



THE MASSACHUSETTS MARIJUANA RETAIL ESTABLISHMENT LICENSING APPLICATION PROCESS: WHAT ABOUT THOSE EXTRA “FEES” IMPOSED BY MUNICIPALITIES?

Under the Massachusetts “recreational marijuana law,” those seeking to operate a Marijuana Retail Establishment (“MRE”) must obtain a license to operate from the Cannabis Control Commission (“CCC”). The first step in that process is obtaining “local” approval from the municipality in which the business will operate. Through local ordinances or bylaws, municipalities can regulate the operations of potential MREs by setting “reasonable” controls on the time, place and manner of operations and limiting the number of MREs within their municipal borders. The critical part of this first step involves the MRE applicant getting the municipality to sign a Host Community Agreement (“HCA”) which sets forth the conditions under which the MRE can operate.

The municipality can require in the HCA that MREs pay a “community impact fee,” statutorily capped at 3% of the MRE’s gross sales for a period of 5 years, to cover a variety of actual costs to the municipality which are reasonably related to the MRE’s operations.¹ In addition, many municipalities include within their HCAs additional costs to the MREs – often described as “fees” or “donations” – some based on an additional percentage of gross sales and others in the nature of charitable donations to certain municipal or non-municipal entities selected by the municipality. These additional costs have for the most part gone unchallenged by MRE applicants anxious to obtain the HCA necessary in order to be licensed to operate.²

An appeal now before the Supreme Judicial Court (“SJC”) may resolve the issue of whether municipalities can impose these additional costs in their HCAs. The case involves Mederi, Inc., one of eight enterprises seeking to operate one of five MREs authorized by the city of Salem, MA (the “City”). Mederi had received approval of a required special permit, and during negotiations for an HCA, the City asked Mederi to undertake certain actions which, in part, included payments for five years of an additional contribution of 1% of its gross sales to a “traffic enhancement fund” and a minimum commitment of \$25,000 in annual charitable contributions to local causes. Ultimately, the City entered HCAs with five other applicants and declined to enter the HCA with Mederi, thereby preventing it from seeking a license from the CCC. Mederi filed suit in the Superior Court and, upon dismissal of the suit, appealed. Interestingly, the SJC took direct appellate review, effectively moving the case ahead in the usual appellate process.

¹ Note that in addition to any community impact or other fees imposed in an HCA, the Commonwealth taxes marijuana sales at 17% (the standard 6.25% tax, plus a 10.75% marijuana sale tax) and the municipality can impose an additional sales tax of up to 3%.

² It bears noting that in 2019, the United States Attorney’s Office for the District of Massachusetts issued subpoenas to municipalities across the Commonwealth in an apparent investigation of these additional fees. <https://www.bostonglobe.com/news/marijuana/2019/11/04/federal-grand-jury-investigating-municipal-marijuana-contracts/ftz2S54H5iiReLuPIOSWaL/story.html>

As part of its argument, Mederi posited that the City exceeded its lawful authority in this case by, among other actions, imposing as a condition of its HCA fees in excess of the 3%-capped community impact fee, which in turn can impact the law's provisions giving priority to economic empowerment applicants—provisions intended to assist communities disproportionately disadvantaged by the “war on drugs.” Because Mederi had not disputed these additional costs during its HCA negotiations or before the Superior Court, under ordinary appellate procedures the court would not decide the appeal on this basis. However, during oral arguments on the appeal, some members of the SJC expressed interest in the division of authority between municipalities and the CCC—and whether the latter has authority to enforce prioritization by municipalities of economic empowerment applicants or to limit fees to the statutorily capped 3% community impact fee. As a result, some legal pundits are of the view that the court may decide that it will provide some guidance on this issue when it rules on the Mederi case.

Notably, at the invitation of the SJC, the CCC filed an amicus brief in the Mederi case. In pointing to competing legislative mandates, the CCC argued that while the legislation did not grant it authority to regulate or participate in the initial “local control” portion of the licensing process or HCAs, the law requires that the CCC give MRE licensing priority to existent medical marijuana treatment center (“MTC”) and economic empowerment applicants. Unfortunately, municipalities’ exclusive control of the HCA process seemed to advantage more experienced and better resourced applicants, leaving economic empowerment applicants at a competitive disadvantage, and in effect controlling those whose license applications the CCC is able to consider.³ The CCC has recommended amendments to the law addressing, among other matters, the additional fees imposed in HCAs. Its recommendations are presently under consideration in the legislature.⁴

Stay tuned! The SJC heard arguments on February 3rd and, under its usual 130-day timeline, may be expected to issue its decision by early summer.



Mary-Lou Rup

✉ mrup@bulkley.com
☎ 413-272-6291



Scott Foster

✉ sfoster@bulkley.com
☎ 413-272-6258



Mary Jo Kennedy

✉ mkennedy@bulkley.com
☎ 413-272-6242



Melinda Phelps

✉ mphelps@bulkley.com
☎ 413-272-6237



Kathleen Bernardo

✉ kbernardo@bulkley.com
☎ 413-272-6295



Ryan Barry

✉ rbarry@bulkley.com
☎ 413-272-6264



Sarah Willey

✉ swilley@bulkley.com
☎ 413-272-6228

³ To illustrate its point, the CCC indicated that since it began accepting license applications in 2018, it had issued 223 MRE licenses to MTCs, but only 18 to economic empowerment applicants.

⁴ See, A Report on Host Community Agreements and Marijuana Establishments, https://mass-cannabis-control.com/wp-content/uploads/2019/03/HCA-Report-FINAL_March2019_v2-1.pdf