

## **Legal Requirements for Decision-Making under the Municipal Act**

### **A Basic Guide for Manitoba Council Members**

Municipalities have to deal with a variety of issues and considerations when making decisions. Municipalities provide services and facilities (contracts, buying land, etc.), and for that purpose make decisions like corporations. In addition, municipalities have legislative and regulatory powers, and for that purpose they make decisions like governments.

The Municipal Act is the main source of authority for municipal decision-making and as to how it should be exercised. For the most part the Act sets out clear standards and procedures that must be followed, and sometimes limits council's authority. There are overriding principles that apply to the exercise of municipal authority:

- it must be exercised in good faith for municipal purposes;
- it must not be exercised for an improper purpose;
- it must be free of bias;
- it must follow the requirements of the Municipal Act.

Municipalities also make decisions under the Planning Act on matters such as re-zonings, conditional uses, variations and subdivisions. While some requirements overlap from the Municipal Act (for example, a decision must be in the best interests of the municipality), the Planning Act contains specific requirements and tests that must be met for decisions. When making a decision under the Planning Act, reference must therefore be made to the relevant sections of the Planning Act.

The focus of this Guide is to deal with the requirements for decisions made under the Municipal Act.

#### **What is a decision of council?**

The Act provides that council may only act by by-law or resolution. If the Act doesn't say a by-law is needed then the action is taken by resolution, and the resolution must be passed at a council meeting. If there is no resolution, then no action has been taken and nothing has been authorized.

This means, for example, that without a resolution:

- consensus expressed by all council members at a meeting to accept an offer to purchase land is not effective;
- an instruction to the CAO to sign a purchase order for a piece of equipment is not effective;
- a councillor does not have proper authority to order gravel for a road.

A decision made by a committee of council is not a decision of council unless and until a resolution is made by council approving the decision.

Note also in some circumstances where something needs to be approved by resolution, that a defeated resolution may not be the final answer. For example, if a motion to approve a subdivision is defeated, that is not equivalent to a resolution to reject it.

### **Who can make a decision besides council?**

By a by-law, Council can delegate decision-making authority to:

- the head of council
- a committee of council
- a designated officer, including the CAO

Delegation means authorizing the other person or body to make the decision. This is not the same as authorizing the person or body to do something specific. For example, the CAO brings quotes and specs to council on photocopiers, and council tells the CAO to buy a particular one. In this case council has made the decision (this is done by resolution). However, if council wants to leave certain purchasing decisions up to the CAO, then it is delegating authority to the CAO. This can only and must be done by by-law. This also applies to spending by public works or the fire chief.

Note that the Act does not permit delegation to a councillor.

### **What happens if there is no resolution or proper delegation?**

The consequences can be significant for the person who spent the money. A municipality is only bound when:

- (1) council passes a resolution, or
- (2) an action is taken by someone whose authority is given by a by-law.

Without one of these, the municipality can refuse to pay invoices, ignore written agreements, and disown promises or approvals. The person who

spent the money may be personally liable to the contractor. This also means if the work has not yet been done, a contractor may be able to back out of a deal with the municipality.

Although the municipality may not be bound technically, there is a recent tendency in the courts to be sympathetic to people who were led to believe the municipality was obligated to pay them. Therefore, councils should not rely on a strict interpretation of the law, and always make it clear to people that no obligation is intended until a council resolution has been passed.

### **What are authorized and unauthorized expenditures?**

The Act has strict rules about financial management. A municipality may only make an expenditure if it is provided for in a budget (except in declared emergencies). Section 169 provides some flexibility. For example, you can take money from a budget item and spend it for another purpose as long as you don't increase total spending. The Act has special rules about deficits, expenditure from reserve funds, borrowing, investment, loans and grants.

Spending or investing money contrary to the Act or other legislation, or contrary to a by-law or resolution, is strictly prohibited. This is uncontroversial in the case of fraud or other improper dealing, but it sometimes relates to things a council may think are worthwhile doing. For example, a municipality may want to provide a tax rebate to a struggling business. This would be contrary to section 258. Even if the municipality has signed an agreement, spending money in compliance with the agreement is improper if the agreement is contrary to the Act.

Another tricky situation is when a capital project is going to be financed by borrowing and council is anxious to start. If you start before the Municipal Board has approved the borrowing, any expenditure is contrary to the Municipal Board Act.

### **Can you deal with unauthorized expenditures retroactively?**

In some cases you can. When a councillor spends money without a resolution (such as ordering gravel), council can later authorize the expenditure by passing a resolution when the invoice comes in – as long as the expenditure doesn't break some other rule such as the one against deficits. But you can't fix an expenditure this way if it is contrary to legislation or a by-law. Examples would be an illegal tax rebate or members' indemnities that are contrary to the indemnity by-law.

### **What are the consequences of an unauthorized expenditure?**

A member of council who participates in an unauthorized expenditure, including simply voting in favour of it, may be guilty of an offence under section 171 of the Act and liable to repay the money to the municipality.

If council does not pursue a claim, any municipal voter can.

### **What can council take into account in making a decision?**

The over-riding principle is that all actions must be taken by council in good faith for a municipal purpose. Municipal purposes are stated broadly:

- to provide good government,
- to provide services and facilities, and
- to develop and maintain safe and viable communities.

Normally, a court will not readily question a council's view of what is in the public interest. However, actions for the sole purpose of benefiting an individual are obviously improper. For example, giving land to someone who is going to build an industrial plant might further a municipal purpose. However, giving land to someone because they are in financial trouble will not further a municipal purpose. Even if the motive is good, the municipal purpose standard will not be met unless there is some broader benefit for the community.

Municipal purpose is not enough. Council is not supposed to exercise its authority to achieve a purpose not intended by the legislature when it granted the municipal authority. For example, although a municipality can control access to municipal roads for the purpose of safety, road protection and proper drainage, council cannot refuse access to prevent a particular unpopular development from going ahead.

Council has an obligation to take proper considerations into account (those that are relevant to the matter being decided) and at the same time not to take improper considerations into account (those that are irrelevant to the matter being decided). Using the access example above, proper considerations would be those relating to safety and road protection. An improper consideration would be the fact the unpopular development is going to cause noise.

### **What is bias in the municipal context?**

The issue of bias arises most often when council is making a decision that affects competing interests, particularly in the context of a public hearing. This usually involves Planning Act matters but also applies to decisions under the Municipal Act. The courts have said that elected politicians are to be held to a less exacting standard than other decision-makers, in that it is acceptable for them to have political bias. They can take public positions – even make election promises – in support of or in opposition to something. What they cannot do is close their minds to the representations of the other side. They must be open to persuasion: they must not give the impression that representations would be futile.

### **Do these rules about making decisions mean that council has to state the reasons for its decisions?**

This is a difficult question to answer. It depends on the circumstances. The issue will of course not arise unless there is someone who will be very unhappy with the decision, so council does not need to state reasons for everything it does. However, if an affected person complains to the Provincial Ombudsman's office, they will ask the municipality to state the reasons. As for the courts, they don't like to second-guess decisions of elected councils, but they don't want to condone decisions that are made for the wrong reasons. In the absence of stated reasons, a judge is left to discern the reasons from minutes, reports, correspondence and statements by council members. If it appears the decision was not made for the right reasons, then the court will be inclined to intervene. They could declare the decision invalid and require council to make it again – this time taking only proper considerations into account.

However, a council cannot insulate a decision from criticism by simply stating reasons. A carefully worded resolution drafted on legal advice may not be convincing to a court in the face of other evidence on the record showing what members of council really think.

### **How does council give reasons?**

The simplest way to give reasons would be to state them in the resolution as part of the Whereas clauses. They should refer to proper considerations, of course. They should be in general terms. For example, "whereas on the basis of the report of the engineer, council is of the opinion that the drainage will be adversely affected"; or "whereas council is of the view that the proposal of ABC represents the best value for the municipality".

The Manitoba Courts have commented on the difficulty of a diverse elected council giving reasons for its decisions, since they are not like panels of judges reviewing evidence and arguments, and each council member might have a different reason for making a decision. We think the courts will not be quick to criticize a council for sticking to general statements when giving reasons.

If after a decision a person (or the Ombudsman) demands more detailed reasons, council will have an opportunity to consider the matter and respond carefully.

**McCandless Tramley**

Municipal Lawyers

Please direct questions or comments to:

Greg Tramley 949-7750 or Mike McCandless 488-1243

November 2006