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GENERAL NOTICE

National Treasury

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GENERAL NOTICE

NOTICE 1634 OF 2007

NATIONAL TREASURY

LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT, 2003

DRAFT MUNICIPAL ASSET TRANSFER REGULATIONS

CALL FOR COMMENTS

I, Trevor A. Manuel, Minister of Finance, acting with the concurrence of the Cabinet member responsible for local government, hereby publish the draft regulations, to be made in terms of section 168 of the Municipal Finance Management Act, 2003, (Act No. 56 of 2003), for public comment in accordance with section 169(1)(b) of the Act, as set out in the Schedule.

Interested persons may submit their comments on the draft regulations in writing on or before 13 December 2007 to: The Director-General, c/o Mr TV Pillay, National Treasury, Private Bag X115, Pretoria, 0001, or per fax to (012) 315-5230 or email to MFMA@treasury.gov.za

Kindly provide the name, address, telephone, fax numbers and e-mail address of the person or organisation submitting the comments.

T.A. MANUEL, MP

MINISTER OF FINANCE

EXPLANATORY MEMORANDUM

Municipal Asset Transfer Regulations

Municipalities are custodians of vast amounts of assets worth billions of Rand, including land, buildings, infrastructure, plant and equipment that have been procured through public resources. On a daily basis these assets are being acquired, built, maintained and disposed – for the purpose of community service provision. There has been a need to improve transparency and accountability through a practical framework for a municipality or municipal entity which wishes to transfer or dispose of an asset. These regulations set out key principles, procedures and deals with the process to be followed by a municipality or a municipal entity when transferring or disposing of capital assets.

The Municipal Finance Management Act (MFMA) has identified the need to provide adequate safeguards by municipalities or municipal entities, in the transfer and disposal of capital assets. The regulations not only constitute the prescribed framework referred to in sections 14(6) and 90(6) of the MFMA, but also provide additional regulations made in terms of section 168(1)(f), (g) and (p) to support and facilitate the effective implementation of the Act.

The purpose of the regulations is to give effect to the enabling provisions in the MFMA and to comprehensively regulate all transfers and disposals of municipal assets, including transfers to private sector parties, other municipalities, municipal entities and national and provincial organs of state and the granting of temporary rights to use municipal assets (such as the leasing of assets).

To assist in the identification and management of risks associated with the transfer and disposal of capital assets, the regulations adopt the following key principles which must be considered and implemented in the context of any transfer:

- Valuation principle, i.e. the need to attach a value to the transfer or disposal of a municipal capital asset, in order to ensure that the interests of the municipality or municipal entity and each of its stakeholders are not prejudiced by the transfer or disposal
- Continuity of service principle, i.e. the need to ensure the uninterrupted continuance of a municipal service when a municipal capital asset that is being used in the delivery of that service, is transferred or disposed of, particularly when the asset is used in the provision of the minimum level of basic municipal services
- Risk transfer principle, i.e. the need to transfer the risk relating to a municipal capital asset in conjunction with the transfer of the asset
- Asset preservation principle, i.e. the need to prevent the indiscriminate or unsustainable transfer or disposal of a municipal capital asset in order not to undermine the ability of the municipality or municipal entity to render or expand municipal services in the longer term.

The regulations will apply to most municipal assets. A capital asset is defined to include all immovable assets such as land and buildings and certain moveable assets which are used for the production or supply of goods and services, for rental to others or for administrative purposes. Capital assets must have a life span of at least one year. A more rigorous and transparent process must be followed when transferring or disposing certain classes of assets such as those required for the provision of minimum level of basic municipal services and assets classified as high value.

The process to transfer or dispose of high value capital assets must commence with a request to the council to authorise a public participation process. A high value asset is an asset which is valued in excess of R1 million or 5 per cent of the total of the municipality's assets, or a value determined by the council. The request must be accompanied by a comprehensive information statement which shows the reasons for the proposal, the asset value, the benefits of disposal, the anticipated proceeds or loss that could be expected if the proposal went ahead.

Upon the council authorising the public participation process the municipal manager must make public the information statement and invite the local community and National and provincial government, at least 60 days before a meeting to consider the proposal, to submit comments or representations.

At a meeting open to the public the council must take into account all comments and representations and a range of prescribed considerations prior to deciding whether the asset should be transferred or disposed.

A key consideration for the council is to decide whether the asset is required to provide a minimum level of basic municipal service or not. If it is agreed that the asset is required to provide a minimum level of basic municipal service, then the asset may only be transferred to another municipality, a municipal entity or a national or provincial organ of state subject to agreement over the continuation of the service. Such transfers are only permissible in instances where the transfer results from:

- the review of service delivery mechanisms when an organ of state is the preferred service provider
- a reorganisation of functions between a municipality and its entity
- an adjustment of powers and functions through legislation
- the transfer of land to an organ of state for housing for the poor
- national legislation which requires or permits the transfer

When considering the transfer of a service, for example waste collection, a municipality must first identify all of the assets associated with that service. This includes plant, machinery, land, buildings as well as staff and any associated liabilities, such as pension funds. Any subsequent transfer of staff to another organ of state must follow the applicable labour legislation. Such a transfer must be considered as a holistic exercise acknowledging all impacts it may have on the parties to the transfer and the sustainability of the service.

Such assets may only be transferred on the condition that any subsequent transfer of the asset may only occur with the permission of the municipality and that ownership of the asset must revert back to the municipality should the organ of state cease or be unable to provide the service which is attached to the asset.

The parties to the transfer must firstly agree if compensation is to be paid. If it is agreed that compensation is appropriate, such compensation is to be based upon the value of the assets to be transferred. This is determined by generally recognised accounting standards or in the absence of such standards any of the following:

- historical cost with adjustments for wear and tear
- fair market value
- depreciated replacement cost, or
- realisable value

Whilst the regulations pay particular attention to high valued assets and those required to provide a minimum level of basic municipal service, it is acknowledged that the majority of assets (and therefore the majority of disposals and transfers) will fall outside this criteria. Capital assets not required for the provision of minimum level of basic municipal services and all other assets not regarded as high value may be transferred or disposed through the competitive process contained in the Municipal Supply Chain Management Regulations.

The Asset Transfer Regulations also capture circumstances in which a municipality or municipal entity grants a right to use, control or manage a capital asset. These types of transactions include leasing, letting and hiring out arrangements and will apply to assets with a value in excess of R10 million for a period in which the right to use the asset exceeds three years. Similar arrangements will apply to these transactions.

The proceeds of the sale of any asset must first be applied to discharge any borrowing against that asset at its redemption date. However in the case of an asset required to provide a minimum level of basic municipal service, in most circumstances any liabilities attached to the asset must be transferred to the organ of state.

Generally a municipality or municipal entity must receive a fair market value for such assets however where the plight of the poor or public interest demands otherwise it is possible to consider a lesser value provided that the following is taken into account:

- interests of the state and local community
- strategic and economic interests of the municipality or entity
- constitutional rights and legal interests of all parties
- whether the interests of the parties to the transfer should carry more weight than the interests of the wider community
- whether the local community would be better served if the asset is transferred at less than fair market value

These regulations do not apply to the transfer of capital assets associated with housing on municipal land for the poor or to beneficiaries of such housing. It is considered that such assets should be provided to the poor based on need and not based on commercial or competitive principles provided that the process that guides the transfer remains fair, equitable and transparent. Where municipal land is transferred to another organ of state for housing for the poor then such transfer shall be in accordance with national or provincial housing policy.

Furthermore, public private partnership agreements are not subject to these regulations as the transfer or disposal of assets associated with these initiatives are separately regulated by the Municipal Finance Management Act and Public Private Partnership Regulations. The Asset Transfer Regulations also exempt a number of other municipal transactions, in instances when those transactions are adequately regulated by other legislation.

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CHAPTER 1

INTERPRETATION AND APPLICATION OF THESE REGULATIONS

Definitions

1. In these Regulations a word or expression to which a meaning has been assigned in the Municipal Finance Management Act, (Act No. 56 of 2003), has the same meaning as in that Act, and –

“**asset**” means a tangible or intangible resource capable of ownership;

“**capital asset**” means –

- (a) any immovable asset such as land, property or buildings; or
- (b) any movable asset that can be used continuously or repeatedly for more than one year in the production or supply of goods or services, for rental to others or for administrative purposes, and from which future economic or social benefit can be derived, such as plant, machinery and equipment;

“**commercial service**” means a service other than a municipal service –

- (a) rendered by a private sector party or organ of state to or for a municipality or municipal entity on a commercial basis; and
- (b) which is procured by the municipality or municipal entity through its supply chain management policy;

“**depreciated replacement cost**”, in relation to a capital asset, means an amount equivalent to the cost to replace the capital asset on the date of transfer adjusted by a deemed depreciated cost at the date of the transfer taking into account the age and condition of the asset;

“**disposal**”, in relation to a capital asset, includes –

- (a) the demolition, dismantling or destruction of the capital asset; or
- (b) any other process applied to a capital asset which results in loss of ownership of the capital asset otherwise than by way of transfer of ownership;

“**disposal management system**” means the system contemplated in regulation 40 of the Municipal Supply Chain Management Regulations, published by General Notice No. 868 of 2005;

“**encumbrance**”, in relation to a capital asset, means a right to the capital asset that is held by a third party that limits the owner’s use of the asset;

“exempted capital asset” means a municipal capital asset which is exempted by section 14(6) or 90(6) of the Act from the other provisions of that section;¹

“fair market value”, in relation to a capital asset, means the value at which a knowledgeable willing buyer would buy and a knowledgeable willing seller would sell the capital asset in an arm’s length transaction;

“high value”, in relation to a capital asset of a municipality or municipal entity, means that the value of the capital asset exceeds any of the following amounts:

- (a) R1 million;
- (b) five per cent of the total value of the capital assets of the municipality or municipal entity, as determined from the latest available audited annual financial statements of the municipality or entity; or
- (c) an amount determined by resolution of the council of the municipality or of the parent municipality of the municipal entity;

“historical cost”, in relation to a capital asset, means the original purchase price or cost of acquisition of the capital asset at the time the asset was acquired;

“long term” means a period of longer than three years;

“municipal capital asset” means a capital asset of which a municipality or municipal entity is the owner;

“municipal service” has the same meaning as assigned to it in section 1 of the Municipal Systems Act;

“non-exempted capital asset” means a municipal capital asset which is not exempted by section 14(6) or 90(6) of the Act from the other provisions of that section;

“organ of state” means –

- (a) a national department or national public entity;
- (b) a provincial department or provincial public entity;
- (c) a municipality or municipal entity; or
- (d) any other organ of state within the meaning assigned to “organ of state” in section 239 of the Constitution;

“private sector party” means a person who is not an organ of state;

¹ The circumstances in which municipal capital assets are exempted are set out in regulation 20.

“realisable value”, in relation to a capital asset, means the amount of cash or cash equivalents that could currently be obtained by transferring the capital asset, less the estimated costs of completion and the estimated costs necessary to make the transfer;

“right to use, control or manage”, in relation to a capital asset, means a right to use, control or manage the capital asset for a period exceeding one calendar month without ceding legal ownership in the asset;²

“service provider” –

- (a) in relation to a municipal service, means a private sector party or organ of state appointed by a municipality in terms of Chapter 8 of the Municipal Systems Act to perform a municipal service in accordance with that Act; or
- (b) in relation to a commercial service, means a private sector party or organ of state appointed in terms of the supply chain management policy of a municipality or municipal entity to render a commercial service to or for the municipality or entity as an independent contractor;

“subsidiary asset”, in relation to a capital asset, means an asset that forms an integral part of the capital asset or of the operation or maintenance of the asset;

“supply chain management policy” means the supply chain management policy which a municipality or municipality entity is required to have in terms of Chapter 11 of the Act;

“the Act” means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

“transfer”, in relation to a capital or subsidiary asset, means transfer of ownership in the asset as a result of a sale or other transaction.

Application of these Regulations

- 2. (1) These Regulations apply to –
 - (a) the transfer and disposal of capital assets by municipalities and municipal entities; and
 - (b) the granting by municipalities and municipal entities of rights to use, control or manage capital assets.

² In other words, where the granting of such rights do not amount to the transfer or permanent disposal of the asset, for example when a right is acquired through a leasing, letting or hiring out arrangement.

- (2) The different Chapters of this Act apply as follows:
- (a) Chapter 2 regulates –
 - (i) the transfer³ by municipalities or municipal entities of non-exempted capital assets⁴ either to private sector parties or organs of state; and
 - (ii) the permanent disposal⁵ by municipalities or municipal entities of non-exempted capital assets;
 - (b) Chapter 3 regulates the transfer by municipalities or municipal entities of exempted capital assets⁶ to organs of state qualifying for such transfers in terms of section 14(6) or 90(6) of the Act;
 - (c) Chapter 4 regulates the granting by municipalities or municipal entities of rights to use, control or manage capital assets in circumstances where sections 14 and 90 of the Act and Chapters 2 and 3 of these Regulations do not apply;⁷ and
 - (d) Chapter 5 deals with matters of general application and provides for certain general exemptions from these Regulations.

Governing principles

3. These regulations are governed and must be implemented in accordance with the following principles:

- (a) **Valuation principle**, i.e. the need to attach a value to the transfer or disposal of a municipal capital asset, in order to ensure that the interests of the municipality or municipal entity and of its stakeholders are not prejudiced by the transfer or disposal.

³ “Transfer” means transfer of ownership in an asset (see definition in regulation 1).

⁴ “Non-exempted capital asset” means a capital asset contemplated in section 14(2) or 90(2) of the Act transferred by a municipality or municipal entity to a private sector party or an organ of state in circumstances where section 14 or 90 does apply (see definition in regulation 1).

⁵ “Disposal” includes the demolition of buildings and other immovable property and the dismantling of plant and equipment where ownership of a capital asset is lost otherwise than by way of a transfer of ownership (see definition in regulation 1).

⁶ “Exempted capital asset” means a capital asset contemplated in section 14(6) or 90(6) of the Act transferred by a municipality or municipal entity to an organ of state in circumstances where section 14 or 90 does not apply (see definition in regulation 1).

⁷ In other words, where the granting of such rights does not amount to a “transfer” or “disposal” of the asset, such as leasing, letting, hiring out, etc, of the asset.

- (b) *Continuity of service principle*, i.e. the need to ensure the uninterrupted continuance of a municipal service when a municipal capital asset that is being used in the delivery of that service, is transferred or disposed of, particularly when the asset is used in the provision of the minimum level of basic municipal services.
- (c) *Risk transfer principle*, i.e. the need to transfer the risk relating to a municipal capital asset in conjunction with the transfer of the asset.
- (d) *Asset preservation principle*, i.e. the need to prevent the indiscriminate or unsustainable transfer or disposal of a municipal capital asset in order not to undermine the ability of the municipality or municipal entity to render or expand municipal services in the longer term.

CHAPTER 2

TRANSFER AND PERMANENT DISPOSAL OF NON-EXEMPTED CAPITAL ASSETS

Purpose of this Chapter

4. (1) The purpose of this Chapter is to regulate the transfer and permanent disposal of non-exempted capital assets by municipalities and municipal entities in order to facilitate the enforcement and administration of section 14(2) and 90(2) of the Act.

(2) This Chapter may not be read as permitting the transfer or disposal of municipal capital assets needed to provide the minimum level of basic municipal services.⁸

(3) This Chapter does not apply to the transfer of –

- (a) non-exempted capital assets in terms of public-private partnership agreements referred to in section 120 of the Act and the Municipal Public-

⁸ Sections 14(1) and 90(1) of the Act do not allow the transfer of municipal capital assets needed to provide the minimum level of basic municipal services. Such transfers are only allowed under sections 14(6) and 90(6) to organs of state selected in circumstances set out in a prescribed framework. This framework is provided in Chapter 3.

Private Partnership Regulations published by Government Notice No. R.309 of 2005;⁹ or

- (b) housing on municipal land for the poor to beneficiaries of such housing.

Part 1: Decision-making process for municipalities

Transfer or disposal of non-exempted capital assets

5. (1) A municipality may transfer or dispose of a non-exempted capital asset only after –

- (a) the municipal manager has in terms of regulation 6 conducted a public participation process to facilitate the determinations a municipal council must make in terms of section 14(2)(a) and (b) of the Act; and
- (b) the municipal council –
- (i) has made the determinations required by section 14(2)(a) and (b);¹⁰ and
- (ii) has as a consequence of those determinations approved in principle that the capital asset may be transferred or disposed of.

(2) Subregulation (1)(a) must be complied with only if the capital asset proposed to be transferred or disposed of is a high value capital asset. If the combined value of any capital assets a municipality intends to transfer or dispose of in any financial year exceeds five per cent of the total value of its assets, as determined from its latest available audited annual financial statements, subregulation (1)(a) must be complied with in relation to all the capital assets proposed to be transferred or disposed of during that year.

(3) (a) Only the municipal council may authorise the public participation process referred to in subregulation (1)(a).

(b) A request to the municipal council for authorisation of a public participation process must be accompanied by an information statement stating –

⁹ This provision does not affect the applicability of section 14 when transfer of municipal capital assets emanates from PPP agreements. See in this regard section 120(7) read with section 110(3) of the Act.

¹⁰ In terms of these provisions the council must (a) decide on reasonable grounds that the capital asset is not needed to provide the minimum level of basic municipal services and (b) consider the fair market value of the asset and the economic and community value to be received in exchange for the capital asset.

- (i) the valuation of the capital asset to be transferred or disposed of and the method of valuation used to determine that valuation;
- (ii) the reasons for the proposal to transfer or dispose of the capital asset;
- (iii) any expected benefits to the municipality that may result from the transfer or disposal;
- (iv) any expected proceeds to be received by the municipality from the transfer or disposal; and
- (v) any expected gain or loss that will be realised or incurred by the municipality arising from the transfer or disposal.

(4) The value of a capital asset must for purposes of subregulation (3)(b)(i) be determined in accordance with the accounting standards that the municipality is required by legislation to apply in preparing its annual financial statements.

(5) In the absence of sufficient guidance in those accounting standards regarding the valuation of capital assets, any of the following valuation methods must be applied:

- (a) historical cost of the asset, adjusted for accumulated depreciation and any impairment losses as at the proposed date of transfer or disposal;
- (b) fair market value of the asset;
- (c) depreciated replacement cost of the asset; or
- (d) realisable value of the asset.

(6) A municipal council may delegate to the municipal manager its power to make the determinations referred to in subregulation (1)(b)(i) and to give the approval referred to in subregulation (1)(b)(ii) in respect of movable capital assets below a value determined by the municipal council.

Public participation process for municipalities

6. If the municipal council has in terms of regulation 5(3)(a) authorised the municipal manager to conduct a public participation process in connection with any proposed transfer or disposal of a high value capital asset or other asset referred to in regulation 5(2), the municipal manager must at least 60 days before the meeting of the council at which the determinations referred to in regulation 5(1)(b) are to be

considered—

- (a) in accordance with section 21A of the Municipal Systems Act –
 - (i) make public the proposal to transfer or dispose of the capital asset together with the information statement referred to in regulation 5(3)(b); and
 - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed transfer or disposal of the capital asset; and
- (b) solicit the views and recommendations of the National Treasury and the relevant provincial treasury on the matter.

Consideration of proposals to transfer or dispose of non-exempted capital assets

7. The council of the municipality must, when considering any proposed transfer or disposal of a non-exempted capital asset in terms of regulation 5(1)(b)(i) and (ii), take into account —

- (a) whether the capital asset may be required for the municipality's own use at a later date;
- (b) the expected gain or loss that is expected to result from the proposed transfer or disposal;
- (c) the extent to which any compensation to be received in respect of the proposed transfer or disposal will result in a significant economic or financial benefit to the municipality;
- (d) the risks and rewards associated with the operation or control of the capital asset that is to be transferred or disposed of in relation to the municipality's interests;
- (e) the effect that the proposed transfer or disposal will have on the credit rating of the municipality, its ability to raise long-term or short-term borrowings in the future and its financial position and cash flow;
- (f) any limitations or conditions attached to the capital asset or the transfer or disposal of the asset, and the consequences of any potential non-compliance with those conditions;
- (g) the estimated cost of the proposed transfer or disposal;
- (h) the transfer of any liabilities and reserve funds associated with the capital asset;

- (i) any comments or representations on the proposed transfer or disposal received from the local community and other interested persons;
- (j) any written views and recommendations on the proposed transfer or disposal by the National Treasury and the relevant provincial treasury;
- (k) the interests of any affected organ of state, the municipality's own strategic, legal and economic interests and the interests of the local community; and
- (l) compliance with the legislative regime applicable to the proposed transfer or disposal.

Part 2: Decision-making process for municipal entities

Transfer or disposal of non-exempted capital assets

- 8.** (1) A municipal entity may transfer or dispose of a non-exempted capital asset only after –
- (a) the municipal entity has in terms of regulation 9 conducted a public participation process to facilitate the determinations the council of the parent municipality of the entity must make in terms of section 90(2)(a) and (b) of the Act; and
 - (b) the council of the parent municipality of the municipal entity –
 - (i) has made the determinations required by section 90(2)(a) and (b);¹¹ and
 - (ii) has as a consequence of those determinations approved in principle that the capital asset may be transferred or disposed of.
- (2) Subregulation (1)(a) must be complied with only if the capital asset proposed to be transferred or disposed of is a high value capital asset. If the combined value of any capital assets a municipal entity intends to transfer or dispose of in any financial year exceeds five per cent of the total value of its assets, as determined from its latest available audited annual financial statements, subregulation (1)(a) must be complied with in relation to all capital assets proposed to be transferred or disposed of during that year.

¹¹ In terms of these provisions the council of the parent municipality must (a) decide on reasonable grounds that the capital asset is not needed to provide the minimum level of basic municipal services and (b) consider the fair market value of the asset and the economic and community value to be received in exchange for the capital asset.

(3) (a) Only the council of the parent municipality of a municipal entity may authorise the public participation process referred to in subregulation (1)(a).

(b) A request to the municipal council for authorisation of a public participation process must be accompanied by an information statement approved by the board of directors of the municipal entity stating –

- (i) the valuation of the capital asset to be transferred or disposed of and the method of valuation used to determine that valuation;
- (ii) the reasons for the proposal to transfer or dispose of the capital asset;
- (iii) any expected benefits to the municipal entity that may result from the transfer or disposal;
- (iv) any expected proceeds to be received by the municipal entity from the transfer or disposal; and
- (v) any expected gain or loss that will be realised or incurred by the municipal entity arising from the transfer or disposal.

(4) The value of a capital asset must for purposes of subregulation (3)(b)(i) be determined in accordance with the accounting standards that the municipal entity is required by legislation to apply in preparing its annual financial statements.

(5) In the absence of sufficient guidance in those accounting standards regarding the valuation of capital assets, any of the following valuation methods must be applied:

- (a) historical cost of the asset, adjusted for accumulated depreciation and any impairment losses as at the proposed date of transfer or disposal;
- (b) fair market value of the asset;
- (c) depreciated replacement cost of the asset; or
- (d) realisable value of the asset.

(6) The council of the parent municipality of a municipal entity may delegate to the chief executive officer of the entity its power to make the determinations referred to in subregulation (1)(b)(i) and to give the approval referred to in subregulation (1)(b)(ii) in respect of movable capital assets below a value determined by the municipal council.

Public participation process for municipal entities

9. If the council of the parent municipality of a municipal entity has in terms of regulation 8(3)(a) authorised the entity to conduct a public participation process in connection with any proposed transfer or disposal of a high value capital asset or other asset referred to in regulation 8(2), the chief executive officer of the entity must at least 90 days before the meeting of the municipal council at which the determinations referred to in regulation 8(1)(b) are to be considered—

- (a) in accordance with section 21A of the Municipal Systems Act –
 - (i) make public the proposal to transfer or dispose of the capital asset together with the information statement referred to in regulation 8(3)(b); and
 - (ii) invite the local community and other interested persons to submit to the parent municipality comments or representations in respect of the proposed transfer or disposal of the capital asset; and
- (b) solicit the views and recommendations of the National Treasury and the relevant provincial treasury on the matter.

Consideration of proposals to transfer or dispose of non-exempted capital assets

10. The council of the municipal entity's parent municipality must, when considering any proposed transfer or disposal of a non-exempted capital asset in terms of regulation 8(1)(b)(i) and (ii), take into account —

- (a) whether the capital asset may be required for the municipality's or municipal entity's own use at a later date;
- (b) the expected loss or gain that is expected to result from the proposed transfer or disposal;
- (c) the extent to which any compensation to be received in respect of the proposed transfer or disposal will result in a significant economic or financial benefit to the municipality or municipal entity;
- (d) the risks and rewards associated with the operation or control of the capital asset that is to be transferred or disposed of in relation to the interests of the municipality or municipal entity;

- (e) the effect that the proposed transfer or disposal will have on the credit rating of the municipal entity, its ability to raise long-term or short-term borrowings in the future and its financial position and cash flow;
- (f) any limitations or conditions attached to the capital asset on the transfer or disposal of the asset, and the consequences of any potential non-compliance with those conditions;
- (g) the estimated cost of the proposed transfer or disposal;
- (h) the transfer of any liabilities and reserve funds associated with the capital asset;
- (i) any comments or representations on the proposed transfer or disposal received from the local community and other interested persons;
- (j) any written views and recommendations on the proposed transfer or disposal by the National Treasury and the relevant provincial treasury;
- (k) the interests of any affected organ of state, the strategic, legal and economic interests of the municipality and the municipal entity and the interests of the local community; and
- (l) compliance with the legislative regime applicable to the proposed transfer or disposal.

Part 3: Provisions applicable to both municipalities and municipal entities

Conditional approval of transfer or disposal of non-exempted capital assets

11. An approval in principle in terms of regulation 5(1)(b)(ii) or 8(1)(b)(ii) that a non-exempted capital asset may be transferred or disposed of, may be given subject to any conditions, including conditions specifying –

- (a) the way in which the capital asset is to be sold or disposed of;
- (b) a floor price or minimum compensation for the capital asset;
- (c) whether the capital asset may be transferred or disposed of for less than its fair market value, in which case the municipal council must first consider the criteria set out in regulation 13(2); and
- (d) a framework within which direct negotiations for the transfer or disposal of the capital asset must be conducted with another person, if transfer or disposal is subject to direct negotiations.

Transfer or disposal of non-exempted capital assets to be in accordance with disposal management system

12. (1) If approval has been given in terms of regulation 5(1)(b)(ii) or 8(1)(b)(ii) that a non-exempted capital asset may be transferred or disposed of, the relevant municipality or municipal entity may transfer or dispose of the asset only in accordance with its disposal management system,¹² irrespective of –

- (a) the value of the capital asset; or
- (b) whether the capital asset is to be transferred to a private sector party or an organ of state.

(2) The disposal management system of a municipality or municipal entity does not apply to the transfer of a non-exempted capital asset if –

- (a) the municipality –
 - (i) reviews in terms of Chapter 8 of the Municipal Systems Act its service delivery mechanisms for the performance of a municipal service;
 - (ii) appoints a private sector party¹³ through a competitive bidding process as the service provider for the performance of that municipal service; and
 - (iii) transfers the capital asset as an integral component of the performance of that municipal service to that service provider; or
- (b) the municipality or municipal entity –
 - (i) appoints a private sector party or organ of state through a competitive bidding process as the service provider for the performance of a commercial service;¹⁴ and
 - (ii) transfers the capital asset as an integral component of the performance of that commercial service to that service provider.

¹² Regulation 40(2) of the Municipal Supply Chain Management Regulations determines the ways in which a municipal asset may be transferred or disposed of and contains conditions as to the payment of compensation.

¹³ If another municipality, municipal entity or other organ of state is the preferred service provider, any transfer of assets is regulated by Chapter 3. See regulation 20(1)(a).

¹⁴ This includes any independent contractor which performs a task for the municipality or municipal entity, eg: a collection agent or a person servicing the equipment of the municipality or entity.

(3) The municipality or municipal entity may negotiate directly with the selected service provider regarding the transfer of a capital asset referred to in subregulation (2)(a) or (b).

(4) A municipality or municipal entity may not commence with the process referred to in subregulation (1) or negotiations referred to in subregulation (3) unless approval in principle has in terms of regulation 5(1)(b)(ii) or 8(1)(b)(ii) been given that the relevant capital asset may be transferred or disposed of.

(5) In applying the process referred to in subregulation (1) or conducting negotiations referred to in subregulation (3), the municipality or municipal entity must consider the gain or loss that will –

- (a) result from the transfer or disposal of the relevant capital asset; and
- (b) be recorded in the accounting records of the municipality or municipal entity.

Compensation for transfer of non-exempted municipal capital assets

13. (1) The compensation payable to a municipality or municipal entity for the transfer of a non-exempted capital asset must, subject to subregulation (2) –

- (a) be consistent with criteria applicable to compensation set out in the disposal management system of the municipality or municipal entity; and
- (b) if regulation 12(2)(b) applies to the transfer, reflect fair market value.

(2) If a municipality or municipal entity on account of the public interest, in particular in relation to the plight of the poor, intends to transfer a non-exempted capital asset for less than its fair market value, the municipality or entity must, when considering the proposed transfer, take into account –

- (a) the interests of –
 - (i) the State; and
 - (ii) the local community;
- (b) the strategic and economic interests of the municipality or municipal entity, including the long-term effect of the decision on the municipality or entity;
- (c) the constitutional rights and legal interests of all affected parties;

- (d) whether the interests of the parties to the transfer should carry more weight than the interest of the local community, and how the individual interest is weighed against the collective interest; and
- (e) whether the local community would be better served if the capital asset is transferred at less than its fair market value, as opposed to a transfer of the asset at fair market value.

Preconditions for transferring non-exempted capital assets as part of appointment of service providers for performance of municipal or commercial services

14. If a municipality or municipal entity intends to transfer to a private sector party or organ of state a non-exempted capital asset following the selection through a competitive bidding process of a service provider for the performance of a municipal service referred to in regulation 12(2)(a) or for the performance of a commercial service referred to in regulation 12(2)(b) –

- (a) all assets needed or directly related to the performance of that service must be properly identified to distinguish those assets from the other assets of the municipality or municipal entity;
- (b) all decisions referred to in regulation 5(1)(b)(i) and (ii) or 8(1)(b)(i) and (ii) relating to the transfer of the capital asset must be taken as an integral part of the broader decision-making process on the appointment of a service provider for the performance of that service; and
- (c) all documents prepared for the purpose of those decisions, must be taken into account in any feasibility study conducted to determine the financial and other implications of appointing a service provider for the performance of that service.

Transfer of municipal assets to service providers appointed through competitive bidding

15. (1) If a service provider is appointed for the performance of a municipal service referred to in regulation 12(2)(a) or for the performance of a commercial service referred to in regulation 12(2)(b), the municipality or municipal entity may, as may be agreed with the service provider and subject to section 14(1) of the Act,

transfer to that service provider all capital assets, including subsidiary assets, essential to the performance of that service.

(2) Capital and subsidiary assets that may be transferred in terms of subregulation (1) as essential to the performance of the service referred to in that subsection may include –

- (a) plant, machinery and equipment and any other movable assets used for or in connection with that service;
- (b) land, property and buildings and other immovable structures used for or in connection with that service, irrespective of whether the land, property, buildings or other immovable structures are classified as investment property in the accounting records of the municipality or municipal entity;
- (c) intangible assets recorded in the accounting records of the municipality or municipal entity as an integral part of that service;
- (d) receivables, both short-term and long-term, provided that the transfer does not undermine the legal recoverability of such receivables by the person to whom the assets are transferred;
- (e) investments, including the instruments referred to in regulation 6 of the Municipal Investment Regulations published by Government Notice No. R.308 of 2005;
- (f) cash and bank balances derived from the performance of that service; and
- (g) any cash reserves associated with the performance of that service.

Discharge of borrowings on assets transferred or disposed of in terms of this Chapter

16. The proceeds received from the transfer or disposal of an asset in terms of this Chapter must be used to discharge any borrowing against the asset as at its redemption date.

Transfer agreements

17. (1) A municipality or municipal entity may transfer assets approved for transfer to a private sector party or organ of state in terms of this Chapter, only by way of a written transfer agreement concluded between the transferring municipality or entity and the receiving private sector party or organ of state.

- (2) A transfer agreement must set out the terms and conditions of the transfer, including, as a minimum –
- (a) a sufficient description of the capital asset being transferred in order to identify the asset;
 - (b) particulars of any subsidiary assets that are transferred with the capital asset;
 - (c) particulars of any liabilities transferred with the asset;
 - (d) the amount of compensation payable to the municipality or municipal entity for the transfer of the asset or assets, and the terms and conditions of payment; and
 - (e) the effective date from which the risk and accountability for the asset or assets is transferred to the receiving private sector party or organ of state.

(3) If a capital asset is transferred following the selection through a competitive bidding process of a service provider for the performance of a municipal service referred to in regulation 12(2)(a) or for the performance of a commercial service referred to in regulation 12(2)(b), the transfer agreement referred to in subregulation (1) –

- (a) must contain provision for –
 - (i) contract termination in the case of non- or underperformance;
 - (ii) dispute resolution mechanisms to settle disputes between the parties; and
 - (iii) a periodic review of the agreement once every three years, in the case of an agreement for longer than three years; and
- (b) may be incorporated into any service delivery agreement or procurement contract to be concluded with the service provider.

Access to transfer agreements

18. An agreement in terms of which a municipality or municipal entity transfers a non-exempted capital asset in terms of this Chapter –

- (a) must be made available in its entirety to the council of the municipality or the council of the parent municipality of the municipal entity; and
- (b) may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

CHAPTER 3

TRANSFER OF EXEMPTED CAPITAL ASSETS

Purpose of this Chapter

19. The purpose of this Chapter is –
- (a) to define the circumstances in which the transfer of municipal capital assets to organs of state is for purposes of section 14(6) and section 90(6) of the Act exempted from the other provisions of section 14 or 90;¹⁵ and
 - (b) to prescribe a framework contemplated in section 14(6) and section 90(6) for regulating the transfer in those circumstances of municipal capital assets to organs of state.

Circumstances in which transfer of municipal capital assets to organs of state is exempted from sections 14 and 90

20. (1) Section 14(1) to (5) and section 90(1) to (5) of the Act does not apply if a municipality or municipal entity transfers a capital asset to an organ of state in any of the following circumstances:
- (a) When transfer of a capital asset emanates from a review by a municipality of its service delivery mechanisms for the performance of a municipal service in terms of Chapter 8 of the Municipal Systems Act and the municipality appoints another organ of state as the preferred option for the performance of the service;
 - (b) when transfer of a capital asset emanates from a reorganisation of powers and functions between a parent municipality and its municipal entity, including asset transfers contemplated in section 84 of the Act;
 - (c) when transfer of a capital asset emanates from an assignment of any of the powers or functions of a municipality to another organ of state by national legislation or in terms of a power contained in national legislation, including an assignment of powers or functions following –

¹⁵ Section 14(6) of the Act provides that section 14 does not apply to the transfer by a municipality of capital assets falling within a prescribed category to another municipality, a municipal entity or national or provincial organ of state, provided the transfer takes place in accordance with a prescribed framework. A similar provision is contained in section 90(6) in relation to the transfer of capital assets by municipal entities.

- (i) an adjustment of the division of powers and functions between a district municipality and local municipalities within the district in terms of section 85 of the Municipal Structures Act;
 - (ii) an authorisation in terms of section 84(3) the Municipal Structures Act; or
 - (iii) a re-demarcation of municipal boundaries in terms of the Municipal Structures Act;¹⁶
- (d) when municipal land is transferred to a national or provincial organ of state for housing for the poor or in terms of a national or provincial housing policy; or
- (e) when transfer of a capital asset to an organ of state is required or permitted in terms of national legislation and that legislation determines the conditions of the transfer.

(2) Any transfer of a municipal capital asset to an organ of state in circumstances described in subregulation (1) may be effected only in accordance with this Chapter and any other legislation specifically regulating the transfer of the asset, but in the event of any inconsistency between a provision of this Chapter and such other legislation, that other legislation prevails.

Circumstances in which transfer of municipal capital assets to organs of state is not exempted from sections 14 and 90

21. Sections 14(1) to (5) and 90(1) to (5) of the Act and Chapter 2 of these Regulations must be applied if a municipality or municipal entity transfers a capital asset to an organ of state when none of the circumstances mentioned in regulation 20 apply, including when the asset is transferred in the course of an ordinary commercial transaction between the municipality or entity and the organ of state.

Municipal decision-making processes for transfer of exempted capital assets

22. (1) If an exempted capital asset is to be transferred to an organ of state in connection with the performance of a municipal service contemplated in regulation 20(1)(a) or a reorganisation of powers or functions contemplated in 20(1)(b) –

(a) all decisions relating to the transfer of the capital asset must be taken by the municipality or municipal entity as an integral part of the broader decision-

¹⁶ In such a case the notice required in terms of section 12 of the Municipal Structures Act will regulate the transfer of the asset

making process on the selection of a service provider for the performance of the municipal service or on the reorganisation of powers or functions in terms of the legislation applicable to that process;

- (b) any document prepared by the municipality or municipal entity for the purpose of conducting a public participation process to involve the community in decision-making must include details of the proposed transfer of the capital asset; and
- (c) the proposed transfer of the capital asset must be taken into account in any feasibility study conducted to determine the financial and other implications of the selection of a service provider for the performance of the municipal service or of the reorganisation of powers or functions.

(2) If a feasibility study referred to in subregulation (1)(c) indicates that there will be a significant increase in the costs of the municipality or municipal entity after the transfer of the capital asset to the organ of state, the municipality or the parent municipality of the entity must demonstrate –

- (a) how the costs can be minimised by considering the sharing of administrative, information technology or financial costs between the municipality or municipal entity and the organ of state;
- (b) how much revenue can be generated by the organ of state which will be available to the municipality or municipal entity to offset any increased costs it will incur as a result of the transfer; and
- (c) the extent to which the municipality or municipal entity can rationalise its administrative, information technology and financial costs subsequent to the transfer.

(3) A municipality transferring a capital asset to an organ of state in the circumstances described in regulation 20(1)(a) must take all reasonable steps to ensure that the transfer will result in the continuation of the municipal service concerned at least at the same or better level that would otherwise have been rendered by the transferring municipality had it not transferred the asset.

Identification of exempted capital assets to be transferred to organs of state

23. Before transferring an exempted capital asset to an organ of state in any of the circumstances described in regulation 20(1), a municipality or municipal entity must –

- (a) properly identify the capital asset, including –
 - (i) in the case of a transfer emanating from the circumstances referred to in regulation 20(1)(a), all other assets needed for or directly related to, and staff associated with, the performance of the municipal service concerned;
 - (ii) in the case of a transfer emanating from the circumstances referred to in regulation 20(1)(b) or (c), all other assets needed for or directly related to, and staff associated with, the exercise of the power or function concerned; or
 - (iii) in the case of a transfer emanating from the circumstances referred to in regulation 20(1)(d) or (e), all other assets needed for or directly related to that capital asset; and
- (b) distinguish that asset and staff from the other assets and staff of the municipality or municipal entity.

Transfer of exempted capital assets needed to provide minimum level of basic municipal services

24. (1) If a municipality or municipal entity transfers to an organ of state an exempted capital asset needed to provide the minimum level of basic municipal services, such transfer may only be effected on condition that –

- (a) ownership in the capital asset must immediately revert to the municipality or municipal entity should the organ of state for any reason cease to render the service or is unable to render the service; and
- (b) the organ of state may not without the written approval of the municipality or the parent municipality of the municipal entity –
 - (i) transfer the capital asset to another person;
 - (ii) dispose of the capital asset;
 - (iii) grant a right to another person to use, control or manage the capital asset; or
 - (iv) encumber the capital asset in any way.

(2) Before transferring an exempted capital asset needed to provide the minimum level of basic municipal services, the municipality or municipal entity must be satisfied that the organ of state to which the asset is to be transferred can demonstrate the ability to adequately maintain and safeguard the asset.

(3) The transfer agreement, service delivery or other agreement between the municipality or municipal entity and the organ of state to whom the asset is to be transferred must reflect the conditions set out in subregulation (1).

(4) If the organ of state replaces, upgrades or improves the capital asset transferred to it, the conditions set out in subregulation (1) remain applicable to the new, upgraded or improved capital asset as if it were the original capital asset.

(5) This regulation does not apply to a capital asset needed to provide the minimum level of basic municipal services which is transferred to an organ of state in the circumstances referred to in regulation 20(1)(c) or (d).

Transfer of exempted capital assets contemplated in regulation 20(1)(a) or (c)

25. (1) If a municipality appoints an organ of state as the service provider for the performance of a municipal service as contemplated in regulation 20(1)(a) or if a power or function of a municipality or municipal entity is assigned to an organ of state as contemplated in regulation 20(1)(c), the municipality or entity must, as may be agreed with the organ of state, transfer to that organ of state all capital assets, including subsidiary assets, essential to the performance of that municipal service or the exercise of that power or function

(2) Capital and subsidiary assets that must be transferred in terms of subregulation (1) may include –

- (a) plant, machinery and equipment and other movable assets used for or in connection with the service, power or function referred to in that subregulation;
- (b) land, property and buildings and other immovable structures used for or in connection with that service, power or function, irrespective of whether the land, property and buildings or other immovable structures are classified as

- investment property in the accounting records of the municipality or municipal entity;
- (c) intangible assets recorded in the accounting records of the municipality or municipal entity as an integral part of that service, power or function;
 - (d) receivables, both short-term and long-term, provided that the transfer does not undermine the legal recoverability of such receivables by the organ of state;
 - (e) investments, including the instruments referred to in regulation 6 of the Municipal Investment Regulations, published in Government Notice No. R.308 of 2005;
 - (f) cash and bank balances derived from the performance of that service, power or function; and
 - (g) cash equal to the residual value of assets and liabilities as well as any reserve funds associated with that service, power or function, or alternatively ensure that the organ of state has appropriate access to the cash resources of the municipality or entity.

Transfer of borrowings

26. (1) If a municipality or municipal entity transfers an exempted capital asset to an organ of state, any borrowings or other amounts owing by the municipality or entity specifically associated with the asset being transferred, or with its acquisition, operation or maintenance, must also be transferred to the organ of state.

(2) If the transfer of an exempted capital asset by a municipality or municipal entity to an organ of state emanates from the appointment of an organ of state as the service provider for the performance of a municipal service as contemplated in regulation 20(1)(a) or the assignment of a power or function of a municipality or entity to an organ of state as contemplated in regulation 20(1)(c), any borrowings or other amounts owing by the municipality or entity specifically associated with the performance of that municipal service or the exercise of that power or function, must also be transferred to the organ of state.

(3) In addition, a portion of the outstanding balance of general borrowings on capital expenditure by the municipality or municipal entity not specifically associated with the capital asset being transferred or with the performance of the

relevant municipal service or with the exercise of the relevant power or function must also be transferred to the organ of state, in a ratio of total value of capital assets being transferred to the organ of state to total value of all capital assets of the municipality or entity, as appears in the accounting records of the municipality or entity.

(4) Subregulation (1), (2) or (3) applies only if –

- (a) the creditor to whom the amount is owed consents to the transfer to the organ of state of the amount owing; and
- (b) any legal, operational, administrative or other constraints do not prevent the transfer to the organ of state of the amount owing.

(5) If a borrowing or other amount owing is transferred to an organ of state in terms of subregulation (1), (2) or (3), the organ of state –

- (a) replaces the municipality or municipal entity as debtor in relation to the borrowing or amount owing; and
- (b) becomes liable for the borrowing or amount owing as fully and effectually as if it originally entered into the agreement with the creditor.

(6) If for any reason a borrowing or other amount owing referred to in subregulation (1), (2) or (3) is not transferred to the organ of state –

- (a) the municipality or municipal entity remains liable for the amount owing to the creditor; and
- (b) the municipality or municipal entity and the organ of state must enter into an agreement whereby the organ of state undertakes to compensate the municipality or entity for all payments made by it to the creditor in terms of paragraph (a).

(7) A borrowing or other amount owing referred to in subregulation (1), (2) or (3) must be identified and allocated to the organ of state on a reasonable basis.

Transfer of staff associated with performance of functions assigned to organs of state

27. If the appointment of an organ of state as the service provider for the performance of a municipal service as contemplated in regulation 20(1)(a) or if the

assignment of a power or function of a municipality or municipal entity to an organ of state as contemplated in regulation 20(1)(c), gives rise to the transfer to the organ of state of staff associated with the municipal service, power or function –

- (a) the staff transfer must be consistent with legislation regulating staff transfers in those circumstances, including any applicable labour legislation; and
- (b) the municipality or municipal entity must, unless agreed otherwise with the organ of state or in terms of the applicable labour legislation, transfer all liabilities associated with such staff, including liabilities relating to leave entitlements, medical, post-retirement and other liabilities.

Compensation for transfer of assets

28. (1) A municipality or municipal entity transferring an exempted capital asset and any subsidiary assets to an organ of state may receive compensation for the value of those assets, as may be agreed with the organ of state.

(2) The value of an asset must for purposes of subregulation (1) be determined in accordance with regulation 29.

Valuation of assets

29. (1) The value of a capital asset or any subsidiary assets transferred to an organ of state in terms of this Chapter must be determined in accordance with the accounting standards that the municipality or municipal entity is required by legislation to apply in preparing its annual financial statements.

(2) In the absence of sufficient guidance in those accounting standards regarding the valuation of assets, any of the following valuation methods must be applied:

- (a) historical cost of the asset, adjusted for accumulated depreciation and any impairment losses as at the date of transfer of the asset;
- (b) fair market value of the asset;
- (c) depreciated replacement cost of the asset; or
- (d) realisable value of the asset.

(3) The value of liabilities transferred to an organ of state in terms of regulation 26 must be determined in accordance with the accounting standards that the municipality or municipal entity is required by legislation to apply in preparing its annual financial statements.

(4) In the absence of sufficient guidance in those accounting standards regarding the valuation of liabilities attached to those assets, any of the following valuation methods must be applied:

- (a) the settlement value of the liability, which is the amount that will be paid or the value of the service that will be provided to settle the liability when due; or
- (b) the net present value of the liability, after discounting future settlement values to present values.

Transfer agreements

30. (1) A municipality or municipal entity may transfer assets and liabilities in terms of this Chapter to an organ of state only in accordance with a written transfer agreement concluded between the municipality or entity and the organ of state.

(2) A transfer agreement must –

- (a) set out the terms and conditions of the transfer, including, as a minimum –
 - (i) a sufficient description of the capital asset being transferred in order to identify the asset;
 - (ii) particulars of any subsidiary assets that are transferred with the capital asset;
 - (iii) details of all staff that will be affected and the legislation in terms of which such staff will be transferred;
 - (iv) particulars of any liabilities transferred with the asset;
 - (v) the amount of any compensation payable to the municipality or municipal entity for the transfer of the asset, and the terms and conditions of payment;
 - (vi) the effective date from which the risk and accountability for the asset or assets is transferred to the organ of state;
 - (vii) in instances in which the organ of state is required or chooses to use the billing, information technology or any other administrative

- structure of the municipality, the terms and conditions of such usage together with the basis of compensation for such usage;
- (viii) details of any staff of the municipality or municipal entity that will be available to the organ of state on a temporary or defined basis, together with the basis of compensation for such staff;
 - (ix) where the asset is to be used by both the municipality or municipal entity and the organ of state, the basis of how the asset is to be shared as well as how the costs and benefits of the shared asset will be apportioned between parties;
 - (x) the value of the asset determined in accordance with regulation 29;
 - (xi) appropriate evidence to support the valuation of the asset; and
 - (xii) details of any servitudes, way leaves and rights of access applicable to the asset;
- (b) state that the transfer is effected on the basis of the provisions of this Chapter and that these provisions must for this purpose be regarded as forming part of the agreement; and
 - (c) be signed on behalf of the municipality or municipal entity and the organ of state.

(3) If a capital asset is transferred following the appointment of an organ of state as the service provider for the performance of a municipal service contemplated in regulation 20(1)(a), the transfer agreement referred to in subregulation (1) –

- (a) must provide for –
 - (i) contract termination in the case of non- or underperformance;
 - (ii) dispute resolution mechanisms to settle disputes between the parties;
 - (iii) a periodic review of the agreement once every three years, in the case of an agreement for longer than three years;
 - (iv) the manner in which the organ of state must participate in the integrated development planning process of the municipality, the achievement of minimum service standards and the elimination of service backlogs;
 - (v) co-ordinating processes and mechanisms for budgeting and implementation of budgets;

- (vi) tariff, indigent and credit policies that the organ of state must comply with, the process by which such policies must be reviewed and updated and the process by which the organ of state must participate in such reviews;
 - (vii) indigent support and free basic services that the organ of state must provide and the basis of compensation for such support and services;
 - (viii) the process by which limitations on tariffs used by the organ of state to generate revenue from the service, must be set;
 - (ix) applicable performance measures and targets in terms of Chapter 6 of the Municipal Systems Act;
 - (x) assurances that the organ of state will be able to provide infrastructure necessary for development where relevant; and
 - (xi) requirements for the organ of state to maintain and safeguard the asset for its intended purpose, taking into account the condition of the asset and its estimated remaining life at the date of transfer;
- (b) may contain –
- (i) limitations or restrictions on the use or subsequent transfer of the asset; and
 - (ii) limitations and conditions by which an asset may be used for the provision of security over any borrowing of the organ of state; and
- (c) may be incorporated into any service delivery agreement to be concluded with the organ of state as service provider.

Impact of asset transfers on financial interests of transferring municipalities and municipal entities

- 31.** (1) Before entering into a transfer agreement in terms of regulation 30, a municipality or municipal entity must consider the effect that the transfer of an asset will have on –
- (a) its credit rating and ability to raise long-term or short-term funds in the future; and
 - (b) its financial position and cash flow.
- (2) Subregulation (1) does not apply if the asset is transferred to an organ of state in the circumstances referred to in regulation 20(1)(c), (d) or (e).

Due diligence

32. Before entering into a transfer agreement in terms of regulation 30 the organ of state to whom a capital asset is transferred must undertake and document a due diligence review on the asset and any liabilities transferred to it.

CHAPTER 4**GRANTING OF RIGHTS TO USE, CONTROL OR MANAGE MUNICIPAL CAPITAL ASSETS****Purpose of this Chapter**

33. (1) The purpose of this Chapter is to regulate the granting by municipalities and municipal entities of rights to use, control or manage capital assets in circumstances where sections 14 and 90 of the Act and Chapters 2 and 3 of these Regulations do not apply.¹⁷

(2) This Chapter does not apply to the granting by municipalities and municipal entities of –

- (a) rights to use, control or manage capital assets in terms of public-private partnership agreements referred to in section 120 of the Act and the Municipal Public-Private Partnership Regulations published by Government Notice No. R.309 of 2005; or
- (b) rights on municipal land to housing for the poor to beneficiaries of such housing.

(3) The granting by a municipality or municipal entity of a right to use, control or manage a capital asset must for the purposes of these Regulations be dealt with in terms of Chapter 2 or 3 as if such granting of a right is a transfer within the meaning of that Chapter, if the right –

- (a) is granted for an indefinite or undetermined period;
- (b) is granted for a period which exceeds –
 - (i) the useful life of the capital asset; or

¹⁷ In other words, where the granting of such rights do not amount to the transfer or permanent disposal of the asset, for example when a right is acquired through a leasing, letting or hiring out arrangement.

- (ii) the economic usefulness of the capital asset and which would require the asset, in order to remain economically useful, to be substantially upgraded, altered or replaced during the period for which the right is granted; or
- (c) confers on the person to whom the right is granted –
 - (i) an option to buy or acquire ownership in the capital asset; or
 - (ii) the power to use, control or manage the capital asset as if that person is the beneficial (but not legal) owner of the asset.

Part 1: Decision-making process for municipalities

Granting of rights to use, control or manage municipal capital assets

- 34.** (1) A municipality may grant a right to use, control or manage a capital asset only after –
- (a) the municipal manager has in terms of regulation 35 conducted a public participation process regarding the proposed granting of the right; and
 - (b) the council of the municipality has approved in principle that the right may be granted.
- (2) Subregulation (1)(a) must be complied with only if –
- (a) the capital asset in respect of which the proposed right is to be granted has a value in excess of R10 million; and
 - (b) a long term right is proposed to be granted in respect of the capital asset.
- (3) (a) Only the municipal council may authorise the public participation process referred to in subregulation (1)(a).
- (b) A request to the municipal council for authorisation of a public participation process must be accompanied by an information statement stating –
- (i) the reasons for the proposal to grant a long term right to use, control or manage the relevant capital asset;
 - (ii) any expected benefits to the municipality that may result from the granting of the right;
 - (iii) any expected proceeds to be received by the municipality from the granting of the right; and

- (iv) any expected gain or loss that will be realised or incurred by the municipality arising from the granting of the right.

(4) A municipal council may delegate to the municipal manager its approval power referred to in subregulation (1)(b) excluding the power to grant long term rights to use, control or manage capital assets of a value in excess of R10million.

Public participation process for granting long term rights to municipal capital assets with value in excess of R10 million

35. If the municipal council has in terms of regulation 34(3)(a) authorised the municipal manager to conduct a public participation process in connection with any proposed granting of a long term right to use, control or manage a capital asset with a value in excess of R10 million, the municipal manager must at least 60 days before the meeting of the municipal council at which the decision referred to in regulation 34(1)(b) is to be considered —

- (a) in accordance with section 21A of the Municipal Systems Act –
 - (i) make public the proposal to grant the relevant right together with the information statement referred to in regulation 34(3)(b); and
 - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed granting of the right; and
- (b) solicit the views and recommendations of the National Treasury and the relevant provincial treasury on the matter.

Consideration of proposals to grant rights to use, control or manage municipal capital assets

36. The council of the municipality must, when considering in terms of regulation 34(1)(b) approval for any proposed granting of a right to use, control or manage a capital asset, take into account —

- (a) whether the capital asset may be required for the municipality's own use during the period for which the right is to be granted;
- (b) the extent to which any compensation to be received for the right together with the estimated value of any improvements or enhancements to the capital asset that the private sector party or organ of state to whom the right is granted will

- be required to make, will result in a significant economic or financial benefit to the municipality;
- (c) the risks and rewards associated with the use, control or management of the capital asset in relation to the municipality's interests;
 - (d) any comments or representations on the proposed granting of the right received from the local community and other interested persons;
 - (e) any written views and recommendations on the proposed granting of the right by the National Treasury and the relevant provincial treasury;
 - (f) the interests of any affected organ of state, the municipality's own strategic, legal and economic interests and the interests of the local community; and
 - (g) compliance with the legislative regime applicable to the proposed granting of the right.

Part 2: Decision-making process for municipal entities

Granting of rights to use, control or manage municipal capital assets

37. (1) A municipal entity may grant a right to use, control or manage a capital asset only after –

- (a) the municipal entity has in terms of regulation 38 conducted a public participation process regarding the proposed granting of the right; and
- (b) the council of the parent municipality of the entity has approved in principle that the right may be granted.

(2) Subregulation (1)(a) must be complied with only if –

- (a) the capital asset in respect of which the proposed right is to be granted has a value in excess of R10 million; and
- (b) a long term right is proposed to be granted in respect of the capital asset.

(3) (a) Only the council of the parent municipality of a municipal entity may authorise the public participation process referred to in subregulation (1)(a).

(b) A request to the municipal council for authorisation of a public participation process must be accompanied by an information statement approved by the board of directors of the municipal entity stating –

- (i) the reasons for the proposal to grant a long term right to use, control or manage the relevant capital asset;
- (ii) any expected benefits to the municipal entity that may result from the granting of the right;
- (iii) any expected proceeds to be received by the municipal entity from the granting of the right; and
- (iv) any expected gain or loss that will be realised or incurred by the municipal entity arising from the granting of the right.

(4) The council of the parent municipality of a municipal entity may delegate to the chief executive officer of the entity its approval power referred to in subregulation (1)(b) excluding the power to grant long term rights to use, control or manage capital assets of a value in excess of R10million.

Public participation process for granting long term rights to municipal capital assets with value in excess of R10 million

38. If the council of the parent municipality of a municipal entity has in terms of regulation 37(3)(a) authorised the entity to conduct a public participation process in connection with any proposed granting of a long term right to use, control or manage a capital asset with a value in excess of R10 million, the chief executive officer of the entity must at least 90 days before the meeting of the council of the parent municipality at which the decision referred to in regulation 37(1)(b) is to be considered—

- (a) in accordance with section 21A of the Municipal Systems Act –
 - (i) make public the proposal to grant the relevant right together with the information statement referred to in regulation 37(3)(b); and
 - (ii) invite the local community and other interested persons to submit to the parent municipality comments or representations in respect of the proposed of the right; and
- (b) solicit the views and recommendations of the National Treasury and the relevant provincial treasury on the matter.

Consideration of proposals to grant rights to use, control or manage municipal capital assets

39. The council of the parent municipality of a municipal entity must, when considering in terms of regulation 37(1)(b) approval for any proposed granting of a right to use, control or manage a capital asset, take into account –

- (a) whether the capital asset –
 - (i) is not required for the municipality's own use; or
 - (ii) may be required for the municipal entity's own use during the period the right is to be granted;
- (b) the extent to which the compensation for the right to use, control or manage the capital asset together with the estimated value of any improvements or enhancements to the asset that the private sector party or organ of state to whom the right is granted will be required to make, will result in a significant economic or financial benefit for the municipality or municipal entity;
- (c) the risks and rewards associated with the use, control or management of the capital asset in relation to the interests of the municipality or municipal entity;
- (d) any comments or representations on the proposed granting of the right received from the local community and other interested persons;
- (e) any written views and recommendations on the proposed granting of the right by the National Treasury and the relevant provincial treasury;
- (f) the interests of any affected organ of state, the strategic, legal and economic interests of the municipality and municipal entity and the interests of the local community; and
- (g) compliance with the legislative regime applicable to the granting of the right.

Part 3: Provisions applicable to both municipalities and municipal entities**Conditional approval of rights to municipal capital assets**

40. An approval in principle in terms of regulation 34(1)(b) or 37(1)(b) that a right to use, control or manage a capital asset may be granted, may be given subject to any conditions, including conditions specifying –

- (a) the type of right that may be granted, the period for which it is to be granted and the way in which it is to be granted;
- (b) the minimum compensation to be paid for the right; and

- (c) a framework within which direct negotiations for the granting of the right must be conducted, if granting of the right is subject to direct negotiations.

Granting of rights to use, control or manage municipal capital assets to be in accordance with disposal management system

41. (1) If approval in principle has been given in terms of regulation 34(1)(b) or 37(1)(b) that a right to use, control or manage a capital asset may be granted, the relevant municipality or municipal entity may grant the right only in accordance with the disposal management system of the municipality or entity, irrespective of –

- (a) the value of the asset;
- (b) the period for which the right is to be granted; or
- (c) whether the right is to be granted to a private sector party or organ of state.

(2) The disposal management system of a municipality or municipal entity does not apply to the granting of a right to use, control or manage a capital asset if –

- (a) the municipality –
 - (i) reviews in terms of Chapter 8 of the Municipal Systems Act its service delivery mechanisms for the performance of a municipal service;
 - (ii) selects through a competitive bidding process a private sector party or appoints an organ of state as the service provider for the performance of that municipal service; and
 - (iii) grants that service provider the right to use, control or manage that capital asset as an integral component of the performance of that municipal service;
- (b) the municipality or municipal entity –
 - (i) selects through a competitive bidding process a private sector party or organ of state as the service provider for the performance of a commercial service; and
 - (ii) grants that service provider the right to use, control or manage that capital asset as an integral component of the performance of that commercial service;
- (c) the right to use, control or manage that capital asset is granted as part of a reorganisation of powers or functions between a parent municipality and its municipal entity; or

- (d) the right to use, control or manage that capital asset is granted in circumstances referred to in section 110(2) of the Act.

(3) The municipality or municipal entity may negotiate directly with the private sector party or organ of state to whom the right to use, control or manage a capital asset referred to in subregulation (2)(a), (b), (c) or (d) is to be granted.

(4) Before granting the right to use, control or manage a capital asset, the municipality or municipal entity must be satisfied that the private sector party or organ of state to whom the right is to be granted can demonstrate the ability to adequately maintain and safeguard the asset.

Preconditions for granting of long term rights to municipal capital assets as part of selection of service providers for performance of municipal or commercial services

42. If a municipality or municipal entity intends to grant to a private sector party or organ of state a long term right to use, control or manage a capital asset with a value in excess of R10 million following the selection of that private sector party or organ of state as the service provider for the performance of a municipal service referred to in regulation 41(2)(a) or for the performance of a commercial service referred to in regulation 41(2)(b) –

- (a) all assets needed or directly related to the performance of that service must be properly identified, to distinguish those assets from the other assets of the municipality or municipal entity;
- (b) the decision required in terms of regulation 34(1)(b) or 37(1)(c) relating to the granting of the right must be taken as an integral part of the broader decision-making process on the selection of a service provider for the performance of that service; and
- (c) all documents prepared for the purpose of that decision must be taken into account in any feasibility study conducted to determine the financial and other implications of appointing a service provider for the performance of that service.

Continuation of municipal services

43. If a municipality or municipal entity grants a right to use, control or manage a capital asset used for or in connection with a municipal service, the municipality or entity must take all reasonable steps to ensure that the granting of the right will result in the continuation of the service at least at the same or better level that would otherwise have been rendered by the municipality or entity had it not granted the right.

Granting of rights to use, control or manage municipal capital assets needed to provide minimum level of basic municipal services

44. If approval in principle has been given in terms of regulation 34(1)(b) or 37(1)(b) that a right to use, control or manage a capital asset may be granted and that asset is needed to provide the minimum level of basic municipal services, such right may only be granted on condition that –

- (a) the granting of the right immediately lapses should the private sector party or organ of state to whom the right is granted, for any reason cease or become unable to render the service for which the capital asset is used; and
- (b) the private sector party or organ of state to whom the right is granted may not without the written consent of the municipality or the parent municipality of the municipal entity grant a right to another person to use, control or manage that capital asset.

Agreements granting rights to use, control or manage municipal capital assets

45. (1) A municipality or municipal entity may grant a right to use, control or manage a capital asset to a private sector party or organ of state only by way of a written agreement concluded between the municipality or entity and the private sector party or organ of state to whom the right is granted.

- (2) An agreement referred to in subregulation (1) must –
 - (a) set out the terms and conditions on which the right is granted, including, as a minimum –
 - (i) a sufficient description of the capital asset in respect of which the right is granted, in order to identify the asset;

- (ii) particulars of any subsidiary assets that are to be made available with the capital asset;
 - (iii) the period for which the right is granted;
 - (iv) the amount of compensation payable to the municipality or municipal entity for the granting of the right, and the terms and conditions of payment;
 - (v) requirements for the private sector party or organ of state to whom the right is granted to maintain and safeguard the asset for its intended purpose, taking into account the condition of the asset and its estimated remaining life at the date of granting of the right;
 - (vi) where the asset is to be used by the municipality or municipal entity and the public sector party or organ of state to whom the right is granted, the basis of how the asset is to be shared as well as how the costs and benefits of the shared asset will be apportioned between parties;
 - (vii) the extent to which the public sector party or organ of state to whom the right is granted will be required to make improvements or enhancements to the asset, and the terms and conditions regulating such improvements or enhancements;
 - (viii) a statement to the effect that the risk and accountability for the asset is transferred to the public sector party or organ of state to whom the right is granted;
 - (ix) the effective date from which the risk and accountability for the asset is transferred; and
 - (x) a clause disallowing the private sector party or organ of state to whom the right is granted from ceding or subcontracting the right to another person; and
- (b) be signed on behalf of the municipality or municipal entity and the private sector party or organ of state to whom the right is granted.

(3) If a long term right to a capital asset with a value in excess of R10 million is granted following the selection of a service provider for the performance of a municipal service referred to in regulation 41(2)(a) or for the performance of a

commercial service referred to in regulation 41(2)(b), the agreement referred to in subregulation (1) –

- (a) must contain provision for –
 - (i) contract termination in the case of non- or underperformance;
 - (ii) dispute resolution mechanisms to settle disputes between the parties;
and
 - (iii) a periodic review of the agreement once every three years, in the case of an agreement for longer than three years; and
- (b) may be incorporated into any service delivery agreement or procurement contract to be concluded with the service provider.

Access to agreements granting rights to use, control or manage municipal capital assets

46. An agreement granting a right to use, control or manage a capital asset to a private sector party or organ of state –

- (a) must be made available in its entirety to the council of the relevant municipality or to the council of the parent municipality of the relevant municipal entity; and
- (b) may not be withheld from public scrutiny except as provided for in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

CHAPTER 5

GENERAL MATTERS

Gains, losses and associated costs not budgeted for to be included in adjustments budgets

47. Any gain that will be realised or any loss and all associated costs that will be incurred by a municipality or municipal entity in respect of the transfer or disposal of, or the granting of a right to use, control or manage, an asset, if not budgeted for in the approved annual budget of the municipality or entity, must be included in the next adjustments budget of the municipality or entity referred to in section 28 and 87 of the Act, respectively.

Assets to remain subject to all existing encumbrances, rights and servitudes

48. The transfer of an asset, or the granting of a right to use, control or manage an asset, in terms of these Regulations does not affect any existing encumbrances, rights and servitudes attached to the asset.

Transfer or disposal of and rights granted in respect of assets to be effected in accordance with the law

49. The transfer or disposal of an asset or the granting of a right to use, control or manage an asset in terms of these Regulations must be given effect to and formalised in accordance with any legislation applicable to such transfers, disposals or granting of rights.

Exemptions

50. These Regulations do not apply to –

- (a) any security or guarantee provided by a municipality or municipal entity to a lender or a representative nominated by a lender and that is used as collateral for any borrowings by the municipality or entity in terms of section 48 of the Act;
- (b) the transfer by a municipality or municipal entity of moneys owed by consumers to a collector appointed in terms of the supply chain management policy of the municipality or entity to enable the collector to collect amounts due to the municipality or entity;
- (c) cash deposited in a bank account in the name of a municipality or municipal entity or an investment made in terms of the investment policy of a municipality or entity referred to in the Municipal Investment Regulations, published by Government Notice R.308 of 2005;
- (d) a security deposit made in the name of a municipality or municipal entity that is required for goods or services acquired in terms of the supply chain management policy of a municipality or entity; or
- (e) a prepayment that is made in terms of short-term insurance or any other related services acquired in terms of the supply chain management policy of a municipality or municipal entity.

Short title and commencement

51. These Regulations may be cited as the Asset Transfer Regulations, 2007, and take effect on the date of publication of the Regulations in the Government Gazette.
