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GOVERNMENT GAZETTE STAATSKOERANT

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

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THE PRESIDENCY

No. 82 30 January 2004

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 44 of 2003: Local Government: Municipal Systems Amendment Act, 2003.

DIE PRESIDENSIE

No. 82 30 Januarie 2004

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 44 van 2003: Wysigingswet op Plaaslike Regering: Munisipale Stelsels, 2003.



AIDS HELPLINE: 0800-0123-22 Prevention is the cure

Act No. 44, 2003

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MUNICIPAL SYSTEMS AMENDMENT ACT, 2003**GENERAL EXPLANATORY NOTE:**

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assented to 22 January 2004.)

ACT

To amend the Local Government: Municipal Systems Act, 2000, so as to delete certain definitions and insert others; to make new provision regarding the assignment of functions or powers to municipalities; to provide for the submission of annual performance reports by municipalities; to provide for the establishment of municipal entities; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 32 of 2000, as amended by section 35 of Act 51 of 2002

1. Section 1 of the Local Government: Municipal Systems Act, 2000 (hereinafter referred to as the principal Act), is hereby amended by—

(a) the insertion after the definition of “basic municipal services” of the following definition:

“**board of directors**, in relation to a municipal entity, means the board of directors of the entity;”

(b) the insertion after the definition of “district municipality” of the following definition:

“**effective control**, in relation to a private company, means the power which a shareholder in the private company may have—

(a) to appoint or remove at least the majority of the board of directors of the private company; or

(b) to control at least the majority of the voting rights at a general meeting of the private company;”

(c) the insertion after the definition of “executive authority” of the following definition:

“**external service provider** means an external mechanism referred to in section 76(b) which provides a municipal service for a municipality;”

(d) the insertion after the definition of “Minister” of the following definition:

“**multi-jurisdictional service utility** means a body established in terms of section 87;”

(e) the substitution for the definition of “municipal entity” of the following definition:

“**municipal entity** means —

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- (a) [a company, co-operative, trust, fund or any other corporate entity established in terms of any applicable national or provincial legislation and which operates under the ownership control of one or more municipalities, and includes, in the case of a company under such ownership control, any subsidiary of that company] a private company referred to in section 86B(1)(a); [or]
- (b) a service utility; or
- (c) a multi-jurisdictional service utility;”;
- (f) the insertion after the definition of “municipal entity” of the following definition: 10
 “**‘Municipal Finance Management Act’** means the Local Government: Municipal Finance Management Act, 2003, and any regulations made under that Act;”;
- (g) the insertion after the definition of “national organ of state” of the following definition: 15
 “**‘National Treasury’** means the National Treasury established by section 5 of the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
- (h) the insertion after the definition of “organ of state” of the following definition: 20
 “**‘parent municipality’**—
- (a) in relation to a municipal entity which is a private company in respect of which effective control vests in a single municipality, means that municipality; 25
- (b) in relation to a municipal entity which is a private company in respect of which effective control vests in two or more municipalities collectively, means each of those municipalities;
- (c) in relation to a municipal entity which is a service utility, means the municipality which established the entity; or 30
- (d) in relation to a municipal entity which is a multi-jurisdictional service utility, means each municipality which is a party to the agreement establishing the service utility;”;
- (i) the deletion of the definition of “ownership control”; 35
- (j) the insertion after the definition of “prescribe” of the following definition:
 “**‘private company’** means a company referred to in sections 19 and 20 of the Companies Act, 1973 (Act No. 61 of 1973);”;
- (k) the substitution for the definition of “service utility” of the following definition: 40
 “**‘service utility’** means [a municipal entity established in terms of section 82(1)(c)] a body established in terms of section 86H;”.

Substitution of section 9 of Act 32 of 2000

2. The following section is hereby substituted for section 9 of the principal Act:

“Assignment of functions or powers to municipalities generally by Acts of Parliament or provincial Acts” 45

9. (1) A Cabinet member or Deputy Minister seeking to initiate the assignment of a function or power by way of an Act of Parliament to municipalities in general, or any category of municipalities, must within a

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- reasonable time before the draft Act providing for the assignment is introduced in Parliament—
- (a) request the Financial and Fiscal Commission to assess the financial and fiscal implications of the legislation, after informing the Financial and Fiscal Commission of the possible impact of such assignment on—
- (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities; and
 - (iii) the transfer, if any, of employees, assets and liabilities; and
- (b) consult the Minister, the Minister of Finance and organised local government representing local government nationally with regard to—
- (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
 - (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
 - (iii) the financial implications of the assignment projected over at least three years;
 - (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);
 - (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
 - (vi) the implications of the assignment for the capacity of municipalities;
 - (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
 - (viii) any other matter that may be prescribed.
- (2) An MEC seeking to initiate the assignment of a function or power by way of a provincial Act to municipalities, or any category of municipalities, in the province must, within a reasonable time before the draft provincial Act providing for the assignment is introduced in the relevant provincial legislature—
- (a) request the Financial and Fiscal Commission to assess the financial and fiscal implications of the legislation, after informing the Financial and Fiscal Commission of the possible impact of such assignment on—
- (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities; and
 - (iii) the transfer, if any, of employees, assets and liabilities; and
- (b) consult the MEC for local government, the MEC responsible for finance, and organised local government representing local government in the province, with regard to—
- (i) the assessment by the Financial and Fiscal Commission contemplated in paragraph (a);
 - (ii) the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option;
 - (iii) the financial implications of the assignment projected over at least three years;
 - (iv) any possible financial liabilities or risks after the three-year period referred to in subparagraph (iii);
 - (v) the manner in which additional expenditure by municipalities as a result of the assignment will be funded;
 - (vi) the implications of the assignment for the capacity of municipalities;

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- (vii) the assistance and support that will be provided to municipalities in respect of the assignment; and
- (viii) any other matter that may be prescribed.
- (3) When draft legislation referred to in subsection (1) or (2) is introduced in Parliament or a provincial legislature, the legislation must be accompanied by—
- (a) a memorandum—
- (i) giving at least a three-year projection of the financial and fiscal implications of the assignment of that function or power for those municipalities;
 - (ii) disclosing any possible financial liabilities or risks after the three-year period;
 - (iii) indicating how any additional expenditure by those municipalities will be funded; and
 - (iv) indicating the implications of the assignment for the capacity of those municipalities; and
- (b) the assessment of the Financial and Fiscal Commission referred to in subsection (1)(a) or (2)(a), as the case may be.”

Substitution of section 10 of Act 32 of 2000

3. The following section is hereby substituted for section 10 of the principal Act:

“Assignment of functions or powers to specific municipalities by acts of executive or by agreement

10. If a function or power is assigned to any specific municipality in terms of a power contained in an Act of Parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, the organ of state assigning the function or power must, before assigning the function or power, submit to the Minister and the National Treasury a memorandum —

- (a) giving at least a three-year projection of the financial implications of that function or power for the municipality; and
- (b) disclosing any possible financial liabilities or risks after the three-year period; and
- (c) indicating how any additional expenditure by the municipality will be funded.”

Insertion of section 10A in Act 32 of 2000

4. The following section is hereby inserted in the principal Act after section 10:

“Funding and capacity building

10A. The Cabinet member, MEC or other organ of state initiating an assignment of a function or power to a municipality in terms of section 9 or 10, must take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed, for the performance of the assigned function or power by the municipality if —

- (a) the assignment of the function or power imposes a duty on the municipality;
- (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or is not incidental to any of those functional areas; and
- (c) the performance of that duty has financial implications for the municipality.”

Insertion of sections 21A and 21B in Act 32 of 2000

5. The following sections are hereby inserted in the principal Act, after section 21:

“Documents to be made public

- 21A.** (1) All documents that must be made public by a municipality in terms of a requirement of this Act, the Municipal Finance Management Act or other applicable legislation, must be conveyed to the local community —
- (a) by displaying the documents at the municipality’s head and satellite offices and libraries;
 - (b) by displaying the documents on the municipality’s official website, if the municipality has a website as envisaged by section 21B; and
 - (c) by notifying the local community, in accordance with section 21, of the place, including the website address, where detailed particulars concerning the documents can be obtained.
- (2) If appropriate, any notification in terms of subsection (1) (c) must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

Official website

- 21B.** (1) Each municipality must—
- (a) establish its own official website if the municipality decides that it is affordable; and
 - (b) place on that official website information required to be made public in terms of this Act and the Municipal Finance Management Act.
- (2) If a municipality decides that it is not affordable for it to establish its own official website, it must provide the information in terms of legislation referred to in subsection (1)(b) for display on an organised local government website sponsored or facilitated by the National Treasury.
- (3) The municipal manager must maintain and regularly update the municipality’s official website, if in existence, or provide the relevant information as required by subsection (2).”

Substitution of section 46 of Act 32 of 2000

6. The following section is hereby substituted for section 46 of the principal Act:

“Annual performance reports

- 46.** (1) A municipality must prepare for each financial year a performance report reflecting —
- (a) the performance of the municipality and of each external service provider during that financial year;
 - (b) a comparison of the performances referred to in paragraph (a) with targets set for and performances in the previous financial year; and
 - (c) measures taken to improve performance.
- (2) An annual performance report must form part of the municipality’s annual report in terms of Chapter 12 of the Municipal Finance Management Act.”

Amendment of section 55 of Act 32 of 2000

7. Section 55 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:

- “(c) proper and diligent compliance with [applicable municipal finance management legislation] the Municipal Finance Management Act.”

Amendment of section 57 of Act 32 of 2000

8. Section 57 of the principal Act is hereby amended by the insertion after subsection (4) of the following subsections:

“(4A) The provisions of the Municipal Finance Management Act conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager. 5

(4B) Bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council concerned.”. 10

Repeal of section 58 of Act 32 of 2000

9. Section 58 of the principal Act is hereby repealed.

Amendment of section 74 of Act 32 of 2000

10. Section 74 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 15

“(1) A municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and [with] any other applicable legislation.”. 20

Amendment of section 78 of Act 32 of 2000

11. Section 78 of the principal Act is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

“(3) If a municipality decides in terms of subsection (2)(b) to explore the possibility of providing the municipal service through an external mechanism it must— 25

(a) give notice to the local community of its intention to explore the provision of the municipal service through an external mechanism; [and] 30

(b) assess the different service delivery options in terms of section 76(b), taking into account— 30

(i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; 35

(ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service;

(iii) the views of the local community; 40

(iv) the likely impact on development, job creation and employment patterns in the municipality; and

(v) the views of organised labour; and

(c) conduct or commission a feasibility study which must be taken into account and which must include— 45

(i) a clear identification of the municipal service for which the municipality intends to consider an external mechanism; 50

(ii) an indication of the number of years for which the provision of the municipal service through an external mechanism might be considered;

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- (iii) the projected outputs which the provision of the municipal service through an external mechanism might be expected to produce;
- (iv) an assessment as to the extent to which the provision of the municipal service through an external mechanism will— 5
- (aa) provide value for money;
- (bb) address the needs of the poor;
- (cc) be affordable for the municipality and residents; and 10
- (dd) transfer appropriate technical, operational and financial risk;
- (v) the projected impact on the municipality's staff, assets and liabilities;
- (vi) the projected impact on the municipality's integrated development plan; 15
- (vii) the projected impact on the municipality's budgets for the period for which an external mechanism might be used, including impacts on revenue, expenditure, borrowing, debt and tariffs; and 20
- (viii) any other matter that may be prescribed.”; and
- (b) by the addition of the following subsection:
- “(6) The national government or relevant provincial government may, in accordance with an agreement, assist municipalities in carrying out a feasibility study referred to in subsection (3)(c), or in preparing service delivery agreements.” 25

Substitution of section 80 of Act 32 of 2000

12. The following section is hereby substituted for section 80 of the principal Act:

“Provision of services through service delivery agreements with external mechanisms 30

80. (1) If a municipality decides to provide a municipal service through a service delivery agreement in terms of section 76(b) with—

(a) a municipal entity or another municipality [or a national or provincial organ of state], it may, subject to subsection (3), negotiate and enter into such an agreement with the relevant municipal entity or municipality [or organ of state] without applying Part 3 of this Chapter; [or] 35

(aA) a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying Part 3 of this Chapter; or 40

(b) any institution or entity, or any person, juristic or natural, not mentioned in paragraph (a) or (aA), it must apply Part 3 of this Chapter before entering into such an agreement with any such institution, entity or person.

(2) Before a municipality enters into a service delivery agreement [for a basic municipal service] with an external service provider it must establish a [mechanism and] programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. 45 50

(3) (a) Where a municipality decides to enter into a service delivery agreement with another municipality as contemplated by section 76(b)(ii), that other municipality must conduct or commission a feasibility study, which it must take into account, before the service delivery agreement is entered into. 55

(b) The feasibility study referred to in paragraph (a), must include—

(i) an assessment on the impact on the budget of that other municipality, and on its assets, liabilities and staff expenditure, for each of the

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- financial years that it intends to serve as an external service provider;
- (ii) an assessment on whether it will be necessary to increase the number of staff to enable that other municipality to be an external service provider, and whether it will be necessary to transfer or second any staff from the appointing municipality to that other municipality;
- (iii) an assessment on the ability of that other municipality to absorb any commitments, liabilities or employees involved, if and when the appointment as external service provider ends; and
- (iv) any other relevant information as may be prescribed.

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Amendment of section 81 of Act 32 of 2000

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13. Section 81 of the principal Act is hereby amended—

- (a) by the substitution for subparagraph (v) of paragraph (a) of subsection (2) of the following subparagraph:

“(v) managing its own accounting, financial management, budgeting, investment and borrowing activities within a framework of transparency, accountability, reporting and financial control determined by the municipality, subject to [applicable municipal finance management legislation] the Municipal Finance Management Act.”; and

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- (b) by the insertion after paragraph (b) of subsection (2) of the following paragraph:

“(bA) must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.”

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Repeal of section 82 of Act 32 of 2000

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14. Section 82 of the principal Act is hereby repealed.

Amendment of section 83 of Act 32 of 2000

15. Section 83 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

- “(a) [are competitive, fair, transparent, equitable and cost-effective] comply with Chapter 11 of the Municipal Finance Management Act.”

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Substitution of heading to Part 4 of Chapter 8 of Act 32 of 2000

16. The following heading is hereby substituted for the heading to Part 4 of Chapter 8 of the principal Act:

“**Part 4: Internal municipal service districts**”

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Insertion of Part 4A in Chapter 8 of Act 32 of 2000

17. The following Part is hereby inserted in the principal Act after section 86:

“**Part 4A: Regulations and guidelines regarding municipal services**

Regulations and guidelines regarding municipal services

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86A. (1) The Minister may for purposes of this Chapter make regulations or issue guidelines in accordance with section 120 to provide for or regulate the following matters:

- (a) The preparation, adoption and implementation of a municipal tariff policy;
- (b) the subsidisation of tariffs for poor households through—
- (i) cross-subsidisation within and between services;
- (ii) equitable share allocations to municipalities; and
- (iii) national and provincial grants to municipalities;
- (c) limits on tariff increases;

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- (d) criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof;
- (e) incentives and penalties to encourage —
- (i) the economical, efficient and effective use of resources when providing services;
 - (ii) the recycling of waste; and
 - (iii) other environmental objectives;
- (f) criteria to be taken into account by municipalities when assessing options for the provision of a municipal service;
- (g) measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets;
- (h) mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation with this Chapter, and the manner in which municipalities must comply with these;
- (i) standard draft service delivery agreements;
- (j) the minimum content and management of service delivery agreements;
- (k) additional matters that must be included in a feasibility study in terms of section 78(3)(c), which may include—
- (i) the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives;
 - (ii) an assessment of the municipality's capacity to effectively monitor the provision of the municipal service through an external mechanism and to enforce the service delivery agreement;
- (l) performance guarantees by service providers; and
- (m) any other matter that would facilitate —
- (i) the effective and efficient provision of municipal services; or
 - (ii) the application of this Chapter.
- (2) The Minister may only make regulations and issue guidelines contemplated in subsection (1)(a) to (e) after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines.
- (3) When making regulations or issuing guidelines in terms of section 120 to provide for or regulate the matters mentioned in subsection (1), the Minister must—
- (a) take into account the capacity of municipalities to comply with such regulations and guidelines; and
 - (b) differentiate between different kinds of municipalities according to their respective capacities.”.

Insertion of heading and sections 86B, 86C, 86D, 86E, 86F, 86G, 86H, 86I, 86J and 86K in Act 32 of 2000

18. The following headings and sections are hereby inserted in the principal Act after section 86A:

“CHAPTER 8A

MUNICIPAL ENTITIES

Part 1: General provisions

Kinds of municipal entities

86B. (1) There are the following kinds of municipal entities:

- (a) a private company—

- (i) established by one or more municipalities in terms of Part 2; or
- (ii) in which one or more municipalities have acquired or hold an interest in terms of Part 2;

(b) a service utility established by a municipality in terms of Part 3; and
 (c) a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.

(2) No municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is—

- (a) a private company, service utility or multi-jurisdictional service utility referred to in subsection (1); or
- (b) a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes.

(3) Subsection (2) does not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with the investment framework envisaged in section 13 of the Municipal Finance Management Act.

Part 2: Private companies

Establishment and acquisition of private companies

86C. (1) A municipality may, subject to subsection (2)—

- (a) establish or participate in the establishment of a private company in accordance with the Companies Act, 1973 (Act No. 61 of 1973); or
- (b) acquire or hold an interest in a private company in accordance with the Companies Act, 1973 (Act No. 61 of 1973).

(2) (a) A municipality may in terms of subsection (1)(a) or (b) either acquire or hold full ownership of a private company, or acquire or hold a lesser interest in a private company.

(b) A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by—

- (i) another municipality or municipalities;
- (ii) a national or provincial organ of state or organs of state; or
- (iii) any combination of institutions referred to in subparagraphs (i) and (ii).

(c) A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in—

- (i) that municipality;
- (ii) another municipality; or
- (iii) that municipality and another municipality collectively.

(3) If a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act, 1973 (Act No. 61 of 1973), and any other law regulating companies, but if any conflict arises between that Act or such law and a provision of this Act, this Act prevails.

Legal status of private companies established by municipalities or in which municipalities hold interests

86D. (1) A private company referred to in section 86C(1)—

- (a) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of the private company; or

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(b) is a public entity to which the Public Finance Management Act, 1999 (Act No. 1 of 1999), applies if ownership control in the company, within the meaning of that Act, is held by a national or provincial organ of state.

(2) A private company which is a municipal entity—

- (a) must restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a); and
- (b) has no competence to perform any activity which falls outside the functions and powers of its parent municipality contemplated by section 8.

Conditions precedent for establishing or acquiring interests in private companies

86E. (1) A municipality may establish a private company or acquire an interest in such a company only—

- (a) for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers referred to in section 8;
- (b) if the municipality can demonstrate that—
- (i) there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality more effectively; and
 - (ii) the company would benefit the local community; and
- (c) if any other conditions that may be prescribed have been complied with.

(2) If a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, Chapter 8 applies.

Conditions precedent for co-owning of private companies

86F. If two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must—

- (a) comply with section 86E;
- (b) consider and reach agreement on proposals for shared control of the company; and
- (c) consider cash flow projections of the company's proposed operations for at least three financial years.

Disposal of companies and equity interests in companies

86G. A municipality may transfer ownership or otherwise dispose of—

- (a) a wholly owned private company, subject to the Municipal Finance Management Act; or
- (b) an interest in a private company —
- (i) subject to section 14 of the Municipal Finance Management Act; and
 - (ii) if that transfer or disposal would not result in an infringement of section 86C(2) by another municipality which holds an interest in the company.

*Part 3: Service utilities***Establishment**

86H. (1) A municipality may pass a by-law establishing a service utility.