The New And Changing Landscape for Host Community Agreements

New amendments to the law governing HCAs may impact cannabis operators' ability to recover previously paid and unsubstantiated community impact fees. Operators should review their host community agreements and pay attention to any changes requested by their municipalities as a result of the newly effective amendments. State law now prohibits flat fees and requires the municipality to produce the documented actual costs incurred reasonably related to the marijuana establishment's operation within one month of its final license annual renewal date. Operators will likely be required to revisit their HCAs once the CCC updates its regulations and may need to act sooner than later to preserve their rights. Read the full article below:

The New And Changing Landscape for Host Community Agreements

Community Impact Fees Are Limited to Documented Actual Costs Incurred By the Municipality Reasonably Related to the Operation of the Marijuana Establishment and the Recoupment of Unsubstantiated Community Impact Fees Improperly Collected

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The landscape of what a municipality can require of a marijuana establishment has changed. The Massachusetts legislature has now clarified what municipalities have to provide, and when, if they want to collect a community impact fee. To begin, a community impact fee is in addition to the 3% sales tax paid by a marijuana establishment to the municipality. The impact fee was never intended to be, and cannot legally constitute, a form of revenue generation for the municipality. Nonetheless, many municipalities have imposed community impact fees that do not comport with state law as it existed previously or under the new amendments.

Each marijuana establishment operating in the Commonwealth of Massachusetts is required by state law to execute a Host Community Agreement (HCA) with its municipality. The controlling statute is G.L. c. 94G. The statute was recently amended, and most of its new or amended provisions went into effect November 9, 2022. The new statute can be found at www.mass.gov/info-details/mass-general-laws-c94g-ss-3.

The amendment of Section 3(d) makes substantial changes to the method and ability of a municipality to collect its community impact fees. Under the old law, the municipality could include a provision in the HCA to collect a community impact fee. Prior to November 9, 2022, the HCA could require a community impact fee of up to 3% of the gross sales of the marijuana establishment provided that the fee shall be reasonably related to the costs imposed upon the

municipality by the operation of the marijuana establishment. Additionally, the law required that any cost to a city or town imposed by the operation of a marijuana establishment be documented. Many municipalities thereby imposed and collected impact fees of 3% (sometimes more) but failed to provide the companion documented costs, and some have taken the position that there is an unlimited time to do so.

The Massachusetts legislature has now passed legislation that amends G.L. c. 94G. The amendments to G.L. c. 94G clarify what the host community must provide in terms of documented costs and when they must be provided.

Like the old law, the new law requires that the community impact fee be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment. Notably, however, the amendments to the statute now prohibit the host community from imposing a fee that is a percentage of gross sales. The new law states that a host community agreement may include a community impact fee for the host community; provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment, and the fee must be supported by documentation of actual costs, not anticipated ones, imposed upon the host community in the preceding year that are reasonably related to the operation of the marijuana establishment. The host community must produce the documented costs not later than one month after the annual renewal of the final license. Additionally, the fee cannot amount to more than 3 per cent of the gross sales of the marijuana establishment and cannot mandate a certain percentage of total or gross sales as the community impact fee.

The new law also prohibits additional payments as part of the community impact fee. The community impact fee shall encompass all payments and obligations between the host community and the marijuana establishment. The community impact fee shall not include any additional payments or obligations, including, but not limited to, monetary payments, in-kind contributions and charitable contributions by the marijuana establishment to the host community or any other organization. Any other contractual financial obligation that is explicitly or implicitly a factor considered in, or is a condition of a host community agreement, shall not be enforceable.

The timing of the impact fee payment is also clarified under the new law. Payment of the community impact fee shall be due annually to the host community, with the first payment occurring not sooner than upon the first annual renewal by the commission of a final license to operate the marijuana establishment.

Under the amendments, a marijuana establishment is also provided with a statutory right to seek its attorney's fees if the municipality breaches the host community agreement and imposes fees that are not reasonably related to the actual costs imposed upon the city or town. If a licensee believes the information documented and transmitted by a host community is not reasonably related to the actual costs imposed upon the host community in the preceding year by the operation of the marijuana establishment, the licensee may bring a breach of contract action against the host community and recover damages, attorney's fees and other costs encompassed in the community impact fee that are not reasonably related to the actual costs imposed upon the city or town.

The amended statute also states that a marijuana establishment seeking a new license or renewal of a license to operate or continue to operate shall negotiate and execute a host community agreement with that host community setting forth the conditions to have a marijuana establishment located within the host community.

Given the recent adoption of the amendments, no court has yet weighed in on whether the amendments will apply to existing HCAs or whether the host community and the marijuana establishment will be required to negotiate a new HCA in compliance in with the new law.

Additionally, the CCC will be reviewing each HCA during the annual license renewal process and will be promulgating revised regulations in line with the amendments, hopefully to include an HCA template to bring some uniformity across the Commonwealth.

Based on the clarifications in the amended statute, we believe it is likely that any HCA that is not in compliance with the amendments will not be allowed. And as for future collection attempts, some municipalities appear to have seen the writing on the wall and have stopped collecting impact fees. At least one, the City of Boston, will refund the impact fees paid to date. Other municipalities, however, may continue to seek to collect impact fees pursuant to a noncompliant HCA. Additionally, operators may be asked, or required, by their host community to execute a new HCA. Each operator should pay attention to the terms of any proposed new HCA to ensure that it is in compliance with the amended statute and that the operator is not waiving any rights by executing the new HCA, specifically with respect to seeking a refund of any impact fees collected in violation of state law.

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