

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
SUPERIOR COURT DEPARTMENT

4/2/2021

ESSEX, ss.

Docket No.

HAVERHILL STEM LLC, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 JAMES J. FIORENTINI, MAYOR AND )  
 CITY OF HAVERHILL )  
 )  
 Defendant. )

RECEIVED

**COMPLAINT FOR MANDAMUS, INJUNCTION, DECLARATORY JUDGMENT,  
AND DAMAGES**

NOW COMES Plaintiff Haverhill Stem, LLC (“Stem” or “Plaintiff”) and complains against Defendants Mayor Fiorentini and the City of Haverhill (“City”) as follows:

**PRELIMINARY STATEMENT**

1. Stem and the City entered into a contract, the Host Community Agreement (“HCA”), pursuant to which both parties undertook certain obligations. Stem has performed all its commitments pursuant to the contract, but the City has shirked its responsibilities. Specifically, the contract requires Stem to pay a community impact fee provided that the City provides documentation on the additional costs it has or will incur as a result of Stem’s operations. As required for its annual license renewal, Stem requested the documentation supporting the community impact fee, but the City has failed to provide any documentation of costs. Accordingly, Stem seeks a writ of mandamus to order the City to perform its nondiscretionary obligation and provide the required documentation and substantiate the fee. Furthermore, Stem requests a preliminary injunction ordering that the community impact fee

payment be deposited with the Court until such time as the City has provided the documentation to substantiate the alleged costs. Moreover, Stem seeks a declaratory judgment that the City cannot seek to recover any impact fee from Stem in the absence of proof of such costs, and that given that the City has failed to produce any such costs, no impact fee is due. Finally, Stem brings claims for breach of contract and breach of the covenant of good faith and fair dealing as a result of the City's refusal to comply with the terms of the contract. In addition, Stem seeks a declaration that Stem does not owe any attorney's fees pursuant the contract's indemnification provisions. The City has demanded payment of its attorney's fees in relation to litigation brought against the City challenging the validity of the City Ordinance. Stem seeks a declaration that the terms of the contract do not provide for indemnification and that the City is barred from seeking indemnification as it has breached the contract.

### **PARTIES AND JURISDICTION**

2. Plaintiff Haverhill Stem LLC ("Stem") is a Massachusetts limited liability company with a principal place of business at 124 Washington Street, Haverhill, Massachusetts 01832. Caroline Pineau is the owner and sole member of Stem and executed the HCA.

3. Defendant James Fiorentini is the Mayor of the City of Haverhill, and has offices at City Hall, 4 Summer Street, Haverhill, Essex County, Massachusetts, 01830. Mayor James Fiorentini, as agent for the City, executed the HCA.

4. Defendant City of Haverhill is a municipality within the Commonwealth of Massachusetts and has offices at City Hall, 4 Summer Street, Haverhill, Essex County, James Fiorentini, as agent for the City, executed the HCA.

5. Jurisdiction is proper in this Court pursuant to M.G.L. c. 212 § 4.

6. Venue is proper in this Court pursuant to M.G.L. c. 223 § 1.

## FACTUAL BACKGROUND

7. On November 8, 2016, Massachusetts voters voted in favor of a ballot initiative known as “Question 4” authorizing the limited adult use of marijuana and the licensing of marijuana establishments. The ballot initiative became Chapter 334 of the Acts of 2016 and created the “Regulation and Taxation of Marijuana Act, G.L. c.94G (“2016 Marijuana Act”).

8. On July 19, 2017, the Massachusetts Legislature passed a bill (H.3818) to amend Chapter 334 and the law it created, G.L. c.94G, as well as create additional laws relating to adult and medical use of marijuana. The bill became Chapter 55 of the Acts of 2017 (“2017 Marijuana Act”) and was signed by the Governor on July 28, 2017. The 2017 Act created the Cannabis Control Commission (“CCC”) and also placed limits and restrictions on municipal control over the siting of marijuana establishments.

9. On March 7, 2018, the CCC promulgated final regulations at 935 CMR 500.

10. The CCC is required by law to engage in a licensing process for marijuana establishments. During the application process, applicants must have executed a Host Community Agreement (“HCA”) with the municipality.

11. The HCA may include a community impact fee of up to 3% of gross sales to be paid to the host community, as long as the fee is reasonably related to real costs imposed on the municipality due to the establishment operating there. The community impact fee may not be effective for longer than five years. Any cost to the city imposed by the operation of a marijuana establishment must be documented and considered a public record under Massachusetts public records laws, G.L. c.4 §7 cl. 26 and G.L. c.66 §10.

12. On January 30, 2018, the Haverhill City Council voted to adopt the Licensed Marijuana Establishments Overlay Zone (LMEOZ). The LMEOZ was amended to its current

form on January 15, 2019. The LMEOZ contains four (4) subzones. Stem is within subzone LME-RO: Retail Sales Only and within Subzone A of the DSGOD and Sub-Zone A of the Waterfront District.

13. Stem operates as a Licensed Marijuana Establishment (“LME”) at 124 Washington Street, Haverhill.

14. Stem obtained an Economic Empowerment License (No. EE202084 issued on 5/1/2018) and submitted a state application for a Licensed Marijuana Establishment (Application #: MRN281327) on Mar 31, 2019. Because Stem was an Economic Empowerment Applicant, it was entitled to priority status and thus qualified and was eligible to receive a certificate of registration from the Cannabis Control Commission (CCC). *See* 935 CMR 500.102(2)(a)(1).

15. Stem received its provisional license from the CCC dated October 15, 2019 and recognized November 26, 2019.

16. Prior to receiving its CCC license, Stem entered into an HCA with the City dated December 28, 2018. See Exhibit A.

17. Pursuant to the HCA, Stem agreed to pay a community impact fee pursuant to the provisions of the HCA. Article II, Section A of the HCA, titled Community Impact Fee, provides:

The Company anticipates that the City will incur additional expenses and impacts on the City's road and other infrastructure systems, law enforcement, fire protection services, inspectional services, and permitting and consulting services, as well as unforeseen impacts on the City. Accordingly, in order to mitigate the financial impact on the City and use of City resources, the **Company agrees to pay an Annual Community Impact Fee to the City, in the amount and under the terms provided herein that is reasonably related to the costs imposed upon the City by the operation of the Company's Marijuana Establishment.**

HCA, Art. II, A. (Emphasis added.)

18. The HCA further provides that “the Municipality is under no obligation to use the payments described in this Section in any particular manner, **provided, however, that the payments are reasonably related to the costs imposed upon the Municipality by the operation of the Marijuana Establishment.**” HCA Art. II, A (5) (Emphasis added).

19. Moreover, the HCA obligates the City to submit the required certifications and documentation in conjunction with Stem’s CCC license renewal. Section IX, Support, provides:

The City agrees to submit to the CCC, or such other state licensing or monitoring authority, as the case may be, the required certifications relating to the Company's application for a license to operate the Facility 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 any zoning application submitted for the Facility, in any particular way other than by the City's normal and regular course of conduct and in accordance with its rules and regulations and any statutory guidelines governing them.

20. Finally, the HCA contains an indemnification provision:

The Company shall indemnify, defend, and hold the City of Haverhill harmless from and against any and all claims, demands, liabilities, actions, causes of actions, defenses, proceedings and/or costs and expenses, including attorney's fees, brought against the City, their agents, departments, officials, employees, insurers and/or successors, by any third party arising from or relating to the development of the Property and/or Facility. Such indemnification shall include, but shall not be limited to, all reasonable fees and reasonable costs of attorneys and other reasonable consultant fees and all fees and costs (including but not limited to attorneys and consultant fees and costs) shall be at charged at regular and customary municipal rates, of the City's choosing incurred in defending such claims, actions, proceedings or demands. The Company agrees, within thirty (30) days of written notice by the City, to reimburse the City for any and all costs and fees incurred in defending itself with respect to any such claim, action, proceeding or demand.

Notwithstanding the provisions of the foregoing paragraph the company shall have no obligation to provide or pay for legal counsel to the city in the event of an appeal of the application for a special permit.

HCA, Art. XII, Indemnification.

21. Stem was also required to obtain a special permit from the City to operate. The Special Permit was granted and issued by Notice of Decision dated September 11, 2019 and recorded with the Essex County Registry of Deeds on May 29, 2020 at Book 38665 Page 156.

22. The CCC issued Stem's final license order on April 9, 2020. Stem received its final license order to commence operations on May 26, 2020 and had its grand opening and began operations on May 30, 2020. The opening was delayed due to the Massachusetts State of Emergency restrictions on public spaces due to the COVID-19 pandemic.

23. As part of its annual license renewal, on or about July 28, 2020, Stem sent a written request to Mayor James Fiorentini asking the City for the documentation to support the Community Impact Fee in conjunction with its annual license renewal which was due in October 2020.

24. The City did not respond, and Stem submitted an attestation to this effect with the CCC, which resulted in the requirement that an update be filed within 90 days.

25. Still having received no response from the City, Stem sent a follow up request on January 15, 2021, stating that Stem had a deadline of no later than Feb 21, 2021 (90 days from the CCC's notice dated Nov 23, 2020) to submit a response.

26. On March 1, 2021, Stem received a response letter from the City, but it did not comport with the CCC requirements and failed to provide the costs alleged imposed upon the City.

27. The City's letter stated: "We do not at this time have specific documentation to provide you with..." The City further responded: "We believe that retail marijuana stores have caused us to have a substantial increase in our costs across a spectrum of municipal departments." The letter fails to provide any specific increase in costs to any department. The

letter references only “an increase in need for drug abuse and mental health services, in both our community and, more specifically, in our schools, as well as an increase in domestic issues,” but it does not provide any specific cost or increase.

28. The letter fails to substantiate the Community Impact Fee. The anticipation of retaining mental health professionals and the allegations that downtown area traffic has increased are made without providing any documentation as to need or cost. Additionally, the City does not provide the cost of the youth drug use survey mentioned in the letter, which is relevant as there is Youth Risk Behavior Survey which is done on a biennial basis and is paid for by the CDC.

29. Pursuant to G.L. c. 94G, §3(d), a community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment.

30. Community impact fees that are "reasonably related" are those that compensate the municipality for its anticipated and actual costs resulting from the operation of the marijuana establishment. The fee must bear some reasonable relation to the costs of providing municipal services or other benefits to the marijuana establishment and not merely be a fee without a sufficient basis and justification. *See* CCC Guidance on Host Community Agreements, Revised by the Commission: January 16, 2020, at p. 4. There must be a proportionality between the cost or impact claimed by the community and the fee required of the marijuana establishment. *See id.* at p. 5. citing *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013) and Attorney General's letter on Hanover Annual Town Meeting Warrant Articles #22 and 23 (Zoning), December 1, 2014.

31. The CCC 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:

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.

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

32. M.G.L. c. 94G, § 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."

33. 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.

34. Stem requested that the City provide documentation related to the costs imposed upon the City. Specifically, Stem requested the increase in cost as a result of Stem's operations,

including, but not limited to, the number of times the fire or police or inspectional services visited Stem, the documentation showing that the alleged increase in youth use or impact on schools is caused by the legal cannabis sales, the documentation of actual increase in costs to each municipal department, and the budget requests and budgets of the municipal departments you allege are impacted by Stem's operations.

35. The City has not provided any further response to Stem's request for documented costs to support the impact fee. The only response received by Stem from the City was a reminder invoice dated April 1, 2021.

36. After Stem had made its requests for information to support the impact fee and comply with the CCC license renewal, the City sent Stem a letter dated February 20, 2021, post marked February 27, 2021, but not received until March 1, 2021, demanding payment for the City's legal fees incurred in the Land Court lawsuit challenging the City Ordinance.

37. On or about May 30, 2019, a lawsuit captioned *J. Bradford Brooks et al. v. City of Haverhill, et al.*, Land Court, Docket No. 19 MISC 000265 (the "Land Court Action"), was filed against the City, Stem, Stem's landlord, and the owner of the building in which Stem operates.

38. The City, as a named defendant in the Land Court Action, filed an answer and motion for summary judgment, which was granted. The Plaintiffs then appealed, and the City filed an appellee's brief. Oral argument is currently scheduled for May 2021. The City has requested its attorney's fees for the Land Court Action.

39. The City has also requested attorney's fees in relation to the special permit that it granted to Stem.

40. The City is not entitled to attorney's fees pursuant to the HCA.

41. The Land Court complaint seeking a declaration that the City Ordinance is void is not “related to the development of the Property and/or Facility.” Instead, the plaintiffs’ claims in the Land Court Action are related to the City’s adoption of the ordinance.

42. In the Land Court Action, the plaintiffs’ claims were brought pursuant to G.L.c. 240, § 14A to determine the validity and extent of municipal zoning ordinances. Specifically, the plaintiffs sought a (1) binding determinations of rights and declarations of rights interpreting such ordinances, by laws or regulations including, but not limited to their validity and interpretations thereof and in particular and without limitation as to whether such ordinance is valid despite being contrary to G.L.c. 94G, § 5 (3), whether such ordinance constitutes spot zoning or illegal zoning; and (2) a declaration declaring the ordinance null and void. The claims in that matter were not related to the “development of the Property and/or Facility” as required by the HCA.

43. Accordingly, Stem is not required to reimburse the City for its legal fees related to the Land Court Action.

44. Moreover, the City has failed to request reimbursement from the other LME’s subject to an HCA. The LMEs which were granted licenses by the City pursuant to the ordinance should be required to contribute as the ordinance also allows them to operate within the City.

45. The City cannot request indemnification related to the special permit. The HCA provides: “...the company shall have no obligation to provide or pay for legal counsel to the city in the event of an appeal of the application for a special permit.” HCA, Section XII. Moreover, preparation of a special permit decision is a usual and customary obligation of the municipality

and is not subject to reimbursement by Stem. These fees are not properly within the indemnification provision and should be excluded.

46. Finally, the Defendants have breached the HCA and therefore cannot seek to enforce its terms. As set forth above, the Defendants have failed to provide the documentation to support the community impact fee.

47. As a result of the Defendants' failure to comply with the terms of the HCA, Stem has been and continues to be damaged.

### **COUNT I—MANDAMUS**

48. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

49. The City has a defined ministerial and non-discretionary legal obligation and duty to provide documentation as required pursuant to the HCA and G.L. c. 94G, §3.

50. The City agreed to provide documentation of any cost imposed by the operation of Stem when it entered into the HCA.

51. Stem entered into the HCA based on the good faith representations of the City in the HCA.

52. Stem is required to submit the documentation to the CCC for its license renewal.

53. Stem has no plain or adequate remedy at law.

54. The issuance of a writ of mandamus will be an effective remedy.

WHEREFORE, Plaintiff requests this Honorable Court order the Defendant City of Haverhill to produce the documentation of any cost imposed by the operation of Stem required by the HCA and G.L. c. 94G, and for such other and further relief as the Court deems just and proper.

## COUNT II—INJUNCTION

55. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

56. The City has failed to produce the documentation of any cost imposed by the operation of Stem required by the HCA and G.L. c. 94G to support the community impact fee it is assessing against Stem.

57. Stem requests that this Court order Stem to pay the assessed community impact fees into the Court to be held until such time as the City has produced the required documentation and that the City be enjoined from using any funds from the payment of the community impact fees until such time as the City produces the required documentation of costs, and the costs are determined to substantiate the imposition of the impact fee.

58. Stem is seeking to act in good faith to comply with the terms of the HCA by depositing the impact fee payment into the Court as provided herein.

59. No harm will occur to the City as the funds will be deposited to be available at such time as the City has produced the required documentation and substantiated its fees.

60. Stem will incur irreparable harm if it pays the impact fee and it is later determined to have been improper.

WHEREFORE, Plaintiff requests an injunction from the Court to order Stem to pay into the Court the community impact fee payment and enjoin the City of Haverhill from using the funds until documentation is produced supporting the costs, and for such other and further relief as the Court deems just and proper.

**COUNT III—DECLARATORY JUDGMENT REGARDING THE COMMUNITY  
IMPACT FEE**

61. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

62. Plaintiff seeks declaratory relief pursuant to M.G.L. c. 231A.

63. G.L. c. 94G, § 3(d) provides “[a]n agreement between a marijuana establishment ... 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 marijuana establishment ... and shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years. Any cost to a city or town imposed by the operation of a marijuana establishment or medical marijuana treatment center shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4.”

64. The HCA provides that Stem “agrees to pay Company agrees to pay an Annual Community Impact Fee to the City, in the amount and under the terms provided herein that is reasonably related to the costs imposed upon the City by the operation of the Company's Marijuana Establishment” and the City can use those funds provided “that the payments are reasonably related to the costs imposed upon the Municipality by the operation of the Marijuana Establishment.”

65. Community impact fees that are "reasonably related" are those that compensate the municipality for its anticipated and actual costs resulting from the operation of the marijuana

establishment and must bear some reasonable relation to the costs of providing municipal services or other benefits to the marijuana establishment and not merely be a fee without a sufficient basis and justification.

66. The City is attempting to assess an impact fee that is not reasonably related to anticipated or actual costs resulting from Stem's operation.

67. There is now an actual, justiciable controversy with respect to which the Plaintiff is entitled to a declaration of its rights against the City.

WHEREFORE, Plaintiff requests a declaratory judgment be entered in its favor against Defendants Mayor Fiorentini and the City of Haverhill and that the Court declare as follows: (a) that the City has failed to produce documentation of any cost imposed by the operation of Stem required by the HCA and G.L. c. 94G; (b) that in the absence of any documentation the City has failed to assess a community impact fee that is reasonably related to anticipated or actual costs resulting from Stem's operation; (c) that the City has not incurred and will not incur any anticipate or actual costs resulting from Stem's operation; (d) that the community impact fee is improperly assessed; (e) that the City is not entitled to any payment by Stem for the community impact fee; (f) that the funds deposited by Stem, if any, into an escrow account or otherwise paid by Stem as a community impact fee are to be returned to Stem with interest; (g) that Stem is entitled to recover the costs and expenses of this action, including attorneys' fees; and (h) that Stem is entitled to such other and further relief as the Court deems just and proper.

#### **COUNT IV—BREACH OF CONTRACT**

68. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

69. The HCA constitutes a contract between Stem and the City.

70. Stem has satisfied all conditions and responsibilities of the contract.

71. The Defendants have failed to perform its obligations, specifically by failing to produce the documentation required to support the community impact fee and by assessing an impact fee not supported by documentation of anticipated or actual costs resulting from Stem's operation.

72. Defendants' failure constitutes a breach of the agreement.

73. As a result of Defendants' breaches, Plaintiff has suffered and will continue to suffer damages.

WHEREFORE, Plaintiff requests an award of damages against the Defendants in an amount to be determined at trial, an award of its attorney's fees and costs, and for such other and further relief as the Court deems just and proper.

**COUNT V—BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

74. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

75. Stem entered into agreements with Mayor Fiorentini and the City, specifically the HCA.

76. Implied in any contract is the covenant of good faith and fair dealing.

77. Stem agreed to perform under the contract and has performed all its obligations in good faith.

78. The Defendants agreed to perform under the contract, including providing documentation in support of the community impact fee as required by G.L. c. 94G, but have refused to provide such documentation, or are unable to provide such documentation because none exists, while still assessing the community impact fee.

79. The Defendants' failure to perform and refusal to produce the required documentation or imposition of the fee without any basis when Stem has satisfied all its requirements constitutes a breach of the covenant of good faith and fair dealing.

80. As a result of Defendants' breaches, Plaintiff has suffered and will continue to suffer damages.

WHEREFORE, Plaintiff requests an award of damages against the Defendants in an amount to be determined at trial, an award of its attorney's fees and costs, and for such other and further relief as the Court deems just and proper.

**COUNT VI—DECLARATORY JUDGMENT REGARDING INDEMNIFICATION**

81. Plaintiff repeats and realleges the allegations contained within the above paragraphs as if fully restated herein.

82. Plaintiff seeks declaratory relief pursuant to M.G.L. c. 231A.

83. The City has made demand for indemnification and payment of attorney's fees the City incurred in relation to the lawsuit captioned *J. Bradford Brooks et al. v. City of Haverhill, et al.*, Land Court, Docket No. 19 MISC 000265 and related to the special permit.

84. The HCA provides for indemnification of costs arising from or relating to the development of the Property and/or Facility.

85. The Land Court Action is not a matter related to the development of the Property or Facility.

86. The fees for the special permit are specifically exempted from the indemnification provisions and preparation of the special permit is a usual and customary function of the City.

87. The City has breached the HCA by failing to perform as stated above, specifically regarding failing to produce documentation pursuant to actual or anticipated costs reasonably related to Stem's operations as required by G.L. c. 94G.

88. There is now an actual, justiciable controversy with respect to which the Plaintiff is entitled to a declaration of its rights against the City.

WHEREFORE, Plaintiff requests a declaratory judgment be entered in its favor against Defendant City of Haverhill and that the Court declare as follows: (a) that the City has breached the HCA; (b) that the City's breach bars it from seeking recovery under the HCA; (c) that the indemnification provision does not apply to fees incurred in the Land Court Action; (d) that the City cannot seek indemnification related to any work related to the special permit; (e) that Plaintiff is entitled to recover the costs and expenses of this action, including attorneys' fees; and (f) that Plaintiff is entitled to such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

PLAINTIFF HAVERHILL STEM LLC

By Its Attorney,

Dated: April 2, 2021

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