

## Marijuana Reform: Part I

Updated for the January 2023

### MMA Annual Business Meeting and Trade Show

The legalization of medical and recreational marijuana in Massachusetts raises significant legal issues for municipalities navigating the permitting for and licensing of this fairly new industry. Many Massachusetts municipalities have engaged in extensive host community agreement negotiations to address both direct and indirect impacts within their municipalities. After much negotiation at the state level, the General Court enacted [“An Act Relative to Equity in the Cannabis Industry”](#) (the “Act”), signed by Governor Baker on August 11, 2022.

The Act makes numerous changes to Massachusetts’ marijuana laws, effective November 9, 2022, including those governing host community agreements (“HCAs”), community impact fees, so-called “social consumption” establishments,” also referred to as marijuana cafes, taxation, and the role of the Massachusetts Cannabis Control Commission (the “CCC”). This is the first in a two-part series exploring these extensive amendments. This memorandum provides an overview of changes made to the law concerning HCAs and community impact fees; we will address separately the issues of social consumption and social equity businesses.

Of course, it is anticipated that DHCD will issue regulations under the Act that will likely clarify or change some of the analysis below. In the meantime, you may review existing DHCD publications including [Guidance for Municipalities on Social Equity and Host Community Agreements](#) and [Guidance for Municipalities](#).

#### HOST COMMUNITY AGREEMENTS

The Act substantially revises the regulatory oversight for and approval of HCAs, limits municipalities’ ability to collect impact fees for anticipated costs, establishes penalties for municipalities that fail to, or improperly, document impact costs, prohibits an HCA from imposing other types of monetary commitments beyond community impact fees, and establishes a mechanism by which municipalities may waive the HCA requirement entirely.

***Impact Fees*** - While the Act does not eliminate the concept of a community impact fee, it does impose requirements on host communities. The Act requires that the calculation of impact fees be in compliance with the following:

1. Fee must be reasonably related to the costs imposed upon the municipality in the preceding year by the operation of the marijuana business, as documented;
2. Fee must be based on actual costs, rather than as a percentage of total or gross sales;
3. Fee may amount to not more than three percent (3%) of the gross sales of the marijuana business;

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4. Fee can be effective for no longer than the eighth (8<sup>th</sup>) year of operation of the marijuana business;
5. Fee commences on the date the marijuana business is granted a final license by the CCC, with payment due annually to the host community;
6. Fee must be documented and transmitted by the host community to the marijuana business not later than one (1) month after the marijuana business' license is renewed by the CCC; and
7. Fee must encompass all payments and obligations between the host community and the marijuana business.

The significance of these changes is that a community impact fee cannot, without being at risk for a challenge, be calculated with regard to what a municipality predicts to be the costs of impacts but must instead be based on actual documented expenditures in the prior year. Further, the Act prohibits an HCA from providing for any other kind of financial commitment to a municipality or a non-profit as directed by the municipality and renders unenforceable “[a]ny other contractual financial obligation that is explicitly or implicitly considered in, or is a condition of, a host community agreement.”

Since the passage of the Act some municipalities have voluntarily amended their existing HCAs to eliminate the requirement for an impact fee, or have even returned the amount already paid to the municipality as impact fees (see attached for a Boston Globe article by Dan Adams dated November 10, 2022 describing the issues), while others will address these issues when entering into an HCA with a new entity or negotiating the extension of an existing HCA. The DHCD issued this [memorandum](#) in November of 2022 indicating that it will not review compliance with the Act until it has promulgated regulations. Concerns remain as to HCAs signed with host communities prior to the effective date of the Act in good faith and in accord with the law as it was then applicable. See the analysis the Massachusetts Municipal Association provided to the CCC concerning the confusion as to the application of the law and requesting that that HCAs negotiated prior to the effective date of the Act not be considered challengeable under the Act, which analysis can be reviewed [here](#).

**Breach of Contract Claim, Damages, Attorneys Fees** – Importantly, the Act creates a breach of contract claim in Superior Court to allow a licensed marijuana business to challenge a municipality's documentation of costs for computation of the community impact fee. If the marijuana business prevails on the claim that a municipality's documented costs under an HCA are not “reasonably related to the actual costs” imposed on the municipality in the preceding year, the violation repercussions may be significant, including attorney's fees other costs encompassed in the community impact fee. The existence of this contract claim, and the high burden it imposes on municipalities will likely require municipalities to: (1) contemporaneously document the process used to track expenditure-related matters that can be characterized as community impact fees, and (2) fund any anticipated impacts for the upcoming fiscal year, with the hope of being reimbursed through the community impact fee process after the end of that fiscal year.

**Minimum Standards for Addressing Opportunity for those Disproportionately Harmed** – Before entering into an HCA with a marijuana business after July 1, 2023, potential host communities must adopt procedures and policies establishing minimum standards for facilitating opportunity in the industry for those disproportionately harmed by marijuana prohibition. Failure to adopt such procedures places the community at risk. The Act provides the following remedy: forfeiture of a monetary amount equal to the annual total of community impact fees received

from all marijuana businesses operating within the host community. Further, the failure of any host community to abide by CCC regulations, once promulgated, concerning such minimum acceptable standards, may also result in forfeiture of impact fees.

***Role of the CCC*** – The Act greatly enhances the authority of the CCC with regard to HCAs. The Act gives the CCC jurisdiction to “review, regulate, enforce and approve” HCAs as part of a completed marijuana business license application and at each license renewal. The Act directs the CCC to promulgate rules and regulations applicable to the negotiation and approval of HCAs, with a focus on encouraging host communities to work with social equity businesses and economic empowerment priority applicants, as well as to prepare a model HCA, by November 2023.

While the Act makes significant changes to existing law regulating municipalities and marijuana businesses, many questions concerning implementation of the Act remain unanswered, including questions about the status of HCAs that predate the Act. When the CCC promulgates regulations, specific review on a case-by-case basis will still be required. We will continue to work with municipalities to negotiate appropriate HCAs and HCA amendments based on, among other things, each municipality’s unique physical characteristics, demographics, and guidance provided by the CCC.

We closely monitor developments in this changing area of the law, particularly as the CCC proposes, and then formally promulgates, regulations, procedures, and policies, and will provide further updates as we know more.

Please contact Attorney [Nicole Costanzo](#) or Attorney [Lauren Goldberg](#) at 617.556.0007 with any further questions.

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# Boston to refund millions in marijuana ‘impact’ fees

City becomes the first in the state to relinquish controversial funds

By [Dan Adams](#) Globe Staff, Updated November 10, 2022, 5:43 p.m.



An employee completed a sale at the March 2020 grand opening of the Pure Oasis marijuana store in Boston's Grove Hall neighborhood. JESSICA RINALDI/GLOBE STAFF

Boston will refund millions of dollars in “impact” fees it collected from marijuana companies, the first Massachusetts municipality to do so after state lawmakers [enacted a measure](#) cracking down on the controversial payments.

Officials in Mayor Michelle Wu’s administration notified local cannabis operators of the decision in a letter sent on Nov. 3, saying they would stop collecting the fees — worth 3 percent of each firm’s annual revenue and ostensibly meant to offset their negative effect on the surrounding community — and return all the money collected since recreational sales began in the city more than two years ago.

In a short statement, a city spokesperson said nine Boston marijuana companies would receive checks totaling \$2.86 million, with some of the money coming from unexpended fees and the remainder from a “legal reserve fund.”

“The city determined this was the appropriate course of action after reviewing the recent changes to state law,” the spokesperson said.

Since 2017, Massachusetts law has allowed cities and towns to charge local marijuana operators impact fees of up to 3 percent of their revenue, as long as the payments were “reasonably related” to the facility’s negative impacts.

But in the absence of enforcement, most cities and towns charged the maximum rate, or even more, without enumerating any issues. They also spent the funds on a variety of projects, many with little apparent connection to the presence of pot shops and growing facilities.

Industry leaders have long criticized the fees as unjustified “shakedowns” that especially hurt smaller cannabis startups, even as municipalities insisted the agreements were negotiated in good faith.

The debate culminated earlier this year when the state Legislature passed a law requiring cities and towns to document the costs supposedly covered by the fees and giving the Cannabis Control Commission oversight of the deals.

The law’s silence on the validity of existing fee agreements has [led to widespread confusion](#), however. Some communities are continuing to charge operators until the

commission finalizes regulations for enforcing the new limits. Others, such as Boston, are backing away from the practice, fearful of being sued by local marijuana companies that are entitled under the new law to recover any unjustified fees and legal expenses in court.

Kobie Evans, co-owner of the Pure Oasis marijuana store in Boston's Grove Hall neighborhood, said his company has paid about \$350,000 in impact fees since its debut as the city's first recreational retailer in March 2020.

"It was honestly shocking," he said, describing the moment he opened the letter announcing the city's refunds. "Being in cannabis, you come to expect municipalities will be bureaucratic, not proactive. No one expected to get their money back. It's a huge weight off our shoulders."

Evans added that the city did not consistently collect the funds amid the two mayoral transitions that followed the resignation of former mayor Martin J. Walsh in March 2021. Still, he said, the seemingly small-percentage fee actually had a significant impact on his company's finances, in part because it is calculated against gross revenues instead of net profits.

"It ends up being more like 10 percent of your net, which is big hit to the bottom line," he explained. "That's money we could be using to create jobs and grow as a business, but instead we're writing this check for services not even rendered — because we have zero impact. It's one of the hardest checks we have to write."

Meanwhile, the state cannabis commission voted unanimously at its monthly meeting Thursday to clarify that it will not enforce the new limits on impact fees until it can come up with a process for evaluating whether each company's payments are fair and writing a model fee agreement that municipal officials can copy.

Developing those regulations could take up to a year. Regulators at the commission pledged they would prioritize the work, but did not give a firm timeline for finishing it. In

the interim, they urged local leaders to work with city and town lawyers to revise their marijuana agreements in accordance with the new law.

“My commitment is that we’ll be back in relatively short order with recommendations for regulations,” Shawn Collins, the agency’s executive director, told commissioners at the meeting.

Some marijuana companies aren’t waiting on the state to come up with new rules, however.

Stem, a marijuana shop in Haverhill, [sued its host city in 2021](#) under the previous law, seeking to recover fee payments it said were not “reasonably related” to its impact.

A hearing on a motion for the case to be decided in Stem’s favor is scheduled for Tuesday in Essex Superior Court.

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## Marijuana Reform - Part II

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This is the second of a two-part memorandum exploring extensive amendments to the Commonwealth's marijuana laws. Effective November 9, 2022, "An Act Relative to Equity in the Cannabis Industry" (the "Act"), made changes to the host community agreement process and calculation of community impact fees, further revised the process for approval of social consumption establishments and emphasized goals for increasing participation of social equity businesses in the industry.

Under the prior law, although social consumption establishments were allowed in theory, a drafting technicality meant there was no lawful mechanism in place for communities to allow these establishments within their borders. The Act directly addresses this issue, creating two distinct paths for municipal approval for social consumption of marijuana or marijuana products on the premises where they are sold: (1) adoption of an ordinance or bylaw allowing so-called "cannabis cafes", OR (2) approval by the voters at an election.

#### Process for Allowing Social Consumption Establishments

##### *Adoption or Amendment of General or Zoning Bylaws:*

1. The Act does not specify whether a general or zoning bylaw or ordinance is required to allow social consumption establishments. We anticipate, therefore, that both types of local laws may be considered. We urge municipalities to review our prior guidance on the Massachusetts Supreme Judicial Court's decision in The Haven Center, Inc. v. Town of Bourne, [here](#), which sets forth criteria to assess whether a local law titled as a "general" bylaw or ordinance, if challenged, may nevertheless be deemed to be a zoning regulation subject to the procedural requirements of G.L. c.40A, §5.
2. Adoption of such a bylaw or ordinance would follow the normal course, including approval by the legislative body, and, for zoning, notice, hearing and a recommendation from the Planning Board.
3. Those communities that wish to allow social consumption establishments to locate within their borders through a general bylaw or ordinance will want to first review their existing zoning laws to determine whether such laws prohibit any use not specifically authorized. If so, zoning revisions may be required.

##### *Local Election:*

1. A petition process may also be used to present the social consumption issue directly to the voters;
2. The Secretary of the Commonwealth will create the petition form;
3. The petition must be signed by not less than 10% of the voters who voted in that municipality at the preceding biennial state election;

4. If the petition is certified as having sufficient signatures, the following question will appear on the ballot, followed by a concise summary of the issue prepared by the town counsel or city solicitor:

Shall [city or town] allow the sale of marijuana and marijuana products, as those terms are defined in section 1 of chapter 94G of the General Laws, for consumption on the premises where sold, a summary of which appears below?

5. If the petition is certified, and the next regular municipal election is more than 35 days away, the question and summary must be added to that ballot at that regular election; and
6. If the petition is certified closer to the date of the municipal election, and therefore is ineligible for inclusion on the local ballot, the question may appear on the state ballot if that municipality provides written notice to the Secretary of State not later than the first Wednesday of August preceding the state election.

### **Eligibility For Social Consumption Establishment License**

The Massachusetts Cannabis Control Commission (the “CCC”) previously authorized a pilot program in which 12 municipalities were authorized, once the law allowed, to host marijuana establishments in which adults ages 21 and older could consume marijuana on site (“Pilot Program”). The CCC may now issue licenses for social consumption establishments in the Pilot Program communities, on a limited, exclusive basis, to economic empowerment priority applicants or social equity program participants, microbusinesses, and craft marijuana cooperatives. This authority will be available for the period of 36 months from the date the first social consumption establishment receives a notice from the CCC to commence operations; provided, however, that the CCC is authorized to extend the so-called “exclusivity” period following a determination that its goals of promoting and encouraging full participation in the regulated marijuana industry by certain entities, people from communities previously disproportionately harmed by marijuana prohibition, farmers, and businesses of all sizes, have not been met.

### **Social Consumption Establishments**

A *municipality* may:

- Enact and enforce local bylaws and ordinances governing the time, place and manner of marijuana establishment operations, including social consumption locations;
- Prohibit or limit the number of marijuana establishments, including social consumption establishments; and
- Establish civil penalties for public consumption.

A *marijuana social consumption establishment* may:

- **Not** sell alcohol or tobacco products;
- **Not** gift or discount marijuana and marijuana products;
- Sell food pre-packaged, shelf-stable and drink items other than edibles if all necessary local licenses and permits have been obtained; and
- Sell products between the hours of 8:00 A.M. and 9:00 P.M. unless otherwise explicitly authorized.

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*At licensed social consumption establishments, individuals 21 years of age old or older may:*

- **NOT** possess or consume marijuana or marijuana products not purchased from the social consumption establishment;
- **NOT** consume alcohol or smoke tobacco indoors;
- Consume pre-packaged shelf-stable products, including food and drink;
- Vape indoors with appropriate HVAC systems; and
- Smoke outdoors, with municipal permission, in designated areas in compliance with outdoor tobacco smoking rules.

Municipalities are encouraged to review their existing bylaws and ordinances to determine whether they sufficiently address the placement and treatment of social consumption establishments.

### **Social Equity Businesses**

Consistent with the name of the Act, the CCC must create and oversee “a social equity program to encourage and enable full participation in the marijuana industry of people from communities that have been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities.” A social equity business is defined as a “marijuana establishment with not less than 51 per cent majority ownership” of individuals who meet the requirements of G.L. c.94G, §22, or whose ownership qualifies it as an “economic empowerment priority applicant” under the applicable CCC regulations. The Act provides further that the CCC must establish policies and procedures for municipalities to promote and encourage such a result.

The Act also establishes an incentive to encourage municipalities to negotiate host community agreements with social equity businesses and economic empowerment priority applicants. Municipalities hosting such entities will receive quarterly from the state 1% of the 10.75% excise related to retail sales from those entities.

We anticipate that additional guidance from the state will be forthcoming concerning implementation of on-site social consumption of marijuana and the role of the CCC in promoting social equity businesses.

Please contact Attorney [Nicole Costanzo](#) or Attorney [Lauren Goldberg](#) at 617.556.0007 with any further questions.

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