September 8, 2023

Cannabis Control Commission
(via Commission@CCCMass.com)
Union Station
2 Washington Square
Worcester, MA 01604

Delivered Electronically

Dear Members of the Cannabis Control Commission:

The Massachusetts Municipal Association ("MMA") joins with the Massachusetts Municipal Lawyers Association ("MMLA") in providing the following comments to the Cannabis Control Commission's ("CCC") filed 935 CMR 500.000 Adult Use of Marijuana Draft Regulations ("Draft Regulations").

By way of context, our organizations support the goal of the Commonwealth, in the adoption of Chapter 180 of the Acts of 2022 ("Chapter 180") to promote equity in the cannabis industry and create guidelines around licensing. However, both of our organizations have significant concerns about the Draft Regulations' retroactive effect on existing Host Community Agreements ("HCAs") and the unduly burdensome requirements for municipalities in order to meet equity requirements. We believe the Draft Regulations are a violation of the Contract Clause of the U.S. Constitution, and that the administrative burden would create an unfunded mandate on municipalities in violation of Proposition 2½, while the end result would stifle the growth of the cannabis market and jeopardize the true intent of the legislation — to increase equity in the industry. These are not new issues - in fact the MMA and the MMLA raised significant concerns about retroactivity when the legislation was pending and those concerns have not been resolved.

This comment letter includes a legal analysis including instances where the Draft Regulations exceed the statutory language, and a review of the practical implications of the Draft Regulations. It also includes as an attachment, a redlined version of the Draft Regulations, pointing to specific provisions of the Draft Regulations that are discussed in this comment letter. These comments are offered, and we hope they are received, as constructive criticism and a basis for refining any final version of the Regulations. More importantly, we believe that the goal of Chapter 180 would be better achieved through a revised approach as we outline herein, and we offer the assistance of our organizations in the recrafting of the Regulations in the interest of a

greater likelihood of success for meeting the goals of Chapter 180, and to create a clear streamlined approach for all stakeholders.

Summary of Comment Letter:

- *The Draft Regulations are incompatible with the Contract Clause of the Constitution by applying retroactively to existing contracts which were negotiated in good faith before passage of Chapter 180.*

- *The framework for review and approval of community impact fees continues to lack the clarity and transparency necessary to create a predictable process, while the definition of "Reasonably Related" as to require an "enhanced need" is incompatible with the existing definition in Chapter 180. Additionally, the process heavily favors the licensee, giving significantly more time for the licensee to pay out its impact fees, and unnecessarily limiting a host community's timeline.*

- *The Draft Regulations exceed the enforcement authority of the CCC by allowing it significant discretion in extending license expiration dates and through the imposition of penalties and fines to municipalities for non-compliance.*

- *The Draft Regulations create an unfunded mandate on municipalities by requiring a significant administrative burden in order to encourage full participation of equity businesses without allowing for a reimbursement mechanism.*

- *The imposition of a mandatory donation of 3% of CIFs to the Social Equity Fund is a violation of the Constitution and applicable Massachusetts General Laws.*

- *The Draft Regulations must cite to applicable Division of Local Services, Local Finance Opinions (LFOs) and Informational Guideline Releases (IGRs), as they may be amended from time to time. Such guidance under municipal finance law is essential in order for municipalities to implement the limitations imposed by the Draft Regulations on how a community may spend a CIF. Generally, to the extent a host community collects a CIF, it goes to the general fund and is appropriated through the legislative body, which may be Town Meeting, unless a separate stabilization fund is created. The Draft Regulations do not appear to consider the Department of Revenue's guidance on this point. Section 500.180(2)(j)(3)*

- *Attorneys' Fees should be recoverable as part of a CIF. Section 500.180(2)(j)(6) prohibits a provision in HCAs that imposes legal, overtime or administrative costs. Attorney fees are clearly Reasonably Related, and are documented. In fact, the Draft Regulations increase the need for attorney services to negotiate and re-negotiate HCAs,*

and to provide other compliance-related guidance, and yet attorneys' fees appear to not be recoverable under the Draft Regulations. These costs are an impact that are unique to that particular establishment.

- *Section 500.850: Waivers, is not contemplated by Chapter 180.*

- *"Good compliance standing" must be defined. Section 500.180(2)(e) states that "Approval of HCAs may be conditioned on a Host Community being in good compliance standing with the Commission relative to any HCA to which the Host Community is a contracting party. Clarity on this point is necessary.*

- *The Draft Regulations do not provide clarity regarding the permitted duration of a HCA or from when the term is measured. May HCAs be for a term of no more than 9 years, or is it up to 8 years? Certainty on the permitted duration of an HCA and start dates would be appreciated.*

- *Of note, there is no process for the yielding-up or surrendering of a license in the Draft Regulations.*

- *Certainty regarding the process for municipal fines under Section 500.360 would be appreciated; including how a municipality must appropriate or allocate any such fine, as well as a process for curing or appealing alleged infractions.*

- *The Draft Regulations should provide an option for a retention period, during which licenses are held and reserved for social equity applications, after which time, if none, then they can be issued to other establishments.*

A. Retroactive Application to Existing Contracts in the Draft Guidelines

The MMA and the MMLA have raised concerns regarding the perils of applying Chapter 180 retroactivity to existing contracts numerous times. More than 1,000 contracts negotiated in good faith by municipalities and marijuana licensees have been put in place since the legalization of the recreational industry in the Commonwealth. Many of these contracts include mutually-agreed-to provisions on community impact fees, which helped to coax many municipalities into sanctioning the industry and establishing the platform for its growth.

Regulations that would retroactively apply to host community agreements that were executed before Chapter 180's effective date would invite substantial litigation under the Contract Clause of the U.S. Constitution, and would future disincentivize communities from allowing continued

growth and expansion of the industry in their municipality. This would further provide a counterproductive marketplace advantage for incumbent recreational enterprise operators and would jeopardize the primary intent of the new law, which is focused on accelerating social equity entrants in Massachusetts. Further, preventing the collection of fees by municipalities as agreed upon in their HCAs may also constitute an unlawful taking of revenue sources, as prohibited under M.G.L. Ch. 29 §27C.

Host community agreements have a term of five years, with many expiring shortly. Upending the industry by worsening costly litigation serves little purpose given this timeline and the burgeoning industry's long future. We strongly urge the Draft Regulations to lay out a two-tiered approach: one for license renewal of firms with existing HCAs, which were negotiated in good faith and are protected by the Contract Clause of the Constitution, and one for the licensure and license renewal of firms with new HCAs that were executed after the new law's effective date. This would move the industry forward by avoiding statutory encroachment of existing HCAs, prevent extensive and costly legal challenges, match the legislative intent to create opportunities for social equity firms, and protect taxpayers and municipalities from destabilizing and unfair retroactive changes.

B. <u>The Draft Guidelines Are Weighed Heavily in Favor of Licensees and Lack Clarity and Transparency in Defining and Determining Community Impact Fees</u>

The Draft Regulations fail to define what a "reasonably related" community impact fee is, with an increasingly narrow definition failing to explain what might meet its threshold. The definition created requires "a demonstrable nexus between the actual operations...and an enhanced need for a Host Community's goods or services in order to offset the impact of operations." This "enhanced need" creates a seemingly higher threshold than considered in Chapter 180, but the Draft Guidelines offer no examples or guidance on what this might look like.

The Draft Regulations create a framework of the process the CCC will undertake when reviewing the community impact fees, as well as a "Sunshine Requirement" for Host Communities to itemize each cost, but fails to require a similar spotlight on the CCC's review, offering no predictability as to what costs may in fact be recognizable. Without clarity in definition and transparency in the system, the CCC and municipalities are likely to continue to be bogged down by the process, as municipalities see what sticks and the CCC continually makes determinations under a shroud.

Additionally, the timeframe for requesting and collecting impact fees is weighed heavily in favor of the licensee while limiting the window for impact fee assessments for municipalities. 500.180 Section (4)(a)4 states that "the initial invoice period of alleged impact fees covers a one-year period that starts from the date the Commission grants a Marijuana Establishment final license."

This negates the fact that there may be significant financial impacts to a municipality *before* a final license is issued, and which may be "reasonably related" to the licensee, including permitting, inspection and legal fees which would not be associated with any other type of business.

Further, section (4)(a)5(b) requires the Host Community to transmit the impact fee invoice to the CCC no later than one month after the anniversary of the date of licensing, otherwise it will forfeit the fees. The Marijuana Establishment is given a term of eight months to pay the incurred fees and can request an administrative hearing to challenge the findings of the Commission. The Host Community is given no similar recourse to challenge the CCCs impact fee determination. While the underlying intention of these sections may be to induce municipalities to scrap impact fees altogether, the result may instead be a cooling reception of the industry in municipalities that already have licensees, and a disinterest in welcoming any by those who have none.

We would suggest allowing municipalities to recoup expenses as they occur, even if this includes expenses incurred before a final license is granted, with a window to file up to one year from occurrence. We also suggest the CCC create a more transparent process for determining impact eligibility so that municipalities and licensees might know ahead of time what expenses they may each be liable for, as well as an example list of eligible recoverable impacts.

C. <u>The Draft Regulations Exceed Enforcement Authority</u>

The CCC's statutory authority under Chapter 180 is to review, regulate, enforce and approve host community agreements as stated in the Draft Regulations 500.180 section 1. However, the Draft Regulations exceed this statutory authority in multiple ways. Allowing marijuana establishments to apply for equitable relief at the CCC's discretion and by levying penalties and fines on non-compliant host communities, the CCC exceeds its authority. Regulations are limited by the scope of the statute they implement and cannot impose sanctions or obligations that are in excess of the underlying legislative action.

In 500.180 of the Draft Regulations, section (3)(c)5 states that a Marijuana Establishment may seek equitable relief if a Host Community discontinues relations with it, allowing the CCC to "exercise its discretion to grant one of more of the following equitable remedies to a Marijuana Establishment: (i) Extension of a License expiration date without incurring additional prorated fees…(iii) other equitable relief as determined by the Commission." It is unclear how a license expiration would work with a host community that intends to discontinue relations, but in no lawful way can the CCC legally bind a municipality to an expired contract. Additionally, the broad discretion given to the CCC for "other equitable relief" is never considered in Chapter 180.

500.360 of the Draft Regulations lays out Fines and Sanctions for licensees, registrants and host communities. Again, this exceeds the statutory authority of the CCC, which may only review, renew and grant host community agreements under its licensing authority.

D. <u>Administrative Burden of the Social Equity Requirements Creates an Unfunded Mandate</u>

The Draft Regulations create an unfunded mandate on municipalities by requiring a significant administrative burden in order to encourage full participation of equity businesses. The requirements for municipalities to affirmatively open access to social equity businesses is a higher standard than any other business it encourages within its borders. 500.181 section 3 of the Draft Regulations requires a municipality to publicize its local approval process, including meeting schedules for public bodies involved - this approval process often involves planning and zoning boards, select boards, and can even encompass historical commissions and others. No other industry requires this type of publication.

500.181 (3)2 requires a Host Community to "develop a plan to promote and encourage full participation in the regulated cannabis industry by individuals disproportionately harmed by cannabis prohibition and enforcement and to positively impact those communities…" Notwithstanding how such a positive impact would be determined, municipalities are not experts in this field, and cannot be expected to do the work regulators failed to do at the onset. Complying with this section would require additional trained staff, triggering the unfunded mandate law under Proposition 2½.

Finally, 500.181(4) requires a Host Community to engage in further administrative burdens which are not imposed in any other contracting or licensing process, including a minimum of two conferences, providing a certified interpreter or translator in all negotiation discussions and conferences, and consideration of flexible terms including capital.

All of these costs would take place before a license is granted, negating them from the possibility of reimbursement under 500.180 Section (4)(a)4 and therefore would create a large unfunded mandate. While the goals of 500.181 are laudable, putting the burden on municipalities in this way will thwart those efforts. Municipalities will have little incentive to welcome additional equity businesses within their borders, and instead create a further entrenchment of existing non-equity licensees.

We suggest that the CCC set aside funding to cover these costs, including developing and training experts to understand the true administrative hurdles and needs of social equity businesses, a list of certified interpreters and translators they will contract with for negotiations

and discussions, and a fund for flexible capital. This would keep control of this important function within the CCC and ensure consistency across the state.

E. The Mandatory Donation is Unlawful

500.181(5) requires a Host Community to donate, "at a minimum, 3% of each CIF it receives from a Licensee" to the Cannabis Social Equity Trust Fund. While properly funding the Social Equity Trust Fund is extremely important to help reach equity goals, requiring 3% of agreed upon impact fees to go toward the fund rather than reimbursing the impact it represents seems not only contrary to its stated "reasonably related" purpose, but also would likely constitute a violation of the Constitution and Massachusetts General Laws. Further, there is no mechanism in municipal finance law to set aside a percentage of this revenue.

Conclusion

The MMA and MMLA recognize and respect the challenges that come with crafting regulations, guidelines, and policies to implement a legislative initiative. This is a task that communities must also undertake at the municipal level. What is critical to successful implementation is the participation of the stakeholders. Municipalities must be included as important stakeholders in these discussions if they are expected to continue to open their doors to the industry. It is important that regulations continue to build upon the partnerships between the industry and their hosts, rather than work to further create an adversarial rift.

For all of the reasons discussed above, the MMLA and the MMA respectfully request that our organizations, acting on behalf of our members, be involved in the revision of the Draft Regulations. If you have questions or desire additional comment, please contact MMA Legislative Analyst Ali DiMatteo at adimatteo@mma.org and Karis L. North, Esq. of MMLA at knorth@mhtl.com.

Thank you for your time and consideration of the above comments and recommendations.

Sincerely,

Karis L. North /s/

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