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How Far is Too Far? Court Strikes Down the City of Richmond's Attempt to Curtail the Cannabis Industry

The City of Richmond's attempt to prohibit the production of medical marijuana on a property was curtailed by the BC Supreme Court in the recent decision of *0826239 B.C. Ltd. v City of Richmond and Joe Erceg*.[1] This decision considered whether Richmond can prohibit the production of medical marijuana by enforcing its own contrary zoning bylaws, despite the *Agricultural Land Reserve Regulations* ("***ALR Regulations***") that expressly allow for the production of licensed medical marijuana as a farm use.

Background:

This case involved an application by 0826239 B.C. Ltd. (the "**Petitioners**") to review Richmond's decision to refuse to lift a stop work order on a building permit (the "**Stop Work Order**") and to refuse to issue two additional building permits (the "**Permits**"). These building permits related to the construction of greenhouses and an electrical building on a 21-acre property in Richmond (the "**Property**").

The Property was located in the Agricultural Land Reserve ("**ALR**") and was zoned as 'Agricultural' pursuant to Richmond's Zoning Bylaw No. 8500 (the "**Zoning Bylaw**"). This agricultural zoning designation permitted the Property to be used for a wide range of farming and

[1] 2018 BCSC 1438.

compatible uses, which included 'farm business use', consistent with the provisions of the ALR. In December of 2003, Richmond added section 3 to the Zoning Bylaw, which stated that 'farm business use' does not include medical marijuana production facilities or medical marijuana research and development facilities.

On May 7, 2015, the *ALR Regulations* were amended to allow for the production of marijuana as a farm use, in accordance with the *Marihuana for Medical Purposes Regulations*. The Province issued a press release stating that this amendment recognized federally licensed medical marijuana production as a farm use in the ALR which local governments can regulate, but not prohibit. While the *Marihuana for Medical Purposes Regulations* have since been repealed, the *Access to Cannabis for Medical Purposes Regulations* ("***ACMPR***") were passed in August 2016. The *ACMPR* sets out the licensing regime for medical marijuana production.

The Petitioners encountered difficulties in proceeding with the construction of their greenhouses and electrical building due to Richmond's concerns that the structures were going to be involved in the cultivation of cannabis. These concerns arose from a press release issued by Emerald Health Therapeutics, a cannabis production company, that described the company's plans to operate a large cannabis production facility in Richmond. Based on these concerns, Richmond's Manager of Plan Review (the "**Manager**") alerted the Petitioners that cannabis production is not a permitted use on the Property and requested that the Petitioners provide a statutory declaration confirming that the Property, and the structures on the Property, would only be used in accordance with the Zoning Bylaw. When the Petitioners refused to sign the declaration, the Manager took this as affirmation that the Petitioners intended to use the greenhouses for cannabis production. The Manager concluded that this prevented the lifting of the Stop Work Order and the issuance of any further building permits on the Property, as permits may not be issued to construct a structure for unlawful purposes.

The Decision:

There were two main issues before the Court. First, whether the Zoning Bylaw was inconsistent with the *ALR Regulations* to the

extent that it prohibited medical marijuana production, which is a designated farm use under the *ALR Regulations*. Second, whether Richmond could refuse to lift the Stop Work Order and withhold approval of the Permits based on staff beliefs that the Petitioners would grow marijuana without first obtaining the required license from the federal government.

1. Is the Zoning Bylaw inconsistent with the *ALR Regulations?*

The Court sided with the Petitioners on this issue, finding that a municipality cannot prohibit a farm use that the *ALR Regulations* specifically allow. Thus, pursuant to the *Agricultural Land Commission Act*, the Zoning Bylaw is of no force or effect to the extent that it prohibits the production of marijuana in accordance with the *Marihuana for Medical Purposes Regulations* which is now the *ACMPR*. Richmond's position on this issue was that they were able to prohibit the production of non-medical marijuana. This argument was dismissed, as the Court found that the Zoning Bylaw cannot be read in that manner. Further, the production of non-medical marijuana is currently illegal. Richmond could have created a bylaw excluding the production of non-medical marijuana, however the Court found that this would be unnecessary, as there are more appropriate mechanisms to enforce the law. Ultimately, it was found that while Richmond may be able to regulate the production of medical marijuana, it cannot prohibit the production of medical marijuana as a farm use. With the finding that the Zoning Bylaw was of no force and effect to the extent that it prohibited the production of marijuana as a farm business, Richmond's decision not to lift the Stop Work Order was declared to be incorrect and the Court found that Richmond could not require the Petitioners to sign the statutory declaration swearing that they will not produce marijuana on the Property.

2. Can Richmond refuse to lift the Stop Work Order and withhold issuance of the Permits based on staff concerns that the Petitioners may grow marijuana on the Property?

The second issue boiled down to whether a local government can delay construction that otherwise complies with applicable bylaws on the basis that the owner may grow medical marijuana in accordance

with the *ACMPR* or because staff believe that marijuana may be grown without first obtaining a license from the federal government. On this issue, the Petitioners sought an order of mandamus compelling the Stop Work Order to be lifted and the Permits to be issued.

The Court found, and Richmond conceded, that the Stop Work Order was not lifted because of Richmond's concerns that the Petitioners may grow marijuana on the Property in a manner inconsistent with the Zoning Bylaw. A stop work order may only be issued and maintained if work on the premises is not being performed in accordance with building codes or applicable bylaws and provincial statues. Because the Court found the Zoning Bylaw to be of no force or effect to the extent that it prohibits the production of medical marijuana as a farm use, it followed that Richmond cannot rely on the Zoning Bylaw to suspend construction on the Property. The Court went further to find that the future possibility that illegal activity might occur on a property is not an appropriate consideration in refusing to lift a stop work order. Thus, the Court ordered Richmond to lift the Stop Work Order.

Regarding the Permits, it was found that Richmond can only withhold a permit for a reason that is within a bylaw that qualifies the applicant's rights. Thus, it would be unlawful to withhold the Permits if Richmond was doing so because the Petitioners may produce marijuana on the Property in the future. The Court found that the Permits appeared to be compliant with other bylaws and building codes. Richmond took the position that they had not yet completed a review of the Permits due to system backlogs in processing permits. Thus, the court granted Richmond 14 days to assess the Permits.

Takeaway:

This decision highlights that municipalities will not be permitted to impede the cannabis industry through bylaws that are inconsistent with the *ACMPR* and the *ALR Regulations*. If local governments want to regulate the production of cannabis, they must do so correctly and fairly. Municipalities will not be allowed to delay construction or refuse building permits that otherwise comply with applicable bylaws based on suspicions that the owner may grow medical marijuana in

accordance with the *ACMPR* or that cannabis might be grown without the requisite federal licenses. Further, the Province has outlined that federally licensed medical marijuana production is a farm use in the ALR which cannot be prohibited by municipalities. Cannabis producers will no doubt welcome this decision and be wary of municipal attempts to improperly regulate or prohibit the production of medical marijuana or cannabis.

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a cautionary note