

Memo

Date: January 14, 2021

Re: Governance – *Varia*

As the Corporation approaches the closing of the RFPQ and the subsequent issuance of the RFP itself, Sharon has asked me to examine a few items relating to governance. I tackled another issue, namely the potential impact of Human Rights legislation on the Corporation's current Eligibility Policy, if any. Rather than forming a comprehensive opinion on the items considered, this memo is aimed more at providing an overview which might lead to further discussion and research.

I have framed the issues as follows and will attempt to address each in turn:

1. The Corporation's ownership of real property (land) under applicable legislation and our constating documents.
2. A review of our Membership structure.
3. The Corporation's reporting requirements generally.
4. The impact of human rights legislation on the Eligibility Policy, as currently approved.

Ownership of Real Property

The Corporation was incorporated and is governed under the province's *Corporations Act* (Part III – Corporations without share capital). Not-for-Profit corporations fall under this category of corporate entity under the Act. Over a decade ago, the Province introduced and passed legislation that is expected to update the governing legislative framework applicable to not-for profits, known as ONCA (Ontario's *Not-for-Profit Corporations Act*). However, the legislation has not yet come into force, and for years now it has been on hold in order for the necessary infrastructure, namely technological I believe, to be developed in support of its full implementation.

More recently (2017), the Province did enact the *Cutting Unnecessary Red Tape Act*, which had the effect of implementing necessary changes to the *Corporations Act* that were in line with the anticipated ONCA. These updates were meant to allow not-for-profit

corporations to take advantage of some of the changes proposed by the ONCA in the interim period.

One of the updates that are now in force under the *Corporations Act* is Section 126.1, which qualifies not-for-profit corporations as “Natural Persons” under law. Much like privately/publicly held corporations governed under the *Business Corporations Act*, not-for-profits are now formally recognized as having the rights generally associated with individual human beings, or in other words having its own legal personality. This, of course, comes with the right to buy and sell property, as well as borrowing money.

With that legislative backdrop, I turn to the Corporation’s constating documents (Letters Patent and By-Laws). Based on my review of these documents, there is nothing preventing or limiting the Corporation from owning land. Moreover, the Corporation’s Letters Patent (or Articles of Incorporation) expressly allow for the ownership of real property under section 5, by way of either purchase or gift.

However, the Corporation might consider passing a separate By-Law within BMAHC to support and better define how that ownership will be governed, once the arrangement with the Municipality on the Gateway Project becomes clearer.

Membership Structure

The Corporation’s By-Law No. 1 allows for two (2) classes of membership: a single Municipal Member and a maximum of twenty (20) Members (at large). The Town is the Municipal Member, and currently, all the Directors make up the Members at large (total of 9 as of the last meeting of the membership I believe). The Municipal Member is entitled to forty-five (45) votes at all meetings of members, while the Members at large are entitled to a single vote each. As a result, the Municipal Member holds control of the Corporation with a majority. In other words, even if the Corporation were made up of its maximum number of Member at large, the vote would still favour the Town by a ratio of 2.25 votes.

Although the copy I have is undated, my assumption is that the current By-Law was approved at the time of incorporation in 2013, and that the current membership structure has not been changed since.

To begin, I have often wondered why this structure was created in the first place. Other than allowing ultimate control to the Town, what was the purpose of limiting the number of Members at large to twenty (20)? Subsection 28(II) provides that such Members shall consist of “*anyone whose application for admission as a member has received the approval of the Board of Directors of the Corporation*”. The term “anyone” is undefined so it is unclear whether that might include individuals, corporations, and other organizations. In other words, anyone who applies can conceivably become a Member if the Board of Directors approves of it. While Directors must become Members in accordance with the By-Law, a Member need not necessarily become a Director as currently worded.

This may create opportunity down the road as the Corporation seeks to extend its relationships and create new ones in the interests of achieving its goals. In any event, the addition of Members at large, up to a maximum of 20, would not change the control of the Corporation, which would continue to be held by the Town. Alternatively, the Corporation might consider amending its By-Law to redefine the Membership Structure in such a way as to better achieve its long-term goals. Any amendment to the By-Law must be approved by a 2/3 vote of the membership present and voting at meeting of members.

As a passing comment, the Letters Patent currently define the objects of the Corporation as follows under section 4:

To augment the supply of healthy, affordable, and sustainable ownership housing units in The Town of the Blue Mountains which are affordable to a larger portion of the population.

Shortly following incorporation, Bob Hamilton, the late local solicitor who assisted with the incorporation, responded to a letter from John McGee, a Member of Council and Director of the Corporation at the time. In that undated letter, Mr. Hamilton recommended that the Letters Patent be amended by way of supplemental Letters Patent to correct for this shortfall in the Corporation's stated objects vis-à-vis its expanding mandate, which includes rental of property. As the Corporation prepares to move forward with the development of the Gateway site, a proposed rental project, it may also want to consider revisiting its Letters Patent to better capture its long-term mandate and objectives, as well to better align itself with its current Conceptual Business Model.

Reporting Requirements

The *Corporations Act* is silent on the internal reporting requirements of a corporation. Further, a review the Corporation's governing documents does not provide any meaningful direction on how the Corporation is to report on its activities, other than at an annual or special meeting of the Members. Therefore, outside of the reporting requirements included in any agreements between the Corporation and third-party funders (e.g. CMHC), the question of how the Corporation ought to regularly report to the Town, its Members and the community as a whole arises. As an option, and to increase public outreach and support, the Corporation might consider adopting a policy aimed at periodic reporting and parameters of such reporting.

Human Rights Code

With the decision to adopt the Whistler Model comes a question of how that model, when applied in Ontario, might trigger human rights issues/complaints. Although the Corporation is far from renting any units, consideration of how the current Eligibility Policy might be impacted by provincial human rights legislation may be warranted at this early stage.

As a starting observation, people cannot be refused an apartment by a Landlord under the Human Rights Code based on a list of enumerated grounds. The Code has primacy over all legislation in Ontario, including the *Residential Tenancies Act*, 2006 (RTA), and is quasi-constitutional which means that a liberal interpretation of its provisions is required. Section 2 of the Code states:

Accommodation

2 (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability, or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (1); 1999, c. 6, s. 28 (2); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (2); 2012, c. 7, s. 2 (1).

While the receipt of public assistance is an enumerated ground, Income is not, nor is place of employment. Therefore, with reference to the Corporation's current Eligibility Policy, income requirements and other policies that limit the availability of housing to applicants employed or who have a history of employment within the Municipality likely does not offend the Code. However, the possibility of complaints associated with alleged discrimination may arise on grounds of age.

Under the Code, "age" is defined as 18 years or more. However, the Policy's requirement that all primary applicants be 18 year of age or older may contravene section 4 of the Code, which states:

Accommodation of person under eighteen

4 (1) Every sixteen- or seventeen-year-old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the person is less than eighteen years old. R.S.O. 1990, c. H.19, s. 4 (1).

(2) A contract for accommodation entered into by a sixteen- or seventeen-year-old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old. R.S.O. 1990, c. H.19, s. 4 (2).

Moreover, the Policy's eligibility criteria relating to history of employment for applicants 55 years of age or older may offend Section 15 of the Code, which states:

15 A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification, or consideration for preferential treatment.

Moving forward, consideration might therefore be given to the language employed in the Eligibility Policy relating to age in such a way as to reduce the risk of complaints on human rights grounds. Otherwise, I cannot see any basis at this stage for challenging the Eligibility Policy on other grounds enumerated under the Human Rights Code.

In any event, I note that Section 14 of the Code permits the designation of “special programs” in housing. This provision would allow the Corporation to apply preferential treatment in relation to possible infringements under the Code. When applying to the Commission for this status, the Corporation must show that its objectives are aimed at relieving economic disadvantage or to help a disadvantaged group achieve equal opportunity in housing. I believe that the Corporation would meet this test, as it is clearly aimed at helping individuals overcome the significant housing barriers within the Municipality, with a focus on the local workforce, their families and those who have retired following a period of employment in the Blue Mountains.

A final, unrelated observation here is that the current model will not fall within the scope of the *Housing Services Act* 2011 (HSA), or under the Province’s Housing Policy Statement issued pursuant to section 5 of that Act. Further, the Corporation and/or the Municipality will not act as a “Service Manager” within the meaning of the HSA or operate as either a “Municipal Services Corporation” or “Local Housing Corporation”, both defined under Regulation 367/11 of the HSA. These observations are made even though “market housing” (private rental and ownership) is captured within the established housing continuum, as well as under section 4 of the HSA, which recognizes the role of the private market in meeting housing needs within the Province.

It is important to make note of these observations insofar as they have the effect of removing the Corporation and its objectives from the exemptive language found under section 7 of the RTA. In short, the Corporation will not be exempt from the application of certain key provisions of the *Residential Tenancies Act, 2006* (RTA) as the Corporation is not a “housing provider”, nor is its contemplated Gateway Project being developed under or pursuant to the HSA. The Corporation will therefore be bound by the business practices permissible to Landlords in selecting prospective tenants for residential accommodation as outlined under Regulation 290/98 of the RTA. In short, as a Landlord, the Corporation will be required to adhere to such business practices, including Section 1:

(1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant. O. Reg. 290/98, s. 1 (1).

(2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (2).

(3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1). O. Reg. 290/98, s. 1 (3).

(4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1). O. Reg. 290/98, s. 1 (4).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (5).

The current Eligibility Policy does not require credit references or rental history information, but requires other items, such as Notices of Assessment, ROEs, paystubs, business licences, etc. Therefore, the Policy may need to be revised to better align itself with the above requirements of the RTA.