

BY-LAW NO. 3

A by-law relating generally to the conduct
of the affairs of

THE BLUE MOUNTAINS ATTAINABLE HOUSING CORPORATION

BE IT ENACTED and it is hereby enacted as a by-law of THE BLUE MOUNTAINS ATTAINABLE HOUSING CORPORATION (hereinafter called the "Corporation") as follows:

INTERPRETATION

1. **Interpretation.** In this by-law and all other by-laws of the Corporation, unless the context otherwise specifies or requires:
 - (a) “**Act**” means the *Corporations Act*, R.S.O. 1990, c. C.38 as from time to time amended and every statute that may be substituted therefor and, in the case of such substitution, any references in the by-laws of the Corporation to provisions of the Act shall be read as references to the substituted provisions therefor in the new statute or statutes;
 - (b) “**by-law**” means any by-law of the Corporation from time to time in force and effect;
 - (c) “**Public Directors**” means individuals that are not employees or members of the Council of the Town of Blue Mountains.
 - (d) “**Regulations**” means the Regulations made under the Act as from time to time amended and every regulation that may be substituted therefor and, in the case of such substitution, any references in the by-laws of the Corporation to provisions of the Regulations shall be read as references to the substituted provisions therefor in the new regulations;
 - (e) all terms which are contained in the by-laws of the Corporation and which are defined in the Act or the Regulations made thereunder shall have the meanings given to such terms in the Act or such Regulations; and
 - (f) words importing the singular number only shall include the plural and *vice versa* and words importing a specific gender shall include the other genders and the word “person” shall include bodies corporate, corporations, companies, partnerships, syndicates, trusts and any number of aggregate of persons; and
 - (g) the headings used in the by-laws are inserted for reference purposes only and are not to be considered or taken into account in construing the terms and provisions thereof or to be deemed in any way to clarify, modify or explain the effect of any such terms or provisions.

OBJECTS

2. **Objects.** The Objects of the Corporation are:

To augment the supply of healthy, affordable and sustainable housing units in The Town of The Blue Mountains which are affordable to a larger portion of the population.

HEAD OFFICE

3. **Head office.** The head office of the Corporation shall be in the Town of The Blue Mountains, in the Province of Ontario (subject to change by special resolution) and at such place within the town in Ontario where the head office is from time to time situate as the directors of the Corporation may from time to time by resolution fix.

SEAL

4. **Seal.** The Corporation does not have and will not be required to use a seal.

DIRECTORS

5. **Duties and number.** The Board of Directors shall consist of nine (9) directors, two (2) of whom shall be any one of the Mayor, Deputy Mayor or any Councillor of The Town of The Blue Mountains, and the remaining seven (7) shall be Public Directors. The affairs of the Corporation shall be managed by the Board of Directors who may be known and referred to as directors, trustees or governors and who may exercise all such powers and do all such acts and things as may be exercised or done by the Corporation that are not by the by-laws or any special resolution of the Corporation or by statute expressly directed or required to be done in some other manner.
6. **Skills-Based Board.** The Corporation shall strive to have a Board of Directors which has a collective skillset that includes knowledge of:
- The housing sector;
 - Planning services, including knowledge of requirements and legislation in the multi-residential sector;
 - Development planning, including asset management planning;
 - Facilities management;
 - Legal expertise;
 - Financial expertise; and
 - Knowledge of the community of The Town of Blue Mountains.
7. **Borrowing:** Without limiting the borrowing powers of the Corporation as set forth in the Act, the Board of Directors may from time to time with authorization of the members:
- a. borrow money upon the credit of the Corporation;

- b. issue, sell or pledge securities of the Corporation; or
- c. charge, mortgage, hypothecate or pledge all of any of the property of the Corporation, including book debts and unpaid calls, rights, powers, franchises and undertaking, to secure any securities or any money borrowed, or other debt, or any other obligation or liability of the Corporation.

The word “securities” as used in this paragraph means bonds, debentures, or other like liabilities of the Corporation whether constituting a charge on the property of the Corporation or not.

8. **Delegation:** The Board of Directors may, from time to time, by resolution delegate any or all of the powers referred to in Article 7 of this by-law to a director or one or more officers of the Corporation.
9. **Qualifications.** Every director shall be eighteen (18) or more years of age and, subject to section 286 of the Act, shall be a member of the Corporation or shall become a member of the Corporation within ten (10) days after election or appointment as a director.
10. **Term of office and vacancies.** The directors' term of office (subject to the provisions, if any, of the letters patent and any supplementary letters patent of the Corporation and of the by-laws) shall be from the date of the meeting at which they are elected or appointed until the annual meeting next following or until their successors are elected or appointed. So long as there is a quorum of directors in office, any vacancy occurring in the Board of Directors may be filled for the remainder of the term by the directors then in office, if they shall see fit to do so; otherwise such vacancy shall be filled at the next annual meeting of the members at which the directors for the ensuing year are elected, but if there is not a quorum of directors, the remaining directors shall forthwith call a meeting of the members to fill the vacancy, and, in default or if there are no directors then in office, the meeting may be called by any member. If the number of directors is increased between the terms, a vacancy or vacancies, to the number of authorized increase shall thereby be deemed to have occurred, which may be filled in the manner above provided.
11. **Vacation of office.** The office of a director shall be vacated: (a) if he does not within ten (10) days after his election or appointment as a director become a member, or if he ceases to be a member of the Corporation; or (b) if he becomes bankrupt or suspends payment of his debts generally or compounds with his creditors or makes an authorized assignment or is declared insolvent; or (c) if he is found to be a mentally incompetent person or becomes of unsound mind; or (d) if by notice in writing to the Corporation he resigns his office which resignation shall be effective at the time it is received by the Corporation or at the time specified in the notice, whichever is later; or (e) if he dies; or (f) if he is removed from office by the members in accordance with paragraph 9.
12. **Election and removal.** Directors shall be elected yearly by the members in general meeting on a show of hands unless a poll is demanded and if a poll is demanded such election shall be by ballot. The whole Board of Directors shall retire at the general

meeting at which the yearly election of directors is to be made but, subject to the provisions of this by-law, shall be eligible for re-election; provided always that the members of the Corporation may, by resolution passed by at least two-thirds (2/3) of the votes cast at a general meeting of which notice specifying the intention to pass such resolution has been given, remove any director before the expiration of his term of office and may, by a majority of the votes cast at that meeting, elect any person in his stead for the remainder of his term.

MEETINGS OF DIRECTORS

13. ***Place of meeting.*** Meetings of the Board of Directors may be held either at the head office or at any place within or outside Ontario.
14. ***Notice.*** A meeting of the Board of Directors may be convened by the President, a Vice-President who is a director or any two directors at any time and the Secretary, when directed or authorized by any of such officers or any two directors, shall convene a meeting of directors. The notice of any meeting convened as aforesaid need not specify the purpose of or the business to be transacted at the meeting. Notice of any such meeting shall be made in writing, sent via regular mail, facsimile or other electronic communication means, including but not limited to e-mail, stating the day, hour and place of meeting and the general nature of the business to be transacted shall be given by serving such notice on each director not less than ten (10) days (exclusive of the day of mailing and of the day for which notice is given) before the date of the meeting; provided always that a director may in any manner and at any time waive notice of a meeting of directors and attendance of a director at a meeting of directors shall constitute a waiver of notice of the meeting except where a director attends a meeting for the express purpose of objecting to the transaction of any business; provided further that meetings of directors may be held at any time without notice if all the directors are present (except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called) or if all of the absent directors waive notice before or after the date of such meetings.

If the first meeting of the Board of Directors following the election of directors by the members is held immediately thereafter, then for such meeting or for a meeting of the Board of Directors at which a director is appointed to fill a vacancy in the Board, no notice shall be necessary to the newly elected or appointed directors or director in order to legally constitute the meeting, provided that a quorum of the directors is present.

15. ***Regular meetings.*** The Board of Directors may appoint a day or days in any month or months for regular meetings of the Board of Directors at a place or hour to be named by the Board of Directors and a copy of any resolution of the Board of Directors fixing the place and time of regular meetings of the Board of Directors shall be sent to each director forthwith after being passed, but no further notice shall be required for any such regular meetings.
16. ***Quorum.*** The number of directors which shall form a quorum for the transaction of business shall be that which is set out in the letters patent, supplementary letters

patent or a special resolution of the Corporation. Notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of directors.

17. ***Voting.*** Questions arising at any meeting of directors shall be decided by a majority of votes.

REMUNERATION OF DIRECTORS

18. ***Remuneration of directors.*** The directors shall serve without remuneration and no director shall directly or indirectly receive any profit from his position as such; provided that a director may be reimbursed for reasonable expenses incurred by him in the performance of his duties.

SUBMISSION OF CONTRACTS OR TRANSACTIONS TO MEMBERS FOR APPROVAL

19. ***Submission of contracts or transactions to members for approval.*** The Board of Directors in its discretion may submit any contract, act or transaction for approval or ratification at any annual meeting of the members or at any general meeting of the members called for the purpose of considering the same and, subject to the provisions of section 71 of the Act, any such contract, act or transaction that shall be approved or ratified or confirmed by a resolution passed by a majority of the votes cast at any such meeting (unless any different or additional requirement is imposed by the Act or by the Corporation's letters patent or supplementary letters patent or any other by-law) shall be as valid and as binding upon the Corporation and upon all the members as though it had been approved, ratified or confirmed by every member of the Corporation.

FOR THE PROTECTION OF DIRECTORS AND OFFICERS

20. ***Conflict of interest.*** In supplement of and not by way of limitation upon any rights conferred upon directors by section 71 of the Act, it is declared that no director shall be disqualified by his office from, or vacate his office by reason of, holding any office or place of profit under the Corporation or under any corporation in which the Corporation shall be a shareholder or by reason of being otherwise in any way directly or indirectly interested or contracting with the Corporation either as vendor, purchaser or otherwise or being concerned in any contract or arrangement made or proposed to be entered into with the Corporation in which he is in any way directly or indirectly interested either as vendor, purchaser or otherwise nor shall any director be liable to account to the Corporation or any of its members or creditors for any profit arising from any such office or place of profit; and, subject to the provisions of section 71 of the Act, no contract or arrangement entered into by or on behalf of the Corporation in which any director shall be in any way directly or indirectly interested shall be avoided or voidable and no director shall be liable to account to the Corporation or any of its members or creditors for any profit realized by or from any such contract or arrangement by reason of any fiduciary relationship. A director who is in any way directly or indirectly interested in a proposed contract with the Corporation shall make the disclosure required by the Act. Except as provided by the Act, no such director shall vote on any resolution to approve such contract.

21. ***For the protection of directors and officers.*** Except as otherwise provided in the Act, no director or officer for the time being of the Corporation shall be liable for the acts, receipts, neglects or defaults of any other director or officer or employee or for joining in any receipt or act for conformity or for any loss, damage or expense happening to the Corporation through the insufficiency or deficiency of title to any property acquired by the Corporation or for or on behalf of the Corporation or for the insufficiency or deficiency of any security in or upon which any of the moneys of or belonging to the Corporation shall be placed out or invested or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person including any person with whom or which any moneys, securities or effects shall be lodged or deposited or for any loss, conversion, misapplication or misappropriation of or any damage resulting from any dealings with any moneys, securities or other assets belonging to the Corporation or for any other loss, damage or misfortune whatever which may happen in the execution of the duties of his respective office or trust or in relation thereto unless the same shall happen by or through his own wilful neglect or default. The directors for the time being of the Corporation shall not be under any duty or responsibility in respect of any contract, act or transaction whether or not made, done or entered into in the name or on behalf of the Corporation, except such as shall have been submitted to and authorized or approved by the Board of Directors. If any director or officer of the Corporation shall be employed by or shall perform services for the Corporation otherwise than as a director or officer or shall have an interest in a person that is employed by or performs services for the Corporation, the fact of his being a director or officer of the Corporation shall not disentitle such director or officer or such person, as the case may be, from receiving proper remuneration for such services.

INDEMNITIES TO DIRECTORS AND OTHERS

22. ***Indemnities to directors.*** Every director of the Corporation, heirs, executors and administrators, and *estate* and effects, respectively, may, with the consent of the Corporation, given at any meeting of the members, from time to time and at all times, be indemnified and saved harmless out of the funds of the Corporation, from and against.

- (a) all costs, charges and expenses whatsoever that he sustains or incurs in or about any action, suit or proceeding is brought, commenced or prosecuted against him for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him, in or about the execution of the duties of his office; and
- (b) all other costs, charges and expenses which he sustains or incurs in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default.

The Corporation shall also indemnify any director in such other circumstances as the Act or law permits or requires. Nothing in this by-law shall limit the right of any person entitled to indemnity to claim indemnity apart from the provisions of this by-law to the extent permitted by the Act or law.

OFFICERS

23. **Appointment.** The Board of Directors shall annually or oftener as may be required elect a President and shall appoint a Secretary and if deemed advisable may appoint annually or oftener as may be required one or more Vice-President and a Treasurer. Notwithstanding the foregoing, each incumbent officer shall continue in office until the earlier of (i) his resignation, (ii) the appointment of his successor, (iii) his ceasing to be a director or member of the Corporation if such is a necessary qualification of his appointment, and (iv) the meeting at which the directors annually appoint the officers of the Corporation. A director may be appointed to any office of the Corporation but, subject to section 291 of the Act, none of the said officers except the President need be a director or member of the Corporation. Two or more of the aforesaid offices may be held by the same person. In case and whenever the same person holds the offices of Secretary and Treasurer he may but need not be known as the Secretary-Treasurer. The Board of Directors may from time to time appoint such other officers and agents as it shall deem necessary who shall have such authority and shall perform such duties as may from time to time be prescribed by the Board of Directors.
24. **Remuneration and removal of officers.** The Officers shall serve as such without remuneration and no officer shall directly or indirectly receive any profit from his/her position as such, provided that officers may be paid reasonable expenses incurred by them in the performance of their duties. All officers, in the absence of agreement to the contrary, shall be subject to removal by resolution of the Board of Directors at any time, with or without cause.
25. **Powers and duties.** All officers shall sign such contracts, documents or instruments in writing as require their respective signatures and shall respectively have and perform all powers and duties incident to their respective offices and such other powers and duties respectively as may from time to time be assigned to them by the Board of Directors; subject, however, to any special resolution of the Corporation.
26. **President.** The President shall be the chief executive officer of the Corporation unless otherwise determined by special resolution of the Corporation or resolution of the Board of Directors. He shall, subject to any special resolution of the Corporation, when present, preside at all meetings of the Board of Directors, and members of the Corporation.
27. **Vice-President.** The Vice-President or, if more than one, the Vice-Presidents in order of seniority, shall be vested with all the powers and shall perform all the duties of the President in the absence or inability or refusal to act of the President.
28. **Secretary.** The Secretary shall give or cause to be given notices for all meetings of the Board of Directors and members when directed to do so and have charge of the minute books of the Corporation and of the documents and registers referred to in section 300 of the Act.
29. **Treasurer.** Subject to the provisions of any resolution of the Board of Directors, the Treasurer shall have the care and custody of all the funds and securities of the Corporation and shall deposit the same in the name of the Corporation in such bank or banks or with such depository or depositories as the Board of Directors may direct. He shall keep or cause to be kept the books of account and accounting records

referred to in section 302 of the Act. He may be required to give such bond for the faithful performance of his duties as the Board of Directors in their uncontrolled discretion may require but no director shall be liable for failure to require any bond or for the insufficiency of any bond or for any loss by reason of the failure of the Corporation to receive any indemnity thereby provided.

30. ***Vacancies.*** If the office of any officer of the Corporation shall be or become vacant by reason of death, resignation, disqualification or otherwise, the directors shall, in the case of the President, elect a person to fill such vacancy and in the case of the Secretary appoint a person to fill such vacancy, and may, in the case of any other office, appoint a person to fill such vacancy.

MEMBERS

31. ***Class of Membership.*** There shall be two (2) classes of membership: Municipal Member and Members (collectively referred to as “members”).

I. MUNICIPAL MEMBER

- a. There shall be only one Municipal Member and it shall be The Town of The Blue Mountains, and the Town of The Blue Mountains shall delegate a representative to attend the meetings of the members or provide a proxy as per Article 39 of this by-law.
- b. The Municipal Member shall have voting rights and shall be entitled to forty-five (45) votes at all meetings of members.

II. MEMBERS

- a. All Public Directors shall be or become Members within 10 days of their appointment as a Director.
- b. Members shall have voting rights and shall be entitled to one vote at all meetings of members.
- c. Members shall consist of anyone whose application for admission as a member has received the approval of the Board of Directors of the Corporation.
- d. There shall be only seven (7) Members.
- e. Members shall cease to be Members upon resignation from the Board of Directors.

32. ***Resignation.*** Members may resign by resignation in writing which shall be effective from acceptance thereof by the Board of Directors.

33. ***Termination of Membership.*** The interest of a member in the Corporation is not transferable and lapses and ceases to exist upon death or dissolution or when his period of membership expires or when he ceases to be a member by resignation or otherwise in accordance with the by-laws; provided always that the members of the Corporation may, by resolution passed by at least two-thirds (2/3) of the votes cast at

a general meeting of which notice specifying the intention to pass such resolution has been given, terminate the membership of any member of the Corporation.

DUES

34. There shall be no membership fees or dues unless otherwise directed by the Board of Directors.

MEMBERS' MEETINGS

35. **Annual Meeting.** Subject to compliance with section 293 of the Act, the annual meeting of the members shall be held at any place within Ontario on such day in each year and at such time as the directors may by resolution determine or, in the absence of such determination, at the place where the head office of the Corporation is located.
36. **General Meetings.** Other meetings of the members shall be convened at any date and time and at any place within Ontario, by order of the President made on his own prerogative or upon his receipt of one of the following:
- (a) a resolution of the Board of Directors; or
 - (b) a written request signed by Members representing not less than ten per cent (10%) of the votes eligible to be voted at such a meeting.
37. **Notice.** A printed, written or typewritten notice, sent via regular mail, facsimile or other electronic communication means, including but not limited to e-mail, stating the day, hour and place of meeting and the general nature of the business to be transacted shall be given by serving such notice on each member entitled to notice of such meeting not less than ten (10) days (exclusive of the day of mailing and of the day for which notice is given) before the date of the meeting.
38. **Votes.** Every question submitted to any meeting of members shall be decided in the first instance by a show of hands.
39. **Proxies.** Votes at meetings of the members may be given either personally or by proxy. At every meeting at which he is entitled to vote:
- a. Every Member and/or person appointed by proxy to represent one or more Members and/or individual so authorized to represent a Member who is present in person shall have one (1) vote on a show of hands. Upon a poll and subject to the provisions, if any, of the letters patent or supplementary letters patent of the Corporation, every Member who is present in person or represented by an individual so authorized shall have one (1) vote and every person appointed by proxy shall have one (1) vote for each Member who is represented by such proxyholder.
 - b. The Municipal Member and/or person appointed by proxy to represent the Municipal Member and/or individual so authorized to represent the Municipal Member who is present in person shall have forty-five (45)

votes on a show of hands. Upon a poll and subject to the provisions, if any, of the letters patent or supplementary letters patent of the Corporation, the Municipal Member who is represented by an individual so authorized shall have forty-five (45) votes and every person appointed by proxy shall have forty-five (45) votes for the Municipal Member who is represented by such proxyholder.

A proxy shall be executed by the member or his attorney authorized in writing.

A person appointed by proxy need not be a member.

Subject to the provisions of the Act and the Regulations, a proxy may be in the following form:

The undersigned Member/Municipal Member of TBM Attainable Housing Corporation (the "Corporation") hereby appoints _____ of _____ or failing him, _____ of _____ as the proxy of the undersigned to attend and act at the _____ meeting of the members of the said Corporation to be held on the ____ day of _____, 20__, and at any adjournment or adjournments thereof in the same manner, to the same extent and with the same power as if the undersigned were present at the said meeting or such adjournment or adjournment thereof.

DATED the _____ day of _____, 20__.

Signature of Member/Municipal Member

Name of Member/Municipal Member

40. **Quorum.** A quorum at any meeting of the members (unless a greater number of members and/or *proxies* are required to be present by the Act or by the Corporation's letters patent or by any supplementary letters patent or any other by-law) shall be a minimum of two persons and/or proxies representing thirty (30) votes, entitled to be voted at the meeting. No business shall be transacted at any meeting unless the requisite quorum be present at the time of the transaction of such business. If a quorum is not present at the time appointed for a meeting of members or within such reasonable time thereafter as the members present may determine, the persons present and entitled to vote may adjourn the meeting to a fixed time and place but may not transact any other business.

COMMITTEES

41. **Committees.** As necessary, at their sole discretion, the Board of Directors may encourage members of the Corporation and the community at large to volunteer for standing committees and/or *ad hoc* committees of the Corporation. Each Committee shall have at least one director of the Board as a Committee member.

42. ***Committee Duties and Powers.*** The duties and powers of each Committee shall be as determined from time to time by the Board of Directors. No Committee shall have the power to act for or on behalf of the Corporation or otherwise commit or bind the Corporation to any course of action. A Committee shall have only those powers as set out by the Board from time to time.
43. ***Committee Member Removal.*** Any committee member may be removed by resolution of the Board of Directors.

CHEQUES, DRAFTS, NOTES, ETC.

44. ***Cheques, drafts, notes, etc.*** All cheques, drafts or orders for the payment of money and all notes and acceptances and bills of exchange shall be signed by such officer or officers or person or persons, whether or not officers of the Corporation and in such manner as the Board of Directors may from time to time designate by resolution.

EXECUTION OF INSTRUMENTS

45. ***Execution of instruments.*** Subject to any special resolution of the Corporation, contracts, documents or instruments in writing requiring the signature of the Corporation may be signed by:
- (a) any one of the President or a Vice-President together with any one of the Secretary or the Treasurer;
 - (b) any two directors; or
 - (c) any one of the aforementioned officers together with any one director;

and all contracts, documents and instruments in writing so signed shall be binding upon the Corporation without any further authorization or formality. The Board of Directors shall have power from time to time by resolution to appoint any officer or officers or any person or persons on behalf of the Corporation either to sign contracts, documents and instruments in writing generally or to sign specific contracts, documents or instruments in writing.

The term “contracts, documents or instruments in writing” as used in this by-law shall include deeds, mortgages, hypothecs, charges, conveyances, transfers and assignments of property real or personal, immovable or movable, agreements, releases, receipts and discharges for the payment of money or other obligations, conveyances, transfers and assignments of shares, share warrants, stocks, bonds, debentures or other securities and all paper writings.

ON DISSOLUTION

46. ***On dissolution.*** Pursuant to the Letters Patent of the Corporation, upon the Dissolution of the Corporation and after the payments of all debts and liabilities, the Corporation’s remaining property shall be distributed or disposed of to The Town of The Blue Mountains.

FINANCIAL YEAR

47. **Financial year.** The financial year of the Corporation shall terminate on the 31st day of December in each year or on such other date as the directors may from time to time by resolution determine.

AMENDMENTS OF BY-LAWS

48. **By-law 1 and By-law 2**

By-law 1 and By-law 2 of the Corporation are repealed.

49. **Amendments of By-Laws.** The By-Laws of the Corporation may be amended by a 2/3 vote of the membership present and voting at a General Meeting of the Corporation.

Proposed amendments to the By-Laws of the Corporation shall be submitted to the Board of Directors no later than 30 days prior to the General Meeting. Copies of the proposed amendments shall be sent to all the Members of the Corporation no less than ten (10) days prior to the General Meeting.

ENACTED the day of , 2021 .

robapp\6518666.1



TO: Blue Mountains Attainable Housing Corporation
FROM: Robins Appleby LLP
SUBJECT: Governance in Housing Corporations
DATE: March 31, 2021
FILE NO.: 2000775

Blue Mountains Attainable Housing Corporation (“**BMAHC**”) is a Municipal Services Corporation, incorporated by the Town of The Blue Mountains (the “**Town**”). You have tasked us with canvassing the drivers for the creation of a housing subsidiary and review the governance structure in place for BMAHC outlining the legal relationship with the Town and the benefits it serves.

This memorandum outlines some of the factors that municipalities consider in establishing independent housing corporations, especially as it relates to managing development projects similar to the Gateway project contemplated by the Town and BMAHC.

RECOMMENDATIONS

Based on our review, we make the following recommendations, which are discussed in further detail in the memorandum:

1. Amend the Letters Patent and the By-laws of BMAHC to contemplate rental housing;
2. Update By-law 1 to reflect BMAHC having nine (9) directors instead of seven (7);
3. Review the requirement of being a member as a result of being a director of BMAHC;
4. The Gateway Project should be managed through BMAHC based on the advantages outlined in this memorandum, including liability protection for the Town, and lowering of risk resulting from an independent skill-based board of directors and holding its interest through BMAHC; and
5. Re-evaluate the governance structure to minimize risk of perception that the two entities are not independent, including potential revisions of the by-laws and the Memorandum of Understanding.



CURRENT GOVERNANCE STRUCTURE

Incorporation

Town Council authorized the creation of BMAHC as a Municipal Services Corporation in its March 25, 2013 Council meeting.¹ The Letters Patent to incorporate BMAHC under the *Corporations Act* (Ontario)² were approved by the Ministry of Government Services on September 4, 2013. The Letters Patent provides that the objects of the corporation are to “augment the supply of healthy, affordable and sustainable ownership housing units in the Town of The Blue Mountains which are affordable to a larger portion of the population.”³ It is noted that the Letters Patent specifically contemplates ownership and does not address rental units. It is recommended that the Letters Patent be amended to allow for rental housing to address the future needs of the organization.

Municipal Services Corporation

As mentioned above, BMAHC is a Municipal Services Corporation. Section 203 of the *Municipal Act*⁴ gives municipalities the power to establish subsidiary corporations referred to as Municipal Services Corporations, which include non-share capital corporations.

Generally, a Municipal Services Corporation can only be established to provide a system, service or thing that the municipality itself could provide, however, section 9 of *Ontario Regulation 599/06* (“**O. Reg. 599/06**”) specifies a list of permissible economic development services. These services include, amongst other things, the acquisition, development and disposal of sites in the municipality for residential, industrial, commercial and institutional uses and the provision of residential housing.

The activities of a Municipal Service Corporation are restricted by Section 18 of O. Reg. 599/06. A key restriction for BMAHC is that Subsection 18(1) of O. Reg. 599/06 provides that the Municipal Services Corporation cannot incorporate another corporation. Thus, BMAHC is restricted from creating subsidiaries, which means that BMAHC will not be able to shield itself from liability from development activities by creating subsidiaries. The Town, though, is shielded from liability via BMAHC, as further discussed later in this memorandum.

By-law 1

By-law 1 provides the governance framework for BMAHC. This By-law also includes the same objects of the corporation as the Letters Patent. Thus, this By-law should also be updated to allow for rental housing.

¹ Town of the Blue Mountains Staff Report CAO.13.01, *Creating the Non-Profit TBM Housing Corporation*, dated March 25, 2015.

² *Corporations Act*, R.S.O. 1990, c. C.38.

³ See Section 4 of Letters Patent for Ontario Corporation Number 1899457, The Blue Mountains Attainable Housing Corporation, dated September 4, 2013.

⁴ *Municipal Act, 2001*, S.O. 2001, c. 25.



By-law 1 also provides the rules related to the board of directors and members. Specifically, it is stated that:

- The Board of Directors consist of seven (7) directors, two of whom shall be any of the Mayor, Deputy Mayor or any Councillor of the Town;⁵ and
- There are two classes of membership:
 - Municipal Member, being the Town, who shall be entitled to forty-five (45) votes at members' meetings; and
 - Members, being the directors of the board, and each having a single vote at members' meetings, with a maximum of twenty (20) such members ("**Board Members**").⁶

It is noted that by-law 1 specifically addresses the need for political appointments to the board, but is silent with respect to non-political appointments. This issue is discussed further later in this memorandum. Furthermore, it is our understanding that, through a meeting of the members, dated October 19, 2017, the composition of the board was changed from seven (7) directors to nine (9) directors. This change is not reflected in the By-law 1 and the document should be updated to reflect this change.

By-law 1 provides for two classes of membership, with the Town having a super majority (i.e. more than two-thirds) of voting rights. Thus, the Town has effective control over BMAHC as it can, amongst various other rights, dictate the composition of the board.

The twenty Board Members spots are reserved for those that are appointed as directors of the corporation, which also include the politicians on the board. The only requirement outlined to qualify as a Board Member is what is prescribed under the *Corporations Act*, i.e. the individual must be 18 years of age or older and must not be an undischarged bankrupt.⁷ It is recommended that this definition be reviewed to determine if there are other requirements (e.g. living in Grey County) that should be included.

By-law 2

A second By-law (By-law 2) was enacted on December 12, 2013 that provides the board of directors with borrowing powers.

Memorandum of Understanding

There is also a Memorandum of Understanding between BMAHC and the Town⁸ (the "**MOU**") that provides for certain services and support (e.g. human resources, IT, financial services, etc.) from the Town to BMAHC.

⁵ See article 5 of By-law 1 of The Blue Mountains Attainable Housing Corporation ("**By-law 1**").

⁶ See article 28 of By-law 1.

⁷ See section 286 of the *Corporations Act*, R.S.O. 1990, c. C.38.

⁸ Memorandum of Understanding between the Blue Mountains Attainable Housing Corporation and the Corporation of the Town of Blue Mountains, dated October 19, 2020 (the "**MOU**").



The MOU also contains language in multiple sections⁹ to acknowledge that the Town and BMAHC are separate and independent entities. Specifically, with respect to the BMAHC, paragraph 5(a) of the MOU provides that:

*The BMAHC is a separate and independent corporate entity of the Town with independent corporate status from the Town and has been established by the Town to provide attainable housing and related services in the Town.*¹⁰

Although this statement is clear in its intent to treat the entities as separate, there are aspects of the MOU that would suggest that the entities are very intertwined. As examples:

- BMAHC is required to present an annual statement of activities and budget to Council each year;¹¹
- BMAHC's Executive Director must work in co-ordination with the Town's budget planning process to assist the Town in providing a consolidated budget to Council;¹²
- BMAHC is to provide yearly audited financial statement to the Town;¹³
- BMAHC must follow some of the Town's policies (e.g. POL IT Infrastructure Acceptable Use Policy); and
- BMAHC is to jointly defend the Town's decision in support of an attainable housing proposal at any future LPAT hearings.¹⁴

It should be noted that Memorandums of Understanding of this type are difficult to enforce if one party decides to not be bound by it as neither side is likely to take disputes to Court. The MOU, though, does contain a dispute resolution mechanism where the disputes are resolved through a committee consisting of two members of Council, two Directors of BMAHC who are not also Councillors, the Chief Administrative Officer of the Town and the Executive Director of BMAHC.¹⁵ This committee is to determine the process to resolve the dispute, which may include third-party mediation. This type of dispute resolution mechanism does contemplate a collaborate approach of discussion amongst equals, but there is no mechanism outlined in the MOU on what happens if the committee is unable to decide on the process to resolve the dispute or if the process is unsuccessful. It would seem that the main option at that point would be to terminate the agreement, which either party can do by providing three months' notice.¹⁶

⁹ For example, see sections 5(a) and 5(b) of the MOU.

¹⁰ Section 5(a) of the MOU.

¹¹ See section 5(d) of the MOU.

¹² See Schedule "B" of the MOU.

¹³ See Schedule "B" of the MOU.

¹⁴ See Schedule "C" of the MOU.

¹⁵ See section 19 of the MOU.

¹⁶ See section 20 of the MOU.



MANAGING DEVELOPMENT RISK

Development risks

In order to assess the merits of an arm's length corporation, it's worth setting out the kinds of risks any public or quasi public body faces when undertaking development:

- Cost over-runs – Cost over-runs can be generated in several ways. The most frequent being unexpected increases in input costs, delays, and design related delays.
- Procurement – We note three distinct procurement risks.
 - First, there is a risk with contracting improperly – a reason that a municipality might prefer to retain control - and which must be clear regardless of who is controlling purchasing.
 - Second, There is a risk of contracting with vendors who are bad actors. The application of standard price based procurement practice in development is dangerous given the extent of the unknowns and reliance on good judgement.
 - Third, there is the risk of being over-prescriptive in procurement and disincentiving participation.
- Design Risks – Flaws in the design can delay projects and add costs to rectify. Being directly involved in the design process can alleviate this risk.
- Utility to the end user – A project can be great on paper, but it is useless unless it meets the needs of the end user. Continuous engagement with the end user is necessary to mitigate this risk.
- Tortuous Liability -- Lawsuits may arise at any point during the project, thus subjecting the owner to risk of damage awards. Corporate structures are created to shield the Owner from such liability.
- Political Risk – Development requires a decision-making timetable that is driven by the circumstances of construction. A stand-alone entity can be made to be more flexible and responsive than a political structure. Further, everyone is in favour of affordable housing until it is too big, too near, too noisy, too dusty and, as always, generating too much traffic. As political pressure mounts, a political “board” may be hard pressed to champion a development.

Different Municipalities, all sharing the goal of building housing, have elected to manage these risks differently. The creation of a subsidiary is a powerful way of addressing these risks.

Control

Before addressing the factors favouring an independent housing subsidiary, it is important to acknowledge why municipalities may prefer to have housing managed and operated internally. The main advantage of direct management of the housing stock versus managing through a arms-length corporation is the control that the municipality can have over the operations of affordable or attainable housing. Without a intermediary board, the municipality is in direct control of the



decision-making process. Such a structure has many risks, especially when dealing with development projects and the municipality retains all liability.

RATIONALE FOR A HOUSING CORPORATION

1. Liability Protection

In general, the use of a subsidiary allocates development risk to the subsidiary and therefore protects the Town's core assets should something go wrong during the development process.

In the event that development occurs under the Town's umbrella, its core assets are exposed. While we would expect that loans would be secured against development sites only, the borrower would still be the Town. A lender – or any other claimant – would be able to look to the land and the covenant of the Town to satisfy its debt or make claims.

In the event that development occurs under the subsidiary umbrella, the Town's assets would not be directly exposed. Notwithstanding the foregoing, there may be circumstances, such as financing, in which the Town may have to directly guarantee the obligations of the subsidiary, thereby exposing the Town to that specific liability of the subsidiary. However, the extent of the guarantee can be negotiated and limited.

Following the Private Sector

It is normal course for private development companies to use subsidiary corporations to isolate themselves from development risk. In the event a project becomes unviable, the project can be abandoned and sold by its creditors, with the developer's loss generally limited to its investment in that project (absent any other independent covenants, like a guarantee). Should something go wrong, it would be a fair question to ask why the Town had not used this mechanism.

The answer we hear most frequently to this question is that the municipality should stand behind its developments. We recognize that due to local politics and optics, it could be difficult for the Town to abandon the subsidiary were it to incur obligations that it cannot meet. However, this does not reduce the benefit of the subsidiary as it allows the Town more options in the event of a serious problem. Without the protection of the limited liability of a separate entity, creditors can impose enforcement processes or coercive terms. With the protection of limited liability, the Town is in a stronger position. The Town would be forced to defend litigation or other claims if the Town's assets are exposed. In contrast, because the subsidiary would be a separate corporate entity and the Town's liability is limited, the Town may adopt a different strategy for disputed claims because its assets are not exposed.

Maintaining the Corporate Veil

It should also be noted that to maintain liability protection via creation of a subsidiary, it is important to ensure that the corporate veil is not pierced. Courts have concluded that piercing of corporate veil is very difficult to do as “[t]ypically, the corporate veil is pierced when a company is



incorporated for an illegal, fraudulent or improper use.”¹⁷ Having said that, where there is lack of independence in decision-making in the subsidiary, a perception is created that the parent and subsidiary are not independent. Such perception can lead to lawsuits against the parent company, which may ultimately be unsuccessful, but still require Town resources to defend. Thus, it is advisable to maintain separation between the parent and subsidiary.

With respect to BMAHC, we have not identified any risks of the corporate veil being pierced by a Court, thus the Town would be protected from liability from development risks if the development were to be at the BMAHC level. It is, though, advisable to consider the perception of independence of BMAHC in light of the control that the Town has through its voting rights under By-law 1 and the intertwining of the entities described in our discussion on the MOU.

It is worth noting that BMAHC ability to follow private sector arrangements to the logical conclusion of incorporating a subsidiary for each project is thwarted by Subsection 18(1) of O. Reg. 599/06.

2. Political Participation

The range of opinion as to how much political participation is to be included in a development subsidiary’s decision-making processes is remarkable and points to the conclusion that municipalities have different tolerances for allowing unelected board members to control how housing is delivered. Some subsidiaries have boards entirely composed of elected officials (e.g. Housing York), some of have no elected officials (e.g. London HDC) and others have some elected officials (e.g. Toronto Community Housing). Entities such as BMAHC follow the hybrid model, where they are overseen by independent board of directors that have members of the community and politicians on their boards appointed by the municipality.

The advantage of having decisions made by politicians is that these individuals represent the community and have an understanding of the priorities of their constituents and the accountability lines are very clear. Such understanding is especially important where taxpayer funds are used for a project as any monies used for one purpose means that the same monies cannot be used elsewhere.

The challenge with having all decisions go through the political prism is that =it is often difficult to construct a skills-based board capable of governing a development enterprise which requires experience in pro formas, managing real estate portfolios, executing development projects and administering tenancies.

In the case of BMAHC, there currently are both political and non-political perspectives at the board level, thus providing for both political and non-political matters to be more easily brought forward. At the board level, the directors, whether Councillors or Citizen Members, all have the same powers and obligations, including fiduciary duties to the corporation.

¹⁷ 642947 Ontario Ltd. v. Fleischer, 2001 CanLII 8623 (ON CA) at para. 68.



Although not involved in the board decision-making, the Town also exerts significant control over the board of director through its appointment powers as it controls the majority of votes via its membership class.

It should be noted that the board composition is dictated by By-law 1. As mentioned previously, By-law 1 is silent with respect to the number of non-politician board members there should be. It is recommended that the By-law be amended to specifically provide for citizen members to be on the board of directors.

Councillor and Director

One caution that we would point out is that it is sometimes difficult for politicians to wear two hats – that of the director with a fiduciary duty to the corporation and that of the politician who is accountable to their constituents. In such cases, the director has to be cognizant of the hat they wear at the board level, and the fiduciary duties that come with the role. At the council level, when issues related to BMAHC are debated, the Councillor is not considered to be in a conflict of interest merely as a result of a being on the board of BMAHC. In *Aurora (Town) v. Ontario*,¹⁸ the Ontario Superior Court concluded that a council-appointed director of a non-share capital corporation is not deemed to have an indirect pecuniary interest under the *Municipal Conflict of Interest Act*¹⁹ when council is considering a matter related to the corporation.

3. Risk Aversion of Municipalities

Municipalities are risk averse by design. Municipalities are used to being regulators and the decision-making process is legislative in nature, rather than transactional. It is not to say that municipalities cannot develop as both Peel and Toronto, for example, manage aspects of housing development internally. However, a subsidiary offers some useful advantages.

Faster Decision Making

A board of directors can make decisions faster because it is not bound to a council cycle and can meet quickly, if needed. It also operates on a much narrower group of issues than a municipal council. Having fewer items to manage allows the board of directors to be more focused on the development project and make decisions more expediently.

Understanding Risk

As a board of directors can be more focused on a development project than a Town Council, the board of directors would have a better understanding of the overall risk profile of the project. We elaborate on governance below. Such understanding of the risk allows the board to make more informed decisions on risk, which usually results in it being less risk averse.

¹⁸ *Aurora (Town) v. Her Majesty the Queen in Right of Ontario*, 2013 ONSC 6020 (CanLII).

¹⁹ *Municipal Conflict of Interest Act*, RSO. 1990, c. M50.



A risk-averse decision-making process does not bode well in the development context where decisions need to be made quickly and often involve taking on calculated risks. Delays in decision-making can directly lead to slippage of project timelines and extra costs.

A natural tension with the Regulator

A municipality governing its own development is faced with having to approve its own projects from a planning perspective. The result in our experience tends to be the undervaluation of land. All developments require unabashed champions to promote their cause and push the regulators within the municipality to understand their vision. This is a more natural fit where the development champion is not on the same organizational chart as the planning regulator.

4. Governing Development and Construction: A Skill-Based Board

Focused governance is one of the most often cited advantages to a development subsidiary. The Town can determine the number of directors for the board of the subsidiary and can tailor its composition.

A diverse composition of the board of directors can be a strength in that diverse perspectives are applied to the challenges of the subsidiary. Development is its own discipline and decisions can be material financial commitments. A board of directors geared to development could be more weighted to development expertise allowing more focussed and knowledgeable attention on such matters. Expertise in the following areas should be considered for such a board:

- Real Estate Development;
- Real Estate Finance;
- Planning and Design; and
- Attainable and Affordable Housing.

Having a separate board does not mean that the Town will not have control and oversight over the entity. As can be seen through the BMAHC governance structure, the Town, through the members, has the power to appoint and to remove the board of directors.

By contrast, a Town Council as a governing body will only have the requisite expertise to govern if, by chance, a slate of councillors are elected with similar skill-sets.

When we speak of governance, consider two roles that a governing body ought to be able to play. First, a governing body ought to be able to set direction for the organization (i.e. establish its vision and mission). Town Council is clearly able to do that and can continue to set out general parameters through the mechanisms below. A second important function is more defensive: it must be able to identify risks the management team is missing or assumptions that may be incorrect. A skills-based board will usually be better placed to fulfill this function.

Once appointed to the board, each individual director owes a fiduciary duty to the corporation which requires directors to act in good faith and in the best interests of the corporation at all times and, to this end, must act reasonably with the skill and diligence of a reasonable person, and to



avoid conflicts of interest.²⁰ While it is expected that the interest of a corporation would align with the Town, on rare occasion that could not necessarily be the case. In the rare event that a conflict happens, the director is required to side with the interests of the corporation and not its members.

3. Ability to Mortgage

One concern with the municipality managing development directly is that regulations passed pursuant to the *Municipal Act* explicitly prohibit a municipality from mortgaging its land.²¹ While the municipality is restricted from mortgaging land, nothing in the *Municipal Act*, its regulations, or the various legal texts on municipal law in Ontario state that a subsidiary corporation is bound by the same restrictions.

We have attached our analysis, including limitations, as Appendix A to this memorandum.

4. Land Ownership and Financing

Development projects often require financing from third parties. The ownership of land can determine the type of financing available. As a general principal it is easier to obtain financing against a freehold parcel of land, then one that is leased. The reasons for that are that lenders do not have to understand the lease and they know that. Also, should they have to sell the property to recover their debt, they do not have to worry about a tenant. They also know that in the event of tenant getting into financial difficulty, there will not be competing claims between the Town as landlord and the lender as mortgagee.

However, there is no question that it is legally possible to borrow money based on the security of a long term lease. The matter of competing claims is resolved through a “Three Party Agreement”, which includes the Landlord, Tenant and Mortgagee. Indeed, we can point to several examples of that arrangement. The arrangement also has the added benefit of not having the land sold out of the public sector on a default. Rather the lender takes over the leasehold interest and can only sell the balance of the tenancy to a third party.

It is not difficult to see why lending underwrites will prefer a freehold arrangement.

5. Contracting confidence in the private community

A subsidiary focused on development may be better able to attract high-quality developers and partners in the private sector than a municipality, which has many ongoing pursuits.

Partnership with the private sector has been used by other housing providers to develop land and build more affordable housing. The advantages of using private-sector partners include leveraging their expertise, borrowing capacity, and relationships.

²⁰ There are no statutory provisions in the *Corporations Act* which parallel the fiduciary duty provisions contained in the *Business Corporations Act* (Ontario). However, Section 71(4) of the *Corporations Act* refers to this duty in an indirect manner. We are of the view that similar duties apply to directors under both acts, but have not completed fulsome research into this point.

²¹ O.Reg 276/02, Bank Loans, s. 4(2).



6. Debt Consolidation

Ontario municipalities are subject to debt and financial obligation limits under *Ontario Regulation 403/02*. All debt for the development project will be consolidated in the subsidiary, making it easy to account for and separate, where permissible under accounting rules. However, in the event that the subsidiary raises funds through secured lending against its real property and the commercial lender is not solely satisfied with the subsidiary's covenant, the Town may be required to guarantee the subsidiary's debt. Such guarantee will likely impact the debt limits of the Town, if any.

7. Accounting Convenience

Different corporations will maintain separate balance sheets for the assets and liabilities of the entities. Of course, they can also be stated on a consolidated basis. A subsidiary focused on development allows for easy segregation of expenses and capitalizing costs where possible.

Keeping separate balance sheets and/or separate bank accounts for the subsidiary can also negate arguments that the subsidiary is not a separate entity from the Town. Such arguments may arise if a third-party in litigation with the subsidiary is trying to "pierce the corporate veil" of the subsidiary to attempt to include the Town as a party to said litigation.



APPENDIX A

1. The Statutory Powers of a Non-Share Capital Corporation allow Mortgaging

The ability to incorporate is derived exclusively from statute as it does not exist at common law. Furthermore as a creature of statute, a corporation's powers must be set out in its incorporating legislation.

Section 118 of the *Corporations Act* allows for the incorporation of a non-share capital corporation in the Province of Ontario and pursuant to section 126.1, a non-share capital corporation is granted with "the capacity and, subject to this Act, the rights, powers and privileges of a natural person" [emphasis added]. As the powers of a natural person include the ability to mortgage one's property, such ability can only be limited by a restriction contained in the *Corporations Act*.

Upon review, the *Corporations Act* includes one restriction with respect to granting a mortgage over the corporation's property. In order to mortgage a corporation's property, the directors must first pass a by-law authorizing such borrowing powers. This statutory limit is in addition to any restrictions which may be found in the letters patent of a non-share capital corporation.

A review of BMAHC's by-laws confirms that it has the borrowing authority via By-law 2.

2. Municipal Service Corporations and Mortgaging

As mentioned previously, the activities of a Municipal Service Corporation are restricted by Section 18 of *Ontario Regulation 599/06*. After reviewing this regulation, which contains restrictions on the actions of a Municipal Services Corporation including that it cannot act as an incorporator of another corporate body and it may only invest in prescribed securities, we are able to conclude that Section 18 does not prohibit a Municipal Services Corporation from mortgaging its land.

In addition to our review of the legislation and its regulations, we reviewed textbooks and other secondary resources respecting the Municipal Act. While there was not an express statement that a municipal subsidiary can mortgage property, the restrictions discussed in these texts did not reference a prohibition on mortgaging property. In fact, these textbooks state that a Municipal Services Corporation is entitled to borrow money and that one of the underlying policy objectives of a Municipal Services Corporation is to increase opportunities for public/private partnerships and to involve private sector partners in the financing and undertaking of public projects through business corporations.

Based on our review of the above-noted legislation, regulations and secondary resources, we are not able to identify a restriction on the right of an subsidiary to mortgage property.

Please note that the issue of whether a Municipal Services Corporation can mortgage, while the municipality cannot, has not been tested by the Courts, who may consider the limitations on the



municipality to mortgage in relation to delegating this authority to a subsidiary. Thus, our interpretation does not have the benefit of judicial review.

[robapp\6491202.3](#)