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Cannabis Producer Challenges Municipal Land-Use Regulation, and Wins

The matter of *0826239 B.C. Ltd. v. Richmond (City)*, 2018 BCSC 1438 (CanLII) involved a business owner planning to operate an agricultural greenhouse facility within the City of Richmond and seeking building permits from the City to construct the greenhouses for the operation. The dispute is seeded in lands that are part of the Agricultural Land Reserve (the "**ALR**"). The issue before the court was whether the City could, through its zoning authority, prohibit the production of licenced medical marihuana in light of ALR regulations that expressly allow the production of such marihuana. Ultimately, the court determined that:

i) the City was not authorized to prohibit a farm use that was specifically authorized under ALR Regulations; and,

ii) to the extent that the zoning bylaw prohibits the production of medical marihuana, the zoning bylaw was of no force or effect.

The decision reaffirms the law regarding a local government's limited discretion with respect to issuing building permits and, in that respect, is not novel. However, the established laws of land use regulation and the advent of cannabis legalization make for a topical discussion. You are invited to read on for details on the factual background and analysis by the court.

The lands in question (the "**Property**") are zoned as Agriculture (AG-1) pursuant to the City's zoning bylaw no. 8500 ("**Zoning Bylaw**"). The petitioner is a numbered company that applied to the City for three building permits under the City's building bylaw ("**Building Bylaw**") to construct two greenhouses and an additional electrical building on the Property. The petitioner originally advised the City that the greenhouses would be used for the production of same day fresh microgreens and possibly experimentation with "alternative crops". The City issued the building permit in respect of the first greenhouse, which is the subject of the stop-work order discussed below. The City had not made a decision regarding the other two building permit applications, though the petitioner claimed that the City was repeatedly deferring to make such decision.

The regulatory scheme within which this dispute arose operates as follows. The Building Bylaw provides for the issuing, and refusal to issue, permits. It provides that a building permit must be issued if the inspector is satisfied the construction will comply with the Building Code and applicable City bylaws. It also authorizes the inspector to refuse to issue a permit if there will be contraventions of the Building Bylaw, the bylaws, or any applicable provincial statutes. The Building Bylaw also permits the posting of "stop-work" orders if unlawful work is being done on the property in question.

The AG-1 zoning of the Property allows it to be used for purposes of a "farm business". In December 2013, the City amended its Zoning Bylaw to include a definition for "farm business" wherein all permitted farm activities were listed. The Zoning Bylaw also set out what "farm business" does not include. Notably, a "medical marihuana production facility" and a "medical marihuana research and development facility" were part of the latter list describing what a "farm business" excludes. In 2015, the Province amended the *Agricultural Land Reserve Use, Subdivision and Procedure Regulations*[i] ("**ALR Regulations**") by including in the list of activities designated as farm uses that cannot be prohibited by a local government bylaw, the production of marihuana in accordance with the *Access to Cannabis for Medical Purposes Regulations* (SOR/2016-230)[ii] ("**Federal Cannabis**

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Regulations"). The Agricultural Land Commission Act[iii] ("**Act**") provides that the Act and the ALR Regulations are not subject to any other enactment (except those specifically noted[iv]). The Act provides that it, and the ALR Regulations, are not subject to local government bylaws that are inconsistent with the Act and ALR Regulations and, to the extent of such inconsistency, that the conflicting bylaws are of no force or effect. Further, the definition of "bylaw" under the Act undeniably includes the Zoning Bylaw. As the foregoing illustrates, a situation arose where the Zoning Bylaw, which expressly prohibits the growing and production of marihuana as a farm business, was in conflict with the Act and ALR Regulations.

As noted above, the City issued the building permit in respect of the first greenhouse. The ALC also granted its permission in respect of fill placement on the Property. The petitioner proceeded with its development on the Property but in early January 2018, failed to obtain an inspection from the City, as required under the Building Bylaw, prior to

> "local governments cannot prohibit the production of marihuana as a farm use"

pouring concrete flooring for the first greenhouse. The inspection was required to ensure the construction of the foundation of the concrete flooring was correctly built. As a result, the City issued a stop-work order ("**Stop-Work Order**"). At about the same time, the City learned of a press release issued by a related company of the petitioner describing the company's plans to operate a cannabis production facility in Richmond, and to expand the Richmond site to 500,000 ft^2 by the end of 2018 in order to serve the recreational cannabis market, and to include at this site space for corporate offices and extraction and other activities. This caused City staff to become suspect that the petitioner, through its related company, may use the greenhouses for the production of retail cannabis. While the petitioner had rectified the issue for which the Stop-Work Order was originally issued, the City refused to lift the Stop-Work Order, taking the position that using the Property to produce marihuana was unlawful.

The petitioner, by way of this court action, sought a court order compelling the City's building inspector to lift the Stop-Work Order, and declaring that the Zoning Bylaw is inconsistent with the ALR Regulations and is of no force or effect to the extent that the Zoning Bylaw purports to prohibit the production of medical marihuana in accordance with the Federal Cannabis Regulations on ALR lands within the City.

The issues specifically considered by the court are as follows:

i) whether the Zoning Bylaw prohibits a designated "farm use" under the ALR Regulations and is inconsistent with the Act and the ALR Regulations; and

ii) whether a local government can withhold a building permit for a greenhouse that otherwise complies with applicable bylaws on the basis that: (a) the applicant may, once the greenhouse is constructed, grow medical marihuana in accordance with the Federal Cannabis Regulations; or (b) the applicant may, once the greenhouse is constructed, grow retail marihuana without first obtaining the required licence from the federal government pursuant to the Federal Cannabis Regulations.

With respect to the first issue, the court determined that the City cannot prohibit a farm use that the ALR Regulations specifically allow and that, to the extent that the Zoning Bylaw prohibits the production of marihuana in accordance with the Federal Cannabis Regulations, the Zoning Bylaw is of no force or effect. As to the Stop-Work Order, the court affirmed that it could only be issued pursuant to the Building Bylaw if work on the Property is not being performed in accordance with building regulations such as the Building Code, gas code, plumbing code, or other applicable bylaws or provincial statutes related to construction and building. As such, the Court found that the City could not rely on the provisions of the Zoning Bylaw relating to prohibiting the production of medical marihuana as a farm use (as these were found to be of no force or effect) to suspend construction.

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As for the refusal to issue a permit without the necessary federal licencing, the court determined that the future possibility that illegal activity will occur on the Property – i.e. operating without a licence – was not a proper consideration in the City's refusal to lift the Stop-Work Order.

What does this mean to municipal land-use authority? Local governments have limited discretion to withhold the issuance of a building permit provided that all of the legislative prerequisites are met by the applicant of the permit. While local governments may be able to regulate or restrict the way medical marihuana is produced (such as the regulation of noise, odour, building of associated facilities, etc.), it cannot prohibit the production of marihuana as a farm use on lands within the ALR.

(i) B.C. Reg. 171/2002.

(ii) At the time the petitioner's action was commenced, the regulation was known as the Marihuana for Medical Purposes Regulations (SOR/2013-119).

(iii) S.B.C. 2002, c.36.

(iv) The exceptions in the Act are the Interpretation Act, the Environmental and Land Use Act, and the Environmental Management Act.

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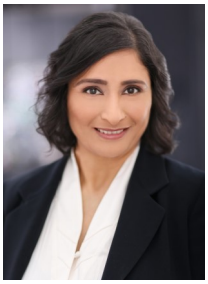

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