



# **Corporate** NO: C399

# **Report** COUNCIL DATE: July 13, 1998

## **COUNCIL-IN-COMMITTEE**

**TO: Mayor & Council**    **DATE: June 30, 1998**

**FROM: City Solicitor**    **FILE: 0022-002**

**SUBJECT: Bill 31 - Local Government Statutes Amendment Act**

## **RECOMMENDATION**

It is recommended that the information in this report be received.

## **BACKGROUND**

Bill 31 is the first set of amendments in a Provincial initiative to completely revamp the *Municipal Act* (the "new Act"). This first phase revises, consolidates and broadens the corporate governance powers through a replacement of Part 5 of the *Municipal Act*, R.S.B.C. 1996, c. 323 (the "old Act") (formerly "Government and Procedure"). Corporate powers are the business powers which enable an individual or company to exercise and manage its affairs. Such powers include, for example, the making of agreements, contracting for goods and services and setting the duties of officers and employees.

The new corporate governance and power reform provisions impact the following key areas:

1. Newly Defined Role of Local Government;
2. Introduction of Important New Definition Concepts;
3. Corporate Status, Governing Bodies and General Corporate Powers;
4. Agreements;
5. Economic Assistance to the Public, Non-Profit and Private Sectors;
6. Acquiring/Disposing of Land and Improvements;

7. Disposal of Utilities and Water Systems;
8. Delegation of Local Government Authority to Officers, Employees and Councillors;
9. Officers and Employees; and
10. Corporate Finance Powers.

## DISCUSSION

### 1. Newly Defined Role of Local Government

Purpose of the old *Act* Part 1 - Introductory Provisions of the old *Act* is to be replaced with a new Part 1 - Purposes and Principles. This new Part 1 is divided into the following main headings:

Purposes of the Act (s. 1):

- (a) to recognize local government is an independent, responsible and accountable order of government within its jurisdiction;
- (b) the Act's purpose is to provide a legal framework and foundation for local government to represent interests and respond to community needs;
- (c) to provide the powers, duties and functions necessary for fulfilling purpose; and
- (d) to provide local governments with flexibility to respond to needs and changing circumstances.

The new *Act's* purposes are then followed by "*purposes of local governments*". It should be noted that the previous definition of "*local government*", which is the Council, is continued in the new *Act*. The purposes of local government (s. 2) are defined in relation to "*community*" so as to characterize these purposes as primarily local in nature. They include the following:

- (a) good government;
- (b) works, services, facility and other "*things*";
- (c) stewardship of public assets; and
- (d) foster current and future economic, social and environmental well-being.

Section 3 of the new *Act* provides that the powers conferred on local governments by the new *Act* are to be interpreted broadly. These powers are to be exercised in accordance with the above-noted purposes of both the new *Act* (s.1) and the purposes of local government (s.2). The Province has also limited this broader scope of power by including the wording in s. 3 "*subject to the specific limitations and conditions established by or*

*under the Act*".

The new *Act* then goes on to define principles for governing the relationship between local governments and the Provincial government. The principle of ultimate provincial control over local government is emphasized in s. 4(e) as "*the independence of local government is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally*".

Otherwise the new *Act* calls for cooperative inter-governmental relations, notice and consultation on Provincial actions that directly affect local government interests (s. 4(c)).

Some of the preamble of the new *Act* that relates to the purposes of the *Act*, and the role of local government may ultimately be useful as an aide to interpretation of local government powers and by-laws. However, there is also an overriding Provincial interest expressed in the new Part 1 and elsewhere in the new *Act*.

The new *Act* in no way opens the door to U.S. style "*home rule*" which leaves for local government areas of jurisdiction not occupied, or in conflict with, state jurisdiction. The new *Act* does not yet introduce broad "*natural person*" powers into the definition of municipal corporate powers. Such powers would impart a full range of legal authority, including the ability to contract, incorporate subsidiaries, incur indebtedness and acquire/dispose of real estate. Instead the new *Act* simply defines the municipality as a corporation and enumerates specific powers.

## 2. New Definitions

The following are the new definitions created by the new *Act*:

- (i) "Counter Petition Opportunity". This is a new definition and such an opportunity for electors to petition against a proposed by-law, act or other matter must be given in the case of public-private partnerships and certain liabilities incurred beyond five years;
- (ii) "Designated Municipal Officer". This is the officer assigned responsibility to a specific officer position under s. 196. If no such assignment has been made then the new Corporate Administrator Position (s. 198) (formerly the Clerk) is assigned responsibility.
- (iii) "First Nation". This recognition has been introduced into the new *Act* as "*an aboriginal governing body, however organized and established by aboriginal people in their traditional territory in British Columbia*". Local Government now have the authority to enter into agreements directly with a first nation.
- (iv) "Manage". This definition has been introduced to apply to "*land, improvements, personal property or other property, includes conserve, use, develop, construct, improve, operate, administer and maintain*". This concept is important in understanding the types of work local governments can contract out.
- (v) "Partnering Agreement". This means *an agreement between a local government and a person or public authority under which the person or public authority agrees to*

(a) *provide or manage a facility or work for the local government, or*

(b) *provide a service on behalf of the local government;*

This definition must be read together with the above-noted definition of "*manage*" to see the intended scope of this agreement. It should be noted that neither the words "*facility*" or "*work*" are defined terms in the new *Act*.

- (vi) "Public Authority". This is an important new definition of public authority that includes the following:
- governments of Canada, B.C. or another province (or an agent of the foregoing), other local government and most local boards
  - a body in another province or country that provides local government services
  - a first nation

These public authorities are important from the point of view of contractual relations. The new *Act* provides broad authority to enter into agreements with defined public authorities. The old *Act* had specific authority scattered throughout it.

Miscellaneous references in the new *Act* to a local government officer also now conveniently refer to the officer's deputy and any person designated to act in the officer's place (s. 6.1).

Section 6.3 does allow local governments to change a counter petition process in particular matters to the full assent of electors process.

Section 6.4 revises how notices are to be published in newspapers.

Section 6.5 provides that notices and document service continues to the new Corporate Administration person, formerly the Clerk.

Section 55 of the old *Act* is amended to allow partial social security numbers for voter registration.

Regulations:

Section 6.6 allows regulations prescribing a body as a "*public authority for the purposes of this Act*".

### 3. Corporate Status, Governing Bodies and General Corporate Powers

#### (i) Authority of Council:

The old *Act* simply states that "*except as otherwise provided in this or another Act, municipal powers must be exercised by Council*". The 1998 wording adds to "*powers*", the words "*functions and duties*" and then states that a "*governing body of a municipality is its Council*". It also provides that a local government (i.e. Council) in exercising or performing the "*powers, duties and functions*" conferred on it by an enactment, is acting as the governing body of the municipality. The old *Act*, on the other hand, gave no statutory definition to the role of Council which is largely common law.

The new *Act* therefore codifies the principle that Council is the governing body and that the powers, duties and

functions are to be exercised and performed by council unless otherwise provided (i.e. through delegation in this or any other Act). Unless otherwise provided, Council's powers may only be exercised within municipal boundaries (s. 174 - 175). Section 176(3) allows for example, a local government to make agreements or works or services outside its boundaries.

(ii) General Corporate Powers

The corporate status in the new *Act* is given in s. 173 which simply says the municipality is a corporation. This in my view is somewhat narrower than the old *Act* which gave the municipalities "*all the rights and liabilities of a corporation*" with "*full power to acquire, hold, dispose of real and other property subject to this Act, and to contract for materials and services*". As noted above "*natural person*" powers are not given in the new *Act*.

Now the "*corporate powers*" are specifically enumerated in s. 176 which consolidate powers that were scattered throughout the old *Act*. Council will have to be careful to ensure it has the appropriate corporate power to exercise a particular power, duty or function.

(iii) Agreements

Section 176(1) lists the following express corporate powers in subsections (a) to (f) as follows:

*"(a) to make agreements respecting the local government's activities, works or services, including agreements respecting the undertaking, provision and operation of its activities, works and services."*

"*Activities, works or services*" are undefined. A key omission is the word "*manage*" which is allowed only in respect of "*partnering agreements*". The agreements may, however, deal with "*undertaking, provision and operation*". Ultimate management and control over the works and services, it appears, must rest with local government. The above agreements may also be entered into with "*public authorities*". As noted above, public authorities are specifically defined in s. 1.

(iv) Assistance

*"(c) to provide assistance for the purpose of benefiting the community or any aspect of the community."*

This is conceptually broad in relation to community and social service provision. It is however, expressly limited by s. 182 which states that as a limitation on s 176(1)(c), "*a local government must not provide assistance to an industrial, commercial or business undertaking*". Partnering agreements, (public/public or public/private joint ventures) may, however, have "*assistance*" components by reason of s. 183. Assistance under the above s. 176(1)(c) and in "*partnering agreements*" must not include a waiver or reduction of a development cost charge under this section (s. 933(11)).

(v) Acquisition and Disposition of Property

*"(d) to acquire, hold, manage and dispose of land, improvements, personal property or other property, and any interest or right in or with respect to that property."*

The above wording is the same as in the old *Act*, however as noted in the discussion in this report under 6 below, it is now subject to new public offering and disclosure requirements.

(vi) Delegation

*"(e) to delegate its powers, duties and functions, including those specifically established by an enactment, to its officers and employees, its committees or its members, or to other bodies established by the local government."*

Section 176(e) is expressly limited by s. 191(1) which states:

*(1) As a limitation on section 176(1)(e) [corporate powers -- delegation], a local government may not delegate the following:*

*(a) the making of a bylaw;*

*(b) a power or duty that is only exercisable by bylaw;*

*(c) a power or duty to appoint, suspend or terminate a local government officer or an auditor;*

*(d) a power or duty established by an enactment that the local government hear an appeal or reconsider an action, decision or other matter;*

*(e) a power or duty established by this or any other Act that the local government give its approval or consent to, recommendations on, or acceptance of an action, decision or other matter.*

(vii) Incorporation of Subsidiary Companies

*"(f) to engage in commercial, industrial and business undertakings and incorporate a corporation or acquire shares in a corporation for that purpose."*

This is a new power, however, it is effectively taken away by s. 195 which says that a local government must not incorporate or acquire shares in a corporation without first receiving the approval of the inspector.

The authority of a local government to exercise the above powers is permitted outside municipal boundaries (s. 176(3)).

4. Agreements

A new Part 5, Division 3 of the new *Act* proposes special treatment of certain municipal contracts. These new provisions focus on corporate transparency and disclosure. Disclosure of information relating to agreements is mandatory if a contract is proposed to be made in relation to a matter that requires either the assent of the electors or requires a counter petition opportunity (s. 177(1)). However, s. 178(1) provides an alternative to seek elector consent or a counter petition in relation to the agreement itself instead of individual questions or transactions. If all the matters require elector assent or counter petition opportunity are packaged together with the agreement, the same s. 177 disclosure requirements then apply (s. 178(2)).

The disclosure requirements of s. 177 require that the agreement and all records relating to the agreement that

are in the custody or under the control of local government be made available for public inspection. The disclosure is not to exceed that allowed under the *Freedom of Information and Protection of Privacy Act* (s. 177(2)).

The records must be made available for public inspection for a period of time that is at least from the time notice of the counter petition opportunity is given until the deadline for submitting the counter petition forms (s. 177(3)(b)). In the case of elector assent, the time runs from the time notice of voting is given until the actual voting day. It is important to note that s.179 of the new *Act* requires that any amendments to an agreement that required elector assent or counter petition opportunity is also subject to the same elector/counter petition opportunity and disclosure process.

Section 180(1) requires approval of the Minister in connection with any agreements for works and services made with public authorities (defined in s. 1) in another province. Of obvious concern to U.S. border municipalities is s. 180(2) which requires Cabinet approval of agreements for works and services with a public authority in another country. This provision is to ensure Provincial veto over contracting with U.S. public authority that could supply services such as solid waste management or water.

## 5. Economic Assistance to the Public, Non-Profit and Private Sectors

The new *Act* expressly prohibits private sector "*assistance*" as defined in s. 181, subject to the section 183 and 176(1)(c) authority to enter into partnering agreements which are defined in s. 1. Assistance to the non-profit sector and to public authorities (except outside the Province) is largely at the discretion of Council.

Assistance is broadly defined in s. 181 for the purposes of corporate powers granted under s. 176(1)(c) as providing a *grant, benefit, advantage or other form of assistance, including*

(a) *an exemption from a tax, fee or charge, and*

(b) *the forms of assistance referred to in section 185(1) [publication of intention to provide certain kinds of assistance].*

Section 182 expressly limits the s. 176(1)(c) community benefit assistance power to exclude "*industrial, commercial or business undertakings*". The only exception to the private sector assistance prohibition is assistance under a "*partnering agreement*" as defined in s. 1. Partnering agreements are defined as an agreement between a local government, a person or public authority under which a person or public authority agrees to provide or manage a facility or work or to provide a service.

To further community benefit assistance to non-profits under s. 176(1)(c) and partnering agreement assistance Council may only give a property tax exemption in accordance with Division 1 of Part 10 [the Assessment and Taxation Exemptions] of the *Municipal Act*. Part 10 - Assessment and Taxation has been amended to add a new s. 344.1 allowing for tax exemptions under a partnering agreement.

Section 344.1 provides the following:

*A council may, by bylaw, exempt from taxation under section 331(1)(a), (b), (c) and (d) [annual rates bylaw -- municipal purposes, debts, special reserve funds, regional hospital district expenses], all or part of the land, improvements or both, owned or held by a party to a partnering agreement with the municipality, during all or part of the term of the agreement.*

Although the exemption can apply to the land and improvements owned by the private sector partner in a "*partnering agreement*", the exemption can only apply to that portion of the land or improvements used for a "*public purpose*". "*Public purpose*" is not a defined term. It is recommended that Council adopt policy statements on the public purposes aspects of their partnering agreements to support the tax exemption created for the particular project.

New publication provisions have been proposed in s.185 under which local government must publish in a newspaper its intention to provide any of the following assistance:

- (a) *disposing of land or improvements, or any interest or right in or with respect to them, for less than market value;*
- (b) *lending money;*
- (c) *guaranteeing repayment of borrowing or providing security for borrowing;*
- (d) *assistance under a partnering agreement.*

The notice must be published before the assistance is provided and must include notice of the intended recipient. It also must disclose the nature, term and extent of the proposed assistance.

No assistance is permitted in the form of waiving or reducing DCC's (s. 933(11)). The *Municipalities Enabling and Validating Act* allows the Minister by regulation to retroactively approve partnering agreements which were entered into before the new *Act* comes into force.

## 6. Disposing of Land and Improvements

The new *Act* makes a major change by introducing new restrictions on the sale of land, publication requirements of proposed sales, the use of money from the sale of land and the disposal of assets acquired with Provincial grants. Under ss. 186 and 187, local governments intending to dispose of land or improvements must not only publish notice in a newspaper of its intention to dispose, but also make these assets available to the public for acquisition. Because the new *Act* is silent on what is meant by "*made available*", disposition guidelines will have to be developed by Council. There are no exceptions to the publication requirement.

The only exception from the public tendering process is where the disposition is to a non-profit corporation, to a public authority, as part of a land or improvement exchange, to a person under a partnering agreement that has been the subject of or process involving the solicitation of competitive bids, and the disposition of land to an owner or adjoining land for the purpose of consolidating the lands.

All monies realized from the sale of land or improvements must under s. 188(1)(a) be credited to a special fund under Part 13.

Section 189(1) adds a further restriction on the s. 176(1)(d) corporate power to deal in property where a provincial grant has been provided for that purpose. The Inspector of Municipalities must be given notice and he/she may require repayment of all or part of the grants. This provision applies to all grants made before the new requirement comes into force, unless the first payment of all or part of the grant was provided at least 20 years before the intended disposal and no grants are being received. An exception is where the land improvement or work will be used for the public purpose for which it was acquired or constructed for at least

20 years after the date of the first payment of all or part of the grant.

## 7. Disposal of Utilities and Water Systems

The corporate s. 176(1)(d) property powers are limited under s. 190 in respect of works for water supply/distribution, collection, treatment, disposal of sewage supply and distribution of gas and works for a transportation system, telephone system and closed circuit television system. Works may only be disposed if they are no longer required or are disposed to another local government. The practical effect of this provision would likely be to prevent, for example, the privatization of water supply and sewage disposal systems which is becoming more common in other provinces, in the U.K. and U.S.

## 8. Delegation of Local Government Authority

The old *Act's* s. 951 delegation of local government authority provisions are repealed. These were modest and limited powers of delegation.

Section 176(1)(e) provides as follows:

*(e) to delegate its powers, duties and functions, including those specifically established by an enactment, to its officers and employees, its committees or its members, or to other bodies established by the local government;*

Although under s. 176(1)(e) delegation is permitted, s. 191(1) prohibits delegation of

*(a) the making of a bylaw;*

*(b) a power or duty that is only exercisable by by-law;*

*(c) a power or duty to appoint, suspend or terminate a local government officer or an auditor;*

*(d) a power or duty established by an enactment that the local government hear an appeal or reconsider an action, decision or other matter;*

*(e) a power or duty established by this or any other Act that the local government give its approval or consent to, recommendations on, or acceptable of an action, decision or other matter.*

A further limitation excludes delegation to a corporation incorporated by a local government (s. 191(2)). Delegation (except a hearing) can only occur through a by-law adopted by 2/3 of votes cast, however, amendment or repeal of the delegation by-law can occur by a simple majority.

Under s. 193(1) hearings may now be delegated by Councils to one or more Council members by a simple majority of the votes cast. Decisions may only be made by the persons holding the hearing (s. 193(3)), and the final decision must be made by Council based upon a report, orally or in writing. These new delegation powers could for example, permit a committee of Council to hold public hearings on zoning by-laws and development permits. The delegation and hearing process procedure must be carefully exercised to comply with the legal requirements of statute and common law.

If a local government delegates public hearings, notice must be given that the hearing is to be held by a delegate (s. 891(1)). If the public hearing is delegated, Council must not adopt the by-law that is the subject of the hearing until the delegate reports to Council, either orally or in writing, on the views expressed at the hearing (s. 891(2)).

Council may delegate the power to issue a development permit and a temporary commercial or industrial use permit, provided in each use the owner is entitled to have Council reconsider the decision of the delegate. Council may not delegate the issuance of a development variance permit.

## 9. Officers and Employees

The key features of ss. 196 to 203 of the new *Act* are to abolish the position of the City Manager and to provide Council with greater flexibility in establishing its administrative structure. There are now only two mandatory officer positions required in a municipality that of "*corporate administrator*" and that of "*financial administrator*". Section 196 is a permissible authority given to Council to establish, by by-law, officer positions with titles it considers appropriate.

Council may by by-law or resolution assign powers, duties and functions to those officer positions and the same person may be appointed to two more officer positions. Section 198 requires one of the officer positions to be assigned the responsibility of "*corporate administration*", which includes duties presently assigned to the Clerk in the form of minutes, records, oaths, freedom of information and service of notices and documents. The only other mandatory position is that of "*financial administration*" whose duties under s. 199 include the normal financial and accounting duties of a municipal treasurer.

The statutory position of City Manager is abolished. Council may assign one of the officer positions to be the chief administrative officer. Council could still call the position "*City Manager*", however, the broad statutory powers of the former position that included delegation all of Council's powers except by-law and resolution enactment (old *Act* s. 241) are now gone. It is open to Council to delegate those powers described in s. 176(e) (subject to the limitations of s. 196(1)) to any officer or to the chief administrative officer.

The new chief administrative officer position includes the following powers, duties and functions:

- (a) *overall management of the administrative operations of the municipality or regional district;*
- (b) *ensuring that the policies and directions of the local government are implemented;*
- (c) *advising and informing the local government on the operation and affairs of the municipality or regional district.*

Section 322(1) of the new *Act* covering transitional provisions allows the person who holds the current position of City Manager to be deemed to have the above s. 197 corporate administration powers and the old *Act's* s. 243 manager powers until the new officer structure is created by Council in a new by-law adopted under s. 196.

The Clerk and Treasurer both hold similar transitional provisions until their positions are assigned in Council's by-law enacted pursuant to the new s. 196.

## 10. Corporate Finance Powers

Section 451(1) provides a new authority for Council, under an agreement, to incur a liability payable after the current year if the liability is not a debenture debt and the period of the liability is not longer than the reasonable life expectancy of the activity, work or service under the agreement. If the agreement is for more than five years (including renewals), Council must not incur the liability unless there has been a counter petition opportunity in relation to the proposed liability. This removes the old *Act's* requirement that agreements beyond five years requires elector assent and it removes the 20 year cap on such agreements. The old *Act's* limitation (s. 452) on acquiring property by way of lease, mortgage or other obligation is gone, including the 30 year agreement limit and required elector consent.

Section 450 of the old *Act* has been repealed. It limited the term of municipal debt to 30 years or the reasonable life expectancy of the work, whichever is the shorter. It also limited debt to capital expenditure program conformity. The result is that debt liability is only restricted by asset life.

Section 455 of the old *Act* is now amended to allow borrowing for the purpose of providing "*assistance*" within the meaning of s. 181. The assistance may now include the guaranteeing of borrowing or providing security for the borrowing. The counter petition opportunity also applies. Further amendments to s. 455 also provide for the following:

1. The term of loan authorization by-law for the purpose of providing assistance ends at the term of the public-private partnering agreement.
2. The maximum term of the debt used or obligation incurred for assistance provided under an agreement is the term of the agreement under which the assistance is provided.

These new s. 455 provisions will help facilitate public-private ventures under the new partnering agreement powers.

## CONCLUSION

The new *Act* is only the first phase of a complete revision of the *Municipal Act*. These amendments primarily relate to new corporate powers, governance and administration. This report has only highlighted the key changes introduced by Bill 31. The Bill will likely be enacted during the fall 1998 session. Questions regarding the operation of this legislation and its transitional provisions should be referred to Legal Services.

CRAIG MacFARLANE

City Solicitor

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