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“Lame Duck” Councils and the 2018 Municipal Election.

On October 22, 2018, residents of Ottawa will elect the City’s municipal council for the next four-year term. This memo outlines possible restrictions on council authority during an election year, which are set out in section 275 of the *Municipal Act*, as well as when these restrictions may take effect.

What is a Lame Duck Council?

Section 275 of the *Municipal Act* (the “Act”) provides that when certain conditions arise during an election year council’s powers will be limited. The purpose of these limitations is to prevent an outgoing council from taking certain actions during an election period. When conditions arise such that the limitations apply, council is known as a “lame duck” council.

When is a Council considered to be a Lame Duck?

There are two periods when a municipal council may be lame duck:

1. Between nomination day (July 27, 2018) and election day (October 22, 2018); and/or
2. Between election day (October 22, 2018) and the start of the new term (December 1, 2018).

During both periods, council will become a lame duck if the “new council will include less than three-quarters of the members of the outgoing council”. That is, will at least 75% of the current council be returning? If “yes”, then there is not a lame duck council.

In the first period, the analysis is done on nomination day. It must be *certain* that 25% or more of the existing council *will* be replaced by one means or another. In Ottawa, this requires certainty that at least 6 of the 24 councillors are retiring or not pursuing re-election.

In the second period, the analysis is done on election day after the election results are known. The results must show that 6 or more existing councillors are not returning in order for council to be a lame duck.

It should be noted that where a lame duck council occurs in the first period, a lame duck council will necessarily occur in the second period as well. However, if a council is *not* lame duck in the first period, it may still be lame duck in the second.

Restrictions on Lame Duck Councils

Where council is not a lame duck there are no restrictions on its powers in an election year.

Pursuant to subsection 275(3) of the *Act*, a lame duck council may not:

- (a) appoint or remove from office any officer of the municipality;
- (b) hire or dismiss any employee of the municipality;
- (c) dispose of any real or personal property of the municipality which has a value exceeding \$50,000 at the time of disposal; and
- (d) make any expenditures or incur any other liability which exceeds \$50,000.

There are no other restrictions on council's authority.

There are, however, three exceptions to these restrictions.

First, nothing in subsection 275(3) will prevent a council from disposing of property or other liability greater than \$50,000 if that disposition was included in the most recent budget adopted by council before nomination day (subsection 275(4)). The City of Ottawa adopted its most recent budget on December 13, 2017. By way of example, if a contract for services for \$60,000 was approved in the budget, then it could be executed during a lame duck period. If it was not approved, then the contract would need to wait until after the lame duck period expires.

Second, subsection 275(3) does not apply to delegated authority (subsection 275(6)). Therefore, any officer of the municipality who obtained delegated authority for a restricted action, prior to council becoming a lame duck, is not restricted by a lame duck council. The restriction on hiring and dismissing, for example, would not impact municipalities that have delegated this duty internally. Ottawa has done so.

Lastly, nothing in subsection 275(3) will prevent a council from taking emergency action (subsection 274(4.1)).

Therefore, in order to facilitate a smooth transition through the two potential lame duck periods, council would be wise to pre-approve its expenditures in its annual budget or otherwise delegate its powers before nomination day.

The 2018 Municipal Election

Recent changes to the *Municipal Act* and the *Municipal Elections Act* will mean that the potential lame duck periods for the 2018 election year are longer than usual.

In previous years, nomination day was in mid-September with voting day in October. This year, nominations have been pushed to July 27, adding approximately seven weeks to the first lame duck

period compared to previous years. To compensate, the province has changed council's term start-date to November 15, making the second period two weeks shorter; however, this change will not take effect until the start of the 2022 term, meaning that the upcoming term of council will be December 1, 2018 to November 14, 2022.

In other words, in 2018 there will be a total of 18 weeks that could be lame duck. In previous years there were only 11 weeks, and in upcoming years there will be 15 weeks.

Do not hesitate to contact us if you have any questions or if you want to discuss.

Yours very truly,



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