

City of Victoria Withstands Judicial Scrutiny in Denying a Rezoning Application for a Cannabis Dispensary

Green Dragon Medicinal Society v. Victoria (City) 2018 BCSC 116

A: Introduction

The British Columbia Supreme Court has recently upheld the City of Victoria's decision to deny a rezoning application submitted by a medical cannabis dispensary. The facts in this case are unique to Victoria, given its particular bylaws and policies relating to cannabis dispensaries; however, this case contains some lessons and reminders regarding how a local government must treat an applicant for rezoning. This case also provides a glimpse into the challenges that lie ahead for local governments, when they will be called upon to consider rezoning applications submitted by cannabis retailers.

B: Factual Background

Victoria has adopted a bylaw that provides for the issuance of business licences to cannabis-related businesses (the *Cannabis-Related Business Regulation Bylaw*), and a policy relating to rezoning properties to permit storefront cannabis retailers (the "Storefront Cannabis Retailer Rezoning Policy"). The bylaw requires that a cannabis storefront retailer is required to apply for rezoning to permit cannabis retail. The rezoning policy states that a storefront cannabis retailer should be at least 200m from a public or independent elementary, middle or secondary school.

The Green Dragon Medicinal Society applied for rezoning to permit a storefront cannabis retail operation – at the time of its application Green Dragon operated a medical cannabis dispensary. Green Dragon sought rezoning to permit retail cannabis if and when retail cannabis is permitted under federal and provincial law.

The City's staff recommended that council approve the application for rezoning, noting that Green Dragon's storefront is not within 200m of a school. In fact, Green Dragon's storefront is located within 200m of the Chinese Public School, an historic school that continues to offer Chinese language, literature, dance and music programs to children and adults.

At the council meeting during which Green Dragon's application was considered, one of the main discussion points related to the rezoning policy's minimum separation from schools. Evidently, the meaning of school, as the term appeared in the rezoning policy, was a matter of some debate.

Ultimately, council voted 7-2 to deny the rezoning application, without proceeding to a public hearing.

C: Decision

The Court framed Green Dragon's complaints, and ruled on those complaints, as follows:

Reasonable expectations

Green Dragon argued that it had a reasonable expectation that its rezoning application would succeed. The court confirmed that the doctrine of reasonable expectations does not apply to a legislative act such as a rezoning application. Furthermore, even if the doctrine applied, Green Dragon failed to prove that it had a reasonable expectation of success.

Meaning of "School"

Green Dragon argued that the meaning of "school" included only elementary, middle or secondary schools that operated during regular school times – this was also the view held by City staff.

Green Dragon further argued that council expanded the meaning of "school", or relied on improper assumptions of its meaning, in finding that the Chinese Public School was a "school".

The Court held that the rezoning policy was not intended to be determinative of the City's response to rezoning application, and that council exercised its discretion in considering the policy, as well as other factors in denying the application. Furthermore, council did not modify the policy in its deliberations, nor did it rely solely on an improper assumption regarding the meaning of school.

Misapprehension of a purpose underlying the minimum separation from schools

Green Dragon argued that council misapprehended the rezoning policy as requiring that there must be a minimum separation between a cannabis retailer and young people. The Court could not identify the evidence of this, and in any event held that council had the discretion to draw that conclusion, given that the rezoning policy is not determinative of council's decision.

Public Hearing

Green Dragon argued that it was unfair for council to decline to hold a public hearing in the matter.

The Court found that Green dragon was provided with the opportunity to address council, and that there was no requirement to hold a public hearing.

Bias

Green Dragon argued that one councilor had predetermined his decision, given that he had voted against all prior rezoning applications relating to cannabis retailers, and that another councilor held a bias in favour of the Chinese Public School, given that she was a former director of a related society. The Court did not accept these arguments.

It is noteworthy that the councilor that had rejected all prior applications remarked during the council meeting that “my unwillingness to support this one is based on overall policy considerations rather than an evaluation of this proposal versus other proposals”.

However, the Court remarked that that particular councilor appeared to have kept an open mind in discussing the application, noting that he remained “capable of persuasion”.

Consistency

Finally, Green Dragon argued that council’s decision was inconsistent with past decisions. The Court held that the City met its procedural obligations, including procedural fairness and that this complaint had no merit.

D: Implications

This case is unique to Victoria given its particular policies for dealing with cannabis retailers. However, once retail cannabis is authorized, many local governments will adopt rezoning policies of their own, and will be faced with any number of rezoning applications, relating to cannabis retailers. Therefore, this case provides a glimpse into the issues that may arise in rezoning applications relating to cannabis retailers (think: definition of “school”). As well, this case reminds us of the standard to which courts will hold municipal councils tasked with considering rezoning applications (think: procedurally fair, free from bias, but otherwise relatively wide discretion).

Please contact us should you wish to discuss the implications of this decision in more detail.