



Committee of the Whole

penticton.ca

Committee of the Whole
to be held at
City of Penticton, Council Chambers
171 Main Street, Penticton, B.C.

Tuesday, September 6, 2016
at 3:00 p.m.

1. **Call Committee of the Whole to Order**
2. **Adoption of Agenda**
3. **Presentations:**
 - 3.1 Regulating Medical Marijuana Dispensaries and Medical Marijuana Production Facilities in Penticton 1-10
4. **Media and Public Question Period**
5. **Adjourn to In-Camera**

Adjourn to a closed meeting of Council pursuant to the provisions of the *Community Charter* section 90 (1) as follows:

- (c) labour relations or other employee relations;
- (e) the acquisition, disposition or expropriation of land or improvements, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality;
- (g) litigation or potential litigation affecting the municipality;
- (i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (j) information that is prohibited, or information that if it were presented in a document would be prohibited, from disclosure under section 21 of the *Freedom of Information and Protection of Privacy Act*.



Committee of the Whole Report

penticton.ca

Date: September 6, 2016 File No: RMS 4300
To: Eric Sorensen, Chief Administrative Officer
From: Blake Laven, Planning Manager
Subject: **Regulating Medical Marijuana Dispensaries and Medical Marijuana Production Facilities in Penticton**

Staff Recommendation

THAT Council, after considering the contents of this report, choose from one of the following options:

Option 1:

THAT Council direct staff to include language in the City's Zoning Bylaw prohibiting the storefront sales of marijuana, and revisit the issue once the new federal rules are in place.

AND THAT staff continue the escalation of enforcement action against non-compliant businesses, including injunctive relief and targeting property owners as well as business owners.

Option 2:

THAT Council considers the following proposed regulatory changes to various City Bylaws to respond to the newly adopted Access to Cannabis for Medical Reasons Regulations (ACMPR) and to address providing access to medicinal marijuana for Penticton residents who are in need, through store front dispensaries in advance of federal legalization:

Amendments to the Zoning Bylaw

1. Create definitions for "medical marijuana", "marijuana dispensary" and "medical marijuana production facility"
2. Include the use "medical marijuana production facility" in the A, C6, C7 and M1 zones under the following conditions:
 - a. Have to be an approved facility under Health Canada regulations;
 - b. Meet all BC Building Code requirements;
 - c. Cannot be in conjunction with retail sales of any products, marijuana or otherwise.
3. Include the use "marijuana dispensary" in the C4, C5, C6 and C7 zones subject to the following regulations:
 - a. Dispensary cannot be combined with any other businesses (retail or otherwise)
 - b. Must not be located within 200 m of an elementary or secondary school;
 - c. Prohibition on having product visible from the outside the store.

Amendments to the Business Licence Bylaw

1. Adding a section to the Bylaw dealing with the licensing of medicinal marijuana, with the following regulations:
 - a. Limiting the hours of operation of a dispensary from 8:00 AM – 10:00 PM;
 - b. Requiring having two staff present at all times during business operation;
 - c. Restrictions on entrance into a dispensary to persons over the legal age of 19 years;
 - d. Must have an approved ventilation system installed;
 - e. No smoking, or consuming product on premise;
 - f. Criminal record check for all employees showing no drug related offences within the past 10 years;
 - g. Must have security plan in place, with all product and money locked in a safe at night.

Amendments to the Fees and Charges Bylaw

1. Creating a one-time licensing fee of \$5,000 and yearly renewal fee of \$2,500 to operate a marijuana dispensary.

Amendment to the Bylaw Notice Enforcement and MTI Bylaw

1. Creating a fine for operating contrary to regulations of \$1,000 under the MTI Bylaw
2. \$500 fine under Bylaw Notice of Enforcement Bylaw

AND THAT prior to introduction of the proposed bylaw changes, a public information session be held to elicit comment from the public.

AND THAT the staff are directed to cease bylaw enforcement against those dispensaries who have paid all levied fines and that are operating in-line with the intent of the proposed guidelines.

AND FURTHER THAT staff continue the escalation of enforcement action against non-compliant businesses, including injunctive relief and targeting property owners as well as business owners.

Option 3:

THAT Council direct staff to not take any action with regard to the currently operating marijuana dispensaries until such time as the federal government legalization has occurred.

Executive Summary

Council has given staff direction to provide a report and recommendations on zoning and guidelines for marijuana sales in Penticton. This report provides an overview of the experience in Penticton as well as across the province. The report also includes an overview of the federal government's new rules on access to cannabis and a current status update on the government's plan for legalization. In addition, the report includes options for Council's consideration moving forward.

The three options that staff are proposing include:

1. Prohibiting marijuana sales through store front dispensaries in Penticton until such time as the federal government establishes a regulatory framework for such practices.
2. Establishing a local regulatory framework prior to federal action on the issue.
3. Take no action until such time as the federal regulations are in place.

Strategic priority objective

N/A

Financial implication

Staff time (100 + hours of staff time this year on enforcement and policy review work) and legal advice (>\$5,000, to date).

Staff are proposing a \$5,000 licensing fee for the first year of operation and a \$2,500 renewal fee. This is a much larger fee than any other licensing fee for a business in Penticton, but staff can justify this because these businesses have generated an inordinate amount of staff resource. It is anticipated that any bylaw created will need to be defended in the courts, which will undoubtedly be a large expense. It is only fair that this cost be put on the businesses that are creating the expense.

Background

Penticton experience

Over the past few years, the proliferation of cannabis businesses has grown in Penticton and across the province. Historically, the city has seen marijuana paraphernalia retail stores that sell pipes and rolling papers and other such items and businesses that focus on growing marijuana (hydroponic equipment sales). More recently though, storefront medical marijuana shops, compassion clubs and marijuana counselling businesses have begun to operate. In all, Penticton currently has nine known marijuana related businesses. Four of these businesses were known to be selling medical marijuana in contravention of federal law.

Of the four businesses that were selling marijuana, three were operating under a business license for other purposes (one a café, one a retail store and one a counselling business). The other storefront dispensary was not issued a business license and has been operating without one.

Once it was established that the businesses were selling marijuana and related cannabinoid products in contravention of Canadian law, the three businesses that were operating under a business licence, were notified that their license would be suspended. When a business license is suspended, businesses have the ability to appeal to Council. All three businesses had a hearing in front of City Council to determine whether their business licence suspension would be upheld and whether their license would ultimately be cancelled.

In all cases, the business owners gave evidence and emotional testimony about the importance of providing access to medical marijuana to their clients. City Council voted to uphold the suspensions and cancel the licenses for the businesses.

Council did, however, direct staff to investigate options for regulations that would provide safe access to medical marijuana in Penticton, through a storefront – in essence, to create regulations that would allow for these storefront businesses to operate with City approval in advance of any federal rules coming into effect.

To date, two of the businesses who had their business licence cancelled, have ceased operation and are not receiving fines. The other business has continued to operate and has been fined on a weekly basis. Those fines have not been paid.

The business that was never granted a license has continued to operate. That business has been fined for operating without a license.

Marijuana Usage

Estimates on marijuana usage in Canada vary. A recent poll conducted by CBC estimated that 20% of Canadians smoked marijuana in the past year. The poll also found that 3 out of every ten respondents said that if marijuana was legal they would try it in the next year. Another study found that 53% of BC residents had tried marijuana in their lifetime at least once.

Access to Cannabis for Medical Purposes Regulations and new federal regulations on the legalization of marijuana in Canada

Cannabis was added to the Confidential Restricted List of banned substances by the Narcotics Drug Act Amendment Bill in 1923, ostensibly beginning the prohibition on marijuana in Canada. It wasn't until 2001 that the federal government created legal access to marijuana for medical purposes. The 2001 legislation gave physicians the ability to prescribe cannabis to patients and gave patients the ability to grow their own cannabis with authorization from Health Canada, and also allowed those with licenses to grow for up to a specified number of other people.

In 2014 the Marijuana for Medical Purposes Regulations (MMPR) replaced the 2001 legislation and established a system where *only* licensed producers (licensed by Health Canada) could provide cannabis to those in need. These are large production facilities not individual growers. To date 34 producers have been licensed across Canada. These are large operations that are required to deliver their product through Canada post. Under the MMPR, growing marijuana for personal use was not permitted.

These rules, though, were tested in court and found to be unconstitutional. The Supreme Court of Canada decision in the *Allard v Canada* gave an injunction to those who previously had the right to grow their own marijuana for medical purposes, the ability to continue to do so, until such time as the federal government brought on new rules. The government was given until this summer to bring forward new legislation.

On August 24, 2016 the new regulations, called the "Access to Cannabis for Medical Purposes Regulations" came into effect, clarifying the issue regarding growing marijuana for personal use (for medical reasons) as well as growing for others. The regulations also provided further clarity on the sale of marijuana from storefront dispensaries – it prohibits the practice.

With regard to the federal pronouncement about the ultimate legalization of marijuana, the adoption of the ACMPR does not change those plans. To the contrary, in the Health Canada press release announcing the new regulations, it was made clear that the ACMPR was not the "end goal" of the federal government and that work was still proceeding on ultimate legalization.

The timeline for legalization and what form it will take is still unknown at this time.

On June 30th, 2016, the Canadian Justice Minister announced that a Task Force would be created to advise the government on the how best to move forward with its plan to legalize marijuana. The Task Force is scheduled to report back to the various Ministers involved in the issue (Health, Justice, etc.) in November of this year for further direction.

It is anticipated that legislation could be introduced as early as Spring 2017.

With the pending reality of legalization law enforcement has been left in a *state of flux* not wanting to expend valuable and limited resource on prosecuting what could essentially become legal in short order. This state of flux has emboldened the marijuana industry to challenge law enforcement and at a more local level bylaw enforcement, by opening dispensaries for both medical and recreational purposes.

For the most part, it has been municipal Councils that have had to respond to this reality. And there have been a multitude of approaches.

Experience from other municipalities

While Penticton would be considered a forerunner if Council were to choose to license marijuana dispensaries ahead of federal legalization, there are several other municipalities that have already taken steps to do so, under the municipal authority to regulate business. Most notably, Vancouver enacted regulations for marijuana dispensaries after over 100+ dispensaries opened in their jurisdiction in relatively quick succession. Victoria, Squamish, Port Alberni and others have also taken steps to try to legitimize dispensaries that have opened in their communities.

The results have been mixed.

In Vancouver, news reports paint a picture of resistance from the marijuana industry to the quite onerous regulatory framework established. Dispensaries cannot be located within 300 m from a school, community centre, youth facility that serves vulnerable youth or another marijuana related business. This has made many of the existing operating dispensaries immediately non-conforming. Dispensaries are also required to go through a development permit process, which involves a public notification process and pay a \$30,000 licensing fee.

To date (August 2016), Vancouver has only licensed three dispensaries since implementing their bylaw in May. Several shops have closed and 27 unlicensed shops are in various stages of injunctive action. At least 33 others are blatantly disregarding city rules. City staff are working diligently to apply the rules and take enforcement action against strong opposition. At least one shop is testing the new bylaw through the courts.

Victoria has taken an approach where each individual property has to go through a zoning amendment process. Because of the process to go through a zoning amendment, staff at the City of Victoria estimate that it will take approximately 6 months to get zoning and licensing in place for the first shop. IT is also an expensive process, \$7,500 for the zoning amendment plus an additional licensing fee. The estimated 30+ shops are operating under a moratorium on enforcement. Victoria is adding staff in both their Planning and Bylaw departments for this issue alone.

The experience in Squamish and Port Alberni seem to be more positive for dispensaries. Squamish, whom staff spoke with in the development of the recommendations for Penticton's rules, has a lower threshold for approval than either Victoria or Vancouver. Marijuana dispensaries are permitted in areas where retail stores are permitted. A distance rule separating dispensaries and was also established. In speaking with staff at the City of Squamish, of the three operating dispensaries, one was shut down as it was an unsafe building, the other two don't quite meet the regulations put in place but have been working with staff on variances to become conforming.

Port Alberni have licensed two dispensaries and are actively pursuing injunctive action against two others. Originally, prior to the local bylaw regime in place, Port Alberni had 6 operating dispensaries. They have turned down approximately a dozen applications for non-compliance. A court date in September 2016 is scheduled for the one dispensary facing action. This may be the first time this type of bylaw is challenged at the judicial level. In speaking with Port Alberni staff, the community is in support of the approach taken and it seems to be working well for the dispensaries.

Other municipalities have taken a decidedly different regulatory position and strengthened the prohibition on dispensaries rather than finding ways to accommodate them. This approach was taken in Osoyoos, where dispensaries were included in the zoning bylaw and then expressly prohibited in all zones. Delta, also took this approach and in a recent court decision successfully had a judge rule in their favor for injunctive action to shut down a pot dispensary. This approach is what was recommended to Penticton by our legal counsel.

Across the Okanagan Valley, Penticton would certainly be the first municipality to license dispensaries.

Kelowna has taken a more hands off approach, waiting for federal rules to change. Vernon Council considered taking a prohibitive stance but ultimately decided to not pass restrictive zoning changes (like Osoyoos did). In Vernon like in Kelowna there are several operating unlicensed dispensaries and other licensed compassion clubs.

Given all of the above, staff have drawn the following conclusions and used them to draft the proposed bylaw changes and options for Councils consideration:

- The current legal framework is set up to favor a prohibitive approach towards marijuana dispensaries, but relies on municipal enforcement and action (\$\$\$).
- Those municipalities that have established prohibitive language in their bylaws have been successful in shutting down dispensaries, but requires staff time and effort (and one has to question if that is well spent resource with pending legalization).
- It is likely that the new federal rules will give local governments regulatory control on location of dispensaries within their communities.
- Those municipalities that have tried to accommodate, have been relatively successful (although no case law has yet tested any of these bylaws).
- Making the requirements too onerous will result in non-compliance.

Medical Marijuana Production Facilities in Penticton

The new ACMPR framework allows authorized patients access to marijuana in the following ways: to grow their own marijuana, to purchase from one of the 34 licensed producers, or have someone grow it for them. The 34 licensed producers, however, are the only legal source of "starting material". This most likely has to do with providing a safe product.

A recent investigation conducted by the Globe and Mail, which purchased product from several storefront dispensaries in Toronto and compared the product to the standards that Health Canada uses, found that 3 out of 9 samples tested had failed. Those failures included excessive yeast and mold levels, potentially harmful bacteria being present and micro-organisms exceeding the standards set by Health Canada. Having the source material come from a licensed producer is thought to protect against some of these potential health risks.

When the MMPR regime came into effect in 2013 creating the ability for large scale growers, Penticton did not make any regulatory changes to its Zoning Bylaw. Staff relied on interpretation to restrict those types of facilities to Industrial and Agricultural areas. Despite several inquiries, no applications have been made to construct one of these facilities in Penticton.

One other important aspect to the ACMPR rules that has the potential to affect the growing of marijuana in Penticton is that growers now may congregate together (up to 4 growers). With each grower being able to produce for two persons and each patient being able to hold up to 150 grams, the potential for larger scale operations and all their inherent risks, mold, overloaded electrical systems (fire hazard), improper ventilation etc., is concerning.

Given these two realities, large scale medical marijuana production facilities and the new congregate growing rules, staff are proposing a system where these uses are defined in the zoning bylaw and specifically placed in certain zones, licensed and regulated.

For those people growing for themselves, or one other person, they will still be able to grow in their home. The RCMP have a number that they can call to inquire whether a person has proper authorization. Staff are proposing that no business licence will be required for those growing for less than two people.

Statutory Authority

The sale of marijuana and cannabis products is illegal and a criminal offence under the *Controlled Drugs and Substances Act*. As such a municipal government has no jurisdiction over the sale of cannabis products, their quality, packaging requirements or who they can sell to. Those types of regulations are ultra vires (beyond the legal authority) of the municipal government.

With regard to the business itself, however, Section 59 of the Community Charter gives local government jurisdiction over the regulation of business within the municipal boundary, including the operation of the business, business licensing fees, the hours of operation, restrictions on the age of clientele, record keeping requirements and security requirements among other items. Much like a local government has no jurisdiction to regulate medicine at a pharmacy, a local government can say where a pharmacy can be located and what hours it may operate.

It is under this statutory power that other local governments have relied on to establish their dispensary regulations. This has yet to be tested in court.

Public Consultation

In the preparation of this report, staff received several dozen emails and items of correspondence from members of the public. Specific groups were given the opportunity to comment on the development of regulations, including Interior Health, School District 67, Pathways Addiction Centre, the Downtown Penticton Association and the operating dispensaries themselves. Staff have also been following social media and traditional news sources on the topic.

For the most part, there has been support for the changes and the dispensaries. Some people, though, have voiced concern over the municipality instituting regulations ahead of the federal changes. Staff have also heard from prospective dispensary owners who are frustrated because they want to open a dispensary in

Penticton and find it unfair that other shops have opened against current zoning. They are claiming it is an unfair advantage and hope that the existing shops aren't grandfathered in at their expense.

In addition to the more informal public consultation done to date, staff are requesting that prior to the introduction of the bylaw changes, that a public open house be held to receive further comment from the public.

Proposed Bylaw Changes

Given the wide variety of approaches towards regulating dispensaries and the lack of tested and experienced 'best practices' to rely on, staff tried to establish a framework that both spoke to the existing dispensaries and mitigated any perceived nuisances that the proliferation of dispensaries may create.

With that in mind, the following approach was created:

Amendments to the Zoning Bylaw

1. Create definitions for "medical marijuana", "marijuana dispensary" and "medical marijuana production facility"
2. Include the use "medical marijuana production facility" in the A, C6, C7 and M1 zones under the following conditions:
 - a. Have to be an approved facility under Health Canada regulations;
 - b. Meet all BC Building Code requirements;
 - c. Cannot be in conjunction with retail sales of any products, marijuana or otherwise.
3. Include the use "marijuana dispensary" in the C4, C5, C6 and C7 zones subject to the following regulations:
 - a. Dispensary cannot be combined with any other businesses (retail or otherwise)
 - b. Must not be located within 200 m of an elementary or secondary school;
 - c. Prohibition on having product visible from the outside the store.

Amendments to the Business Licence Bylaw

1. Adding a section of the Bylaw dealing with the licensing of medicinal marijuana, with the following regulations:
 - a. Limiting the hours of operation of a dispensary from 8:00 AM – 10:00 PM;
 - b. Requiring having two staff present at all times during business operation;
 - c. Restrictions on entrance into a dispensary to persons over the legal age of 19 years;
 - d. Must have an approved ventilation system installed;
 - e. No smoking, or consuming product on premise;
 - f. Criminal record check for all employees showing no drug related offences within the past 10 years;
 - g. Must have security plan in place, with all product and money locked in a safe at night.

Amendments to the Fees and Charges Bylaw

1. Creating a fee of \$5,000 and yearly renewal fee of \$2,500 to operate a marijuana dispensary.

Amendment to the Bylaw Notice Enforcement and MTI Bylaw

1. Creating a fine for operating contrary to regulations of \$1,000 under the MTI Bylaw
2. \$500 fine under Bylaw Noticed Enforcement Bylaw

Analysis

Option 1 Prohibiting marijuana dispensaries in Penticton and actively enforce through injunctive action against both business operators and business owners.

This first option follows the examples set by municipalities such as Osyoos and Delta, whose staff and Council have taken swift action to quell any dispensaries within their jurisdictions. It involves the inclusion of definitions for marijuana dispensaries in the Zoning Bylaw, but expressly prohibits the use within the city, until such time as the federal government has had the opportunity to establish the marijuana distribution rules. This would be followed with injunctive action on any non-compliant businesses.

With this approach, Council would certainly be on the right side of the current legal framework, but may be on the wrong side of history, given pending legalization.

Option 2: Move forward with changes to the Zoning Bylaw and Business Licence Bylaw for marijuana dispensaries

The federal government has made overtures towards legalization and it is likely that municipalities will have a say in how marijuana is distributed within its jurisdictional boundaries. By using the powers to regulate business, Penticton could be seen as *getting ahead of the issue*.

In their presentations to Council all of the dispensary owners stated that they wanted to be operating with authorization for the City. Option 2 would provide legitimacy to those business operators.

There is a risk though. In going ahead of federal legalization, Penticton may find themselves with rules that don't jive with the federal distribution system. This could provide businesses a false sense of security.

As these types of bylaws have not been tested yet in court, there is a risk that Penticton may face a successful legal challenge, if we tried to enforce the bylaw.

Option 3: Not take action

Council may choose not to make any regulatory changes until such time as there is more clear direction from the federal government (likely not until Spring 2017 at the earliest). Council would then direct staff to not take enforcement action against the operating dispensaries and they would continue to operate in a state of non-compliance and be subject to law enforcement action.

While the City would be seen as not-enforcing its bylaws, which could affect the legitimacy of the bylaws with this approach, this is a unique situation. This approach is the least costly. All of the risk remains with the business operators.

Next Steps

If Council is in support of the introduction of regulatory changes to support dispensaries in Penticton (Option 2), staff will develop an engagement strategy to elicit feedback from the public on the proposed bylaw. Upon conclusion of that process, the proposed bylaw changes will be introduced at an upcoming Council meeting, which will trigger a statutorily required Public Hearing. It is anticipated that if this is the route that Council chooses to take that the dispensaries may be licensed within a 3 month time period.

In the meantime, staff will work with the 4 known businesses that have been selling medical marijuana on coming into compliance with the new rules and any other business owners that wish to open a dispensary in Penticton. Staff will not take enforcement action as long as all fines levied to date are paid in full and the dispensaries are working towards meeting the intent of the regulations.

It is important that all fines be paid as the current businesses have gotten an unfair advantage at the expense of other prospective business owners. There should be consequences for operating in violation of a Council order.

Alternate Recommendations

THAT staff are directed to do further research and report back to Council at a later date.

Attachments

N/A

Respectfully submitted,

Blake Laven, RPP, MCIP
Planning Manager

Approvals

Chief Administrative Officer <i>ES</i>
--