UNIVERSITY PROPERTY DEVELOPMENT TRUSTS: HOW THEY WORK AND POINTS TO CONSIDER

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With university trusts being the development entity of choice for many universities across Canada, this Bulletin explores some high-level takeaways for universities looking to implement a trust, as well as developers and lenders navigating these projects. While this Bulletin focusses on Western Canada and specifically Alberta, in any event, the points outlined below should be considered in the specific context of each development and trust situation.

A typical configuration for university trust development involves establishing:

1. a university development trust (the "**Trust**")[1] with the university (the "**University**") in question as the beneficiary (or the beneficiary of an endowment fund or other charitable entity), structured internally to maximize tax benefits, plus a development corporation, as trustee of the Trust. This specialized management structure allows property development to occur independently from the University's activities, while still giving the University effective control and responsibility over the future development (see e.g. the governance structure for the University of Northern British Columbia Land Trust).
2. a long-term[2] master ground lease or an agreement to lease (in either case, the "**Head Lease**") over the lands to be developed (the "**Development Lands**"), with the University as head landlord and the Trust as tenant (and effectively the master developer), with rent prepaid by the Trust (possibly with the help of third-party financing). This Head Lease serves as the overarching document which guides development of the Development Lands and maintains an appropriate level of University oversight, often following a pre-planned community layout (see e.g. Michener Park by University of Alberta Properties Trust) which may be part of a larger community master plan (see e.g. UniverCity by the SFU Community Trust), with one or both of those planning documents contained in the Head Lease.
3. if necessary for preparation or refurbishment of the Development Lands, a sublease of the Development Lands back to the University (the "**University Sublease**") so that the Trust may obtain financing and the University can use some or all of the Development Lands during the creation of development plans and building infrastructure while maintaining the property tax-free status of the Development Lands, as applicable.

4. an acquisition agreement ("**Development Agreement**") akin to a purchase agreement between the Trust and the property developer (the "**Developer**"), containing the construction obligations (including sustainability requirements and design or architectural guidelines, for example).
5. a mechanism in the Development Agreement and the Head Lease, by which the Head Lease and, if necessary, the University Sublease, can be partially surrendered, allowing the Trust to enter into separate head leases (between the University and the Trust) and in turn subleases with Developers for portions of the Development Lands on terms similar to the Head Lease (the "**Developer Lease**"),[3] with rent typically paid up front by the Developer. Upon the eventual expiry of the Developer Lease term, the University then has the option to repurpose the lands under the Development Lease (or even the Master Head Lease).

Some of University-specific benefits of instituting this Trust and land lease structure are as follows:

- **Property diversification**: areas that are being underutilized or were deemed nonessential to the academic and research needs of the University (like the University of Alberta's West 240 parcel) can be revitalized as unique community and innovation spaces with new residential, retail or industrial development, that increases the University's property portfolio and diversifies its revenue streams. The Trust can then apply its master developer expertise in implementing the vision and mission of these developments, which may include a retail high street (possibly with mixed retail/residential properties, purpose-built rentals, condominiums or townhouses, research buildings, innovation districts, etc.).
- **Retail and office leasing**: through the various development options noted above, there is a significant opportunity for attracting high-profile and lucrative commercial tenants to the development, within walking distance of residential developments and working professionals, which if the Trust retains the retail component, can generate income for the Trust.
- **Flow-through income**: the prepaid rent from the Developer Lease and the University Sublease flows back to the University or its designated beneficiaries (thereby maximizing the return on investment for what is ultimately University lands).
- **Financeable**: the Trust can often obtain major bank debt financing for the operating cost of developing the Development Lands, without the University having to guarantee such financing or provide an equity investment (thereby remaining onside of provincial rules).
- **University not liable**: the structure allows for a degree of separation between the University and the legal and financial liabilities and responsibilities arising out of developing the Development Lands (which may include a separate board of directors and separate legal counsel between the University and the Trust).
- **Tax exemption and mitigation**: although the availability varies from jurisdiction to jurisdiction, this

structure offers a strong opportunity to (i) preserve a property tax exemption which may be available for the Development Lands during the term of the University Sublease (as remaining University-controlled); and (ii) mitigate land transfer taxes which would otherwise apply.
- **Charitable status**: this kind of development is intended to allow for the University to keep its charitable status.

Some points to consider in setting up this arrangement include:

- **Timing**: as shown in this graphic for UNBC, the time and consultation involved in initial formation of the Trust and drafting the corresponding planning documents should be factored in to planning discussions.
- **Legislative restrictions**: the applicable laws for the province in question will need to be analyzed, including issues such as the allowable term or approvals required for long-term leasing of lands originally owned by the University (i.e. the Development Lands), applicable land use/zoning regimes implemented by the municipality or under the Head Lease's (or University's standalone) pre-approved land use plan (e.g. from the SFU master plan), and taxation matters.
- **Experienced advisors**: as more particularly set out in a Development Agreement, the Trust will likely be responsible for municipal subdivision (to subdivide the project parcel out of the Development Lands, or create strata lots) and site servicing requirements, whereas the Developer must construct in accordance with the sustainability, construction and branding guidelines imposed by the Trust and construction plans approved by the Trust. The Developer will be responsible for obtaining the necessary development permits and project financing. All this to say that having legal counsel, lenders and other advisors with experience in university trust developments is highly recommended.
- **Current and future scope**: understanding the particular arrangements with the University and its ongoing relationship with the Trust are important from both a Trust and Developer perspective. The Trust may have or subsequently acquire one or more Development Lands parcels in its portfolio, which could be adjacent to the University campus (e.g. the proposed University of Northern British Columbia Land Trust) or spread across different portions of the city (e.g. the University of Alberta Properties Trust portfolio), with each parcel having varying objectives, development guidelines and land uses to consider. In some cases (such as the UBC Properties Trust) the Trust may extend to the University campus itself.
- **Conveyancing format**: for residential units, consideration will need to be given in the Development Agreement to the logistics of "selling off" units to third-party purchasers (as permitted by the Developer Lease), such as a form of tripartite agreement among the purchaser, the purchaser's lender and the University (as the head landlord). The Trust and the Developer will want to ensure their legal counsel are well-versed in conveyancing procedures and negotiating the requisite agreements.
- **Developer financing**: due to the nature of a university trust development being akin to a freehold

property owner and given the lengthy term of the Head Lease, banks should be comfortable providing project financing for a Developer.

- **Community association**: to facilitate delivery of amenities and services to residents of the Development Lands, the Trust can set up a community association among the Trust, the Developers and any condominium/strata corporations associated with particular projects. Dues are paid into the community association to help fund these amenities and services.

McMillan has a breadth of experience advising both university development trusts as well as developers and lenders involved in such developments, including work negotiating and structuring Head Lease arrangements, Developer Leases, Development Agreements and Trust deeds, completing project due diligence, and advising on corporate governance and retail leasing matters for these developments. Should you want to learn more about how McMillan can help in establishing or navigating the university trust landscape, please contact Craig Harkness at craig.harkness@mcmillan.ca or 403.215.2759, or Mitch Allison at mitchell.allison@mcmillan.ca or 403.531.8743.

[1] Depending on the circumstances, local laws and tax considerations, the University may instead elect to set up a hybrid trust-limited partnership structure, where the limited partnership and its general partner take on a role akin to the Trust as described in this Bulletin.
[2] Commonly for a 99-year term.
[3] A Developer Lease for a condominium project will understandably contain some variations from a Developer Lease for a non-condominium project and the Head Lease, but those are beyond the scope of this Bulletin.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.