

PROPOSED RENEWAL OF MPS TRUST

In 1965 a trust indenture was established to govern the use of certain lands and premises situated in the Town of Sidney BC. The historical development of the trust arrangement is described in Appendix A attached hereto. The original trust arrangement of 1965 named the Royal Trust Company as trustee.

In July 1986, by decision of the Supreme Court of BC the Royal Trust Company was relieved of its duties as trustee and the Sidney and North Saanich Memorial Park Society (MPS) was substituted as trustee. Since that time MPS has discharged its duties and responsibilities in accordance with the original trust indenture of 1965.

The current MPS board of directors has reached the conclusion that the 1965 trust indenture needs revision in order to: faithfully discharge its current operational duties and responsibilities; respond to the present and future economic conditions affecting the MPS; and respond to future developments of the usage of the lands and premises under trust. The trust requires essential revitalization.

A draft indenture was prepared by MPS lawyers and carefully reviewed by the current MPS board, a number of past MPS directors, and a meeting of MPS members called to review the document. The objective was to make necessary changes but still respect the fundamental purpose of the Trust. The current draft Indenture, incorporating the recommendations from this extensive consultation has received the unanimous support of the MPS Board, past MPS directors, and MPS members.

The MPS Board of Directors has instructed its lawyers to present the current draft trust to the Supreme Court of British Columbia and request that it replace the 1965 indenture.

Residents of Sidney and North Saanich who are currently beneficiaries Under the trust are invited to provide comment on the proposed changes to the Trust document by March 31, 2015 to bedgett@marywinspear.ca

Residents are also requested to advise if they would like to attend a public meeting on the topic. If there is sufficient interest a public meeting will be held 7 PM April 8, 2015 at the Mary Winspear centre.

Eleven Fundamental and Significant issues addressed in the New Trust Indenture

There are eleven fundamental and significant issues to the new trust indenture and they are discussed below.

1. BENEFICIARIES

This first change relates to the description and definition of the class of beneficiaries outlined in the trust indenture of 1965.

1. Current Description.

Currently the trust document of 1965 defines beneficiaries as “residents of the Electoral District of Saanich whose names appear from time to time on the then current list of voters of the said Electoral District prepared under the Provincial Elections Act and who reside north of the present North boundary of the municipality of Central Saanich (as defined in Section 5 of the Provincial Elections Act of 1960). “

2. Proposed Change

The proposed indenture defines beneficiaries as “ all persons who are resident within the Districts of North and Central Saanich and the Town of Sidney”. This definition is proposed for the following reasons:

- 1) The 1965 definition of beneficiaries is not representative of the actual class of individuals who benefit from the trust lands and facilities
- 2) The 1965 definition excludes those individuals who are not of voting age or for any other reason not included on the most recent list of voters.
- 3) The 1965 definition excludes all residents of Central Saanich (whether they are on the voters list or not) many of whom benefit from the use of the trust lands.

- 4) The 1965 definition of beneficiaries is unnecessarily complex and inherently confusing.

2. BUSINESS ACTIVITY

The second change relates to the enumeration of the power of the trustee (MPS) to carry on business activities.

2.1. Current Description

The 1965 Trust Indenture describes in Sections 16 and 17 the enabling powers of the MPS acting as trustee. In neither section is the trustee granted specifically the power to carry on a business activity nor is the power, however, precluded. The trust is silent on the granting of the power to carry on a business.

The MPS is incorporated under the Society Act of BC and in Section 2(2) of that Act the power to carry on a business activity is specifically included. Therefore, the MPS, not acting as trustee, has the business activity power. In addition, the MPS as trustee has specifically the power to manage the lands and premises under trust.

It has always been interpreted and assumed that included under its management power the MPS has the power to carry on a business including: hiring employees; leasing property; catering; running a theatre; selling goods; and providing services. This interpretation has gone unchallenged, but without the specific, enumerated business power it has proven difficult sometimes to prove to a granting authority that the MPS acting as trustee has the specific authority to carry on a business,

2.2. Proposed Change

It is apparent that the inclusion and enumeration in the trust indenture of the authority for the MPS to carry on a business would be clearly advantageous.

The proposed indenture gives the Trustee the express power to carry on a business that compliments and furthers the carrying out of the purposes of the Trust. This inclusion of a power to carry on

a business is proposed because it confirms the business activities currently carried out by the Memorial Park Society as Trustee of the lands.

It should be noted that the change provides only limited authority to carry on a complementary business. It does not extend any power to MPS to carry on business beyond the power contained in the Society Act under which MPS is incorporated. The Society Act limits business activity to those that are “ incident to the purposes of the Society”

This amendment resolves any ambiguity and improves an understanding of the trustee’s power. It is to be noted, however, that the business power is not absolute. On the contrary the proposed indenture, at Section V 1 (1) only gives the Trustee the express power “to carry out on any part of the lands such uses or activities that further the objects of the Trust, and that meet the requirements of the relevant local authority as to permitted use”. Section V 2 (1) provides that leases, agreements or licenses entered into by the trustee must complement and further the carrying out of the objects of the trust. This is an important limiting factor and in practical terms it will ensure that the Trustee cannot lease the trust lands for commercial ventures like shopping centers or stand alone fast food outlets

This inclusion in the draft indenture to carry on a business is proposed because it will confirm the scope of business activities within the powers of the Trustee.

3. PURPOSE OF THE TRUST

3.1 Current Description

The 1965 Trust document provides that the Trust Lands and Premises are to be held in trust for residents for community, cultural, athletic, and recreational purposes.

3.2. Recommended Change

Under the new Trust document the purposes or objects of the trust are to hold the lands as a memorial to those who gave their lives in the service of Canada during the wars or peacekeeping in which Canada has taken part, and thereto to provide the lands are held in trust to advance the community, cultural, athletic, and recreational lives of the Residents, doing so in conformity with the law of charity.

The proposed change confirms the memorial aspects of the trust, and ensures the property will be used for charitable purposes that benefit the lives of residents.

4. Permitted use of funds from expropriation

4.1 Current Description

Article 12 of the 1965 Indenture provides. If all or any part of the Lands and premises shall be expropriated then the Trustee shall use the proceeds of such expropriation, after the payment of just fees and expenses into the following trusts:

- (a) for the purchase of other lands and premises. (Substituted Premises)
- (b) to hold the balance of the proceeds in trust for the maintenance and improvement of the substituted premises.

4.2. Proposed Change.

This article has been the subject of many interpretations and much confusion over the years.

The change provides that expropriated funds can be:

- i) Used to purchase land and improvements on a new site.
and
- ii) Invested in Capital improvements on either a new site or the existing Trust lands, and
- iii) Placed in an investment with the proceeds (interest or capital gain) from the investment used for the maintenance, management or improvement of any of the MPS trust lands.

It only stands to reason that if a general trust asset is expropriated then the expropriation funds should be available for the improvement of all

the remaining property and not exclusively for the substituted property.

The proposal ensures that trust assets are preserved and protected. It also gives the Trustee the ability to invest trust funds in improvements that most benefit residents.

5. RESIDENT OVERSIGHT AND DIRECTION

The present Trust document was prepared by the Sidney and North Saanich War Memorial Society (SNSWMPS) in 1965 with the expectation that the Society's responsibilities would be given over to Royal Trust with the residents of Sidney and North Saanich as beneficiaries. SNSWMPS was dissolved soon after the Trust was created and residents were given the authority to provide the oversight and direction that SNSWMPS could no longer provide.

5.1. Current Description

The current Trust document gives extensive powers for 15 residents to call a public meeting and direct certain actions be taken including:

Clauses 6&7, can cause an investigation to be undertaken to determine if any tenant is not carrying out its responsibilities with respect to land use and the maintenance of the cenotaph area

Clause 8 gives residents the power to require the Trustee to terminate any tenant on 30 days notice if the tenant is in breach of its land use undertakings.

Clauses 9 10 &11, give residents the power to cause a referendum to be called to determine if residents favour the termination of any lease and the granting a lease to the municipality. If Residents vote in favour, existing leases are to be cancelled on 30 days notice and the trustee will "forthwith grant a lease of the Park to the municipality"

Clauses 13-15 gives power to residents in the event of an expropriation of trust lands to identify alternative lands to be purchased by the trustee to replace the lands and premises.

Clause 16 gives residents the authority to provide direction to the trustee with respect to any matter whatsoever.

Clause 19 gives residents the power to initiate an application to the courts to replace the trustee.

The powers and authorities of the residents have never been exercised. Nevertheless, since residents do have this authority under the trust, the trustee must include 30-day cancellation provisions in every lease it enters into to ensure that it has the capacity to comply to the letter of its obligations under the current trust. This is a totally unreasonable impediment on the ability of MPS to develop and improve facilities and services for its beneficiaries.

5.2. Proposed Change

The proposed trust document removes the specific powers given to residents but provides the equivalent authority to residents as they have under the existing trust in a much more practical and effective way.

Membership in the Memorial Park Society has been expanded to include any resident of Sidney, North Saanich or Central Saanich. Everyone is welcome and encouraged to become a member of the Society. They can attend all regular, special, and annual general meetings. All members are encouraged to offer their opinions and advice and to let their name stand for election to the board of Directors.

MPS's AGM is open, not only to members but to all residents, to receive a report on the affairs of the Society. The agenda and minutes for every meeting will be posted the MPS web site

Section 3.4 of the MPS bylaws and section 85 of the Society Act allows any member, with the support of 10% members eligible to vote, to require MPS Directors call an Extraordinary General meeting.

In addition, anybody could seek a court order under Section 85 of the Society Act to remedy a problem respecting the way MPS is carrying out its responsibilities as a society or a trustee

6. POWERS OF TRUSTEE

This change relates to the enhancement of the powers of the MPS as Trustee to enter into long-term leases.

6.1. Current Description

Section 3 of the current trust gives the Trustee the power to lease lands and premises for five years. The trustee has the further enabling power to grant an option for a further five years as outlined in section 17 (a). The literal interpretation of these sections would lead to the conclusion that no lease term can extend beyond 10 years. This is a very serious constraint on MPS to achieve the best potential use of the trust property. The best illustration of this limitation would be the use of Blue Heron Park; where the opportunity to lease a portion of the property for long-term athletic use (building a soccer clubhouse) would not be possible if the term of the lease was limited to 10 years.

6.2 Proposed Change

Under Section V 1 of the new trust, the trustee will have the power to determine the appropriate term for any lease so long as the lease serves the purposes of the Trust. This amendment will allow MPS to lease Trust lands for uses consistent with the purpose of the Trust that require a longer lease term to amortize the lessees capital expenditure.

Section V 2 (1) of the new trust indenture introduces the idea that the commercial arrangements could take the form of a license or other use agreement as well as a lease. This recommended change

reflects the reality of the majority of MPS's current commercial activity at the Mary Winspear Centre.

7. APPOINTMENT OF SUBSTITUTE TRUSTEE

Generally courts will not permit a trust, the purpose of which is charitable, to fail if its general intent is capable of achievement. As far as possible the courts will preserve a charitable trust but not a society or corporation acting as trustee. Courts will therefore support and encourage the appointment of a replacement trustee if circumstances require that such a change be made.

7.1. Current description

Under clause 18 of the current document the trustee may make application to the Supreme Court of BC to be relieved of its duties of trustee and for the appointment of a replacement trustee.

Clause 19 also provides that 15 residents could initiate a process that could lead to an application to the courts to replace a trustee.

7.2. Proposed Change

It is difficult to foresee the circumstances under which MPS would willingly give up its role as trustee because the trust lands and facilities are central to everything it does. Without the Trust lands, MPS would essentially lose its reason for existence.

If circumstances ever did require MPS to give up its role of trustee, there are two alternative trustee replacement possibilities identified in the new agreement.

Under Clause XIII the trustee can apply to have the trust amalgamated with another trust fund or not for profit Corporation having similar purposes to MPS.

Under Section VII the trust could be transferred to the municipality in which the lands are located.

Some may question if the Municipality acting as trustee would be the preferred option. The reality is that MPS faces a continuing financial challenge and could not continue its present role without financial support from the municipalities. Most facilities similar to the Mary Winspear Centre are owned and operated directly by municipalities so the idea of a municipality taking over role of Trustee could, at some future date, be the best option.

The new trust document in Section VII 1 provides that a replacement trustee can be appointed only “in accordance with documented legal advice”

Regardless of what is in the trust document, any resident can apply to the courts to have a trustee replaced, or to challenge the proposed replacement trustee.

8. POWER OF SALE

8.1. Current Description

The current trust is silent with respect to the Trustee’s power to sell land held under the trust.

8.2. Proposed Change

The revised document in Section IV 2 expressly excludes the power of sale or mortgage of Trust land to ensure it will be available in perpetuity for the benefit of residents.

9. AMENDMENT OF TRUST

A charitable trust is created to survive in perpetuity. However many things can happen over time affecting the operation of a trust and there must therefor be a means to revise the trust document in response to changing circumstances.

9.1. Current Description

The existing trust document is silent on the amendment of the trust document.

9.2. proposed Change

Clause XII 1 in the revised document confirms that a revision to the trust document is possible but only with proper legal advice and process.

10. DESCRIPTION OF LANDS

A trust Document should clearly identify the property held under trust

10.1. Current Description

The current trust document includes a description of the lands, as they existed in 1965 when the trust was created. Since that time a portion of that land has been expropriated and removed from the trust, and replacement land has been added.

10.2. Suggested Change

The revised Indenture includes a current description of the Trust lands

11. RECOGNITION OF THE LANDS AS A WAR MEMORIAL UNDER THE TRUST

The file indicates that the trust land was originally provided as a WW1 “war memorial athletic park and children’s playground”. The original Sidney and North Saanich War Memorial Park Society was founded to hold title to the land and ensure it was used for its intended purposes. There was no formal trust indenture covering this undertaking. In 1924 a cenotaph was added to the park in honour of the local men who lost their lives in the Great War. The 1965 Trust Document included a number of provisions to ensure the continued maintenance of the cenotaph and surrounding area.

11.1. Current Description

In 1969 BC highways acquired the trust land on which the cenotaph was located. In 1970 the cenotaph was relocated in front of the Town of Sidney Municipal Hall. There are no other provisions in the 1965 document recognizing the war memorial

aspects of the trust lands other than the reference to the cenotaph area that is now removed from the trust lands.

11.2. Proposed Change

The new trust indenture will ensure continued recognition of the memorial aspects of the Trust by recognizing the trust lands as a memorial in the purposes of the trust. Clause IV 2 (1) of the new trust also gives the Trustee the obligation preserve and maintain a sculpture on the trust lands as a tribute to the sacrifices of the veterans of the Canada's Armed forces in the service of the nation.

MPS Trust Historical Background Appendix A

HISTORICAL BACKGROUND TO THE SAANICH AND NORTH SAANICH MEMORIAL PARK SOCIETY TRUST INDENTURE

1921

Sidney and North Saanich War Memorial Park Society (SNSWMPS) was founded to hold title to a 12-acre parcel as a "war memorial athletic park and children's playground".

1924

A "cenotaph" dedicated to the local men who died in WW1 was installed on the land.

1952

The Sidney and North Saanich Community Hall Association (SANSCHA) was formed and agreement was reached to construct the hall on SNSWMPS lands.

1958

SANSCHA members completed the community hall.

1961

BC Highways expropriated a portion of land for Pat Bay highway.

1965

SNSWMPS and SANSCHA created a trust document and placed the land under the management of a public trustee, Royal Trust. SNSWMPS was dissolved and SANSCHA continued to manage the lands as a tenant of the trustee.

1969

BC highways purchased additional land including land on which the cenotaph was located.

1970

Cenotaph moved to a location in front of the Town of Sidney Municipal Hall.

1981

Town of Sidney expropriated additional lands

1983

Courts ordered the Town of Sidney to pay just over \$500,000.00.

1985

The Sidney and North Saanich Memorial Park Society (SNSMPS) was formed essentially reactivating the SNSWMPS that was dissolved in 1965.

1986

BC Supreme Court ordered that SNSMPS replace Royal Trust as Trustee. SANSCHA continued management of the hall as tenant. MPS focused on the development of Blue Heron Park and management of the expropriation funds.

1993

SNSMPS assumed responsibility for the hall and all lands after SANSCA was dissolved.

1999

SANSCHA Hall and the land it was situated on was designated as an historical site by the Town of Sidney