

Date: April 1, 2020

To: Mayor and Members of Council

From: Andra L. Maxwell B.A., LL.B., CIC.C, City Solicitor

Originator's files:

Meeting date:  
April 8, 2020

## Subject

***Bonusing: An overview of section 106 of the Municipal Act, 2001***

## Recommendation

That the report of the City Solicitor dated March 31, 2020 titled "Bonusing: An overview of section 106 of the *Municipal Act, 2001*, be received for information.

### Report Highlights

- A municipality's power to make grants and provide economic development services is subject to the anti-bonusing provisions contained in s. 106 of the *Municipal Act, 2001*
- Municipalities are prohibited from using tax funds to give an obvious advantage to one or a few commercial or industrial enterprises over their business competitors and can be challenged in the Superior Court of Justice for violating s.106
- "bonusing" is not clearly defined and each proposed contract or financial arrangement must be examined on its own facts to determine whether it violates the Act.
- Arrangements that provide a financial benefit to one or a small group of commercial enterprises and give them an advantage over their competitors, without a clear corresponding benefit to the municipality, are most likely to constitute improper bonusing.
- Arrangements that benefit an entire class of businesses, across an entire municipality, while maintaining a level playing field among competitors, are less likely to be challenged for bonusing.

## Background

Whenever a municipality enters into a commercial agreement with a for-profit enterprise (lease, land transfer, grant, funding arrangement etc.) or contemplates providing financial aid, it must take care not to violate the anti-bonusing provisions contained in s. 106 of the *Municipal Act*,

2001 (the “Act”), otherwise, it is subject to a challenge in the Superior Court of Justice. Municipalities are creatures of statute and only possess the powers granted to them by the Province of Ontario. A municipality does not have jurisdiction to pass a by-law, or grant assistance, that is prohibited by the Act.

The portion of the Act entitled “Economic Development Services” provides municipalities with several tools, including the power to establish programs for small business, as well as a general power to make grants or give financial aid to individuals or groups under s. 107. The ability to make grants, however, is subject to the s. 106 anti-bonusing provisions, which prohibits municipalities from granting assistance or a bonus to commercial or industrial enterprises:

**106 (1)** Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.

(2) Without limiting subsection (1), the municipality shall not grant assistance by,

- (a) giving or lending any property of the municipality, including money;
- (b) guaranteeing borrowing;
- (c) leasing or selling any property of the municipality at below fair market value; or
- (d) giving a total or partial exemption from any levy, charge or fee.

#### **Exception**

(3) Subsection (1) does not apply to a council exercising its authority under subsection 28 (6), (7) or (7.2) of the *Planning Act* or under section 365.1 of this Act

## **Comments**

The purpose of s. 106 is to prevent a municipality from using tax funds to give an unfair advantage to one commercial or industrial enterprise over its business competitors.

The term “bonus” is not defined, but has historically been interpreted as “conferring an obvious advantage or undue benefit” to private parties within the commercial market place. The courts have recognized that all municipal contracts confer an advantage or benefit of some kind and that public-private partnerships, for example, should be permitted so long as the municipality is receiving a corresponding benefit under the arrangement. When considering whether there has been a violation, the court will take a wholistic approach and look at an entire project, initiative or transaction to determine whether there has been bonusing, rather than focusing on a single element of the arrangement.

There is no exhaustive list of what constitutes bonusing and each situation must be considered on its own facts. Some features which suggest there has been bonusing are:

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- the assistance is given to an industrial or commercial enterprise, as opposed to an individual or a non-profit entity;
  - only one or a few enterprises in the municipality have been benefitted, as opposed to a scheme of general application that benefits all enterprises of the same type across the entire municipality;
  - property is leased or sold by the municipality at less than fair market value, with no obvious benefit to the municipality in return;
  - the municipality is “giving something for nothing”; and/or
  - the assistance will give the recipient an advantage over its competitors in the market place.

When municipalities have been challenged for bonusing, the courts have generally shown deference to the policy decisions and judgment of municipal councils concerning economic development. The courts have held that the power of a municipality to make grants under s. 107 of the Act should be interpreted broadly, while the prohibitions against bonusing in s. 106 should be interpreted narrowly. This means that, in an ambiguous situation, the court will lean towards finding that the arrangement is permitted, rather than leaning towards finding it prohibited bonusing.

## Financial Impact

N/A

## Conclusion

Bonusing is a grey area, open to interpretation. Each proposal must be evaluated on its own facts to determine whether it violates s. 106. Arrangements that provide a financial benefit to one or a small group of commercial enterprises and give them an advantage over their competitors, without a clear corresponding benefit to the municipality are most likely to constitute improper bonusing. Arrangements that benefit an entire class of businesses, across an entire municipality while maintaining a level playing field among competitors, are less likely to be challenged for bonusing.



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