

Municipal Bonusing: “Obvious undue advantage” remains the threshold, but still little judicial guidance on how municipalities should draw the line

Municipal, Land Use, and Development

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Section 106 of the Ontario Municipal Act, 2001 is a much worried about “anti-bonusing” provision of broad application. It is worrisome because its limits and applications are far from clear. By its terms, the provision purports to create an unqualified prohibition on municipalities directly or indirectly assisting any manufacturing, industrial, or commercial enterprise through “bonusing”. The scope of prohibited “bonusing” extends to the giving or lending of any municipal property, including money, guaranteeing borrowing, leasing or selling any municipal property, or giving a total or partial exemption from any levy, charge, or fee.

Even though the anti-bonusing provision, by its terms, would appear to place very significant and wide-ranging restrictions on municipal action, in the little judicial consideration the provision has received, it has actually been construed and applied quite narrowly. Four Ontario cases have now considered the anti-bonusing provision, with the most recent consideration being in *Vincorp Financial Ltd. v. The Corporation of the County of Oxford* (2014) ONSC 2580 released April 30, 2014.

The judicial consideration prior to *Vincorp* establishes several principles applicable to the interpretation of the anti-bonusing provision. Stated briefly these are:

1. Powers conferred upon municipalities by the Municipal Act, 2001 are to be given a broad and purposive interpretation;
2. The anti-bonusing provision restricts municipal powers, therefore must be construed narrowly so as not to unduly detract from municipal powers;
3. All municipal contracts confer an advantage or benefit of some kind;
4. The anti-bonusing provision should be construed as only prohibiting the granting of “obvious undue advantages”.

The challenge with the anti-bonusing provision lies in the application of these principles to the facts of any particular situation. Determining whether there has been a contravention of the anti-bonusing

provision requires a judgment call as to whether there has been an “obvious undue advantage” or, stated another way, an “unmerited windfall” to some enterprise. These are inherently subjective concepts. In the absence of further judicial guidance, precisely how municipalities and their advisors should go about making such a judgment call remains unclear.

In Vincorp, the Court had an opportunity to provide further legal guidance, but unfortunately it did not do so. The Vincorp case involved an expropriated shopping mall owner who alleged that the County of Oxford had provided a bonus to Toyota by expropriating the mall lands and then transferring those lands to Toyota at the “expropriation price” as opposed to “fair market value”. There was no evidence and no specific finding by the Court as to the actual difference, if any, between these values.

The Court in Vincorp rejected the mall owner’s position, but in reaching its conclusion simply adopted and applied past judicial analysis to conclude that any advantage conferred on Toyota did not pass the pre-existing threshold of “obvious undue advantage”. The Court noted that the County and the Province would derive significant economic benefits as a result of Toyota building a new manufacturing plant in Woodstock, such that any benefit that might have accrued to Toyota through the transfer of the mall lands at the expropriation price could not be considered an “obvious undue advantage”.

The Vincorp decision’s greatest significance appears to be that it involves a novel, albeit failed, attempt to apply the anti-bonusing provision to an expropriation for a municipal economic development purpose. Beyond that, however, it provides little by way additional judicial guidance as to how to distinguish between “obvious undue advantages” and “merited advantages”.

In the event an appeal from Vincorp is heard (and we understand an appeal has been filed), then it would be hoped that the Court of Appeal takes the opportunity to provide further guidance on how the distinction between “obvious undue advantages” and “merited advantages” ought to be made. Municipalities should monitor for further judicial guidance on the anti-bonusing provision and, in the meantime, exercise caution to ensure that any advantage conferred by the municipality cannot be characterized as “undue”. At present, this appears to mean that the municipality needs to be able to point to significant (and perhaps proportionate) benefits to itself and/or the public any time an advantage is conferred, otherwise a municipality may be exposed to allegations of illegal bonusing.

* * This article is intended only to inform and educate. It is **not legal advice**. Be sure to contact a lawyer to obtain legal advice on any specific matter.

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