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BARRISTERS + SOLICITORS

THE 4P AFFORDABLE HOUSING PARTNERSHIP

PUBLIC - NON-PROFIT - PRIVATE COLLABORATIONS IN AFFORDABLE HOUSING

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INTRODUCTION

Collaboration and partnerships have long been the watchwords in delivering affordable housing, but private developers working with Non-profit organizations ("**NPOs**") to let NPOs fill units in private rental buildings is relatively new. Over the last year, the Housing team at Robins has worked on the implementation of two models that do just that.

This paper will compare those two models. The first, and simpler of the two, is a referral model, in which the NPO refers prospective tenants to the landlord, and the second is a long-term head lease between the NPO and the landlord.

As this paper is being presented alongside representatives from organizations with which we worked on the head lease model, we have referred to the parties by name in our paper. We have now worked through two referral arrangements, but have chosen to refer to the parties in more general terms.

THE PUBLIC BACKDROP

Though the agreements we will discuss are between a private landlord and a NPO, the collaboration is made possible in all cases we have participated in so far by the active engagement and financial support of the City of Toronto (the "**City**") and other levels of government. Whether using the referral or head lease model, the underlying rental unit is made affordable through a public grant and secured by a charge on title (more on that below). As has been the practice for some time, the City entered into a "**Contribution Agreement**" with the private landlord (referral model) or the NPO (head lease model) pursuant to which it provided funding in exchange for which the units involved would be rented at affordable rates.

[1] With thanks to Amelia Briggs-Morris for her help and insights.

THE MODELS

The Referral Model

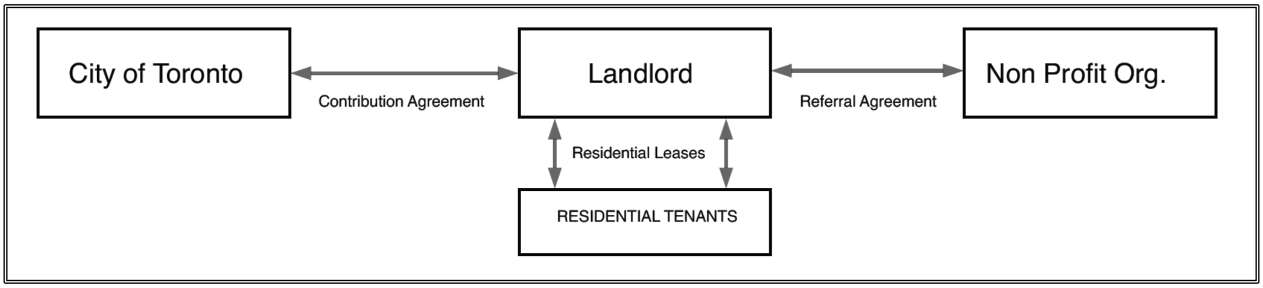

Figure 1: The Referral Model

The Referral Agreement is an agreement between a private Landlord and a NPO pursuant to which the NPO has a first right of referral to refer tenants for a given number of units in the landlord's building. The term of the agreement can range and is a negotiable term. The level of services to be provided to tenants referred by the NPO may also be negotiated. Essentially, the referral agreement requires the NPO to refer tenants to the landlord who is entitled to screen them in a manner consistent with its normal practice. If the landlord accepts a referral from the NPO, then the candidate signs a residential lease with the landlord and becomes a tenant. We note that in some cases, screening is simplified by having the NPO screen on behalf of the Landlord, particularly where the Landlord has satisfied itself with a given non-profit program.

One of the more challenging issues with a referral agreement is vacancy risk. What happens if the NPO is not able to make a referral in a timely way? This risk can be managed through the transfer of this risk contractually to the NPO, or by limiting the period within which the referral can happen and allowing the landlord to find a tenant directly if the NPO does not respond.

It is important to remember that, if the Referral Agreement were terminated, either as a result of a default or as a result of a termination right, the Contribution Agreement continues to bind the units, which must remain affordable.

The Head Lease Model

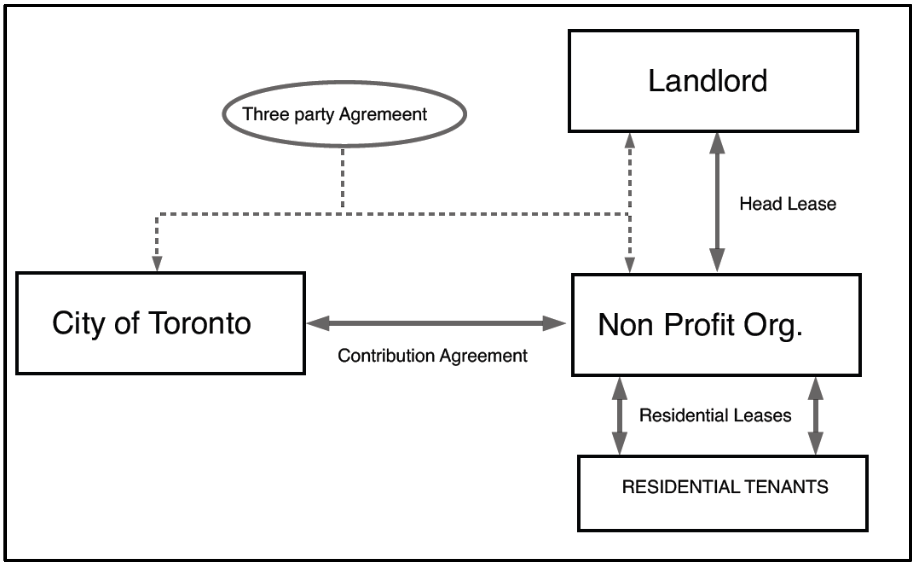

Figure 2: The Head Lease Model

25 Nicholas Street is a rental building owned by Sun Life and Daniels Corporation (collectively the "**Head Landlord"**) in Regent Park. Approximately 10% of the units will be affordable rental units. Rather than take referrals and remain the direct landlord, this Head Landlord leased units directly to Woodgreen Community Housing Inc. ("**Woodgreen**") as the tenant, for forty years. The designated affordable units will be occupied by participants and graduates of Woodgreen's "Homeward Bound" program. Woodgreen pays the Head Landlord monthly rent equal to the affordable rent it, in turn, is charging for the units. Woodgreen is responsible for selecting sub-tenants for the designated affordable units and there is no screening carried out by the Head Landlord.

Again, there is a Contribution Agreement providing initial capital funding to offset a portion of the Head Landlord's loss of rental revenue and to secure affordability. However, in this case, the agreement is between the City and Woodgreen rather than the landlord. Funds flow to the Head Landlord through the Head Lease itself.

Lastly, the City, the Head Landlord, and Woodgreen entered into a tri-party agreement to establish, amongst other things, the rights and remedies of the City, as a leasehold mortgagee, upon an occurrence of an event of default under the Head Lease or the Contribution Agreement. If Woodgreen defaults under either agreement, without curing the default, then the City may assign the Head Lease, on behalf of Woodgreen, to a new tenant, assume the Head Lease as tenant, or terminate the Head Lease.

<u>HEAD TO HEAD TO HEAD LEASE COMPARISON</u>

We have set out below a head to head comparison on several key factors showing the differences between these two models. However, some of the advantages of these models are best seen when comparing them on the same criteria to development of a standalone building by a NPO. Both models operate as turnkey models from the NPO's perspective: they do not take on any development or construction risk.

	SunLife/Daniels Head Lease	Referral Agreement	Standalone Non-Profit Building
Principal Agreements	-Head Lease (between owner and NPO) -Contribution Agreement (between NPO and City) -Tri-party Agreement (between owner, NPO and City)	-Referral Agreement (between owner and NPO) -Contribution Agreement (between owner and City)	- Contribution Agreement - All Agreements associated with development
Security for Contribution Agreement	Charge of Lease	Charge on Freehold	Charge on Freehold
Vacancy Risk	NPO	Owner or NPO as per agreement	NPO
Risk of Subsurface Conditions (like environmental)	Owner	Owner	NPO
Equity and Financing Risk	Owner	Owner	NPO
Risk of Construction Cost Over-runs	Owner	Owner	NPO
Time from public contribution to occupancy	Months	Years	Years
Control of Unit and Tenant Choice	NPO	Owner	NPO
Who is Signing the Residential Lease?	NPO and tenant	Owner and tenant	NPO and tenant
Who Maintains the Units?	Owner - Generally NPO – Specific damage	Owner	NPO
Who Maintains the Building	Owner	Owner	NPO
End of Term of Head Lease or Referral Agreement	As per agreement, provided that tenant rights are respected.	Obligations of owner and NPO to each other shall cease.	N/A

SOME IMPORTANT CONSIDERATIONS

Security and the Three Party Agreement

One of the critical differences between the two models is who has the contract with the City. This impacts how those obligations are secured. The matter is straight forward in the Referral Agreement context. The Landlord is responsible for delivering affordable units. If they default, the obligation is secured by a charge on title.

With a head lease, affordability is the obligation of the NPO. While there is a charge registered on title, it binds the NPO's leasehold interest. So if the lease is terminated for default, the leasehold interest is lost and with it the affordability obligations. While sitting tenants would retain rights, the City's ability to enforce is compromised. That is why the three party agreement is critical – it is the vehicle through which the City protects the public interest in this context.

Who is the Residential Landlord?

Easy answer for the referral agreement: The landlord is the landlord.

But the answer is not what most people expect for in the Head Lease context. While there is no court made law on the point, the best answer, based on decisions of the Landlord and Tenant Board is: Both! A private owner entering into a Head Lease would become the direct landlord if the Head Lease were to fail.

The roles of the parties with respect to rent and repairs should also be considered. With the Head Lease, rent is collected by the NPO from tenants and paid by the NPO to the Head Landlord. Repair issues are generally dealt with by the Head Landlord, but there is some overlap here as the NPO is involved in conflict resolution. Effectively, the Head Landlord retains normal life cycle repairs, while repairs arising from acts of the tenant are the NPOs responsibility.

Successful Tenancies

Here is one thing these models have in common, they both look to create mechanisms to promote successful tenancies. The Head Lease arrangement involves direct support from the NPO at all times, since that is the main point of contact for the tenant. The Referral Agreements we have worked with provide for a mechanism to bring the NPO back into the picture in the event of a dispute. While the landlords retain rights to end a tenancy, they are motivated to support tenants.