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LAWYERS

February 10, 2020

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Mayor Marvin Junkin and Members of Council
Town of Pelham
20 Pelham Town Square, P.O. Box 400
Fonthill, ON L0S 1E0

Dear Mayor and Members of Council:

Re: Town of Pelham Proposed Odourous Industries Nuisance By-law

We act as solicitors to CannTrust Inc.

This correspondence is provided in response to the "Draft Recommendation Report On Managing Cannabis Nuisances in the Town of Pelham" (the "Report') prepared by the Cannabis Control Committee. The correspondence also deals with issues relating to the draft Odourous Industries Nuisance By-law (the "Draft By-law"). We would ask that this communication be provided to the Mayor and all Members of Council and that it form part of the municipal Council package for the February 18, 2020 meeting.

In our respectful submission there are serious procedural concerns with the Town's process leading to the Report and the Draft By-law. These in turn have led to significant substantive issues relating to both the Report and the Draft By-law. The Report itself is replete with factual errors and misinformation. The Draft By-law is not only deeply flawed, it is both discriminatory and illegal.

Through this submission, **we are asking that Council press pause, and refer the Report and the Draft By-law to staff for consultation with all stakeholders to ensure that a proper review is conducted and a proper background report is prepared prior to finalizing a by-law.**

Our concerns are summarized below.

A. PROCEDURAL ISSUES

The Cannabis Control Committee (the "CCC") is said to be a committee of the Town of Pelham *"created by Council as an advisory committee to provide advice to Council on opportunities to mitigate against adverse land use impacts of cannabis production facilities in the Town"*.

The CCC began its work in May of 2019. Only two members of the CCC (in addition to Council representative Mike Ciolfi) have toured our client's facility, and that tour took place before the CCC was formed.

No member of the CCC has reached out to our client, or, to the best of our knowledge, to any other members of the industry to invite input on cannabis facilities or operations.

No member of the CCC has reached out to our client, or, to the best of our knowledge, to any other members of the industry, seeking input on proposed regulations that would directly impact the cannabis industry.

Simply put, there has been no communication or consultation with our client, or to the best of our knowledge, others in the industry relating to issues raised in the report, or matters raised in the Draft By-law. Communication and consultation are absolutely fundamental to understanding the cannabis industry and the land use issues the CCC is said to be studying. Without it, the CCC is acting in a vacuum.

The CCC is said to be a committee to advise Council "on opportunities to mitigate against adverse land use impacts" of these facilities. And it purports to do so with no knowledge of what is actually happening in terms of mitigation steps already taken by our client. The result is predictable – a flawed report leading to a fatally flawed Draft By-law.

Had even the most basic and minimal amount of consultation with our client been undertaken, the CCC would have learned of the extensive work and research CannTrust has done, including:

- Extensive testing on the effectiveness of the leading odour control products available, at a cost of tens of thousands of dollars;
- The use of active carbon filters at all exit points of greenhouse exhaust air;
- Smoke tests to study air flow in the facility; and
- Ventilation being adjusted to ensure that no air can escape the facility without filtration.

In addition, the CCC would have had the opportunity to base its Report on accurate facts, including that:

- CannTrust has become a leader in the industry in respect of odour control;

- CannTrust has spent hundreds of thousands of dollars on odour control, including the implementation of some 180 carbon filters; and has implemented full odour mitigation in a dry room which had previously been (erroneously) unmitigated; and

With respect to light control, the CCC could have also learned that:

- Winter ventilation has been upgraded to allow blackout light curtains to be closed during ventilation to mitigate light pollution in all flower zones, and that this has eliminated the escape of all "red" light which accounts for about 90% of CannTrust's previous light pollution; and

- Special blackout curtains are currently being designed to be installed in the vegetative zones, which will completely stop all light leaks out of the greenhouse roofs.

Rather than referring the Report and Draft By-law to staff for review and report in the normal course, we understand that on February 3, 2020, the Draft By-law was put over to February 18, 2020 for review and **approval**. This is a stunning departure from what would be considered basic best practices, and leads to the conclusion that neither the CCC nor Council have any interest in acting in good faith in this entire matter.

That conclusion is supported by our review of the record from the February 3, 2020 meeting. That record discloses that not a single Council member spoke to the Report or the Draft By-law. There were no questions, there were no inquiries. This leads our client to the inescapable conclusion that Council had improperly pre-determined the outcome of this matter.

We urge Council to review and reconsider the process to date. It has been out of the ordinary and it has been unfair.

B. SUBSTANTIVE ERRORS

(I) The Report

The Report, or a draft version of it, was placed on-line in advance of the February 3, 2020 Council meeting. This draft was incomplete and contained several placeholders.

We have now obtained a copy of a revised report that was subsequently filed. It is still incomplete, devoid of analysis and full of inaccuracies and misstatements.

Our comments on the Report include:

1. A fundamental flaw in the Report is the mischaracterization of the cannabis cultivation. Section 3.2 of the Report is entitled "Cannabis Industry – Industrial or Agricultural?"

   The Report cites the "North American Industry Classification System (NAICS) in an apparent attempt to classify the cannabis industry. That system in fact, identifies virtually all uses as meeting an industrial classification, including all types of agriculture, clothing stores, newspapers, postal services, sporting goods, transit systems, universities, etc.

   What the Report ignores is the fact that the NAICS is intended to address economic conditions, not to regulate the use of land in any context.

   With respect to MPAC, the Report appears to quote Ontario Regulation 282/98. That Regulation, however, contains no reference to cannabis. Further, the position that a use is industrial because some component falls with the *Assessment Act* classification would mean that every greenhouse that includes shipping or every orchard that provides warehousing is an industrial use

   MPAC's classification system is utilized for the purpose of assessing land value for property taxation, not to regulate the use of land.

   The CCC's interpretation of this Regulation found in the Report is simply wrong.

   As set out below in some detail, Provincial planning policy envisions and permits the cannabis production as agriculture-related uses.

2. Section 3.3 of the Report speaks to the *Environmental Protection Act* and Provincial Guidelines and Regulations.

   The report cites Section 14 of the *Environmental Protection Act, R.S.O. 1990,* but fails to acknowledge other relevant provisions of the legislation.

   For example, the report identifies odour as a contaminant but does not address exemptions or the identification of contaminants as provided for in the Ontario Regulations.

   Ontario Regulation 419/05 – Air Pollution – Local Air Quality twice (subsections 20(2.3) (a) and 20.3(a)) references agricultural operations as being exempt from contaminants in Schedules 2 and 3 under subsection 2(1) of the *Farming and Food Production and Protection Act.*

   Further, subsection 2(1) of the *Farming and Food Production Protection Act*, 1998, R.S.O. 1998, c. 1 states:

"When farmer not liable
2 (1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice. 1998, c. 1, s. 2 (1)."

The Act defines disturbance as:

"odour, dust flies, light, smoke, noise and vibration"

A normal farm practice is defined as:

"a practice that,
(a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
(b) makes use of innovative technology in a manner consistent with proper advanced farm management practices; "

The Report also cites NPC-300, "Environmental Noise Guideline - Stationary and Transportation Sources - Approval and Planning", but fails to point out the following:

"3. Stationary sources addressed under the jurisdiction of the Ontario Ministry of Agriculture, Food and Rural Affairs

Part B and Part C of this guideline do not apply to the noise impact of stationary sources associated with agricultural operations during the course of normal farm practice which are addressed through the Farming and Food Production Protection Act, 1998, Reference 9. These sources do not require an MOE approval. Examples of such sources include, but are not limited to [in part]:

building heating, ventilation and air conditioning (HVAC) equipment used in livestock, greenhouse, horticultural and other facilities;

other noises from other stationary sources on agricultural operations during normal farm practice."

In addition, Subsection A6 of the NPC-300 provides the legislative background for the Guideline, stating specifically:

"A6.6 Farming and Food Production Protection Act
The Farming and Food Production Protection Act, 1998, Reference 9, addresses, among other things, noise sources for agricultural operations. The NPC guidelines do not apply to noise sources from agricultural operations during the

course of normal farm practice, which are subject to the Farming and Food Production Protection Act, 1998."

3. Starting at item 3.4, the Report considers planning in the context of the Provincial Policy Statement ("PPS").

   However, the Report does not contain a proper (or in fact, any) planning analysis. It either cites policy without analysis, or simply inserts a placeholder.

   As indicated above, a fundamental flaw in both the Report and the Draft By-law is a mischaracterization of our client's land use.

   The PPS provides the following definitions of uses:

   "Agricultural uses: means the growing of crops, including nursery, biomass, and horticultural crops; raising of livestock; raising of other animals for food, fur or fibre, including poultry and fish; aquaculture; apiaries; agro-forestry; maple syrup production; and associated on-farm buildings and structures, including, but not limited to livestock facilities, manure storages, value-retaining facilities, and accommodation for full-time farm labour when the size and nature of the operation requires additional employment. "

   "Agriculture-related uses: means those farm related commercial and farm-related industrial uses that are directly related to farm operations in the area, support agriculture, benefit from being in close proximity to farm operations, and provide direct products and/or services to farm operations as a primary activity"

   "On-farm diversified uses: means uses that are secondary to the principal agricultural use of the property, and are limited in area. On-farm diversified uses include, but are not limited to, home occupations, home industries, agri-tourism uses, and uses that produce value-added agricultural products."

   The lands are also identified as specialty crop area in the PPS. The PPS defines specialty crop area as:

   "areas designated using guidelines developed by the Province, as amended from time to time. In these areas, specialty crops are predominantly grown such as tender fruits (peaches, cherries, plums), grapes, other fruit crops, vegetable crops, greenhouse crops, and crops from agriculturally developed organic soil, usually resulting from:

   a) soils that have suitability to produce specialty crops, or lands that are subject to special climatic conditions, or a combination of both;
   b) farmers skilled in the production of specialty crops; and

c) *a long-term investment of capital in areas such as crops, drainage, infrastructure and related facilities and services to produce, store, or process specialty crops."*

The above referenced policies make it clear that the PPS envisions the use of agricultural lands for a variety of agricultural purposes, including greenhouse crops, subject to the uses being considered a normal farm practice.

Our client's use is also clearly defined in the Town's planning documents

- Our client's lands are designated under the Town's Official Plan within the Specialty Agricultural designation. According to the Town's Official Plan, the principle use of land in the Specialty Agricultural designation shall be for the production of the full range of specialty crops identified in the Greenbelt Plan. The use as a cannabis production facility is permitted under the Town's Official Plan as an agricultural use, which is defined to include the growing of crops, including nursery and horticultural crops and associated on-farm buildings and structures.

- Policy B2.2.8 of the Specialty Agricultural designation specifically states *"Greenhouses and hoophouses are considered to be an agricultural use, ... ".*

- *"Specialty Crop Area"* is defined in Appendix F to the Official Plan *"as Specialty Crop Areas means areas designated using evaluation procedures established by the province, as amended from time to time, where specialty crops such as tender fruits (peaches, cherries, plums), grapes, other fruit crops, vegetable crops, greenhouse crops, and crops from agriculturally developed organic soil lands are predominantly grown, usually resulting from: a) Soils that have suitability to produce specialty crops, or lands that are subject to special climatic conditions, or a combination of both; and/or b) A combination of farmers skilled in the production of specialty crops, and of capital investment in related facilities and services to produce, store, or process specialty crops. (PPS, GP, PTGP)"*

4. Sections 3.6, 3.7, 3.7.1, 3.7.2, 3.7.3, 3.8 and 3.8.1 all indicate "to be completed".

   Our client's use is permitted as an agricultural use in the Greenbelt Plan, the Region's Official Plan and, as described in detail above, the Pelham Official Plan and Zoning By-law.

5. Section 3.9 of the Report quotes Section 6.19 of the Zoning By-law which deals with obnoxious uses.

   However, the Report fails to identify that the Pelham Zoning By-law 1136 (1987) at subsection 7.1(a) permits, *agricultural uses including greenhouses as a permitted use*, as of right. Subsection 5.5 of the By-law defines agricultural use as:

"a use of land, building or structure for the purpose of animal husbandry, bee-keeping, dairying, fallow, field crops, forestry, fruit farming, horticulture, market gardening, pasturage, nursery, poultry-keeping, greenhouses, or any other farming use, and includes the growing, raising, packing, treating, storing and sale of farm products produced on the farm and other similar uses customarily carried on in the field of general agriculture and which are not obnoxious".

Subsection 7.3 of the By-law contains provisions for the development of lands for greenhouse use.

Further:

- Our client's lands are zoned Agricultural (A) Zone in the Town's Comprehensive Zoning By-law, which permits, inter alia, agricultural uses including greenhouses.

- Section 5.5 of the Zoning By-law defines "AGRICULTURAL USE" as *"a use of land, building or structure for the purpose of animal husbandry, bee-keeping, dairying, fallow, field crops, forestry, fruit farming, horticulture, market gardening, pasturage, nursery, poultry-keeping, greenhouses, or any other farming use, and includes the growing, raising, packing, treating, storing and sale of farm products produced on the farm and other similar uses customarily carried on in the field of general agriculture and which are not obnoxious".*

- Section 5.61 defines "FARM" as *"a lot, with or without accessory buildings or structures, which is used for: (i) the tillage of soil; (ii) the growing of vegetables, fruits, grains or flowers including, but not necessarily limited to lettuce, carrots, tomatoes, mushrooms, beans, melons, and potatoes; (iii) woodlots; (iv) the raising of livestock including, but not so as to limit the generality of the foregoing, cattle, swine, sheep, goats, poultry, horses, ponies, donkeys, mules, mink, ducks, rabbits; (v) dairying; (vi) beekeeping; (vii) greenhouses; or (viii) the sale of farm products produced on the farm."*

- Section 5.190 defines "GREENHOUSE" means *"a structure used to cultivate or grow floral, vegetable or other horticultural produce in a climatically controlled environment and made primarily of translucent building material, usually plastic or glass."*

- Our client's lands are not site specifically zoned or designated in any direct way. The use is permitted because of it being considered an agricultural use.

6. Section 3.10 of the Report speaks to a municipality's power in Section 128 and 129 of the *Municipal Act* with respect to the prohibition and regulation of odour, light, nuisances and noise.

The *Municipal Act 2001, S.O 2001, c. 25* clearly affords municipalities opportunity to approve by-laws regulating actions within its borders. Our client does not dispute this fact. However, these by-laws cannot be considered in isolation and need to be addressed in the context of this use and other applicable legislation.

In respect to conflict between by-laws and statutes, Section 14 of the Act states:

> *"14 (1) A by-law is without effect to the extent of any conflict with,*
>
> *(a)a provincial or federal Act or a regulation made under such an Act; or*
>
> *(b)an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation. 2001, c. 25, s. 14.*
>
> *Same*
> *(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument. 2006, c. 32, Sched. A, s. 10."*

7. The Report contains a number of erroneous statements. For example:

   (i) *"Immediately following the legalization of recreational marijuana in October 2018, major cannabis operations sprung up in the Town of Pelham overnight catching residents completely off guard as there was no requirement for public meetings; and finding Town staff unprepared as there was no guidance provided to municipalities on how to manage this new dynamic industry which was created overnight."*

   CannTrust's Pelham facility was initially licensed on 2017-10-06, a year prior to legalization of recreational cannabis. CannTrust's initial market was the medical patient.

   Public meetings were not necessary because the use was appropriately zoned.

   The Town was well aware of the presence of CannTrust, as any applicant for a license through Health Canada had to provide notice to the municipal government. The implication that the Town was not aware until the eleventh hour is both misleading and inaccurate.

   (ii) *"Loss of precious specialty crop agricultural lands"*

   On the OMAFRA website hemp, tobacco and greenhouse crops are listed as specialty crops.

The use of the Subject Lands as a cannabis production facility is permitted under the Provincial Policy Statement, Greenbelt Plan and Regional Official Plan as well as the Town's Official Plan and Zoning By-law as an agricultural use

Councillors should ask themselves this question - Would there be criticism of a non-cannabis crop that was being grown when the operation employs 100 or more people?

(iii) *"Industrial-like facilities disrupting their picturesque country street and neighbourhoods"*

Our client's use is a permitted agricultural use. There are many large-scale agricultural operations that have aspects that are akin to industrial-type facilities. Our client has taken steps to aesthetically improve its site. Over $100,000 has been spent on planting 800 cedar trees, flower bulbs and landscaping upgrades

(iv) *"Heavy traffic and noise disrupting their quiet country streets and neighbourhoods"*

CannTrust is located along a major highway, not a local road. Most access to the facility is via Highway #20 and not local roads.

(v) *"Real estate agents now require disclosure if you live near a cannabis facility. Considering the fact that many of these properties that are affected are million-dollar retirement properties, even a 10% loss in value has significant economic ramifications'.*

January 2, 2020 article in Niagara This Week reported that "on the Ontario multi-listing system for real estate in December, the average price of a home listed for sale in Fenwick was $799,400. That's up about 9 per cent since Ontario legalized cannabis."

(vi) In respect to comments from the industry *"The CCC has considered these comments and has done its best to address them."*

This comment is baffling, given that there has been no consultation or communication by the CCC with the cannabis industry.

The above represents an overview of the issues with the Report. In our respectful submission, it is deeply flawed. Further, and as troubling, is that the report appears to be engineered in such a way as to cast our client in a negative light. For example, it includes photographs depicting light emissions taken before any light control or mitigation was installed. In addition, it infers our client removed soil from the property, which is factually incorrect.

The matters raised above do not constitute an exhaustive list of errors and omissions in the Report. The authors of the Report have chosen to ignore relevant facts, or did not take any steps to determine what those facts are, and either do not understand the relevant legal principles involved, or have chosen to ignore those principles. We believe that the Report needs significant revisions to be accurate both in fact and in law.

(II) The Draft By-law

As we have indicated in the past, and above, while municipalities may have jurisdiction to regulate cannabis production facilities:

1. Municipal by-laws cannot conflict with federal legislation/regulations; and

2. Municipal by-laws cannot frustrate the purpose of a federal enactment.

In general terms, a municipality must ensure that its by-laws do not frustrate the operation of federally-licenced facilities and that its by-laws are not discriminatory. Further, by-laws should be carefully reviewed by Town staff and legal counsel to ensure they are lawful and to determine how they relate to administration and enforcement matters.

The CCC's process, including the quote by the CCC Chair Tim Nohara at the Policies and Priorities Committee on February 3rd that "The Odourous Industries Nuisance By-law is a cannabis by-law for sure, but we have learned from other heavy odour industries and have included them in the by-law" make it clear the Draft By-law targets Cannabis producers.

The Report itself indicates that the By-law is reactive as opposed to proactive and indicates that it is based on direct experience with the existing cannabis producers. It cites adverse effects with respect to noise and light. However, it contains no updated information with respect to the alleged adverse effects, and no information as to the extensive mitigation measures undertaken by our client.

The Report states "Perhaps the greatest indicator that this By-law is urgently needed is the fact that cannabis producers have not remediated the problems…". As indicated at the outset of this report, there have been significant and successful mitigation measures taken by our client.

Additional concerns with the Draft By-law include:

- What is the definition of "trivial impact"?

- The By-law purports to define "adverse impact" differently than it is defined provincially? A municipality cannot change a provincial standard.

- Why does "heavy odour operation" not include other agricultural uses?

- Why does "obnoxious odour" only apply in respect of a cannabis operation or the limited "heavy odour operation"?

- What justification does the municipality have to scope the application of this By-law?

- What is the justification for imposing site plan control outside the scope of the *Planning Act*?

- Does the By-law conflict with specific federal requirements?

- Does the municipality have the ability to enforce the By-law?

- How can powers of entry be applied in the context of a secure federal facility?

- The By-law's sole purpose in targeting cannabis producers is also evidenced by the fact that the By-law, which is supposedly about (industrial) odour, inexplicitly adds provisions related to light and noise.

In our respectful opinion, the entirety of this Draft By-law is without jurisdiction, is discriminatory and is unenforceable. We urge the Town to carefully consider its jurisdiction and the specific regulatory provisions of any by-law that impacts a cannabis operation. The By-law as drafted creates potential for direct conflict with federal approvals and requirements.

C. CONCLUSION

As indicated, the purpose of this correspondence is to point out the procedural and substantive irregularities in the Report and Draft By-law, and to ask that Council defer the matter to staff and its legal counsel for review and advice to ensure that its process is fair and that the by-law when enacted is lawful and appropriate.

Councillors should ask themselves the following questions:

(a) Was there proper consultation with the industry in respect of this By-law?

(b) Has Council received advice from its staff and/or solicitor with respect to the legality and appropriateness of this By-law? Is the By-law enforceable? Does the Town have the resources to properly administer and enforce the By-law as drafted?

(c) Is Council confident that the report before it is well vetted, well researched, fair and reasonable?

(d) Is Council prepared to treat all legitimate lawful industries in its community the same?

(e) Is Council confident that this By-law can withhold a challenge?

From our review of the Report and the Draft By-law, we believe that the answer to each question would be a resounding "no".

We would like to make one final point. Our client recognizes that some degree of municipal regulation is appropriate and warranted. It considers itself to be a contributing corporate member of the community, and it is prepared to work with the community, its neighbours and the Town to achieve an appropriate set of municipal regulations. That can only happen though true consultation and communication.

We would be happy to answer any questions or concerns of the Committee and/or Council and we look forward to an appropriate and inclusive consultative process.

Yours very truly

Sullivan Mahoney LLP

Per:

Sara J. Premi

SJP:bj

cc—client
cc – Mr. Callum Shedden, Town Solicitor