

Cannabis Control Commission Regulatory Amendments Impacting Municipalities (Part II)

Prepared for the January 2024 MMA Business Meeting and Trade Show

This is the second of a three-part memorandum exploring extensive amendments to the Commonwealth's cannabis laws. In late October 2023, the Cannabis Control Commission ("CCC") promulgated amended regulations, [935 CMR 500.000](#) and [935 CRM 501.000](#), which, among other significant revisions, substantially alter the process in which Host Communities collect and calculate community impact fees ("CIFs").

Prior to the enactment of Chapter 180 of the Acts of 2022, "[An Act Relative to Equity in the Cannabis Industry](#)" (the "Act"), while G.L. c.94G, §3(d) regulated Host Community Agreements ("HCAs") and CIFs, the CCC did not have any jurisdiction or oversight to impose additional obligations on Host Communities. The Act, however, provided the CCC with expanded power to review, certify and approve HCAs and CIFs, including criteria for calculating CIFs. The first part of this three-part memorandum discussed the CCC's authority in reviewing and approving HCAs. In this second part, we discuss important changes that municipalities should be aware of if they wish to collect CIFs. The third part will explore new social equity regulations, as well as the HCA process for Social Equity Businesses.

COMMUNITY IMPACT FEES

HCAs may still include CIFs for the Host Community provided however, among other requirements, that no HCA shall include a CIF after the eighth year of operation of a marijuana business. All CIFs must be "reasonably related" to the actual costs imposed by the marijuana business. Once the CCC certifies a CIF, it becomes due and payable to the Host Community unless the marijuana business disputes the CCC's certification determination. Still, Host Communities should be aware that they are not required to assess a CIF and may choose to forgo collection of a CIF.

Reasonable Related. To qualify as a CIF, an impact fee alleged by a Host Community must be reasonably related to the actual costs imposed on the municipality by the operation of the marijuana businesses. The CCC has defined "reasonably related" in such a narrow manner as to impose a higher burden on communities that wish to meet this standard and seek to collect CIFs:

Reasonably Related means a demonstrable nexus between the actual operations of a marijuana business and an enhanced need for a Host Community's goods or services in order to offset the impact of operations. Fees customarily imposed on other non-marijuana businesses operating in a Host Community shall not be considered Reasonably Related.

NOTE: The CCC has not yet issued any guidance on the definition of “enhanced need.” Nor has the CCC issued any amended guidance for Host Communities with a list of reasonably anticipated impacts, the costs of which might be assessed to marijuana businesses. Communities that wish to propose a list of reasonable impacts for the CCC’s review or receive clarity on any proposed impact expenditures in advance, may contact the CCC at 774-415-0200 or Commission@CCCMass.com.

Timing. The initial invoice period for requested CIFs must cover a one-year period that starts from the date the CCC grants a marijuana business a final license. The CCC will not certify any CIFs attributable to dates outside of the applicable invoice period. This means that any impact costs incurred prior to the CCC granting a final license cannot be included in the CIF.

A Host Community must transmit its CIF invoice to the marijuana business no later than one month after the anniversary of the date the received a final license from the CCC. Following this, the Host Community must ensure that all subsequent, one-year invoice periods are consistent with the anniversary of the business’ final license date. Failure to transmit the CIF within the prescribed time will result in a forfeiture of any CIFs for applicable year of operations.

Once the CIF invoice is received, the marijuana business has 30 days to submit the invoice and any supporting documentation, if applicable, to the CCC in a form and manner yet-to-be determined by the CCC. A marijuana business that has agreed to pay a CIF under its HCA must annually pay any undisputed CIF by the end of the current fiscal year or 90 days from the date of the CCC’s certification, whichever is later.

NOTE: The amended regulations presume that any costs sought to be recouped through a CIF assessment must be first expended, prior to certification by the CCC and subsequent payment by the marijuana business. Thus, CIFs essentially become reimbursements for public monies already spent, but only so long as the expenditures are deemed “reasonably related.” Additionally, communities should be reminded that HCAs may no longer mandate or otherwise require that the CIF be a certain percentage of total or gross sales, but in no event can the total CIF collected from any particular establishment exceed three percent (3%) of gross sales. Moreover, establishments cannot be required to pay CIF prior to certification by the CCC. Accordingly, communities that have or intend to rely on HCA payments for certain impact expenditures should be aware of the risk in relying on such monies where certification by the CCC may not be guaranteed.

Calculating and Documenting CIFs. Good faith estimates, prorating, unquantifiable costs, and general expenses are insufficient methods of measuring costs for CIFs. A Host Community must ensure that CIF invoices include a specific description of how the alleged impact fees were spent, including a line itemization for each good or service charged stating its cost, purpose, and relation to the marijuana business’ operations.

In circumstances where a licensed premises is the site of multiple final licenses, no Host Community “may amplify its assessment of claimed impact fee(s) by assigning the same impact fee(s) to each final license operating from the licensed Premises without regard to the distinct operations of each licensed entity.” The Host Community shall ensure that the CIF invoice is restricted to the licensee operating from the licensed premises alleged to have impacted the community. Further, Host Communities should be aware that the CCC will not certify CIFs for legal costs incurred by a Host Community to defend against a lawsuit brought by the marijuana business.

Challenging a CIF Determination. The CCC shall make a determination certifying the CIF, in whole or in part, and notify the parties of their option to seek court intervention to independently review the CIF by bringing a breach of contract action (or seeking certiorari review). Marijuana businesses may also request an administrative hearing before an independent hearing officer of the CCC to challenge the findings of fact and conclusions of law. Municipalities are not afforded this administrative option but may intervene as a party to the hearing. Once a CIF dispute has been resolved, the marijuana business must show the CCC proof of payment or proof that the obligation was eliminated with its next license renewal application.

NOTE: Host Communities and marijuana businesses may choose to bring a CIF dispute before a private mediator retained by the parties at any time if such mediation is voluntarily agreed to or is a term of the HCA. Though neither party may unilaterally compel private mediation, if the parties both consent, in an effort to reduce litigation costs, mediation provisions in HCAs are, generally, recommended.

For further information, please contact your KP Law attorney at 617.556.0007 with questions or contact Attorneys Lauren F. Goldberg (lgoldberg@k-plaw.com) or Nicole J. Costanzo (ncostanzo@k-plaw.com).

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