Review of Sale of Lands by York University

to Tribute Homes in March 2002

By

The Honourable Edward Saunders

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By letter dated March 4, 2005 (Appendix 1), the President of York University, Dr. Lorna R. Marsden, asked me to undertake a review of the sale of lands by York University to Tribute Homes ("Tribute") in March 2002. I was asked to determine if the process through which the price was negotiated with the buyer was appropriate in light of the criteria imposed by the University and, if any improprieties or conflicts existed or occurred in relation to the sale.

The request for review was prompted by an article published in the Toronto Star on Saturday, February 26, 2005 (Appendix 2).

In the course of the review, I have examined a number of documents provided by the Board of Governors of the University (the "BOG") and York University Development Corporation ("YUDC") (Appendix 3). I have interviewed nineteen persons (Appendix 4) and have received written submissions from the BOG and five others which were made in response to an invitation to the members of the York community (Appendix 5). Finally, I have requested and received written information from Tribute.

It has been assumed that the minutes of meetings substantially reflect what took place at those meetings. Not everyone who was involved was interviewed. An effort was made to speak with those who could provide a context to what took place. The interviews were not transcribed and I have relied on my notes in preparing this report. Generally, I have accepted at face value what I have been told. I found no reason to do otherwise. Where there are different recollections, I have tried to indicate them in the report. In discussing the nature of real estate development transactions, in addition to my own experience, I have been helped by the views of the consultants to the

University. They are professionals and I am satisfied that they gave me independent information.

While I have tried to make the report an understandable and free-standing document, a reader might benefit from access to the documents in Appendix 3.

I. Governance of York University

In 1959 York University was incorporated by an act of the Legislature of the Province of Ontario. In 1965 the incorporating act was repealed and replaced by The York University Act, 1965 (the "York Act") which remains in full force and effect.

Section 16 of the York Act provides, in effect, that the University has the power to acquire, hold and dispose of real property.

The power to dispose of land is vested in the BOG. Section 10 of the York Act provides in part as follows:

> Except, as to such matters by this Act specifically assigned to the Senate the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University,…

In general, section 12 of the York Act provides that the Senate is responsible for academic policy. The section sets out its function and powers. The Senate has no specific power to dispose of property. There are no by-laws of the BOG which limit or restrict the power of the BOG to deal with real property.

The BOG has the power to appoint an executive committee and other committees. The Finance Property and Human Resources Committee was a committee of the BOG. In 2002 property issues were transferred to a new committee which was named the Land Use Committee (the "LUC").

To provide assistance to the BOG in dealing with University lands, YUDC was incorporated in July 1985. It has one share which is owned by the University. One of its functions is to market lands that the University has decided to sell. Another function is to plan the future use of land not required for academic purposes. It has from time to time received advice from an Advisory Council which is made up of representatives of the University community.

The Land Use Coordinating Group (the "LUCG") was a committee composed of members of the University administration and other faculty members which, as its name implies, dealt with issues relating to existing and future use of University property. To a certain extent its function overlaps with that of the YUDC. The LUCG has been replaced by the Master Planning and Facilities Committee. The function of the committee is to advise the President.

In 1988 the University adopted a Master Plan as a guideline for dealing with and developing University real property. Ms. M.L. Reimer was appointed Master Planner in 1989 and held that office until she retired in January 2002. Like official plans of municipalities, the Master Plan needs to evolve as circumstances change. The University Master Plan is currently undergoing revision.

York University is not a public institution in the sense that it is accountable to the public for what it does. It has its own governing body and, unlike some universities, none of the members of the BOG are appointed by the Province. The lands in question were acquired by purchase or exchange and were not part of the lands that were granted to the University. The University does perform a public service and receives substantial funds from government. It is understandably sensitive to public perception of its activities. It is not, however, an organ of government.

Nevertheless, the University, like any other owner, does not have a free hand in developing its property. If property is sold, for development, the University and its purchaser must reach agreement with the municipality on a myriad of issues such as streets, utilities, parks and schools. The structure and use of the property must comply with the official plan of the municipality and with its zoning by-laws. In this connection, the University and the municipality in 1991 agreed on a Secondary Plan which is on file. There is a current process taking place to negotiate a change in some of these understandings.

II. Background Leading up to the Decision to Sell the Lands

1. The lands owned by the University are shown on the photograph attached as Appendix 6. The lands are divided into four precincts – the Core Precinct, the North Precinct, the Southwest Precinct and the Southeast Precinct. (The two southern precincts are south of Pond Road and are sometimes collectively referred to as the "Southlands"). The lands sold to Tribute in 2002 are shown as Phase I on Appendix 6. Additional lands that were sold to Tribute in 2004 are shown as Phase 2. All lands sold to Tribute are in the southwest and southeast precincts and are south of Pond Road.

2. When York University was founded it received land grants from the Province. However, the lands purchased by Tribute (including Phase 2) were not part of the lands granted. They were acquired by purchase or exchange from several owners. The University has power to expropriate lands for the purposes of the University (see University Expropriation Powers Act). Prior to acquiring the

lands eventually purchased by Tribute, the University registered an expropriation plan on title. However, it did not proceed further with the expropriation procedures. Instead, it acquired the lands between September 1967 and August 1971 by private contract.

3. In 1984 the administration of the University commissioned Dr. Phillip A. Lapp to prepare a report on the future use and develop of University lands. His report was submitted to the BOG at its meeting on March 12, 1985. One of his recommendations was the establishment of a development corporation which among other things would be the instrument of the University in marketing and promoting its lands and facilities. As a result, YUDC was incorporated in July 1985.

4. In 1987 the University sold 22 acres in the southwest precinct to Bramalea Ltd. for approximately $45 million. Requests for a proposal ("RFP") were sent out to six or seven builders from which a short list of three was created. Bramalea was selected and an agreement was reached. Bramalea planned to build high density high rise apartment buildings on the property. The building never took place. Bramalea became insolvent. In July 1997 the University reacquired the land for $5.5 million.

5. In 1996 Tribute Homes initiated discussions with YUDC on development of the southwest and southeast precincts excluding the lands sold to Bramalea. Tribute advised Ron Hunt ("Hunt"), the President of YUDC, that it wished to make a proposal. Hunt said the approach was unsolicited. Inquiries were being made all the time about the lands but the Tribute inquiry was unusual because of the amount of detail. After a presentation in November 1996, a formal proposal was submitted on April 30, 1997. The proposal was prepared with the assistance of the MBTW Group ("MBTW") who are urban design

consultants and community planners. Tribute proposed to build on 75 acres with the balance of the lands, described as non-residential, remaining in the ownership of the University. After taking into account servicing costs and value added to the non-residential lands, Tribute estimated the purchase price would range between $401,000.00 and $436,000.00 per acre.

The proposal was discussed with the LUCG as well as the YUDC. There were meetings with experts. Eventually the University decided not to proceed and the discussions came to an end in early 1998 without an agreement.

6. From the spring of 1998 until the late summer of 2001, YUDC was considering what to do with the Southlands. A Concept Plan was commissioned to be provided by a consortium of three consultants. The LUCG transferred its authority for the development of the Southlands to YUDC. The Advisory Council which had been dormant for several years was reactivated and held several meetings on the subject. There was much discussion, some debate and, as may be expected, some difference of opinion. Issues concerning whether to dispose or hold the lands; whether to lease or sell; and whether to develop residential or commercial or both were discussed. Parking was always a concern. The possibility of a subway or other public transit came up from time to time. For a while the possibility of the 2008 Olympics was a factor. On the negative side, there had been incidents of assaults and vandalism on the vacant land.

   Throughout the discussions there was an effort to reconcile two fundamental principles about the Southlands on which there was general agreement. Broadly expressed they were:

   a. The development should lead to the creation of a community which was compatible with the University and its environment; and

b. The development should realize significant capital funds for the University.

It will be readily seen that emphasis placed on one principle can have an adverse effect on the other. One member of the York community aptly compared the situation to an owner of a residence planning to sell an adjacent vacant lot. The owner would wish to obtain the highest price but not if it had the effect of reducing the enjoyment of the owner's residence.

7. In January 1998 the YUDC Board agreed that the IBI Group ("IBI"), who were urban planners, or another planning firm be asked to provide information as to how the objectives of the Master Plan might be achieved. In the meantime, the University should determine its financial objectives. At the next meeting of the YUDC Board on May 11, 1998, IBI presented a memorandum on a proposal call and a macro-concept report. At its meeting on July 16, 1998, the YUDC Board had before it a further IBI report which recommended a proposal call as well as a memorandum from Hunt recommending that a RFP be prepared for presentation to the marketplace. The Board asked for a final report from IBI and asked Hunt to consider what firms would assist in the development of a community concept plan.

Following a selection process which took until May 1999, the YUDC decided to engage a consortium of three consultants and approved a budget for their work. IBI was joined by MBTW and PMA Brethour who were real estate marketing consultants. For the preparation of the Concept Plan MBTW was the lead consultant.

8. The consultants presented a preliminary report to a meeting of the YUDC directors on January 25, 2000. They were aware that the objective of the

University was to net between $50 million and $100 million from the sale of the Southlands. In order to meet that objective the properties would have to be sold and not leased or made subject to a co-op arrangement. It was the view of IBI that if the costs of relocating parking were to be attached to the project, the realization objective could not be met.

At a meeting of the YUDC Board on December 14, 2000, MBTW presented their report on the Concept Plan. After discussion of a number of issues, there was agreement that while a workable concept had been established, a more detailed plan was required. It was agreed to accept the Concept Plan as a working premise.

9. At a meeting of the YUDC Board on April 17, 2001, the consultants presented the Concept Plan for the Southlands which provided for residential lots tied together with a green system. The consultants suggested the Bramalea site as a starting place. It was decided that a further meeting was necessary to discuss planning issues. It was also decided to set up a group to work with the consultants.

On April 27, 2001 the Executive Committee of the YUDC Board met and established a working group to meet with the consultants. Joseph Sorbara ("Sorbara"), the Chair of the YUDC Board, was to be Chair of the group which included Messrs. Arthurs, Kelton, Hunt and Ms. Reimer. (Professor Harry Arthurs was a former President or the University and Dr. Roger Kelton was then Chair of the School of Kinesiology and Health Sciences and Chair of the YUDC Advisory Council). Their aim continued to be the achievement of $100 million for the University but it was recognized that there would have to be trade-offs amongst the design principles, financial returns, marketability and University sensitivity.

10. At the YUDC Directors meeting on June 21, 2001, Sorbara reported on the meeting of the working group with the consultants. There were changes made in the Concept Plan. Phase I would have 705 residential units. It was considered that it was not possible to achieve a return of $100 million for the Southlands. Sorbara recommended that the University begin by developing Phase I. The land was already partly serviced and was seen by the consultants as the most valuable piece for residential development – likely to get the highest price up front and set a standard for the proposed community. The phasing would permit the University to take advantage of any improving market conditions were there to be a subway announcement or to hold off with the next phase if the markets were to turn down.

    There was discussion on the various issues that had come up over the years including the method of marketing (whether York or the purchaser be the developer), the phasing of the development, the possibility of a health precinct, the possibility of a subway, the parking situation, and the impact of the development on the campus.

    At the meeting Sorbara moved that the recommendations for the development of Phase I, as outlined in the Concept Plan, be taken forward to the BOG for approval. It was generally agreed to aim for the September meeting of the Board but it was recognized that there was still work to be done before the approval could be sought.

11. The YUDC Board met again on August 15, 2001. The Board was advised that there had been preliminary discussions with three builders. Two of them – Monarch Construction Limited ("Monarch") and Tribute had expressed strong interest and a willingness to consider the purchase of either developed land or raw land. The third builder had said it was not interested in participating.

There was discussion on the possible return from servicing the lands or selling them unserviced. At the end, Sorbara and Hunt were authorized to conduct preliminary negotiations with the builders for Phase I.

The third builder was Great Gulf. Hunt had a meeting with senior employees of that company and left them a package. The proposal was considered by The Great Gulf board of directors who decided about a week later that it did not want to build in the Keele Street area.

12. In his report, Dr. Lapp had recommended that an Advisory Committee representing the University community be created to provide advice and views on campus development to the YUDC on a continuing basis.

The committee was established in 1985 roughly at the same time as YUDC. Its mandate was to act as a two way channel of information between YUDC and the University and to provide a forum to reflect academic and other needs of the University concerning the development and improvement of the campus; to provide advice to YUDC concerning the use and development of the University land; to seek out and actually solicit the views of individuals and interests affected by proposals for development on the campus; and to create opportunities for input for those to the committee. The committee was known as the Advisory Council of YUDC.

It would appear that at some time after 1988 the Advisory Council ceased to be active. In January 1998, efforts were made by the YUDC Board to reactivate the Council contemporaneously with the increase in the number of directors of YUDC. The efforts resulted in a meeting of the Council on November 3, 1998. There was discussion of the Master Plan and the Secondary Plan. There was also discussion of the approval process involving YUDC, LUCG, the Advisory

Council and the then Finance and Property Committee of the BOG with final approval by the BOG. Hunt reported to the Council on the consideration of a concept plan for the southern campus lands. He said that the University currently envisaged a type of village concept.

The Council next met on September 16, 1999 when the consultants made an extensive presentation including expounding planning goals, development principles and process for feedback. The consultants subsequently met with various groups of the University community and obtained their views on the concept for the Southlands.

The next meeting of the Council was on June 22, 2000. There was a report on studies for present and future parking needs, the need to attract a subway and future planning studies.

The last meeting of the Council prior to the agreement with Tribute was held on September 17, 2001. Sorbara made a presentation which reviewed the decision to develop the most southerly lands and the reason for that decision. He discussed some alternatives which had either not been proceeded with or had been deferred. There was some criticism of the Concept Plan in terms of housing types and financial expectations. It was suggested there should be higher density as the single family and multi-family owners in the first phase would likely oppose further high density later on.

13. As previously indicated, the LUCG was created by Professor Arthurs when he was President of the University. It consisted of members of the University administration. Under the policy procedures of the University, the President is required to seek advice and recommendation of the LUCG prior to recommending approval of a project by the BOG. The LUCG has now been replaced by the Master Planning and Facilities Committee.

The LUCG discussed the first Tribute proposal at its meeting on January 21, 1997. There was concern about the absence of financial benefit to the University. There was doubt that much of a return could be expected from a project of that nature. It was mentioned that the possibility of competitive bids remained open. At a meeting on November 10, 1997, discussion of the Tribute proposal was deferred. There was, attached to the minutes, a memorandum from Ms. Reimer, the Master Planner, which was critical of the Tribute proposal. In general, she felt that a number of issues were not addressed; more urbanity and high density was desirable; and leasing was to be preferred over selling.

On November 27, 2000, it was proposed that the development of the Southlands be assigned to YUDC in view of the capital needs of the University and desirability of housing on the lands. This action would give YUDC the freedom to plan and negotiate development projects. It was acknowledged that increased enrolment would be limited to the campus north of Pond Road but by that time there appears to have been a consensus that the Southlands were surplus to the academic needs of the University. (The BOG had reached that conclusion in 1987). After discussion, the transfer was agreed to. That was the end of the involvement of the LUCG with the Southlands.

14. The BOG was kept informed of the process. However, it would appear that the 1997 Tribute proposal was never brought to its attention as it never got beyond the preliminary discussion stage. At its meeting on December 14, 1998, Charles Hantho, the then Chairman of the BOG and of YUDC, reported on the activity of YUDC. He stated that YUDC was looking at plans and considering proposals under the auspices of its Advisory Council. On April 12, 1999,

Sorbara provided a brief update to the BOG on the proposal to prepare a community Concept Plan.

At the BOG meeting on September 29, 2000 the Chair, Marshall Cohen, stated, as one of his personal priorities, that it was time to move forward in an attempt to monetize the land holdings of the University. President Marsden then submitted a report on the York lands which included a proposal that the westerly part of the Southlands (including Phase I), be used for residential purposes. At the end of the discussion on the President's report, Mr. Cohen reiterated that a way must be found to free up the Southlands for development and not tie the process to plans for other developments. He stated that YUDC hoped to be in the position to come to the Board with proposals in early 2001.

On June 25, 2001 Cohen, who was a member of the YUDC Board of Directors, announced that action on campus land development was expected soon on the basis of the initiatives of YUDC.

15. Throughout the discussions there was always the possibility that the University would be the developer of the Southlands and would sell serviced lots rather than unserviced raw land. This was the preference of Sorbara for the simple reason that the return would be greater for the University in the end. On the other side, there were financial risks in taking on the servicing including the uncertainty of municipal arrangements, lapse of time and changing market conditions. Furthermore, the University did not have the human resources to manage a development. Hunt was the single management employee of YUDC and his experience in dealing with development matters was limited. There was discussion about hiring an experienced real estate developer.

The possibility of York being the developer was never abandoned. Sorbara was advocating it at the YUDC Board on August 15, 2001. There was expressed at that meeting the alternative view that the object of negotiation should be to get as close to the desired number as possible without having to do the development work through YUDC.

16. The foregoing history demonstrates that prior to the events that led up to the sale of the lands to Tribute, the issues relating to the development of the Southlands were fully canvassed, discussed and debated by those charged with the responsibility of making recommendations and that there was information provided to the York community, principally through the consultants, and an opportunity for feedback. When the time came to negotiate a contract with a builder, it was necessary for sound commercial reasons to conduct such negotiations on a confidential basis. Open negotiations can severely impair reaching a mutually satisfactory agreement.

III. The Sale of Lands to Tribute in 2002

1. Sorbara made a presentation to the BOG at its meeting on September 28, 2001. He distributed the Concept Plan and a summary of the residential unit count by housing type. He talked about the evolution of the Concept Plan and described it. He mentioned the situation with regard to the subway and he suggested that it would be prudent and safe to proceed with some development in an area that would be least impacted by any rapid transit decision. The logical place would be the southwest quadrant. He then talked about the projection that 42 acres could realize between $18 million and $20 million for York. He said this could be achieved by YUDC completing the rezoning of the lands, providing infrastructure and selling off serviced lots or blocks to builders who would obtain building permits. He advised that York would not hold an open bid. He further advised that there were two builders who had indicated serious interest in the parcel and

who had experience in building communities. He said that proposals would be solicited from them. The proposals would be to either purchase the property in its current state but with a draft plan approval for the development or to purchase serviced lots and blocks. The minutes then recorded that the YUDC would review the proposals at its next meeting and report back to the Board.

2. The RFPs to Monarch and Tribute went out in the form of a letter dated October 5, 2001. Responses were requested by following November 12 (38 days).

   The letter described the Concept Plan and the overall objectives of the University. It stated the intention to proceed on approximately 45 gross acres and that the opportunity to participate was being given to selected members of the building community.

   The letter then identifies two possible approaches to the involvement of the builders:

   a) Purchase of raw land with three conditions; and

   b) Purchase of serviced lots and blocks to be developed by YUDC.

   The three conditions on the purchase of raw land were:

   a) The University would sell the land on an "as is" basis with draft plan approval and zoning in place;

   b) The builder would construct all internal and external services required for the development of any other servicing conditions of the municipality; and

   c) The University would reimburse the builder on a proportionate basis, for any costs of servicing incurred by it which benefit adjacent University lands (e.g.: storm pond construction and hydro services).

The purchase price was to be expressed as “per gross acre” in the event that the proposal was to purchase raw land. The proposal had to contain a statement of commitment to the housing mix defined in the Concept Plan. Any sale was to be subject to the approval of the BOG.

3. Monarch did not make a proposal. In a letter to YUDC, dated November 12, 2001, it stated that two concerns prevented it from doing so. The first concern was the marketability of the low rise walk-up apartment buildings which comprised over one half of the unit count. Monarch felt that the returns on this type of housing were too slim to justify such a large percentage of the plan. The second concern was the planning risks associated with the lands considering the renewed interest in the possible extension of the subway. It was their understanding that any proposed expansion of the Spadina line could dramatically impact the lands in question. At the time, Monarch was considering a number of potential projects and there was not much interest in the York proposal. The locations of the other potential sites were more attractive and, hence, less risky for residential development. Monarch might feel differently now.

   It was suggested that 38 days was too short a time for a response and that as a result, Tribute might have been given an advantage as it had already done considerable work several years earlier on a proposal. The consultants did not consider the time to be unusual although on occasion more time is given. One consultant said there is never enough time to respond. In any event, Monarch did not need more time to make its decision

4. Tribute made a 15 page detailed proposal on November 12, 2001 for the purchase of 35.5 acres of raw land at $450,000.00 per acre. The proposal bears the same date as the letter from Monarch. The proposal provided for a 25

percent cash payment over a period of time ending with draft plan approval with mutually acceptable draft conditions and final zoning. The balance of the purchase price would be a take back mortgage for three years at 5 percent interest with the first 12 months being interest free. While there was an expressed commitment to the Concept Plan, there was some concern about the number of low rise apartments.

Before the agreement was executed in March 2002, the Concept Plan had been amended to considerably reduce the number of low rise apartments. Under the current building plans there are no low rise apartments.

5. The YUDC Board met on December 3, 2001. It was faced with one proposal for 35.5 acres of raw land at $450,000.00 per acre. There was a conclusion that the transaction could be expected to net approximately $11 million for the University which would be about $7 - 9 million less than would be realized if the University did the development. There was an extensive discussion. With only one proposal on the table, concern was raised about the public perception because there was not a public tender and about the involvement of MBTW with a prior proposal by Tribute. There were also concerns expressed about the need for design control, including control over the changes that would have to be made to the Concept Plan as a result of negotiations with Tribute and with the municipality. It was agreed there was a need for further analysis of the proposal and a meeting with the consultants. There seemed to be an agreement to proceed with the proposal in hand rather than to abandon or defer the process.

   At the end, Sorbara and Hunt were authorized to attempt to increase the purchase price to $475,000.00 per acre, to improve some of the other financial terms and to preserve architectural control. It was the understanding that there would be as little change as possible made to the Concept Plan.

At the meeting there was also a discussion about the Advisory Council and its composition. Hunt expressed the view that the presentation to the Council in September had been well received and that the members are generally in favour of the proposed development (although there were some objections – see para II.12 above). Hunt undertook to keep the Council informed concerning plans for development as they unfolded. Concern was expressed that there should be more intense communication with the Council to provide an opportunity for comment and input. However, the Council had been fully informed on the decision to sell the lands for residential purposes in accordance with the Concept Plan. The Council did not meet again until January 2003.

6. Negotiations then took place which resulted in an agreement made as of 8 March 2002 (the "Sale Agreement"). Hunt and Sorbara represented YUDC along with two firms of lawyers. Harriet Lewis, the General Counsel of the University, was also involved. Sorbara did not attend all of the negotiating sessions but participated with the York group in developing negotiating strategy on some issues. He said he only attended the negotiating sessions on a couple of occasions when there were planning issues involved. Ron Hunt was the leader of the negotiating team. MBTW, the design consultants, confirmed that while Sorbara was involved they always got their instructions from Hunt.

7. Tribute made a presentation to the YUDC Board on 30 January 2002 and answered questions on several matters. After the Tribute group left the meeting, Sorbara reported on the state of the negotiations. The Tribute requirement for an opportunity to acquire further land to the north, design control and the integration of the new community with the University community were discussed. Sorbara had earlier said that the parties were close to settling the business and legal points. He advised that no further negotiation was possible on price. There was discussion on planning issues although it was recognized that it was difficult to

move on detailed planning without a signed agreement. There was also discussion of process for approval including showing the proposed development to the York community. (This had already been done through the Advisory Council). It was understood, however, that details of the proposal could not be made public until there was an agreement. It was agreed that the proposal should go with the recommendation of YUDC and the President to the Finance, Property and Staff Resources Committee (the "FPSR") and then on to an in-camera session of the BOG.

8. On February 8, 2002, Sorbara and Hunt made a presentation to the FPSR. The committee resolved to support the recommendation of the President of the University and the President of YUDC that the BOG authorize the sale of approximately 35.5 acres of land to Tribute "on terms to be negotiated or as substantially described". In the presentation it was said that the lands were being developed in the first instance because of proximity to existing services, the relatively low impact on the rest of the campus and the uncertainty surrounding possible subway routes. In light of the principles underlying the community Concept Plan, YUDC was concerned with finding a company with experience in building communities as well as housing, as it was intended that any proposed development on the Southlands would have interaction with the University. Three companies with demonstrated track records had been invited to bid on the project. Tribute was offering $450,000.00 per acre which was firm. The University would have to bear responsibility for supplying hydro services and a drainage pond for the development with a portion recoverable from the developer. The University would retain a large degree of architectural and planning control. Tribute was to obtain a right of first opportunity with respect to the offering of adjoining lands.

9. The project was discussed in-camera at the meeting of the BOG on 25 February 2002. The President gave a brief presentation outlining the proposal and setting out the two objectives. The Chair noted that the YUDC had spent an enormous amount of time working through the proposal and, in his opinion, the proposal before the Board was the best one currently available. (It was the only one). The Board must be satisfied that the lands were being sold to a developer who can build a viable and liveable community. The Chair assured the Board that the University would retain a large amount of control over the proposed development as it went forward. Sorbara informed the Board that there was some reluctance on the part of YUDC to develop all the lands at once so they isolated the areas of the land that would be best to develop initially. The University would maintain architectural and developmental control over the development and the Concept Plan was capable of being developed phase by phase so that the University, should it decide to continue development, could capture increases in market prices in land in the future.

   It was reported that the University would receive $450,000.00 per acre. Tribute would also spend about $15 million to service the land. The Chair confirmed that there were no environmental issues of concern.

   Representatives of Tribute then came and addressed the meeting. They dealt with the nature of the development itself rather than the business terms with the University. They discussed the price of homes in the community. They also discussed the relationship between the residents and York University with respect to the use of facilities. Concern was expressed about accessibility given the price range. The Chair reminded the Board that its role is not to be the developer but rather to approve a plan that meets the objectives of the University. Sorbara noted that there would not be an opportunity in this proposal to develop subsidized housing and the plan was not to develop student housing although students might end up renting space in some of the residential homes.

Following the discussion, the BOG authorized the sale on the terms recommended by the FPSR.

10. The Sale Agreement made as of 8th March 2002 was executed around that date. At the risk of repetition, its salient terms were:

a) The purchase price was based on $450,000.00 per acre, subject to usual adjustments. The lands are shown as Phase I on Appendix 6. They are sometimes divided into Phase I (west of Sentinel) and Phase II (east of Sentinel).

b) Cash payments aggregating 27.5 percent of the purchase price were to be made with the balance secured by a first mortgage for a term of three years from the closing. The mortgage would bear no interest for a period of nine months from closing and thereafter interest was to be calculated and paid semi-annually at the prime rate of the Royal Bank of Canada plus one percent.

c) The University was to pay for and install a hydro electric service running along Sentinel Road adequate to service the dwellings contemplated to be constructed. It was acknowledged that the service might accommodate not only the land sold to Tribute but also other University lands. Tribute was to pay its share of the cost of installing the service based on the capacity required for the lands it had purchased.

d) The University was obliged to remove all parking lots on terms and conditions set out in the agreement.

e) House buyers were to be allowed to use University facilities such as gyms, tennis courts and swimming pools on a privileged status basis subject to reasonable fees, rules and regulations. It is understood that the University facilities are available to the general public on the same terms. Tribute agreed to retain and pay for a community development coordinator.

f) The University agreed to retain an architectural/design control consultant and a servicing/planning consultant (collectively referred to as the "Consultants"). Tribute was to pay the cost of the Consultants to the extent only of review and approval of Tribute's elevations and servicing plans. Tribute agreed to be bound by the decisions and approvals made by the Consultants subject to arbitration (there has been no arbitration to date). There is a representation by the University that it is satisfied and consents to the Concept Plan but there is no such representation by Tribute.

g) Tribute had the right to negotiate for the purchase of adjoining lands to the North known as the Phase III lands if the University determined to offer to sell them. In 2004 Tribute agreed to purchase lands to the North. It is therefore not necessary to summarize the provisions setting out what was to occur if an agreement could not be reached. Tribute, at the moment, has no further rights of negotiation or otherwise with respect to additional University lands.

h) The University agreed to convey to Tribute such lands as are required by Tribute or an authority for a storm water pond facility and related management and control purposes in the general location as shown on the Concept Plan provided the conveyance has been approved by the Consultants as being necessary.

i) Tribute was to be responsible for all work related to draft plan approval pursuant to the Planning Act and for zoning changes. Tribute was also responsible for parkland dedication requirements. The University agreed to cooperate in the execution of plans, documents and agreements as may be approved by the Consultants, as necessary or desirable. The University also agreed to provide consents related to submissions or applications. The University further agreed to grant required easements, rights, or licences, or road conveyances or dedications as approved by the Consultants as being necessary or desirable.

j) The University was to contribute its proportional share of any servicing costs attributable to the University lands not sold to Tribute.

k) There were provisions for an approval period and a buy back by the University if the project does not proceed, which are now academic. There were usual representations, warranties, covenants, conditions and default provisions.

When the transaction closed in 2004, Tribute paid for 35.3 acres which included 1.8 acres of parkland. The University contributed 7.0 acres comprising 4.3 acres of perimeter roads and 2.7 acres for the storm pond.

11. The proposal to develop the land sold to Tribute and the Concept Plan were reviewed before the YUDC Advisory Council in September 2001. The Sale Agreement was approved by the YUDC, the President, the FPSR and, ultimately, by the BOG. At each level the proposal was fully discussed by those charged with responsibility of making the decision. The required process leading to the agreement on the part of the University was followed.

IV. Events After the Execution of the Sales Agreement

In the two year period between March 2002 and March 2004, agreements were reached with the municipality to allow the building on Phase I and Phase II to proceed; the consent to severance was given under the Planning Act; Tribute and the University entered into a cost sharing agreement; the sale of the Phase I and Phase II Lands was completed; and an agreement was made by the University with Tribute to sell approximately 35 acres to the immediate north and east of the Phase I and Phase II lands which was known as Phase III.

It is not necessary to recite chronologically the steps that were taken to achieve those results. They are not, strictly speaking, part of this review. There are some matters, however, that should be mentioned in order to put the sale of the Phase I and Phase II lands into context.

1. Agreements with the City of Toronto

   In order to proceed with the building of the residential units, it was necessary to obtain a consent to the severance of the lands under the Planning Act and to amend the zoning by-law. It would have been unlikely for the municipality to resist the building of residences on the lands. Nevertheless, it was an opportunity for the City to obtain some concessions in the public interest. It took over two years before all the arrangements were made and the sale could be closed. This is not an unusual length of time. Among the agreements made with the municipality were agreements relating to:

   a. Park land

Tribute bought from the University 1.76 acres which it contributed to park land. The University also contributed 1.24 acres for park land. The University contribution included 0.5 acres which was “owed” by the University for the Harry Crowe residence. That was a “trailing” liability and should not be taken into account in determining the amount of lands that were disposed of by the University in the Tribute transaction. The University received from the municipality a “credit” for the remaining 0.74 acres which was available to be used for future development. The University transferred the credit to Tribute in the Phase III transaction but Tribute will pay for all the lands acquired from the University on a per acreage basis. In determining the acreage disposal of by the University in relation to Phase I and Phase II there should be no allocation for park lands. Also in relation to park land, the University was required to spend $95,000.00 to prepare part of the lands, where there had been a parking lot, to meet the base park standards of the municipality.

The understandings reached on the park lands was favourable to the University. Bramalea had agreed to contribute approximately 13 acres for the “Fred Young Park”. While the University was not bound by the Bramalea commitment, a park of that size was in the mind of the municipality. After extensive negotiation on Phase I and Phase II, the municipality has agreed to accept three acres of park land (1.24 acres from the University and 1.76 acres from Tribute). In developing Phase III Tribute will be required to make a further contribution. If more University lands are required for this purpose Tribute has agreed to purchase them. The University will make no further contribution.

b. Storm Pond

The University contributed 2.7 acres for a storm pond. Tribute did not pay for that land. Tribute was obliged to pay the cost of storm water sewers except that the University was required to pay its proportional share of that cost to provide sewers of sufficient size to service the University property beyond Phase I and Phase II.

c. Road Dedication

The University contributed 4.3 acres for roads which were not included in the lands purchased by Tribute. The University was also required to spend about $455,000.00 on road improvements.

The overall contribution of the University to the municipality was 7.0 acres for which it was not paid.

While all this was going on, the University was in the course of updating its Master Plan. This involved appealing the official plan of the municipality with respect to the University lands. The stated objective of the University in processing these amendments was to ensure that the University maintained the broadest flexibility in the use of its lands in order to protect and maximize their value.

There were some changes made in the Concept Plan following the execution of the Sales Agreement. IBI reviewed the Concept Plan which governs the Phases I, II and III construction to be carried out by Tribute. IBI is of the view that the Concept Plan as amended is consistent with and in general conformity to the Master Plan of the University.

At the moment, it is the understanding of the University officials that all issues with the municipality with respect to Phase I and Phase II have been resolved and documented.

2. Cost Sharing

In general, Tribute was responsible for the costs of obtaining approvals and other matters required to be done before building permits could be issued. To the extent that the incurrence of such costs benefited York lands not being sold to Tribute, York agreed to pay its proportional share. To this end, the parties entered into a cost sharing agreement which provided for allocation of costs in general and also contained specific provisions for road works, storm water management works and electricity and utility services. The agreement also contained provisions respecting urban design guidelines and the review of Tribute's servicing plans and elevations. Accordingly, in addition to contributing lands for parks and roads, the University incurred expenses for sanitary sewers, storm water sewers and pond, road improvements, and preparing park land so it met the base park standards of the municipality. The University received an adjustment from Tribute for the cost of the electricity feeder line upgrade. Some costs that the University incurred may be regarded in whole or in part as "up front costs" which will either be recaptured or not have to be incurred with respect to future development of the University lands. They include such items as sanitary and storm-water sewers and road improvements. An updated analysis of the revenue and expenses relating to Phase I and Phase II is attached as Appendix 7 to this report. It shows that the net proceeds to the University to May 2005 of the sale of Phase I and Phase II were $13,537,625.00 which is over two million more than the $11,000,000.00 that was originally estimated.

In relation to the cost sharing agreement, there is one point that should be mentioned. MBTW is named in that agreement as the consultant for design related matters for both Tribute and the University. That circumstance will be discussed later.

3. Completion of the Sale

When all the necessary approvals and agreements were in place, the transaction closed on June 4, 2004 with title to the Phase I and Phase II lands being transferred to Tribute and the purchase price being paid by it. Tribute had been permitted to go on the land six months earlier for the purpose of resurfacing. It was agreed between the parties that the entry by Tribute was by licence only and that possession would not be delivered to Tribute nor would construction be commenced until the transaction had been closed.

4. Phase III

Under the Sale Agreement, Tribute had negotiating rights of land to the north of the Phase I and Phase II lands if the University determined to offer them for sale. In October 2004, a non-binding letter of intent was signed and a formal agreement was entered into dated 3 December 2004 whereby Tribute agreed to purchase the Phase III lands which comprised approximately 35 acres (see Appendix 6).

The terms of the agreement are similar to those in the agreement for Phase I and Phase II except there are no negotiating rights for additional lands. The purchase price is based on $750,000.00 per acre which is a significant increase over the $450,000.00 amount paid under the Sale Agreement. The increase in price is, in part, due to a general increase in real estate values over the intervening two years. According to PMA Brethour ("Brethour"), one of the consultants to the University, land prices in the market area had increased, on average, by approximately 37 percent from October 2001 to October 2003 and by October 2004 they had moved to over 68 percent. The increased price might also be due to the establishment of Phase I and Phase II as a viable project which could be expanded. It was also reasonable to contemplate that expenditures of Tribute to put the property in the position where building could commence would be reduced over the expenditures Tribute had to incur for Phase I and Phase II.

Prior to entering into the letter of intent, the University received a valuation from a consultant. The valuation was between $650,000.00 and $750,000.00 per acre. It is noted the consultant was of the view that to get the best price the property should be widely marketed and that lower density would have an adverse impact on price. The consultant thought that there would be very little planning risk for Phase III. The University officials agreed because most of the planning issues had been resolved at the Phase I and Phase II stage.

5. Process

The completion of the Sale Agreement and the agreement with respect to Phase III were managed by YUDC. The BOG was kept informed by regular reports to its Land Use Committee. In addition, the BOG approved the various planning agreements, the amendment to the Concept Plan and the sale of the Phase III lands.

The Advisory Council of YUDC met on 19 January 2003 when representatives of Tribute attended and there was a full discussion of the Phase I and Phase II project. The committee did not meet again until January 2005. There were some members who complained about the long time between meetings although, presumably, any member could have arranged to convene a meeting. In any event, the substance of the sale to Tribute of the Phase I and Phase II lands was conveyed to the Council in a timely fashion.

V. Issues

1. The Marketing of Phase I and Phase II

YUDC has been criticized for not requesting proposals from more builders.

There was no requirement that the University solicit competitive bids although that was contemplated by the University Master Plan. IBI had recommended a two-stage proposal call to the YUDC in 1998. That technique had been used when twenty-two acres of the Southlands were sold to Bramalea. The technique was also used by the Workplace Safety and Insurance Board (the "WSIB") when it sold lands in the Jane and Wilson area in 2003 (see Section V-2 below). It is obvious that a good way to determine the range of possible prices is to expose the availability of the property to be sold as widely as possible.

In the Spring of 2001, YUDC, after extensive discussion, had reached a decision to recommend the sale of the Southwest part of the University lands to a builder who would build residential units in accordance with the Concept Plan. While the University wanted a good return for the property, it was abundantly clear that it was not seeking the highest price if that meant compromising on the quality of the development. There were those who argued for a sale to a high density builder such as Bramalea but their views did not prevail.

There was no recent professional appraisal of the value of the property but YUDC had some idea of the range of possible selling prices. Brethour, had developed a statistical analysis system which was widely used in the industry.

The analysis by the consultants to the University had concentrated on the return to the University if it were to be the developer. However, the consultants did supply some data on raw land sales which gave some guidance to the YUDC Board. The Brethour analysis indicated that land prices from October 1999 to 2001 were very stable with little or no upward movement.

In order to carry out the plan to sell, it was necessary to find a builder with experience, financial resources and reputation for community building. The requirement that the builder should conform to the Concept Plan not only had a downward effect on price but also reduced the number of possible builders. It is generally agreed that although there are a great number of home builders in southern Ontario, there are very few who have the qualifications to build the type of residential community called for by the Concept Plan. Tribute, Monarch and Great Gulf were obvious possibilities. Mattamy Homes was another builder frequently mentioned. There were several other possibilities mentioned in the interviews, one of whom has since become insolvent.

Hunt was given the task of lining up the candidates. In a memorandum to the Board of August 15, 2001, he reported that meetings had taken place with a number of residential builders including Monarch, Great Gulf and Tribute to determine interest in the development. Hunt does not now remember with whom he met in addition to those named in the memorandum. He cannot say whether he approached Mattamy. He does say that none were interested except the three that were mentioned in the memorandum.

There had been discussion in the YUDC Board about the extent of the bid proposals. There were those who advocated a proposal call as had been done in 1987 which resulted in the sale to Bramalea. There were others who felt there was a danger in too wide an exposure. There were very few suitable builders and a high bid might be obtained from a builder who was considered unsuitable based on financial resources or past performance or both. Even an ironclad contract could not prevent trouble. Also a wide bidding process does not necessarily produce the highest bid. Finally, a broadly based proposal involves additional time and expense.

In any event, at its meeting on August 15, 2001 the YUDC Board knew that at the moment there were only two interested builders. There was a wide ranging discussion about what to do. It was eventually decided to conduct preliminary negotiations with the two builders who had shown an interest.

At its meeting on September 28, 2001, the BOG was advised that there had been no open bid but that YUDC had chosen two builders who had experience in building communities.

At the meeting of the YUDC Board on December 3, 2001 there was only the Tribute proposal on the table. The Board had the choice of continuing negotiations with Tribute, abandoning the decision to sell or seeking other builders. In the ensuing discussion a concern was expressed about the public perception because there was not a public tender and there was only one proposal on the table. Again, at the end of the day, the YUDC was authorized to negotiate an agreement with Tribute.

A number, but not all, of the persons interviewed thought with the benefit of hindsight, that it might have been better to send the RFPs to a larger group.

Whether that would have made any difference either beneficially or adversely to the University, it is not possible to say.

In summary, there was no requirement to hold an open or wider bidding process. The question was discussed by the YUDC Board on several occasions. The investigation by Hunt turned up only two builders who were interested. A decision was made to request proposals from them and from no one else. While it is possible to hold a different view, it was not an unreasonable decision in the circumstances by those charged with the responsibility of making it. The decision was communicated to the BOG which had the ultimate authority. There was nothing inappropriate in the decision nor were there any improprieties.

2. Purchase Price

An assessment of the purchase price is not part of this review. It is not possible to say whether the price paid by Tribute was too low or was less than fair market value or was the best price. In all sale transactions, the vendor is concerned that not enough has been paid and the purchaser is concerned that too much has been paid. No one will ever know for certain. A vendor can derive some comfort from having the property appraised or by conducting a wide bidding process. As already discussed that was not done here.

It is appropriate in this review to consider the process by which the price was determined. The conflicting objectives of the University to maximize price and obtain a new community have already been discussed. There are those that suggest that the University has a duty to its community to obtain the best price. In my view that is too high a standard. It is not possible to determine what is the best price in any given situation. It seems to me that the University is required to use its best efforts to obtain fair market value under the conditions in which the property is to be sold. The decision to build low density residential units in accordance with the Concept Plan had an obvious downward effect on price.

It is too simple to express the price paid by Tribute as $450,000.00 per acre. The price by Tribute was paid by an initial cash deposit, a second cash deposit and a cash payment and mortgage for the balance of the price on closing. The cash portion of the price represented 27.5 percent and the mortgage represented the balance of 72.5 percent of the price. In addition, land contributed to the municipality and costs incurred by the University have to be taken into account. Tribute paid for 35.3 acres and York contributed and additional 7.0 acres for roads and the storm pond. The University also incurred expense of approximately $2.3 million. Appendix 7 indicates a net cash return to the University of approximately $320,000 per acre which is a snapshot of the current position. There are expenses that have been incurred that may in the future be allocated to the Phase III lands or to other University lands that may be sold. If that should occur, YUDC estimates that the additional return to the University could be increased by up to $1,000,000.00 or $23,000.00 per acre.

As previously indicated, the YUDC Board had received information from its consultants which gave it some idea of the range of prices that might be proposed. When the original proposal was made by Tribute for $450,000.00 per acre, the YUDC directors considered it to be a good offer. Some thought it was higher than expected. When YUDC set out its negotiating strategy, it only raised the asking price to $475,000.00 per acre which is consistent with their view that $450,000.00 was in the appropriate price range. Eventually, it was agreed to accept the $450,000.00 offered by Tribute. I am satisfied that YUDC directors, in good faith, thought they were obtaining a good price from Tribute.

While not related to the amount of the purchase price, one person was critical of the take back mortgage. The mortgage was characterized as financial assistance by way of a loan to Tribute with an interest free period. It would be more accurate to describe the mortgage as security for the balance of the purchase price. A vendor take back mortgage is not unusual in transactions of this kind. An all cash transaction would have been unusual. Since the early 1980s an interest free period subsequent to closing has been a common provision in take back mortgages. There was nothing improper in the University agreeing to accept a mortgage, nor with the provision in that mortgage of a nine month interest free period.

One method of assessing value of land is to examine sale prices of similar properties under similar conditions. As indicated, sale prices have to be approached with caution because it is the net return to the vendor that is significant not the expressed purchase price in the sale agreement. As I am not assessing the purchase price, I am not concerned with comparable sales. However, the Toronto Star article did refer to the terms of three sales. In the course of the interviews these sales were mentioned. It might be appropriate, in view of the emphasis given to them in the Star article, to pass on some of the comments with the caveat that I have not reviewed the documents relating to any of them. In discussing land values, I have relied on information supplied by Brethour.

The WSIB sold 57 acres in the Jane and Wilson area to the Conservatory Group for a purchase price of approximately $880,000.00 per acre. There are significant differences between the development of that property and the sale to Tribute. First, the WSIB sale was between two and three years after the sale to Tribute. In that time, there had been a rapid price escalation in the general land

and housing market. The WSIB marketing process was initiated in the fall of 2003 and the sale price may have been established as early as December of that year. Second, the location factors are different between the two properties. The WSIB property is closer to the City and has some premium frontage with a view over first class golf course. The Tribute property is farther north and offers no significant views with the exception of a few lots with park frontage. The proximity to the University is advantageous but the surrounding area has some location deficiencies such as a hydro corridor and an oil refinery. To a first builder on the University property, there was the additional risk of successful integration with the neighbourhood to the west. The Tribute property has better access to public transit and there is less highway noise than in the Jane and Wilson area. Third, the WSIB lands went to market with the official plan and zoning by-law amendments approved along with a residential plan of subdivision. No severance approval was apparently required. None of these steps had been accomplished in the sale to Tribute. While the risk of not obtaining the approvals was probably small, they take time which is a factor in comparing the two properties. Finally, the residential units on the WSIB land had a higher overall density than that permitted by the University Concept Plan. The WSIB property development included a residential block of senior housing which could justify paying a higher price for the land. In my view, the WSIB transaction does not support the contention that the price paid by Tribute under the Sale Agreement was too low.

MacMillan Bloedel sold approximately 21 acres to Fram Building Group in March 1999 for approximately $392,000.00 per acre. It is not known when the price was negotiated. According to Brethour, prices showed no upward movement in the period October 1, 1999 to October 2001. Brethour is of the view that MacMillan Bloedel’s price was a reasonable basis to compare to the price that the University sold to Tribute in October 2001. The price is $52,000.00 less than the price per acre paid by Tribute and $72,000.00 per acre more than the current net return to the University. We do not know the net return to MacMillan Bloedel. MacMillan Bloedel had the municipal approvals which the University did not, which circumstance would have had a downward effect on the price the University could obtain. There do not appear to be any significant location or density factors which would affect the comparison. It may be that MacMillan Bloedel obtained a better price than the University but this is not to say that the price accepted from Tribute was unreasonable.

The final comparable in The Toronto Star article was the sale by Canadian Tire of 6.88 acres to Norstar Developments for approximately $681,000.00 per acre. Brethour believes that the price was negotiated in early 2004 when prices were considerably higher than they had been in 2001. Again, municipal approvals had been obtained and the lands were ready for market. The product design was different from that of the Concept Plan and the density was higher. The Canadian Tire property had access to 401 and good shopping. It may be that the University got a better price from Tribute than Canadian Tire did from Norstar.

Finally, comment has been made on the absence of any payment by Tribute for each residential unit such as was contained in the 1997 proposal. A purchase price is made up of a number of elements all of which go to determine the overall price. It is the overall price that matters not how it is made up. In this review, it does not matter that a per unit payment was not included.

After review of the circumstances, I am of the view that the YUDC made its best efforts to obtain a reasonable price which it believed in good faith was in the range of fair market value.

3. The Involvement of Joseph Sorbara in the Sale

Joseph Sorbara is a graduate of the Osgoode Hall Law School at York University. He served as a governor for twelve years which is the maximum time a governor may serve. For a number of years he has been an honorary governor and, as such, he is entitled to attend meetings and to speak but not to vote.

Sorbara is engaged in the land development business. He is part of a family business founded by his father which is known as the Sorbara Group. It has a high reputation for integrity and fair dealing.

Sorbara has been a member of the YUDC Board of Directors for a number of years and since June 2001 he has been the Chair of the Board. As such, he has played a leading role in Board decision-making up to the present time.

Sorbara has an ongoing business relationship with Tribute. Tribute is a home building enterprise with over 20 years experience in building dozens of communities and more than 20,000 homes across the GTA. It is controlled by Al Libfeld and Howard Sokolowski.

Specifically from June 1, 2000 to April 2005 Tribute has been engaged in approximately 35 different projects. The Sorbara Group, through its subsidiaries, has an interest in six of them. In two projects the Sorbara Group was a developer who sold the lands to Tribute and as part of the purchase price, received a percentage of the home building profits. In three other projects the Sorbara Group is a partner in the project. The five projects involve approximately 2,500 dwelling units. The remaining project is described as a joint venture for the development of 50 acres of land.

The Sorbara Group has no direct or indirect interest in the lands sold by the University to Tribute. Sorbara has a high regard for Tribute as a builder. He thinks they are community minded and, although they are hard bargainers, they keep their word. When Tribute made its first approach in 1997, Sorbara arranged a bus tour for the YUDC directors and others so that they might have a look at a Tribute project in the Whitby area. He has a personal relationship with the principals of Tribute. From time to time he may have informally discussed the University lands with them but he has no recollection of doing so.

When the YUDC Board was informed by Hunt in September 1996 that Tribute wished to make a proposal, Sorbara declared his interest in Tribute. At that time, the Sorbara Group had an interest in a Tribute project in Whitby and may have been in the course of negotiating for other projects. The declaration is recorded in the minutes. In addition to Sorbara, most of the YUDC directors were very impressed with the original Tribute proposal. It was not pursued because the University was not then ready to proceed. It had not determined what to do. There is no indication that Sorbara made any attempt to keep the Tribute proposal alive even though he was enthusiastic about its capability as a community builder.

In the following years, Sorbara took a leading role in the work which lead to the Concept Plan and eventually to the request for proposals. He thought that the best course was for the University to develop the land and sell serviced lots. He persisted in that view and the request for proposals gave the builders a choice of buying raw land or serviced lots. Once the decision was to sell the lands for residential purposes, everyone on the YUDC Board expected that Tribute would be considered as a possible builder. However, no one on the Board thought that

Sorbara was trying to dominate the discussion or was pushing them towards an agreement with Tribute. Sorbara thought that proposals should be requested from the only two builders who had informally expressed an interest rather than to a wider group. On reflection, he would have added Mattamy Homes as a person who might be asked to make a proposal. Sorbara was surprised when Monarch did not put in a proposal.

When the Tribute proposal for the purchase of raw land became the only proposal on the table, Sorbara supported its acceptance. The alternative would have been no agreement which would have required either a different course of action or starting the proposals all over again. Sorbara played little part in the direct negotiations with Tribute. He said that he attended a couple of meetings where planning issues were discussed. He did participate in developing the negotiation strategy and in presenting the proposal to the BOG and its Property Committee. He resisted giving Tribute rights in the Sale Agreement to the Phase III lands until he was persuaded otherwise.

It is the view of everyone who was involved in the events leading up to the Tribute proposal and in the subsequent negotiations of the agreement that Sorbara always acted in the best interests of the University. Because of his experience they welcomed his participation. There were some who were not directly involved who were critical but the criticism was not based on any specific circumstance other than the existence of the business relationship with Tribute.

Sorbara has a duty to YUDC as a director. The duty is two fold and may be described as follows:

> “(a) to act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

The first duty is sometimes described as the duty of loyalty and as a fiduciary duty and the second as the duty of care. The duty of loyalty has been described recently by the Supreme Court of Canada in the following terms:

> “The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally.”

Apart from the possibility of a conflict of interest, there is nothing in this review that suggests that Sorbara was in breach of either duty. Quite the contrary. He took a leading role in the extensive discussion and work that led to the Sales Agreement. He was Chair of the working group and then Chair of YUDC. He presented the proposal to the BOG and participated in negotiation of the final terms of the agreement. Throughout, there is no criticism of what he did.

His declaration of an interest in Tribute to the YUDC Board in 1996 is the only recorded declaration of that interest. He has no recollection of ever mentioning it again. There are other board members who recall him referring to his interest on several occasions. Some board members certainly knew of the interest but at least one, and perhaps more, did not. The interest was never declared to the BOG. He was an honourary governor who could not vote. He had no financial or other interest in the transaction that was being considered. Again, many of the BOG members knew of his interest but it cannot be said that it was known to all. Everybody knew he was in the development business. With the benefit of hindsight, it might have been prudent to have mentioned the interest to the BOG but there was no requirement to do so.

Strictly speaking, there was no conflict of interest. Sorbara had no financial interest direct or indirect in Tribute or in the agreement between the University and Tribute. It might be thought that this is a too narrow view of the situation. After all, the Sorbara Group has a significant interest in a number of Tribute projects and Sorbara has a personal relationship with its principals. This circumstance must be considered in its context. While there are a great number of developers and builders in the GTA, there are a relatively small number who perform the majority of the work. The Sorbara Group is involved with other builders and Tribute is involved with other developers. It is not uncommon in the industry to be in a partnership in one transaction and on the other side of the table in another with the same party. The University and Tribute transaction is an example. Notwithstanding that Sorbara was a partner with Tribute in other projects, his colleagues advised that he took a strong negotiating position on the sale by the University. There is nothing that I have come across in my extensive investigation that suggests that the University was not loyally served by Joseph Sorbara.

4. Other Matters

There are several other matters that came up in the course of the review on which comment should be made:

a. MBTW

MBTW, as consultant to Tribute, prepared the design element of the proposal that Tribute submitted in 1998. Subsequently, it was the lead consultant to the University in the preparation of the Concept Plan. It was also retained by the University as the design control consultant under the Sale Agreement. Finally it was design consultant for both the University and Tribute in the Cost Sharing Agreement.

MBTW was not involved as design control consultant for the University until after the Sale Agreement was executed. The University had considerable architectural control over the development. Tribute had to abide by the MBTW decisions, subject to a right to arbitrate if it did not agree. For example, MBTW persuaded Tribute to make the roofs on the residences flat rather than triangular as Tribute had done in other projects. Overall, the development has gone smoothly and to date there has been no arbitration.

MBTW is engaged in urban design, community and resort planning and landscape architecture. It is retained by developers and by builders. It was retained by Tribute in 1996 to make the proposal to the University. It has been retained by developers in two other projects in which Tribute was the builder. In those projects, MBTW performed the same function as it does under the Sale Agreement. It supervises and monitors the design of what is being built. In its business, this sort of thing happens all the time. MBTW does not regard its earlier involvement with the 1998 Tribute proposal as of any significance in its involvement with the University under the Sale Agreement. Its retainer from the University is to exercise design control in accordance with the Concept Plan which it has done. There were some variations made on the Concept Plan along the way which were agreed to by all concerned. This is usual in building projects.

The fact that MBTW was named as the design consultant to both Tribute and the University came as a surprise to Garry Watchorn and Steven Wimmer, the principals of MBTW. They were unaware of it. They took their instructions from the University and did not think they had any responsibility to Tribute. It was the understanding of the University and Tribute that MBTW should speak for both of them to the municipality on design issues so that consistency would be maintained. That may have been the reason why MBTW was named as the design consultant for both parties. That was the view of one of the consultants.

MBTW was engaged by the University along with two other consultants to develop the Concept Plan after a decision had been made not to proceed with the Tribute proposal on which MBTW had also been the consultant. After the Concept Plan was created, there was nothing inappropriate in the University engaging MBTW to act as design control consultant and to later supervise and monitor the construction by Tribute even if MBTW had been previously engaged by Tribute with respect to substantially the same property. There is no suggestion that MBTW did not carry out its responsibility to the University in a professional manner. Its past relationship with Tribute may have been an advantage. The relationship amongst developers, builders, consultants and municipalities on a development is a collaborative one based on business principles.

b. Relationship of Tribute to York University

In 2003, Tribute Communities made a gift commitment of $1 million in support of the Accolade Project: (fine arts learning and performing facilities.) Also in 2003, Tribute communities became the Title Sponsor of the Chair's Cup Golf Tournament by agreeing to donate $30,000.00 a year for three years. It is not uncommon for donations to be made by persons having business dealings with the University. These donations were made after the Sales Agreement and there is nothing to suggest any financial connection between the donations and the Sales Agreement. The donations were made while the Phase 1 and Phase II lands were in the course of development and the sale of the Phase III lands was being negotiated. This raises a questions as to whether the donations had any impact on the development or the negotiations. While some involved were uncomfortable with the golf tournament, others knew nothing about the donations although it was public knowledge. Nobody thought the donations had any effect on the business relationship with Tribute.

c. Involvement of Peter Currie

A question was raised about the involvement of Peter Currie who was a member of the BOG when the sales agreement was approved and continues to be a member. At the time of the approval Currie was a vice president of the Royal Bank of Canada. In 2004 the Bank provided financial assistance to Tribute in relation to Phase I and Phase II. It is not known when the arrangement was negotiated. Currie was not part of the lending arm of the Bank and it would be unlikely that he would know anything about the fact that the assistance had been provided. Currie confirmed that such was the case. As a governor he had no obligation to make enquiries about the possibility of a relationship between the Bank and Tribute.

VI – Conclusion

YUDC developed a Concept Plan for the Southlands which was consistent with the Master Plan of the University. YUDC explored the market and negotiated the sale with Tribute after it became apparent that Tribute was the only suitable builder interested in building to the standards set by the University in the Concept Plan. YUDC and the President of the University recommended the sale which was approved by the Property Committee of the BOG and then by the BOG itself. The process was appropriate and there were no improprieties or conflicts in relation the sale.

Respectfully submitted

June , 2005

ES:bt