Massachusetts Legislature Passes Host Community Agreement (HCAs) Reform Legislation

Written by Jesse Harlan Alderman, Kevin C. Conroy, Stephen L. Bartlett

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Key Takeaways:

- The Massachusetts Legislature has proposed new limitations on community impact fees, which may change the dynamic of the relationship between licensees and their host communities.
- Once effective, the Cannabis Control Commission would be charged with reviewing the community impact fee provisions of both new and existing HCAs for compliance.
- Specific limitations on community impact fees include a prohibition on fees tied to a percentage of gross sales.
- Cannabis businesses should carefully review the specific language of their HCAs and consider next steps to reduce or eliminate their fees.

The Massachusetts Legislature passed a bill, S. 3096, on August 1, 2022 that among other items clarifies and limits the authority of municipalities to demand percentage-based annual Community Impact Fees and other donations or fees in Host Community Agreements ("HCAs"). This bill – which we expect Governor Baker to sign – has the potential to generate substantial cost savings for cannabis businesses in Massachusetts – many of whom are currently paying 3% of gross revenue or more per license to their host community.

Recommended Next Steps for Licensees

We describe the key HCA-related provisions in the bill below. If signed by the Governor, we recommend licensees take the following actions to respond to this significant change in law:

1. **Review Your HCAs Carefully.** The HCAs may have severability clauses that void flat, percentage based fees. However, the HCAs may also have clauses that allow a municipality to terminate the agreement by right. The precise language in each HCA will help inform next steps.
2. **Consider Timing.** As discussed below, the Cannabis Control Commission (the "Commission") must review all HCAs now as part of the license application or renewal process. Consider where your licenses are in this process and how soon a submission may be required to the Commission. As discussed below, we also expect the Commission to adopt regulations and/or guidance regarding its review of HCAs, which may delay review by the Commission of the HCAs.
3. **Consider Other Approvals Needed from the Municipality**. Some municipalities require an HCA – *and amendments* – to be voted on by the City Council or Select Board. Other municipalities require cannabis businesses to hold licenses from a municipal licensing authority separate from an HCA, and often these require annual renewal or can be revoked. Consider these factors before determining the right approach to your host community.
4. **Strategize on an Effective Approach to the Municipality to Reform Your HCA and Next Steps if You Encounter Resistance**.

Please contact Jesse Alderman, Kevin Conroy or Stephen Bartlett to discuss these recommended next steps. Each HCA and each licensee's circumstances will be different, and we can assist with these important next steps.

Summary of Key Provisions of the New Law

Although the concept of Community Impact Fees was originally well intentioned and sought to compensate municipalities for anticipated, incremental costs related to hosting cannabis businesses, certain municipalities were quick to take advantage of the lack of regulatory oversight demanding annual payments of 3% of gross sales – the statutory maximum amount – regardless of the actual expenses that the municipality incurred. The existing Community Impact Fee rules, which have elicited considerable contempt from industry due to widespread abuse, are poised to change dramatically if the Governor signs the bill, which would overhaul the existing HCA paradigm, invalidate many existing Community Impact Fee arrangements and install the Commission as a watchdog for improper municipal exactions.

The key provisions of S. 3096 are summarized below. In short, it would have far-reaching impacts on the industry and licensee-host community relationships. All licensees should seize this opportunity to scrutinize the terms of their existing HCAs and strongly consider engaging with their host communities to renegotiate illegal Community Impact Fees.

- **Invalidation of All Fees Based on Percentage of Sales.** Section 10 of the bill states that Community Impact Fees "cannot mandate a certain percentage of total or gross sales" and, further, that such fees: 1) must be reasonably related to the costs imposed upon the municipality as a result of the operation of the cannabis establishment; 2) cannot exceed more than three percent of gross sales; 3) cannot be effective after the establishment's 8th year of operations; 4) must commence on the date which the establishment obtains final licensure from the Commission, but the first payment of the fee shall not occur before the first annual renewal of the final license; and 5) shall be due annually to the host community. Licensees should review the Community Impact Fee requirements in their HCAs to determine if they are compliant with the new limitations.
- **Additional Payments Are Not Enforceable.** Section 10 of the bill invalidates and renders unenforceable "any additional payments or obligations, including but not limited to, monetary payments, in-kind contributions and charitable contributions" by the establishment. It also confirms that, except for a legitimate Community Impact Fee, any other financial obligation in an HCA is not enforceable. Note, however, that many licensees have committed to certain payments and charitable contributions in the Positive Impact and Diversity Plans filed with their initial license applications. This provision of the bill would not invalidate those existing commitments.
- **Licensees Can Sue Host Communities for Breach of Contract.** Section 10 of the bill requires a municipality to transmit to a licensee documentation of costs imposed on the municipality no later than one month after the annual renewal of the establishment's final license. The bill also includes a mechanism for a licensee to bring breach of contract actions against its host community if it believes that the supporting documentation from the municipality is not reasonably related to the actual costs imposed on the community. In such lawsuits, licensees would be able to recover damages, attorney's fees and other costs that are not reasonably related to the actual costs imposed on the community.
- **Existing Licensees Must Submit Compliant HCAs with Annual Renewal Applications**. Section 10 of the bill requires existing licensees to submit compliant HCAs with their annual license renewal applications. Practically speaking, it requires licensees with noncompliant HCAs to renegotiate compliant HCAs prior to their next license renewal submission deadline. We will need to see whether the Commission provides a grace period while it considers guidance and/or regulations to address this provision. The bill provides that the Commission must promulgate regulations no later than one year after the law takes effect. This should inform the timing of outreach to host communities.
- **Commission Oversees Compliance with the New HCA Rules.** Section 10 of the bill installs the Commission as the arbiter of HCA disputes and obligates the Commission to review all HCAs during initial licensure and during annual license renewals. The Commission must review an HCA within 90 days of receipt and, if the Commission determines that an HCA is not compliant, it must provide written notice of deficiencies and can request additional information from the municipality and licensee. The Commission is also expressly prohibited from approving a final license application unless Commission staff certifies that the HCA is compliant. However, the bill does not imbue the Commission with the power to compel municipalities to execute compliant HCAs. Accordingly, without new regulations and/or guidance from the Commission, it is conceivable that recalcitrant municipalities could upset the annual license renewal process for existing licensees.
- **Commission Will Promulgate New Regulations on HCAs.** Section 15 of the bill requires the Commission to adopt regulations addressing "criteria for reviewing, certifying and approving host community agreements and community impact fees," including but not limited to criteria for calculating Community Impact Fees consistent with the above described rules. However, Section 28 of the bill provides the Commission with 1 year to promulgate new regulations or amend existing regulations to be consistent with the new rules. Therefore, there is some uncertainty regarding how and when the Commission might begin enforcing strict compliance

with these new HCA rules.

We welcome any questions you might have regarding the potential impact of these looming statutory changes on your business and are prepared to analyze your current HCA terms and provide strategic advice for engaging with your respective host communities.

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