

## Legal Implications of an MDC

The proposed municipally controlled for-profit land development corporation (“MDC”) is a separate legal entity from the City, which is managed by its own board of directors and management. The municipal corporation of the City of Edmonton will be its sole shareholder. The sole shareholder’s role is generally limited to electing the board of directors, appointing the auditor, and reviewing the corporation’s financials and other matters presented by the board at the corporation’s annual general meetings. The shareholder may exercise control over the business and affairs of the company but if the shareholder elects to do so, the board is relieved of any duties or liabilities in relation to those matters.

The MDC may conduct any business unless restricted by its Articles, Unanimous Shareholder Agreement (“USA”) or bylaws. The board and officers of the MDC owe complete allegiance to the MDC. The purpose for which a for-profit entity like the MDC exists is to earn profit and pay dividends to its shareholder. If the shareholder wishes to have the board and management undertake objectives other than profit in relation to some or all of the MDC’s development projects, the shareholder’s power to do so must be in the USA, and then determined by the shareholder in the context of each development project undertaken by the MDC.

Councillors should not sit as board members or officers of the MDC because they owe their allegiance to the municipal corporation of the City of Edmonton. There is a potential for conflicts of interest between the MDC and the municipal corporation as the narrow business of the MDC could be in conflict with the City-wide goals of the municipal corporation. Also, the whole Council, as the governing body of the City, is normally assigned the role of voting as the shareholder’s representative.

The City cannot establish an MDC without Ministerial approval. The Minister must be satisfied that the MDC is being established for a “municipal purpose” as defined in the *Municipal Government Act* of Alberta (“MGA”), and will solely exist to provide a municipal service, or regional municipal service, facility or other thing. The Minister must also be satisfied that the MDC will be independent of the City for its operating costs, and that the purpose for which the MDC exists, and its profits and dividends, will provide a direct benefit to the residents of the municipality. The application to the Minister must include a business plan and cash flow projection that satisfies the Minister that the regulatory criteria are met.

Unlike other for-profit entities, the MDC will be subject to the requirements of the *Freedom of Information and Protection of Privacy Act of Alberta* (“FOIP Act”). The FOIP Act requires that all records in the custody or control of the MDC be public, unless all or part of the record fits within the defined exceptions to disclosure enumerated in the FOIP Act.

The MDC will also be subject to the requirements of the New West Partnership Trade Agreement (“NWPTA”). NWPTA requires all public entities to procure goods, services and construction in the same manner as the City through an open, public and transparent procurement process to procure goods, services or construction if valued at more than \$75,000 for goods or services, and \$200,000 for construction. The MDC therefore cannot select business partners or enter into agreements in the same manner as private land development companies. It will be required to procure development services to develop its lands through an open public procurement process. It should also be noted that partners are generally responsible for liabilities arising from the enterprise they are engaged in, or one another’s actions in relation to the partnership, it is often beneficial to consider using business arrangements other than partnerships or joint ventures, regardless of the procurement rules.

If the MDC is at least 90 percent controlled by the municipality, it is exempt from income taxation, but property taxes are still payable in relation to its land holdings. The MDC’s financial matters are included in the City’s financial reporting. If the City transfers land to the MDC at less than appraised fair market value, it must advertise the transaction in the manner required by the *Municipal Government Act* (“MGA”).

### **Additional Legislative Requirements to Establish Municipally Controlled For-Profit Corporations**

There are additional legislative requirements imposed on an MDC, over and above those in the BCA. Municipalities are prohibited from establishing a for-profit corporation without Ministerial approval. The requirements for approval are set out in the Control of Corporations Regulation the (“CCR”), passed under the authority of MGA.

The CCR imposes requirements for Ministerial approval that must be met by a municipality seeking to establish a new for-profit corporation. The municipality’s application must demonstrate to the Minister that:

1. The municipally controlled corporation will carry on business **solely** for the municipal purposes set out in section 3 of the MGA:
  - to provide good government
  - to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
  - to develop and maintain safe and viable communities
2. The municipally controlled corporation will:

- acquire the assets of an entity that provides an existing municipal service for the purpose of providing that service
  - provide a **regional municipal service, facility or other thing**, or
  - enter into partnership arrangements with other entities to provide a municipal service, facility or other thing
3. The municipally controlled corporation will not own or lease assets outside of Alberta without Ministerial approval.
  4. The municipally controlled corporation will **not be dependent** on the municipality that controls it for its ongoing operations.
  5. The purpose, profits, and dividends of the municipally controlled corporation will provide a **direct benefit to the residents** of the municipality.

The application to the Minister to establish a new municipally controlled corporation must contain the following information:

- The costs for establishing or obtaining control of the controlled corporation; and
- A copy of the corporation's proposed business plan that includes its cash flow projections for the first three years of operation, or any other period satisfactory to the Minister.

The Minister may request any additional information he or she deems necessary to review the application and has complete discretion to allow or refuse an application.