Focus MUNICIPAL LAW

Zoning out on local medical marijuana production

Eden Alexander

The federal government's most recent amendment of the commercial medical marijuana production regime has led to differing municipal approaches to land use regulation, and implies uncertainty about the degree to which local governments can dictate where medical marijuana production facilities (MMPFs) are located.

It has been just over a year since Health Canada released the most recent amendment to the Marihuana for Medical Purposes Regulations, SOR/2013-119, which effectively opened the commercial market for the production of medically prescribed marijuana in Canada. Distinguishable from the Marihuana Medical Access Regulation, SOR/2001-227, which was repealed in March 2014 pending ongoing constitutional legal battles, the Marihuana for Medical Purposes Regulations (MMPR) as amended creates conditions for a commercial medical marijuana industry where growers and sellers are strictly vetted, licensed and inspected by the federal government.

The amended MMPR has incited thousands to apply for federal licences to produce, sell and distribute the controlled substance, and the regulation is clear that strict standards of facility, security, safety, advertising, disposal and distribution are required for licensing to be approved.

To date, approximately 20 production facilities across Canada are fully authorized to produce and sell medical marijuana, and another five to 10 are licensed for cultivation purposes only. The size of production facilities varies, but some are as large as aproximately 150,000 square feet. Some grow in retrofitted industrial greenhouses and others in abandoned factory spaces. Some grow hydroponically, some not, and some have turned to organic agriculture. Licenses have been granted to companies who are publicly traded, to those already in the pharmaceutical business, and at least one licensed operation has partnered with a foreign company with the intention to advance the popularity and progeny of a particular strain of marijuana for export.

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All this implies the increased legitimacy of medical marijuana in the Canadian economy in the years to come. But as licence approvals are processed by the federal government and more operations are angling to get into the market for production of medical marijuana at the outset, local governments are left to resolve the question of "where."

Having been delegated the provincial authority over land use regulation, local governments may pass official plans and zoning bylaws in relation to land use planning and development in accordance with their obligation to balance the larger public interest with the private property interests of land owners. Accordingly, the MMPR has prompted many local governments to consider how to balance the public interest in potential economic development opportunities that may come by hosting a facility within their boundaries, with public anxieties about the implications of "legal grow-ops" near their neighbourhoods and concerns over plummeting property values.

Over the last year, various Canadian municipalities have considered the necessity and form of zoning bylaws to regulate the location of MMPFs within their boundaries. Some have interpreted MMPFs to be a land use that fits within their existing definitions and have found no need to zone further, while others have found that zoning bylaw amendments were necessary to define the MMPFs as a land use and permit them in designated zones or "as a right." Some local governments have chosen to prohibit the practice entirely, subject to exemptions on a case-by-case basis.

Interestingly, the majority of local governments who have amended zoning bylaws to accommodate the new federal regime appear to have given a lot of thought as to whether MMPFs should be regulated under the traditional designations of agricultural or industrial, or should be given a designation of their own. Further, most have gone beyond the text of the MMPR (which prohibits locating an MMPF in a dwelling place) and have required locating MMPFs at an appropriate set back from sensitive land and residential uses.

For example, the idea that the "production" of marijuana is more aptly described as the simple cultivation of a plant was supported by the British Columbia Agricultural Land Commission this past year, when they approved the interpretation of MMPFs as consistent with the definition of "farm use." Despite this announcement, municipalities such as Surrey, B.C., have amended their zoning bylaws to specifically exclude the growing of medical marijuana from the definition of "horticulture." Technical methods of production such as reproductive cloning and strain selection, and hydroponic cultivation that often requires the extensive use of chemical agents for cultivation, are often cited as reasons why municipalities choose to zone MMPFs as industrial. This is difficult to reconcile when an MMPF is, or seeks to grow, in a large-scale greenhouse previously used for tomatoes. There appears to be merit to both the industrial and agricultural classifications of MMPFs. This being so, one must ask: is there more to the diverging municipal characterizations?

Though it is unclear whether in general MMPFs represent an agricultural or industrial land use, or a horse of a very different colour, it is no mystery that regulation of MMPFs may pose particular challenges to municipalities seeking certainty in their development processes in an area rife with legal challenges. In an effort to consider community concern for the cultivation of an otherwise illicit substance, local governments are walking a very thin line between regulation of MMPFs as a land use, and the regulation of drug production — an area of exclusive federal jurisdiction. Diverging municipal characterization of MMPFs may add fodder to the fire of any upcoming constitutional challenge.

While there is no doubt that municipal zoning powers are broad and include the ability to permit, prohibit, or regulate use in a zone on the basis of (for example) public health and welfare, the municipal reactions to last year's amended MMPR suggest that the legislated medical marijuana regime will continue to leave producers, municipalities, and prescribed users dazed and confused in days to come.

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Duplication: Not implementing codes of conduct could lead to challenges

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could establish codes of conduct to govern the ethical behaviour of members of their councils and local boards. Municipalities could also appoint their own integrity officers, including integrity commissioners, auditors general, lobbyist registrars, and municipal ombudsmen.

A large number of municipalities promptly adopted codes of conduct and a significant number appointed integrity commissioners to enforce them. A smaller number of municipalities have also appointed auditors general and ombudsmen and/or have adopted lobbying bylaws.

The question *quis custodiet ipsos custodes*? — Who will watch the watchmen? — was seemingly answered by the province by providing municipalities with the authority to establish their own rules and to police their own conduct. In essence, municipal governments were recognized as responsible and accountable orders of government.

That message has been confused with the passage of the *Public Sector and MPP Accountability and Transparency Act, 2014*. The province appears to be retracing its steps and seeking to turn back the clock on municipal legislation reform. As noted by the Association of Municipalities of Ontario, the statute offends the spirit of the *Municipal Act, 2001* and its subsequent amendments. With respect to municipalities, the new statute will undoubtedly create duplication, inefficiencies and redundancies. Many municipalities are already reconsidering why they should even be bothered with codes of conduct and integrity officials.

Municipalities should be wary of abdication. A failure to implement their own ethical regimes and to appoint their own integrity officials will render them susceptible to challenge when a complaint is eventually lodged with the Ontario ombudsman. In matters of ethical conduct and integrity it is always better to be proactive than reactive.

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