IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2021
VOL.62
NO.02



OFFICERS
President
Tyrone E. Cooper
City Attorney
Beaumont, Texas

President Elect
Barbara Adams
General Counsel
Illinois Local Government Lawyers Association

Immediate Past President
Patrick Baker
City Attorney
Charlotte, North Carolina

Treasurer
Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia

General Counsel and Executive Director
Charles W. Thompson, Jr.
IMLA Rockville, Maryland

BOARD OF DIRECTORS
Christopher Balch
City Attorney
Brookhaven, Georgia

Shauna Billingsley
City Attorney
Franklin, Tennessee

Lori Grigg Bluhm
City Attorney
Troy, Michigan

Alan Bojorquez
Borjorquez Law Firm PLLC
Austin, Texas

Beth Anne Childs
City Attorney
Owassa, Oklahoma

Jeffrey Dana
City Solicitor
Providence, Rhode Island

Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York

Douglas Haney
Corporation Counsel
Carmel, Indiana

Nina R. Hickson
City Attorney
Atlanta, Georgia

Joy Hulton
Regional Solicitor
York Region, Ontario, Canada

Wynetta Massey
City Attorney
Colorado Springs, Colorado

Marcel S. Pratt
City Solicitor
Philadelphia, Pennsylvania

Gregory Priamos
County Counsel
Riverside County, California

Kelly Jean Long Pridgen
General Counsel
Association County Commissioners of Georgia
Atlanta, Georgia

Tracy Reeve
City Attorney
Portland, Oregon

Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County, Florida

Nancy Thompson
City Counselor
Columbia, Missouri

Randall Van Vleck
General Counsel
New Mexico Municipal League
Santa Fe, New Mexico

Byron Werry
City Solicitor
Regina, Saskatchewan

Susana Alcala Wood
City Attorney
Sacramento, California

CONTENTS

MARCH / APRIL 2021

ROBOCALL ME MAYBE-FEDERAL RESTRICTIONS ON MUNICIPAL AUTOMATED MESSAGING
By: David S. Johnson, Assistant City Attorney, City of Arlington, Texas
While emergency alerts and COVID updates may generally be communicated without the recipient's prior consent, most municipal robocalls and texts, even where well-intentioned, require advance authorization.
PAGE 6

THE MUNICIPALITY AS SHAREHOLDER: SECURITIES LITIGATION IN THE AGE OF FISCAL AND SOCIAL RESPONSIBILITY
By: Joshua Grabar, Principal, Grabar Law Office, Philadelphia, Pennsylvania
Municipalities increasingly take action as shareholders, seeking recourse for corporate fraud and mismanagement and exerting pressure for social and environmental reforms.
PAGE 12

DEPARTMENTS

PAGE12, 6, ILLUSTRATIONS BY TRUJILLODESIGN

18 AFFIRMATIVE LITIGATION
Public Sector Entities and Affirmative Litigation
By: Edward Truant, Founder, Slingshot Capital, Inc., Toronto, Ontario and Grant Farrar, Founder, Arran Capital, Inc. Evanston, Illinois
An additional mechanism to fund municipalities seeking recourse on behalf of their constituents.

22 PRACTICE TIPS
Mandatory Employee Vaccinations: Complexities Abound
By: Karen Day White, Executive Counsel, Louisiana Municipal Association, Baton Rouge, Louisiana
Covid vaccines are increasingly available. Easy answers are not.

24 SUPREME COURT
Legislators Rein in Qualified Immunity: High Court Review Ahead?
By: Lisa Soronen, Executive Director, SLLC Washington D.C.
Legislatures seek to limit QI.

28 AMICUS
About Face? Reviewing a Prior Administration's Pending Cases
By: Amanda Karras, IMLA Deputy General Counsel and Director of Legal Advocacy
A tradition of Solicitor General fidelity to prior pleadings.

32 PREEMPTION
Pandemic Proof? Cannabis Retailers Thrive in Ontario
By: Monica Ciriello, Ontario 2015, Hamilton, Ontario
A province overrides local regulatory efforts. Uncontrolled proliferation follows.

34 DIVERSITY
Diversity, Equity, and Inclusion, Oh Yes!
By: Deanna Shahnami, IMLA Associate Counsel
The law department as an investment portfolio.

36 INSIDE CANADA
Examining Racism, Bias, and Procedural Fairness
By: Monica Ciriello, Ontario 2015, Hamilton, Ontario
Recent cases of interest.

38 LISTSERV
Virtual Realities: Avoiding Mishaps While the Camera is On
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Do's and dont's in a Zoom world.

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Deanna Shahnami

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2021 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

PREEMPTION

BY: MONICA CIRIELLO
Ontario 2015

Pandemic-Proof? Cannabis Retailers Thrive in Ontario

COVID-19 has seemingly spared few businesses in its path. While local restaurants, travel and tourism industry giants and thousands of small businesses have suffered, one unlikely player has thrived; the retail cannabis industry. Over the last year, the City of Hamilton, a metropolis of 600,000, has received over 100 applications from the Alcohol and Gaming Commission of Ontario (AGCO), the provincial licensing regime, to open cannabis retail stores. Many of these applicants have applied to operate their shops in vacant commercial spaces where once-vibrant local businesses once stood.

This has raised several important questions. Many are a matter of policy, such as, which businesses are best suited to occupy valuable downtown commercial real estate? The answer to these questions tends to rely on complex evaluations of costs and benefits. Other questions are a matter of jurisdiction, such as what authority does the City have to regulate cannabis retail stores in their community? To this question the answer is much simpler: none!

Federal Jurisdiction: Legalizing Recreational Cannabis

The Federal government proposed two bills to legalize and regulate the use of non-medical cannabis across Canada: Bill C-45 and Bill C-46. Bill C-45 *An Act respecting cannabis and to amend the Controlled Drug and Substances Act, the Criminal Code and other Acts (Cannabis Act,* S.C. 2018, c. 16*)* created a regulatory framework for the production, distribution, sale, cultivation and possession of cannabis across Canada. Bill C-46, *An Act to amend the Criminal Code and to make consequential amendments to other Acts* addressed the offences relating to cannabis. The recreational use of cannabis became legal on October 17, 2018.

Under the *Cannabis Act* the federal government is specifically responsible for:

- Individual adult possession of cannabis;
- Promotions and advertising, including regulating how cannabis or cannabis accessories can be promoted;
- Packaging and labelling;
- Licensing commercial cannabis production;
- Criminal penalties.

The Ever-Changing Provincial Process

In Ontario, the provincial government was originally the only legal vendor of recreational cannabis, selling it online from the Ontario Cannabis Store. With a change of government in 2018, the Province amended its approach, providing municipalities the authority to contemplate bricks and mortar cannabis retail stores within their jurisdiction. In accordance with the *Cannabis Licence Act, 2018, S.O. 2018,* c. 12 Sched. 2, the Province, not the municipality, would ultimately license the cannabis retail stores through the AGCO.

Municipalities had the option to debate whether to opt-in or opt-out of the provincial government's offer. The City of Hamilton opted-in, permitting cannabis retail stores to open and operate within the municipality.

At the time Council opted-in it was concerned of its limitations under the *Cannabis Licence Act, 2018* and sought further authority. The City wanted the authority to determine:

i. separation distances from sensitive land uses such as parks, schools, day care and health care facilities;
ii. over-concentration of dispensaries in one area of the City;
iii. the total number of dispensaries City-wide and within particular areas of the City;
iv. general issues of urban design such as location of entrances and transparency of facades;
v. advertising and signage;
vi. hours of operation;
vii. property standards compliance;
viii. the ability to restrict or prohibit operations that routinely violate municipal standards such as noise, nuisance or property standards.

In 2019, the Province announced that the AGCO would conduct a lottery to permit 25 private cannabis retail stores into communities that opted in. Two of these lottery locations were in Hamilton. A second lottery was held in August 2019 for 50 cannabis retail stores and of the 50 authorizations, the Province allocated eight stores to retailers to operate on a First Nations Reserve, with the remaining 42 stores being allocated throughout the Province; five authorizations through this lottery went to Hamilton.

The process changed again for municipalities when the Province announced that the AGCO had been given regulatory authority to open the market for retail cannabis stores beginning in January 2020, without the need for a lottery. This meant that the temporary cap on the number of private cannabis retail stores throughout the Province and the pre-qualification requirements for prospective retailers were removed. Other amendments included:

- Increasing the ability of licensed producers to open a store at one of their facilities;
- Phasing in limits on the number of authorized stores a licence holder can hold; and
- Allowing retailers to sell other cannabis related items, such as cannabis magazines and cookbooks.

The changes occurred without municipal consultation.

Municipalities are only Commenting Bodies

The AGCO only advises municipalities of an application for a proposed cannabis retail store in its jurisdiction. Within 15 days, municipalities are responsible for reviewing the applications and providing comments to the AGCO. As a result of the influx of applications, the City of Hamilton has established a designated Cannabis Team responsible for reviewing each proposed location utilizing Council's *Cannabis Policy Statement*. This includes reviewing and reporting on the City's desired 150-metre radial separation setback from schools, parks, day cares, libraries, community centres, addiction and health centres and other cannabis stores. The team also solicits input from the area Councillor, internal stakeholders such as police, building and public health officials, as well as canvases residential addresses and businesses within a 300-metre radial area. All comments or concerns are compiled and provided to the AGCO for consideration.

The AGCO issues a cannabis retail licence to all applicants as long as it does not contravene the "public interest" as defined in section 10 of Ontario Regulation 468/18 of the *Cannabis Licence Act, 2018*:

10. For the purposes of paragraph 5 of subsection 4 (6) of the *Act*, only the following matters are matters of public interest:
    1. Protecting public health and safety
    2. Protecting youth and restricting their access to cannabis.
    3. Preventing illicit activities in relation to cannabis.

Over the past year the City of Hamilton has received 101 applications for cannabis retail stores from the AGCO. Upon review, the City had no objection to 58 of the applications, objected to 30 applications for a contravention of the City's *Cannabis Policy Statement*, and the remaining 13 applications are still pending. The AGCO has granted all applications including the 30 opposed by the City. Presently 88 cannabis retail stores are open or set to be opening their doors in Hamilton, with 13 more expected in short order despite objection. In summary, whatever authority the City appears to have been given, is in fact, inconsequential.

Municipal Authorities

One of the most common business regulations is the requirement that people obtain a business licence from the City in order to operate. The *Municipal Act, 2001*, S.O. 2001, c. 25 provides municipalities broad authority to pass by-laws respecting business licensing, establishing in the bylaw terms and conditions that must be met for obtaining, continuing to hold or renewing a business licence. The bylaw may suspend or cancel a business licence for failing to comply with the terms and conditions. However, section 42(1) of the *Cannabis Licence Act, 2018* explicitly restricts a municipality's by-law making authority for cannabis retail stores:

> 42(1) the authority to pass a business licensing by-law within the meaning of the *Municipal Act, 2001* […] does not include the authority to pass a by-law providing for a system of licenses respecting the sale of cannabis, holders of a licence or authorization issued under this Act or cannabis retail stores.

The same limitation applies for *Planning Act*, RSO 1990, c. P. 13 by-laws:

> *42(2) the authority to pass a by-law under section 34, 38, or 41 of the Planning Act does not include the authority to pass a by-law that has the fact of distinguishing between a use of land, a building or a structure that includes the sale of cannabis and a use of land, a building or a structure that does not include the sale of cannabis.*

With cannabis retail stores on the rise with no indication of slowing, it may be time for the Province to increase municipal authority to regulate cannabis retail stores through municipal licensing so as to differentiate dispensaries from other commercial forms of retail use, and/or to have broader separation distances from other establishments such as schools, parks or residential neighborhoods. ML