least three (3) individuals to act as the incorporators of the corporation. A decision about whether charitable registration is desired will need to be made so the corporation's objects can be tailored appropriately. If a municipal capital facility agreement is desirable, discussions with the County should probably be initiated. The parties will need to discuss how they wish to be represented in the corporation, through membership and/or the right to elect or choose one or more directors. The objects of the corporation will need to be determined and a by-law incorporating these decisions will need to be drafted. A name will also need to be selected and cleared.

Once the establishment of a not-for-profit corporation is underway, we would suggest that you begin discussion about how lands and funds will be obtained, how ownership of the land and the housing units should be structured, who could construct and/or finance the housing units and whether the Town wishes to reduce or waive property taxes, building permit fees and/or development charges. While discussion on those matter can await completion of the incorporation, we suspect that there will be value in beginning those once there is agreement that a corporation should be incorporated because some of those decisions may affect the exact structure of the corporation.

Please contact us if you have any questions.

Yours very truly,

GOWLING LAFLEUR HENDERSON LLP



David C.K. Tang

DCT:gvd

APPENDIX A

Nature of The Affordable Housing Entity

Common Law Trust: An unincorporated common law trust could be formed specifically to provide housing in the Town. A trust would be governed by trustees, who would be selected in accordance with the trust declaration that establishes the trust. Once established, the trust purposes would be difficult to change, typically requiring the consent of the settlor of that trust (the person or entity that provided the trust with its initial assets) or a court order. The assets of the trust would be held by trustees for the purposes of the trust and could only be used for those purposes. The difficulty of changing the trust's purposes could be increased by increasing the number of settlors to include some or all of the current stakeholders. The governance of the trust would be established in the trust declaration and could provide some or all of the stakeholders would be trustees or alternatively, have the ability to appoint trustees. One disadvantage to the use of a common law trust is the requirement that lands owned by the trust be registered in the name of the trustees, necessitating transfers of the land any time any of the trustees change. It may be possible to reduce the frequency of those transfer by splitting the trustees' responsibility; appointing different trustees for the land than for all other assets. However, doing so is complicated and likely confusing. Another, potentially more problematic aspect of a common law trust is the greater potential for personal liability on the part of the trustees since the trust itself does not provide any type of legislative or intrinsic limitation on liability. This structure is typically only used when the organization is small, the trustees closely related or if the organization is religious in nature. Religious organizations benefit from the *Religious Organizations Land Act* which resolves many of these concerns.

Not-For-Profit Corporation: A non-share capital corporation could be incorporated pursuant to Part III of the Ontario *Corporations Act* with clear affordable housing purposes as are set out in its letters patent. This type of corporation would benefit from limited liability on the part of its members and through insurance and indemnities, can largely protect the directors and officers. Generally this type of corporation will be tax exempt pursuant to the *Income Tax Act*. The purposes can be changed at a later date although this can be made more difficult by structuring the by-laws and the letters patent of the corporation so as to require unanimous consent from all of the stakeholders or by imposing trust restrictions on some of the more substantial assets (eg. the primary piece of land) provided to the corporation or contractual restrictions using the municipal capital facility agreement mechanism discussed below.

Business Corporation: The Town can incorporate a business corporation under the municipal service corporation powers (section 203 of the *Municipal Act, 2001*) and once incorporated, could sell or transfer some of the shares of the corporation to the other stakeholders if that was desirable. If more than 10% of those shares are transferred, the corporation would no longer qualify to be tax exempt under the *Income Tax Act*. Typically, the shareholders would, in addition to approving organizational by-laws that guaranteed the desirable structure, enter into a shareholders agreement to ensure that structure remained in place. The purposes of the corporation must be limited to purposes permitted by the regulations, but because those purposes include more than the provision of

affordable housing, changes to the purposes of the corporation are more easily achieved than with a common law trust. The provision of residential housing is one of the permitted purposes. A business corporation is entitled to have a profit motive and to convey its income and profits to its shareholders. The stakeholders would have to determine whether that is an acceptable possibility for this entity. If established this way, the entity could not become charitable.

There are procedural requirements, involving public participation, in the establishment of a municipal service corporation, which may be considered a liability in utilizing a business corporation.

APPENDIX B

We have also considered the ways in which the Town could contribute land or other benefits to the entity and how those affect the type of entity which should be created. While we have kept in mind the various opportunities and processes for acquiring land or funds, how ownership of the land and the housing units should be structured in the long term, who could construct and/or finance the housing units and how the Town could reduce or waive property taxes, building permit fees and/or development charges, those are issues which we have been asked to discuss in a separate letter.

Ownership of Land

Ownership of the land and the housing units can be separated or placed together in one entity. The Town, the new entity and the individual residents are the three groups who could own the land upon which the housing units are constructed and/or the housing units themselves.

1. **Land Owned by the Town and Leased to Entity:** The land, if currently owned or acquired by the Town, could continue to be owned by the Town and leased, probably for the long-term (e.g. 99 years), to the affordable housing entity. We have assumed that the Town itself would not wish to directly lease the land to the individual residents. Our expectation is that the new entity would assume responsibility for making decisions about how the lands are developed, the housing units are erected, sold or leased and how to deal with resales or leases of those individual housing units.

Continued ownership of the land by the Town ensures that at some point in the future, when economic life of the housing units has come to an end, the Town has an opportunity to determine whether it wishes to consider continue providing the land for affordable housing or whether the land should be re-purposed elsewhere. It may be that at some point in the future, affordable housing will no longer be a priority in the Town and these lands can be utilized in a different manner. However, as governments across Ontario have found, it is not always politically feasible to simply evict residents of homes built on leased land when the lease expires.

Ownership of the land by the Town limits and complicates the ability of the entity and the residents to finance construction or acquisition of the housing units. It also adds an additional layer of complexity and cost to all documentation and transactions.

2. **Land owned by Entity Without Any Special Arrangements:** Section 106 of the *Municipal Act, 2001* generally prohibits a municipality from “assist[ing] directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.” The transfer of land or funds at less than fair market value is specifically prohibited, as is the waiver of any levies or fees. It is our opinion that a not for profit corporation established properly with its purposes limited to the provision of affordable housing in the Town itself with prohibitions against profits being conveyed to any of its members, would not constitute a commercial enterprise. Land and assistance could be provided to it by the Town. As discussed below, there are provisions in both the *Planning*

Act and the *Municipal Act* which specifically permit municipal assistance notwithstanding this section. While we would suggest that it would be better if one of those provisions were utilized to clearly legitimize the Town's assistance of the affordable housing entity, this would not be required.

3. **Land Owned by the Entity Pursuant to Community Improvement Plan:** The land can clearly be transferred by the Town to the affordable housing entity if a community improvement project area is established pursuant to section 28 of the *Planning Act*. This is one of the specific exemptions to section 106 of the *Municipal Act, 2001*. Before that can occur, a community improvement plan needs to be approved, following a public process that is essentially the same as the process for adopting an Official Plan, except that there is no requirement for approval by the approval authority. The public and the Minister of Municipal Affairs and Housing are given appeal rights to the Ontario Municipal Board. Section 28(6) of the *Planning Act*, R.S.O. 1990 c.13 provides that for the purposes of carrying out a community improvement plan that has come into effect, the Town is entitled to:

"sell, lease or otherwise dispose of any land acquired or held by it in the community improvement project area to any person or governmental authority for use and conformity with the community plan".

Our expectation is that the entity would likely be a not-for-profit corporation or common law trust if this option is chosen. Advantages and disadvantages include:

- Process to pass Community Improvement Plan is public and potentially lengthy;
- Public process enables the Town to ensure that there is adequate input from the public on the initiative and guarantees the public the ability to challenge the decision.
- No easy ability to waive development charges or taxes, except to offset the cost of remediating environmentally contaminated lands pursuant to section 365.1 of the *Municipal Act, 2001*;
- The manner in which lands or funds are conveyed to the entity, the manner in which those lands or funds can be used must conform to the community improvement plan. This has the effect of opening up the activities of the affordable housing entity to legal challenge by members of the public; and
- The housing provided must be affordable and affordability must be defined by the Town in the community improvement plan.

4. **Land Owned by Municipal Service Corporation:** The Town may also transfer the land to a municipal service corporation established pursuant to section 203 of the *Municipal Act, 2001*. This would be a business corporation, but one whose objects would be limited to "economic development services" and the "provision of residential housing". Advantages and disadvantages include:
- The Town may designate that business corporation as a "designated economic development corporation" rendering that corporation a local board of the Town. These provisions essentially permit the Town to levy additional rates on any areas in the Town it can establish the availability of this housing exclusively benefits.
 - The Town can provide assistance to the municipal services corporation if the corporation is wholly owned and its purpose is limited to providing services to the corporation's owners or members. The assistance may include giving or selling of property of the Town.
 - Shares of the corporation can be transferred to other stakeholders.
 - The directors and officers of the corporation are deemed to be members for the purposes of the *Municipal Conflict of Interest Act*.
 - The corporation, if wholly owned, is an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*.
 - Care must be taken to ensure that the tax exemption afforded *municipal corporations* by section 149(1)(d.5) of the *Income Tax Act* is not lost.
 - This corporation will never be able to obtain charitable registration and while potentially tax exempt, will not have the ability to issue donation tax receipts; and
 - One downside to use of a municipal service corporation is that it can be established for the purposes of providing any residential housing. The housing need not be affordable. Even if it is now established so as to clearly limit its activities to affordable housing, there is a possibility that the municipal service corporation could alter its objects to provide housing that is no longer affordable. Both the use of a community improvement plan and a municipal capital facility agreement would require any eligible housing to be affordable.

5. **Land Owned by Entity subject to Municipal Capital Facility Agreement:** The Town may transfer the land to the entity if the entity enters into a municipal capital facility agreement pursuant to section 110 of the *Municipal Act, 2001* and the Municipal Capital Facilities Regulation. These provisions permit the transfer of land and other municipal resources for municipal capital facilities that provide affordable housing.
- The use of a municipal capital facility agreement permits the affordable housing entity to be a common law trust, a not-for-profit corporation or a business corporation.
 - One advantage of a municipal capital facility agreement over both the establishment of a community improvement project area and a municipal services corporation is that it can be achieved more quickly and with less procedural requirements.
 - A municipal capital facility agreements must obligate the entity to provide the affordable housing and can contain whatever other arrangements the parties agree to and are reasonably flexible.
 - A municipal housing facility by-law must be passed by the municipality which enters into the municipal capital facility agreement. That by-law must contain both a definition of affordable and the public eligibility for the affordable housing units. This ensures that the housing will be affordable and permits public input into the eligibility criteria without providing any public appeal rights to those criteria.
 - Permits the waiver of taxes, at least during construction of the affordable housing and if desired, afterwards with either some limitations or additional actions.
 - Clearly permits the waiver of development charges, which none of the other options permit.
 - Permits the Town to establish and control a capital reserve for the housing (in addition to or instead of a reserve controlled by the affordable housing entity)
 - May require all residents to sign separate municipal capital facility agreements, depending on how ownership of the units are structured and whether there is any desire to continue providing benefits (including a Town controlled reserve) after completion of the housing units.
 - The most problematic aspect of this structure, which is otherwise ideal, is that only a delivery agent under the *Ontario Works Act, 1997* authorized to operate and manage housing projects under the *Social Housing Reform Act, 2007* may enter into such an agreement if the municipal capital facility is for a municipal housing project facility. This scheme would require Grey County to pass the municipal housing facility by-law and enter into that agreement. We would expect that the Town would have significant input into that by-law. The agreement must provide for at least one of the

benefits that section 110 of the Act enumerates (assistance through giving or lending money, property, guaranteeing borrowing or providing the service of the employees of the County). If the County has no separate interest in doing so, the Town would have to separately agree to somehow compensate Grey County for the benefit provided. We would suggest however, that the benefit the agreement provides need not be large. Once that agreement has been executed, the Town can provide additional assistance, waive taxes and development charges and establish a reserve fund without the County's further consent or participation. The provisions which permit a municipality to provide the assistance require simply that a municipality enter into the agreement with the entity, not that the municipality providing the assistance be a party of that agreement. The Town itself would not be able to enter into such an agreement with the entity itself.

- If the County also wishes to work with other municipalities and utilize this arrangement, the municipal housing facility by-law could contain the same definition of affordable and public eligibility criteria for the affordable housing units. We have not yet considered whether the by-law could contain separate definitions of affordable and eligibility criteria for each lower tier municipalities.