

Guidance on Host Community Agreements

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Introduction

This document offers guidance to municipalities and applicants working cooperatively to negotiate and execute a Host Community Agreement (HCA), a municipal process separate and apart from the Cannabis Control Commission's (Commission) licensing process.¹ Before being issued a provisional license to operate as a Marijuana Establishment (ME) or Medical Marijuana Treatment Center (MTC), the applicant and municipality must execute an HCA and the municipality must submit a certification of this agreement to the Commission. See 935 CMR 501.101(1)(a)8; 935 CMR 502.101(1)(a)8.

Obligations for Municipalities

The parties to the HCA are the owners or authorized representatives of the ME or MTC and the contracting authority for the municipality. As with any agreement, the HCA must be negotiated between willing parties to the contract. As with any agreement entered into by a municipality, the municipality and contracting authority have obligations under federal and state law above and beyond M.G.L. c. 94G, § 3, which requires a municipality to act reasonably in negotiating essential terms with the ME or MTC that seeks to operate within its community.

Municipalities should be aware that the negotiation of HCAs have been and may be subject to scrutiny by federal and state law enforcement agencies. Municipalities are encouraged to develop a process that is fair and transparent and that is available to applicants of all types and businesses of all sizes.

There are state resources that municipal officials and members of the public can consult to ensure that HCAs are compliant with state law. The Office of the Inspector General (OIG)² can advise municipalities on whether the terms and conditions of an HCA implicate state

¹ In *Mederi, Inc. v. City of Salem, et al*, Essex Superior Court Civil Action No. 1877CV01878, the Suffolk Superior Court (Feeley, J.) found as follows:

“As the [Commission] argues, it has been its consistent position that it has no role under Chapter 94G in reviewing the contents of HCAs, and the court agrees. The statute requires as part of a license application the inclusion of a certification that an HCA has been executed. The statute gives the [Commission] no further role in looking beyond the certification to the contents of the HCA. The executed HCA itself is not a required part of the license application submitted to the [Commission].”

² For information about contacting the OIG: <https://www.mass.gov/orgs/office-of-the-inspector-general>



procurement laws. The Department of Revenue (DOR)³ can advise municipalities as to the optional local excise tax.

Getting Started

As noted above, a municipality must act reasonably in negotiating essential terms with the ME or MTC that seeks to operate within its community.

“A [ME or MTC] seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community setting forth the conditions to have a [ME or MTC] located within the host community which shall include, but not be limited to, all stipulations of responsibilities between the host community and the [ME or MTC]. An agreement between a [ME or MTC] and a host community 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 [ME or MTC] and shall not amount to more than 3 percent of the gross sales of the [ME or MTC] or be effective for longer than 5 years. Any cost to a city or town imposed by the operation of a [ME or MTC] shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4.”

M.G.L. c. 94G, § 3(d).

Required – Basic Terms & Conditions⁴

The only requirements of an HCA are that the HCA identifies “the conditions to have a [ME or MTC] located within the host community” and “all stipulations of responsibilities between the host community and the [ME or MTC].” M.G.L. c. 94G, § 3(d).

As a municipality and applicant can agree on additional terms and conditions that vary widely, the following should not be construed as an exhaustive or exclusive list, but as possible provisions of an HCA:

- [Municipality] agrees to submit to the Commission, or other such licensing authority as required by law or regulation, certification of compliance with applicable local bylaws and ordinances relating to the [ME’s or MTC’s] application for licensure and/or operation where such compliance has been properly met, but makes no representation or promise that it will act on any other license or permit request including but not limited to special permit or other zoning applications submitted by the [ME or MTC] in any particular way other than in accordance with the municipality’s governing laws.
- In the case that the [ME or MTC] desires to relocate within [Municipality], it must first obtain approval of the new location before any relocation of the facility.

³ For information about applicable marijuana retail taxes:

<https://www.mass.gov/regulations/830-CMR-64n-marijuana-retail-taxes>

⁴ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section3>



- The [ME or MTC] agrees that jobs created at the facility will be made available to [Municipality] residents. [Municipality] residency will be one of several positive factors in hiring decisions at the facility but shall not be determinative and shall not prevent the [ME or MTC] from hiring the most qualified candidates and otherwise complying with all Massachusetts anti-discrimination and employment laws.
- The [ME or MTC] agrees to provide a paid police detail for the purposes of traffic and crowd management during peak hours of operation, which shall include, but may not be limited to, Fridays between []:00 pm – []:00 pm; Saturdays, Sundays, and state holidays.
- A key-and-lock system shall not be the sole means of controlling access to the [ME or MTC]. The [ME or MTC] agrees to implement a method such as a keypad, electronic access card, or other similar method for controlling access to areas in which marijuana or marijuana products are kept in compliance with [935 CMR 500.000 and 501.000].
- Termination of the HCA: The [ME or MTC] may terminate this agreement [] ([]) days after the cessation of operations of any facility within [Municipality]. The [ME or MTC] shall provide notice to [Municipality] that it is ceasing to operate within the [Municipality] and/or is relocating to another facility outside the [Municipality] at least [] ([]) days prior to the cessation or relocation of operations. If the [ME or MTC] terminates this agreement, the final annual payment as defined in paragraph [] of this agreement shall be paid to the [Municipality] by the [ME or MTC]. The [ME or MTC] shall pay the final annual payment to [Municipality] within [] ([]) days following the date of termination.
- The [Municipality] agrees to work with the [ME or MTC], if approved, to assist the [ME or MTC] with community support, public outreach, and employee outreach programs.
- The [ME or MTC] agrees to work collaboratively with the [Municipality] and provide staff to participate in a reasonable number of municipal-sponsored educational programs on public health and drug abuse prevention geared toward public health and public safety personnel.

Optional – Local Excise Tax⁵⁶

Under M.G.L. c. 64H and 64N, the Legislature explicitly authorized municipalities to adopt an optional local excise tax of up to 3%, as applied to retail transactions, in addition to state sales and excise taxes. M.G.L. c. 64H, § 2 and M.G.L. c. 64N, §§2 and 3(a); 830 CMR 64N. 1. 1: Marijuana Retail Taxes. In so doing, the Legislature established the ceiling for state-authorized taxes that may be assessed on MEs (not MTCs):

⁵ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter64H/Section2>

⁶ <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter64N>



- the 6.25% sales tax;
- the 10.75% excise tax on Marijuana and Marijuana Products; and
- the optional 3% local tax, which may be applied to retail sales only.

More information on the tax implications for ME operations is available from DOR at <https://www.mass.gov/marijuana-retail-taxes>.

Optional – Community Impact Fee

Under § 3(d), an HCA may also “include a community impact fee for the host community.” It must be structured appropriately and consistently with § 3(d) and the decisional law on fees. While § 3(d) does not include a definition of what constitutes a “community impact fee” and does not provide for elements of the fee, it does impose other express limitations on any community impact fee included as part of an HCA:

1. The fee must not amount to more than 3% of the gross annual sales of the ME or MTC.
2. It must be “reasonably related to the costs imposed upon the municipality by the operation of the [ME or MTC].”
3. It must be limited to a term of 5 years.

Capped at 3%

The Commission emphasizes that there is a strict limitation on the amount of the community impact fee that a municipality may collect as part of an HCA. The fee is capped at 3% of the ME’s or MTC’s gross annual sales. Thus, any fee that is more than 3% of gross annual sales is not a valid community impact fee. The Commission reiterates that, consistent with the statutory requirement of “reasonable relation” and decisional law on fees, there must be a specificity and proportionality between the cost or impact claimed by the community and the fee required of the ME or MTC.

As discussed below, any fee – whether characterized as a fee, donation, or other exaction, including any assessment above 3% of gross annual sales – must also comply with applicable legal requirements.

Reasonably Related

The Commission views fees that are “reasonably related” as those that compensate the municipality for its anticipated and actual costs resulting from the operation of the ME or MTC. It is important that the fee bears some reasonable relation to the costs of providing municipal services or other benefits to the ME or MTC and not merely be a fee without a sufficient basis and justification.



In accordance with the decisional law on fees, there must be a proportionality between the cost or impact claimed by the community and the fee required of the ME or MTC.⁷ While municipalities have some latitude to plan for expenses, municipalities are encouraged to develop a plan that provides a sufficient basis and justification for requiring the applicant to pay the community impact fee to cover the municipality's anticipated costs and that provides the mechanism to monitor the relationship between the fee and actual costs. When negotiating with MEs or MTCs, municipalities are cautioned against relying on fees that are simply revenue generators and planning their municipal budgets around these fees.

When an ME or MTC renews its license, the host municipality and ME or MTC are encouraged to amend the HCA so that the terms are related to the actual costs incurred by the operation of the ME or MTC.

5-Year Term

The Commission reads the provision that provides “the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the [ME or MTC] and shall not...be effective for longer than 5 years,” as strictly limiting the HCA to a term of 5 years or less.

Both M.G.L. c. 94G, § 3(d) and the Commission's regulations anticipate the collection and publication of additional information on the costs imposed by the operation of ME or MTCs. Thus, the parties' agreement on community impact fees may be renegotiated.

- Parties may consider negotiating a fee with a shorter duration. This may be particularly helpful to reaching an agreement where the parties have difficulty ascertaining unknown costs and wish to revisit the community impact fee once more information relevant to the particular ME or MTC is available.
- At, or before, the conclusion of the term of the preceding community impact fee, the parties may choose to negotiate a new, optional community impact fee which shall similarly be limited to a term of 5 years or less.

Regardless of whether the parties choose to negotiate a new community impact fee, the Commission interprets the strict time limitation of § 3(d) as extinguishing the preceding community impact fee upon the expiration of 5 years or less, whichever was originally agreed to by the parties.

Decisional Law

The Commission also interprets the “community impact fee” as needing to comply with applicable legal requirements established in the decisional law. In the municipal context, “regulatory fees” can be imposed based on the municipality's power to regulate businesses or activities within its borders, but only if certain requirements are met:

⁷ Koontz v. St. John's River Water Management District, 133 S. Ct. 2686 (2013); See also Attorney General's letter on Hanover Annual Town Meeting Warrant Articles #22 and 23 (Zoning), December 1, 2014.



1. The fee must be charged in exchange for a service which benefits the ME or MTC paying the fee in a manner not shared by other members of the public;
2. It is paid by choice, in that the ME or MTC paying the fee has the option of not utilizing the service and thereby avoiding the charge; and
3. It is collected not to raise revenues but to compensate the municipality providing the services for its expenses.

Denver St. LLC v. Town of Saugus, 462 Mass. 651, 652-653 (2012), citing Emerson College v. Boston, 391 Mass. 415, 424-425 (1984).

What is Permissible as Part of a Community Impact Fee?

Some anticipated costs that may reasonably be included in a fee of up to 3% of gross annual sales include services such as:

- Municipal inspection costs;
- Traffic intersection design studies where additional heavy traffic is anticipated because of the location of a retail or social consumption establishment;
- Public safety personnel overtime costs during times where higher congestion or crowds are anticipated;
- Environmental impact or stormwater or wastewater studies anticipated as the result of cultivation; or
- Additional substance abuse prevention programming during the first years of operation.

The aforementioned list is illustrative, not exhaustive or exclusive.

Optional – Additional Fees

While M.G.L. c. 94G, § 3(d) does not preclude fees above and beyond the community impact fee, the Commission has sought clarity from the Legislature as to whether municipalities can exact additional fees for several reasons. Importantly, the imposition of additional fees makes it difficult for applicants and businesses of all sizes to operate within a host community.

As discussed in detail above, a municipality seeking to impose any fee whether characterized as a fee, donation, gift, or other exaction, including any assessment above the 3% community impact fee, must also comply with the applicable legal requirements for regulatory fees. Denver St., *supra* at 652-653, citing Emerson College, *supra* at 424-425.

Renewal



Both M.G.L. c. 94G, § 3(d) and the Commission’s regulations anticipate the collection and publication of additional information on the costs imposed by the operation of an ME or MTC in a host community. Section 3(d) provides:

“Any cost to a city or town imposed by the operation of an [ME or MTC] shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4.”

The associated regulations provide:

“A [ME or MTC] shall submit as a component of the renewal application documentation that the establishment requested from its Host Community the records of any cost to a city or town reasonably related to the operation of the establishment, which would include the city’s or town’s anticipated and actual expenses resulting from the operation of the establishment in its community. The applicant shall provide a copy of the electronic or written request, which should include the date of the request, and either the substantive response(s) received or an attestation that no response was received from the city or town. The request should state that, in accordance with M.G.L. c. 94G, § 3(d), any cost to a city or town imposed by the operation of a [ME or MTC] shall be documented and considered a public record as defined by M.G.L. c. 4, § 7, cl. 26.”

935 CMR 500.103; 935 CMR 501.103. Thus, an ME or MTC licensee must seek documentation of the cost imposed by its operations in the host community.

Seeking Counsel & Support

Municipalities, applicants for licensure as an ME or MTC, and licensees are encouraged to seek legal advice from a licensed attorney regarding HCA negotiations.

Other resources that are available:

- Municipalities can seek advice on state procurement laws by contacting the OIG’s Chapter 30B Assistance Hotline at (617) 722-8838.
- Eligible applicants for licensure and licensees may be qualified to receive services through the Commission’s Social Equity Program. If you are a participant in the Social Equity Program or are interested in learning more about the services offered as part of the Social Equity Program, please contact the Commission at (774) 415-0200.
- Individuals concerned about fraud, waste, and abuse can contact the OIG’s Hotline at (800) 322-1323.

Questions?

If you have additional questions regarding Host Community Agreements, please contact the Commission at Commission@CCCMass.com or (774) 415-0200.

