



## ***Massachusetts Municipal Lawyers Association***

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Cannabis Control Commission  
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Re: Regulatory Review: the Host Community Agreement Working Group, the Municipal Equity Working Group, and the Social Consumption Working Group

To the Members of the Cannabis Control Commission:

This is in response to the Commission's April 14, 2023 announcement, soliciting comment on three critical areas of importance currently under consideration by the Cannabis Control Commission (the "Commission") pursuant to Chapter 180 of the Acts of 2022, "An Act Relative to Equity In The Cannabis Industry" (the "Act"). The Massachusetts Municipal Lawyers Association ("MMLA") (formerly the City Solicitors & Town Counsel Association) is the municipal law bar association for Massachusetts. MMLA has served Massachusetts cities and towns and has provided municipal law educational opportunities to its members and public officials since 1946. MMLA members consist of attorneys whose practice includes providing legal services to cities and towns or who otherwise devote a substantial portion of their practice to the advancement of municipal law.

MMLA members have drafted by-laws regulating marijuana establishments, helped develop and implement policies related to marijuana establishments and, negotiated numerous host community agreements ("HCAs") on behalf municipalities pursuant to G.L. c.94G, §3(d). In this capacity, MMLA members have an intimate understanding of the challenges and concerns of municipal officials and the constituents they serve, especially in light of recent legislative amendments. Of course, the MMLA recognizes that cities and towns may have differing

opinions on marijuana establishments generally and further, that many variables may impact the law's effect on a particular municipality.

The below comments are divided by topic, with appropriate designations to the specific Commission working groups, as per the Commission's April 14<sup>th</sup> announcement. The MMLA greatly appreciates the Commission's solicitation of input in this regard and welcomes the opportunity to engage with the Commission on matters of significant importance to cities and towns in Massachusetts.

### **Host Community Agreement Working Group**

There is no doubt that when Question 4 appeared on the ballot in 2016, Massachusetts residents were divided on the Question of legalizing adult-use marijuana. The Question passed by a relatively slim margin, 1,769,328 votes in favor (or 53.7%) versus 1,528,219 votes opposed (or 46.3%). Even in many communities where Question 4 passed, there was vocal resident opposition to allowing adult-use marijuana operations in the community, whether retail or otherwise. Indeed, the resulting statute (G.L. c. 94G) provides communities a mechanism to ban marijuana operations entirely, regardless of whether a community voted in favor of Question 4 or not. It is evident that the increase in both state and local excise taxes, as well as the requirement of host community agreement and allowance of a "community impact fee," were intended to support the growth of this industry in the face of significant opposition (as evidenced by the close vote on Question 4), by providing both financial incentives and financial protections for communities agreeing to "host" such newly-legalized marijuana establishments.

Thus, at the time when adult-use establishments were originally seeking Host Community Agreements ("HCAs") in the communities in which they wished to operate, some local officials such as Select Boards were faced with public pressure and even division amongst their own members about whether to enter into HCAs, as well as the terms and conditions of those HCAs, given the uncertain impacts of this brand new industry. Based upon our collective experiences in advising communities and local officials, we can confidentially say that in many instances, a significant factor in "tipping the scales" toward allowing adult-use marijuana establishments was the ability to collect community impact fees ("CIF"). Early entrants into the market often used the promise of the CIF to entice municipal officials to enter into HCAs, especially in the face of local opposition.<sup>1</sup> The underlying principle of the CIF, as it was understood by many of our clients, was to fairly allocate the impacts that these businesses may have on a community with the increased costs of municipal services by upfront CIF payments thus, ensuring that taxpayers alone would not shoulder the burden of future effects of the industry.

It is unfortunate that much of the public discourse on HCAs and municipal collection of the CIF, as permitted under G.L. c. 94G, §3(d), has been one-sided and biased in favor of the marijuana industry. The notion there are little-to-no impacts as a result of the legalization of marijuana is belied by the experiences in other states that legalized marijuana before Massachusetts. The Commission itself has previously found that the effects of the legalization of marijuana cannot be, and have yet been, fully realized. In fact, the Commission has included the following items of concern on its research agenda<sup>2</sup> to be more fully studied:

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<sup>1</sup> Notably, the local option sales tax provided for under G.L. c. 64N, §3 only applies to retail sales, and is not available for other marijuana-related activities such as cultivation and manufacturing operations.

<sup>2</sup> See Commission Research Agenda available at <https://masscannabiscontrol.com/research/>,

- Patterns of use, methods of consumption, sources of purchase and general perceptions of marijuana among minors, among college and university students and among adults;
- Incidents of impaired driving, hospitalization and use of other health care services related to marijuana use, including a report of the state of the science around identifying a quantifiable level of marijuana-induced impairment of motor vehicle operation and a report on the related financial impacts;
- Economic and fiscal impacts for state and local governments including the impact of legalization on the production and distribution of marijuana in the illicit market and the costs and benefits to state and local revenue; and
- A compilation of data on the number of incidents of discipline in schools, including suspensions or expulsions, resulting from marijuana use or possession of marijuana or marijuana products.

The Commission has even suggested that law enforcement officers undergo training to better detect impairment and enforce the law regarding operating under the influence of marijuana including, Advanced Roadside Impaired Driving Enforcement (ARIDE) training and Drug Evaluation and Classification Program: Drug Recognition Expert (DRE) training.<sup>3</sup> The Commission has also entered a partnership with the Massachusetts Registry of Motor Vehicles and the AAA Northeast to create a curriculum teaching the risks of cannabis-impaired driving as part of its mandatory driver’s education for new drivers under the age of eighteen.<sup>4</sup> This is consistent with studies and reports in Colorado, for example, where recreational marijuana was legalized in 2013, which reflect significant increases in impaired driving and fatalities (impairment due to marijuana alone or marijuana in combination with other substances) since legalization.<sup>5</sup>

Perhaps most critically, there are several medical studies and reports that show ever increasing youth use and misuse of marijuana, tracking the legalization of marijuana, which carries with it not only changing perceptions about the acceptability of marijuana use, but also the availability of cannabis in greater varieties and higher potencies than before legalization. Vaping of marijuana is particularly problematic, according to some medical experts. Again, looking to Colorado’s experience, “marijuana use shows a 45 percent increase in comparing the three-year average prior to recreational marijuana being legalized to the three years after legalization” and shockingly, that “marijuana use for ages 12 and older is ranked 3rd in the nation and is 85 percent higher than the national average.”<sup>6</sup>

It is beyond clear that studies related to cannabis use patterns, perceptions, and related behaviors are critical to track for prevention and harm reduction as the adult-use cannabis market

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<sup>3</sup> See, e.g., [Legislative Report: Special Commission on Operating Under the Influence: A Baseline Review and Assessment of Cannabis Use and Public Safety Part 2: 94C Violations and Social Equity: Literature Review and Preliminary Data in Massachusetts](#)

<sup>4</sup> See “WBUR | Massachusetts is first state to add marijuana component to drivers’ ed classes”, available at <https://masscannabiscontrol.com/2023/01/massachusetts-is-first-state-to-add-marijuana-component-to-drivers-ed-classes/>

<sup>5</sup> *Impacts of Marijuana Legalization in Colorado, A Report Pursuant to C.R.S. 24-33.4-516*, Colorado Department of Public Safety, Division of Criminal Justice, Office of Research and Statistics, July 2021

<sup>6</sup> *The Legalization of Marijuana in Colorado: The Impact: Volume 5, Update*, Rocky Mountain High Intensity Drug Trafficking Area, September 2018

continues to emerge and development. While it may too early to assess the full impacts of legalization on youth cannabis use and associated behaviors, some impacts are more readily available and identifiable. For example, water usage problems, wastewater disposal issues, and odor impacts (to name a few) have been reported in several communities with marijuana cultivation/manufacturing operations.

The above examples are not exhaustive but provide ample support for the proposition that the impacts of legalized marijuana are often measured over time, and not always immediately documentable. In a report from November, 2019, the Commission acknowledged that there were limited data collection tools and methods available to measure impacts and recognized the importance of continued studies.<sup>7</sup> Where the state has not undertaken to create such data collection tools and methods, or yet conduct the type of studies as have occurred in states like Colorado, it is left to individual municipalities to sort out, on their own, how they might best measure and document impacts. Moreover, the impact of the COVID-19 pandemic at a critical time in the establishment of the adult-use market, cannot be underestimated.

Against this backdrop, we turn to the practical impacts of a strict construction of the legislative amendments to Section 3(d), which suggest that communities must spend tax dollars to address impacts before it can collect the CIF. In the world of municipal finance, this is problematic, in that municipal departments are generally precluded from incurring an obligation in excess of existing appropriations. See, e.g., G.L. c. 44, §31. Moreover, the Massachusetts Department of Revenue has stated that CIF must be deposited into a community's general fund.<sup>8</sup> Thus, the CIF must be collected and deposited in a community's general fund and then subsequently appropriated for a particular use. With very limited exceptions, a municipality cannot spend what it does not have (i.e. "deficit spend"). The point of the CIF is to help a community address impacts resulting from the post-legalization operation of marijuana establishments in that community, in a way that does not necessarily require increased taxes or diversion of existing tax revenues from other essential municipal services and operations.<sup>9</sup> In many ways, to the extent the Commission interprets the current Section 3(d) as requiring documentation of incurred "actual costs", rather than anticipated "actual costs", as a predicate to collection of the CIF, it puts the "cart before the horse," so to speak.

More specifically, such an interpretation would itself be a deterrent to municipal planning and budgeting for strategies to address impacts, for example, in anticipation of hiring additional police officers, truancy officers, and/or guidance counselors/social workers to address substance abuse prevention and marijuana use in schools and homes. In addition, given the uncertainties about the implications of the Act, some municipalities have halted plans to have their police officers participate in drug recognition roadside impairment training. While communities seek to implement such programs in an effort to keep roads safe and reduce the risk of accidents by drivers under the influence of marijuana, they do not yet have funding sources available for such purposes. This is especially true in small municipalities, where it is less likely that they have the funds necessary to efficiently and effectively implement these programs and services without upfront CIF payments.

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<sup>7</sup> [Evaluating the Impact of Cannabis Legalization in Massachusetts: State of the Data | November 2019.](#)

<sup>8</sup> Massachusetts Department of Revenue, DLS, Local Finance Opinion 2018-3

<sup>9</sup> As noted in the Statement of Financial Consequences, contained in the Question 4 voter guide, "[a] March 2016 report from the Special Senate Committee on Marijuana concluded as follows: 'Tax revenues and fees that would be generated from legal sales may fall short of even covering the full public and social costs (including regulation, enforcement, public health and safety, and substance abuse treatment).'"

Furthermore, several prominent representatives of marijuana establishments have taken the position the legislative amendments apply retroactively, effectively rendering null and void any HCA provision that does not comply with the new version of Section 3(d). They have used this unsupported position to advise marijuana establishments to simply stop paying any monies agreed to under pre-existing HCAs, negotiated in good faith, that do not fit within the narrowed statutory language concerning fees that are permissible in HCAs. This violates both state law and the Contracts Clause to the U.S. Constitution. In light of marijuana establishments' legal challenges to the collection of CIF, their position on retroactive application of the statutory amendments to Section 3(d), as well as the more restrictive requirements for HCAs under the amended Section 3(d), public officials across the state are questioning whether their community ought to continue to "host" marijuana establishments, particularly where the Supreme Judicial Court in Mederi, Inc. v. City of Salem, 488 Mass. 60, 66 (2021), confirmed that a community's decision to enter into any HCAs is discretionary. Without balance between municipal and industry interests, both new and existing marijuana establishments will surely find some communities much less receptive to entering into new or renewed HCAs, in light of the significantly changed landscape.

We urge the Commission to consider the following topics when promulgating regulations implementing the legislative amendments to G.L. c. 94G, effective November 9, 2022, and any interim guidance, with respect to HCAs:

1. The legislative amendments to G.L. c. 94G, §3(d) **do not** apply retroactively to HCAs entered into prior to November 9, 2022. A statement from the Commission that, in its view, the legislative amendments do not apply retroactively, will provide much needed clarity for both municipalities and marijuana establishments.
2. Identify the Commission's position on the impacts of a community's decision to not renew an expired HCA and to not waive the requirement for an HCA, on the Commission's treatment of an establishment's license renewal application.
3. Identification of the types of costs that a municipality may consider as reasonably related to marijuana operations. While the Commission has previously identified "impact" items such as substance abuse prevention programming as anticipated costs that may be reasonably related to marijuana operations, there has been significant push back from operators, who do not believe that CIF ought to fund such things as youth-targeted marijuana awareness, use and abuse, and prevention programs. The argument advanced by industry representatives is that because under-age marijuana use is not legal, marijuana establishments can never be responsible for any impacts associated with such use (and thus CIF cannot be collected or expended for such programs). If accepted, such a position improperly shifts the responsibility for addressing these impacts entirely to local communities and, ultimately, to the taxpayers.
4. Description of what level of documentation the Commission considers sufficient to support collection of community impact fees. There is nothing in Section 3(d), either before or after the Act became effective on November 9, 2022, that speaks to this issue. While it is our position that the documentation requirement ought not to be onerous upon a municipality, at a minimum, we respectfully suggest that if a city or

town has budgeted for a particular expense, through the statutory requirements for the adoption of a city or town budget, and/or the appropriation of funds by a community's appropriating authority, that documentation of this approved and anticipated budgeted expense or appropriation is sufficient to support an associated "actual costs" for the collection of CIF. This complies with the intent of the "documentation" requirement of Section 3(d) while also taking into account the realities of municipal budgeting in accordance with applicable municipal finance statutes.

5. Clarification of the scope of review the CCC expects to undertake with respect to pre-existing HCAs (if any), as well as with respect to HCAs that were executed after the effective date of last year's legislative amendments to Section 3(d).

### **Municipal Equity Working Group**

Cities and towns across the Commonwealth have expended significant time and resources holding hearings and attending meetings of zoning boards of appeals, planning boards, select boards and city/town councils, preparing and passing thoughtful zoning by-laws and ordinances to allow marijuana establishments and medical marijuana treatment centers to locate within their communities, developing HCA policies and procedures to ensure good-faith negotiations, and expend the CIF since the passage of Question 4 in 2016. The new legislative mandate set forth in the Act, however, that municipalities establish policies and procedures to "promote and encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities" *before* the Commission establishes minimum acceptable standards in November, effectively undermines and upends years of municipal planning.

The Act requires that a city or town that is not already host community establish such procedures and policies before entering into a host community agreement with a marijuana establishment or medical marijuana treatment center and, that all other municipalities adopt such policies not later than July 1, 2023. It further provides that:

[t]he failure of a host community to establish procedures or policies pursuant to subsection (a) shall result in a monetary penalty to the host community equal to the annual total of community impact fees received from all marijuana establishments or medical marijuana treatment centers operating within the host community, to be deposited into the Cannabis Social Equity Trust Fund established in section 14A of said chapter 94G.

While the Act does not designate whether the Commission, or any other agency for that matter, has enforcement powers, it only leaves municipalities to speculate on what minimum acceptable standards might be, in light of an enormous penalty, with little to no guidance from the Legislature and to this point, the Commission.

Some municipalities have pondered whether exclusivity periods for certain marijuana establishments or giving priority preferences to certain applicants seeking to operate marijuana establishments that are limited in number by applicable local laws (such as retail establishments), might be appropriate. Others, however, are left questioning their position where they have either banned or limited marijuana establishment and reached maximum capacity for marijuana

establishment pursuant to their by-laws and ordinances. This is especially true in those communities that were at the forefront in developing regulations and welcoming the cannabis industry within their borders.

Still, there are also many communities that are in the middle of active HCA negotiations and feel that adopting exclusivity periods or preferences, at this point, would frustrate negotiations. We can confidently say that industry representatives have expressed skepticism at such a position and have pushed back in communities that have sought to halt HCA negotiations until such a policy is adopted.

Moreover, while communities seem genuinely encouraged to promote fairness in the industry, establishing monetary penalties for municipalities that fail to create and adhere to such policies seems to be a broad overstep that is entirely contrary with municipal constitutional Home Rule and policing powers afforded to municipalities. The Commission should not police and micro-manage municipalities' statutorily granted separate and independent authority to regulate and choose which businesses to enter into contractual agreements on behalf of local interests. This legislative encroachment on host communities' discretionary exercise of their police powers or contracting authority in this manner – with no guidance and steep penalties – is entirely unfair and contrary to well established principles of municipal law.

Absent the Commission's establishment of recommended or minimum acceptable standards for social equity policies, creating and implementing such policies are likely be a herculean administrative task, especially for communities that are currently engaged in active HCA negotiations and those that have already met their marijuana establishment quotas. Further, municipalities, including those which are not yet host communities have been, to some extent, disincentivized to engage in new HCA negotiations, given the uncertainties of what will be required under new social equity policies.

We therefore impress upon the Commission the importance of issuing minimum acceptable standards before July 1 to allow communities time to digest and build upon those standards in a meaningful manner. In the alternative, we urge the Commission to issue a declaration that municipalities will not be penalized for failure to adopt such policies before the Commission issues its own.

### **Social Consumption Working Group**

Now that the law allows for municipal approval for social consumption of marijuana or marijuana products on the premises where they are sold, many new questions have arisen. On behalf of our municipal clients, we ask the Commission to consider the following issues when promulgating its amended regulations:

1. Whether serving limits will be implemented and how they can be enforced (i.e., prevention of group sharing);
2. Whether search procedures will be required to ensure that patrons are not bringing in marijuana products purchased off-site;
3. Whether communities may implement “secret shoppers” at social consumption establishments;
4. Whether fines will be established for overserving or serving minors in a manner similar to establishments with liquor licensing;

5. Whether, and to what extent, odor control mechanisms (indoor and outdoor, if outdoor smoking is permitted) will be mandated to mitigate nuisances to abutters;
6. Whether patrons will be limited in the amount of time they can spend at the establishment, to help prevent overconsumption;
7. Whether local health agents will be permitted to inspect edibles and whether edibles will be considered “food” and subject to the Retail Food Code;
8. Whether the types of permissible edibles and marijuana products will be expanded to other foods like pizza, pasta, etc.;
9. Whether patrons will be permitted to package items to go; and
10. Whether social consumption establishments will have to provide funds (through the CIF) for roadside impairment training to help local law enforcement recognize impaired drivers.

## **Conclusion**

The MMLA appreciates the Commission’s efforts to engage with municipalities in an effort to promulgate thoughtful and encompassing regulations. The MMLA acknowledges the extraordinary task that the Commission is faced with in implementing and enforcing the Act. To that end, the MMLA is committed to assisting the Commission in developing regulations to ensure that equity in the cannabis industry is balanced against the needs of host municipalities and their citizens.

Very truly yours,

*Matthew G. Feher*

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