

REGIONAL MUNICIPALITY OF OTTAWA CARLETON  
MUNICIPALITÉ RÉGIONALE D'OTTAWA CARLETON

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REPORT  
RAPPORT

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DATE                        2 May 1997

TO/DEST.                 Co-ordinator  
                                 Corporate Services and Economic Development Committee

FROM/EXP.                Regional Solicitor

SUBJECT/OBJET         **PROPOSALS FOR A NEW MUNICIPAL ACT**

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#### **DEPARTMENTAL RECOMMENDATIONS**

**That the Corporate Services and Economic Development Committee and Council approve:**

- 1.     That the Regional Municipality congratulate the Minister of Municipal Affairs and Housing for taking the initiative to completely overhaul and re-write the Ontario *Municipal Act*:**
  - a)     Ending the use of prescriptive enabling legislation;**
  - b)     Employing the natural person power approach such that a municipality can act freely within its spheres of jurisdiction;**
  - c)     Assigning wide areas, described in broad terms, of local government operating and service delivery authority;**

**all of which are intended to enable municipalities to function more effectively and efficiently;**

2. That the Regional Municipality ask the Minister of Municipal Affairs and Housing to reconsider and change the preliminary draft on the following areas of concern:
- a) To avoid possible restrictive interpretation by the courts, the 13 wide areas of jurisdiction should be consolidated into one or a few much wider and more general descriptions of municipal authority;
  - b) The new Act should express municipal jurisdiction and responsibility by using the terms “spheres of jurisdiction” or “areas of responsibility” rather than perpetuating the existing municipal legislation which identifies enactment of by-laws in particular areas;
  - c) Unrestricted power to pass regulations permits provincial interference with exercise of municipal powers. If the power to pass such regulations is to be maintained, the circumstances in which the power can be exercised should be restricted, so that regulations can only be passed within certain defined categories;
  - d) The type of “commercial activities” which the Province can limit by regulation should be defined and any such regulations should lapse after two, not three, years as proposed;
  - e) Inability to create local boards or assign non-administrative powers to committees restricts ability to configure innovative ways of providing services. Local Boards, or delegated authority to committees, should be permitted either by categories, or by regulation;
  - f) Absolute prohibition against incorporating a company, or owning shares, discourages public/private ventures. Such corporate investment should be permitted either by categories or by regulation;
  - g) Limitation on power to regulate facilities owned by others may interfere with legitimate Regional public service functions and should be reviewed;
  - h) The restriction on the use of area rating by municipal Councils is unwarranted and at least a very wide discretion to area rate service and capital costs should be made available;
  - i) The existing provisions concerning the migration of service delivery responsibilities between the two tiers of government in Regional areas require further review to incorporate an objective and independent review mechanism available to any municipality with criteria established against which such review applications may be measured;

- j) **If the Bill 26 provisions for structural review are to be made applicable in Regional areas, they should be augmented by an independent review mechanism that does not require the triple majority approval mechanism that is available on municipal applications. This mechanism should measure any such review application against established governmental organization service delivery criteria. Such jurisdiction in the Ontario Municipal Board warrants consideration;**
  - k) **The proposal to repeal upper-tier discretion in the establishment of levy due dates for upper-tier taxes can only increase upper-tier finance costs;**
  - l) **Other statutes affecting municipalities are still prescriptive and should be amended on the same basis;**
  - m) **As this Act will repeal all individual Regional Acts, as well as *The Regional Municipality of Ottawa-Carleton Act*, consultation is required to ensure that specific provisions relative to specific regions (i.e. transit in the RMOC) will be carried forward in satisfactory form into the new Act;**
3. **That because of the importance of the New Municipal Act as the base municipal operating statute for the long-term future;**
- a) **An action program to incorporate other statutes into the New Municipal Act be commenced following the passing of this Act;**
  - b) **When a full copy of the proposed New Municipal Act is available and tabled in the Legislative Assembly, that meaningful time be allotted for municipal and public review and comment, both to the Ministry and to a Standing Committee of the Legislative Assembly.**

## PURPOSE

On March 10, 1997, the Minister of Municipal Affairs and Housing released consultation documents setting out a proposed legislative framework for a new *Municipal Act*. The Minister has indicated that the release of these documents signals the commencement of a 60-day consultation period ending May 9, 1997. The purpose of this memorandum is to summarize those aspects of the proposal thought to be significant from the Regional Corporation's perspective, and to aid in the formulation of a preliminary response to the Province.

## DISCUSSION

### Overview of Consultation Documents

The substantive portion of the consultation documents consists of a 33-page outline of the proposed Act and 16 pages of selective statutory language and explanatory notes. It is expected that upon completion the draft legislation will amount to some 200 pages and will include recent amendments made to the existing *Municipal Act* through the enactment of Bills 26 (*Savings and Restructuring Act*) and 86 (including the *Municipal Elections Act*), proposed amendments such as are to be found in Bill 106 (*Fair Municipal Finance Act*), and other statutes having application to municipalities.

It has been proposed that the Act be divided into nine parts, namely:

- Part I - General\*
- Part II - Municipal Structure
- Part III - Municipal Councils
- Part IV - Practices and Procedures
- Part V - Municipal Powers\*
- Part VI - Municipal Finance
- Part VII - Miscellaneous
- Part VIII - Regulations\*
- Part IX - Transition

\* the draft statutory language consists of 22 sections from these three Parts.

### Municipal Forms, Responsibilities

The proposed Act substitutes "lower-tier municipality", "upper-tier municipality" and "single-tier municipality" for the current method of categorizing regional municipalities, cities, towns, counties, etc., although municipalities will have discretion in how they describe themselves.

With the passage of Bill 103 in the Legislature last week, the new City of Toronto will be considered a single-tier municipality, unless and/or until the Greater Toronto Services Board is established as a municipality.

The proposed Act will distinguish the responsibilities of Council from those of municipal staff:

### Responsibilities of Council

1. Representing the residents of the municipality.
2. Developing and evaluating the municipality's policies and programs.
3. Ensuring that there are administrative practices and procedures in place to implement Council's decisions effectively.
4. Maintaining the municipality's financial integrity.
5. Carrying out other duties set out in legislation.

### Responsibilities of Head of Council

1. Providing leadership to the Council.
2. Presiding over Council meetings.
3. Representing Council at official functions.
4. Carrying out other duties assigned by legislation or Council.

### Responsibilities of Staff

1. Undertaking research and providing advice to Council on the policies and programs of the municipality.
2. Establishing administrative practices and procedures to carry out Council's decisions.
3. Keeping and preserving the records of the municipality.
4. Administering the financial affairs of the municipality.
5. Carrying out other duties set out in legislation or assigned by Council.

The proposed Act will provide that Councils will have broad discretion to determine their own procedures and arrangements. Municipal Councils would therefore have broad discretion to arrange their committee structures and configure their procedural by-laws. Many of the current statutory notice provisions will be removed from the Act and replaced with a requirement that Councils establish and adhere to policies governing how they will consult with the public, and in what manner Council will give notice to the public concerning the various matters which come before it.

The proposed Act will not empower municipalities to establish bodies corporate such as local boards. Existing boards would be continued through transitional provisions, or, in the case of Metropolitan Toronto, through amendments to Bill 103.

The organization of administrative staff would also become a local decision. The new Act will not mandate particular municipal staff positions, but will set out the administrative duties and responsibilities of the municipality (as outlined above). This would leave a Council with broad authority to determine what staff positions it requires and to appoint such staff. A single non-elected person, however, will still have to be designated to be responsible for the municipality's financial affairs.

### Municipal Powers

The proposed Act will be far less prescriptive than the current Act. Whereas the current Act confers specific authority for each power to be exercised by a municipality, the proposed Act would take the reverse approach and grant broad powers to municipalities, subject to limitations which would be imposed by statute or regulation.

Following the format of municipal statutes in Alberta and Manitoba, the proposed Act would grant municipalities these broad powers to be exercised in 13 "areas of authority" (also known as "spheres of jurisdiction"):

1. The health, safety, protection and well-being of people and the protection of property.
2. Public utilities.
3. Waste management.
4. Public highways, including parking and traffic on highways.
5. Transportation systems other than public highways.
6. The natural environment.
7. Culture, recreation, and heritage.
8. Economic development.
9. Nuisances, noise, odour, vibration and dust.
10. Drainage, and flood control, except storm sewers.

11. Structures, including fences and signs.
12. Parking, except on public highways.
13. Animals, and human activities in relation to them.

Within each of these areas, or with respect to any authority conferred by another statute, municipalities would have the powers of a natural person as well as certain governmental powers.

There is concern that itemizing basic municipal jurisdiction under 13 specific headings may be interpreted by the courts on a prescriptive basis. Since the government intends municipalities to have wide jurisdiction for local government service concerns, a broad consolidation of these 13 headings into one or a few may better suit the long-term municipal role. Similarly, the draft legislation continues to use the expression “by-laws may be enacted in relation to ...” This places a misleading emphasis upon the manner of exercising jurisdiction - as opposed to the jurisdiction itself. Accordingly, it would be better if the New Municipal Act referred to “spheres of jurisdiction” or “areas of responsibility” and left the manner of implementation (by-law, resolution, delegated authority) to the municipal Councils themselves.

Natural person powers amount, essentially, to the powers of a business corporation. These include the ability to enter into contracts; purchase, own and dispose of property; hire, pay and dismiss employees; delegate administrative responsibilities; provide and charge for goods and services; and sell or otherwise dispose of assets.

Since natural persons do not have the power to direct the activities of other persons, municipalities would be given certain governmental powers to be applied to matters under their jurisdiction, which would include the power to:

1. Regulate or prohibit, and provide for a system of licenses, permits, approvals or registrations, and to deal differently with different classes of persons, businesses, activities, services or things.
2. Make grants or loans (however bonusing restrictions will continue).
3. Impose fees and charges, and levy taxes (subject to current restrictions).
4. Enforce by-laws, create offences, apply for injunctions, and impose fines.
5. Expropriate.
6. Without court order, enter lands or buildings which are not dwellings, for the purpose of inspecting compliance with law.
7. Enter private lands for certain specific purposes, such as erecting snow fences.
8. Licence businesses similarly to the manner provided for in the current Act.

## 9. Transfer services amongst municipalities.

The powers (and duties) related to the financial aspects of municipal government will be described in much greater detail than the powers associated with the general areas of authority.

The consultation document indicates that municipalities will be given expanded powers to impose an additional mill rate on delineated areas of the community to cover costs of some services benefiting only that area (area rating). The manner in which area rating will be permitted has not been finalized. One option would provide that if restructuring has occurred in a municipality, area rating will be permitted if the restructuring results in differences in property-related municipal services, or differences in assets and liabilities brought into the restructured municipality. Under this option, if there is no restructuring, area rating would be permitted only for property-related capital installations.

The new Act will replace all existing area rating authority either under the *Municipal Act*, or the *Local Improvement Act*, or other legislation. The draft Act appears to be unnecessarily restrictive in this regard. It would be better if the new Act gave municipalities general discretion to area rate the cost of services or improvements on any basis that appeared reasonable to the Council concerned. It is expected that in such circumstances, the Councils will be both responsible and accountable for the decisions taken.

### Restrictions Upon Municipal Powers

The proposed Act will impose certain restrictions on the exercise of both natural person powers and governmental powers within certain named areas of authority. For example, no municipality would be able to regulate another person's facilities by exercising a power within the "public utilities", "waste management", or "transportation systems other than public highways" areas of authority, (although a municipality would still be able to regulate the location of non-owned public utility plant within a municipal road by exercising a power under the "public highways" area of authority - unless in doing so it creates a conflict with a power of another jurisdiction).

Unless specifically authorized, a municipality will not be permitted to incorporate a corporation, acquire an interest in a security of a corporation, become bankrupt or make an assignment or proposal as an insolvent person.

The proposed Act will reserve to the Lieutenant Governor in Council a very broad power to pass regulations to restrict the authority of municipalities to pass by-laws, and specifically to engage in commercial (which is undefined) activity or to pass by-laws which are in the opinion of the Lieutenant Governor "unnecessary", "undesirable" or which "represent duplication". A statutory amendment would be required to maintain such a restriction for a period longer than three years from the effective date of the regulation. A similar provision (with a two-year limit) is found in the Alberta statute.

### Interpretation



Direction will be given to interpret the municipal powers conferred by the proposed Act broadly, so as to:

1. Enable municipalities to govern their affairs as they consider appropriate.
2. Enhance their ability to respond to municipal issues.
3. Include, rather than exclude, municipal powers that existed on the day before the new powers became available to municipalities.

The draft statutory language does not direct that municipal powers granted by other statutes (and not falling within the 13 areas of responsibility) be interpreted in the same broad manner.

Should there be a conflict between a lower-tier by-law and a by-law enacted by an upper-tier pursuant to an assigned area of responsibility, the by-law of the upper-tier will prevail to the extent of the conflict. Special provisions will be provided where other statutes confer authority directly upon upper-tier municipalities.

Municipal by-laws will be subordinate to enactments (including regulations) made by the provincial or federal governments.

### Division of Powers

The draft new Act contains a table which sets out the allocation of areas of authority between upper-tier and lower-tier municipalities in the thirteen general areas of responsibility referred to above. The table allocates these responsibilities on either an exclusive basis, e.g. sewage treatment and water distribution, or a non-exclusive basis, e.g. public highways and storm sewers. The table is intended to describe the existing division of responsibilities in all counties and regions in the Province (but does not include Metropolitan Toronto, because of the “Megacity” (Bill 103) restructuring legislation).

The draft legislation expects the service migration provisions of the existing *Municipal Act* (Bill 26) to be continued in the new Act. Essentially, that legislation allows for the migration of sewage and water services to the upper-tier (upward migration only) and the migration upwards or downwards of business licensing, economic development, fire services and public transportation. These are the only municipal services that have been designated by regulation as appropriate for migration thus far. In each case, a triple majority authorization is required.

The legislation is not successful. For two-tier systems where the upper-tier is directly elected, the Bill 26 triple majority formula is unlikely to succeed. In the two-tier system with indirect

election to the upper-tier, this formula leaves the long-term service delivery and planning responsibilities of the upper-tier open to migration to the lower-tier at any time that there is a concerted lower-tier desire to do so. What is required is an objective mechanism whereby proper responsibility for the delivery of particular services may be evaluated against established public service delivery criteria. One such model could involve a review or appeal authority in the Ontario Municipal Board where such a review would be governed by accepted criteria.

### Structural Review

The draft legislation does not deal with the possibility of future restructuring in existing Regional Municipalities. The Minister has stated on many occasions that the structural review provisions of Bill 26, or legislation similar to Bill 26, would be made applicable to Regional Municipalities. If that takes place, it is expected that it will be part of the New Municipal Act.

Under Bill 26, structural change may be effected essentially in two ways:

1. By the appointment of a Municipal Review Commissioner. Triple majority support is required. The Commissioner appointment is made by the Minister of Municipal Affairs. The municipalities may request criteria or policy to govern or limit the review and they may recommend choices for appointment as Commissioner. The Minister, in making such appointments, is not bound by any such recommendations. Subject to consultation, the municipalities have no control over the Commissioner's review, recommendations or result.
2. The municipalities may develop a scheme of reorganization and structural reform on their own. Such a scheme requires the same triple majority. If so approved, then the Minister is obligated to implement the scheme by regulation.

Beyond this, municipalities can apply to the government for change in municipal responsibilities and organization by legislation. Historically, this is the way that municipal reorganization has taken place in the Regional Municipalities since they were created.

The triple majority formula outlined above makes meaningful structural reform difficult at best. As indicated above, in relation to service migration, the system would be better if it were augmented by an independent third party system that could be accessed by municipalities without the triple majority requirement, with such applications being measured against recognized and established municipal organization and service delivery criteria. Again, such an option could be the Ontario Municipal Board with expanded jurisdiction in this area and with criteria that could be included in the statute, established by regulation or developed by the Board itself.

### Restrictions on Municipal Activities

Although, in general, the proposed legislation will provide greater flexibility to municipalities, there are some provisions in the draft Act which do raise concerns about unnecessary restrictions on municipal activities.

One example is found in clauses 12(a) and (b) of the proposed Act, which prohibit a municipality from incorporating a corporation, or acquiring or guaranteeing an interest in a security of a corporation. These provisions would severely limit a municipality's ability to participate in innovative arrangements with the private sector, such as forming a new corporate entity to manage a specific facility or program. Although there is a need to ensure clear accountability to the municipal Council, and to protect a municipality's financial interests, it is submitted that the draft legislation does not allow for a reasonable amount of flexibility in this area.

At a minimum, municipalities should be permitted to incorporate non-share capital corporations for purposes which are within their designated areas of authority. There is a precedent for this kind of corporate structure in the area of municipal non-profit housing. Accountability could be ensured by means of provincial regulations specifying who is eligible to be a member of such municipally-created corporations, which could act as vehicles for responsive and effective decision-making in conjunction with private sector participants.

Similarly, it would be reasonable to allow municipalities to hold shares in a business corporation, again within their allocated areas of responsibility. In this way, a corporate entity could be created to build, operate, or manage a specific project in conjunction with a private sector proponent, with both the municipality and the proponent subscribing for shares in the new corporation. The Province could institute appropriate safeguards on share ownership in such corporations, for example, by limiting the number and class of shares to which municipalities could subscribe, together with restrictions on the transferability of such shares.

Another restriction on a municipality's activities, which seems to be overly broad, is contained in subsection 22(2) of the draft Act. This provision would permit the Lieutenant Governor in Council (Provincial Cabinet), to make regulations which would limit municipal authority to engage in "commercial activities". This power is identical to that which has been reserved to the provincial government under the recently enacted legislation governing municipalities in Alberta and Manitoba. The draft provision in the Ontario legislation states that any regulation restricting the powers of municipalities to pass by-laws will be deemed to have been revoked after three years, if it has not been revoked before that time.

Although this proposed power to make regulations would be limited to the three-year time frame, it is difficult to understand the need for a potentially broad restrictive power of this kind. Many municipalities have demonstrated their creativity in areas such as computer technology and the development of health-related educational materials, and should be permitted to exploit the potential of their property in the same manner as private sector entities. Provided that such

activities are within the municipality's assigned areas of authority, there is arguably no reason to restrict activities merely because they generate revenue for the municipality. Accordingly, it is submitted that section 22 of the draft Act should be amended to clarify that activities which are related to a municipality's assigned areas of authority will not be considered as "commercial activities" which may be restricted by regulation.

## CONCLUSION

The consultation document and the draft Bill would have a positive effect for all municipalities by affording greater flexibility in the ability to govern within designated areas of authority. The proposed legislation would recognize the important role of municipal government in delivering services to the public, and will eliminate the need to seek private legislation, or to seek the approval of a provincial agency, as municipalities respond to new challenges and situations. Although the proposed new Act confers greater independence on municipalities to manage their own affairs, there are some restrictions contained in the draft Bill which could interfere with a municipality's abilities to carry out their responsibilities in an efficient and financially viable manner. It is submitted that those restrictions should be much more limited in scope.

In summary, after a preliminary review of the consultation document and the draft Bill, it is my view that the proposed new *Municipal Act* will provide significant benefits for all municipalities, primarily by allowing for greater flexibility in the ability to govern within the assigned areas of responsibility. The need to seek private legislation, or the approval of a provincial agency, will no longer be necessary in the large majority of municipal initiatives. There are some provisions in the draft Bill which do raise concerns about future restrictions on municipal activities, such as the proposed power of the Province to make regulations which would restrict the power of municipalities to pass by-laws which the Province considers to be "unnecessary or undesirable", or which represent "duplication". In addition, the Province would have the power to make regulations limiting municipal authority to engage in "commercial activities". In my view, the criteria for determining when a by-law is unnecessary, or for defining what is a commercial activity, should be clearly stated in the legislation. Otherwise, the Province will be in a position to arbitrarily interfere in a municipality's operations which may be founded upon important and legitimate objectives.

The proposed Act will contain clear benefits for municipalities, but will not provide unrestricted discretion or unlimited power to govern. The following is a point-form summary of the key advantages and concerns associated with the proposed framework.

## NEXT STEPS

Following the receipt of comments on May 9, it is expected that the government will produce a full draft statute to be introduced in the Legislature before the end of June, 1997. Since this is the base operating statute for municipalities - and not simply an amending statute - it is a tremendous undertaking. Whether the Ministry is capable of achieving that document in that time remains to be seen.

Hopefully, the introduction of the Bill will be followed by a realistic time for further municipal/public input and Committee hearings before the Bill is finally enacted in the fall so as to be in force by January 1, 1998.

*Approved by  
J. Douglas Cameron  
Regional Solicitor*

JDC/pc