

Headnote

Mutual Reliance Review System for Exemptive Relief Applications C exemption from eligibility requirements under National Instrument 44-101 and National Instrument 44-102 in order to conduct rights offering and qualify exercise of long term warrants C issuer has substantial market following

Applicable Ontario Statutes

Securities Act, R.S.O. 1990, c.S.5, as am.

Applicable Ontario Rules

National Instrument 44-101 Short Form Prospectus Distributions, ss. 2.2(3), 2.9 15.1

National Instrument 44-102 Shelf Distributions, ss. 2.1, 2.2(1), 2.2(3)(b)(ii), 11.1

IN THE MATTER OF THE SECURITIES LEGISLATION OF ONTARIO, BRITISH
COLUMBIA, ALBERTA, SASKATCHEWAN, MANITOBA, QUEBEC, NEW BRUNSWICK,
NOVA SCOTIA, PRINCE EDWARD ISLAND AND NEWFOUNDLAND AND
LABRADOR

AND

IN THE MATTER OF THE MUTUAL RELIANCE REVIEW SYSTEM FOR EXEMPTIVE
RELIEF APPLICATIONS

AND

IN THE MATTER OF FIRST CAPITAL REALTY INC.

MRRS DECISION DOCUMENT

WHEREAS the local securities regulatory authority or regulator (the "Decision Maker") in each of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador (the "Jurisdictions") has received an application from First Capital Realty Inc. ("First Capital") for a decision under the securities legislation of the Jurisdictions (the "Legislation") that First Capital be exempt from the requirements of:

- (a) subsection 2.2(3) of National Instrument 44-101 Short Form Prospectus Distributions ("44-101") that the aggregate market value of its equity securities be \$75,000,000 or more on certain dates;
- (b) section 2.1 of National Instrument 44-102 Shelf Distributions ("44-102") that it only file a short form prospectus that is a base shelf prospectus in certain circumstances; and
- (c) subsection 2.2(1) of 44-102 that it meet the qualification criteria under section 2.2 of 44-101 in order to qualify to file a preliminary short form prospectus that is a preliminary base shelf prospectus,

(collectively, the "Eligibility Requirements") so that it may (i) distribute rights ("Rights") to all holders of its common shares ("Common Shares") to subscribe for common share purchase warrants ("Warrants") of First Capital pursuant to a short form prospectus, and (ii) qualify the Common Shares issuable upon the exercise of the Warrants under a base shelf prospectus, all as further described below;

AND WHEREAS under the Mutual Reliance Review System for Exemptive Relief Applications (the "System"), the Ontario Securities Commission (the "Commission") is the principal regulator for this application;

AND WHEREAS First Capital has represented to the Decision Makers that:

1. First Capital is a corporation incorporated under the laws of Ontario and is a reporting issuer under the Legislation and is not in default of any requirements of the Legislation.
2. First Capital is a growth-oriented real estate investment company that concentrates on the ownership of neighbourhood and community shopping centres.
3. The authorized capital of First Capital consists of an unlimited number of Preference Shares, issuable in series, and an unlimited number of Common Shares. As of February 6, 2002, there were no Preference Shares and 15,377,024 Common Shares issued and outstanding. In addition, as of February 6, 2002, First Capital had outstanding: (i) \$57,441,000 principal amount of 8.5% convertible unsecured subordinated debentures (the "8.5% Debentures"), convertible into Common Shares at any time prior to redemption or maturity at a price of \$15.50 per Common Share; (ii) \$97,522,000 principal amount of 7.875% convertible unsecured subordinated debentures (the "7.875% Debentures"), convertible into Common Shares at any time prior to redemption or maturity at \$17.00 per Common Share; (iii) \$99,999,100 principal amount of 7.0% convertible unsecured subordinated debentures (the "7.0% Debentures"), convertible into Common Shares at any time prior to redemption or maturity at \$23.50 per Common Share; (iv) \$100,000,000 principal amount of 7.25% convertible unsecured subordinated debentures (the "7.25% Debentures"), convertible into Common Shares at any time prior to redemption or maturity at \$25.25 per Common Share; and (v) \$38,166,000 principal amount of 7.5% secured subordinated debentures (the "7.5% Debentures") (the 8.5% Debentures, 7.875% Debentures, 7.0% Debentures, 7.25% Debentures and the 7.5% Debentures are collectively referred to as the "Debentures").
4. The Common Shares and the Debentures are listed on The Toronto Stock Exchange (the "TSE").
5. First Capital has been a reporting issuer in each of the Provinces of Ontario, Newfoundland and Labrador, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta and British Columbia since its initial public offering in March 1994, and a reporting issuer in Quebec since November 1996.

6. First Capital completed an initial public offering in 1994 of 1,908,300 Common Shares and an aggregate principal amount of \$38,166,000 of 7.5% Debentures for total gross proceeds of approximately \$57 million pursuant to a special debenture transaction.
7. Subsequent to its initial public offering, First Capital has completed:
 - (i) an offering of 2,941,180 Common Shares for gross proceeds of approximately \$25 million pursuant to a special warrant transaction which was completed in July 1995;
 - (ii) a public offering of 5,250,000 Common Shares for total gross proceeds of approximately \$55 million in February 1996;
 - (iii) a public offering of the 8.5% Debentures for total gross proceeds of approximately \$60 million in November 1996;
 - (iv) a public offering of the 7.875% Debentures for total gross proceeds of approximately \$100 million in February 1997;
 - (v) a public offering of the 7.0% Debentures for total gross proceeds of approximately \$100 million in February 1998; and
 - (vi) a public offering of the 7.25% Debentures for total gross proceeds of approximately \$100 million in June 1998.
8. First Capital intends to carry out a rights offering (the "Rights Offering") in which it will offer Rights to all holders of its Common Shares to subscribe for the Warrants.
9. Under the terms of the Warrants, First Capital will be required to maintain a prospectus during certain periods (each an "Exercise Period") during the term of the Warrants to qualify the Common Shares issuable upon the exercise of the Warrants. Under the terms of the Warrants, a holder of Warrants will only be entitled to exercise Warrants to acquire Common Shares during such Exercise Periods.
10. First Capital intends to file a short form base shelf prospectus (the "Base Shelf Prospectus") and, prior to the commencement of each Exercise Period, a prospectus supplement, in order to qualify the Common Shares issuable upon the exercise of the Warrants during such Exercise Period.
11. As of February 6, 2002, First Capital's principal shareholder, Gazit-Globe (1982) Ltd., through its indirect wholly-owned Canadian subsidiaries, Gazit (1997) Inc. and 2000386 Ontario Limited (collectively, "Gazit"), owned 10,466,500 Common Shares representing approximately 68.07% of the outstanding Common Shares. In addition,

as of February 6, 2002, Gazit owned an aggregate principal amount of \$13,412,000 of 7.5% Debentures, an aggregate principal amount of \$9,393,000 of 8.5% Debentures, an aggregate principal amount of \$31,930,000 of 7.875% Debentures, an aggregate principal amount of \$28,980,600 of 7.0% Debentures and an aggregate principal amount of \$32,049,000 of 7.25% Debentures. If all such Debentures (excluding the 7.5% Debentures which are not convertible) were converted into Common Shares, Gazit would hold an additional 4,986,720 Common Shares and would hold approximately 75.88% of the outstanding Common Shares.

12. As of February 6, 2002, Alony-Hetz Properties & Investments Ltd. ("Alony-Hetz"), through its wholly-owned subsidiary A. H. Canada Holdings Ltd. ("AH Canada"), owned 2,931,824 Common Shares representing approximately 19.07% of the outstanding Common Shares. In addition, as of February 6, 2002, AH Canada owned an aggregate principal amount of \$3,800,000 of 7.5% Debentures, an aggregate principal amount of \$2,335,000 of 8.5% Debentures, an aggregate principal amount of \$8,556,000 of 7.875% Debentures, an aggregate principal amount of \$8,031,000 of 7.0% Debentures and an aggregate principal amount of \$8,921,000 of 7.25% Debentures. If all such Debentures (excluding the 7.5% Debentures which are not convertible) were converted into Common Shares, AH Canada would hold an additional 1,348,991 Common Shares and would hold approximately 25.6% of the outstanding Common Shares. Alony-Hetz is a significant institutional investor in First Capital but does not act jointly or in concert with Gazit.
13. First Capital would, but for the requirement contained in paragraph 3 of section 2.2 of 44-101 (the "Public Float Test"), be qualified to file a prospectus in the form of a short form prospectus under 44-101. In this regard, the aggregate market value (the "Public Float") of First Capital's equity securities that are listed and posted for trading on the TSE, calculated in the manner contemplated by section 2.9 of 44-101 which requires the exclusion of the Common Shares held by Gazit and Alony-Hetz, is \$24,733,750, being less than the \$75,000,000 requirement of the Public Float Test.
14. First Capital had been eligible to participate in the POP System under former National Policy 47 since 1996 and undertook the offerings referred to in clauses (iii) through (vi) in paragraph 7 above by way of a short-form prospectus. First Capital became ineligible to use the POP System upon the acquisition of control of First Capital by Gazit in August 2000 and the increase by Alony-Hetz of its investment in First Capital following the acquisition of control of First Capital by Gazit, which resulted in a reduction in the aggregate market value of its Public Float. Since that time, First Capital has continued to comply with the other requirements of the former National Policy 47 and now 44-101.
15. First Capital has a substantial market following and is closely followed by analysts and investment advisors from several Canadian securities dealers. In addition, First Capital

has been the subject of numerous articles in the press and receives significant media attention.

AND WHEREAS under the System, this MRRS Decision Document evidences the decision of each Decision Maker (collectively, the "Decision");

AND WHEREAS each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met;

THE DECISION of the Decision Makers under the Legislation is that First Capital be exempt from the Eligibility Requirements in connection with the filing of a short form prospectus that qualifies the distribution of the Rights and Warrants pursuant to the Rights Offering in the manner set out in paragraphs 8 through 10 above, provided that First Capital otherwise complies with all of the requirements and procedures set out in 44-101;

AND THE FURTHER DECISION of the Decision Makers under the Legislation is that First Capital be exempt from the Eligibility Requirements in connection with the filing of the Base Shelf Prospectus and related prospectus supplements that qualify the Common Shares issuable upon the exercise of the Warrants in the manner set out in paragraphs 8 through 10 above, provided that:

1. the Base Shelf Prospectus qualifies only the issuance of Common Shares upon the exercise of the Warrants;
2. First Capital otherwise complies with all the requirements and procedures set out in 44-101 and 44-102;
3. the receipt issued for the Base Shelf Prospectus in reliance upon this Decision is effective until the earliest of:
 - (a) the date 25 months from the date of its issue;
 - (b) the time immediately before entering into of an agreement of purchase and sale for a security to be sold under the Base Shelf Prospectus, if at that time
 - (i) First Capital does not have a current AIF, or
 - (ii) the aggregate of (i) the aggregate principal amount of the Debentures listed on the TSE, excluding the Debentures held by Gazit and Alony-Hetz and (ii) First Capital's Public Float, has not been \$200,000,000 or more on a date within 60 days before the date of the agreement; and

- (c) the lapse date, if any, prescribed by the Legislation if relief has not been granted to First Capital extending the lapse date for the distribution; and
- 4. the relief provided by this Decision shall expire on the earlier of:
 - (a) the date that is 25 months from the date on which the final receipt is issued for the Base Shelf Prospectus; and
 - (b) the time immediately before the filing of a subsequent base shelf prospectus filed to qualify the distribution of Common Shares upon the exercise of the Warrants.

DATED February 26, 2002.

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