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March 19, 2019

Craig Manley, Acting CAO

Haldimand County

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NOA 1EO

Dear Sir:

Re: Community Improvement Provisions - Grant Offers Pursuant to Planning Act

The purpose of this report is to have to provide Council with an explanation of the statutory framework, and to provide commentary from relevant case law respecting the following matters:

- 1. Overarching statutory framework and case law commentary.**
- 2. Bonusing.**
- 3. Community improvement plans.**

In preparing this report, we reviewed relevant provisions of the Municipal Act ("the Act") and the Planning Act, as well as various cases decided by Ontario courts, respecting each of the above matters. We also reviewed the material delivered to the County by Rob Duncan, which we understand will form the basis of his presentation to Council on March 26, 2019.

1. Overarching statutory framework and case law commentary

In order to understand the statutory provisions dealing with bonusing, it is helpful to consider some general provisions of the Act respecting the powers of municipalities in Ontario.

Municipalities are created by the Province to be responsible and accountable governments with respect to matters within their jurisdiction, and they are given powers and duties under the Act (and under other statutes) for the purpose of providing good government with respect to those matters.

The powers of the municipality are to be broadly construed.

If there is an ambiguity as to the powers of a municipality, the ambiguity should be resolved to include rather than exclude the powers that the municipality had before the Act came into effect. A municipality has the capacity, rights, powers and privileges of a natural person for the purposes of exercising its authority.

A single tier municipality may provide any service or thing that it considers necessary or desirable for the public interest.

Bylaws enacted in good faith are not subject to being quashed by a court because they may be unreasonable.

The above powers are not absolute, and depending on the issue, are subject to the restrictions and limitations as set out in the Act. One such set of restrictions involves the bonusing provisions referenced below.

The courts in Ontario have commented on these provisions and have offered the following confirmation and insights:

The statutory provisions regarding broad and liberal interpretation of municipal powers are necessary in order to give municipalities the tools to meet the challenges of governing in the 21st century.

The broad interpretation of provisions respecting a municipality's powers (subject to statutory restrictions) is necessary to achieve the legitimate interests of the municipality and its inhabitants. Given the above, any finding that a municipality has acted outside of its jurisdiction should be limited to the clearest of cases.

Whether a bylaw referencing an arrangement entered into by a municipality turns out to be a good deal or a bad deal for the municipality is not relevant to the interpretation of a municipality's powers or to the issue of good or bad faith in assessing the bylaw.

2. Bonusing

(a) Statutory Framework

The bonusing provisions are found in Sections 106 and 107 of the Act. They read as follows:

Assistance prohibited

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. 2001, c. 25, s. 106 (1).

Same

(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. 2001, c. 25, s. 106 (2).

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. 2001, c. 25, s. 106 (3); 2002, c. 17, Sched. A, s. 23; 2006, c. 23, s. 34.

Section Amendments with date in force (d/m/y)

General power to make grants

107 (1) Despite any provision of this or any other Act relating to the giving of grants or aid by a municipality, subject to section 106, a municipality may make grants, on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, including a fund, within or outside the boundaries of the municipality for any purpose that council considers to be in the interests of the municipality. 2001, c. 25, s. 107 (1).

Loans, guarantees, etc.

- (2) The power to make a grant includes the power,
- (a) to guarantee a loan and to make a grant by way of loan and to charge interest on the loan;
 - (b) to sell or lease land for nominal consideration or to make a grant of land;
 - (c) to provide for the use by any person of land owned or occupied by the municipality upon such terms as may be fixed by council;
 - (c.1) to provide for the use by any person of officers, employees or agents of the municipality upon such terms as may be fixed by council;
 - (d) to sell, lease or otherwise dispose of at a nominal price, or make a grant of, any personal property of the municipality or to provide for the use of the personal property on such terms as may be fixed by council; and
 - (e) to make donations of foodstuffs and merchandise purchased by the municipality for that purpose. 2001, c. 25, s. 107 (2); 2006, c. 32, Sched. A, s. 49.

Section Amendments with date in force (d/m/y)

The highlighting has been added. I do not propose to paraphrase the above sections as I believe they are self-explanatory. The apparent conflict between S. 106 and 107 is resolved at least in part with reference to the statement in 107 that it is subject to 106. This portion of the report, however,

deals solely with S. 106, which is the main bonusing provision. S. 107 is not technically necessary for the purposes of this report, but I have included the language because it does make reference to the bonusing prohibition of S. 106. The last portion of the report deals with Section 28 of the Planning Act, which as explained in that section, provides the County with the authority to make the grants, loans etc. which have been reference in Mr. Duncan's submission.

(b) Case Law Commentary

There are very few Ontario court decisions dealing with bonusing. The leading case is a 2012 decision of the Ontario Court of Appeal. The case name is Friends of Lansdowne Inc. vs. City of Ottawa and Ottawa Sports and Entertainment Group, intervenor. The facts of that case are not particularly relevant to this report, but the principles enunciated are both relevant and important, and are summarized below.

- the broad powers given to municipalities referenced above in this report are restricted by the bonusing provisions of section 106;
- while municipal powers are to be interpreted broadly, restrictions on those powers are to be narrowly construed;
- the bonusing provisions are designed to prevent municipalities from giving an unfair advantage to private commercial parties;
- to qualify as a bonus there must be an obvious advantage or an undue benefit conferred on a commercial enterprise;
- this last point is tempered by the fact that all municipal contracts confer a benefit on a contractor (i.e. having the work and making a profit). Interpreting a "bonus" so broadly as to prohibit ordinary contracts would lead to absurd results;
- an undue benefit (and therefore a bonus) is one that, on the spectrum of benefits, falls closer to providing a party with an un-merited windfall;
- whether or not a municipality has made a good deal is not a relevant consideration in determining whether or not a transaction is a bonus;

3. Community improvement plans.

(a) Statutory Framework

This section of our report deals with community improvement project areas and community improvement plans. The report is provided to Council in light of the intended presentation to be made by Rob Duncan at the March 26 CIC meeting in which he is suggesting that Council does not have the legal authority to offer grants under its Downtown and Rural Community Improvement Plans.

Section 28 of the *Planning Act* outlines the municipal authority for the implementation of a community improvement plan.

Section 28(1) contains definitions of "community improvement," "community improvement plan," and "community improvement project area". They are defined as follows:

- **“community improvement”** means the planning or replanning, design or redesign, resubdivision, clearance, development or redevelopment, construction, reconstruction and rehabilitation, improvement of energy efficiency, or any of them, of a community improvement project area, and the provision of such residential, commercial, industrial, public, recreational, institutional, religious, charitable or other uses, buildings, structures, works, improvements or facilities, or spaces therefor, as may be appropriate or necessary;
- **“community improvement plan”** (“CIP”) means a plan for the community improvement of a community improvement project area; and
- **“community improvement project area”** means a municipality or an area within a municipality, the community improvement of which in the opinion of the council is desirable because of age, dilapidation, overcrowding, faulty arrangement, unsuitability of buildings or for any other environmental, social or community economic development reason.

There are a number of conditions which must be met before a municipality can develop a CIP.

Two of those conditions are referenced in Section 28 (2). The first requires that there must be an official plan in effect that contains provisions relating to community improvement. Once it is determined that the official plan contains those provisions, the second empowers Council to enact a bylaw to designate the whole or any part of an area covered by the official plan as a community improvement area.

In addition, there are requirements for public meetings and Council approval, as well as regulatory requirements for circulation of the proposed CIP, including to the Province, even though it is approved locally. These provisions are included in s. 28(5) and (5.2), which incorporate by reference the detailed public notice and circulation provisions of S. 17 of the planning Act.

Each of those conditions and requirements are designed to ensure transparency in the CIP process.

Once those conditions are met, S. 28 then sets out a series of powers, and limitations on those powers in developing CIP's for community improvement purposes.

The powers available to a municipality under section 28 for community improvement purposes include:

- Acquiring, holding, clearing, grading, or otherwise preparing land for community improvement (s. 28(3));
- Preparing a CIP for the community improvement area suitable for adoption (s.28 (4));
- Constructing, repairing, rehabilitating, or improving buildings on land acquired or held by the municipality (s. 28(6)(a));

- Selling, leasing, or otherwise disposing of land acquired or held by the municipality (s. 28(6)(b));
- Providing grants and loans to owners, tenants, and their assignees of lands and buildings within the community improvement project area to pay for eligible costs of the community improvement plan, including costs related to environmental site assessment, environmental remediation, development, redevelopment, construction and reconstruction of lands and buildings for rehabilitation purposes or for the provision of energy efficient uses, buildings, structures, works, improvements or facilities (s. 28(7)); and
- Providing property tax assistance for environmental remediation purposes (s. 28(7.1)).

In addition to the *Planning Act* provisions, S.365.1 of the *Municipal Act* empowers a municipality to cancel some or all taxes in a community improvement area.

The community improvement planning powers that relate to land under subsection 28(6), grants or loans under subsections 28(7) and (7.1), and property tax assistance under subsection 28(7.1) and S.365.1 of the *Municipal Act* are exceptions to the prohibition against bonusing contained in section 106 of the *Municipal Act*. Accordingly, without a valid community improvement plan, grants and loans to private property owners would be illegal.

There is a limitation placed on a municipality undertaking this community improvement process as well. S. 28 (7.3) provides that the total of the grants, loans and tax assistance that is provided in respect of the lands and buildings shall not exceed the eligible costs of the community improvement plan (as described s. 28 (7) and in bullet point 5 above) with respect to those lands and buildings.

(b) Case Law Commentary

Case law commenting community improvement plans is extremely limited. The only relevant decision we have found is *Marvin Hertzman Holdings Inc. v. Toronto (City)*, 1998 CanLII 19426 (ON SCDC).

In that case, the Divisional Court was reviewing a decision of a Joint Board of the Ontario Municipal Board and Board of Inquiry (“the Joint Board”). The Joint Board was hearing appeals regarding the City of Toronto’s plan to proceed with a community improvement plan which would rejuvenate the intersection of Yonge Street and Dundas Street to create what is now known as Yonge-Dundas Square through a public-private development project.

The Joint Board had found that section 28(1) should be given a broad and liberal interpretation and that the definition of “community improvement project area” is sufficiently broad to allow municipalities to designate community improvement project areas on the basis of whether there may be social or economic benefits to such a designation regardless of whether the area suffers from any physical dilapidation or blight.

The Court rejected the submission that the enumerated terms in section 28(1) are specific terms of a common nature relating to the physical condition of buildings. Rather, the Court explained that the ordinary meaning and use of the phrases “faulty arrangement” and “unsuitable” in the definition of “community improvement project area” permits reference to matters other than physical blight and may relate to unsuitability and faulty arrangements from a land use planning perspective.

Further, the use of the word “community improvement” informs the definition of “community improvement project area” and the concluding words “for any other environmental, social or community economic development reason” import a wide interpretation to the definition.

This decision is consistent with the statutory provisions and case law comments included under the heading “Overarching statutory framework and case law commentary” at the beginning of this report, namely that municipal powers are to be broadly construed.

4. Application of Principles to Haldimand County’s CIP’s

Mr Duncan included a list of projects at slide 6 to his presentation. With the exception of the McClung subdivision matter and some of the listed arrangements with non-profit organizations, each project deals with community improvement plans.

The McClung loan was made pursuant to S. 110 of the Act. We provided advice on that loan arrangement and are confident that it is fully compliant with the municipal capital facilities provisions of S.110.

Mr Manley advises that, the listed items relating to non-profit organizations were made in accordance with County policy. In any event it is our opinion that these are neither commercial nor industrial enterprises and accordingly do not constitute bonusing. This last comment applies to the Caledonia Fair item as well.

We have not reviewed the remaining project files; rather, we have discussed the statutory requirements with Craig Manley, and he advises as follows:

1. The County OP contains the necessary policies relating to community improvement.
2. The County undertook the necessary study to identify the relevant community improvement project areas. The initial study was conducted in 2008, and was updated by a second study in 2011.
3. The County followed necessary statutory processes including the required public notification and meetings, as well as circulation of the document to relevant agencies.
4. After those processes were completed, Council adopted the necessary by-laws to adopt the Community Improvement Plans.

5. With respect to individual plans in amounts over \$5,000, staff provide a report to Council explaining the project, the cost and confirmation that it complies with County policies and statutory requirements. For plans costing less than \$5,000, the approval authority has been delegated to Mr. Manley, who receives the same type of information from staff to establish compliance with County policy and provincial legislation.

Based on the information received from Mr. Manley, it appears clear that the conditions of the Planning Act have been met and accordingly the exemption to section 106 of the Municipal Act has been properly applied. The result is that there is no conflict in law relative to the bonusing provisions of the Municipal Act.

5. Response to Points Raised by in the Delegation's Slides

At your request we also reviewed the material provided by the delegate in terms of our review of the legislation and case law and offer the following comments:

1. "The purpose of aid under a community improvement plan is to assist with reconstruction or redesign of built areas to improve use."

Response:

Based on the definition of "community improvement" and "community improvement project area," and the Divisional Court's comments in *Marvin Hertzman Holdings Inc.*, Mr. Duncan's comment results from an extremely narrow reading of section 28 and ignores the breadth of what is permitted by the definitions, as refined by the case law.

2. "The *Planning Act* exception to bonusing was specifically intended to give aid to allow buildings, that act as impediments to economic development, to be removed, redesigned, repurposed, or replaced with, for example, a commercial strip mall or building that would generate considerably more tax revenue while also creating new employment opportunities. Such a development would benefit the community, even though aid to a developer would otherwise not be allowed."

Response:

Again, this is an extremely narrow understanding of what is permitted under section 28.

3. "Currently, all of Haldimand County is designated as a community improvement area to permit grants and loans for purposes not intended under the *Planning Act*, which deals exclusively with land use, development and redevelopment."

Response:

There is nothing in the *Planning Act* that precludes a municipality from designating its entirety as a community improvement project area. In fact, the definition of "community improvement project area" seems to contemplate that the entirety of a municipality may be designated as a

community improvement project area. Such a designation may be made for any environmental, social or community economic development reason.

4. "There is no mention of charitable contributions being allowed in Ontario's *Municipal Act* and therefore it is not permitted under the Act."

Response:

While it is unclear why this comment is included, I expect the implication is that a municipality providing grants or loans to land owners and tenants in a community improvement project area to pay for eligible costs of a community improvement plan is, in effect, making a charitable contribution. The authority for such grants and loans is specifically provided in section 28(7). Accordingly, as long as the municipality complies with the provisions of section 28, such grants and loans are not "charitable contributions." Furthermore, in our opinion the right of a municipality to make grants under S.107 of the Act includes the right to make charitable grants.

If the charitable comment refers to some of the contributions included in slide 6 of Mr. Duncan's material, then as indicated earlier in this report, we would point out that these are not commercial or industrial enterprises, and the loans, grants etc. made to these organizations do not offend the bonusing provisions of S.106 of the Act,

I trust that all of the above is satisfactory but if there are any questions please feel free to call.

Yours very truly,

Sullivan, Mahoney LLP

Per:

A handwritten signature in black ink, appearing to be 'W. B. McKaig', written over a horizontal line.

Woodward B. McKaig
WBM*tlS

Cc: Don Boyle

Cc: Evelyn Eichenbaum