

An Act Relative To Equity In The Cannabis Industry Marijuana Reform September 6, 2022

The legalization of medical and recreational marijuana in Massachusetts raises many significant legal issues for municipalities as they navigate the permitting for and licensing of this fairly new industry. Many Massachusetts municipalities have engaged in extensive host community agreement negotiations to address both direct and indirect impacts within their communities. After much negotiation at the state level, the General Court recently enacted “An Act Relative to Equity in the Cannabis Industry” (the “Act”), which was signed by Governor Baker on August 11, 2022.

The Act makes numerous changes to Massachusetts’ marijuana laws, including those governing host community agreements (“HCAs”), community impact fees, so-called “social consumption” establishments,” also referred to as marijuana cafes, taxation, and the role of the Massachusetts Cannabis Control Commission (the “CCC”). This is the first in a two-part series exploring these extensive amendments. This memorandum provides an overview of changes made to the law concerning HCAs and community impact fees; we will address separately the issues of social consumption and social equity businesses.

HOST COMMUNITY AGREEMENTS

The Act substantially revises the regulatory oversight for and approval of HCAs, limits municipalities’ ability to collect impact fees for anticipated costs, establishes penalties for municipalities that fail to, or improperly, document impact costs, prohibits an HCA from imposing other types of monetary commitments beyond community impact fees, and establishes a mechanism by which municipalities may waive the HCA requirement entirely.

Impact Fees - While the Act does not eliminate the concept of a community impact fee, it does impose new and different requirements on host communities.

The Act identifies the following requirements applicable to the calculation of impact fees:

1. Fee must be reasonably related to the costs imposed upon the municipality in the preceding year by the operation of the marijuana business, as documented;
2. Fee must be based on actual costs, rather than as a percentage of total or gross sales;
3. Fee may amount to not more than three percent (3%) of the gross sales of the marijuana business;
4. Fee can be effective for no longer than the eighth (8th) year of operation of the marijuana business;

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5. Fee commences on the date the marijuana business is granted a final license by the CCC, with payment due annually to the host community;
6. Fee must be documented and transmitted by the host community to the marijuana business not later than one (1) month after the marijuana business' license is renewed by the CCC; and
7. Fee must encompass all payments and obligations between the host community and the marijuana business.

The significance of these changes is that a community impact fee cannot, without being at risk for a challenge, be calculated with regard to what a municipality predicts to be the costs of impacts but must instead be based on actual documented expenditures in the prior year. Further, the Act prohibits an HCA from providing for any other kind of financial commitment to a municipality or a non-profit as directed by the municipality and renders unenforceable “[a]ny other contractual financial obligation that is explicitly or implicitly considered in, or is a condition of a host community agreement.”

Breach of Contract Claim, Damages, Attorneys Fees – The Act also creates a breach of contract claim, to be brought in Court, to allow a licensed marijuana business to challenge a municipality's documentation of costs for purposes of calculating the community impact fee. If the marijuana business prevails on the claim that a host community's documented costs are not “reasonably related to the actual costs” imposed by its operation in the preceding year, the violation may be punishable by the award of damages attorneys' fees and other costs encompassed in the community impact fee. This is a significant remedy and likely imposes a high burden on municipalities to (1) contemporaneously document the process used to track expenditure-related matters that can be characterized as community impact fees, and (2) fund any anticipated impacts for the upcoming fiscal year, with the hope of being reimbursed through the community impact fee process after the end of that fiscal year.

Minimum Standards for Addressing Opportunity for those Disproportionately Harmed – By July 1, 2023, potential host communities must adopt procedures and policies that establish minimum standards for facilitating opportunity in the industry for those disproportionately harmed by marijuana prohibition before entering into an HCA with a marijuana business. Failure to adopt such procedures creates a significant risk for the host community, as the Act provides that such a community may be required to forfeit a monetary amount equal to the annual total of community impact fees received from all marijuana businesses operating within the host community. Further, the failure of any host community to abide by the regulations concerning such minimum acceptable standards, once promulgated by the CCC, may also result in forfeiture.

Role of the CCC – The Act provides the CCC with enhanced authority concerning HCAs. The CCC has jurisdiction to “review, regulate, enforce and approve” HCAs as part of a completed marijuana business license application and at each license renewal. The Act directs the CCC to promulgate rules and regulations applicable to the negotiation and approval of HCAs, with a focus on encouraging host communities to work with social equity businesses and economic empowerment priority applicants, as well as to prepare a model HCA.

While the Act makes significant changes to existing law regulating municipalities and marijuana businesses, the effect of the Act on the status of pre-existing HCAs is still not entirely clear and will likely require specific review

on a case-by-case basis. Communities may have already begun receiving request to amend existing HCAs in light of the aforementioned legislative amendments. We will continue to work with municipalities to negotiate appropriate HCAs and HCA amendments based on, among other things, each municipality's unique physical characteristics, demographics, and guidance provided by the CCC.

We are closely monitoring developments in this changing area of the law, particularly as the CCC proposes, and then formally promulgates regulations, procedures, and policies, and will provide further updates as we know more.

Should you have further questions on this topic, please contact Attorney Nicole Costanzo at ncostanzo@k-plaw.com or 617.556.0007 with further questions on this topic.

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