MEMO

TO: COUNCIL

FROM: SHAWN MCKERRY, iCAO

CC: COLIN SWAP, GM OF FINANCE; CHRISTINA SCHARFL, EXECUTIVE ASSISTANT.

DATE: 23 MARCH 2021

SUBJECT: **2021 TAXATION REBATE**

It is of the utmost concern that the CAO assist County Council make the best informed decision including where there maybe concerns that may bring liability or undue harm upon Council and/or the municipality.

For Council's consideration, administration presents the following three points of interest as they consider the 2021 Final Budget:

(1) **Tax Rebate – Brownlee Law LLP**
Inadvertently, it was revealed that the tax rebate may not be permitted under the Municipal Government Act and may introduce liability onto the municipality. Although the municipality is permitted to grant a tax refund under Section 347 of the MGA, the County's practice may not achieve the intent of this section, as well, it may put the County at risk of a at least four additional factors that need to be considered and weighed by Council.

a. <u>Risk 1, Equity Concern</u> - The range of different property types that have been covered (and not covered) by the rebate.

b. <u>Risk 2, Revenues collected will not meet (or could greatly exceed) the revenue requirement</u> - The property taxation bylaw must set out all of the rates necessary to raise the revenue required for the expenditures and transfers plus requisitions set out in the budgets.

c. <u>Risk #3, De Facto Contravention of Section 358.1 (AKA the 5:1 Ratio)</u> – Avoidance tax rate of no greater than 5:1 between the highest non-residential tax rate and the lowest residential tax rate.

d. <u>Risk #4, A Double Penalty? De Facto Usury?</u> - construed as a particularly harsh means of applying consequences for non-payment of taxes, over and above the usual tax penalties.

See Appendix A

(2) **Arbitration Concern**
Administration is concerned that offering a rebate this year will have a negative impact on our looming arbitration. This can tell a story that the County has too much money and/or that the municipality is not properly budgeting and has inflated numbers. The tax rebate has only been spoken to slightly by the town in mediation but Council must be prepared that the Town will use this as a big hammer in arbitration. We need to change the narrative so it aligns with County strategies, not further bolstering the Town's position. The rebate will be counterproductive to our key messages and business case in

arbitration. Council also must be mindful that the task to administer the tax rebate does come with an added cost of staff time, paper, printing and postage.

A tax reduction tells a different story this year. Aligned with our position on recreation, it can show that the County is further tightening down, reducing spending, and reducing services in all areas, all while keeping money in everyone's pockets in the first place. This better aligns with our position for arbitration.

(3) **Financial Impact**

On top of the information provided in Item 1 and Item 2, <u>administration does not support the rebate</u> due to the County's financial situation. Council needs to critically consider the financial impacts of:

a. loss to linear assessment,

b. the loss of well drilling tax,

c. the downloading of police cost,

d. the unknown legal and arbiter costs of arbitration,

e. the unknown recreation settlement and ongoing operating contribution to the Town of Drayton Valley,

f. the 10% disaster relief funding now worn by municipalities, and

g. the changes to Municipal Sustainability Initiative funding.

In the past, to support the rebate operating expenses were reduced by shaving the number of employees in the County but this option has most certainly been exhausted. Reserves, traditionally kept and earmarked for future capital asset replacements and planned projects, also may have been utilized as a onetime injection of money for the rebate but is not a supported go forward strategy due to reserve level and rationale for why reserves are in place.

If Council still wishes to proceed with a rebate, tax adjustment or a tax payment incentive bylaw, administration requires that Council focus on service level reductions, revenue generation and reducing grants/subsidies.

In closing, administration has the responsibility to undertake their due diligence to inform Council on matters of concern for protection of Council and the municipality. Due to the concerns presented, it is the recommendation from administration that Council does not proceed with tax rebate in the 2021 budget.

/sm

Attachments:

- Appendix A - Opinion re: County Tax Rebate Program, Brownlee LLP.

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March 22, 2021

Sent via Email "SmcKerry@brazeau.ab.ca"

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Attention: Shawn McKerry, Interim CAO

Dear Sir:

Re: Opinion re: County Tax Rebate Program

Further to your correspondences with the writer on March 10 and 11, we are now able to provide our opinion with respect to the County's Tax Rebate program (the "Program"), to assist Council for the County in determining whether the Program should be continued for the 2021 tax year.

Specifically, in this letter we discuss the scope of the County's authority to maintain the Program, as well as certain risks and points of caution associated with it given the scheme of the *Municipal Government Act* ("*MGA*").

A. BACKGROUND

Our understanding is that, since 2016, the County has been providing municipal tax rebates for certain types of property in the range of 30-40% of the taxes due for a given year, to parties whose tax accounts are in good standing and who pay their taxes on time (or pursuant to a monthly payment plan).

We understand that logistically, the way this has generally worked is that a party would visit the County office to pay their annual taxes before the June deadline, and the County would issue a rebate cheque back to them at the same time. Or, for those parties who pay their annual taxes by way of monthly payments, the rebate is pro-rated over the applicable months and a credit is added to their tax accounts each month.

The County implements this Program annually by way of Council resolution. The policy reasoning behind the Program is to put more money in the pockets of the County's citizens, so more can be spent within the County.

B. EXECUTIVE SUMMARY

In our opinion, the Program is not a valid incentive for the payment of taxes by a certain date pursuant to section 339 of the *MGA* (as this power may only be exercised by bylaw) and it *likely* does not constitute a valid exercise of Council's authority to refund taxes pursuant to section 347(1)(b) of the *MGA,* although we cannot be certain as we are not aware of any binding case law precedent that is directly on point. Should Council see fit to continue a similar program in

2021 and beyond, we recommend Council adopt a bylaw to provide incentives for prepayment of taxes by the dates set out in the bylaw. Alternatively, Council could consider simply lowering mill rates if it wishes to prioritize making more spending money available for its ratepayers and/or raising late payment penalties if it wishes to incentivize timely payment of taxes.

C. DISCUSSION

Taxation is a government power that may only be exercised if authorized by statute. In other words, the County cannot rely on its natural person powers to develop a novel tax scheme and must ground its taxation program (including tax incentives) in the provisions of the *MGA*. In this context, Council's authority to implement and maintain the Program will likely need to be found in either section 339 or 347.

Section 339 reads as follows:

> **Incentives**
>
> **339** A council may by bylaw provide incentives for payment of taxes by the dates set out in the bylaw.

The above provision clearly authorizes a council to impose a tax incentive program; however, in order to rely on this section, an incentive must be implemented by <u>bylaw</u>, not merely by resolution of Council. This conclusion is drawn from section 180(2) of the *MGA*, which provides that where a council or municipality is required or authorized to do something by bylaw <u>it may only be done by bylaw</u>. Thus, if the Program is to continue in the future, it must be implemented by bylaw if this is the authority Council is relying upon. Typically such a tax incentive bylaw will provide for a prepayment discount to be applied to the tax bill if taxes are paid early, by a fixed date prior to the due date. A prepayment discount can be offered for prepayment by a specific date at a rate of discount of X%; or, a discount may be applied for prepayment of taxes during any of the months leading up to the due date with a declining rate of discount applied to each month as the due date nears.

That said, in our view this provision is intended to be used to lower the amount paid by the taxpayer if payment is received early, rather than to provide for the issuing of a rebate (partial refund) after receiving payment in full by the due date. Statutory authority does, however, exist for refunding of taxes under certain conditions.

Section 347 reads as follows:

> **Cancellation, reduction, refund or deferral of taxes**
>
> **347(1)** If a council considers it equitable to do so, it may, generally or with respect to a particular taxable property or business or a class of taxable property or business, do one or more of the following, with or without conditions:
>
> > (a) cancel or reduce tax arrears;
> >
> > (b) cancel or refund all or part of a tax;
> >
> > (c) defer the collection of a tax.
>
> **(2)** A council may phase in a tax increase or decrease resulting from the preparation of any new assessment.

Given that the Program is characterized as a rebate program, and involves issuing back certain percentages of taxes after they are paid, this certainly looks to be a "refund" of part of a tax, falling within section 347(1)(b) of the *MGA.*

In our opinion, section 347 does not give Council the authority to issue business incentives by way of cancellation or reduction of property taxes. Admittedly there is very limited jurisprudence on the scope (and limits) of section 347; however, we see considerable risks to relying upon this section to create a tax incentive program. We briefly discuss each of these risks below.

i. Risk #1: Equity Concerns

Under section 347(1) of the *MGA,* a tax refund can only be provided "If a council considers it equitable to do so." Although Council does have discretion in deciding what is equitable, any such exercise of discretion is still subject to court scrutiny by way of judicial review.

The above section authorizes a municipality to cancel or refund property taxes "to a particular taxable property" or "a class of taxable property". Accordingly, a municipality may extend the cancellation or refund of property taxes to properties on an individual basis, or to an entire class of taxable property. A municipality may not extend tax cancellations or refunds to one or more sub-classes within a taxable class. Nor is a municipality authorized to extend cancellation or refund of taxes on the basis of any criterion other than taxable class, unless the cancellation or refund is extended specifically to an individual property. In short, the jurisdiction of a municipality to extend tax cancellations or refunds is strictly constrained by section 347(1) of the *MGA*.

In *Telus Communications Inc. v. Opportunity (Municipal District) No. 17*, 1998 ABQB 884, the Alberta Court of Queen's Bench considered, among other things, a Council resolution purporting to partially cancel municipal property taxes for a certain sub-class of non-residential properties for the stated purpose of providing a "business incentive". In reviewing this bonusing scheme the Court considered an earlier decision by the Supreme Court of Canada, citing with approval the following excerpt at paragraph 41

> *It cannot... be disputed that the principles of [e]quality and uniformity should pervade all local taxation which ought to be uniform on the same class of subject, and assess upon all properties according to its proper evaluation and... a court should hesitate to give any interpretation to taxing act which would disturb that equality or give any advantages or exemptions in respect of any particular portion of the property within the district over which the assessment extends unless it is clearly warranted by the statute imposing the tax.*

The bonusing scheme was ultimately found to be contrary to the long-standing principles regarding equitable assessment and taxation. In summary, the Court was reluctant to interpret Section 347 as allowing cancellation of taxes for the purpose of creating a "business incentive".

It could be argued that the Program is "equitable" as it offers a percentage-based tax refund to a wide range of ratepayers (and thus, the amount of refund each one receives is proportional to the amount of taxes they would owe if not for the refund). However, from an equity perspective, we are concerned about the range of different property types that have been covered (and not covered) by the Program. It appears that from 2016 to 2019, the Program was available to "Commercial Sites", "Industrial Sites", "Vacant Commercial" and "Vacant Industrial". While these categories appear to refer to different kinds of non-residential property, it is not clear whether the entire non-residential class is covered by these categories, or whether certain non-residential property is being treated differently from others.

If the latter is the case, then this creates a significant equity concern as generally, properties in the same assessment class should be treated the same for taxation purposes. The *Matters Relating to Assessment Sub-Classes Regulation* ("*MRASC*") does provide that the non-residential class can be divided into sub-classes, but only into the "vacant non-residential", "small business", and "other" sub-classes; the categories of "Commercial", "Industrial", "Vacant Commercial", and "Vacant Industrial" do not appear to conform to this. So, even if we are wrong in interpreting section 347(1)(b) as not applying to sub-classes within a taxable class of property, the Program does not appear to comply with the sub-classes that may be established under the *MRASC*.

ii. Risk #2: Revenues collected will not meet (or could greatly exceed) the revenue requirement

In *Telus Communications Inc. v. Opportunity (Municipal District) No. 17*, it was also argued that the municipality was attempting to raise revenue greater than the expenditures, transfers and requisitions set out in the municipal budget, contrary to the *MGA*. The applicant relied on section 247 which provides that a municipality must adopt an operating and capital budget before passing a property taxation bylaw and sections 353 and 354 which provide that the property taxation bylaw must set out all of the rates necessary to raise the revenue required for the expenditures and transfers plus requisitions set out in the budgets. The inference the applicant wanted the Court to adopt was that the taxation bylaw should be designed so that the revenue collected under it will equal the budgets of the municipality and any requisitions for a given year. Ultimately, the Court rejected this argument noting at paragraph 15 that "[b]udgets are estimates only, and it is inevitable that actual revenues and expenditure will never precisely match the estimates for reasons such as the non-collection of taxes due to default or appeals, final grant monies received and final expenditures being often different from estimates, etc."

However, it is noteworthy that the Court found that the difference between the municipality's required tax revenues estimated in the operating budget and the taxes estimated to be collected under the property tax bylaw would result in a surplus of $207,586, or approximately 1.25% higher revenue than estimated in the operating budget. Specifically, the Court held at paragraph 14 that this variation "still substantially complies with s. 353 of the Municipal Government Act" which suggests that the legal principle holds, but the facts of that case simply did not support an adverse finding against the municipality.

We are concerned that the 30-40% tax rebates offered by the County under the Program for paying taxes *on time* could result in substantial variances between the County's budgeted revenue requirement and actual revenues collected. 30-40% rebates are significant and, given that the only requirement for eligible properties to take advantage of the incentive is that taxes must be paid by the legislated due date, we presume there has and will continue to be significant uptake on the Program. Although we have not had an opportunity to review the County's budgets or financial statements, we question whether the County's annual property tax bylaws accurately impose taxes to raise revenues to be used toward the payment of the expenditures and transfers set out in the County's budgets and the requisitions, if any, in years where the Program has operated.

iii. Risk #3: De Facto Contravention of Section 358.1 (AKA the 5:1 Ratio)

Another prominent risk associated with this Program is that, depending on which assessment classes it is applied to in a given year, it could be characterized as an attempt by the County to avoid the operation of section 358.1 of the *MGA,* which requires that there be a tax rate of no greater than 5:1 between the highest non-residential tax rate and the lowest residential tax rate. This section is intended to limit the extent to which non-residential properties can be relied on for a municipality's tax base as compared to residential ones (i.e. it is acceptable and expected that non-residential will generally be taxed higher than residential, but only up to a certain point).

In the event that a rebate is applied to one or more residential sub-classes, and not applied to one or more non-residential sub-classes, then it could be characterized as an attempt to maneuver around the 5:1 ratio limit, avoid the operation of section 358.1 of the *MGA,* and effectively create a disparity between residential and non-residential tax rates that the *MGA* does not allow. In other words, a party challenging the rebate could say that it is an attempt to do indirectly what the law does not allow the County to do directly. This would be *ultra vires* the County's authority and illegal.

From what the County has told us about the types of property that the rebate has been applied to, it does not appear that there is an immediate risk that the Program would be highly susceptible to this argument, as it seems that rebates have never been made available for any residential properties without also being made available for all non-residential properties. That said, this issue still highlights an inherent risk in maintaining a Program like this, as a rebate offered in a future year could be more vulnerable to this argument depending on what classes of property the rebate is available to. Moreover, even making the rebate available to residential properties as the County did in 2020 still represents some risk; it could be argued that if there is even a single residential property that receives the rebate, and a single non-residential property that does not, then this represents an affront to the 5:1 ratio, even if the rebate was available to both properties upon timely payment of taxes.

iv. Risk #4: A Double Penalty? De Facto Usury?

Lastly, there is a risk that the Program could be construed as a particularly harsh means of applying consequences for non-payment of taxes, over and above the usual tax penalties applied for late payment of current taxes and tax arrears under sections 344 and 345 of the *MGA.*

While it may seem that it would be difficult for a party to characterize a Program that refunds money back to ratepayers as "harsh", the idea here is that a party seeking to challenge the Program would argue that because the rebate creates a difference between what a timely ratepayer in good standing would pay, and what a late ratepayer would pay, it effectively results in a penalty for failing to pay taxes in a timely manner, *on top of* any penalties that are already in place pursuant to section 344 and 345.

Viewed from this perspective, the *de facto* penalties for late payment of taxes can get very high, very quickly. Consider, for example, a hypothetical municipality that, pursuant to a tax penalty bylaw, applies a 12% penalty on late current taxes on July 1 and another 5% penalty on December 1, and also offers a 30% rebate for those who pay on time. Suppose that there are two ratepayers that own identical properties, and are each required to pay $10,000 in taxes by June 30. Suppose also that one ratepayer pays on time, while the other does not pay until December 15.

In such a scenario:

- The timely ratepayer is given a 30% rebate, and thus essentially pays only $7,000 in taxes.

- The late ratepayer is not given the 30% rebate and must pay both the 12% and the 5% penalty, resulting in a total payment of $11,760.

- $11,760 divided by $7,000 is 1.68, meaning that the late ratepayer pays *68% more than the timely ratepayer*, despite being only six months late.

- It is worth noting that the maximum allowable annual interest rate under the *Criminal Code of Canada* is 60% - anything above that is a criminal rate (see s. 347 of the *Criminal Code*).

While penalties are not the same thing as interest, it is still likely to be concerning for the Court, in the event of a challenge by way of judicial review, if a Council is requiring ratepayers to pay amounts that, if they were interest, would result in an excess of the maximum lawful rate. It could be argued that the penalties applied by tax penalty bylaw, together with the rebate program, create a result that Council does not have the authority to create.

As this lies outside the scope of our opinion, we have not reviewed the County's applicable tax penalty bylaw or undertaken any calculations to confirm the ultimate difference between the amounts that timely vs. late ratepayers pay, and whether or not it results in a situation that could be argued to be *de facto* usury under the *Criminal Code.* That said, even if it does not, the County will need to be careful. Even aside from the usury angle, the Program may still be susceptible to the argument that it is a hidden "double penalty" that the County does not have the authority to create, and which should properly be incorporated into the County's applicable tax penalty bylaw where ratepayers can be given notice of it.

As a final note on this point, it should also be understood that under section 10 of the *Judicature Act,* the Court has the authority to provide relief from penalties. This may provide another mode of challenge for a ratepayer besides judicial review. If a ratepayer applies for relief under that section of the *Judicature Act*, and if the Court is of the view that the combined impact of penalties/rebates results in excessive penalization for late payment of taxes, then the County may be required to grant relief to one or more ratepayers in accordance with the Court's orders.

D. CONCLUSION

In summary, we do not recommend Council implement the Program (in its current form) for the 2021 tax year. If Council wants to continue to put more money in the pockets of the County's citizens, Council could simply lower the mill rates (in compliance with what section 358.1 and other sections of the *MGA* allow) or Council can raise penalty rates in its applicable tax penalty bylaw to incentivize payment by the due date.

Alternatively, Council may by bylaw provide incentives for prepayment of taxes by the dates set out in the bylaw pursuant to section 339 of the *MGA*. Such a bylaw could provide for one or more dates to which a discount for prepayment will apply and either a constant or a declining discount percentage relative to prepayment of taxes. We would be pleased to assist the County in preparing such a bylaw or reviewing a draft prepared by the County upon request.

We trust the foregoing to be of assistance in considering this matter. Should you have any questions with respect to the content of this letter, please feel free to contact the writer.

Yours truly,

BROWNLEE LLP
PER:

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