



Corporate Report

NO: R256

COUNCIL DATE: December 8,

2003

REGULAR

TO: Mayor & Council DATE: December 3,
2003

FROM: City Solicitor FILE: 0125-90

SUBJECT: Community Charter

RECOMMENDATION

That this report be received for information.

INTENT

The intent of this report is to inform City Council and staff of the key changes made by the *Community Charter* (the "Charter") to the municipal law embodied in the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*Local Government Act*").

BACKGROUND

INTRODUCTION TO COMMUNITY CHARTER

The *Charter* process to date involves two major Bills that have already received Royal Assent: the *Charter* itself, introduced as Bill 14, and the *Community Charter Transitional Provisions, Consequential Amendments and Other Amendments Act*, 2003, first introduced as Bill 67 and then withdrawn and replaced by Bill 76. Bill 76 includes provisions dealing with the phasing in of certain provisions of the *Charter*; consequential amendments to about 100 other provincial statutes, most notably the *Local Government Act*, and minor amendments to the *Charter* itself. A related initiative not discussed in this paper is the *Local Government Bylaw Notice Enforcement Act*, being Bill 65 of 2003. This legislation implements the "*bylaw forum*" approach to by law enforcement and makes it possible for the Province to eliminate the use of both long form prosecutions and municipal tickets in local by law enforcements.

The *Charter* does not end the application of the *Local Government Act* to B.C. municipalities. Most of the amendments to the *Local Government Act* contained in Bill 76 transform that statute from general enabling legislation for both municipalities and regional districts into enabling legislation for regional districts only. However, the following Parts and Divisions of the *Local Government Act* will continue to apply to municipalities for the time being:

- Part 2 – Incorporation of Municipalities
- Part 3 – Electors and Elections
- Part 4 – Other Voting
- Part 5.1 - Division 3 – Certification of Senior Officials
- Part 6 - Division 2 – Challenge of By laws
- Part 7 - Division 2 – Proceedings Against Municipalities

- Part 7 - Division 3 – Enforcement of Orders Against Municipalities
- Part 8 - Division 2 – Municipal Forest Reserves
- Part 10 - Division 3 – Utility Taxation
- Part 11 – Annual Municipal Tax Sale
- Part 20 – Regulation of Carriers and Commercial Vehicle Licensing
- Part 21 – Building Code and Other Building Regulations
- Part 25 – Regional Growth Strategies
- Part 26 – Planning and Land Use Management
- Part 27 – Heritage Conservation
- Part 28 – Replotting Schemes
- Part 29 – Inspector of Municipalities
- Part 30 – Administrative Commissioner

The *Charter* relies heavily on the enactment of provincial regulations to give effect to its provisions, and to that extent is not a complete or clearly articulated statement of the Province's intentions regarding the authority of local government.

The most apparent difference between the *Charter* and the *Local Government Act* is that the *Charter* combines many specific powers into more generally worded descriptions of municipal power. Other Canadian provinces such as Alberta have amended their municipal legislation to grant broadly worded powers to indicate to the courts a more expansive view of municipal powers.

Whether judges will take that more expansive view is not yet clear. Currently, a decision of the Alberta Court of Appeal holding a by-law of the City of Calgary to be beyond its powers, despite the adoption of broadly worded municipal enabling legislation by the Alberta Legislature, awaits a decision by the Supreme Court of Canada on Calgary's appeal. Calgary's scheme of taxi licensing, which limited the number of licenses available, and which was specifically authorized by the previous enabling legislation, was held not to be within the scope of a broadly worded power to regulate businesses, the court wishing to see more particularity in enabling legislation to justify any interference with a citizen's right to make a living. B.C.'s response to this example of the law of unintended consequences has been to leave intact (in Part 20 of the *Local Government Act*) the authority of municipalities to regulate carriers until the Calgary taxi case is resolved by the Supreme Court of Canada.

Many other kinds of municipal by-laws that were enacted pursuant to specific enabling provisions of the *Municipal Act* or *Local Government Act* may, however, soon be vulnerable to legal challenges, based on the argument that the broad powers in the *Charter* no longer indicate a specific intention on the part of the Legislature to authorize such by-laws. The Supreme Court's decision in the Calgary case will be closely analyzed in every Canadian jurisdiction that has adopted a "broad powers" approach, including our own.

Natural Person Powers

Included in Section 8 of the *Charter* is the "natural persons" power. Municipal corporations in B.C., unlike most other statutory corporations, have lacked this power in the past, necessitating the inclusion in the *Municipal Act* and the *Local Government Act* of more detailed provisions equipping municipalities with particular corporate powers required to provide services to the public. The inclusion of a general "natural persons" power in the *Charter* does not entirely eliminate the need for the legislation to deal with details, however, as the Province has carried forward certain restrictions on the use of these natural person powers which are now stated plainly as such, rather than as limitations accompanying the grant of a particular corporate power. In addition, the *Charter* contains a few express grants of authority that are redundant given the existence of the natural persons power, but which have perhaps been retained for the sake of certainty.

Accommodating the Provincial Interest

Also dealt with in the *Charter* is the accommodation of the provincial interest in matters within the scope of municipal jurisdiction. The "concurrent authority" regime established in Section 9 of the *Charter* was already in

place with respect to health and soil deposit and removal by laws, but now extends to regulatory by laws dealing with wildlife, the protection of the natural environment, and building standards. The *Charter* makes it possible for the Province to state its interest in these matters by enacting regulations or entering into agreements with municipalities regarding the extent of local and provincial jurisdiction in these areas, but does not require it to do so. The Memorandum of Understanding between the Ministry of Health and the City concerning the regulation of methadone dispensaries is an example of this approach to concurrent jurisdiction. The option of *ad hoc* ministerial approval of local by laws remains.

Another aspect of the *Charter* in which the relationship between municipalities and the Province will continue to evolve is the large role that provincial regulations will play in fleshing out the actual impact of the *Charter*. Such matters as the purposes for which municipalities may incorporate companies, municipal borrowing and debt servicing limits, and the manner in which municipal by laws may be enforced will be subject to provincial regulations. To date none of these have been released and very few of which are subject to the mandatory UBCM consultation procedure in Part 9 of the *Charter*. This approach removes the status of municipalities from the direct control of the Legislature, and makes them subject to control by Cabinet order to an extent that seems inconsistent with the concept articulated in the *Charter* that municipalities are an "*order of government*". While it is constitutionally impossible for the Province to define the jurisdiction of local governments in a way that makes their jurisdiction of equal constitutional status to that of the Province itself, it would have been possible to make the jurisdiction of local governments a matter of provincial law subject only to the will of the Legislative Assembly. Instead, the Province has shifted the focus of power over the jurisdiction of B.C.'s local governments from the public forum of the Legislative Assembly to the Cabinet table.

Key Changes

The principal innovations in the *Charter* include:

- Express powers to discontinue providing services for non payment of fees or breach of rules governing the service;
- Municipal ownership of highways and parks;
- Definition of the responsibilities of Councillors;
- Provisions for electronic meetings may be set out in local procedure by laws without the need for an authorizing Regulation by the Cabinet;
- Ability of Councillors who declare conflicts of interest to participate in the matter after obtaining legal advice that they do not in fact have a conflict;
- A statutory duty to respect Council confidentiality;
- A prohibition on interference with municipal staff in the conduct of their duties;
- Permissive tax exemptions for revitalization areas;
- Simpler procedures for permissive tax exemptions generally;
- Authority to obtain the approval of the electors to the "*concept*" of partnering agreements so that the details of those agreements may be negotiated subsequently without having to be approved again;
- Mandatory consultation with UBCM on certain kinds of provincial legislative initiatives;
- The repeal of the "*demolition by law*" provisions of Section 698 of the *Local Government Act* in favour of the standardized remedial action procedures in Section 72 of the *Charter* will eliminate the use of this remedy in relation to by laws other than building by laws. In the past, the enactment of by laws under Section 698 in relation to a "*building, structure or thing, in whole or in part, that contravenes a bylaw*" has proven an effective and cost efficient remedy in relation to zoning contraventions;
- A new requirement for municipalities to obtain approval by the Minister (order under a regulation or agreement) for by laws addressing building standards;
- The establishment of the concurrent authority regime in relation to building standards will likely lead to friction between some municipalities and the Province over such matters as building sprinklers and other local building standards that go beyond the requirements of the Building Code;
- The vesting in municipalities of both rights and obligations under drainage rights of way previously granted to the Province that accompanies the vesting of non arterial highways may contain some unpleasant surprises when the terms of those rights of way become known, and in the short term merely inventorying those

- rights of way and their state of maintenance may present some challenges;
- The new requirements related to gifts to Councillors will likely result in considerable amounts of time being spent debating whether particular gifts may be accepted as an incident of protocol, and determining the value of gifts for reporting purposes; and
 - The requirement for disclosure of any contract with the municipality in which a Councillor has a direct or indirect pecuniary interest appears to put both the municipal corporation and the Councillor under an onerous duty to identify all such contracts, even when the Councillor's pecuniary interest in the contract is one that arises via a mere shareholding, including shares held through a mutual fund.

DISCUSSION

PART 1 – PRINCIPLES, PURPOSES AND INTERPRETATION

The "*municipal purposes*" in Section 7 remain virtually the same as under the *Local Government Act*. The "*purposes*" are similar to those recently enacted in Alberta, Manitoba and Yukon legislation, except the exercise of powers (including enactment of by laws) is **not** expressly stated to be for the defined "*municipal purposes*", as is the case in other jurisdictions.

Unlike the *Local Government Act* and the municipal legislation enacted in the other jurisdictions, the *Charter* ties "*municipal purposes*" to the principles of municipal governance and sovereignty and to the broad interpretation provisions, but not expressly to the exercise of powers. In this regard Section 1(1) provides that municipalities are recognized as an order of government within their jurisdiction that provides for the "*municipal purposes*" of their communities. Section 3 provides that the purposes of the *Charter* are to provide municipalities with a legal framework for the powers, duties and functions that are necessary to fulfill their municipal "*purposes*".

PART 2 – MUNICIPAL POWERS AND POWERS

Division 1 – Purposes and Fundamental Powers

Natural Person Powers

Under Section 8(1), municipalities have natural person powers. Instead of having the list of delineated corporate powers, every municipality has the capacity, rights, powers and privileges of a natural person of full capacity. Municipalities are not limited to a list of express corporate powers. There is a significant body of case law addressing the scope of natural person powers in relation to other entities. A municipality may exercise natural person powers outside of its boundaries (s. 12(2)).

Natural person powers do not give municipalities new service or regulatory authority. Natural person powers are, in effect, corporate powers that would enable municipalities to carry out routine legal transactions without additional express legislative authority. (For example, they could make agreements, acquire interests in land or other property, hire or dismiss employees, purchase shares or incorporate companies, enter into public-private partnerships, etc.). The exercise of natural person powers is subject to the case law and express provisions in the remainder of the Act.

Fundamental Powers

Section 8 and the other general powers set out in the rest of Part 2 replace one hundred and seventeen detailed,

express, prescriptive sections of the *Local Government Act* respecting regulatory authority. The *Charter* provides for broader authority instead of detailed, prescribed powers. Municipalities may use the fundamental and general building blocks (such as the authority to regulate or require within a sphere, establish conditions and variations, require a permit, impose a fee, and require security), rather than acting only pursuant to a particular power where all of those modalities are spelled out in relation to that power (e.g. where the *Local Government Act* specifically authorizes regulation of the sale of wildflowers).

Section 8(3) creates 13 spheres within which a Council may by law regulate, prohibit or impose requirements (e.g. "animals"). These spheres are intended to enable municipalities to respond to future needs to regulate without requiring future *ad hoc* amendments to the *Charter*. These omnibus provisions are more generous than in other provisional or territorial municipal legislation, and are worded on the basis of the empowerment thesis found in the reasons for judgment in the Supreme Court of Canada decision in *Spraytech v. Hudson (Town)*.

The definition of "regulate" has been changed to include authorizing, controlling, inspecting, limiting and restricting, "including by establishing rules respecting what must or must not be done", in relation to persons, properties, activities, things or other matters being regulated.

There is a new general authority to "require" in a by law. This would empower a Council, for example, to require persons to undertake work or incur expenses as provided in the by law (e.g. clear debris in front of a business premise or remove graffiti). It would also include the power to require persons to use a municipal service (e.g. to connect to a sewer system) or to have insurance if providing a service on behalf of or in lieu of the municipality. Council could impose requirements in relation to regulating, prohibiting or providing a service, or they could impose bare requirements.

Section 8(2) states that a municipality may provide any service. There are no limitations in regard to what services a municipality may provide (subject to the *Charter* and constitutionality). There are restrictions and limitations on services in the recent municipal legislation of other provinces. Under Section 8(2), a municipality may provide any service directly or through another person. This, combined with natural person powers, facilitates public private partnerships, contracting out, cooperation with other municipalities or public authorities, and other approaches that Council considers desirable.

One of the spheres of regulatory authority (in respect of which Council may regulate, prohibit or require) is that of "municipal services" (s. 8(3)(a)). Accordingly, a Council could by by law impose prohibitions or requirements in relation to roads, parks, recreation facilities, solid waste, or other services. For certainty, Section 8(10) provides that for the purposes of Section 8(3)(a), a municipal service does not include an activity that is merely the exercise of authority to regulate, prohibit or impose requirements and related enforcement. As well, the authority to establish a service under Section 8(2) does not include the authority to regulate, prohibit or impose requirements although a Council may regulate, prohibit or impose requirements by by law in relation to a municipal service under Section 8(3)(a).

In regard to two other areas of jurisdictions "signs" and "business", a Council does not have the full authority to regulate, prohibit and impose requirements. In regard to signs and other advertising (s. 8(4)), a Council may with a by law regulate and impose requirements, but not prohibit. Signs remain a land use matter under Part 26 of the *Local Government Act*. Under Section 8(5), Council may by by law regulate in relation to business, but not prohibit or impose requirements.

In response to the Alberta Court of Appeal decision in *United Taxi Cab Federation et al v. Calgary (City)*, Section 8(7) is a new interpretation clause that expands the breadth of the powers to regulate, prohibit and impose requirements.

A Council is no longer required to establish every service by by law. Nonetheless, a municipality must now make available to the public, on request, a statement respecting the Council's reasons for adopting a by law under Section 8(3) [Spheres of Jurisdiction], (4), [Signs] or (5) [Business].

Section 8(6) clarifies that the powers to regulate, prohibit and impose requirements under Section 8 may not be used in relating to planning and land use or heritage conservation. Those matters continue to be governed by the express authority found under Parts 26 and 27 of the *Local Government Act*.

Concurrent Authority

In addition to the 13 spheres of jurisdiction within which a Council may regulate, prohibit or require, and the more limited spheres of "*signs*" and "*business*", there are five areas of provincial municipal concurrent regulatory authority (public health, building regulation standards, protection of the natural environment, wildlife, prohibition of soil removal, or prohibition of soil deposit on the basis of soil quality s. 9(1)). In regard to those five areas, one or more municipalities may make an agreement with the applicable minister authorizing the municipalities to exercise authority within a "*concurrent sphere*" subject to conditions and restrictions set out in the agreement (e.g. air pollution s. 9(5)).

In lieu of an agreement, the UBCM or a particular affected municipality may, further to the consultation provisions in Part 9 of the *Charter*, develop with the applicable minister a regulation to be made by the minister under which the municipality or municipalities could exercise authority in an area of concurrent regulatory authority subject to the terms, conditions and restrictions set out in the regulation (e.g. building regulation s.9(4). Certain regulations may be developed in consultation with affected interests so that the regulations are ready for enactment when this portion of the *Charter* comes into force (e.g. in relation to requiring sprinklers under building regulation by laws).

In lieu of an agreement or regulation, an individual municipality may obtain approval for a specific by law in one of the areas of concurrent regulatory authority (e.g. a smoking or pesticide by law in relation to "*public health*" s. 9(3)(c)).

One change that results in reduced autonomy for municipalities is the requirement that a by law addressing building standards be approved by the minister (order under a regulation or agreement). Previously, a municipality could "*top up*" building standards (e.g. fire sprinklers) where the by law was not inconsistent with the provincial building code (e.g. where the code was silent) without provincial approval.

Section 277(2) provides that if the UBCM so requests, the minister responsible must engage in discussions respecting the making of a regulation or agreement under this section and make all reasonable efforts to reach agreement in negotiating an arrangements.

The restriction in Section 9 with respect to the five areas of concurrent jurisdiction does not apply to a by law permitted under the fundamental powers that falls under one of the municipal spheres of regulatory jurisdiction under Section 8 or that is specifically authorized in another act or another provision of the *Charter*. For example, Section 64(b) deals expressly with the regulation or prohibition of "*odour*". Section 60(c) deals expressly with air emissions and Section 64(d) deals expressly with waste disposal and recycling. Although, these deal with environmental protection, the requirement for a ministerial approval, regulation or agreement would not be required.

Division 2 – Scope of Jurisdiction

Relationship with Provincial Laws

Section 10 is an interpretation tool for the benefit of the reader, including a court. This section is a codification of the Supreme Court of Canada decision in the leading case *Spraytech v. Hudson (Town)*. That is, a municipal by law is not inconsistent with another enactment if a person who complies with the by law does not, by this, contravene the other enactment. In other words, Council can "*meet or beat*" the provincial statute or regulation, subject to express legislative language to the contrary (e.g. legislation that expressly pre-empts municipal law coexistence, such as s. 9).

Division 3 – Ancillary Powers

Conditions and Variations

Under Section 12, there is a new comprehensive general authority to establish different classes, make different provisions for different classes, and make exceptions in relation to any situation where a Council exercises its powers or makes a by law. It is no longer necessary to look for this authority in each empowering section or in relation to each power. Section 12(2) expressly provides that a Council may in exercising its natural person powers establish any "*terms and conditions*" it considers appropriate. The express authority to establish terms and conditions in relation to natural person powers indicates that a Council may establish any terms or conditions it considers appropriate when enacting a by law or otherwise exercising its powers.

Intermunicipal Services and Regulations

Two or more municipalities may by by law establish an inter municipal scheme in relation to services, regulation and other matters. For example, the municipalities could enact the same building regulation by law and one of the municipalities could enforce the by law through the area of its application. This enables sharing of regulatory services (if the parties consider this to be politically or financially desirable) without necessitating amalgamation.

Codes, Standards or Rules

A municipality may, when it is regulating, incorporate by reference a standard, code or rule (s. 15(2)). This could be a standard published by any body or standards association (e.g. disposal of a sewage system, water main lining, erosion control, building envelope standards, etc.). As well, a Council may, when regulating, adopt a rule enacted by some other jurisdiction. Subject to any applicable concurrent authority provisions, this would allow a municipality to proceed on the basis of the international "**precautionary principle**". It would allow, for example, a municipality to enact a "**Georgia Basin Drainage Code**" that is the same as one adopted by other Lower Mainland municipalities and by Seattle area municipalities.

Such a standard may be adopted as is or with revisions, and may be adopted as frozen in time or as amended from time to time (s. 15(2)). The "**as amended**" provision would allow municipalities to embrace a standard that may be revised from time to time by the standard maker, such that the constraining rule of law in **Canadian Occidental Petroleum v. North Vancouver (District)** would no longer apply.

Entry on Property

The authority to enter on private property to inspect provides for "**one stop shopping**" with respect to the municipal power to enter on property, and clarifies the rules that apply to protect private property interests while permitting reasonable access at reasonable times subject to appropriate notice for by law enforcement or service provision purposes (s. 16). Section 16(5) provides for entry warrants tailored to the needs of municipalities in relation to municipal responsibilities under any Act or as required under the **Charter or Local Government Act**. This addresses in part the difficulties associated with attempting to obtain warrants under the **Offence Act**.

Municipal Action at Defaulter's Expense

There is a streamlined provision for direct action to enforce on default of an owner or occupier, and to

collect the cost of direct enforcement in the same manner as taxes (s. 17).

Disconnection

There is a new authority (s. 28) to discontinue a service to a specific property or person (e.g. disconnect electrical service) if the applicable fees or taxes are unpaid, if the user breaches the applicable rules related to the service, or for some other reason related to the service. The disconnection by law must provide for reasonable notice and, in the case of disconnection for breach of rules governing the service, must provide for a person affected to have a reasonable opportunity to make submissions to the Council prior to disconnection.

Security

Section 19 sets out rules related to security in relation to a municipal service or as a condition on a permit, license or approval. This clarifies that the security must be used only for the purpose provided and any amount left over must be returned to the provider.

Emergencies

Under the **Local Government Act**, a Council in the event of an emergency (e.g. earthquake, terrorism, water contamination, etc.) must act by by law (i.e. requiring two Council meetings at least one day apart) adopted by a vote of at least two thirds of the Council members. Under Section 20 of the **Charter**, a Council may act by resolution (i.e. at one Council meeting, including a special meeting called for the purpose) and may act by way of a simple majority if there is an emergency.

Part 3 – Additional Powers and Limits on Powers

Division 1 – Partnering and Other Agreements

See discussion under Part 7 – Municipal Revenue at pp. 29 – 32.

Division 2 – Restriction Providing Assistance

See discussion under Part 7 – Municipal Revenue at pp. 29 – 32.

Division 3 – Municipal Property

A more detailed discussion of the significant **Charter** innovations with respect to property and highways is

found at pp. 12 – 15.

A municipality does not need to make municipal property available to the public for acquisition before disposing of the land or improvements. Although notice of disposal of land or improvements is required under Section 26(1), it is no longer necessary to offer it to the general public by way of option, tender, notice, request for proposals or otherwise.

Division 5 – Highways

There is a new authority to restrict the common law right of passage generally (e.g. to erect gates s. 36(3)).

Section 35(11) of the **Charter** provides new authority for easements, encroachment agreements and license agreements with respect to highway lands.

There are new rules in Section 41 protecting owners who would otherwise be deprived of access to their property by a highway closure or alteration. There is also in Section 41 protection of highways that provide access to a body of water (the land must be exchanged for equal access to the same body, or the sale proceeds must be placed in a protected reserve fund for the sole purpose of acquiring at least equal access to the same body of water).

There is in Section 42 a simplified power for a Council to make an agreement with a person for the payment of compensation for damage or expense caused by extraordinary traffic (e.g. where large trucks haul gravel from a pit, resulting in extraordinary damage to the municipal road).

Division 6 – Animals

The **Local Government Act** sets out special rules governing seizure of dogs and specific animals, along with the authority to deal with them. Under Section 8(3)(k) of the **Charter**, there are also general regulatory, prohibitory and requirement powers respecting animals, along with additional powers to deal with them.

The authority to seize, sell, dispose of or destroy animals has been expanded under Section 48 (to include all members of the animal kingdom other than humans). There is new authority to provide for the seizure and destruction of any impounded animal under Section 48(d) or of any animal that is subject to suffering under Section 48(e).

Division 8 – Building Regulations

Under the **Local Government Act**, an occupancy permit may be withheld until the building complies with the health and safety requirements of the by laws or of any statute. This would be expanded under Section 54(2) of the **Charter** to provide that the occupancy permit may be withheld until the building

complies with building relations, any requirements established under a building/structure regulatory by law, or any other applicable by law, any other health or safety requirements established by municipal by law, and any other federal or provincial enactment in relation to health or safety.

Under the **Local Government Act**, a Council proposing to file a note against land title that a building regulation has been contravened may only do so after hearing the owner. Section 57(2) and (3) of the **Charter** clarifies that the Council must give the owner a reasonable opportunity to be heard.

Division 9 – Business Regulations

Section 8(5) of the **Charter** preserves the **Local Government Act** or imposes requirements (and previous **Municipal Act**) policy of not allowing a Council to exercise its power to prohibit in relation to business, persons carrying on business, or business activities. The business prohibitions allowed under the existing legislation are grandparented under Section 56(2).

Division 10 – Public Places

Section 8(3)(b) gives a Council the authority to regulate, prohibit or impose requirements by by law in relation to public places. Section 62 clarifies that this authority includes the authority in relation to persons, property, things and activities that are in, on or near public places. This would include, for example, the authority to require skateboarders to wear a helmet in a skateboard park.

Nuisances

In regard to nuisances, disturbances, unsanitary conditions and other matters, there is authority under Section 8(3)(h) of the **Charter** to regulate, prohibit or require by by law in relation to such disturbances and "**nuisances**" in addition to the existing authority to prohibit in special cases. The authority under Section 8(3)(h) may be exercised in relation to the eleven sets of enumerated matters under Section 60.

Soil

In regard to the removal and deposit of gravel, soil and other such material, the approval required by the applicable ministers would now be subject to the concurrent authority scheme under Section 8.

PART 3 – ADDITIONAL POWERS AND LIMITS ON POWER

Local Government Land, Parks and Highways & the **Charter**

Division 3 – Municipal Property

The most significant *Charter* impact in this area will be the elimination of the general requirement that a municipality offer land or improvements to the public for acquisition (s. 29). This change will greatly facilitate negotiations with prospective purchasers.

However, a sale of land or an improvement at less than market value will still constitute assistance under the *Charter* and, accordingly, where a sale is negotiated without a public acquisition process, a municipality must be satisfied that the purchase price reflects market value in circumstances where assistance is prohibited.

Council must still publish (s. 26) a newspaper notice of the land before disposing of land or an improvement. If Council wishes to offer land or improvements to the public, the newspaper notice must set out a description of the land, the nature and term of the disposition, the acquisition process and the identity of the acquirer. The newspaper notice must be published once each week for two consecutive weeks and the notice must also be posted in all "*public notice posting places*" to be identified in new procedure by laws required under the *Charter* (s. 94).

With respect to a disposition of land, improvements or works acquired or constructed with a provincial grant, the obligations under Section 189 of the *Local Government Act* to first notify the Inspector of Municipalities and, in some cases, to repay all or part of the grant, will be phased out under Section 11 of the *Amendment Act* (Bill 76). Section 189 will continue to apply to provincial grants provided before Section 11 comes into force, except in circumstances where the first grant payment is at least 20 years before the disposition and the local government no longer receives grants with respect to the property or where the property will be used for the public purpose for which it was acquired or constructed for at least 20 years after the first grant payment.

Municipalities will have to place the proceeds of the sale of land or an improvement in a reserve fund for the purpose of "*paying any debt remaining in relation to the property and of acquiring land, improvements and other assets of a capital nature*" (s. 188).

Reservation and Dedication of Local Government Land

Under the *Charter*, a municipality will be able to dedicate or reserve municipal land for a municipal or other public purpose by by law adopted by majority vote, except for park or heritage purposes, which will require a vote by two thirds of Council members (s. 30(1) and (2)). This change increases the voting requirement for a reservation by law, and for dedication for highway or other public purposes where the land area is less than 5,000 square meters, from the simple majority presently required under the *Local Government Act*. However, it will greatly facilitate the adoption of by laws to dedicate land for highway or public purposes having a greater area, for which the *Local Government Act* presently requires electoral assent.

To remove a reservation or dedication (other than a heritage or park reservation or dedication), a Council will simply have to publish a newspaper notice of its intentions and give affected persons an opportunity to make representations to Council before adopting the removal by law (s. 30(4)). This change will clarify the uncertainty surrounding the process for removal of a dedication of municipal land under the *Local Government Act*. The *Local Government Act* does not explicitly include a removal process, other than in circumstances where a highway dedication is cancelled for the purpose of rededicating the land as park. While it is arguable that Council could, under the *Local Government Act*, repeal a dedication by law by following the same process as that required to adopt the dedication by law, it is not clear that repealing the by law actually has the effect of removing the dedication.

To remove a park or heritage designation, the removing by law will have to receive the "*approval of the electors*" (s. 30(3)). Under the *Charter*, such approval may be obtained by way of traditional electoral assent or by way of the *Charter's "alternative approval process"*. That process is similar to the *Local Government Act* counter petition process, except that, notably, the new process will increase the threshold for a successful counter petition from 5% to 10% of electors.

Division 5 - Highway Vesting

The new *Charter* includes a vesting of the soil and freehold of most highways to municipalities (s. 35(1)), however, the vesting is subject to provincial rights that effectively make the vested land unmarketable without some provincial involvement.

Specifically, the vesting of freehold title to highways will be subject to a provincial right to resume the highway land if the land is required for arterial highway purposes, other transportation purposes or park purposes. The Province's right to resumption will remain even where a municipality closes and removes the dedication of a highway. It also appears that this right will amount to a qualification on the municipality's title to the land and will affect a subsequent purchaser's interest in such land. Such a right would obviously have a significant impact on the marketability of such land.

The right of resumption may be cancelled by order of the minister responsible for the *Highway Act*. The Province may also adopt a regulation setting out circumstances where the reservation will automatically be cancelled. We understand that a regulation is in the works, but may not be implemented until some time after January 1st.

Because the *Charter* will not include the present *Local Government Act* provision expressly authorizing municipalities to do highway exchanges, the right of resumption will have to be cancelled in order to give clear title to the other party to the highway exchange. Under the *Local Government Act*, municipalities can presently exchange highway land for other land to be used for highway without provincial involvement. Municipalities frequently do highway exchanges where a development involves an alteration (often a minor alteration) to a highway in order to accommodate the development. Unless the anticipated regulation addresses this matter, this change amounts to a reduction in the authority of municipalities to deal with highway land.

Easements, Licenses to Occupy

It is also important for municipalities to realize that although they will have freehold title to most highway land, such land remains highway land and subject to the public's right of access, and easements, and to permit encroachments to limit that right. Presently municipalities are precluded from granting easements over Crown highways. Now the *Charter* expressly authorizes municipalities to grant licenses of occupation and easements, and to permit encroachments on highways (s. 35(11) and (12)). It should be noted that municipalities are precluded from granting exclusive licenses to occupy to a person for a purpose not related to public use on a street. Section 35 of the *Charter* and the transfer of fee simple title to the City may not eliminate this rule.

Furthermore, municipal authority to regulate highways will include the power to restrict the public's common law right of passage over a highway vested in the municipality, if necessary to exercise the regulatory authority (s. 36(3)). This provision may be useful, for instance, where a municipality wishes to prohibit the public from using a closed road allowance. Care must be taken in what types of easements are granted. This is because the grantee will have an interest in land with a market value that may only be required by paying compensation if the municipality wishes to reacquire the interest.

Stopping Up and Closing

With respect to highway closures under the *Charter*, before adopting a highway closure by law, Council will be required to notify utility companies whose works will be affected of the closure (s. 40(4)). Utility companies will also have an express right to require the municipality to accommodate its works "*on agreed terms*" (s. 42(4)).

With the transfer of title to streets to the municipalities, approval of the Minister for the abandonment and disposition of stopped up and closed roads will no longer be required. As a result, additional protections are introduced in the *Charter* when a municipality wishes to stop up and close, and dispose of a portion of a city street or lane. These include:

- (a) notice of a by law to stop up and close, or remove the dedication of a highway must be given to utilities operators whose transmission or distribution facilities may be affected by the closure;
- (b) where a highway provides access to the ocean, or a lake, river or other stream or watercourse, may only dispose in exchange for similar access to same body of water, or proceeds must be deposited in reserve to acquire property for that purpose;
- (c) approval of the Minister (*Highway Act*) required to close (or reopen) a highway within 800 metres of an arterial highway;
- (d) consent, compensation and another means of access for an owner required where closure will completely deprive an owner of access to their property;
- (e) an affected utility may require the municipality to provide reasonable accommodation of affected transmission or distribution facilities on agreed terms, arbitration is available if the parties cannot reach agreement;
- (f) consent of subdivider if original owner and highway has not been developed for its intended purpose.

Drainage Rights of Way

The vesting of title to highways with municipalities will also include the vesting of all drainage rights of way and easements in respect of such highways and the assumption of all of the Province's obligations with respect to those easements (s. 35(5)). Accordingly, potential liability to third parties for flood damage due to poor maintenance of drainage works should be a concern for all affected municipalities. The City should ascertain whether it will be vested with any such easements and address maintenance of such works and any other obligations that may be expressly or impliedly set out in the easement or right of way.

Parks

Municipalities are presently, and will continue to be, vested with title to parks provided as a condition of subdivision under Section 941 of the *Local Government Act* and provided in lieu of development cost charges under Section 936 of the *Local Government Act*.

The most significant impact of the *Charter* in relation to parks is that land in a municipality that is dedicated as park or public square by subdivision plan, reference plan or explanatory plan will vest in the municipality (s. 29). Although Section 29 itself is not entirely clear, Section 13 of the *Amending Act* clarifies that this vesting will be retroactive and apply to all Crown owned park within a municipality that was previously dedicated by subdivision, reference or explanatory plan.

Despite the vesting of title to parks and public squares with municipalities under the *Charter*, a municipality may still only dispose of such land by by law adopted with "*approval of the electors*" and only in exchange for other land suitable for park or public square or for money to be deposited in a park land acquisition reserve fund. It should be noted that the Section 86 "*alternative approval process*" may be used in lieu of "*approval of the electors*" in disposing or exchanging title to parks. That process is similar to the *Local Government Act* counter petition scheme, except that the threshold for a successful counter petition drive has been raised from 5% to 10% of the electors.

PART 4 – PUBLIC PARTICIPATION AND COUNCIL ACCOUNTABILITY

Division 3

Closed Meetings

The *Charter* adds additional grounds to close a meeting to the public (s. 90):

- (1) A part of a council meeting may be closed to the public if the subject matter considered relates to or is one or more of the following:
 - (h) an administrative tribunal hearing or potential administrative tribunal hearing affecting the municipality, other than a hearing to be conducted by the Council or a delegate of Council;
 - (k) negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages and that, in the view of the Council, could reasonably be expected to harm the interests of the municipality if they were held in public;
 - (l) discussions with municipal officers and employees respecting municipal objectives, measures and progress reports for the purposes of preparing the annual report under section 98 [annual municipal report];
 - (o) the consideration of whether the authority under section 91 [other persons attending closed meetings] should be exercised in relation to a council meeting.
- (2) A part of a council meeting must be closed to the public if the subject matter being considered relates to one or more of the following:
 - (b) the consideration of information received and held in confidence relating to negotiations between the municipality and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party.

Division 5 – Reporting

Section 98 of the *Charter* introduces a new requirement for an annual report. This annual report must be made available for inspection at the municipal hall. It must also be made available at the annual meeting required for the purpose of considering the report. The annual report must include the following:

- (a) financial statements for the previous year;
- (b) the amount of property taxes foregone in respect of each permissive tax exemption granted in the previous year;
- (c) a report respecting municipal services and operations for the previous year;
- (d) a statement of municipal objectives, and the measures that will be used to determine progress respecting those objectives, for the current and next year;
- (e) a progress report respecting the previous year in relation to the objectives and measures established for that year;
- (f) any declarations of disqualification made by the Supreme Court in relation to a Councillor's failure to take oath, unexcused absence, conflict, unauthorized use of money or election disqualifications in the previous year.

Section 99 of the *Charter* requires that Council consider, at a council meeting or other public meeting, the annual report and submissions and questions from the public in relation to the annual report.

Sections 98 and 99 have no counterparts in the *Local Government Act*, which requires only that a municipality hold a council or other public meeting by June 30 in each year for the purpose of presenting the annual audited financial statements for the preceding year, together with a report on remuneration and expenses.

Section 98 of the *Charter* sets out in more detail than exists under the *Local Government Act* the notice requirements that must be met prior to the annual meeting. Under the *Charter* the notice will have to be published once each two weeks for two consecutive weeks in a newspaper distributed in the municipality, or if that is not practicable, alternative notice that Council considers reasonably equivalent is required. The *Local Government Act* requires publication of only one notice in a newspaper.

A significant aspect of the new reporting requirements under the *Charter*, as listed above, is the new requirement for measuring performance against stated municipal objectives.

Local government performance measurement is new in British Columbia, but common in other jurisdictions. The Governmental Accounting Standards Board in the United States, the National Centre for Public Productivity in the United States and the International City/County Management Association have all published useful material in relation to performance measurements for local governments. Performance measurements or indicators could include input indicators, workload indicators, effectiveness indicators and productivity indicators. We understand that the Ministry of Community, Aboriginal and Women's Services, in collaboration with the Union of British Columbia Municipalities, will be publishing best practice manuals and other information to assist municipalities in meeting the new requirement to measure progress against stated municipal objectives.

The *Charter* transitional provisions contained in Bill 76 provide that the statement of municipal objective, and the performance measures in relation to those objectives, are not required until the 2004 annual report, and the first progress report in relation to the stated objectives is not required until the 2005 annual report.

Finally, we note that Sections 90(1)(1) of the *Charter* says that a part of a council meeting may be closed to the public "*if the subject matter being considered relates to ... discussions with municipal officers and employees respecting municipal objectives, measures and progress reports for the purposes of preparing an annual report under Section 98*".

Division 6 – Conflict of Interest

There is no definition of "conflict of interest" in the *Charter* and the common law rules apply. The *Charter* carries forward the provisions of the *Local Government Act* to provide that the conflict provisions do not apply if a Councillor's pecuniary interest:

- (a) is in common with electors of the municipality;
- (b) relates to his or her remuneration as a Council member; or
- (c) is so remote and insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter.

The Charter does not change the current rules dealing with disclosure of campaign contributions and disclosure of remuneration.

Disclosure of Gifts

The *Criminal Code* already makes an offence for both a Councillor and their benefactor to accept a fee, gift or personal benefit that is connected with a Council member's performance of their duties.

Section 105 of the *Charter* restricts the ability of Council and board members to receive gifts and personal benefits, except in certain circumstances including where the gift or personal benefit is received as an incident of the protocol or social obligations of the member. Typical social obligations that members of Council attend are charitable events, community or association events, cultural displays and official openings. Gifts from a "*twined municipality*", another level of government would also fall under this permitted category.

However, if the costs of attendance at a function, sporting event or dinner are paid for by another person who has an interest in the performance of a Councillor's actions or duties, then the gift is prohibited. Similarly, any trips or transportation paid for, or provided gratuitously, by a person or company with an interest in the performance of a Councillor's duties would be prohibited. A member of Council who contravenes this new rule is subject to the disqualification provisions of Section 110(2) unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Section 106 requires gifts that are permitted (i.e. as an incident of protocol or social obligations) to be disclosed by filing, "*as soon as reasonably practicable*", a disclosure statement with the corporate officer (City Clerk). Disclosure is required where a gift or benefit exceeds \$250 in value, or the total value of gifts or benefits from one source or person in any 12 month period exceeds \$250. Failure to disclose can disqualify a member from holding office. The City Clerk will provide Council with a form of such disclosure, which the *Charter* requires to contain the following information:

- the nature of the gift or benefit;
- its source, including, if it is from a corporation, the full names and addresses of at least two individuals who are directors of the corporation;
- when it was received; and
- the circumstances under which it was given and accepted.

The first implementation bill, Bill 67, suggested this requirement might have retroactive effect. Section 15 of Bill 76 now provides instead:

Section 106(2) of the Community Charter does not apply in respect of any gift or benefit received before the date that section comes into force.

Inside Influence

Section 102 of the *Charter* will impose restrictions on Council and board members from exercising inside influence where members are in a conflict of interest situation. Councillors are prevented from attempting to influence decisions on advice from City staff.

Outside Influence

Section 103 of the *Charter* will restrict Council and board members from exercising an "*outside influence*" where the member is in a conflict of interest. This is a broad provision and could include for example using one's office to lobby an external public or private sector decision maker in a letter written on City letterhead.

Disclosure of Contracts

Under Section 107 of the *Charter*, a Council or board member will be obliged by law to disclose whether he or she has any contracts with the municipality or regional district.

Use of Insider Information

Section 108 of the *Charter* will also impose restrictions and sanctions on Council and board members who use insider information for personal profit.

Disgorgement of Financial Gain

A new remedy introduced in the *Charter* is a Supreme Court order that the Councillor or former Councillor pay to the municipality all or part of any financial gain they have realized as a result of a contravention of the *Charter* in relation to the various rules of conduct. The municipal corporation or an elector may apply for such an order. If an elector's application is successful, the municipality must pay the elector's costs. The Supreme Court may also order another party, including the Councillor or former Councillor to reimburse the municipality.

These provisions will be of interest to former Councillors. Obviously, they no longer have to worry about being disqualified from office, but could run afoul of the new insider information rules and be subject to this type of application.

The *Charter* does not apply to former Councillors retroactively, but attaches consequences to actions they may take that would not have attached under previous legislation. Therefore, the City may want to circulate information to former Councillors to advise them of the new insider information rules.

Division 7 - Disqualification

Disqualification from office is the main remedy or consequence of breaching the ethical conduct rules discussed above. Disqualification will result from a breach of the rules regarding:

- disclosure of conflicts of interest;
- inside influence;
- outside influence;
- gifts;
- disclosure of gifts;
- disclosure of contracts;
- insider information.

Persons disqualified for these reasons may not hold office until the next general election. They are not eligible to contest the by election held to fill the seat they have vacated. The *Local Government Act* previously permitted Councillors disqualified for failing to disclose a conflict of interest to run in such by election.

The *Charter* deems the Councillor to be disqualified and their office vacant. If a Councillor continues to act in office, either the municipal corporation or 10 or more electors may bring a Supreme Court application for a

declaration that a Councillor is disqualified. The *Local Government Act* required just four electors.

The court application must be brought within 45 days of the alleged basis of the disqualification coming to the attention of any other member of the Council or any of the electors bringing the application.

The *Charter* abolishes the procedure set out in Section 214 of the *Local Government Act*. That procedure provided that a Council could simply adopt a resolution declaring vacant the seat of a Councillor it considered was disqualified, with a statutory right of appeal by the Councillor to the Supreme Court.

The *Charter* also contains rules permitting a Councillor to continue to act in office pending the decision of the Supreme Court.

Municipalities are automatically liable for the costs of electors bringing successful applications, but the Supreme Court may order another party, including the disqualified Councillor, to reimburse the municipality.

PART 5 – MUNICIPAL GOVERNMENTAL AND PROCEDURES

Division 1 – Council Roles and Responsibility

Duty of Confidentiality

Section 117 of the *Charter* will impose a new duty on Council members to keep in confidence any record held in confidence by the municipality until the record is released to the public as lawfully authorized or required. The section will also require elected officials to keep confidential any information considered in closed council/board meeting (or closed committee meeting) until the information is discussed at an open meeting or otherwise released by the local government to the public.

Division 2 – Council Proceedings

Procedure By-law

The *Charter* will require the City's procedure by law address the following additional matters (s. 124):

- (c) provide for the taking of minutes of council meetings and council committee meetings, including requiring certification of those minutes;
- (e) identify places that are to be public notice places for the purposes of section 94 [public notice];
- (f) establish the procedure for designating a person under Section 130 [designation of member to act in place of the Mayor];

- (g) establish the first regular council meeting referred to in Section 125(1) [council meetings] as a day in the first 10 days of December following a general local election.

Note that Bill 76 provides that municipalities will have 120 days following the *Charter* being brought into force in order to adopt their amended procedure by law.

Reconsideration

The *Charter* will expand the right of the Mayor or Chair to return a matter for reconsideration by Council or the Board. The new rules (s. 131) will allow the Mayor to return either an adopted or rejected resolution or by law either at the same meeting or within 30 days following that meeting. A matter may not be returned for reconsideration if it has had the approval or assent of the electors followed by council adoption, or there has already been a reconsideration under this section.

The rule in the *Local Government Act* that a matter may not be brought back to reconsideration if it has been "*acted upon*" by the local government is not contained in the *Charter*.

Bill 76 discusses the Mayor/Chair's authority to reconsider under Section 8:

If a bylaw, resolution or proceeding was voted on by a local government before section 131 of the Community Charter came into force, the mayor or chair may require reconsideration of the matter only in accordance with the previous section 219 of the Local Government Act, and for these purposes section 219 of that Act applies.

This simply means that the Mayor or Chair may not use the new, broader reconsideration powers to return a matter that was adopted before the *Charter* comes into force.

Designation of Member to act in place of Mayor

New Section 130 will require that a municipality's procedural by law provide for the designation of a Councillor as the member responsible for acting in place of the Mayor when the Mayor is absent or otherwise unable to act or when the office of the Mayor is vacant. If both the Mayor and the member designated are absent, the members must choose a member to preside.

Electronic Meetings

Section 128 of the *Charter* will allow for electronic or other communication facilities for:

- (a) a special council meeting, or
- (b) attendance by a member of Council (or council committee) who is unable to attend a meeting.

The rules that apply to such meetings are:

- the meeting must be conducted in accordance with the applicable procedure by law;
- the facilities must enable the meeting's participants to hear, or watch and hear, each other;

- for a special council meeting, the notice must include notice of the way in which the meeting is to be conducted and the place where the public may attend to hear the proceedings that are open to the public, and, except for any portion of the meeting closed to the public, the facilities must allow for the public to hear, or watch and hear, the meeting and a designated municipal officer must be in attendance at that specified place.

These requirements suggest that telephone conference or videoconference are the two most likely formats for this type of remote participation in council or committee meetings.

Notice of Council Meetings

Section 127 of the *Charter* will require Council to:

- make available to the public a schedule of the date, time and place of regular council meetings; and
- give notice of the availability of the schedule in accordance with Section 94 [public notice] at least once a year.

Notice of a special council meeting must be given at least 24 hours in advance by:

- posting a copy of the notice at the regular council meeting place,
- posting a copy of the notice at the public notice posting places, and
- leaving a copy for each Council member.

The notice must include the date, time and place of the meeting, describe in general terms the purpose of the meeting and be signed by the Mayor or the corporate officer.

PART 6 – FINANCIAL MANAGEMENT

Division 1

Financial Planning and Annual Audit

The provisions of the *Charter* dealing with the requirements for a financial plan, annual financial statements and a report on Council remuneration are essentially unchanged from the corresponding provisions in the *Local Government Act*. The audit provisions in the *Charter* are also essentially unchanged. There is however one change worth noting in this regard. If a Council terminates the engagement of an auditor under the *Local Government Act*, the auditor can appeal the decision to the Inspector of Municipalities who then has the authority to confirm or set aside the termination. The auditor's right to appeal termination has not found its way into the *Charter*.

Division 3

Limits on Expenditure

The *Charter* will not change the current rules relating to limits on expenditures. Except in respect of expenditures for emergencies, a municipality will still have to ensure that a proposed expenditure is included for that year in its financial plan (s. 173).

Limits on Liabilities

The rules relating to limits on aggregate liabilities have been slightly modified in the *Charter*. Under the *Local Government Act* aggregate liabilities cannot exceed a total of 20% of the current value of tangible assets and 20% of the converted assessed value of land and improvements in the municipality averaged over the current and two preceding years. Three types of liabilities are currently excluded from the calculation of aggregate liability:

- (a) liabilities prescribed by the Minister,
- (b) revenue anticipation borrowing, and
- (c) debt of another public authority for which a local government is jointly and severally liable.

None of these rules will apply under the *Charter*. Instead, the *Charter* stipulates that the Lieutenant Governor in Council may make regulations establishing limits for municipalities on borrowing and other liabilities and on the annual cost of servicing such liabilities (a municipality's borrowing power).

It also includes financial obligations under leases and long term agreements. For example, partnering agreements often impose obligations on municipalities such as sharing the long term expenses of operating a facility or providing a service program. These types of obligations are caught within the definition of liability, and would be included in the aggregate liabilities of a municipality.

The regulations under the *Charter* that will establish the limits on borrowing and other liabilities have not yet been released for public review. Presumably these regulations will include transition provisions.

Liabilities Under Agreements

The *Local Government Act* and the *Charter* both state that a municipality may incur liabilities under an agreement provided that the liability is not a debenture date and provided that the duration of the liability is not longer than the activity, work or service under the agreement. The relevant provision in the *Charter* is Section 175 and the relevant provision in the *Local Government Act* is Section 334.1. Since most agreements that are entered into by local governments result in some form of liability or potential liability being incurred by the local government, these provisions are very significant.

Both Section 175 in the *Charter* and Section 334.1 in the *Local Government Act* state that the term of any agreement imposing liabilities on a municipality, together with renewals and extensions, cannot be for more than five years in duration unless approval of the electors is obtained (under the *Charter*) or a counter petition has been offered (under the *Local Government Act*). While the *Charter* and the *Local Government Act* are not fundamentally different in these respects, there are some important differences, as follows:

1. Under the *Local Government Act* there are only two exceptions from the requirement for a counter petition opportunity where a municipality proposed to incur liabilities in an agreement over five years; liabilities incurred for supplies under the *Police Act* and liabilities incurred under employment contracts and collective agreements.
2. Under the *Charter*, in addition to the above two exceptions, approval of the electors will also not be required in relation to "a liability to be incurred in circumstances prescribed by regulation or in relation to an agreement or a class of agreement prescribed by regulation, subject to any conditions established by

regulation".

The proposed regulation in this regard has not yet been released, but we understand that there will be two types of exemptions which together will form an "**assent free zone**":

- (a) exemptions relating to liabilities contained within specified classes or categories of agreements, for example, liabilities in statutory right of way agreements; and
 - (b) exemptions for liabilities below a stipulated threshold.
3. Section 175(5) of the *Charter* stipulates that all approval of the electors will not be required if the liability is in a partnering agreement that is in accordance with a concept that has already received approval of the electors. This provision has no counterpart in the *Local Government Act*.

Alternative Approval Process

The counter petition process in the *Local Government Act* has been replaced with what is called the "*alternative approval process*" in the *Charter* (s. 86). The *Charter* stipulates that where approval of the electors is required (for example, for a partnering agreement containing liabilities over five years) it may be obtained either by way of elector assent (majority vote) or by way of the alternative approval process. The alternative approval process is similar to the counter petition process under the *Local Government Act*, but there is one very significant change.

The counter petition process requires assent of the electors if 5% or more of the electors have petitioned against the proposed by law, action or other matter that is the subject of the counter petition opportunity. Under the *Charter*, the bar has been set higher – assent of the electors required is 10% or more of the electors indicate that the proposed by law, action or other matter should not proceed unless it is approved by assent of the electors. In this regard, as far as we are aware, there has never been a counter petition opportunity in British Columbia where more than 8% of the electors have signed a counter petition.

Short Term Borrowing

The rules relating to short term borrowing are essentially unchanged under the *Charter*. As under the *Local Government Act*, a municipality may only incur a liability as expressly authorized under an enactment. Also as under the *Local Government Act*, short term capital borrowing must still be done by by law and will still require approval of the Inspector. The borrowing will also still have to be payable no later than the lesser of:

- (a) five years from the date on which the security is issued; or
- (b) the reasonable expectancy of the capital asset for which the debt was incurred.

Also, the rules relating to revenue anticipation borrowing (e.g. operational borrowing prior to taxes being collected) are unchanged.

There is, however, one change in the *Charter* in relation to short term borrowing. The limit on aggregate short term liability, which is \$50 multiplied by the municipal population under the *Local Government Act*, will be established by regulation under the *Charter*. Again, the proposed regulation has not yet been released, but we understand that the Province is considering a change in the ceiling on short term liabilities.

Loan Authorization By laws

Section 180 of the *Charter* says that a loan authorization by law may only be adopted with the approval of the electors except in very limited circumstances (for example, relating to loan authorization by laws for court, arbitration and expropriation requirements). This is unchanged from the *Local Government Act* except that the counter petition process in the *Local Government Act* has been replaced with the alternative approval process in the *Charter*. There is, however, one other change which may prove to be very significant. Section 180(2)(c) in the *Charter* provides that a loan authorization by law for the purpose prescribed by regulation or in circumstances prescribed by regulation does not require approval of the electors. There is no similar exception in the *Local Government Act*. The significance of this exception will depend, of course, on the content of the provincial regulation made pursuant to Section 180(2)(c). To date, no such regulation has been released, but, as mentioned in relation to liabilities under agreements, we understand that the Province is considering a regulation which will exempt loan authorization by laws from the requirement for assent of electors (by way of the alternative approval process) where the annual debt servicing is below a specified threshold expressed as a percentage of total revenues of the municipality (i.e. the assent free zone).

Section 335.3 of the *Local Government Act* dealing with security issuing by laws has been removed from the *Charter*, thus removing the Inspector approval requirement found in Section 335.3.

Division 4

Reserve Funds

The rules relating to reserve funds have been much simplified in the *Charter*, and all of the sinking funds and debt retirement fund provisions have been removed.

The *Local Government Act* stipulates a number of different types of reserve funds, each with its own rules. For example, the use or expenditure of money in a capital works reserve fund or a tax sale reserve fund requires a by law adopted by two thirds of Council members, and a special reserve fund may only be established by by law after Council has provided a counter petition opportunity in relation to the by law. These rules have been replaced in the *Charter* with a simple provision stipulating that Council may, by by law, establish reserve funds for a specified purposes at Council's discretion. A number of non discretionary reserve funds which must be established by a municipality have been retained. These include:

- (a) development cost charge reserve funds;
- (b) reserve funds for money received from the sale of park land;
- (c) reserve funds for money received in relation to disposal of highway property that provides access to water (this is a new requirement in the *Charter*);
- (d) reserve funds for money received under Section 906(3) of the *Local Government Act* in relation to parking spaces requirements; and
- (e) general capital reserve funds for money received from the sale of land and improvements.

The rules relating to the transfer of money between reserve funds are essentially unchanged under the *Charter*. The *Charter* contains an express provision that a transfer from a reserve fund established for a capital purpose may only be made to another capital reserve fund. The *Local Government Act* contained no such express provision.

Division 6

Statutory Tax Exemptions

The general statutory exemptions from municipal taxation currently found in Section 339 of the *Local Government Act* are located in Section 220 of the *Charter*. The provision dealing with grandparenting of pollution abatement exemptions has been moved to its own Section 221 and a new Section 223(1) has been added stating that the Lieutenant Governor in Council may make regulations establishing new exemptions from property taxes in respect of industrial or business improvements, community airport improvements and land or improvements at community ports. Otherwise, the statutory exemptions are essentially unchanged.

Division 7

Permissive Tax Exemptions

Currently under the *Local Government Act* a permissive tax exemption may be given for one year without assent of the electors or for up to 10 years with the assent of the electors, and in both cases a by-law adopted by a two-thirds majority is required. Under the *Charter*, on the other hand, the by-law requires only a simple majority, and, significantly, the exemption can be for up to 10 years with no requirement for elector assent, but notice must be provided in accordance with Section 227 (as discussed below).

Permissive tax exemptions, which are currently found in Section 341 of the *Local Government Act*, are located in Section 224 of the *Charter*.

An attempt has been made to make these exemptions more generic. For example, the *Local Government Act* has specific permissive tax exemptions for property held by horticultural or agricultural societies, property held by charitable or philanthropic organizations supported in whole or in part by public funds and used as an art gallery, museum or other cultural purpose, and property held by charitable or philanthropic organizations supported in whole or in part by public funds and used as a search and rescue facility. These and other permissive exemptions have been replaced with the following more generic and broad power:

224(2) Tax exemptions may be provided under this section for the following:

- (a) *land or improvements that:*
 - (i) *are owned or held by a charitable, philanthropic or other not for profit corporation, and*
 - (ii) *the council considers are used for a purpose that is directly related to the purpose of the corporation.*

The *Charter* also contains a new permissive tax exemption for property in a revitalization area as designated by Council in either the annual financial plan or another official community plan. This is found at Section 226 and has no counterpart in the *Local Government Act*. Council may establish a tax exemption revitalization program in a designated revitalization area in respect of the construction of new improvements or the alteration of existing improvements.

There is a new notice requirement in relation to permissive tax exemptions found at Section 227 of the *Charter*. This provision has no counterpart in the *Local Government Act*. The notice must be posted in a public place and must be published in a newspaper once each week for two consecutive weeks. It must identify the property, describe the proposed exemption, state the number of years of the proposed exemption, and provide an estimate of the taxes forgone in the year in which the proposed by-law authorizing the exemption would take effect and for two years thereafter.

PART 7 – MUNICIPAL REVENUE

Sources of Revenue

The law respecting municipal fees (Section 194 in the *Charter* and Section 363 in the *Local Government Act*) is essentially unchanged. A power to levy fees and charges is only authority to recover the costs and charges relating to the public service provided or the administration of a regulatory scheme to which they are annexed. However, we understand that the Province is considering the introduction of a revenue bill that may authorize fees to be levied to revenue purposes beyond cost recovery.

The law relating to property value taxes (Section 197 in the *Charter* and Section 359 in the *Local Government Act*) and parcel taxes (Section 200 in the *Charter* and Section 360 in the *Local Government Act*) is also essentially unchanged.

The law respecting local services taxes is also essentially unchanged, but the relevant statutory provisions in this regard have now been consolidated at Sections 210 to 219 of the *Charter*. Local improvement area taxes, specified area taxes and business area taxes are now all addressed in Section 216 of the *Charter* and are called local services taxes, thus simplifying the statutory requirements involved.

Assistance Other Than Tax Exemption

The *Charter* does not fundamentally change the rules relating to the granting of assistance. There remains a general prohibition against assistance to a business, and there remains a specific exception to this general rule for assistance to a business under a partnering agreement. The relevant provisions are found at Section 21(a) and 25 of the *Charter* (replacing Sections 181 and 185 in the *Local Government Act*).

Section 94 of the *Charter* sets out in more detail than exists under the *Local Government Act* the notice requirements that must be met when granting assistance under a partnering agreement. The notice will now have to be published once each week for two consecutive weeks in a newspaper distributed in the municipality, or if that is not practicable, alternative notice that Council considers is reasonably equivalent is required. As under the *Local Government Act*, the notice must identify the intended recipient and describe the nature, term and extent of the proposed assistance.

Partnering Agreements

The *Charter* does not greatly expand upon the provisions in the *Local Government Act* that have facilitated public private partnerships since 1998, but there have been a number of helpful revisions. These include the ability to grant tax exemptions for more than five years under partnering agreements without elector assent, the removal of the requirement to offer land and improvements to the public for acquisition, and an increase in the threshold for a referendum from 5% to 10% under the alternative approval process (see above) in the *Charter*.

Section 517.1 of the *Local Government Act* stipulates that, with a few limited exceptions, a local government may not operate a service, and therefore may not enter into a partnering agreement with respect to a service, until after Council has adopted an establishing by-law for the service. This requirement will disappear under the *Charter*, thus removing one procedural hurdle to entering into public private partnerships. Under the *Charter* there will no longer be a formal requirement for establishing a service by-law. Section 8(2) of the *Charter* is the operative provision:

A municipality may provide any service that council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.

As a result, Council will continue to have a broad statutory discretion under the *Charter* in deciding what activities, works or facilities are suitable for public private partnership.

A service, under *Charter* and under the *Local Government Act*, is broadly defined to encompass any activity, work or facility undertaken by or provided by or on behalf of the municipality. Under a partnering agreement the service is delivered to the community by a private sector entity on behalf of the local government. In this sense the local government and the private sector entity share the same public service objective, and in this sense there is a public private partnership.

A partnering agreement could involve anything from building and operating an ice rink facility to undertaking the design and construction of a bridge, to providing a curbside garbage collection service. But typical fee for service agreements, stipulated price contracts, or purchase agreements cannot usually be said to be providing the service, work or facility, as the case may be, on behalf of the local government. Rather, the contractor or supplier will in most cases be providing the service, work or facility to the local government usually for cash.

Partnering Agreements and Assistance

One of the main purposes of invoking the partnering provisions in the *Charter* is to take advantage of the partnering exception to the general prohibition against assistance to a business.

Partnering Agreements and Permissive Tax Exemptions

The *Charter* introduces a number of changes in the rules relating to permissive municipal property tax exemption under partnering agreements. These changes are as follows:

1. First, and most importantly, the *Local Government Act* stipulates that if a municipal property tax exemption in a partnering agreement is to be for more than five years, then a counter petition opportunity is required. There is no corresponding requirement in the *Charter*. A tax exemption can be for the term of the partnering agreement, however long that may be, without a requirement for the approval of the electors. The *Charter* stipulates only that the by law authorizing the exemption:
 - (a) must establish the term of the exemption;
 - (b) may only be adopted after the notice has been given in accordance with Section 227 (briefly discussed above);
 - (c) requires an affirmative vote of at least two thirds of all Council members; and
 - (d) does not apply to taxation in a calendar year unless it comes into force on or before October 1 in the preceding year.
2. The *Local Government Act* stipulates that property tax exemptions under partnering agreements may only be provided for that portion of the land and improvements owned or held by the private sector partner used for a public purpose. Under the *Charter* a Council may exempt what is called "*eligible partnering property*" which is defined as property that "(i) is owned by a person or public authority providing a municipal service under a partnering agreement, and (ii) the council considers will be used in relation to the service being provided under the partnering agreement". Although not expressly stated, this new definition, in our opinion, encompasses municipal land held or occupied by a private sector partner. The definition is no longer necessarily limited only to those portions of the land or improvements directly used for a public purpose.
3. Section 225(5) in the *Charter* authorizes entering into exemption agreements with private sector partners. These agreements can address the extent of the tax exemption and conditions on which the exemption is made. A non exclusive list of possible exemptions is provided in Section 225(6). There is no counterpart to these provisions in the *Local Government Act*.

These changes in the *Charter* (particularly number 1 above) are significant. A tax exemption will inevitably be an important component in the negotiation of partnering agreements whenever there is even a possibility that land held or occupied by the private sector partner will be subject to property taxation. In this regard, many partnering agreements require that the private sector partner, in providing the service, either hold land in its own name or occupy land held by the local government. Where the private sector partner owns land in its own name, property taxes will be levied. Less obviously, property taxes may also be levied even where the private sector partner merely occupies land owned by the municipality.

While a private sector partner under a partnering agreement is engaged in providing a service on behalf of the municipality, that does not mean that municipal land used by the private sector partner for that purpose is always occupied on behalf of the municipality. In fact, the private sector partner will often be occupying the land for its own benefit, as is illustrated in the B.C. Court of Appeal decision in *Boundary Bay Airport Corp. v. B.C. Assessor* (2001). If the private sector partner is occupying on its own behalf, then taxes will be levied unless exempted under a partnering agreement.

Paying Property Taxes on Behalf of Private Sector Partner

An agreement to pay taxes on behalf of a ratepayer is different from exempting the ratepayer from paying the taxes. Specific statutory authority is required before tax exemptions may be given, but is not required for an agreement to pay the taxes provided that the agreement is supported by good consideration. For example, a local government, as landlord, could agree that rent paid by a tenant includes the tenant's property taxes, which will then be paid by the local government in its capacity as landlord.

While this approach avoids the need to rely on any partnering agreement tax exemption, a local government may favour a tax exemption in any event for two reasons:

1. An agreement to pay the private sector partner's property taxes would be a liability within the meaning of Section 334.1 of the *Local Government Act* (Section 175 in the *Charter*), and therefore a counter petition opportunity (assent of the electors) would be required if the agreement were over five years in duration.
2. A local government may be indifferent as between a tax exemption and an agreement to pay the municipal portion of the property taxes, but will likely be less indifferent with respect to the school and other provincial portions of the property taxes. These taxes, unless exempted, represent an out of pocket expense, either to the local government or the private sector partner, and they will increase the overall cost of the transaction.

A tax exemption under a partnering agreement, as well as other forms of assistance to a business under a partnering agreement, are exceptions to general prohibitions, and will represent the main reasons to invoke the partnering provisions in the *Charter* after it comes into force.

Partnering Agreements and Buying and Selling Land

The *Charter* removes the general rule currently found in the *Local Government Act* that a municipality offer land or improvements to the public for acquisition. Under the *Charter* municipalities will be able to transfer land or improvements to private sector partners (or anyone else) without a competitive process, keeping in mind that the land or improvements may not be sold to a business for less than market value except under a partnering agreement. Where there is no assistance all that will be necessary is publication of a notice identifying:

- (a) the land;
- (b) the private sector partner who will be acquiring the land;
- (c) the nature of the interest to be acquired; and

- (d) the price to be paid to the municipality.

The notice must be published once each week for two consecutive weeks and must be posted in all "*public notice posting places*" identified in the municipality's new procedure by law to be adopted under the *Charter*.

PART 2 – ADDITIONAL POWERS

Division 12 – Remedial Action Requirements

New Direct Enforcement and Nuisance Powers and Procedures

In addition to Council's ability to regulate, prohibit or to impose requirements by by law, or to commence proceedings in Supreme Court to enforce or prevent or restrain a contravention of the Act or the by law, the *Charter* gives municipalities broad authority to undertake direct enforcement and to require remedial action in Part 3, Division 12 of the Act. This discussion will be of particular importance to those who are interested in how Legal Services and the City's By law Enforcement & Licensing Sections will be innovative in crafting new by laws and, enforcing the City's various by law and licensing schemes under the *Charter*.

Remedial action refers to the ability of municipalities to require the owner or occupier of property to remedy a hazardous or nuisance situation and the ability of a municipality to enter onto property to carry out that work should the owner or occupier fail to comply with the Council's directions, with the costs for doing so being recoverable by the municipality.

Section 72 provides that Council may impose remedial action requirements in relation to hazardous conditions, declared nuisances or if someone has obstructed or damaged a dike or water course.

Hazardous conditions are defined in Section 73 to mean any of the following which Council considers is in or creates an unsafe condition or contravenes the Provincial Building Regulations or municipal building by law:

- (a) a building or other structure, an erection of any kind, or a similar matter or thing;
- (b) a natural or artificial opening in the ground, or a similar matter or thing;
- (c) a tree;
- (d) wires, cables, or similar matters or things, that are on, in, over, under or along a highway;
- (e) matter or things that are attached to a structure, erection or other matter or things referred to in paragraph (a) that is on, in, over, under or along a highway.

Section 74 provides that if Council considers any of the following to be so dilapidated or unclean as to be offensive to the community, they may declare them to be a nuisance:

- (a) a building or other structure, an erection of any kind, or a similar matter or thing;
- (b) a natural or artificial opening in the ground, or a similar matter or thing;
- (c) a drain, ditch, watercourse, pond, surface water, r a similar matter or thing;
- (d) a matter or thing that is in or about any matter or thing referred to in paragraphs (a) and (c).

In relation to either a hazardous condition or declared nuisance, Council may impose a remedial action on the owner, lessee or occupier and require them to:

- (a) remove or demolish the matter or thing;
- (b) fill it in, cover it over and later it,

- (c) bring it up to a standard specific by law, or
- (d) otherwise deal with it in accordance with the directions of Council or a person authorized by Council.

Harm to drainage or a dike is defined in Section 75 to mean if a person has:

- (a) obstructed, filled up or damages a ditch, drain, creek or watercourse that was constructed or improved under this Act or the *Local Government Act*, or
- (b) damages or destroyed a dike or other drainage or reclamation work connected with it.

In such a case, Council may require the person to undertake restoration work in accordance with the directions of Council or a person authorized by Council.

The procedure for such direct action is as follows. The resolution imposing the remedial action must specify the time by which the required action must be completed which must not be less than 30 days after notice has been sent to the person unless there are urgent circumstances. Council will have the ability to extend the time for completion.

Notice of any remedial action requirement must be given by personal service or registered mail to the person subject to the requirement and to the owner of the land where the required action is to be carried.

In addition, notice of the remedial action must be mailed to any holder of a registered charge and any person who is an occupier.

The notice must advise that the person affected by the requirement may request a reconsideration by Council. The notice must also specify that if the action is not completed by the date specified for compliance, that the municipality may take action at the expense of the person.

A person who has been given notice may request reconsideration within 14 days from the notice being sent.

If Council receives a request for reconsideration, it must provide the person with an opportunity to make representations, Council may confirm, amend or cancel the remedial action requirement. Council's final decision must be provided in writing in the same manner that notice has been given.

If Council considers that there is a significant risk to health or safety, it may shorten the 30 days notice to the party affected and shorten the time for requesting consideration.

Municipalities will have the ability to enter on property for the purpose of determining whether the requirements are being met and to take action at the defaulter's expense if they have failed to do so.

In addition to the authority to enter onto property and to carry out the work at the defaulter's expense, Section 80 of the *Charter* also gives the municipality the ability to recover municipal costs through the sale of property.

PART 9 – GOVERNMENTAL RELATIONS

Dispute Resolution – Municipalities and the Province

Consistent with the *Charter's* statements on the principles of Municipal – Provincial relations and with the objective that the provincial government and municipalities should attempt to resolve conflicts between them by consultation, negotiation and dispute resolution, the *Charter* establishes a new dispute resolution procedure in Part 9, Division 3.

If a dispute arises between a municipality and the Province which cannot be resolved, either one may apply to a Dispute Resolution Officer for help in resolving the dispute. The Dispute Resolution Officer is a person designated

by the Minister for the purposes of this part of the Act. The Dispute Resolution Officer must review the matter and attempt to help the parties to resolve the dispute through mediation or some other non binding alternative dispute resolution process. The Dispute Resolution Officer can also determine how any costs are to be paid.

The Province and the municipality can agree to have the dispute resolved by binding arbitration which can proceed either as a final proposal arbitration or alternatively full arbitration.

In final proposal arbitration, a single arbitrator will use written documents and written submissions only and determine the dispute by selecting one of the final written proposals submitted by the parties. No written reasons are provided by the arbitrator in this process.

Full arbitration is the usual arbitration procedure conducted by a single arbitrator who can conduct the proceedings in whatever manner is required including by written submission or a full hearing. In this process, the arbitrator must give written reasons.

The Minister must consult with UBCM to prepare a list of acceptable arbitrators. Subject to agreement between the parties, the costs of the arbitration are to be shared equally.

Following the arbitrator's decision under either process, the parties have 60 days to agree on a settlement that differs from the arbitrator's decision. If an agreement is not reached, the decision of the arbitrator becomes binding. Once binding, municipalities and the Province have 90 days to implement the binding decision either by adopting by laws or taking other action required.

The time limit for bringing any Court action to challenge the decision of an arbitrator by judicial review is 60 days after the arbitrator's decision. If an arbitrator's decision must be implemented by by law, the approval of electors or the assent of electors which would otherwise be required by the Act are not required. Time limits may be varied by the Dispute Resolution Officer. The Minister may make regulations regarding arbitration.

CONCLUSION

Effective January 1, 2004 the City will begin operating under a more complex statutory regime with the coming into force of the *Community Charter*. For the next few years the City will be governed by both the *Local Government Act* and the *Charter*. In 2004 the Province will be reviewing Parts 24 and 26 of the *Local Government Act* dealing with planning and land use regulation, that will result in more legislation. Legal Services will be further advising Council and staff on the new regulations to be issued under the *Charter*.

CRAIG MacFARLANE
City Solicitor

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