

nondiscretionary obligation and provide the required documentation and substantiate the fee. Furthermore, Bloom Brothers requests an injunction prohibiting the City from spending the fees collected and prohibiting collecting any further fees until such time as the required documentation is produced to substantiate the alleged costs. Moreover, Bloom Brothers seeks a declaratory judgment that the City cannot seek to recover any impact fee from Bloom Brothers 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 or was properly owed and that a refund from the City of all funds paid is due. Finally, Bloom Brothers seeks damages for the City's breach of contract and breach of the covenant of good faith and fair dealing.

PARTIES AND JURISDICTION

2. Plaintiff Slang, Inc. d/b/a Bloom Brothers ("Bloom Brothers") is a Massachusetts corporation with a principal place of business at 2 Larch Street, Pittsfield, Massachusetts, 01201. Nathan Girard is the CEO and President of Bloom Brothers and executed the HCA.

3. Defendant Linda M. Tyer is the Mayor of the City of Pittsfield. Defendant City of Pittsfield is a municipality within the Commonwealth of Massachusetts and has offices at the City Hall, at 70 Allen Street, Pittsfield, MA 01201. Mayor Tyer executed the HCA on behalf of the City.

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

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

FACTUAL BACKGROUND

6. 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”).

7. 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.

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

9. 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.

10. 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.

11. Bloom Brothers is licensed to operate a Licensed Marijuana Establishment (“LME”) at 2 Larch Street, in Pittsfield.

12. Bloom Brothers was granted a license by the Cannabis Control Commission (“CCC”) in 2018 and engaged in the architectural review process through the CCC.

13. It obtained its Certificate of Occupancy in July 2019, and after completing the responsible vendor training required by the CCC, it obtained its final license in January 2020.

14. Pursuant to CCC approval, Bloom Brothers opened for business on or about March 7, 2020.

15. Shortly thereafter, due to the State of Emergency resulting from the COVID-19 pandemic and the Governor's orders, the LME was shut down through May 26, 2020. On May 26, 2020, Bloom Brothers re-opened and has been continually engaged in business since then.

16. Prior to receiving its CCC license, Bloom Brothers entered into an HCA with the City dated August 23, 2018. See Exhibit A.

17. Linda M. Tyer, as Mayor of the City of Pittsfield, executed the HCA on behalf of the City.

18. Slang LLC was converted to SLANG, Inc. subsequent to the execution of the HCA and the HCA agreement was ratified between SLANG, Inc. and the City by Mayor Tyer.

19. Pursuant to the HCA, Bloom Brothers agreed to pay a community impact fee pursuant to the provisions of the HCA and Massachusetts law.

20. The HCA provides:

Host Community Fees. The parties stipulate and agree that the CITY will incur additional expenses and impacts upon the CITY's road system, law enforcement, fire protection services, inspectional services, permitting services and public health services. Accordingly, in order to mitigate such impacts upon the CITY and use of CITY resources, Slang LLC DBA Bloom Brothers shall pay fees to the CITY, on a biannual basis, as follows:

- (a) for the first year of operation, an amount equal to Sixty Thousand Dollars (\$60,000); and
- (b) for the second year of operation, an amount equal to One Hundred Thousand Dollars (\$100,000); and
- (c) for the third year of operation, an amount equal to One Hundred Fifty Thousand Dollars (\$150,000); and

- (d) for the fourth year of operation, an amount equal to Two Hundred Thousand Dollars (\$200,000); and
- (e) for the fifth year of operation, an amount equal to Two Hundred Thousand Dollars (\$200,000).

See HCA, at p. 1-2.

21. Moreover, the initial payment was due on or before the first of July or January, whichever occurs first, following the end of the first six (6) months from the day Slang LLC DBA Bloom Brothers commenced adult-use marijuana sales from the Premises. *Id.* at p. 2.

22. The HCA also contains a “Right to Re-Open” provision which states:

If, during the term of this Agreement, the Host Community Fees imposed upon Slang LLC DBA Bloom Brothers under this Agreement are determined to exceed the costs imposed upon the CITY by the operation of the Premises, then the CITY agrees to reopen this Agreement, and in good faith, negotiate an amendment that fairly adjusts the Host Community Fee such that the fee is reasonably related to the costs imposed upon the CITY due to Slang LLC DBA Bloom Brother’s operation of the Premises.

See HCA, Para. 4(b) at p. 3.

23. Furthermore, the HCA provides that it is governed by the laws of the Commonwealth of Massachusetts.

24. Pursuant to the HCA, Bloom Brothers made impact fee payments biannually, beginning on December 17, 2020.

25. 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."

26. 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.

27. Thus, an ME or MTC licensee must seek documentation of the cost imposed by its operations in the host community.

28. On or about December 14, 2020, Bloom Brothers requested the documented costs as required for its annual license renewal application to the Cannabis Control Commission ("CCC").

29. The City's first response was that "The City has prepared a standardized response for these license renewal requests" and the City Solicitor would be able to provide the response.

30. Bloom Brothers sent a follow up request on December 17, 2020, as nothing had been forwarded by the City.

31. On January 5, 2021, the City forwarded by email a letter dated January 4, 2021, with the note that "The City's attorney put this together, and we have been providing identical responses to the other groups going through license renewal." The letter dated January 4, 2021, enclosed a "memo and exhibits." The attachments included (1) a blank sample HCA; (2) a memorandum from 2018 summarizing anticipated costs including "ramp up costs," development costs, operational costs, and community costs which went into creating the fee schedule, and (3) a list of marijuana businesses, including medical dispensaries, recreational retailers, cultivators, manufacturers, and transporters.

32. Bloom Brother submitted the City's January 5, 2021, response to the CCC as required for its 2020 annual license renewal.

33. On or about October 13, 2021, Bloom Brothers made its request for the documented costs for its second annual renewal. In this request, Bloom Brothers, pursuant to a request from the CCC, requested “a line by line breakdown of the costs that cannabis establishments have forced the City of [P]ittsfield to incur warranting the need for payments of the community impact fees.”

34. The City responded via email on October 15, 2021 referring Bloom Brothers “back to the response the City provided during its relicensing process and the attached memos.” Thus, the City provided the same insufficient and irrelevant information as provided on January 5, 2021.

35. Bloom Brothers submitted the City’s October 15, 2021, response to the CCC as required for its second annual license renewal, but the CCC rejected it.

36. The City’s response failed to document any costs. The memo submitted by the City, now almost four years old, recited “anticipated costs” related to all marijuana businesses, including medical marijuana establishments, and attempts to average and annualize costs for each category of business.

37. As evidenced by the CCC’s rejection, these documents completely fail to document any cost to the City imposed by the operation of Bloom Brothers.

38. Thus, the City has failed to provide any documented costs pursuant to G.L. c. 94G §3(d).

39. At the time of the request for documented costs for its 2021 license renewal, Bloom Brothers had made impact fee payments of \$30,000 on December 17, 2020, and \$30,000 on July 10, 2021.

40. Bloom Brothers paid an additional \$50,000 of impact fees on January 24, 2022.

41. To date, Bloom Brothers has made all Annual Payments as required by the HCA, totaling \$110,000.

42. The impact fee payments are deposited into the City's general fund.

43. The City has breached the HCA and is in violation of state law because the impact fee is not reasonably related to costs resulting from the operation of Bloom Brothers.

44. 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.

45. 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.

46. 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).

47. Bloom Brothers requested the documented costs to the City imposed by the operation of Bloom Brothers as required by M.G.L. c. 94G, § 3(d) but the City has failed to comply with the terms of the HCA or Massachusetts law.

48. The City has collected \$110,000 in impact fees from Bloom Brothers and has not produced documented costs to show that the City has incurred \$110,000 in costs reasonably related to the operations of Bloom Brothers.

49. Bloom Brothers requests a refund of all Annual Payments it paid that were assessed in violation of the HCA and state law.

50. The next impact fee payment of \$50,000 is due on or about July 1, 2022.

51. As a result of the City's failure to comply with the terms of the HCA, Bloom Brothers has been and continues to be damaged.

COUNT I—MANDAMUS

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

53. 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.

54. The City agreed to provide documentation of any cost imposed by the operation of Bloom Brothers when it entered into the HCA.

55. Bloom Brothers entered into the HCA based on the good faith representations of the City in the HCA.

56. Bloom Brothers is required to submit the documentation to the CCC for its license renewal.

57. Bloom Brothers has no plain or adequate remedy at law.

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

WHEREFORE, Plaintiff requests this Honorable Court order the Defendant City of Pittsfield to produce the documentation of any cost imposed by the operation of Bloom Brothers 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

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

60. The City has failed to produce the documentation of any cost imposed by the operation of Bloom Brothers as required by the HCA and G.L. c. 94G to support the community impact fee it has assessed and is continuing to assess against Bloom Brothers.

61. Bloom Brothers requests 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.

62. Bloom Brothers further requests an order enjoining the City from collecting any further 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.

63. No harm will occur to the City because there has been no impact to the City from the operation of Bloom Brothers.

64. Bloom Brothers, however, will incur irreparable harm if it is required to continue to pay the impact fees and it is later determined to have been improperly assessed.

WHEREFORE, Plaintiff requests an injunction from the Court to enjoin the City of Pittsfield from using the funds from the payment of the community impact fees until documentation is produced supporting the costs, and an order enjoining the City from collecting any further impacts fees until such time as the City produces the required documentation of costs, and further relief as the Court deems just and proper.

COUNT III—DECLARATORY JUDGMENT

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

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

67. 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.”

68. The HCA provides that the impact fees are to mitigate such impacts upon the CITY and use of CITY resources. *See* HCA at p. 1.

69. The HCA further provides that if the community impact fees are determined to exceed the costs imposed upon the City by the operation of Bloom Brothers, then the City agrees to reopen the HCA and, in good faith, negotiate an amendment that fairly adjusts the Host Community Fee such that the fee is reasonably related to the costs imposed upon the City due to Bloom Brother's operation of the Premises. *See* HCA, Para. 4(b) at p. 3.

70. 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.

71. The City is attempting to assess an impact fee that is not reasonably related to anticipated or actual costs resulting from the operation of Bloom Brothers.

72. 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 City of Pittsfield and that the Court declare as follows: (a) that the City has failed to produce documentation of any cost imposed by the operation of Bloom Brothers as 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 the operation of Bloom Brothers; (c) that the City has not incurred and will not incur any anticipated or actual costs resulting from the operation of Bloom Brothers; (d) that the community impact

fee is improperly assessed; (e) that the City is not entitled to any payment by Bloom Brothers for the community impact fee; (f) that the funds paid by Bloom Brothers to the City as a community impact fee are to be returned to Bloom Brothers with interest; (g) that the HCA should be reopened and the impact fee removed from the HCA; (h) that Bloom Brothers is entitled to recover the costs and expenses of this action, including attorneys' fees; and (i) that Bloom Brothers is entitled to such other and further relief as the Court deems just and proper.

COUNT IV—BREACH OF CONTRACT

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

74. The HCA constitutes a contract between Bloom Brothers and the City.

75. Bloom Brothers has satisfied all conditions and responsibilities of the contract.

76. The Defendant City has 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 the operation of Bloom Brothers.

77. The Defendant City has also failed to perform its obligations by failing to reopen the HCA and reduce the impact fee to zero as there have been no impacts to the City.

78. Defendant's failure constitutes a breach of the agreement.

79. As a result of Defendant's breaches, Plaintiff has suffered and will continue to suffer damages.

WHEREFORE, Plaintiff requests an award of damages against the Defendant 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

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

81. Bloom Brothers entered into an agreement with the City of Pittsfield, specifically the HCA.

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

83. Bloom Brothers agreed to perform under the contract and has performed all its obligations in good faith.

84. The Defendant agreed to perform under the contract, including providing documentation in support of the community impact fee as required by G.L. c. 94G, and to reopen the HCA, but has refused to provide such documentation, or is unable to provide such documentation because none exists, while still assessing the community impact fee.

85. The Defendant's failure to perform and refusal to produce the required documentation and imposition of the fee without any basis when Bloom Brothers has satisfied all its requirements constitutes a breach of the covenant of good faith and fair dealing.

86. As a result of Defendant's breaches, Plaintiff has suffered and will continue to suffer damages.

WHEREFORE, Plaintiff requests an award of damages against the Defendant 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.

VERIFICATION

I, Nathan Girard, being first duly sworn, state that I am the CEO and President of the plaintiff Slang, Inc. d/b/a Bloom Brothers in the above-captioned action; that I have read the foregoing complaint and know the contents hereof; and that it is true to my knowledge and belief.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY, THIS 11th DAY OF APRIL, 2022.

/s/ Nathan Girard
Nathan Girard

signed w/ approval,
/s/ Thomas K. MacMillan
Thomas K. MacMillan, Esq., BBO# 312150

RESPECTFULLY SUBMITTED,

PLAINTIFF SLANG, INC.,
d/b/a BLOOM BROTHERS

By Its Attorneys,

Dated: April 11, 2022

/s/ Thomas K. MacMillan
Thomas K. MacMillan, Esq., BBO# 312150
MacMILLAN LAW OFFICES
145 South Main Street - P.O. Box 5279
Bradford, MA 01835
978-521-5272
tkmmaclaw@aol.com

/s/ Kristin M. Yassenka
Kristin M. Yassenka, Esq., BBO# 659944
Yassenka Law PLLC
One New Hampshire Avenue, Suite 125
Portsmouth, NH 03801
603-952-3452
kristin@yassenkalaw.com