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A New Common Law Exception to Section 106 of the *Municipal Act, 2001*

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An anti-bonusing clause is a common provision in municipal legislation throughout all of Canada. In Ontario, such clause is contained in section 106 of the *Municipal Act, 2001* (the "Act"), which provides that:

> (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.

Section 106 goes on to specify the scope of the prohibition:

> (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.

The section also provides a narrow carve-out:

> (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.

The effect of subsection 106(3) is to expressly authorize a municipality to provide financial assistance with respect to community improvement plans (section 28 of the *Planning Act*) and cancellation of property taxes to promote the remediation of brownfield sites (section 365.1 of the Act).

The Act does not contain a definition of "bonus" or "bonusing". In common law "bonusing" means the conferring of an "obvious financial advantage" to a particular person or entity.

In Ontario, the courts have recently considered ratepayer challenges to municipal decisions involving agreements, in part, on the basis that they contravene section 106 of the Act. In matters, involving the City of Fort Erie and the City of Ottawa, the courts found that the allegations of illegal bonusing were unfounded and the courts make some clear and important pronouncements on the nature of municipal agreements and arrangements with private sector developers.

In *Friends of Lansdowne Inc. v. Ottawa (City)* (2011), 88 M.P.L.R. (4th) 100, Justice Hackland of the Ontario Superior Court of Justice dismissed an application brought by the Friends of Lansdowne Inc. challenging the City's actions and authority in relation to an agreement with a consortium of developers ("OSEG") for the purposes of revitalizing and redeveloping Lansdowne Park. The by-laws authorizing contractual arrangements for this revitalization and redevelopment were challenged for being enacted in bad faith and for breaching section 106 of the Act. The court found that the applicant had engaged in a

misapplication of the anti-bonusing provision and that the applicant had incorrectly "cherry-picked" those aspects of the deal which conferred a private benefit on developers. On appeal, the Ontario Court of Appeal upheld the City's by-laws[1], and found that there was no breach of section 106 of the Act. The courts found that the arrangement between the City and OSEG was a complex and multi-faced "partnership" arrangement to revitalize and redevelop Lansdowne Park

At the first instance, Justice Hackland found that:

> "The commercial arrangement must be viewed as a whole and the question asked as to whether the City has conferred an obvious advantage on the private developer (OSEG) which is not balanced by a concomitant benefit to the City." (S.C.J. decision at para. 77, emphasis added).

He also determined that an isolated provision cannot be interpreted as a prohibited bonus if that interpretation is not available upon reading the contract as a whole.

The courts confirmed that the prohibition against granting bonuses in section 106 should be restrictively interpreted. The courts also determined that all municipal contracts confer an advantage or benefit of some kind because they inevitably provide work and profit to the contractor. Further, the granting of an advantage is to be anticipated; the granting of an obviously undue advantage is prohibited – on the spectrum of benefits, it falls closer to providing a party with an unmerited windfall.Justice Hackland employed the "obvious advantage" standard and found at paragraph 84 that OSEG had not received an obvious advantage

In *Nowak v. Fort Erie (Town),* 2012 ONSC 2152, the court again considered allegations that the Town violated section 106 of the Act. In this instance, the Town entered into an agreement with a developer to convey a portion of land to the developer in order for the developer to construct a 12-storey residential condominium. The Town received no cash for the transaction but it was agreed that the developer would provide various community benefits that were worth more than the appraised value of the property. Several property owners brought an action against the Town arguing that the agreement was *ultra vires*, constituted an illegal bonus, and was not supported by consideration. The court rejected these arguments and found that the Town has the power to enter into contracts and is authorized to provide any service that it considers necessary for the public.The court applied the decisions in the *Friends of Lansdowne* case and determined that:

> The overall contractual arrangement between the Town and the Molinaro Group cannot be said to involve "something for nothing". When the transaction as a whole is examined there are clearly concomitant obligations from both parties and there is no obvious or undue advantage being conferred... (at para. 31).

The court also found that although no cash was exchanged in the transaction, the community benefits to be provided by the developer, as well as the positive economic impacts of the development, represented adequate consideration. The court also noted that the municipality actions in this regard were consistent with its natural person powers as set out in the Act. This decision is currently under appeal.

The decisions in *Friends of Lansdowne* and *Nowak* signal that Ontario courts are prepared to adopt a holistic approach to interpreting agreements between businesses and municipalities. Under each of these transactions a municipality provided value to a developer which, taken alone, may have offended section 106 of the Act. The respective courts, however, insisted on a narrow interpretation of the section based on an analysis of the contractual arrangements as a whole. In neither case did the developers enjoy an

[1] 98 M.P.L.R. (4th) 1

obvious or undue advantage, and the respective municipalities were found not to have offended the anti-bonusing provision of the Act.

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