

Municipal Corporation Governance

Date	February 3, 2021
To	Executive Committee
From	Financial Strategy & Sustainability
Service Area	Office of the City Clerk
Item No.	EX21-12

RECOMMENDATION

That Executive Committee be receive, file and permanently close this report.

ISSUE

On May 13, 2020, in a private session of Executive Committee, members asked about the current governance structure of the City's municipal corporations, which include Economic Development Regina Inc. (EDR), Buffalo Pound Water Treatment Plant Corporation (Buffalo Pound) and Regina Exhibition Association Limited (REAL). In particular, Committee members asked about the impact of appointing more Council members to these boards, with the discussion primarily focused on appointments to the Board of EDR.

IMPACTS

None with respect to this report.

OTHER OPTIONS

This report is presented as information as requested by Executive Committee at its meeting on May 13, 2020. No decisions are being sought in this report.

Currently, Council appoints a non-voting director on the boards of both EDR and REAL. Administration's advice is to continue to limit the number of Council members and City employees on these boards.

Should Council desire to appoint additional non-voting directors to either EDR or REAL, it is recommended Administration be asked to bring a report forward to a public meeting of Executive Committee recommending changes to the current board composition that would increase the number of non-voting directors Council may directly appoint. Changes in board composition would also require consultation with EDR and REAL as amendments to the Unanimous Members Agreements (UMAs) between the City and the corporations, and municipal corporation bylaws would be required to affect the change.

COMMUNICATIONS

None with respect to this report.

DISCUSSION

The purpose of this report is to provide information on the structure and governance framework for the municipal corporations where the City of Regina (City) is the sole or majority shareholder.

The roles of City Council (Council) and the board of directors of each organization will be outlined, as well as the legal requirements governing the relationship between the City and the corporations.

The City is the majority or sole shareholder of three municipal corporations. The corporations discussed in this report are:

- 1) EDR (established January 1, 2016)
- 2) Buffalo Pound (established January 1, 2016)
- 3) REAL (established January 1, 2014)

Each of the above has been structured to be "Membership Corporations" pursuant to *The Non-profit Corporations Act, 1995* wherein the City is the sole voting member (as is the case with REAL and EDR) or the majority voting member (as is the case with Buffalo Pound, where the City of Moose Jaw holds a minority of the voting memberships).

When all three municipal corporations were established, City Council approved a governance structures which required these boards to contain independent board members who possess certain professional skills and experience that is needed to oversee the operations of that particular municipal corporation. The objective was to ensure that the municipal corporation could manage its business affairs with an entrepreneurial and return-on-investment focus while providing Council the ability to ensure the goals of the City were met by establishing certain boundaries through UMAs between the City and the respective corporation. The key topics in each UMA are:

- 1) The mandate of the municipal corporation.
- 2) The rights and obligations of the City with respect to the municipal corporation.
- 3) The relationship and the decision-making structure between the City and the Corporation.

Municipal Corporation Governance

Article 4 of each respective UMA instructs that each corporation is governed by an independent board of directors which shall at all times act independently of the City with full authority to make strategic business decisions.

Pursuant to the UMAs, each year a board committee nominates a slate of voting directors for appointment to the board to fill board positions that have been vacated at the end of a board member's term, or by that member's resignation. A report is presented to Council for each slate of directors where Council can approve the full slate, or request a new slate be provided. If the slate is approved, Council delegates its authority to a senior City of Regina executive (historically, this has been the Executive Director, Financial Strategy and Sustainability), to vote at the respective corporation's annual general meeting to appoint the new board members.

Article 4 of each respective UMA outlines the constitution of the membership of each Corporation. The UMAs of REAL and EDR specify the following:

REAL – One non-voting director appointment nominated by the Minister of Agriculture, and, one non-voting director appointment nominated by Council.

EDR – One non-voting director appointment nominated by Council.

Current Board Composition

The current board compositions of each of the municipal corporations is captured in the table below.

Municipal Corporation	Minimum Size	Current Board Size	City Representative
Buffalo Pound	5-9 voting members	7 (all voting)	No
REAL	7-13 voting members Two non-voting members	15 (13 voting)	Yes – one member designated by Council. Current appointment is the City Manager
EDR	8-12 voting members One non-voting member	11 (10 voting)	Yes – one member designated by Council. Historically, appointment has been the Mayor

Board Appointment Strategy (Voting Directors)

In recommending a slate of board member nominations to Council, the respective board committee is guided by their Board Skills and Experience matrix. The respective board of each municipal corporation has developed a Board Skills and Experience matrix to guide recruitment efforts to the board. Each board assesses the skills and experience required for effective leadership of the organization, then completes a self-assessment of the current composition to identify priority skills to bring to the board. Common skills identified are in legal, finance, business development and engineering.

Voting and Non-Voting Directors

Members of the boards of directors at the City's municipal corporations are categorized as voting or non-voting directors. Where the board member is designated by Council, they are non-voting directors. A non-voting director of a board has all rights of a director other than the right to vote on any matter before the board of directors. A non-voting director has all the same fiduciary duties as the other directors and must act in the best interest of the municipal corporation.

Oversight

The goal in establishing the three municipal corporations was to create structures that were consistent with one another and that supported the appropriate balance between delegating each organization the authority to manage its business affairs and the ability of Council to ensure that the goals of the City are met by establishing certain boundaries.

Each UMA addresses oversight by outlining the specific items that must be brought to City Council for approval or decision. The items include but are not limited to: any material change in the business, winding-up or dissolving a municipal corporation, changes in ownership structure, debt issuance and changes in the fiscal year.

The UMAs also outline other reporting requirements for the corporations to City Council. For example, the corporations must submit an annual report that contains:

- 1) Any revisions to long-term strategic plans or capital asset plans.
- 2) An operating and capital budget for the next fiscal year and an operating and capital budget projection for subsequent fiscal years contemplated in the current strategic or capital asset plans.
- 3) Pro forma audited financial statements prepared in accordance with generally accepted accounting principles.
- 4) Accomplishments during the fiscal year along with explanations, notes, and information as is required to explain and account for any variances between the actual results and the strategic plans or capital asset plans.

Challenges of Having Council Members on Municipal Corporation Boards

While there may be a desire to put additional Council members on the boards of the City's municipal corporations to indicate support of the governance of the entity and promote the interests of the City, this can put Council members in a very difficult position. This is because Council members on these boards have a fiduciary duty to act in the best interests of that municipal corporation. At the same time, Council members have important roles and decision making responsibility as members of City Council. While it may be rare when the interests of the two bodies do not coincide, when such situations do arise, Council members are placed in a difficult position.

As a board member, the fiduciary duty to a municipal corporation is set out in section 109 of *The Non-profit Corporations Act, 1995* and has been elaborated on in the caselaw. This fiduciary duty or duty of loyalty may be summarized as:

- To act honestly and in good faith and in the best interests of the corporation at all times and help it achieve its purpose;
- Not to favour the interests of the organizations who arranged for his or her appointment, if those organization's interests differ from the interests of the corporation;
- Information learned as a director belongs to the corporation unless otherwise stated and, therefore, a director must not disclose the corporation's confidential information to the organization who arranged for his or her appointment; and,
- To disclose to the corporation any information relevant to the corporation (this may include information about the appointing organization).

There has been judicial consideration of this issue, which has clearly established that appointed directors owe a fiduciary duty to the corporation whose interests they are

considering, and they cannot permit their appointing corporation (the City of Regina in this case) to control the best exercise of their judgement in that context (see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.*). This fiduciary duty has the potential to cause conflicting duties of loyalty as Council members also have loyalties to the City and its residents as members of Council. Where the interests of the corporation are not aligned with the interests of the City, it would be difficult for a Council member to resolve these duties.

While the Council appointed members on EDR and REAL are non-voting so they do not have the difficult position of deciding how to vote in the face of a conflicting duty of loyalty, they are still participating in board discussions and are potentially influencing votes and are privy to confidential information. When doing these activities or receiving confidential information the member is required to consider the best interests of that municipal corporation. Failing to act in the best interest of the corporation can lead to personal liability of directors.

In the past, Council members who have been appointed to the Provincial Capital Commission Board have experienced this conflicting duty of loyalty, especially in the case of sharing information. With some of REAL's recent financial difficulties, there is also a significant potential that a City employee or Council member sitting on the REAL board would also face conflicting duties.

Sitting on a board carries a heavy responsibility and entails the possibility of personal legal liability for the actions taken by the board in some cases. While some protections for board members are available, such as indemnity agreements, waivers, and insurance, these are never fool proof.

For the above reasons, Administration's advice is to limit the number of Council members and City employees on these boards.

Administration considered an approach of having a certain number of "observer" status positions where elected officials could attend board meetings as observers instead of as non-voting directors on the boards of the municipal corporations. In considering this matter, it was unclear what status the observer would have at the Board table to either provide input or provide feedback. As well, having observer status would likely require the same protection of information and confidentiality challenges as being a member of the Board, restricting the ability of an observer to share the information with fellow Council members or as part of Council decision making processes. There are current mechanisms in the UMAs to require municipal corporations to seek Council approval for any significant actions and to provide regular reporting to Council. If the current reporting requirements to Council or ability to provide perspective and feedback to the corporations are deemed insufficient, changes could be made to the UMAs to require additional reporting and Board/Council discussion mechanisms.

Other Bodies

Whenever a Council member is sitting on a board of a corporation, they have a fiduciary duty to that corporation and the issues noted above may arise. Other examples of boards of directors of corporations that include Council members include the Provincial Capital Commission, the Board of Police Commissioners, the Regina Public Library Board, the Downtown Business Improvement District Board, and the Warehouse Business Improvement District Board¹. In some cases, there is different or additional legislation that applies to these.

Determining Number of Elected Officials on Municipal Boards and Other Alternatives

While the Administration would recommend that the number of elected officials to municipal corporations should be minimized for the reasons outlined above, there is no specific rule or guideline that restricts or dictates the number of elected officials that should or should not be appointed to the board of a municipal corporation. As noted above, there are many examples of where elected officials are appointed to related entities. However, the number of elected officials appointed is typically small in relation to the overall board composition of those entities.

Factors to consider when determining if elected officials should be appointed to municipal boards or the number of elected officials to be appointed include:

- What objective is Council attempting to achieve by placing elected officials on municipal corporation boards? Can the objective be achieved in another manner without appointing an elected official? If not, does achieving the objective require more than one elected official to be on the board?
- Council approved the establishment of the existing governance structures of its municipal corporations with the objective of creating independent boards whose members possess critical professional skills and experiences to oversee the operations of the corporation with an entrepreneurial and return-on-invest focus. This is especially critical with Buffalo Pound which oversees the City's water supply. What impact would appointing additional elected officials have on this objective?
- What conflict of interest challenges are likely to exist as elected officials fulfill their fiduciary responsibility to the corporation and their role as members of City Council? Council members are also already stretched in terms of their time consuming duties on

¹ The Provincial Capital Commission Act does not require a Council Member to be appointed but traditionally a Council member has been appointed. The Police Act requires that the Mayor and two other Council members be appointed to a Police Board where the board consists of more than three members (section 27). The Public Libraries Act, 1996 requires that the Mayor be on the Library Board and it contains the restriction that only one other Council member can be appointed to the Board (section 13). The Cities Act does not require the Business Improvement Districts (BIDs) to include Council members on those boards but the bylaws establishing these BIDS do require a Council member to be appointed on each (Bylaw 2003-15 and Bylaw 2003-80).

Council so is it realistic to add additional board of director duties on the City's municipal corporations as well?

The general role of a board is to provide oversight, not manage the day to day operations of the organization. If Council members are wanting to receive more information about the operations of the municipal corporations, an appropriate mechanism for that may be to require more reporting from the municipal corporation to the Council. Additional reporting requirements could be added to the Unanimous Membership Agreements.

If Council has ongoing concerns with the direction and operations of any of the municipal corporations, the primary avenue for resolving these is through the chair of the board and the board appointment process.

DECISION HISTORY

This report is in response to some general inquiries made by Council members. There is no other Committee or Council reports that have considered this issue.

Respectfully Submitted,



Byron Werry, City Solicitor

10/07/2020

Respectfully Submitted,



Barry Lacey, Executive Director Financial Strategy & Sustainability

6/12/2020

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