

THE MUTTART FOUNDATION

Consultation on Charities and Mixed-use Housing

*24-27 April 2018
Banff, Alberta*

A Summary of the Discussion

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This report is a summary of one of a series of periodic discussions convened by the Muttart Foundation on voluntary sector regulatory issues. The session was held to promote an exchange of ideas and to develop a fuller understanding of the concerns of both sector groups and government regulators. Any remarks included in the report are intended to reflect the discussions. No undertakings or commitments from either regulators or sector participants are expected or made, notwithstanding any of the wording in the report.

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DAY ONE

INTRODUCTIONS

The facilitator welcomed participants to the consultation to discuss the rules and processes that must be considered when registered charities offer housing through mixed use developments. Some concerns have been raised around housing projects operated by, or involving, charities that may include commercial operations or market housing due to design considerations, zoning regulations or particular funding arrangements. These types of mixed-use housing projects raise questions regarding unacceptable private benefit and about whether groups are remaining within the scope of their charitable purposes. Increased interest in mixed-use developments by charities, whether to provide housing or as a mean to generate revenue has been observed by the Canada Revenue Agency (CRA). It was also noted that the new National Housing Strategy could result in government departments or related entities approaching charities to encourage these types of developments.

The facilitator then reviewed logistics and ground rules for the consultation. Participants were encouraged to be open and to make comments freely 'without prejudice'. In addition, participants were free to talk about what was discussed during the consultation, but to do so without attributing comments or observations to any of the participants. The facilitator then invited participants to introduce themselves, highlight the role they played in their organization and identify what this consultation topic meant to their organization.

HOUSING VANCOUVER STRATEGY 2018-2027

The facilitator invited one of the participants to begin the consultation by providing an overview of Vancouver's housing strategy. For purposes of analysis housing can be divided into three broad categories: a) **Social Housing** for the impoverished, seniors, or people with disabilities; b) **Supportive or Below-Market Housing**, which is housing that is below market and provided to those not necessarily eligible for social housing, and c) **Market Housing**. The vision of the housing strategy is to create more inclusive communities that are sustainable.

Key elements of the strategy identified include:

- Encourage a shift to rental, social and supportive housing and greater diversity of forms in housing stock – housing and affordability must reflect the diversity of those most in need.
 - Address speculation on demand/prices.
 - Protect and promote diversity of incomes, backgrounds and household types in the City of Vancouver housing.
 - Preserve and expand the affordability of existing stock of rental and non-market housing and renew these buildings.
 - Commit to a 'new direction' for affordable housing delivery with an emphasis on working with partners across all sectors – non-profit organizations, co-ops and indigenous housing partners.
 - Increase supports and protections for renters and the homeless.
 - Align and improve the City of Vancouver processes.
- There are a number of challenges facing charities and non-profits wishing to undertake or participate in the development of real estate. Constraints arising from the *Income Tax Act* (ITA) have a significant impact on the formal structuring. An inflexible statutory framework exists for both registered charities and non-profit organizations (i.e., groups that wish to qualify for the 'non-profit organization' tax exemption). The following outlines the issues that affect each entity.

A **registered charity** may:

- carry on a business if the business is related to its charitable purposes;
 - make a gift to a 'qualified donee' (a defined term under the ITA that includes registered charities and certain other entities, but does not include ITA non-profit organizations);
 - sell property at fair market value (a gift to a qualified donee may be at other than fair market value);
 - lend funds in certain circumstances at fair market value even if the borrower is not a qualified donee; and
 - provide housing for the impoverished, seniors and/or people with a disability.
- If the charity contravenes the Act, it could lose its charitable status and would have to transfer its assets to another entity or government, or pay a revocation tax, as specified in the ITA

A **non-profit organization**, which qualifies for the exemption in the Act:

- must not be, nor can it qualify to become, a charity (so is defined as distinct from a registered charity – i.e., they are mutually exclusive categories);
 - cannot be organized for the purpose of making a profit (surpluses are allowed in certain circumstances – e.g., when they are incidental) ; and
 - can provide Below-Market Housing and/or Social Housing as a social purpose.
- A non-profit organization intending to operate Below Market Housing cannot continue to accumulate investment capital unless there is a plan to use this capital for its social purposes, for example to acquire and develop another affordable project.

- In addition to the Act, other constraints must be considered. In British Columbia the transfer of property to a registered charity is exempt from the property transfer tax. For any other transfer, the tax applies.
- There is a different recovery method for the Goods and Services Tax (GST) for registered charities, non-profit organizations and business corporations. The recovery method is less favourable to registered charities wishing to undertake real estate development than it is to non-profit organizations and business corporations. Lastly, financing and cash flow upon project completion must also be considered.
- An observation was offered that it is mostly churches participating in mixed-use housing because they own significant land that they are keen to develop. This excess land that they want to develop may be viewed by the CRA as an unrelated business. Mixed-use housing requires complex structures and congregations are not well-equipped to deal with these complexities, and this can in turn be frustrating for developers. As well, consultants who are advising congregations may not be knowledgeable on these complexities. Registered charities and non-profits are very different types of organizations with separate tax rules. This is not well understood at the municipal, provincial or national level.
- The scale and financing of a complex structure is not always considered in sufficient detail upfront. These complex structures are also better suited for larger projects because the cost associated with them can be spread over a larger number of units.

CRA PERSPECTIVE

The facilitator then called upon the representatives of the regulator to provide a perspective on registered charities and mixed-use housing.

Guidance CG-022 discusses the provision of housing that:

- Relieves poverty
- Includes specially adapted facilities or services to assist those with disabilities and/or the aged.

It was also noted that a more comprehensive guidance is currently under development.

Below are highlights of the current guidance:

- Providing modest rental housing for the poor at below market value can relieve poverty.
- Merely providing subsidized housing to a disadvantaged group is not currently recognized as an independent purpose under the fourth head of charity (other purposes beneficial to the community). Where residents potentially qualify as charitable beneficiaries, specialized services and amenities that relieve specific conditions attributable to the disabled or seniors must also be provided (e.g. meals, basic utilities, clothing, furniture and counseling).
- A charity may charge less than fair market value for these specialized services and amenities.

- The relief and/or benefit provided by the charity should correspond to the need being addressed.
- Charitable housing and services should only be provided to eligible charitable beneficiaries (e.g., individuals or families that are needy, necessitous, underprivileged, low-income, or of small/limited means).
- Private benefit is a concern if housing or other charitable resources are provided to individuals that are not eligible beneficiaries.
- Beneficiaries of housing that includes specialized services and amenities do not have to be assessed using an income threshold. Housing does not have to be provided at less than fair market value.
- In addition to its charitable programs a charity can undertake:
 - Incidental activities that generate income from property (rental income)
 - Related business activities. A related business is a business that is either run primarily by volunteers (at least 90%); or is 'linked and subordinate' to one or more of the charity's charitable purposes.
- Within the context of housing the charity can operate mixed-use property that includes:
 - Rental units below market rate for charitable beneficiaries
 - Units at market rates that generate business or rental income.
- Issues being explored by the CRA are property development, affordable housing vs charitable housing and housing strategies. Property development and units that are not for charitable purposes are an issue for the CRA. However, mixed-use housing as an approach is not in-and-of-itself an issue.
- In order for the CRA to gain a better understanding of the issues around charitable housing and mixed-use property development the following questions were posed:
 - What is driving the current interest in mixed-use property development?
 - Why is mixed-use property development a solution?
 - Creating multi-organization structures is complicated and costly. Are there any other barriers? Any other solutions?
 - Are there other issues or factors to consider or clarify?
- It was suggested that additional clarification regarding what constitutes investment income and how incidental benefit is defined be included in the guidance document.
- An observation was made that there is a need to look at outcomes rather than the component parts. This helps create flexibility and will help in 'staying out of the weeds' – for example, looking at an initiative creating a home, rather than a house, would be helpful. It was suggested that we look at housing under the charity law related to public amenities and their public benefit.
- A comment was made that current public policies and products are based on models that don't fit where society is today – i.e., movement away from segregated communities to communities that are inclusive and diverse.

ENGLAND & WALES PERSPECTIVE

After a discussion about charities and housing in Canada, the facilitator invited an international participant to share England and Wales' approach to charitable housing.

The following comments were offered:

- Up until the twentieth century charities provided social housing to those in need. During Margaret Thatcher's time as Prime Minister, the sale of council housing was introduced which led to a depletion of rental housing stock. Other privatization initiatives also contributed to the depletion of stock.
- Today registered charities provide specific housing, for the disabled, the aged and the poor. Many large and medium size charities have a subsidiary trading group for their revenue generation activity, to mitigate the risk to the charity's assets and segregate parts of their work that may give rise to taxable income. Rental income, however, is not treated as trading income. Incidental private benefit remains a grey area.
- Housing charities are in many ways similar to co-operatives. They enjoy the same tax breaks as registered charities but are not registered with the Charity Commission, and are subject to far less regulation. England and Wales have very large housing associations, which were first introduced in the 1970s.
- There are strict rules regarding the disposal of assets for registered charities. These rules do not apply to the housing associations that are non-registered charities. To some extent the model that has developed may stem from there not being non-profit organization corporate structures (i.e., non-share capital corporations) in England and Wales.
- The definition of relief of poverty that is used in England and Wales is somewhat broader than the one used in Canada. Providing affordable housing is also accepted as a way to achieve a range of charitable purposes other than relief of poverty. For example, in addition to poverty relief or serving the needs of seniors or the disabled, such charitable purposes can also include promoting urban or rural regeneration in economically or socially depressed areas.
- Providing housing for key workers, e.g., teachers or health care professionals where there is a shortage of affordable accommodation for such workers can be charitable when those workers are essential to delivering charitable services, such as education or health care.
- Assessing financial need is fact specific and will vary according to local circumstances (e.g., the average income levels and the cost of accommodation in the area). It was mentioned that CRA looks at both assets and income when assessing financial need.
- Property development is currently not seen as an independent charitable purpose, though this may be revisited. Any trading subsidiary must be set up as an arm's-

length company. Issues with property transfer taxes during housing development by charities or others partnering with charities are similar those experienced in Canada.

- When eligible beneficiaries no longer qualify for charitable housing there is typically no immediate action taken. The process for reassigning a unit to a different beneficiary when the current occupant no longer meets eligibility criteria can be complicated and difficult. In Canada, charities are expected to assess the eligibility of such beneficiaries on an annual basis.

UNITED STATES PERSPECTIVE

Continuing with the international perspective, the facilitator invited a participant to share the US experience with charitable housing.

Remarks are provided below:

- Housing low income people is recognized as a charitable purpose. Tax credits attract private investors to invest in low income housing partnerships with tax-exempt organizations. The Internal Revenue Service (IRS) has adopted a two-part analysis to determine whether an exempt organization participating as a general partner in a partnership with for-profit investors would negatively affect its exemption.
- The two part analysis involves 1) the charitable purpose test and 2) the private benefit test. The first test determines whether the organization's participation in the partnership serves its exempt purpose(s). The second test determines whether the partnership arrangement permits the organization to act exclusively in furtherance of exempt purposes, rather than for the benefit of for-profit partners. Both tests must be met by the housing organization.
- As housing models became more nuanced the IRS struggled with the concept of low income and looked to the Department of Housing and Development (HUD) for guidance. In 1976 the IRS established a safe harbor for low-income housing organizations to help them determine whether they met the charitable requirement of relieving the poor and the distressed.
- Income standards are now tested every 3 years, which is a recent feature of the policy. The standard is flexible and allows for a mix of residents. Income from an unrelated business is taxable under the US Unrelated Business Income Tax rules. The exempt organization can undertake initiatives that alleviate community deterioration; provide housing with access to medical care or other services for the elderly and the disabled, etc. without having to follow income guidelines percentage used for alleviation of poverty projects.
- For housing partnerships, the assessment procedure entails a factual analysis that determines if the charitable purpose test is met. The 'safe harbor' is met if:
 - At least 75% of the units are occupied by families that qualify as low income. As well, it is satisfied where at least 20% of the units are occupied by residents that are very low income, or at least 40% of the units are occupied by residents whose income does not exceed 120% of the area's very low

income limit. (More particularly, “low income” is defined under HUD as family income of no more than 80% of the median family gross income of the area, adjusted for family size, while –“very low income” is defined as family income of no more than 50% of the median family gross income of the area, adjusted for family size.)

- The project is occupied by residents who are poor and distressed.
 - The housing is affordable to the charitable beneficiaries, (i.e., under government-imposed rent restrictions).
 - For multiple buildings, they must share the same grounds, if they do not separately meet the requirements mentioned above.
- If the safe harbor is not met, the procedure lists facts and circumstances whereby the organization may demonstrate that it relieves the poor and distressed. Even if the safe harbor is met, the organization may not qualify for exemption because private benefits are judged to be more than incidental.
 - An observation was made that the policies and procedures regarding mixed-use housing in the United States avert or provide a means to deal with many of the issues experienced in Canada.

AUSTRALIA PERSPECTIVE

The facilitator then called on a participant from Australia to round out the international discussion on charitable mixed-use housing.

- The *Word Investments* case of 2008, which addressed how an unrelated business could in fact further a charitable purpose, opened the door to mixed-use housing being accepted as a charitable purpose in Australia.
- The National Rental Affordability Scheme (NRAS) is part of the Australian Government’s long-term strategy to address the issue of affordable housing. The NRAS encourages large-scale investment in affordable housing; usually projects of 100 or more houses. Small scale, private, individual investors in the rental property can become involved with the NRAS by investing in or purchasing properties from approved participants or by becoming part of a consortium arrangement. Participants who are approved are usually property developers, not-for-profit organizations and community housing providers.
- NRAS homes must be rented to eligible tenants at a rate that is at least 20% below the market value rent. The NRAS Scheme offers annual incentives for ten years. Two key elements of the program are:
 - An Australian Government incentive per dwelling per year as a tax offset or direct payment
 - Payments by state and territory governments that may offer approved participants a contribution per dwelling per year in direct or in-kind financial support.

- Eligible tenants are persons in low or moderate income households. Household income thresholds vary based on the composition of the household.
- Housing co-operatives exist in Australia and are regarded as charitable organizations; however, they are not used very much.
- The Commissioner for the Australian Charities and Not-for-Profits Commission (ACNC) articulated in the *Commissioner's Interpretation Statement: Provision of Housing by Charities* that poverty does not mean destitution. Rather it is the inability to afford a modest standard of living from one's own resources.
- For the ACNC the following factors may be relevant in determining poverty, distress or disadvantage:
 - Income and assets
 - Specific disadvantage or distress experienced
 - Eligibility for government assistance related to the relief of poverty
 - Number of dependents and their needs
 - Cost of providing the other necessities of life
 - Geographical location and available accommodation in that location
 - Income required to secure accommodation in that area
- Charitable housing providers may obtain and manage housing assets through state or territory government schemes. To be treated as a charitable housing provider, the wind up clause in the governing documents must make explicit that:
 - "Assets required to be returned to the government on winding up by state or territory law or contract, will be returned, and
 - Other remaining assets will be distributed to a charity with similar charitable purposes."

GENERAL OBSERVATIONS

The facilitator invited the participants to share their observations on the various presentations and perspectives that had been offered on the topic of charitable mixed-use housing. Comments offered included the following:

- In other countries, there appears to be intentional openness to taking a broader approach to mixed-use housing. Australia's *Word Investments* case accepts that if profits further a charitable purpose then, in that jurisdiction and at least in some circumstances, those activities are charitable.
- A suggestion was made to expand the CRA definition of poverty in a manner similar to the definition used in Australia.
- The following question was posed: Are we mature enough as a country (Canada) to look at different models of organizing in order to provide housing? It was also remarked that we had not yet addressed the issue during the consultation around housing for indigenous populations.

- It was suggested that the problems in Canada with social housing are more typically around mismanagement rather than attracting 'bad actors', as there is little money to be made in providing social housing.
- One issue raised was: How does a charity ensure that it is getting fair market value for an asset? An example was shared that a church property was sold for \$4 million only to be resold for \$20 million several months later.
- It was noted that charitable organizations are not really included in the national, Alberta, B.C., or Ontario housing strategies. How do we get them involved? Should they be involved? It was noted that ancillary services provided by charities and non-profit organizations are often critical to the success of mixed-use housing.
- Day one concluded with the facilitator asking the participants to form into small groups and generate questions to be addressed over the next couple days.

DAY TWO

The participants were welcomed back by the facilitator and presented them with a list of synthesized questions from their small groups on the previous day. The questions were reviewed and clarified. The following questions were highlighted for further group discussion.

- 1. What would be required to reframe mixed-use housing as 'public infrastructure' rather than considering it as a business activity?**
- 2. Charities may provide housing that relieves poverty or which includes adapted facilities or services for eligible beneficiaries, but are there other conditions or circumstances where housing should be considered charitable?**
- 3. What rationale should be offered for including urban and rural regeneration as a fourth head charitable purpose?**
- 4. What would be the benefits of a 'destination of funds test' for charitable providers of housing, and what are the barriers to its introduction?**
- 5. What steps should be taken to increase the successful participation of charities in federal, provincial or municipal housing initiatives or should there be only minimal interest in the participation of charities?**
- 6. What actions might be taken to consolidate the housing activities of charities in order to take advantage of scale, and what governance supports should be made available to protect charities from the risks of development?**

Prior to addressing the questions highlighted above, the facilitator posed a central question to the participants: ***What mischief is the CRA regulatory framework trying to prevent and what work is it trying to facilitate?***

- There has been an increased amount of activity in mixed-use housing in the last ten years. Some of these housing projects are big and carry a significant amount of risk to the charities involved. The concern for the CRA is around unrelated business activity with no charitable purpose. A question was asked whether the CRA would have a problem with a charity owning a shopping mall, as is sometimes the practice in England and Wales. The response was 'no' if the mall was an investment and 'yes' if it was a business activity.
- It was then suggested that the development and who is doing the development is a red herring since the form of capital should not matter. The following three issues were put forward as potentially giving rise for concerns:
 - Does the endeavour result in a collateral non-charitable purpose?
 - Will the endeavour result in impermissible private benefit?
 - Is there a violation of the exclusively charitable provisions of the ITA or the exclusivity imperative found in the common law?
- Other concerns, for which there are no precise tests, are with the potential for creating an "unlevel playing field" (i.e., unfairly disadvantaging for-profit suppliers of housing) and with putting charitable assets unduly at risk (historically the argument against charities aggressively engaging in business ventures).
- Charities must demonstrate a public benefit, which is presumed with the relief of poverty. It may also be presumed for certain other purposes associated with mixed-use housing – e.g., providing accessible units to the differently-abled, providing nursing services, or programs for the aged) but this will depend of the specific purpose(s). The presumption may be rebutted if the composition of the occupants or mix of uses, for example, gives rise to concerns with private benefit.
- What is the issue with respect to a charity developing mixed-use housing and partnering with a developer? The following charity law principles that can be used in analyzing whether a development project they undertake is charitable were offered:
 - If the purpose of the activity is charitable, there shouldn't be a problem;
 - There is an identified public benefit;
 - Mixed-use property that achieves a public benefit through related business activities is acceptable.
- How do we deal with concerns about unfair competition that are heard from for-profit organizations? It is important to first nail down the fundamentals. It was suggested that CRA guidance with case studies and the rules that would apply would be helpful. It would also be helpful if the guidance also stated what is not permissible.
- A comment was made that the ITA rules regarding business activities are especially 'thin'. It was also mentioned Imagine Canada is carrying out an analysis of charities that are participating in a competitive market with for-profit organizations. This information may prove helpful to both the sector and CRA.

- CRA audits reveal that multi-purpose buildings (e.g. residential and commercial) are more of an issue for the agency than mixed-use housing (e.g., exclusively residential). Is there also an issue with the form of title, e.g. condominium or strata? It was noted that real estate law varies from province to province and that this could have an impact.
- The CRA is struggling with the concept of 'affordable' housing, as it is not necessarily furthering relief of poverty. The term is somewhat of a red herring since there's no standard definition of affordable. The term originated with Canada Mortgage and Housing Corporation and was coined in an effort to reduce stigma. One possible solution is for the regulatory definition of poverty to be broadened as it is in other jurisdictions. As it was agreed that merely providing housing is often not sufficient to relieve poverty, it was suggested that charitable purposes that fall under the fourth head of charity should also be considered. One possibility in this regard was the case law stating that public amenities can be considered charitable.

1. What would be required to reframe mixed-use housing as 'public infrastructure' rather than considering it as a business activity?

- In 2012 the Court of Appeal in England ruled that a public amenity is more general than urban regeneration. See *Helena Partnerships Ltd v. HM Revenue & Customs*.
- In the United States organizations that help lessen the burden of the government, such as in providing safe affordable housing, are seen to be onside regarding their charitable purposes and activities.
- It was recommended that mixed-use housing be addressed directly rather than be reframed as public infrastructure. It was suggested that certain uses of ground floor space could help reduce 'not in my back yard' sentiment and bring community acceptance to mixed-use housing.
- It was suggested that the CRA look at the whole development rather than the parts; e.g., look at the relief of poverty in addition to other heads of charity since a charitable organization can be charitable with respect to more than one head of charity.
- A suggestion was made that the CRA might want to look at its policy statement on registering charities that promote racial equality and use this as a possible template for mixed-use housing.
- An important consideration was what leads to a house being a home and that it be taken into account what support, relationships and the community look like in a mixed-use housing model

2. Charities may provide housing that relieves poverty or which includes adapted facilities or services for eligible beneficiaries, but are there other conditions or circumstances where housing should be considered charitable?

- The participants concluded this was sufficiently addressed in question #1.

3. What rationale should be offered for including urban and rural regeneration as a fourth head charitable purpose?

- The fourth head of charity is '*other purposes beneficial to the community*'. There is also a requirement that a purpose be analogous to another purpose previously identified as charitable. If it can be demonstrated that urban and rural regeneration provide a public benefit then they would meet the criteria for consideration under the fourth head of charity.
- In England & Wales there needs to be more than one activity to constitute regeneration – e.g., housing, education, road maintenance etc. The issue of any associated private benefit must also be addressed. It was noted that it is difficult to work with this particular head of charity.
- In Australia ecological conservation is recognized as beneficial to the community. There are significant differences between rural, regional and remote locations and the large coastal urban centres of Australia and therefore the local or regional context is very important when considering what is judged to be beneficial to the community.
- In the United States there are well developed precedents of tax breaks offered to businesses and exempt organizations to stay in certain communities to alleviate economic distress and provide employment opportunities. Relocation incentives are also offered to less desirable locations.
- The CRA guidance on the relief of poverty is being updated and will be published soon. There will be more modern language, a broader context and examples. Suggestions were made that the new guidance include real estate examples, particularly in the areas of managing risk for these types of projects and use of property assets in programs versus as investments.
- The CRA relies on the charity to define the beneficiaries. This may include requiring statistics to support why they qualify – e.g., the availability of housing in a particular community including income levels, rent, etc.
- Is there some entrée into the fourth head of charity regarding public safety, e.g. more lighting in newer buildings to reduce crime? It was suggested that in this context you would have to demonstrate the deprivation or disadvantage the project would address.
- There are some indigenous groups – some charitable organizations and some not – that are operating in this area that they often go beyond providing housing. Examples of such initiatives include:

- Buying a mall
 - Buying a pharmacy and delivering prescription medications to shut-ins.
 - Opening a construction company and hiring and training apprentices
 - Building a hotel with an art gallery and providing housing for homeless artists
 - Building a hotel with a medical facility in northern or rural areas
 - Providing housing for key workers
- Local government requirements include demonstrating that there is deprivation and following the policy framework regarding affordable housing – i.e., income levels, rent and vacancy rates. A question was raised on whether affordable housing could be approached as a program related investment.
 - It was noted that in the designing a regulatory framework, it needed to be borne in mind that many of those people being served live precarious lives.
 - An observation was made that in the area of housing there is currently a convergence with the social innovation/social enterprise movement and religious charities and that this will likely continue to grow.

4. What would be the benefits of a ‘destination of funds test’ for charitable providers of housing, and what are the barriers to its introduction?

- As mentioned earlier in this summary, the *Word Investments* case in Australia is a good example of the destination of funds test. Australian regulatory compliance in this area has been ‘decluttered’, which makes other rules easier to explain and enforce, and as a result compliance is much better.
- Some of the barriers of a destination of funds test noted include:
 - It could create unfair competition for profit organizations, with non profit organizations able to undercut the market and gain increased market share. (An observation was made that the perceptions around this problem and what is actually happening may be quite different. Data is needed in order to have an evidence-based conversation since the issue is not going to go away.)
 - There could be a drain on the Treasury as a result of lost tax revenue or additional tax expenditures subsidizing what have to date been taxable business undertakings. Again, data on the extent and severity of the problem isn’t available, so perceptions versus reality are hard to gauge.
 - There could also be an issue with collection of sales or similar taxes. It was suggested establishing a regime similar to the US related business tax rules might be one way to address this.
- A comment was made that it is difficult to apply the destination of funds exemption for just one head of charity – e.g., social housing.
- It was suggested that more clarity is required in the CRA guidance regarding renting out space. Sometimes this is done to generate investment income and sometimes to

create a business as a way to advance a charitable program (e.g., to employ people who have difficulty finding employment.) It was suggested that charities see the current guidance on related business as stifling social innovation.

The day ended with a few participants staying behind to create two hypothetical models of proposed mixed-use housing to further the discussion.

DAY 3

The day began with the facilitator welcoming back the participants and inviting a spokesperson to walk through the two scenarios.

Scenario A

A cathedral with a historic designation is in an area that is not considered to be economically depressed. The proposal is to build a structure on the church property that includes an underground parkade; a community centre; some floors for low income housing; some floors for market rentals; and the significant number of remaining floors to be developed and sold as condominiums.

Scenario B

This is a religious property that is in an economically depressed part of a city. The area is targeted for intensification and deeply affordable housing. The City has agreed to partner in the project and contribute to the funding. The proposal is to demolish the existing church. A local university conducting work in innovation as well as a daycare would occupy the street level floor. There would be a floor for religious and community activities, three floors for deeply affordable (social) housing, three floors for affordable housing and three floors for market housing.

- After a review each of the scenarios, the facilitator invited the international participants to offer some comments on how these proposals might be approached in their jurisdictions.
- In the United States since Scenario A is not in an economically depressed area, the development would have to meet threshold guidelines regarding unrelated business taxation. Condominium revenues would be considered taxable income. Careful planning would be needed to address the various tax implications. There would be no tax consequences in Scenario B, because the development is located in an economically distressed area. It was suggested that separate entities would likely be needed to respond to financing considerations.
- In England and Wales, the revenues from the sale of condominiums within a charity operated structure (Scenario A) would be taxable income; therefore, it would likely be better to do this through a trading subsidiary. Scenario B advances relief of poverty in its provision of affordable and deeply affordable housing. Some retail could also be considered charitable. It was suggested another charity be set up to minimize the risk to charitable assets and broaden the purpose and objectives and encompass new aspects of the charity's endeavours. In the suggested circumstances, the existing charity might also consider setting up a trading subsidiary.

- In Australia setting up a property trust would be recommended. This would facilitate pursuit of wider charitable objects in both Scenarios A and B. Under Australian law the property trust could act as a bank to the religious charity. The structure would be designed to take into account:
 - Equity
 - Certainty
 - Simplicity
 - Economy
 - Convenience

Questions to be considered in setting up the structure would include: does it solve tax and other problems, and facilitate good behaviour, in cost effective ways?

- From the CRA perspective, their approach to Scenario B is similar to that taken in by regulators in the United States and England & Wales. Under Canadian law, the development and sale of condos in Scenario A is an unrelated business and would need to be done through a separate entity, which could potentially be subject to tax.
- A concern was raised with mission drift in relation to property development. Furthering charitable purposes or making a return on investments are both acceptable, but there is a grey area in between these two that can be problematic.
- A comment was offered that charities are typically not interested in becoming property developers. However, they may want to turn an existing asset into a better and different asset – e.g., land into a building. Development is a transitory issue and typically a one-off. Some of the questions explored may be: What's the program we want? What do we need? What are the financial commitments and the conditions? What are the zoning requirements? What is possible? Does the building need to be subdivided? Are tax and liability considerations appropriately dealt with?

5. What steps should be taken to increase the successful participation of charities in federal, provincial or municipal housing initiatives or should there be only minimal interest in the participation of charities?

- There is a faith imperative for many religious groups to be involved in housing initiatives, particularly given the huge assets they hold in land in many Canadian cities and towns. A concern is that many charities that have housing as part of their charitable mission are not well informed about the law and rules governing them. It would be helpful for them to partner with housing umbrella organizations or government agencies to increase opportunities to create diverse communities. Ways could also be explored to increase participation in this area by those charities that have access to capital but don't own land.
- The view was expressed that charities and non-profit organizations that get into housing initiatives often need to expand their activities in order to be sustainable and this is not necessarily mission drift. It was suggested that there ought to be scope

under the relief of poverty head of charity to be innovative, as has been seen in the other jurisdictions.

- Australia and England and Wales have a more contemporary definition of poverty and it was suggested that Canada take a look at sister jurisdictions to widen the definition of poverty.
- Charities who own land need to be aware and informed when involved in development. It was pointed out that hospitals and universities have been involved in the development phase of projects for many years.
- Charities need to think about how they can hold on to their land and use it for public good. Under the existing related business guidance, it was suggested that property development could be seen as subordinate to other purposes if a long view is taken. For example, a church that has been in existence for 100 years is now looking to develop its assets in a different way.
- Questions needing further exploration include: Can we better define the scope and nature of the current crisis? How do we bring this to the attention of the appropriate government ministers? As well, consideration should be given to whether housing is a human right. What do we need to do to rally everyone?
- More broadly, the donation gift model is changing and the resulting crisis in resourcing of (and delivery of services by) charities will likely be fairly significant. The gap is growing between decreasing donations and increasing social need. Young people don't buy into the concept of charity in the way their parents and grandparents did. Does the current charity framework need to be updated for this to be effectively addressed?
- Charities need some certainty with guidelines that address 80% of the situations they encounter. Treating every situation as a one-off is a problem. The current government initiatives in this area suggest this is a time to have an expansive rather than a restrictive policy.

6. What actions might be taken to consolidate the housing activities of charities in order to take advantage of scale, and what governance supports should be made available to protect charities from the risks of development?

- The participants did not discuss this question.

FINAL REFLECTIONS

- At the end of the consultation, the facilitator offered the participants an opportunity to share their personal reflections on the past three days. There was much praise and gratitude expressed to the Muttart Foundation for sponsoring the consultation and for the care and attention to detail of the arrangements.

- Appreciation was expressed to the international guests for sharing their ideas and perspectives. As well, the civil and thoughtful exchanges between the regulator and the participants, whether from the sector or private practice, contributed to a rich discussion.
- There were 'Thank yous' to the facilitator and note-taker for their process that contributed to a successful consultation.
- A representative from the Muttart Foundation thanked the participants on behalf of the Foundation and wished everyone safe travels home.