

Regulating Medical Marihuana Production Facilities through Municipal Land Use Planning

BY PETER GROSS

MEDICAL MARIHUANA ZONING BY-LAW ROUND-UP

On April 1, 2014, the federal Marihuana for Medical Purposes Regulations (“MMPR”) came into full force and effect after a transition period intended to phase out the Marihuana Medical Access Regulations (“MMAR”). While the future status of the MMAR remains uncertain pending the outcome of several Charter challenges, aspiring commercial producers are having to work through proposed and newly enacted zoning by-laws that will regulate medical marihuana production facilities (“MMPFs”) for the first time. Municipal responses in Ontario have been varied as local councillors and staff consider where MMPFs should locate and what performance standards are appropriate.

Three Different Approaches

Under the MMPR, a licence to produce marihuana includes permission to grow the plants, an activity that suggests an agricultural use. However, the same licence also authorizes processing, selling and shipping of marihuana, activities that suggest an industrial use. The municipal approaches to regulating MMPFs can be divided into three categories (see Table 1 on the following page for examples of the different approaches).

In the first category are municipalities, such as Windsor and Smiths Falls, that have examined MMPFs and reached the conclusion that the use fits within existing definitions of an industrial or manufacturing use and accordingly no further action is required.

In the second category are municipalities, such as Toronto, Ottawa, Fort Erie, Milton and Port Colborne, that have approved recommendations or passed zoning by-law amendments that define MMPFs and permit them “as of right” in specified zones.

In the third category are municipalities, such as Chatham-Kent and the Township of West Lincoln, that have passed zoning by-law amendments that define the use and specify the zone in which the use must be located, but in all cases require an additional site-specific zoning by-law amendment to permit the use.

What setback, if any, is appropriate?

The use of setbacks specific to MMPFs has also varied among municipalities. While Windsor and Smiths Falls have not imposed setbacks, Ottawa and Chatham-Kent impose setbacks only to specified zones such as residential and institutional. Toronto and Fort Erie impose setbacks to other specified zones as well as sensitive uses such as schools, places of worship and day nurseries. The most interesting approach is West Lincoln which imposes one setback if the MMPF is located in an agricultural zone and a different setback if the MMPF is located in an industrial zone.

Of note is the Ottawa zoning by-law amendment that stands alone in providing an exemption from setback requirements for MMPFs that meet the standard when established but later fail to comply because an adjacent residential or institutional use is established as of right within the setback.

Without this exemption, the legal non-conforming use provisions of section 34(9) of the *Planning Act* may not adequately protect licenced producers from future non-compliance when an adjacent landowner establishes an “as of right” sensitive use and the MMPF cannot meet the required setback. Section 34(9) only protects a use where non-compliance is caused by the passing of the by-law but not when non-compliance is caused by an adjacent landowner exercising existing rights.

Preserving Appeal Rights

Many municipalities in Ontario are considering whether zoning by-law amendments are required to regulate MMPFs. Under the *Planning Act*, a person or public body must make oral submissions at a public meeting or written submissions to Council before a zoning by-law is passed, in order to appeal the by-law to the Ontario Municipal Board.

For more information, please contact **Peter Gross** (416-203-7573).

****Note re Toronto:** On 2 April 2014, Council approved recommendations to pass by-laws regulating MMPFs. Until the by-laws are passed, there is a window of opportunity for a person or public body wishing to preserve a right of appeal to make a written submission. It is not known at this time when the by-laws will be brought forward for enactment. See article on page 4 for more information.

Table 1. Municipal Land Use Approaches to Regulating MMPFs (Select By-laws)

	Permitted As of Right		Defined Use, Specific Zones					Requires Site Specific ZBLA	
	Smiths Falls	Windsor	Fort Erie	Milton	Ottawa	Port Colborne	Toronto	Chatham-Kent	West Lincoln
Zoning By-law Status	N/A	N/A	By-law 07-2014 passed 20 January 2014; in force	Part of new comprehensive zoning by-law passed 24 Feb 2014; appealed to OMB	By-law 2014-74 passed 26 Feb 2014; appealed to OMB	By-law 6059/25/14 passed 14 April 2014; appeal period pending	Council adopted recommendations for by-law 2 April 2014; by-law enactment forthcoming (date to be determined)	By-law 1-2014 passed Jan 2014; in force	By-law 2014-17 passed 24 March 2014; in force
Agricultural Zones	No	No	Yes; 70 m setback to residential zones and sensitive uses	No	No	Yes; 150 m setback to sensitive uses (defined term)	N/A	Yes (subject to site-specific zoning by-law amendment); 75 m setback to various zones in primary urban area (100 m in other areas)	Yes (subject to site specific zoning by-law amendment); 150 m setback to neighbouring lot lines
Industrial Zones	Yes	Yes	Yes; 70 m setback to residential zones and sensitive uses	Yes; 70 m setback to various zones and sensitive uses	Yes; 150 m setback to residential and institutional zones	No	Yes; 70 m setback to various zones and sensitive uses	Yes (subject to site-specific zoning by-law amendment); 75 m setback to various zones in primary urban area (100 m in other areas)	Yes (subject to site specific zoning by-law amendment); 45 m setback to residential or institutional uses on adjacent lot
Rural Zones	No	No	Yes; 70 m setback to residential zones and sensitive uses	No	Yes; 150 m setback to residential and institutional zones	Yes; 150 m setback to sensitive uses (defined term)	N/A	Yes (subject to site-specific zoning by-law amendment); 75 m setback to various zones in primary urban area (100 m in other areas)	No
Other Zones	No	No	Existing Open Space Zone 70 m setback to residential zones and sensitive uses	No	No	No	No	No	No

Note: This table has been prepared by Wood Bull LLP for information only. Please consult the by-laws for the exact language and references.

The following articles are Wood Bull blog posts, originally posted at www.woodbull.ca/blog. They are reprinted chronologically in this **Wood Bulletin** to provide background and context on the federal regulations related to medical marihuana production facilities.

MARIHUANA FOR MEDICAL PURPOSES REGULATIONS: NEW LICENSING REGIME FOR COMMERCIAL PRODUCERS, MUNICIPAL NOTIFICATION REQUIREMENTS

Blog Post: July 29, 2013

Commercial Licences to Produce

On June 10, 2013 Health Canada issued new Marihuana for Medical Purposes Regulations (“MMPR”) to improve access to medical marihuana by introducing a new regime to allow commercial production of medical marihuana and shipment directly to authorized users.

Licences can be issued by Health Canada to individuals or corporations that allow for the production, sale and shipment of marihuana subject to strict site security restrictions aimed at preventing diversion to the unregulated marketplace. The new regulations are in effect concurrently with the Marihuana Medical Access Regulations (“MMAR”) that have been in effect since 2001.

In announcing the new regulations to the public, the Honourable Leona Aglukkaq, Minister of Health stated: “Under the new regulations, production will no longer take place in homes and municipal zoning laws will need to be respected, which will further enhance public safety”.

Municipal Notification Requirements

Before submitting an application for a new or amended licence to produce, an applicant must notify the local government, fire department and police force in writing of the location of the proposed production facility, the regulated activities that will take place on the site and the date on which the application will be submitted to Health Canada. All applications must be accompanied by a declaration specifying the names of the officials who were given notice, the date notice was given together with a copy of each notice.

Once a licence has been issued, amended or renewed, a licensee has 30 days to provide written notice of the issuance and a copy of the licence to the same local authorities who received notice of the applicant’s intent to submit the application.

Sunset Provisions of Marihuana Medical Access Regulations

Until September 30, 2013 Health Canada will continue to accept Designated Person Production Licence applications under the MMAR regime. Licences issued under these regulations will expire on March 31, 2014 and on that date the regulations will be repealed. As of April 1, 2014, all marihuana for medical purposes must be produced by a commercial producer licensed under the MMRP.

FEDERAL COURT EXTENDS MARIHUANA MEDICAL ACCESS REGULATIONS

Blog Post: March 26, 2014

On March 21, 2014, a Federal Court in Vancouver granted an interlocutory injunction preventing the federal government from fully repealing the Marihuana Medical Access Regulations (“MMAR”) as scheduled on March 31, 2014.

The applicants for the injunction claimed that if the MMAR were repealed, they would be forced to either buy more expensive medical marihuana from producers licenced under the new Marihuana for Medical Purposes Regulations (“MMPR”) or break the law by continuing to grow it themselves or having a designated person grow it for them. The applicants argued that the government’s action in making changes to the regulatory scheme for accessing medical marihuana was a breach of section 7 of the Canadian Charter of Rights and Freedoms (the “Charter”).

In granting the applicants’ request for interlocutory relief, the Court found that they had clearly demonstrated that if the MMAR were repealed, they would suffer irreparable harm caused by an inability to access medical marihuana at an affordable cost while the merits of their Charter claim is adjudicated. The harm in this case was found to outweigh the public interest in wholly main-

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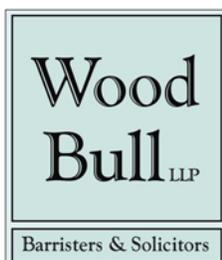
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taining the new regulations intended to increase the health, safety and security of the public. The Court did however limit the amount of medical marihuana a person may possess to 150 grams.

The Court's order provides the following relief:

Holders of an Authorization to Possess, Personal Use Production Licence or Designated Person Production Licence issued pursuant to the MMAR valid on September 30, 2013 or issued thereafter are exempt from repeal of the regulations on March 31, 2014. Licences remain valid regardless of the date of expiry shown on the licence until the underlying Charter claims are resolved.

Holders of an Authorization to Possess issued pursuant to the MMAR valid on September 30, 2013 or issued thereafter may possess the amount permitted by the licence or 150 grams, whichever is less.

A full trial on the merits of the applicants' Charter claims is expected to take place within the next 12 months.

CITY OF TORONTO COUNCIL ADOPTS RECOMMENDATIONS TO ENACT ZONING BY-LAWS TO REGULATE MEDICAL MARIHUANA PRODUCTION FACILITIES

Blog Post: April 3, 2014

On April 2, 2014, Toronto City Council adopted recommendations to enact zoning by-law amendments to the zoning by-laws of the former municipalities as well as the City-wide Harmonized Zoning By-law to regulate Medical Marihuana Production Facilities ("MMPFs") throughout the City. The zoning by-laws will be brought forward for enactment at a future Council meeting.

The amendments will apply to commercial producers of medical marihuana licenced under the new federal Marihuana for Medical Purposes Regulations ("MMPR") and will require MMPFs to locate in select industrial and employment areas throughout the City. In addition, the MMPFs will be subject to 70-metre setbacks from sensitive uses such as schools, places of worship and day nurseries as well as other zones, including some industrial zones.

The MMPR were scheduled to repeal the old federal Marihuana Medical Access Regulations on March 31, 2014 under which persons authorized to produce medical marihuana were not subject to municipal zoning by-laws. A federal court in Vancouver recently granted an injunction to prevent repeal of the MMAR until a trial resolving Charter issues is concluded. The federal government has announced it will appeal the lower court's decision to the federal Court of Appeal seeking to overturn the injunction.

This **Wood Bulletin** is intended to provide updates and commentary, and should not be relied upon as legal advice.

For more information on the municipal and planning law implications of the federal regulations, please feel free to contact Peter Gross at 416-203-7573 or pgross@woodbull.ca.

WEBSITE LINKS

- ◆ Marihuana for Medical Purposes Regulations (MMPR):
<http://www.laws-lois.justice.gc.ca/eng/regulations/SOR-2013-119/>
- ◆ Marihuana Medical Access Regulations (MMAR):
<http://www.lois-laws.justice.gc.ca/eng/regulations/SOR-2001-227/>
- ◆ Wood Bull Blogs, on topics of planning and development law and practice, development charges, heritage preservation and environmental law and practice: www.woodbull.ca/blog