

CANNABIS COMPLIANCE: HOST COMMUNITY AGREEMENTS AND SOCIAL EQUITY REQUIREMENTS

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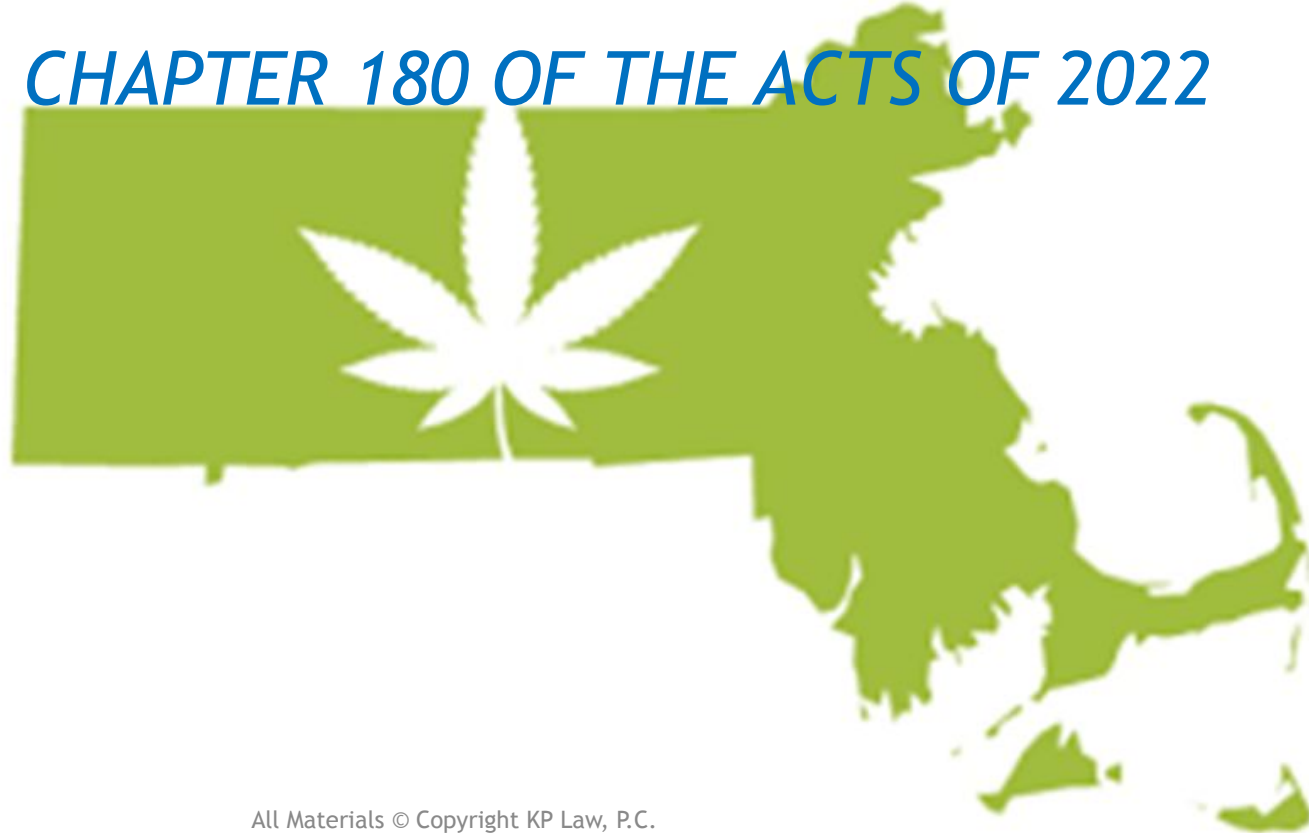
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AN ACT RELATIVE TO EQUITY IN THE CANNABIS INDUSTRY

CHAPTER 180 OF THE ACTS OF 2022



The Act significantly reformed cannabis laws including:

- ❖ Role of Massachusetts Cannabis Control Commission (“CCC”)

Final Regulations, Promulgated October 27, 2023

- 935 CMR 500.00 (Adult Use)

- 935 CMR 501.00 (Medical)

Host Community Agreements (“HCAs”)

- ❖ Community Impact Fees (“CIFs”)

- ❖ Equity Standards





THE CANNABIS CONTROL COMMISSION

The Act provides the CCC with enhanced authority

To review, regulate, enforce and approve host community agreements pursuant to G.L. c. 94G, §3(d);

Establish procedures and policies for municipalities to promote and encourage full participation in the regulated marijuana industry during negotiations of host community agreements with social equity program businesses and economic empowerment priority applicants; and

Develop a model host community agreement, minimum acceptable standards and best practices for municipalities and prospective licensees during negotiations of host community agreements with social equity businesses

HOST COMMUNITY AGREEMENTS

- ▶ Beginning **March 1, 2024**, the CCC shall **review and approve** each HCA as part of a completed license application and at each license renewal **to determine compliance with the Act and new regulatory requirements** (or agree to a “compliant” HCA waiver).
- ▶ The CCC may deem an HCA provision **invalid, unenforceable, or voidable**.
- ▶ The CCC may also declare an HCA or a provision of an HCA voidable upon deeming the HCA as a **contract of adhesion**.
- ▶ The CCC may issue **fines and other sanctions** against a host community that is “noncompliant” with HCA regulatory requirements.
- ▶ Approval of HCAs may be conditioned on a Host Community being in **good compliance standing** with the CCC.



New Regulatory Requirements:

HCAs must now satisfy certain “minimum acceptable requirements” including, but not limited to:

1. No Host Community may impose an unreasonable condition or a term that is “unreasonably impracticable” in an HCA

Unreasonably Impracticable means that the measures necessary to comply with the regulations, ordinances or bylaws subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.



THE REGULATIONS IDENTIFY THE FOLLOWING CONDITIONS THAT ARE PRESUMED REASONABLE:



- ✓ It is required under by local rules, regulations, ordinances, or bylaws;
- ✓ It has been “**deemed necessary** to ensure public safety and proposed by the chief law enforcement authority and/or fire protection chief with **explanation and detail** why the condition is necessary for public safety.”
- ✓ It has been “**deemed necessary** to ensure public health and proposed by the chief public health authority in a Host Community with **explanation and detail** why the condition is necessary for public health.”
- ✓ It is a local requirement **customarily imposed** by a Host Community on other, non-cannabis businesses operating in the community;
- ✓ It is required by law;
- ✓ It does not conflict with other laws; or
- ✓ It is otherwise “**deemed reasonable** by the Commission based on **particular circumstances** presented by an HCA or contracting parties”

2. HCAs must include a statement of all stipulated responsibilities between a Host Community and a Marijuana Establishment Licensee/License Applicant including:

- A provision requiring a Host Community to **annually transmit its invoice of claimed impact fees**, if any, to a Licensee **within one month of the anniversary** of the date the Marijuana Establishment received final licensure;
- A provision **explicitly identifying any generally occurring fees** to be charged by a Host Community.

“Generally occurring fees are customarily imposed on other non-cannabis businesses” operating in a Host Community and shall not be considered a CIF (e.g., routine water, property tax, sewer, trash pickup etc.)”



4. HCAs must also include “clear, specific terms” regarding a host community’s assessment of a CIF.

3. In addition, HCAs must include the following information:

- ✓ The certified business name of the licensee as recorded with the Secretary of State and CCC
- ✓ The specific type of marijuana operations permitted (e.g., manufacturing, retail, delivery, cultivation, etc.);
- ✓ The name, signature, and title of the individual(s) authorized to enter into the HCA;
- ✓ The date(s) of execution by both parties;
- ✓ The effective date of an HCA; and
- ✓ The duration of an HCA.



Prohibitions:

The following terms, conditions, or clauses are prohibited in an HCA:



1. Provisions *discouraging* parties from bringing a civil cause of action or other legal challenge relative to an HCA or to an individual term;
2. Provisions requiring *upfront payments* as a condition for operating in the Host Community;
3. Provisions that require money to be held in *escrow, bond, or other similar account* for a Host Community's use or purposes;
4. Provisions that afford a Host Community *sole and absolute discretion* on how it will spend a CIF;
5. Provisions that mandate or otherwise require that the CIF be a *certain percentage* of a total or gross sales;

6. Provisions that impose legal, overtime, or administrative costs or **any costs other than a CIF** with the exception tax obligations or routine, generally occurring municipal fee;
7. Provisions that categorically deem a Host Community's claimed impact fees to be **reasonably related** or that otherwise excuse a Host Community from calculating impact fees based on the actual operations of a Marijuana Establishment;
8. Provisions that require a Marijuana Establishment to make **any additional payments or obligations** including but not limited to monetary payments, in-kind contributions, providing staffing, advance payments, or charitable contributions;
9. A provision including or otherwise **deeming** good faith estimates, unquantifiable costs, generalized expenses, or pro-rated **expenses as a CIF**; and
10. Provisions waiving a Marijuana Establishment's ability to dispute whether impact fees claimed by a Host Community are **reasonably related** and properly due and payable as a CIF.

“No Host Community may rely on other written instruments, contracts, or agreements to impose terms or conditions on a License Applicant, Marijuana Establishment, or Medical Marijuana Treatment Center outside of an HCA”

“A contractual financial obligation, other than a CIF, that is explicitly or implicitly a factor considered in or included as a condition of an HCA is unenforceable”

Express exceptions include taxes and generally occurring fees (e.g., water, sewer, property tax, etc.)





HCA REVIEW AND CERTIFICATION

- ▶ All applications for renewal and initial licensure **submitted on or after March 1, 2024**, must include an HCA that complies with 935 CMR 500.000 (or 935 CMR 501.000) or a compliant HCA Waiver CCC is required to complete its review of an HCA within ninety (90) days after the HCA is received.
- ▶ Failure to submit a compliant HCA or a compliant HCA Waiver with an application for licensure may result in an application remaining **incomplete** or may be grounds for denial of a renewal application.
- ▶ The CCC will provide written notice to the parties of any **deficiencies** identified by during its review of the HCA for compliance and may request additional information from the marijuana business and the host community.

If the CCC determines that the HCA does not comply, the HCA determination notice shall state:

- ▶ The **factual basis** for the finding of noncompliance, including identification of the noncompliant term(s), condition(s), or provision(s) of the HCA, if applicable;
- ▶ The parties' **option to correct** the noncompliance and submit an amended HCA;
- ▶ The parties' option to submit an **HCA Waiver**; and
- ▶ The parties' option to proceed under an executed HCA that conforms with the CCC's Model Host Community Agreement, to be relied on in the interim until the parties come to an agreement

Notably, the draft provision, which would have included notice of “either party’s option to discontinue relations as host community and license applicant” was not included in the final regulations



Still, the regulations allow host communities to **discontinue relations ...**



“A Host Community shall notify a Marijuana Establishment if it no longer intends to continue as a Host Community for a Marijuana Establishment. **A Host Community shall not discontinue relations with a Marijuana Establishment in bad faith.** On receipt of a notice of discontinuance from a Host Community, the Marijuana Establishment shall notify the Commission.”

935 CMR 500.180(3)(c)(5)

If a host community discontinues relations with a marijuana establishment, then a marijuana establishment may submit a request for equitable relief to the CCC

- ▶ A marijuana establishment shall ensure that the request for equitable relief includes a host community's notice.
- ▶ The CCC may exercise its discretion to grant one or more of the following equitable remedies to a marijuana establishment:
 - ▶ Extension of a license expiration date without incurring additional prorated fees;
 - ▶ Waiver of a Change of Location fee;
 - ▶ Institution of procedures for winding down operations;
 - ▶ Other equitable relief as determined by the CCC.
- ▶ If the CCC grants or denies equitable relief to a marijuana establishment, it will provide notice of its decision to a marijuana establishment and a host community.





- A host community or a marijuana establishment may seek relief from a court of competent jurisdiction.
- Any action subsequently taken to deny a marijuana establishment's renewal application due to failure to produce a **compliant HCA** or a **compliant HCA Waiver** shall afford marijuana establishments a right to an administrative **hearing**
- A host community may seek intervention as a party to the hearing.

HCA WAIVERS

- ▶ A host community may waive the regulatory requirement to have a compliant HCA by submitting an HCA Waiver, in the form and manner determined by the CCC, **at any time**.
- ▶ An HCA Waiver constitutes a **total relinquishment** of the requirement to enter into an HCA.
- ▶ No party to an HCA may use an HCA Waiver to waive **individual provisions** of an HCA. An HCA Waiver that sets an expiration date or any conditions is deemed **noncompliant**.
- ▶ An HCA Waiver **may only be rescinded on CCC approval** of an HCA subsequently executed and submitted by the parties.



COMPLAINTS ALLEGING NONCOMPLIANCE

- ▶ If an allegation of noncompliance with HCA regulatory requirements is substantiated, CCC may take administrative or enforcement action against a host community including sending a notice of deficiency, requesting additional information, or “**otherwise taking action**”
- ▶ Failure by a host community to correct the noncompliant conduct may result in one or more of the following:
 - ▶ Issuance of **sanctions** pursuant to 935 CMR 500.360 (assessment of an administrative fine of up to \$50,000 per violation, with a right to an administrative hearing)
 - ▶ Loss of a host community’s **good compliance** standing;
 - ▶ **Identification** of a host community lack of good compliance standing in a form and manner determined by the CCC; or
 - ▶ **Abstaining** from consideration of any new license applications affiliated with a host community until a host community’s good compliance standing is restored.

COMMUNITY IMPACT FEES

- ▶ CCC is “charged with establishing criteria for **reviewing, certifying, and approving** CIFs”
- ▶ To qualify as a CIF, an impact fee alleged by a host community must be “**reasonably related**” to costs imposed by the operation of the marijuana establishment



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.



- ✓ A host community shall ensure that the initial invoice period of alleged CIF covers a one-year period that starts from the date the CCC grants a final license.
- ✓ A host community shall further ensure that all subsequent, one-year invoice periods are consistent with the anniversary of a final license date.
- ✓ The CCC will not certify any CIFs attributable to dates outside of the applicable invoice period.
- ✓ A host community shall transmit its CIF invoice no later than one month after the anniversary of the date the received a final license from the CCC.



- ✓ A host community seeking to assess a CIF shall transmit an itemized invoice in a form and manner determined by the CCC documenting alleged impact fees arising from the preceding year of operations.
- ✓ A host community shall ensure that CIF invoices include a specific description of how the alleged impact fees were spent, including each line item for each good or service charged stating its cost, purpose, and relation to operations.
- ✓ CIF shall not include any legal costs incurred by a host community to defend against a lawsuit brought by the marijuana establishment
- ✓ A host community's failure to transmit the CIF invoice within the prescribed time shall result in a forfeiture of any CIF for the applicable year of operations.
- ✓ A host community shall ensure that the CIF invoice is restricted to the license number(s) operating from the licensed premises alleged to have impacted the community.
- ✓ Within 30 calendar days of receiving a host community's invoice of alleged CIFs, the marijuana establishment shall submit the invoice and any supporting documentation, if applicable, to the CCC in a form and manner determined by the CCC.
- ✓ A marijuana establishment that has agreed to pay a CIF under its HCA shall annually pay any undisputed CIF no later than the end of the current fiscal year OR ninety (90) days from the date of the CCC's certification, whichever is later.

The CCC shall make a determination certifying the CIF, in whole or in part, and notifying the parties of:

- ▶ The marijuana establishment's option to request an **administrative hearing** before an independent hearing officer of the CCC to challenge the findings of fact and conclusions of law.
 - ▶ The host community may seek **intervention** as a party to the hearing
- ▶ The marijuana establishment's option to seek **court intervention** to independently review the CIF by bringing a breach of contract action.



The parties' may also elect to bring a dispute between the parties before a **private mediator** at any time.

After a CIF dispute has resolved, a marijuana establishment must **provide proof of payment** of the certified CIF with its renewal application.

MINIMUM ACCEPTABLE EQUITY STANDARDS GOVERNING MUNICIPALITIES AND HOST COMMUNITIES

- ▶ The CCC has developed regulatory requirements for municipalities to **promote and encourage full participation** in the regulated Marijuana industry during negotiations of HCAs with **Social Equity Businesses** and to develop **minimum acceptable standards** governing HCA negotiations with Social Equity Businesses
- ▶ Host Communities must adopt local rules or bylaws to comply with 935 CMR 500.181(3) on or **before May 1, 2024**
- ▶ A Host Community shall submit an **attestation** in a form and manner determined by the CCC affirming that complied and identifying the specific laws passed, as well as **copies of its equity plan** to the CCC.
- ▶ Failure to comply may result in **fines**, after receiving notice and opportunity to comply, no sooner than **May 1, 2025**



MANDATORY TRANSPARENT PRACTICES TO PROMOTE AND ENCOURAGE FULL EQUITY PARTICIPATION



A host community **must publicize** certain information in a conspicuous location at its offices and on its website which shall, at minimum, include:

- ▶ **All** required steps of a host community’s “**local approval process**”, including, but not limited to, **all associated fees**, **deadlines**, and **meeting schedules** for local bodies involved in the local approval process
 - ▶ *Local Approval Process means the steps involving a host community’s cannabis licensing, including, but not limited to, zoning, all associated fees, deadlines, and meeting schedules for local bodies involved in such processes*
- ▶ **Identification of key individuals** involved in a host community’s local approval process, including, but not limited to, their name, title, business address, and business contact information such as email address or phone number

MANDATORY TRANSPARENT PRACTICES TO PROMOTE AND ENCOURAGE FULL EQUITY PARTICIPATION

- ▶ A list of **all documentation** required by a host community's local approval process, in **downloadable form and paper form**
- ▶ Identification of **application criteria** for local approval to operate a marijuana establishment and **scoring methodologies** relied on by a host community
- ▶ **General scoring information** for all applicants and a host community's scoring of each individual applicant
- ▶ **A host community's explanation, in narrative form, of its reasoning for the approval or denial of an application**
- ▶ Any other information required by the CCC



- ▶ A host community must develop an equity plan to promote and encourage full participation that:
 - ▶ *Encourages applications* from Social Equity Businesses; and
 - ▶ Includes *goals, programs, and measurements* a host community will utilize to promote and encourage equity participation.
- ▶ A host community shall publish data regarding its total applicant pool, which shall identify each Social Equity Business and license applicant that has been designated as a Social Equity Program Participant or Economic Empowerment Priority Applicant, or who have been pre-verified.
- ▶ A host community shall adhere to “best practices” for HCA negotiations



CCC's BEST PRACTICES FOR HCA NEGOTIATIONS

- ▶ Develop a **standard evaluation form** (or use a form developed by the CCC) that scores components of an application.
- ▶ The evaluation form shall include consideration of equity in the **overall evaluation score**, which must comprise not less than 25% of the total evaluation score.



- ▶ In circumstances where a host community imposes a cap on the number of businesses that may obtain local approval to operate, **if a host community later decides to allow additional businesses, at least 50% of those licenses, but no less than 1 license**, above the previously-established cap shall be reserved for Social Equity Businesses or license applicants that have been designated as Social Equity Participants or Economic Empowerment Priority Applicants.

Standards for Negotiations with Equity Parties



- ▶ **Prioritize** negotiations of HCAs with equity parties.
- ▶ Engage in an ongoing dialogue by providing multiple opportunities for discussion and negotiation of HCA terms including, **at minimum, two conferences.**
- ▶ Include any **attorney**, representative, or other advocate, if elected by an equity party, in **all** negotiation discussions and conferences.
- ▶ Promote **language access** by providing a certified **interpreter or translator** to assist an equity party during all negotiation discussions and conferences.
- ▶ Provide reasonable opportunities for an equity party to **review a proposed** HCA, HCA term or condition outside of a negotiation conference, or to seek review or input by a third party of their choice.
- ▶ Negotiate the terms of an HCA in good faith, including consideration of **flexible terms** that may mitigate particular challenges affecting an equity party, such as access to capital, with all terms and clauses conspicuously identified and openly discussed.
- ▶ Allow an equity party to **propose an amendment to, or seek cancellation of,** an HCA **within thirty days** from the date of execution of the HCA.

- ▶ Host Communities must also adopt a **plan to positively impact communities** that were disproportionately harmed by marijuana prohibition and enforcement.
- ▶ Host Communities must publicize this plan in a conspicuous location at their offices and on their website. The plan must outline the goals, programs, and measurements the Host Community will pursue.



ANY FINAL QUESTIONS?



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