2017 ONPHA Conference and Trade Show

Shaping our Future

502

EOA: Ensuring legal readiness

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Learning goals

To prepare housing providers for potential legal effects of operating agreements ending including:

1. Relevance of the purposes and objects in your incorporating documents
2. Tax implications and exemptions that may no longer apply
3. Legal pitfalls and other considerations

Introduction

- There are far more issues facing housing providers as they come out of their Operating Agreements than we could ever hope to address in a session like this.
- Also, the issues and options that are available to any given housing provider depend on many issues:
  - how much housing stock do you have?
  - are different buildings in your stock coming out of operating agreement at different times?
  - have you obtained any other funding (SHEEP, SHRRP, etc.) that places obligations or constraints on what you can do?

Introduction

- does your organization have charitable status or are you affiliated with a religious organization?
- what is your relationship with your service manager?

- We are hoping to give you an overview of some of the issues that you might think about to address the challenges and take advantage of the opportunities that come with the end of your operating agreement – some of what we say may or may not be particularly relevant to some of you, but we hope that it gets you thinking about this new world for non-profit housing providers

Incorporating documents

- Articles of incorporation, letters patent
- Contain a statement of objects:

> to provide and operate housing accommodation, with or without any public space, recreational facilities, and commercial space or buildings appropriate thereto, primarily for persons of low or modest income.

- And conditions:

> The corporation shall be carried on without the purpose of gain for its members and any profits or other accretions to the corporation shall be used in promoting its objects;

Incorporating documents

- Will this change as your OA ends?
  - Purposes
  - Use of profits
- If your purposes and/or objects change, must update your incorporating documents
- May face serious penalties if you don't

Tax Issues

- Public Service Bodies' Rebate
  - Certain organizations can claim a rebate of a significant part of the HST they pay
  - Charity, qualifying NPO or a "selected public service body"
  - Qualifying NPO means an NPO "whose percentage of government funding is at least 40% of its total revenue"

Tax Issues

- If you have stock that is subject to more than one operating agreement, coming out of OA at different times, you may have to consider whether your status as a Qualifying NPO will be affected
- The Challenge? How to avoid losing the HST exemption for the stock that is still receiving funding simply because other stock is no longer receiving funding
- One option is to incorporate a separate corporation and transfer your stock to that new corporation once it no longer receives government funding, to keep the percentage of your revenue of the original corporation (where you keep the stock that is still under OA) that is from government funding above 40%

Tax Issues

- Alternate sources of income
  - Applies whether your OA has expired or not, but may be more relevant as housing providers look for ways to make up for lost federal funding
  - A provider may look to offer services that it performs in the course of carrying on business (eg: property management, maintenance or cleaning services) to other entities, to earn a profit on those activities
  - May affect your charitable or non-profit status and the tax exemptions that come with it

Tax Issues

- Again, a possible solution is to incorporate a separate corporate subsidiary to carry on those activities, which will pay tax on that profit, but can thereafter distribute after tax profits to the housing provider (subject to restrictions of the Income Tax Act)
- In both cases, it is important that separate corporations be properly incorporated and operated.
- Administrative filings, tax filings and governance all have to be dealt with separately
- Care must be taken to ensure that if any space, staff or equipment are shared, then the cost sharing arrangements are both reasonable and properly documented
- Otherwise, the "for profit" business activity could be attributed to the housing provider and jeopardize its charitable or non-profit status

Legal pitfalls – Subsidies and the RTA

- *Residential Tenancies Act, 2006* governs landlord and tenant relationship
- Certain exemptions from RTA rules on rent increases
- RTA section 120:

  > No landlord may increase the rent charged to a tenant, or to an assignee during the term of their tenancy by more than the guideline

- Guideline set by regulation and changes annually; currently 1.5%

Legal pitfalls – Subsidies and the RTA

- A project will be exempt if (s. 7)
  - The housing unit is in a project developed under an affordable housing program with the federal, provincial or municipal government; **<u>and</u>**
  - The project continues to operate under:
    - an unexpired federal operating agreement
    - Part VII of the *Housing Services Act* (Provincial Reform Projects)
    - an “agreement” with a municipal body or service manager

Legal pitfalls – Subsidies and the RTA

- At EOA, subsidies may end but so may entitlement to exemption
- Housing providers possibly breaching RTA by raising rent
- Example

Market/lawful rent:	$1000
Subsidy:	$600
Subsidized rent payment:	$400

Legal pitfalls – Subsidies and the RTA

- What can you do?
  - Breakdown lawful rent v. subsidized rent
  - Give notice of lawful rent before EOA
  - Acknowledgment signed by the tenant that the market rent for the unit is the lawful rent owing
- **Note - this is new territory and these approaches have yet to be confirmed as acceptable by the LTB or courts**

Other Legal Considerations

- Employee relationships: changing responsibilities and duties
- Property use: residential v. commercial; opportunities for intensification
- Restrictions on sale and mortgage in governing documents and agreements

Employee Relationships

- Reducing costs, including staff costs, may be a way to make up for the funding that you will lose once you are out of OA
- Have to consider notice obligations to employees - to determine your notice obligations, consider the following:
  - Is your workplace unionized? If so, what does the Collective Bargaining Agreement say?
  - Do you have a written employment contract with your employees? Does it contain a provision setting out the amount of notice you have to give? Is that provision enforceable?

Employee Relationships

- Note that notice obligations can be expensive depending on the circumstances – is there any way to reduce your exposure?

  - Entering an employment contract now? – be sure to give the employee some benefit, or “consideration” for entering such a contract

  - Giving notice of termination now, on the understanding that the employee will be rehired thereafter? – be aware that courts have often considered this to be inappropriate if it is nothing more than an attempt to reduce the employee’s notice when and if their employment is really terminated

Property Use

- Does your property provide any opportunity to increase revenue by increasing the number of units on the property, or by adding commercial uses?
- In addition to other issues you may face, such as impacts on your tax status, contractual restrictions, or accommodating tenants during construction, you also need to consider whether your property has the proper designations for such changes
- You will need to consider zoning by-laws, official plan provisions and whether a severance is necessary or desirable

Restrictions on Selling or Mortgaging your Property

- Review your articles and bylaws - are there any restrictions on your ability to borrow funds or to sell any or all of the property
  - Some provisions may limit the amount that can be borrowed on the security of the property to a specific amount (requiring special approval from the members of any higher amount), or for a specific purpose (such as permitting borrowing on the security of the property for current operating expenses only)
- Limits on your ability to sell or mortgage the property may also exist due to contractual or legislative restrictions

Conclusions

- EOA is an event that brings challenges and opportunities
- There is no “cookie cutter” approach – what works for one housing provider may not work for another
- Start by considering your specific circumstances, such as:
  - Are you a charitable organization, affiliated with a religious organization, a non-profit organization, etc?
  - What is your stock – how many properties and units do you have? Are they coming out of OA at about the same time, or will you be operating for some time with some properties out of OA and others still under OA?

Conclusions

  - Are there any other contractual obligations that you have that would prevent you from taking certain steps?
  - Do your articles and bylaws place any restrictions on what you can do?
  - What is your relationship with your service manager? What are the needs of your community?
- Once you have thought about these issues, you will be in a better position to consider the options that may work for you, and will be better positioned to inform your legal and financial advisers so that you get helpful advice as economically as possible