

Subject: Regulation of Cannabis Odour in the Town of Pelham

Recommendation:

BE IT RESOLVED THAT Council receive Report #2024-0241 Regular of Cannabis Odour in the Town of Pelham, for information;

AND THAT Council determine its preferred approach to odour regulation in the Town of Pelham;

AND THAT Council approve, in principle, the proposed Odour Management By-law that corresponds to its preferred approach, being option _____;

AND THAT Council provide direction to staff on the administrative penalty amounts proposed for contraventions of the proposed Odour Management By-law;

AND THAT Council direct that the selected version of the proposed Odour Management By-law be presented to Council for consideration at the next regular meeting of Council.

Background:

In March 2020, Council passed the Odorous Industries Nuisance By-law (OINBL), which regulates odour produced by cannabis facilities and other heavy odour operations in the Town of Pelham. Staff and Council have received negative feedback from the community about the effectiveness of the OINBL. In August 2024, Council directed staff to undertake a comprehensive review of current odour thresholds in the OINBL and to investigate and report on the following related matters:

- Examine existing odour testing data
- Provide recommendations for revised odour limits that align more closely with community expectations while respecting industry standards
- Consult an odour expert for professional insights and recommendations on odour thresholds
- Investigate odour detection enforcement technologies to ensure Nasal Ranger is sufficient
- Maintain existing by-law, but provide analysis of potential odour threshold reduction options
- Review administrative penalties for odour emission and propose progressive penalty options

Staff have extensively investigated these matters and have consulted with odour expert Phil Girard. This report sets out the information gathered by staff and provides analysis and recommendations as requested by Council.

Analysis:

i. Review of Existing Test Data

The Town has been recording cannabis odour complaints since 2019 and conducting and recording cannabis odour readings with the Nasal Ranger device since 2021.

Complaints are submitted through an online system that is available 24 hours per day. By-law staff process and respond to complaints during business hours, which typically includes Nasal Ranger testing in the complaint area. By-law staff also conduct random Nasal Ranger testing almost daily from Monday to Friday at Redecan (182 Foss Road) and Thunder Spirit Ventures (1396 Balfour Street). Recently, By-law staff have also been testing odour at 1809 Underground (1760 Effingham Street). This is a new facility that is understood to have previously grown only cannabis seedlings that were shipped out before maturity; however, the business is now growing full-sized plants. The Town received a first odour complaint regarding this property in April 2024 and has been conducting odour readings with the Nasal Ranger since that time. In all cases, By-law staff test at the property line of the respective facility and record Nasal Ranger readings. In addition, during both complaint investigations and random testing, By-law staff note whether cannabis odour is detected in the ambient air.

Complaint and test data from January 2019 to July 2024 can be summarized as follows:

	2019	2020	2021	2022	2023	2024
Complaints	91	79	63	17	96	54
Nasal Ranger Detection	N/A	N/A	1	0	0	0
Ambient Air Detection	N/A	N/A	2	1	0	0
Random Tests	N/A	60	387	449	331	170
Nasal Ranger Detection	N/A	2	11	5	9	7
Ambient Air Detection	N/A	10	40	65	21	29

The OINBL provides odour strength thresholds in *odour units*, which is defined in part as the number of dilutions required to meet the detection threshold. The dilutions referred to here pertain to an odour measurement method known as *dilution-to-threshold (D/T)*. The Nasal Ranger allows the user to select a dilution ratio and when odour is detected, this is the D/T. The preset dilution ratios on the Nasal Ranger are 3, 5, 7, 15, 30 and 60. When the D/T is reached, the user adds a factor of 1 to arrive at the number of *odour units*.

The OINBL currently provides that odour strength measured at a facility property line must never exceed 6 *odour units*. A D/T reading of 5 on the Nasal Ranger constitutes 6 *odour units*. The chart above shows that the Nasal Ranger has detected odour in a small number of tests from 2021 to 2024. In all cases, however, the D/T was 3 or 5, which corresponds to 4 or 6 *odour units*. As the OINBL requires odour to exceed 6 *odour units*, there has never been a cannabis-related contravention.

This in a nutshell is the core of the problem: residents have experienced relatively strong odour issues, leading to the filing complaints, which in turn has led to testing. With the current OINBL requirements, none of the odour incidents which underlie the complaints have been significant enough to trip the *odour unit* threshold. Therefore, there have been multiple occasions where the OINBL has been inadequate to meet community expectations.

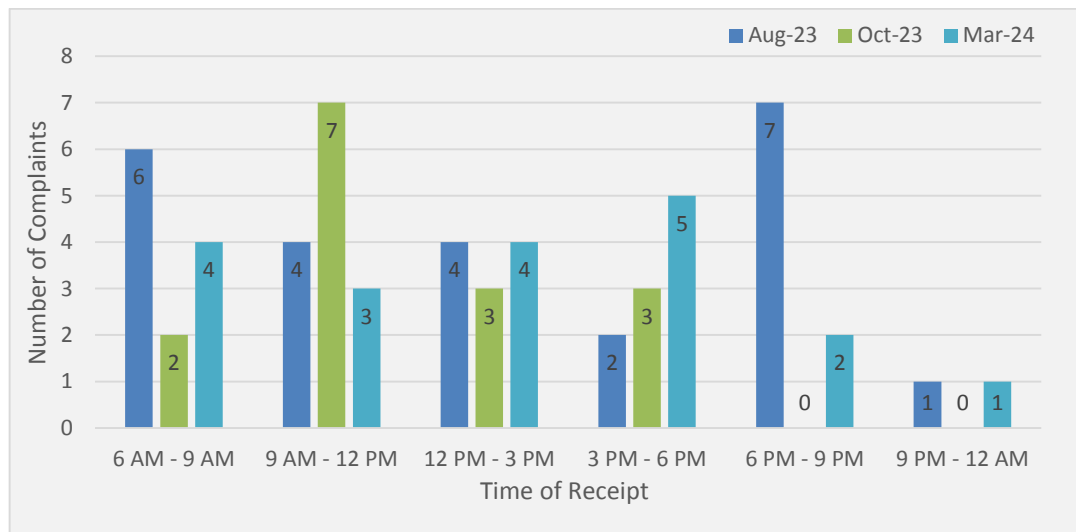
Staff have prepared a summary of monthly complaints, random test results with Nasal Ranger data, and ambient air detection data, from January 2019 to July 2024, which is attached as Appendix A to this report.

Staff have also reviewed individual complaint records for complaints received in August 2023, October 2023 and March 2024, which are the last three months with the highest complaint volume. The purpose of this review was to identify the number of complaints received from non-residents of the Town and to determine if there are peak hours for complaint frequency.

The breakdown of resident and non-resident complaints is as follows:

Month	Total Complaints	Number of Complainants	Resident Complaints	Non-Resident Complaints
August 2023	24	12	18	6
October 2023	15	10	13	2
March 2024	19	8	8	11

Complaint receipt times are as follows:



Complaints are generally made during the day and most are received during the regular operating hours of the By-law department.

ii. Recommendations for Revised Odour Limits

Cannabis cultivation is considered an agricultural use in Ontario. The *Farming and Food Production Protection Act, 1998* protects agricultural owners and operators from liability for nuisance disturbances resulting from normal farm practices and prohibits municipal by-laws from restricting them. The purpose of the legislation is to balance the needs of agriculture with health, safety and environmental concerns.

Normal farm practice is defined as a practice “conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances” or that “makes use of innovative technology in a manner consistent with proper advanced farm management practices”. Provided that a cannabis facility utilizes normal farm practices as defined in the statute, odour production is protected by the *Farming and Food Production Protection Act, 1998*.

The federal *Cannabis Regulations* require cannabis producers to equip buildings with a system to prevent odours escaping their facilities. There are no federal odour control requirements for outdoor production. Complaints can be made to Health Canada, but there is a general lack of enforcement at the federal level. In addition, Health Canada recently published guidance noting that although air filtration systems help limit odour intensity and how often it is noticed, there may still be cannabis odours from indoor production.

As discussed above, the Nasal Ranger uses D/Ts to quantify odour strength. The OINBL threshold of more than 6 *odour units* requires a D/T greater than 5. This is consistent with Canadian and American case law indicating that a D/T of less than 7 would not generally constitute an objectionable odour.

Staff recognize that residents impacted by cannabis odour would prefer a significant reduction of the odour threshold in the OINBL. However, given the statutory protections afforded to normal farm practices, the Health Canada guidance effectively acknowledging that cannabis odour cannot be prevented, and the case law, staff are unable to support a substantial reduction of the current threshold. However, staff do recommend that the threshold be described using D/Ts instead of *odour units* and that it be set at a preset dilution ratio on the Nasal Ranger rather than being required to exceed it. This would simplify testing and enforcement of odour complaints. In addition, case law indicates that odour units are not sufficiently reliable to be used as a compliance measure.

An alternative approach to odour regulation is to prohibit nuisance odours without using a specific odour threshold. For example, the Town of Leamington has a cannabis-specific by-law that requires producers to eliminate the migration of odour that is “*persistent or continuous and is likely to interfere with the ordinary enjoyment of other property in the vicinity*”. Similarly, the Town of Lincoln nuisance by-law prohibits the emission of odours that are likely to disperse to other properties and “*is of such emission that it causes a nuisance to a reasonable person*”. Cannabis producers in California must ensure that odours “*cannot be detected by a reasonable person of normal sensitivity*”. This is similar to the approach taken in the Noise Control By-law of the Town (By-law No. 4454(2022)), which defines *Clearly Audible* to include noise that is “*easily perceptible, without undue effort, to a disinterested person with no hearing disability*”.

To assist Council in determining its preferred approach to odour regulation, staff have prepared two draft by-laws for consideration. The draft by-law attached as Appendix B to this report relies on an odour threshold for enforcement purposes. The draft by-law attached as Appendix C to this report does not incorporate an odour threshold.

iii. Consultation with Odour Expert

Staff asked Phil Girard of PG Compliance Management Inc. to provide:

1. professional insights and recommendations on appropriate odour levels; and
2. information on odour detection enforcement technologies to ensure that the Nasal Ranger is adequate for the Town.

Mr. Girard prepared a confidential report in September 2024. He noted that Council and staff have expressed concern about legal enforceability of lower odour limits. Mr. Girard reviewed some case law in this area, which is referred to above, and opined that *“odour measurements and odour units as a compliance metric should be removed from the by-law and instead adopt a complaint based, adverse effect compliance approach”*. Mr. Girard made the following specific recommendations for the revised OINBL:

1. eliminate all references to dilution to threshold, odour unit measurements, and odour unit and impact frequency as compliance metrics
2. abandon odour measurements as an enforcement tool
3. eliminate references and requirements to conduct ambient odour monitoring programs monitored by the facility or otherwise
4. include revised and/or new definitions for odour unit, substantiated complaint, sensitive land uses, substantiated complaint trigger, contingency odour management plan
5. emphasize obligations of cannabis operations to comply with federal legislation
6. impose “non-detect” odour standards at all sensitive land uses
7. impose odour complaint recording and reporting to the Town
8. impose odour mitigation planning obligations and implementation timelines on the odorous facilities if the substantiated complaint trigger is met
9. impose continuous improvement odour mitigation if complaints persist

Many of these recommendations are incorporated into the proposed by-law attached as Appendix C to this report.

Mr. Girard further recommended that complaints be investigated while the odour event is occurring and proposed that the Town retain a trained and calibrated odour assessor to respond to complaints 24/7. Staff do not support this recommendation due to cost and because most complaints are received during the ordinary operating hours of the by-law department as noted above.

Mr. Girard noted that due to successful legal challenges against the use of odour units in British Columbia, it would seem prudent for the Town to adopt a different approach. He recommended the Town “*abandon the use of odour units as a compliance measurement and enforcement tool*” and instead adopt a “*community complaint based/adverse effect compliance process*”.

Mr. Girard recommended that the OINBL incorporate compliance tools from the Minutes of Settlement in the Redcan appeal such as odour emission reporting, odour abatement planning, and abatement implementation. Mr. Girard opined that proving adverse effect need not be difficult and stated:

“Adverse impact is established by the courts and based on my understanding the testimony of residents/complainants holds much weight. If the recommendations put forth are adopted by the Town, residents should be informed and encouraged to report odour impacts and hopefully be willing to testify should the need arise.”

Staff concur that the testimony of witnesses impacted by odour would be persuasive to a court. However, the Town generally prefers to enforce it by-laws via the administrative penalty system, which is much faster and more efficient than proceeding with charges. The administrative penalty system does not typically involve witness evidence and the hearing officer does not have jurisdiction to make a factual finding of adverse impact. These are important considerations in evaluating this proposed compliance approach.

With respect to odour measurement technology, Mr. Girard identified several equipment categories: laboratory olfactometers, field olfactometers that mimic laboratory devices by testing bottled air, field olfactometers that blend odorous and filtered air (the Nasal Ranger is of this type), and chemical sensors known as electronic noses.

Mr. Girard described the Nasal Ranger as being very portable, quick and easy to use. He noted that it measures D/Ts, which is not the same as odour units. He noted that some field olfactometers, like the Scentroid SM100, measure in odour units. Mr. Girard stated that the Scentroid SM100 tests bottled air and requires more training to operate than the Nasal Ranger. Mr. Girard did not recommend laboratory olfactometers or electronic noses for the Town. He concluded that the Nasal Ranger is a sufficiently reliable tool for the Town if odour measurements remain part of the OINBL.

iv. Odour Detection Enforcement Technologies

Based on Mr. Girard’s recommendations for suitable odour measurement technologies, staff obtained a quotation for the Scentroid SM100. The total quotation was \$12,658, which includes the following items:

- Scentroid SM100 Ultra-Portable Olfactometer
- On-Site Analysis Package
- N-Butanol Sensitivity Kit
- 3 User Masks

Training, maintenance and replacement costs would be in addition to the purchase cost.

v. Options for Progressive Administrative Penalty Options

The OINBL was amended by By-law No. 4263(2020) to bring it into the administrative penalty system. The amending by-law provides for an administrative penalty of \$250 for each day on which a contravention of the OINBL occurs or continues.

Section 434.1 of the *Municipal Act, 2001* provides that the amount of an administrative penalty cannot be punitive in nature and cannot exceed what is reasonably required to promote compliance with the by-law to which it relates. There is no prohibition against escalating penalties for successive by-law contraventions.

There is no case law or other guidance to establish what constitutes a punitive penalty amount. Consequently, staff have reviewed administrative penalty amounts imposed by the Town and other municipalities in Niagara Region for contraventions of a noise or nuisance by-law, which are the most analogous to odour by-laws. Not all municipalities use the administrative system for non-parking by-laws or set out their penalty amounts online. However, the available information can be summarized as follows:

Municipality	By-law Type	Escalating?	Low End	High End
Pelham	Noise By-law	Yes	\$250	\$750
		1 st contravention	\$250	\$250
		2 nd contravention	\$500	\$500
		3 rd contravention	\$750	\$750
Pelham	Nuisance By-law	Yes	\$250	\$1000
		1 st contravention	\$250	\$250
		2 nd contravention	\$500	\$500
		3 rd contravention	\$1000	\$1000
Fort Erie	Noise and Nuisance By-law	Yes	\$250	\$700
		1 st contravention	\$250	\$500
		2 nd contravention	\$350	\$600
		3 rd contravention	\$450	\$700
Port Colborne	Noise By-law	Yes	\$168	\$1340
		1 st contravention	\$168	\$335
		2 nd contravention	\$336	\$670
		3 rd contravention	\$672	\$1340
Thorold	Public Nuisance By-law	No	\$150	\$500
Wainfleet	Public Nuisance By-law	No	\$300	\$300
West Lincoln	Noise By-law	No	\$250	\$250

The administrative penalties imposed by the Town for contraventions of the nuisance by-law are generally comparable to those in other municipalities. Staff are of the view that imposing similar amounts for odour by-law contraventions is appropriate. Council may also wish to consider different penalty amounts for different by-law provisions, perhaps based on the overall frequency of contravention and/or the impact of same.

Should Council wish to impose a single administrative penalty scale for any odour-related by-law contravention, staff recommend the following:

Contravention	Amount
1 st contravention	\$250 for each day on which contravention occurs or continues
2 nd contravention	\$500 for each day on which contravention occurs or continues
3 rd contravention	\$1000 for each day on which contravention occurs or continues

Should Council wish to modify administrative penalty amounts according to frequency of contravention or severity of impact, staff recommend the following:

Frequency or Severity of Contravention	Contravention	Amount
Minor	1 st contravention	\$250 for each day on which contravention occurs or continues
	2 nd contravention	\$500 for each day on which contravention occurs or continues
	3 rd contravention	\$1000 for each day on which contravention occurs or continues
Moderate	1 st contravention	\$315 for each day on which contravention occurs or continues
	2 nd contravention	\$625 for each day on which contravention occurs or continues
	3 rd contravention	\$1250 for each day on which contravention occurs or continues
Major	1 st contravention	\$400 for each day on which contravention occurs or continues
	2 nd contravention	\$750 for each day on which contravention occurs or continues
	3 rd contravention	\$1500 for each day on which contravention occurs or continues

Staff support the use of a single administrative penalty scale for ease of administration but recognize that different penalty amounts may be effective to promote compliance with sections that are frequently contravened.

Financial Considerations:

Financial impacts associated with odour regulation will vary depending on the preferred approach selected by Council but may include costs to implement and enforce the odour management by-law and potential legal costs if the by-law is challenged.

Alternatives Reviewed:

The following alternatives are presented for consideration:

- Odour Regulation Options:
 - Odour threshold measured in odour units
 - Odour threshold measured in dilutions to threshold (D/T)
 - Odour threshold set at preset dilution ration for Nasal Ranger
 - No odour threshold
- Compliance Tool Options:
 - Odour assessor
 - Witness testimony
 - Nasal Ranger
 - Scentroid SM100
- Administrative Penalty Options:
 - Non-escalating penalty amount for all contraventions
 - Escalating penalty amounts consistent for all contraventions
 - Escalating penalty amounts based on frequency/severity of contravention
- Proposed By-law Options:
 - Approve proposed By-law Option 1 (Appendix B)
 - Approve proposed By-law Option 2 (Appendix C)
 - Refer proposed by-law(s) back to staff for revision

Strategic Plan Relationship: Community Development and Growth

Cannabis odour regulation is of substantial importance to the community.

Consultation:

The Senior Leadership Team and staff from the planning and by-law departments were consulted on and/or contributed to the preparation of this report.

Other Pertinent Reports/Attachments:

Appendix A – Complaint Summary

Appendix B – By-law Option 1

Appendix C – By-law Option 2

Prepared and Recommended by:

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