

B.3.3 NADG NNN Real Estate Investment Trust

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions – application for relief from requirement to obtain separate minority approval for each class of units – no difference of interest between holders of each class of units in connection with the proposed related party transaction – safeguards include independent committee, fairness opinions, and appraisal – declaration of trust provides that unitholders will vote as a single class unless the nature of the business affects holders of one class of units in a manner materially different from another class – requiring a class-by-class vote could give a de facto veto right to a very small group of unitholders.

Applicable Legislative Provisions

Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions, ss. 8.1(1) and 9.1(2).

August 28, 2023

**IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)**

AND

**IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS**

AND

**IN THE MATTER OF
NADG NNN REAL ESTATE INVESTMENT TRUST
(the Filer)**

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) exempting the Filer, pursuant to Section 9.1 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**), from the requirement in Subsection 8.1(1) of MI 61-101 to obtain minority approval from the holders of every class of affected securities of the Filer, each voting separately as a class, in connection with a related party transaction to which the Filer is a party, and requiring instead that minority approval be obtained from all Disinterested Unitholders (as defined below) voting together as a single class.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) the Filer has provided notice that Subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Québec and New Brunswick.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is an unincorporated open-ended trust established in accordance with the laws of the Province of Ontario pursuant to a declaration of trust dated June 8, 2017, as amended and restated on July 26, 2017 (the **DoT**).
2. The Filer's head office is located at 2851 John Street, Suite One, Markham, Ontario, L3R 5RT.

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3. The Filer completed its initial public offering (**IPO**) on August 17, 2017.
4. The Filer is a reporting issuer in each province of Canada. The Filer is not in default of any requirement of the securities legislation of such provinces.
5. The Filer's investment objectives are to: (a) indirectly acquire, own and lease a portfolio of interests in diversified income producing commercial real estate properties in the U.S. with a focus on outparcel properties leased to national or regional operators pursuant primarily to triple-net leases; (b) enhance the potential for long-term growth capital; (c) generate cash flow from operations to achieve targeted annualized pre-tax distributed yield; and (d) initiate and complete a liquidity event defined as (i) the listing of Units (as defined below) on a stock exchange or the exchange of Units for securities listed on a stock exchange, (ii) the sale of the Filer's portfolio of Properties (as defined below), securities of the Filer's subsidiaries or investee entities directly or indirectly holding Properties or the Units for cash or securities listed on a stock exchange or a combination of cash and securities listed on a stock exchange, (iii) a transaction which provides the Unitholders (as defined below) with comparable liquidity that such holders would have if the Units were listed on a stock exchange, whether by means of a reverse take-over, merger, amalgamation, arrangement, take-over bid, insider bid, reorganization, joint venture or similar transaction or other combination with a public issuer, (iv) a transaction involving a combination of the Filer's portfolio of Properties with one or more other portfolio of properties (whether owned, controlled or managed by a related party or otherwise), (v) a direct or indirect initial public offering or listing of securities of an existing or newly created entity that owns or will own all or substantially all of the Properties (whether as a result of a reorganization, combination, merger or other similar transaction), or (vi) an event similar to those described in (i) to (v) above and designated a liquidity event by the independent trustees of the board of trustees (the **Board**) of the Filer.
6. The Filer is externally managed and operated pursuant to a management agreement entered into with North American Asset Management Corp. (the **Canadian Manager**) and NADG (US), LLLP (which subsequently assigned the agreement to its affiliate, North American Realty Services, LLLP) (the **US Manager**, and together with the Canadian Manager, the **Managers**).
7. The Filer's activities are conducted indirectly through its subsidiaries and investee entities, which own 54 investment properties (the **Properties**) on a 50/50 basis with an investment vehicle domiciled in the U.S. for which the US Manager is the asset manager.
8. The beneficial interests in the Filer are divided into three classes of units (collectively, the **Units**): Class A units (**Class A Units**), Class I units (**Class I Units**) and Class U units (**Class U Units**).
9. As at June 30, 2023, there were 3,804,150 Units issued and outstanding, comprised of 2,165,950 Class A Units, 684,300 Class I Units and 953,900 Class U Units.
10. As at June 30, 2023, the Class A Units represented approximately 56.9% of the issued and outstanding Units, the Class I Units represented approximately 18.0% of the issued and outstanding Units and the Class U Units represented approximately 25.1% of the issued and outstanding Units.
11. No class of Units are listed on a stock exchange and the Filer is a venture issuer under applicable securities law, including for purposes of MI 61-101.
12. At the time of the IPO, the Units were divided into three classes for the following reasons:
 - (a) the Class A Units were designed for investors wishing to make their investment and receive distributions in Canadian dollars;
 - (b) the Class U Units were designed for investors wishing to make their investment and receive distributions in U.S. dollars; and
 - (c) the Class I Units were designed for institutional investors wishing to make their investment and receive distributions in Canadian dollars, and differed from the Class A Units because the IPO agents' fee payable on the issuance of Class I Units was lower than those payable on the issuance of Class A Units.
13. The holders of the Class A Units, Class I Units and Class U Units (the **Unitholders**) have the same rights and obligations and no Unitholder is entitled to any privilege, priority or preference in relation to any other such holder, subject to the following:
 - (a) The Class A Units and Class I Units are denominated in Canadian dollars. The Class U Units are denominated in U.S. dollars.
 - (b) The proportionate entitlement of the holders of Class A Units, Class I Units and Class U Units (together, the **Proportionate Class Interest**) to participate in distributions made by the Filer including distributions of Net

Realized Capital Gains (as defined in the DoT) or income, if any, and to receive proceeds on a redemption of Units and/or upon termination of the Filer, wherein the Proportionate Class Interest is essentially equal to (i) (A) the aggregate gross proceeds received by the Filer for the issuance of such class of Units less the agents' fee payable in respect of such class of Units, less (B) the aggregate amount paid on redemption of such class of Units, divided by (ii) the net proceeds of the IPO (being the gross proceeds less the agents' fee) for all classes of Units less the aggregate amount paid on redemption of all classes of Units.

- (c) The Class I Units are convertible by holders thereof into Class A Units at a ratio determined in accordance with the DoT based on the Proportionate Class Interest of each class.
14. Section 10.5 of the DoT provides that the Unitholders vote as a single class in respect of any matter to be voted upon unless the nature of the business to be transacted at the meeting affects holders of one class of Units in a manner materially different from its effect on holders of another class of Units, in which case the Units of the affected class will vote separately as a class.
15. Section 10.5 of the DoT also provides that in the event the Filer enters into a transaction that is subject to review under MI 61-101, and as a result requires approval from each class of Units, in each case voting separately as a class, the Filer will apply to applicable securities regulatory authorities for discretionary relief from such obligation given that (i) Section 10.5 of the DoT provides that Unitholders will vote as a single class unless the nature of the business to be transacted at the meeting of Unitholders affects holders of one class of Units in a manner materially different from its effect on holders of another class of Units, (ii) the relative returns of any proposed transaction to each class of Units are fixed pursuant to the formula set out herein, and (iii) providing a class vote could grant disproportionate voting power to a potentially small number of Unitholders.
16. The Filer, a subsidiary holding entity of the Filer, NADG NNN Operating LP (**Operating LP**), a limited partnership formed under the laws of the State of Delaware, and a subsidiary of the 50/50 co-owner of the Properties, and a subsidiary holding entity of Operating LP (the **Purchaser**) have entered into an interest purchase agreement, pursuant to which the Purchaser will indirectly acquire the Filer's 50% interest in the Properties (the **Proposed Transaction**).
17. The Proposed Transaction will not alter the entitlements or otherwise provide for the payment of cash or assets to Unitholders in a manner that differs from their pre-established Proportionate Class Interest entitlements in the DoT. Therefore, the interests of the holders of each class of Units are aligned in respect of the Proposed Transaction.
18. The purchase price to be paid by the Purchaser to the Filer under the Proposed Transaction was negotiated by the parties and is the result of arm's length negotiations over the course of several months between the Purchaser and the independent committee (the **Independent Committee**), which is comprised solely of trustees of the Board who are independent of the Filer and the Managers for purposes of MI 61-101. In accepting the proposed purchase price, the Independent Committee considered, in part, (i) the certainty of value and liquidity which the Transaction provides to Unitholders, (ii) the Transaction's attractive proposition to Unitholders relative to the available alternatives, including the risks and ongoing costs associated with pursuing an alternative liquidity event for Unitholders, (iii) the Proposed Transaction values the Filer's 50% interest in the Properties greater than the appraised value of the Filer's approximate 50% non-controlling fractional interest in the Properties and that the Appraisal (as defined below) was based on an April 1, 2023 valuation date and market conditions have deteriorated since then, (iv) the Proposed Transaction value compares favourably to the fair value of the Properties as set out in the Filer's financial statements for the three-month period ended March 31, 2023, (v) the arm's length negotiation process and oversight, and (vi) the Fairness Opinion. Subject to satisfaction of the conditions to closing, the Purchaser intends to satisfy the purchase price with cash.
19. The Purchaser is a "related party" of the Filer for purposes of MI 61-101.
20. The Proposed Transaction is a "related party transaction" pursuant to clause (a) of the definition of "related party transaction" in MI 61-101 and is subject to the applicable requirements of MI 61-101 relating to, among other things, the approval by a majority of the votes cast by disinterested Unitholders entitled to vote on the Proposed Transaction (the **Minority Vote**) at a special meeting (the **Meeting**) of Unitholders to seek the approval in accordance with MI 61-101 of the Proposed Transaction.
21. The Minority Vote requires the exclusion of the votes attached to Units beneficially owned, or over which control or direction is exercised, by any party specified in Subsection 8.1(2) of MI 61-101, being the U.S. Manager, any other interested party and any related party or joint actor thereof. The balance of the Unitholders (the **Disinterested Unitholders**) are entitled to have their votes included in the Minority Vote.
22. As at June 30, 2023, the U.S. Manager held:
- (a) 0 Class A Units (or approximately 0% of the Class A Units and 0% of the Units);
- (b) 0 Class I Units (or approximately 0% of the Class I Units and 0% of the Units); and

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- (c) 100,000 Class U Units (or approximately 10.5% of the Class U Units and 2.6% of the Units).
23. As at June 30, 2023, the Disinterested Unitholders held:
- (a) 2,165,950 Class A Units (or approximately 100% of the Class A Units and 58.5% of the Units);
- (b) 684,300 Class I Units (or approximately 100% of the Class I Units and 18.5% of the Units); and
- (c) 853,900 Class U Units (or approximately 89.5% of the Class U Units and 23.1% of the Units).
24. The Proposed Transaction is subject to the following procedural mechanisms to ensure the collective interests of Unitholders are protected:
- (a) Negotiation of the Proposed Transaction has been overseen by the Independent Committee.
- (b) The Independent Committee retained Blair Franklin Capital Partners Inc. (**Blair Franklin**) as financial advisor in respect of the Proposed Transaction and Blair Franklin has provided the Independent Committee and the Board with a fairness opinion (the **Fairness Opinion**) concluding that, the consideration to be received by Disinterested Unitholders pursuant to the Proposed Transaction is fair, from a financial point of view, to such Unitholders. The Fairness Opinion will be included in the Information Circular (as defined below). The Fairness Opinion and the associated disclosure will comply with the provisions of CSA Multilateral Staff Notice 61-302 *Staff Review and Commentary on Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions*.
- (c) The Independent Committee has retained Miller Thomson LLP to act as counsel for the Independent Committee.
- (d) The Board has exercised the requisite standard of care in accordance with the terms of the DoT with respect to the Proposed Transaction. Stephen S.B. Preston (as Managing Partner, North American Development Group) and Robert S. Green (as President and Partner, North American Development Group) have recused themselves from any Board deliberations and the passing of any resolutions.
- (e) The Filer will hold a special meeting of Unitholders to allow Unitholders to consider and, if deemed advisable, approve the Proposed Transaction by a majority of votes cast by the Disinterested Unitholders, voting together as a single class of the Filer.
- (f) The Filer will prepare and deliver to its Unitholders an information circular (the **Information Circular**) prepared in accordance with the applicable securities law requirements and including the enhanced disclosure requirements mandated by MI 61-101, in order to provide sufficient information to allow the Unitholders to make an informed decision at the Meeting in respect of the Proposed Transaction.
- (g) The Independent Committee retained Joseph J. Blake and Associates, Inc. to prepare, and provide to the Independent Committee and the Board, an appraisal of the portfolio of Properties in contemplation of a potential transaction with the Purchaser (the **Appraisal**). A description of the Appraisal will be included in the Information Circular and a copy of the Appraisal will be appended to the Information Circular.
25. The Filer and the Managers are of the view that the mechanisms set out above are the optimal mechanisms to ensure that the public interest is well protected and that the Disinterested Unitholders are treated fairly and in accordance with their voting and economic entitlements under the DoT.
26. The Filer, the Managers and the Independent Committee have each determined that the Proposed Transaction will not affect holders of one class of Units in a manner materially different than holders of another class of Units, as holders of all Units will receive the formulaic and pre-established treatment as specified by their respective Proportionate Class Interest (subject to payment in the currency of the particular class of Units) determined at the time of the IPO when investors selected their preferred class (if applicable) and purchased or acquired their Units.
27. Separate class votes by the Unitholders would have the effect of granting disproportionate importance to Disinterested Unitholders of Class I Units (18.5% of issued and outstanding Units) and Class U Units (23.1% of issued and outstanding Units). Despite their relatively small holdings (and, in the case of Class I Units, they can be converted into Class A Units), Disinterested Unitholders in each of these groups would be afforded a *de facto* veto right in respect of the Proposed Transaction that could be exercised against all other Unitholders. Because quorum for a meeting of a class of Unitholders is only 10% for each class, it is possible that a holder of less than 2% of the Units could “veto” the Proposed Transaction. Such an outcome would not be in accordance with the reasonable expectations of the Unitholders.
28. To the best of the knowledge of the Filer and the Managers, there is no reason to believe that the holders of Units of any particular class would not approve the Proposed Transaction where the holders of Units of other classes are in favour.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that the following mechanisms are implemented and remain in place:

1. a special meeting of Unitholders is held in order for the Disinterested Unitholders to consider and, if deemed advisable, approve the Proposed Transaction, such approval to be obtained with the Disinterested Unitholders voting together as a single class of the Filer;
2. the Information Circular is prepared and delivered by the Filer to its Unitholders in accordance with applicable securities law requirements; and
3. the Fairness Opinion concluding that the consideration to be received by Disinterested Unitholders is fair, from a financial point of view, to such Unitholders is included in its entirety in the Information Circular.

“David Mendicino”
Manager, Office of Mergers & Acquisitions
Ontario Securities Commission