

**IN THE MATTER OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

- and -

**IN THE MATTER OF
NEXPOINT HOSPITALITY TRUST**

**APPLICATION
OF HIGHLAND CAPITAL MANAGEMENT, L.P.**

(In connection with a transactional proceeding under Rule 16 and
Under Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

A. ORDERS SOUGHT

The applicant, Highland Capital Management, L.P., requests that the Tribunal make the following orders:

1. an order pursuant to s. 127(1)(5) of the *Securities Act* requiring NexPoint Hospitality Trust (“**NHT**”) to amend its Notice of Annual and Special Meeting of Unitholders and Management Information Circular filed September 21, 2023 (the “**Information Circular**”) to address the deficiencies in the Information Circular outlined in this application, and to provide Staff with a copy of the amended information circular at least five business days before it is sent to NHT’s unitholders;
2. an order requiring NHT to postpone the annual and special meeting of unitholders, currently scheduled for October 12, 2023, to a date not earlier than 21 calendar days after the date the amended information circular is sent to NHT’s unitholders;
3. an order pursuant to s. 127(1)(2) of the *Securities Act* requiring NHT to cease trading of its securities, or the securities of NHT Operating Partnership LLC, with any entities controlled or managed by James Dondero until such time that NHT complies with clauses 1 and 2 above;

4. an order requiring NHT to exclude the votes attached to units owned by Liberty CLO HoldCo, Ltd. and Highland Dallas Foundation in determining minority approval at the 2023 annual and special meeting of the unitholders;
5. an order, if required, granting standing to the applicant to bring this application pursuant to s. 127 of the *Securities Act*;
6. an order for an expedited hearing to be held before October 12, 2023; and
7. such further and other relief as the Capital Markets Tribunal may deem just.

B. GROUNDS

The grounds for the request are:

8. In this application, a significant minority unitholder, the applicant, requires the Capital Markets Tribunal's assistance to correct a seriously deficient information circular that asks NHT's unitholders to approve amendments to over \$56 million USD worth of convertible loans.

The parties

9. The applicant, Highland Capital Management, L.P. ("**Highland**"), is an investment advisory firm based in Texas. It owns 7.25% of NHT's units. In October 2019, Highland filed for bankruptcy in the US.
10. NHT is an Ontario real estate investment trust ("**REIT**") established in 2019. It currently trades on the TSX Venture Exchange (the "**TSXV**") at \$0.25 USD per unit. It is a reporting issuer in Ontario and Alberta.
11. As disclosed in its prospectus, NHT's assets were held indirectly through NHT Operating Partnership LLC ("**OP**"), a limited liability company formed in Delaware, and NHT owned all Class A Units in OP through two wholly owned subsidiaries, NHT Intermediary LLC and NHT Holdings LLC.
12. James Dondero, Graham Senst, Jerry Patava, and Neil Labatte are NHT's trustees. Dondero, through various entities, owns 72.13% of NHT's units. Numerous court

decisions in Highland's bankruptcy proceedings have recognized that Dondero directly and indirectly owns, controls, and directs various entities, including unitholders of NHT.

13. Under the Limited Liability Corporation Agreement between NHT, OP, and NHT Holdings LLC, Class B Units in OP are redeemable after one year of their issuance for units in NHT at the discretion of NHT Holdings LLC. Dondero is the manager of NHT Holdings LLC.

NHT enters into related party transactions

14. From 2019 to 2022, NHT disclosed that it has entered into over \$82 million USD worth of convertible notes with entities affiliated with Dondero (the "**Convertible Notes**"). None of the Convertible Notes was subjected to minority approval when they were entered into. NHT has provided very little information about the notes to its unitholders.
15. NHT's financial statements provide very few details about the terms of the Convertible Notes. They included a stock description of the Convertible Notes, disclosing that they are convertible to Class B units of OP at the election of NHT subject to TSXV approval, they mature in 20 years "in most cases", and they were used for general corporate and working capital purposes.
16. NHT's financial statements also vaguely and apparently inconsistently describe the interest rates of the Convertible Notes. NHT's Q3 2022 financial statement disclosed that the notes "bear interest at an annual rate ranging between 1.82% to 7.50% while outstanding". NHT's Q1 2023 financial statement disclosed that the notes "have rates ranging from 1.93% to 7.50% while outstanding". There is no explanation as to why the lowest interest rate in the range rose from 1.82% in Q3 2022 to 1.93% in Q1 2023.
17. NHT published multiple news releases about the Convertible Notes in 2021 and 2022. Each news release disclosed that the Convertible Notes constituted a related party transaction under Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**"). The news releases disclosed that these notes were exempt from the formal valuation and minority approval requirements under s. 5.7(1)(a) of MI 61-101 because the fair market value of each note did not exceed 25%

of NHT's market capitalization when they were entered into. The news releases did not disclose any other reason for why there was no minority vote for the notes.

18. However, according to NHT's own disclosures, the Convertible Notes that NHT entered into in Q1 2022 total over 25% of its market capitalization in that quarter.

NHT undertakes to amend the Convertible Notes

19. On June 26, 2023, NHT announced via news release that NHT had undertaken, at the request of the TSXV, to amend the terms of \$56,165,000 USD worth of the Convertible Notes issued to NexPoint Real Estate Opportunities LLC and Highland Income Funds during the COVID-19 pandemic (which NHT now refers to as the "**COVID Loans**" in the news release and Information Circular) as follows:

- a. Reduce the conversion term to five years from the date of issuance;
- b. Establish a minimum acceptable conversion price based on market prices at the time of each particular advance; and
- c. Remove the conversion of interest.

20. NHT also disclosed in this news release that the conversion terms of one \$8.5 million USD note will be removed altogether. The removal of conversion terms of the \$8.5 million USD note would result in outstanding Convertible Notes in the amount of approximately \$74 million USD.

21. Since the notes are a related party transaction, this news release announced that MI 61-101 requires that NHT seek minority approval of the amendments at the upcoming annual and special meeting of the unitholders.

22. Article 9.3 of NHT's Declaration of Trust requires that NHT's trustees deliver notices of all meetings of the unitholders to each unitholder no less than 21 days before the meeting.

Highland requests information from NHT

23. Highland has requested information from NHT about the Convertible Notes and upcoming vote, but these requests have largely gone unsatisfied.
24. On July 11, 2023, Highland's counsel sent NHT's counsel a letter requesting more information about the Convertible Notes so that it could be fully informed about them for the upcoming vote. The letter requested, among other things, the terms of the original notes, the terms of the proposed amended notes, minutes of meetings and resolutions of the trustees, and correspondence between NHT and the TSXV related to the TSXV's requested amendments. Highland relied on Article 18.12 of NHT's Declaration of Trust, which stated that the unitholders have the right to examine any documents or records which the trustees determine should be available for inspection.
25. NHT's counsel responded on July 17, 2023, and refused to provide access to these documents.
26. On July 28, 2023, NHT set the date for the annual general and special meeting of the unitholders as October 2, 2023. On August 31, 2023, the meeting date was amended to October 12, 2023.
27. On September 18, 2023, Highland's counsel sent another letter to NHT's counsel outlining its concerns about NHT's inclusion of Liberty CLO HoldCo, Ltd. and Highland Dallas Foundation as minority unitholders entitled to vote on the amendments, in view of the US Bankruptcy Court of the Northern District of Texas's having recognized that Dondero may indirectly direct or control these entities. The letter requested that NHT include in its upcoming information circular any information that the trustees have obtained in inquiring about the control and direction of these entities. As described below, this information, however, was not included in the Information Circular.

The Information Circular is released and is deficient

28. On September 21, 2023, NHT released the Information Circular. The Information Circular specified that NHT received 32 loans from entities controlled or managed by

Dondero between June 2021 and September 2022 in the aggregate amount of \$56,165,000 USD. According to the Information Circular, each of these loans is unsecured, has a 20-year term and bears interest at rates ranging from 2.25% per year to 7.5% per year. The Information Circular notes that the principal and interest owing under the COVID Loans is convertible into Class B units of OP based on the value of a Class B unit at the time of conversion. The Information Circular provided that the Convertible Notes were principally used to fund NHT's operating expenses and loan repayments, but they were also used to acquire two hotel properties focused on the leisure travel market to modify NHT's asset mix.

29. The Information Circular discloses for the first time that the Convertible Notes are convertible at the option of the holder at any time. All previous NHT disclosures have described the Convertible Notes as convertible at the option of NHT.
30. Although NHT had consistently disclosed that these notes were exempted from MI 61-101's minority approval requirement under s. 5.7(1)(a) of MI 61-101 due to their being less than 25% of NHT's market capitalization, the Information Circular disclosed for the first time that NHT also relied upon the financial hardship exemption under s. 5.7(1)(e) of MI 61-101. The Information Circular explained that, at the time the notes were issued, NHT's trustees determined that the REIT was in serious financial difficulty and the notes were designed to improve its financial position.
31. The Information Circular also disclosed that the loans were filed with the TSXV at various points during 2021 and 2022 under TSXV Policy 5.1 – Loans, Loan Bonuses, Finder's Fees and Commissions. However, according to the Information Circular, the TSXV advised NHT in December 2022 that these loans were required to be treated as "Convertible Securities" under TSXV Policy 4.1 – Private Placements, and, as a result, the TSXV required amendments to the notes. NHT never disclosed the TSXV's recategorization of the Convertible Notes until the Information Circular.
32. The Information Circular disclosed that if the amendments are implemented, a maximum number of 21,075,012 Class B units will be issuable upon conversion of the notes.

33. The Information Circular also disclosed that:

The Board, having undertaken a thorough review of, and having: (i) considered the terms of the Amendments to the COVID Loans; (ii) considered the need to comply with the requirements of the TSXV in order to maintain a listing for the Units, and (iii) consulted with its legal advisors, concluded that the Amendments are in the best interests of the REIT and agreed to pursue the approval of the Amendments.

...

If the Amendments are not approved at the Meeting, the REIT will engage with the TSXV to seek alternative solutions to the [sic] satisfy the TSXV listing requirements; however, there can be no assurance that a satisfactory solution will be found, and if a solution is not found, the TSXV may halt trading in the Units, suspend trading in the Units and/or initiate a delisting review of the REIT's Units as, absent the Amendments, the REIT would not be in compliance with TSXV listing requirements.

34. The Information Circular disclosed that the units of NexPoint Real Estate Opportunities, Dugaboy, NHT Holdco, LLC, Governance Re Ltd, and NexPoint Real Estate Advisors, LP will be excluded from the minority vote. The Information Circular did not exclude Liberty CLO HoldCo, Ltd and Highland Dallas Foundation as voters and did not provide reasons for not doing so.

35. On September 29, 2023, NHT announced via news release that 817,905 units held by Liberty CLO Holdco, Ltd. through NHT Holdco, LLC will also be excluded from voting on the proposed amendments.

The Information Circular breaches securities law

36. S. 5.3(3) of MI 61-101 outlines the requirements of an information circular, which shall include, among other things:

- a. a description of the background to the transaction;
- b. a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the transaction, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee;

- c. disclosure of the number of votes attached to the securities that, to the knowledge of the issuer after reasonable inquiry, will be excluded in determining whether minority approval for the related party transaction is obtained; and
 - d. the identity of the holders of securities specified in subparagraph (c) together with their individual holdings.
37. The companion policy to MI 61-101 identifies other pieces of information in relation to a related party transaction that should be disclosed, including the trustees' "reasonable beliefs as to the desirability or fairness of the proposed transaction" and the material factors on which the beliefs are based, including the background of the trustees' deliberations.
38. The Information Circular makes significant material omissions and breaches these standards of disclosure. It does not provide sufficient detail about the Convertible Notes to enable Highland and other minority shareholders to make an informed decision on how to vote on the proposed amendments.
39. The unitholders can cast an informed vote on the amendments only if they know about the fairness of the proposed amendments. However, the trustees do not disclose in the Information Circular their reasonable beliefs as to the desirability or fairness of the amendments to the Convertible Notes. Nor do the trustees disclose in reasonable detail the material factors on which their beliefs about the proposed amendments are based. Instead, the Information Circular contains a list of vaguely described factors, with no elaboration on why or how these factors allowed the trustees to conclude that the amendments are "in the best interests of the REIT".
40. To cast an informed vote, the unitholders also need to know if the proposed amendments are the best terms for NHT. The Information Circular does not describe how the specific terms of the amendments were agreed to with the TSXV or the lenders; nor does it explain why, under the proposed amendments, at least one note would have its conversion terms removed altogether. The Information Circular does not at all discuss the trustees' deliberations about the amendments.

41. The unitholders also need to know the implications of approving or rejecting the amendments in order to make an informed vote. However, the Information Circular does not disclose how the notes will affect NHT in the future and there is no discussion about the impact of the notes' potential conversion on NHT's financial status. There is no discussion in the Information Circular about the likelihood that some or all of the notes will be converted. There is also no discussion about whether it would be beneficial for NHT to have the notes converted or pay back the notes in full.
42. The Information Circular also does not discuss NHT's options in the instances that the amendments are not approved. There is no discussion on possible alternative solutions, how they could affect NHT, or whether the trustees have engaged with the TSXV on available options.
43. To make an informed decision on how to vote, the unitholders need to know the TSXV's views on the amendments. The Information Circular is silent on why the Convertible Notes are being amended so long after the TSXV first advised NHT that they must be amended, or why the TSXV requested the amendment so long after their issuance. There is no description of any negotiations or discussions between NHT and the TSXV on the appropriate policy treatment or discussion on whether the TSXV provided options for amendments or demanded a single set of specified amendments.
44. The Information Circular does not provide an explanation for why only \$56 million USD worth of notes are being amended when NHT has entered into over \$82 million USD worth of Convertible Notes in total. NHT's financial statements have never uniquely described any group of Convertible Notes such that they would be treated differently by the TSXV. If there will be future similar amendments to the rest of the Convertible Notes, that is a significant piece of information that would inform the unitholders on how to vote.
45. There is no further explanation on why the trustees and their advisors did not believe that the COVID Loans were to be treated as "convertible securities" under TSXV Policy 4.1 – Private Placements when they have been described as "convertible notes" in NHT's financial statements since 2020. This initial mischaracterization places the unitholders of

NHT in a difficult position since they are now forced to approve amendments to Convertible Notes that were already issued without minority approval, at the risk of delisting by the TSXV.

46. To make an informed decision on how to vote on the amendments to Convertible Notes that have already been issued, the unitholders need disclosure on why the Convertible Notes were not subjected to minority approval at the time they were issued. However, the Information Circular does not even provide basic information about the notes, such as who the lenders are, the amounts of the notes, each note's rate of interest, when they were entered into, or their purposes. Without this information, unitholders are unable to determine whether the Convertible Notes are potentially connected transactions under s. 5.7(1)(a) of MI 61-10 such that the notes would not qualify for the market capitalization exemption in that provision.
47. The Information Circular also does not discuss why the Convertible Notes are suddenly also exempted from MI 61-101's minority approval requirement under the financial hardship exemption in s. 5.7(1)(e) of MI 61-101. Before the Information Circular, NHT consistently disclosed only that the Convertible Notes were exempt under the market capitalization exemption in s. 5.7(1)(a) of MI 61-101. NHT had never made reference to the financial hardship exemption and the Information Circular provides no information on why the trustees are retroactively applying this exemption.
48. If Dondero-affiliated entities are included as minority unitholders for voting purposes, this would defeat the purpose of MI 61-101's minority approval requirements and would render Highland's vote meaningless. The Information Circular does not provide any commentary on the inclusion of Liberty CLO HoldCo, Ltd. and Highland Dallas Foundation as minority unitholders, even though Highland had objected to their inclusion and requested that information relevant to any inquiries made by the trustees regarding the control or direction over these parties be included in the Information Circular.
49. The Information Circular also contains inadequate disclosure regarding how the conversion right can be exercised. While NHT's financial statements and news releases have consistently disclosed that the Convertible Notes are convertible at the option of

NHT, the Information Circular—for the first time—describes the Convertible Notes as convertible “at the option of the holder at the time”. This change in the exercise of the conversion is not included as one of the three amendments for which NHT is seeking minority approval, suggesting that the change may already have been made.

50. Changing the exercise of the conversion from being at the option of NHT to being at the option of the Dondero-affiliated lenders consolidates Dondero’s control over the Convertible Notes. Rather than needing the approval of NHT’s independent trustees to convert the notes, Dondero can now seek to convert them at his will to his benefit. The Information Circular does not draw attention to this significant change, only briefly mentioning it among numerous other facts about the Convertible Notes, and it does not disclose any additional information about this change.
51. The Information Circular may also contain misrepresentations. The Highland Opportunities and Income Fund (“**HFRO**”) disclosed in its US securities filings that it held a secured promissory note with OP for over \$42 million USD maturing February 14, 2027.
52. The only entry in NHT’s Q2 2023 financial statements that could accommodate the HFRO secured loan is the entry for the Convertible Notes. If this is true, NHT’s Information Circular would contain a misrepresentation since it describes the COVID Loans as unsecured and having a 20-year term. NHT unitholders require additional disclosure to reconcile the HFRO secured note with NHT’s Information Circular.
53. All of the above information is vital to enable Highland to vote on the amendments. NHT currently trades at \$0.25 USD per unit and the TSXV lists its market capitalization as \$7,338,014 USD with 29,352,055 outstanding units. The approval of over \$52 million USD of convertible notes with Dondero-affiliated parties, which may result in the conversion of 21,075,012 units, poses a significant risk of dilution for Highland’s shares and could drastically consolidate Dondero’s control of NHT. NHT’s trustees must provide much more disclosure in its Information Circular before asking NHT’s unitholders to approve this significant transaction.

54. The Information Circular should be amended to include the following information to allow the unitholders to make an informed decision on how to vote on the amendments to the COVID Loans:

- a. Copies of all executed agreements, including any amendments or assignments, for the Convertible Notes;
- b. Details about the COVID Loans and Convertible Notes, and their terms, including:
 - i. the amount of each note;
 - ii. the date each note was entered into;
 - iii. the terms of each note;
 - iv. the identity of the lender of each note;
 - v. the intended purpose of the proceeds of each note;
 - vi. the terms related to the convertibility of each note;
 - vii. all assignments of each note, if any; and
 - viii. all proposed and executed amendments to each note;
- c. The reasonable beliefs of the NHT trustees on the desirability or fairness of the amendments, including:
 - i. the background of the trustees' deliberations regarding the amendments;
 - ii. the review and approval process adopted by the trustees regarding the amendments;
 - iii. a description of how the trustees and the TSXV or NHT's lenders agreed to the specific terms of the amendments, including any alternative amendments proposed by the TSXV;

- iv. a discussion on whether the terms of the amendments are the best terms that NHT could negotiate;
 - v. the reason for the complete removal of the conversion terms from one \$8.5 million USD note;
 - vi. an analysis of whether it is in the best interests of NHT to remove the conversion terms from the \$8.5 million USD note; and
 - vii. all other material factors on which the trustees based their beliefs regarding the Convertible Notes;
- d. The implications of approving the proposed amendments, including:
- i. a description of how the notes and their conversion will affect NHT in the future, including its financial status;
 - ii. the likelihood that the notes will be converted; and
 - iii. an analysis on whether it is beneficial for the Convertible Notes to be converted or be paid back in full;
- e. The implications of not approving the proposed amendments, including:
- i. alternative options available if the amendments are not approved at the annual and special meeting of the unitholders; and
 - ii. the details of any discussions or negotiations between NHT and the TSXV about these alternative options;
- f. The details of any discussions or negotiations between NHT and the TSXV on the appropriate policy treatment of the Convertible Notes, including:
- i. the reason why the TSXV has requested the amendments so long after the notes were issued;

- ii. the reason why the TSXV requested an amendment of only \$56 million USD worth of notes when NHT entered into over \$82 million USD worth of notes;
 - iii. the reason why the trustees and their advisors did not believe the notes should be treated as “convertible securities” under TSXV Policy 4.1 when they first filed them with the TSXV; and
 - iv. the reason why NHT is attempting to amend the notes now when the TSXV advised NHT of the required treatment of the notes in December 2022;
- g. An explanation of NHT’s exemptions from minority approval, including:
- i. an explanation as to why NHT is now relying on the financial hardship exemption under s. 5.7(1)(e) of MI 61-101 when it has never referenced this exemption before issuing the Information Circular; and
 - ii. an analysis related to the conclusion that the market capitalization exemption in s. 5.7(1)(a) of MI 61-101 was available, including clarification on whether the notes were connected transactions under MI 61-101; and
- h. An explanation of the inclusion of Liberty CLO HoldCo Ltd. and Highland Dallas Foundation as minority unitholders, including information relevant to any inquiries made by the trustees regarding the control or direction over these parties.

The meeting should be postponed

55. In order that NHT may make the required amendments to the Information Circular, the annual and special meeting of unitholders, currently scheduled for October 12, 2023, should be postponed to a date not earlier than 21 calendar days after the date the amended information circular is sent to NHT’s unitholders.

Highland should be granted standing to bring this application

56. This application involves both past and possible future conduct regulated by Ontario securities law, namely the contents of the Information Circular and how it impacts the validity of the vote scheduled for October 12, 2023.
57. This application is not purely enforcement in nature.
58. Highland seeks future-looking relief, namely the amendment of the Information Circular so that it can vote on the proposed amendments with adequate information.
59. This Tribunal has the authority to order an amendment of an information circular under s. 127 of the *Securities Act*.
60. Highland, as one of the few minority unitholders of NHT, is directly affected by the lack of disclosure in NHT's Information Circular.
61. It is therefore in the public interest to hear this application.

Highland requests an expedited hearing

62. Because the annual and special meeting of the unitholders is currently scheduled for October 12, 2023, Highland requests a hearing of this application before that date.

C. EVIDENCE

The applicant intends to rely on the following evidence at the hearing:

63. The affidavit of James P. Seery, Jr., to be affirmed; and
64. Such further and other evidence as this Tribunal may permit.

DATED this 2nd day of October, 2023

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