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STAFF REPORT:



REPORT TO:	Committee of the Whole
MEETING DATE:	August 18, 2014
REPORT NO.:	CAO.14.05
SUBJECT:	Delegation of Authority to Chief Administrative Officer to Hire a Director of Finance & IT Services and Fire Chief
PREPARED BY:	Troy Speck

A. Recommendations

That Council receive Staff Report CAO.14.05 “Delegation of Authority to Chief Administrative Officer to Hire a Director of Finance & IT Services and Fire Chief”;

AND THAT Council delegate authority to the Chief Administrative Officer (CAO) for the 2014 period during which a “lame duck” council is in effect pursuant to Section 275 of the Municipal Act, 2001, S.O. 2001, c25 to address matters within the jurisdiction of the municipality, namely to hire or dismiss any employee of the municipality, and more specifically, to hire for the positions of: 1) Director of Finance & IT Services; and 2) Fire Chief;

AND THAT in the hiring of the Director of Finance & IT Services and the Fire Chief, the CAO may negotiate such terms and conditions of employment as deemed necessary, within the limits of policies approved by Council including, without limiting the foregoing, step placement within the band for Directors on the Town’s salary grid and amount of vacation time;

AND FURTHER THAT the CAO report to Council on any and all actions undertaken under the delegated authority in the subject report.

B. Background

As Council are aware, the Town’s first attempt at advertising for a Director of Finance and IT Services did not result in finding a suitable candidate, and so staff will again go to the market to find a suitable candidate. At the same time, we will also be advertising to fill the Fire Chief position. It is anticipated that the process of advertising, reviewing and screening applications, conducting interviews and testing, and preparing offers of employment will take us beyond September 12, 2014. With respect to the hiring of department heads, the Town’s current CAO job description provides the CAO with authority only to “make recommendation” to Council. Council makes the final hiring decision regarding department heads.

The purpose of this report is to delegate certain powers to the Chief Administrative Officer between September 12, 2014 and the inaugural meeting of Council scheduled for December 1, 2014, if the provisions of Section 275 of the Municipal Act are in effect.

Council of a municipality is restricted from taking certain actions either after Nomination Day (September 12, 2014) or after Election Day (October 27, 2014), when it can be determined that the new Council will include less than 3/4 quarters (less than 6 members) of the members of the outgoing Council. The restrictions continue until the date of the new Council takes office (December 1, 2014). This period of time is referred to as the “lame duck” period.

One of the restrictions placed on a “lame duck” Council by section 275 of the Municipal Act is that they cannot hire or dismiss any employee of the municipality during the lame duck period. (s. 275(3)(b))

Based on the uncertified nominations for the 2014 Town of The Blue Mountains Election, Council may be in a “lame duck” position after Nomination Day, therefore Council will not have that authority because the restricted acts provisions contained in Section 275 of the Municipal Act, 2001 will apply.

However, subsection 275(6) of the Act provides that:

“Nothing in this section prevents any person or body exercising any authority of a municipality that is **delegated to the person** or body **prior to nomination day** for the election of a new council.” (emphasis added)

Such delegated authority is often provided to ensure the efficient management of the municipal organization during the election period.

The Chief Administrative Officer will ensure that all documentation associated with the delegation is reviewed with our municipal solicitors, if required and to ensure that Council is informed, a memorandum would be submitted by the CAO to Council advising of the hiring of Director of Finance & IT Services and the Fire Chief.

Although Council may delegate to the CAO the authority to fill the two position vacancies, subsection 23.3(1), paragraphs 1 and 9, prohibit Council from delegating the authority to formally appoint individuals to the position of either “Treasurer” or “Fire Chief”. As such, though we hope to be able to hire individuals to fill these two positions, and they can begin working for the Town, they will not be formally appointed to the statutory positions of “Treasurer” and “Fire Chief”, respectively, until after a new Council are inaugurated in December 2014.

C. The Blue Mountains’ Strategic Plan

“Providing a strong, well-managed Municipal Government.”

D. Environmental Impacts

None

E. Financial Impact

None

F. In Consultation With

Leo Longo, Solicitor
John Metras, Town Solicitor
Tracey McKenna – Manager of Human Resources

G. Attached

1. Municipal World Article, “Lame Duck” Council

Respectfully submitted,

Troy Speck
Chief Administrative Officer

“LAME DUCK” COUNCIL

Restricted acts after Nomination Day in Ontario

The “lame duck” council provisions that restrict council’s powers were completely rewritten in Ontario’s *Municipal Act, 2001* and amended further in 2006. What follows is intended to provide members of council and municipal staff a summary of the lame duck restrictions and what preparations need to be made in advance of the election period. Two questions must be asked when looking at section 275. First, when does a council become “lame duck”? That is, under what circumstances is a council restricted in its ability to act? The second question: how is council restricted?

Subsection 275 (1), paragraph 1 deals with the situation where the composition of council does not change. It is this situation that is dealt with in this article. Paragraphs 2 and 3 deal with situations where the size of the new council is different from the old council because of an amalgamation or restructuring.

So, when does a council become lame duck?

A council can become lame duck in one or both of two separate time periods. First, the period from nomination day to election day. In 2014, this period is from September 12 at 2:00 p.m. to October 27. The second time period runs from election day to the end of the term. In 2014, this second period runs from October 27 to November 30. The clerk must do an analysis after each of these dates.

Nomination Day

The test for this first time period is whether the new council “will include less than three-quarters of the members of the outgoing council.” The use of the word “will” suggests that there is a determination that the council will with

certainly have less than 75 percent of the members of the old council. Not that it “may” have.

The first thing to do is determine 75 percent of the membership of council. For example, 75 percent of a council consisting of seven members is 5.25. Thus, five members are less and six members are more than 75 percent.

Let’s do some examples based on a council of seven members, elected by wards.

There is NOT a lame duck council in the following situations:

- ▶ six members are running in elections and one is not running for office; or
- ▶ three members are acclaimed and four are running for office in elections.

In these examples, it cannot be determined with certainty that at least 75 percent of the former members will be returning to council. Will the new council include less than 75 percent of the outgoing council members? It could, but it could also include more than the 75 percent. Thus, the answer is no, and, as a result, the outgoing council is not restricted in its actions during this period.

There is a lame duck council in the following situations:

- ▶ six members are retiring and one is in an election;
- ▶ the head of council and two members are running for office of mayor and four are running in elections for their current office; or
- ▶ two are retiring and five are in elections for their current office.

In these examples, it can be determined with certainty that less than 75 percent of the current members of council will be returning to sit on the new council. Thus, the test in paragraph 1 of subsection 275

(1) – that the new council *will* include less than 75 percent of the outgoing council – is satisfied.

Election Day

The second analysis must be done on election day, after the results are known. The same question must be asked: Will the new council be composed of 75 percent or more of the members of the old council?

If the answer is “yes” then there is *not* a lame duck council. If the answer is “no,” then council will be restricted in its actions; it will be lame duck. Again let’s do some examples:

There is NOT a lame duck council in the following situations:

- ▶ six members are returned in elections, but the mayor lost to a newcomer;
- ▶ two members are acclaimed and the rest are elected; there are no new members on the council; or
- ▶ a councillor ran against the mayor and won, and all the other members were re-elected.

In these examples, it can be determined with certainty that 75 percent or more of the members of the old council are returning as members of the new council. Thus, in these examples, the new council is *not* a lame duck council from the date of the election until the end of the term. Council’s powers are *not* restricted during this period.

There is a lame duck council in the following situations:



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- ▶ five members of the old council are elected and two are defeated;
- ▶ four members are acclaimed to their old office and one of the three members running for mayor is elected, thus two are defeated; or
- ▶ five members are acclaimed and two have retired.

In these examples, it can be determined with certainty that less than 75 percent of the current members of council will be returning to sit on the new council. Thus, the test in paragraph 1 of subsection 275 (1) – that the new council will include less than 75 percent of the outgoing council – is satisfied. Thus, in these examples, the old council is a lame duck council from the date of the election to the end of the term, and its powers are therefore restricted.

Restricted Acts

Once the determination has been made with certainty that the council is lame duck for either or both time frames, then the four restrictions in subsection (3) will apply. These are:

- (a) the appointment or removal from office of any officer of the municipality;
- (b) the hiring or dismissal of any employee of the municipality;
- (c) the disposition of any real or personal property of the municipality that has a value exceeding \$50,000 at the time of disposal; and
- (d) making any expenditures or incurring any other liability that exceeds \$50,000.

This is the complete list. There are no other restrictions on a council's ability to make decisions or exercise powers.

The restriction on the hiring or firing of staff could cause real difficulties for a municipality, particularly as many will be

hiring for winter maintenance. Subsection 275 (6) provides that nothing in this section prevents a person or body from exercising authority delegated by council. Thus, if the power to hire employees has been delegated to staff, then the fact that council's powers are restricted during the lame duck period will not restrict staff from being hired or fired. Large municipalities have delegated to staff this authority to hire and fire, but it is important for smaller municipalities where councils often maintain control of the hiring process.

It is important to note that council cannot delegate during the election period. The delegation by council must be made before nomination day. Any delegation will require that council's delegation policy be amended. This could require special notice in accordance with council's notice policy.

There is another provision that lessens the impact of the restrictions on a lame duck council. Subsection 275 (4) provides that restrictions in clauses (c) and (d) do not apply if the disposition or liability was approved by council in the annual budget. The one condition is that council must have approved the budget before nomination day.

Thus, a contract could be awarded by a lame duck council for an amount in excess of \$50,000, so long as the amount was included in the annual budget. The lame duck council would not be able to award the contract, however, if the amount of the tenders or bids exceeded the amount included in the budget.

A frequently asked question is whether the municipality can close a real estate transaction during the lame duck period. The answer is "yes" – assuming that council passed a by-law approving the execution of the agreement of purchase

and sale in advance of the lame duck period.

In 2006, the province added a new subsection (4.1), which provides that nothing in section 275 prevents a municipality taking action in the event of an emergency. What constitutes an emergency? It does not mean merely urgent or inconvenient. The best definition for a council to apply is found in the *Emergency Management and Civil Protection Act*, in which "emergency" is defined to mean "a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise."

Conclusion

Council and staff should begin planning well in advance for the eventuality of a council whose powers are restricted during the election period.

Once nomination day arrives, the first step is for the clerk to do the 75 percent calculation; don't round up or down. Determine whether the council's powers will be limited during both the period between nomination and election day, and then again between election day and the end of the term of the old council. If it is a lame duck council, there are only four powers of council that are restricted.

The impact of these restrictions is reduced by the ability of council to exercise powers in those matters that have been previously approved in the annual budget. Also, council may delegate its powers before nomination day and the person to whom they have been delegated will be able to act. **MW**

as published in

Municipal World

CANADA'S MUNICIPAL MAGAZINE – SINCE 1891

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