

## **Farming Assistance Ad-Hoc Committee Request to Proceed with Incorporating a Non-Share Capital Corporation**

### **Executive Summary:**

The Farming Assistance Ad-Hoc Committee's mandate is to provide recommendations regarding a grant program for young and new farmers.

The purpose of this report is to request that Council approve the establishment of a non-share capital corporation for the purpose of providing assistance to farmers and small businesses. Starting the incorporation process now will allow the development of the grant process and forming of the corporation to move forward concurrently.

### **Recommendation:**

**THAT the report of the Chief Administrative Officer dated May 22, 2018 regarding Farming Assistance Ad-Hoc Committee Request to Proceed with Incorporating a Non-Share Capital Corporation be received;**

**THAT Council approve the incorporation of a Non-Share Capital Corporation to be utilized for providing assistance to farmers and small businesses in accordance with Section 108 of the *Municipal Act*.**

### **Purpose:**

The purpose of this report is to request that Council approve the establishment of a non-share capital for the purpose of providing assistance to farmers and small businesses.

### **Background:**

The Farming Assistance Ad-Hoc Committee has been formed to provide recommendations to Council about County financial assistance programs designated to mitigate the impacts of increased property taxes primarily for young and new farmers whose financial viability has been negatively impacted by increased taxes.

A legal opinion was provided by Templeman recommending that the small business program as provided for in the Municipal Act be the recommended course of action to facilitate the provision of grants to Young and New Farmers. The provision of grants directly by the municipality could be construed as bonusing – using the small business program provisions of section 108 of the Municipal Act would alleviate these concerns as it allows Council to provide grants to a corporation set up to facilitate the small business program.

At their May 15, 2018 meeting the Farming Assistance Ad-Hoc Committee adopted the following motion:

*THAT it be recommended to Council that a non-share capital corporation be established for the purpose of providing assistance to farmers and small business.*

**Analysis/Comment:**

The Farming Assistance Ad-Hoc Committee has a mandate to report back to Council with recommendations regarding a grant program for young and new farmers by July 12, 2018. The Committee is meeting on a bi-weekly basis and has established a work plan that will adhere to the mandated timeframe. The Committee's objective is to have grants in the hands of farmers as close to the final 2018 tax installment date of September 15<sup>th</sup> as possible.

The Committee has identified a non-share capital corporation as the most appropriate mechanism to deliver the grant program. The incorporation process for this corporation is estimated to take between eight and twelve weeks. The Committee is therefore asking Council's approval to have staff start the incorporation process now as opposed to waiting for the program recommendations from the Committee. This will allow the development of the grant process and forming of the corporation to move forward concurrently.

In addition to enabling the farm grants, a municipal business corporation could provide the Municipality with a vehicle for the delivery of other grant programs including the County's existing community grant program(s), future Community Improvement Plan (CIP) incentives and grants in support of built heritage. Other programs not currently contemplated could also be delivered through this mechanism. This would have the benefit of ensuring a consistent approach to grant allocation by an arms-length entity of the County that leverages experience from within the community and which can develop a focused expertise around the delivery of these sorts of programs.

**Corporate Strategic Plan/Priority Implications:**

The recommendations of this report support the following Corporate Strategic Objective(s)

**2. Business-Friendly Environment**

**2.3** Develop incentives to encourage private sector development

**3. Maintain Rural and Historic Character**

**3.2** Promote and support traditional agriculture, value-added agriculture and agri-tourism.

**Financial Implications:**

The estimated legal costs of to incorporate the company are \$3,500 to \$5,000 plus disbursements. These costs would be expensed to the Professional & Contracted

Services line in the Mayor and Council statement. The 2018 budget for this line is \$10,000.

**Policy Implications:**

None identified for the recommendations of this report.

**Notice/Consultation:**

Farming – Assistance Ad Hoc Committee  
Amanda Carter, Director of Finance  
Neil Carbone, Director of Community Development & Strategic Initiatives

**Other Options:**

Council could decide to delay the incorporation process until such time as the Committee provides its recommendations.

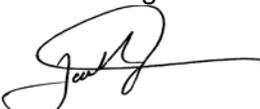
**Attachments:**

1. Letter dated March 22, 2018 regarding Ad-Hoc Committee re Farmers-Grant Program
2. Letter dated April 11, 2018 regarding Ad-Hoc Committee re Farmers-Grant Program; and
3. Memorandum dated April 17, 2018 regarding Not-for-Profit Incorporation Process

Prepared by: James Hepburn May 17, 2018  
Chief Administrative Officer

Reviewed by: Amanda Carter May 17, 2018  
Director of Finance

Reviewed by: Neil Carbone May 17, 2018  
Director of Community Development  
and Strategic Initiatives

Approved by:  May 17, 2018  
James Hepburn  
Chief Administrative Officer

March 22, 2018

Amanda Carter  
Director of Finance/Treasurer  
Prince Edward County  
332 Main Street, Shire Hall  
Picton, ON

via email: [acarter@pecounty.on.ca](mailto:acarter@pecounty.on.ca)

Dear Ms. Carter:

**Re: Ad Hoc Committee re Farmers – Grant program  
Our File 04192**

Further to our telephone discussion of March 21, 2018, we are please to provide you with an opinion on whether providing grants to young and/or new farmers to assist with increased tax assessments would be considered “bonusing” contrary to the *Municipal Act, 2001*.

### Summary

In our opinion, a grant program is not likely to meet the restrictive interpretation of what constitutes a “bonus” under the *Municipal Act, 2001*. We recommend considering a time limit on the grant program based on the objective of providing relief from the impact of an increased tax assessment. Alternatively, Council may consider using its powers to make grants through a small business program to encourage the establishment or initial growth of a class of small businesses i.e. farms.

### Background

Farmers have been lobbying to reduce the farm tax ration from 0.25 to 0.2. Council is considering forming an Ad Hoc Committee to set up a grant program to provide assistance to young and/or new farmers to assist with the increased tax assessments. Terms of Reference for the Ad Hoc Committee are in the process of being drafted.

## **Discussion**

### ***Bonusing***

Section 106 of the *Municipal Act, 2001* prohibits the granting of bonuses:

**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.

The section is intended to avoid a municipality giving unfair assistance to a business enterprise to the detriment of local taxpayers and competing businesses. "Bonus" is not a defined term in the Act. In the fairly limited case law under this section, the Courts have interpreted a "bonus" as conferring an obvious undue advantage, an unmerited windfall, or "something for nothing". The section is not meant to prevent arrangements which are intended in good faith to advance the interests of the citizens of the municipality. The Courts have also made it clear that the section should be interpreted restrictively, consistent with the modern deferential approach to municipal powers.

Presumably, there is a valid municipal objective in assisting start up farmers in establishing their farm operations, which would have a long-term benefit to the County to the benefit of all ratepayers. While there is an advantage to the farmers in doing so, in our opinion this would not meet the threshold of an obvious undue advantage to the detriment of the ratepayers or competing businesses.

## **Grants**

Section 107 of the *Municipal Act, 2001* discusses the power of a municipality to make grants. It permits Council to make grants for any purpose that Council considers to be in the interests of the municipality, subject to section 106.

The Court of Appeal considered a similar situation involving changes to the tax ratio and a grant under section 107 for tax relief to residential property owners facing large tax increases in 2003. In response to a “tax revolt” by the ratepayers, the municipality adopted a grant program funded by reduced budgetary expenditures to provide relief for non-commercial homeowners affected by the tax increase. The grant was limited to the 2003 tax year and the amount was based on the lesser of either the 2003 tax change or 6.5% of the homeowner’s 2002 taxes (6.5% being the average tax increase).

Commercial property owners challenged the by-law on the basis that it defeated the provincial tax regime. I note that the issue of an illegal bonus was not raised in this case. The Court found that the language of section 107 gives a municipality broad authority and it acted in the best interest of the municipality because “[i]t needed to deal fairly, effectively and quickly with an explosive situation that had been created, in large measure, by forces beyond its control.” The Court found that the by-law did not change the tax regime created by the province; rather, the municipality followed the assessment and collection process and validly used grants to offset the difficult consequences created by that regime. Citizens were required to pay taxes in accordance with their assessment and were then at liberty to apply for a municipal grant.

In this case, the County is not necessarily faced with an explosive tax revolt; however, the issue is being raised by farmers faced with an increase in taxes largely beyond the County’s control. There are certainly parallels that can be drawn between the case above and the County’s situation.

The one-time-only relief to taxpayers was a factor in the Court finding that the by-law’s purpose was not to circumvent provincial legislation. Accordingly, we recommend putting a time limit in place on the grant program to support the argument that Council is taking steps to address an unexpected and difficult situation for farmers.

## **Small Business Program**

There is also an opportunity for the County to set up a small business program which includes the power to establish a corporation without share capital for the purpose of encouraging the establishment and initial growth of classes of small businesses in the municipality, per section 108 of the *Municipal Act, 2001*. This section permits the County to make grants to the corporation for that purpose **despite section 106**. There are specific requirements set out in O.Reg. 594/17 respecting these small business programs:

Prescribed conditions

1. The following are the prescribed conditions that must be met before a municipality establishes a program under paragraph 1 of subsection 108 (2) of the Act:

1. The municipality has consulted with the public about the proposed program.
2. The municipality has adopted and published a business case study in relation to the proposed program, which includes the following:
  - i. An outline of the anticipated benefits of the proposed program to the municipality.
  - ii. The anticipated linkages of the proposed program to the municipality's economic development objectives, including in relation to small business growth and local job development.
  - iii. An outline of how any assistance to small business included in the proposed program would help achieve the municipality's economic development objectives.
  - iv. An outline of how the proposed program would be expected to facilitate the fiscal sustainability of small business through the program after any assistance from the municipality ends.

Using the small business program under section 108 powers may be the most prudent way of proceeding. The purpose of the grant program as described appears to align with the authority for encouraging the establishment and initial growth of farm businesses. The public consultation process may address any concerns of the citizens in advance, and the grants are permitted despite section 106, meaning that the grant cannot be challenged on the basis of being an illegal bonus.

Please let us know if you have any questions or concerns.

Sincerely,  
**TEMPLEMAN LLP**

  
**JENNIFER SAVINI**  
JGS/



Certified by the Law Society of Ontario as a Specialist in Municipal Law (Local Government/Land Use Planning and Development)

April 11, 2018

Amanda Carter  
Director of Finance/Treasurer  
Prince Edward County  
332 Main Street, Shire Hall  
Picton, ON

via email: [acarter@pecounty.on.ca](mailto:acarter@pecounty.on.ca)

Dear Ms. Carter:

**Re: Ad Hoc Committee re Farmers – Grant program  
Our File 04192**

Further to our opinion letter of March 22 and our telephone discussions in this matter, you have requested our opinion on the recommended course of action in response to the proposed terms of reference for the Ad Hoc Committee.

**Summary**

In our opinion, the small business program is the recommended course of action as a grant program could potentially fall within the unlawful bonusing restrictions. The small business program would achieve the objectives of Council while reducing the potential for a challenge to the program.

**Discussion**

As discussed in our March 22 letter, a similar situation was considered by the Courts involving a grant program to provide temporary tax relief. We note again that the bonusing issue was not considered in that decision. In the decision, all residential taxpayers impacted by the tax increase were entitled to apply, and the grant was limited to the tax year in which the increase was implemented. These were important factors in the Court's decision to uphold the grant program.

In this situation, we understand the proposal is to provide a three-year tax relief program to certain eligible individuals. We note that the longer the program runs and the more restrictive the eligibility criteria are, the more likely the program could be found to be an illegal bonus. We understand this to be a contentious issue, and there is a risk that someone who does not benefit from the program (for example, an ineligible farmer) could challenge it. There are costs to responding to such a challenge, whether successful or not, as well as the potentially divisive nature of the situation between farming communities.

While it is still possible that the proposed grant program could withstand such a challenge, there is little caselaw on bonuses to guide the courts and a Judge may consider the grants as providing an undue advantage to certain farmers. We understand that while there are theoretical advantages to the County and the ratepayers as a whole in undertaking this program, these are difficult to quantify or to support with evidence in response to a challenge. As such, there is a risk that a grant program could be successfully challenged.

Using the small business program provisions of section 108 of the Municipal Act would reduce these concerns as it allows Council to provide grants, despite the anti-bonusing provisions, to a corporation set up to facilitate the small business program. The program is permitted to establish a class of small businesses in the municipality which could include the type of farm operation Council is seeking to assist.

As previously discussed, there are certain requirements in establishing the small business program corporation, and we would be happy to review these further with you.

Please let us know if you have any further questions.

Sincerely,  
**TEMPLEMAN LLP**



**JENNIFER SAVINI**  
JGS/



Certified by the Law Society of Ontario as a Specialist in Municipal Law (Local Government/Land Use Planning and Development)

**MEMORANDUM**

**TO:** James Hepburn ([jhepburn@pecounty.on.ca](mailto:jhepburn@pecounty.on.ca))  
Amanda Carter ([acarter@pecounty.on.ca](mailto:acarter@pecounty.on.ca))  
Prince Edward County

**FROM:** Angela K. Brown  
Templeman LLP

**DATE:** April 17, 2018

**SUBJECT:** Not-for-Profit Incorporation Process  
File No 49162

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We understand that you are seeking to establish a non-share capital corporation for the purpose of providing assistance to farmers and small businesses. This memorandum will provide an overview of the process for establishing a corporation without share capital (i.e. a not-for-profit company).

**OVERVIEW**

A corporation without share capital exists for reasons other than making a profit. It has members that do not own a financial stake or share of the organization. In your case, the purpose of the Corporation would be to provide assistance to small businesses and farmers that meet the criteria under your program. This is intended to fall under section 108 of the Municipal Act.

The overall timeframe to complete the incorporation process depends on the time to finalize the application with you (~2-4 weeks), and then the time for the Ministry to respond to the Application (~6-8 weeks). You will also be involved in public consultation as part of the requirements of the Municipal Act during that time.

**PROCESS****1. Municipal Act Requirements.**

As indicated in the memo from Jennifer Savini of March 22, 2018, the regulations outline certain conditions that must be met before a municipality establishes a small business program under Section 108. The conditions include:

- a. Consulting with the public about the proposed program; and
- b. Adopting and publishing a business case study in relation to the program, outlining the benefits to the municipality, links to economic developments, and post-program sustainability.

Each of the above items will take some time to complete. The consultation with the public is likely to involve a meeting or two with the public in order to present the program and seek their input.

## 2. **Application for Letters Patent**

The next step in the process is to apply for letters patent to establish the corporation. We can start this process right away so it overlaps with the public consultation period and there is no additional delay.

We note that the corporation must have “members”, who appoint directors amongst other things. In your case, we would recommend that the County act as the sole member of the Corporation.

The requirements for the Application are as follows:

### **a) *Name Selection.***

The Members must select a name for the Corporation (i.e. not simply a numbered corporation). The Corporation’s name must be:

- ✓ *Distinctive.* This means that the name is not overly general or similar to the name of an existing organization such that the public might be confused into believing there is a connection or association with an existing organization. Coined phrases and names that combine several generic words are typically distinctive;
- ✓ *Descriptive.* This means that the name should describe the activities of the corporation in concise manner that is not misleading;

The name may have a legal element such as “Corporation”, “Incorporated”, “Inc.” or “Corp.” etc. This is optional. However, the Corporation’s name must not:

- contain certain prohibited words (i.e. “royal”, “university”, “college”);
- suggest a relationship with the government that does not exist; or
- be confusingly similar to the name of another organization;

Members should choose several alternatives in case a primary choice is not available. We would conduct a NUANS search for the chosen name. This search is required to incorporate and ensures that the preferred name is available for use before proceeding to the next step.

**b) Application for Incorporation of a Corporation Without Share Capital**

The *Corporations Act* authorizes the Ontario Government to grant corporate status to applicants (known as “Letters Patent”). The Ministry of Government and Consumer Services is the name of the Ontario ministry that is responsible for granting Letters Patent. The required form is called “Application for Incorporation of a Corporation without Share Capital” (Form 2).

1. Preliminary Matters: Government Consents.

If the Corporation is involved in providing services to the government, or is involved in a highly regulated industry, specific approval from ministries or inclusions in the Letters Patent may be required. The Members should inquire into whether there are any such requirements and include these in its application.

2. Complete Form 2

i. *Corporate Name:*

a. The name selected for the Corporation must be included along with the corresponding NUANS name search report.

ii. *Head Office:*

a. A head address for the Corporation must be provided (this must be a municipal address. PO Boxes are not acceptable).

b. The Head Office does not need to be owned by the Corporation (i.e. leased premises are acceptable).

iii. *First Incorporators:*

The names and addresses of the first directors must be included:

a. The number of directors must be fixed and there must be at least three (3);

b. Directors must be at least 18 years of age, mentally competent, and not an undischarged bankrupt;

c. Directors can be personally liable in certain instances for the acts of Corporation (i.e. failure to withhold source deductions from employees and remit them to the Canada Revenue Agency). These risks vary depending on the nature of the Corporation. They should be discussed along with risk management strategies (i.e. insurance) The members then must carefully define its “objects”.

- iv. *Objects.*
  - a. Objects define what a corporation does and the reason for its existence. They are statement of purpose(es) not a list of activities the Corporation is involved in.
  - b. The corporation will only be able to do the work described in these objects and other activities that further the objects and are minor in relation.
  - c. The Corporation cannot engage in activities outside the scope of the objects chosen. If it does, the Corporation's directors can be required by a court to repay the money used for the other purposes.
  
- v. *Restrictions*
  - a. Restrictions specifically prohibit the Corporation from undertaking certain activities. These need to be tailored to suit individual circumstances.

3. Submit Form 2 to the Ministry of Government and Consumer Services

*Timing.* The application is typically processed in **6 – 8 weeks** from the time it is received.

**3. Organization of Corporation**

Once the corporation is established, we would work with you to draft the bylaws under which the corporation would operate. The bylaws govern many items, such as the terms and qualifications of directors, the roles of officers, the process for amendments, etc.

**SUMMARY**

We trust that this provides you with an overview of the incorporation process.

We understand you would like a cost estimate as well. It is difficult to estimate the cost since it depends largely on the time required for legal advice and consultation. Based on our experience, we would suggest a fee range of \$3,500 - \$5,000 (plus disbursements and HST).

If you decide to proceed with an incorporation for the Farm Grant Program, please contact us to discuss details of the Application as outlined above.

We would be pleased to assist with this project and answer any questions you may have.