

# Cannabis in Massachusetts: Review, Updates and Trends

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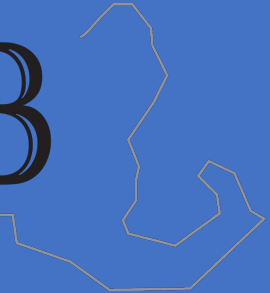
Massachusetts Association of Health Boards

MHOA Annual Conference

October 2022

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# Disclaimer

- This information is provided for legal educational purposes only. It is not intended to constitute legal advice. Please consult your municipal attorney for legal advice relative to legal questions regarding cannabis and hemp.

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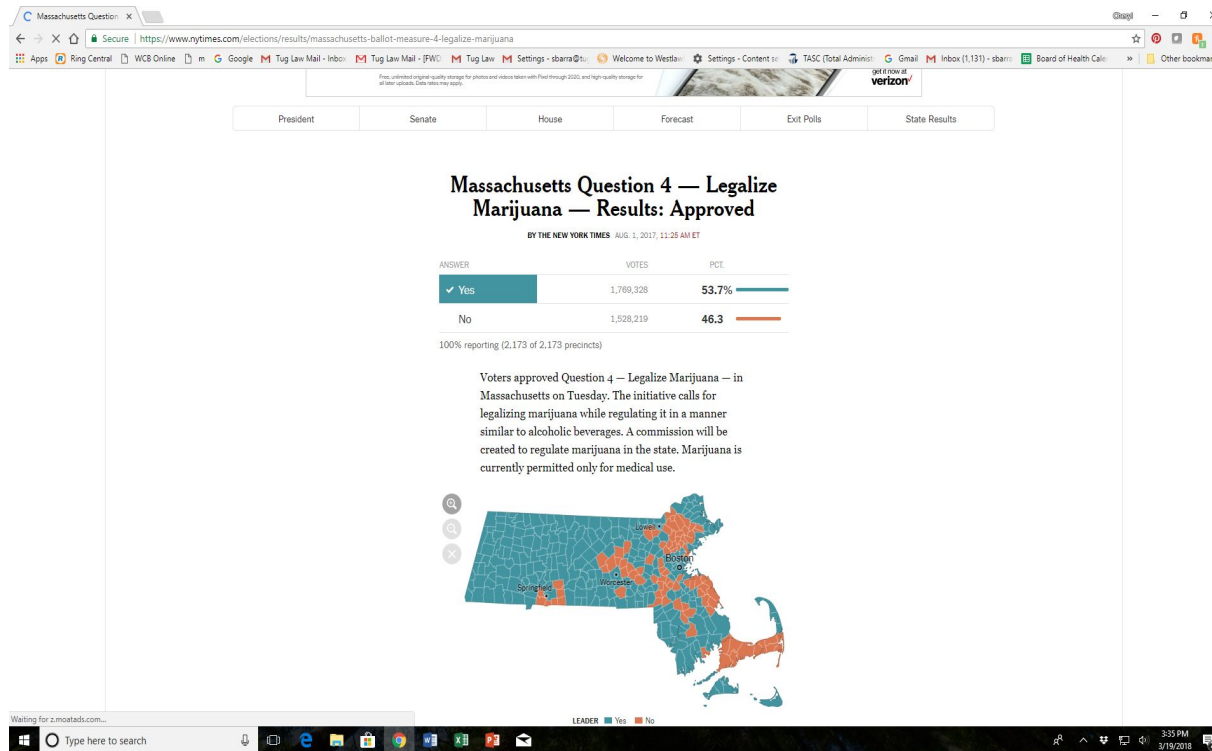
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# Results of November 2016 ballot question

*53% voted YES.*

## Chapter 334 of the Acts of 2016 “Regulation and Taxation of Marijuana” G.L. c. 94G



# Chapter 351 of the Acts of 2016

- Exempted the cultivation of marijuana from the agricultural exemption in the Zoning Act, G.L. c. 40A, § 3.
  - **Retains local control over the placement of marijuana establishments.**
- Required DPH to contract with a research entity to content a **baseline study** of marijuana use in MA.



# Relevant Laws

*Chapter 94G. Regulation of the Use and Distribution of Marijuana Not Medically Prescribed – July 2017*

*SB. 3096. An Act Relative to Equity in the Cannabis Industry – Aug. 2022*

**Cannabis Control Commission Regulations 935 CMR 500.141(3)(m). *No smoking in social consumption establishments.***

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# Chapter 94G

## 7.28.17



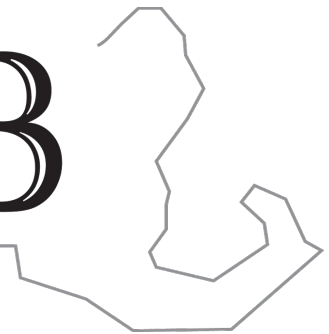
- **Legalized Adult-Use Marijuana**
- **Created Cannabis Control Commission**
  - **Commission Chair – Shannon O’Brien – Sept. 2022**  
former State Treasurer
  - **Commissioners**
    - Nurys Camargo, BS,MPA
    - Kimberly Roy, M.A. Professional Communication
    - Ava Callender Concepcion, JD
    - Bruce Stebbins, BA
- **Housed at the Office of the Treasury**
  - Both medical and adult-use
- **Exempted hemp**
  - Less than 0.3% - “Delta 9” THC

# Responsibilities of CCC

- **Promulgate regulations prior to licensing.**
- **Supervise industry.**
- **Implement state licensing system.**
- **Issue licenses to operate.**
- **Investigate and enforce violations.**

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# Cannabis Advisory Board (25 members)

- Commissioner of Public Health
- Department of Housing and Economic Development
- Commissioner of Revenue
- Commissioner of Agricultural Resources
- State Police representative
- Massachusetts Municipal Association
- Massachusetts Patient Advocacy Alliance
- Qualifying Medical Marijuana Patient
- ACLU of Massachusetts
- Marijuana cultivation expert
- Marijuana retailing expert
- Marijuana manufacturing expert
- Expert in laboratory sciences and toxicology
- Legal expert in representing marijuana businesses
- Expert in **minority business development**
- Expert in economic development strategies for **under-resourced communities**
- Expert in farming



# Cannabis Advisory Board (continued)

- Expert in **social justice**
- Expert in criminal justice reform
  - **To mitigate disproportionate impact of drug prosecutions on communities of color**
- Expert in **minority-owned businesses**
- Expert in women-owned businesses
- Expert in prevention and treatment of substance use disorders
- Experience in impairment detection and evaluation.



# Research Agenda of CCC

- **Study social and economic trends of marijuana in MA;**
- **How to close illicit marketplace;**
- **Public health impacts of marijuana;**
- **Patterns of use;**
- **Methods of consumption;**
- **Sources of purchase;**
- **Marijuana use among minors, etc.;**
- **Conduct baseline study;**
- **Incidents of impaired driving; and**
- **Ownership and employment trends in marijuana industry.**

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# Key sections in CCC regulations

- **No smoking in Social Consumption Establishments.\***
- **Registered Marijuana Dispensaries (RMDs) that sell adult-use marijuana must set aside 35% of their product or a six-month average of their medical marijuana sales for registered patients.**
- **Marijuana growers are capped at 100,000 square feet (2.3 acres).**
  - **To prevent diversion.**
- **Convicted drug traffickers banned from working in the industry (other than convictions for marijuana trafficking).**
- **Growers must satisfy minimum energy efficiency and equipment standards established by the CCC.**

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## Conundrums with 94G



# Challenges with Original Host Community Agreements – *Law was Amended.*

- **ORIGINAL HOST COMMUNITY AGREEMENT LAW**
- Commission won't consider application until host agreement is in place.
- Allegations that municipalities are receiving larger community impact fees than actually necessary.
  - “voluntary donations”
  - Encourages “big” marijuana.
  - Discourages small cultivators and minority businesses.
- Commission voted 4 – 1 to not to review the agreements.
  - Law unclear and they don't have the authority to review agreements.

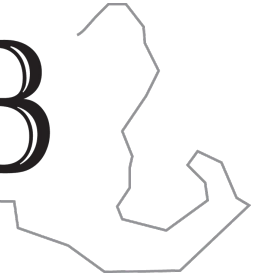


# Conundrum

- Chapter 94C, §1: “**drug paraphernalia**”
  - Includes but is not limited to “water pipes . . . roach clips . . . electric pipes . . . air-driven pipes . . . bongs . . .”
  - Historically only permitted if retailer had a tobacco sales permit.
- Now called “**marijuana accessories.**”
  - Not illegal.
  - Head shops are perfectly legal businesses.
  - No need for tobacco sales permit.

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# Conundrum – *Law Amended*

- Chapter 94G, Section 13: “**No person shall consume marijuana in a public place . . .**”
  - Includes smoking bars and adult-only retail tobacco stores because these places are ***public places***.
- Effectively bans smoking of marijuana everywhere except in a private home and maybe private clubs.
  - The Summit Lodge, Worcester
- **Public housing is smoke-free (HUD).**
  - ***Social equity issue.***



# Conundrum



- **Statewide smokefree workplace law (G.L. c. 270, §22).**
  - **Amended definition of smoking (2018).**
    - **Removed “or non-tobacco product designed to be combusted or inhaled.”**
  - **Only addresses smoking of “tobacco products”.**
    - **94G prohibits consumption of marijuana in public places, but not private places.**
- **Local secondhand smoke law can define “smoking” more broadly.**
  - **Would prevent “smoking” marijuana, but not edible marijuana.**



# Conundrum

- **Federal Controlled Substances Act (CSA).**
  - Illegal at federal level.
  - COLE memo – Obama administration
    - DOJ won't get involved if there is compliance with state law.
  - US Attorney revoked COLE memo – Trump administration
  - US Attorney Garland – enforcement of CSA relative to marijuana is not a constructive use of federal resources.
- Cash business
  - Safe Banking Act bill pending.
  - Social Justice bill pending.



# Recent Developments



- ***“Biden pardons thousands convicted of marijuana possession under federal law.”***
- *Will review whether marijuana should still be in the same legal category as heroin and LSD.*
  - *Boston Globe 10.6.22*



# Recent Developments

***“Healy promises  
marijuana pardons if  
elected Mass.  
governor.”***

*Boston Globe 10.6.22*



# Conundrum

- **Boards of Health can enact local regulations that are stricter than state law (not preemptive).**
- **BUT they cannot be “unreasonably impracticable.”**
  - “. . .subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.”
    - ***What does this mean?***

# Conundrum just not “unreasonably restrictive”

- Language in law and regulation:
  - “Marijuana establishments and marijuana establishment agents ***shall comply with all local rules, regulations, ordinances, and bylaws.***”
  - “***Nothing in 935 CMR 500.000 shall be construed so as to prohibit lawful local oversight and regulation,*** including fee requirements, that does not conflict or interfere with the operation of 935 CMR 500.000.”

# An Act Relative to Equity in the Cannabis Industry - 2022

- **Industry is not nearly as diverse and equitable as originally intended.**
  - In January 2022, of the 346 cannabis businesses, only 20 (**less than 6%**) were led by economic empowerment entrepreneurs or were connected to participants in the CCC's social equity program. *(Rep. Dan Donahue – Cannabis Policy Committee).*
  - Law was intended to provide economic opportunities for diverse communities and for those previously harmed by harsh drug laws inequitably enforced.
- **Municipalities have, in some cases, taken advantage of the leverage they can hold over cannabis businesses in Host Community Agreements and Community Impact Fees.**
- **Social consumption establishments have been stalled.**

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## Summary of New Law's Key Provisions



# Host Community Agreements (HCAs)

- Revamps rules surrounding HCAs and Community Impact Fees (CIFs).
- CIF (part of HCA) – Must be **reasonably related** to costs on municipality.
  - Must document costs imposed as a result of the operation of the business.
  - Cannot exceed 3% of business's gross sales.
  - Cannot mandate payment of certain percentage (see above documentation requirement).
  - Cannot extend past 8<sup>th</sup> year of business's operation.
  - First annual payment not due prior to the 1<sup>st</sup> annual license renewal.
  - Must not include any additional required payments or obligations.
- CCC must approve HCA.

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# HCA – Standards and Policies for Social Equity

- **Social Equity Cannabis Businesses (SEBs)**

- Cannabis businesses operated by those disproportionately affected by criminal prohibition of cannabis.
- CCC shall create regulations, including a template, creating **minimum standards and best practices**.
- Existing host communities must establish policies to promote equity no later than July 1, 2023.
- New host communities must establish policies before entering into an HCA.
- Host communities will receive an additional 1% of gross revenue.
- Penalties for noncompliance.

# Cannabis Social Equity Trust Fund

- Provide grants and loans to social equity program participants and economic empowerment priority applicants.
- Marijuana Regulation Fund
  - Receives all revenue derived from marijuana excise tax, application and licensing fees, and industry penalties.
- 15% of revenues in the Marijuana Regulation Fund are now directed to Cannabis Social Equity Trust Fund.

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# Social Consumption Establishments for Equity Applicants only.

- Municipalities can authorize on-premises Social Consumption Establishments by adopting a **city ordinance, town by-law or by a local voter initiative petition.**
- CCC will review its regulations.
  - Require a pilot program involving 12 municipalities, including Somerville, Provincetown, North Adams, Amherst, Springfield.
  - Currently prohibits smoking combustible cannabis products indoors.
- Current law prohibits smoking **tobacco and tobacco vaping products** inside these establishments.
- TFM advocated for an amendment to the original bill and the amendment passed.

# Why regulate locally when the CCC already regulates cannabis?

- To enable local enforcement of state regulations.
  - Including compliance checks and inspections.
  - Assuring clean cultivation and distribution.
  - Local food code enforcement.
- To address “head shops” by regulating where “marijuana accessories” can be sold.
- To enable issuance of local Operating Permits.
- To enable local penalties for selling to someone under 21.
- To incorporate tobacco control strategies.
  - No self-service, no vending machines, etc.

# Possible local strategies

- Require compliance with sanitary requirements in 105 CMR 500.000 for onsite preparation and consumption of edible marijuana products (**good manufacturing practices**).
- Require compliance with 105 CMR 590.000 for food service and retail food establishments (**minimum standards for food establishments**).
- Require an **Operating Permit** for all classifications of Marijuana Establishments and ability to suspend permit.
- Incorporate **nuisance law** (c. 111, §§ 122, 123 into local regulation.
  - Addresses odiferous smells from manufacturing, etc.
  - Might address smoking or vaping on decks.



# Possible local strategies (cont.)

- Incorporate tobacco control strategies:
  - Prohibit distribution of coupons for cannabis.
  - Prohibit free sampling.
  - Prohibit vending machines.
- *Restrict selling of marijuana accessories to marijuana establishments and adult-only retail tobacco stores.*
  - *Framingham*
- *Prohibit marijuana establishments from selling alcohol.*
  - *Licensing issues with CCC*
- *Prohibit marijuana establishments from holding a tobacco sales permit.*
- *Increase sales age to 25 (Belmont).*
- **RESOURCE ISSUES WITH LOCAL ENFORCEMENT – COULD HCA ADDRESS THIS?**





# Hemp-Derived Cannabis Products



# The Farm Act (2018)

- Removes **hemp** from the definition of **marijuana** in the Controlled Substances Act (CSA).
- Definition of **hemp**: “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all **derivatives**, extracts, cannabinoids, **isomers**, acids, salts, and salts of isomers, whether growing or not, with a **delta-9** concentration of not more than 0.3 percent on a dry weight basis.”
- Plain language – all products that are **sourced** from the Cannabis plant, contain not more than 0.3 percent delta-9 THC, and are a derivative, extract, cannabinoid, or one of the other terms in the definition of hemp.



# What is Delta-8?\*

- One of the more than 100 cannabinoids produced in the Cannabis sativa L. plant.
- An “isomer” of Delta-9.
  - Same atoms but arranged differently.
  - Found naturally, but in **miniscule** amounts.
  - No Delta-8 product is naturally extracted. They are synthetically produced in labs.
- To produce Delta-8 naturally with the necessary isolation and purification required you would need to process about 55,000 kilos ( app. **122,000 lbs.**) of hemp to produce one kilo (app. **2.2 lbs.**) of natural Delta-8. Cost would be about **\$22,000,000**.
- “Calling commercial Delta-8 THC a ‘hemp-derived’ or a ‘natural’ product is the equivalent of calling codeine a ‘poppy-derived, natural’ herbal supplement.
- Available in candy, cookies, gummies, vapes, dabs, shatter, smokable hemp sprayed with delta-8 THC extract, distillate, tinctures, and infused beverages.

# What is Delta-8 (continued).



- Josh Swider, CEO of *Infinite CAL*, a highly respected cannabis testing lab, tested more than 2000 samples of Delta-8 products.
  - Only 6 were compliant with the legal limits of Delta-9 TCH (less than 0.3%).
  - Only 2 were pure synthetic Delta-8 THC extract.
    - The rest had added chemicals like acetic acid, bleach, and other unidentified components and solvents.
  - “Many producers making these products cannot carry [on] a chemistry conversation.”
- Delta-8 gets people high.
- \*<https://medium.com/seed-stem/i-stand-corrected-the-truth-about-delta-8-thc-e8085725ed9e>

# Public Health Concerns

- Health effects have not been researched extensively.
- Psychoactive and impairing.
- Some Delta-9 THC regulated products also contain Delta-8 THC without accurate labelling.
- Not regulated.
- Frequently mislabeled.
- Confused with hemp or CBD products that are not intoxicating.
- Increased reports of severe adverse effects.
- Widely available to youth in stores and online.



**Public Health**  
Prevent. Promote. Protect.

# US Court of Appeals for the Ninth Circuit Decision May 2022

- AK Futures LLC, v. Boyd Street Distro, LLC
- Trademark infringement case
  - Cake-branded Delta-8 THC products.
- Question before the Court:  
**Does federal law prohibit the sale of Delta-8 products.**



# Yes, it's legal argument.

- The Farm Act used the **concentration of Delta-9** to distinguish between hemp and cannabis.
- The Act defines hemp as a product including **any part** of the Cannabis sativa L. plant, including **all** derivatives, extracts, cannabinoids whether growing or not.
  - As long as the Delta-9 THC concentration is no more than 0.3 percent on a dry weight basis.
- The Act is silent relative to Delta-8 THC.
- Plaintiff describes the product as “a hemp-derived product with less than 0.3% of the psychoactive delta-9 THC compound.”
- Plain meaning of the Act leads to the conclusion that Delta-8 products are legal. **If it has less than 0.3 % of Delta-9, it's hemp-derived and legal.**

# No, it's not legal argument.

- The Drug Enforcement Agency (DEA) Delta-8 remains a schedule I substance because of its method of manufacture.
  - “All synthetically derived [THC] remain schedule I controlled substances.” 85 Fed. Reg. at 51,641.
  - Delta-8 products need to be extracted from the cannabis plant and refined through a manufacturing process.
    - It's synthetically derived because it's concentrated and flavored.
- Congressional intent of the Farm Act was to legalize only industrial hemp and not potentially psychoactive substances like Delta-8.

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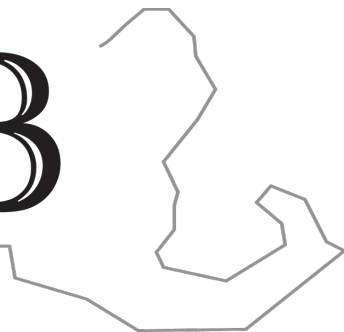




# MA Department of Agricultural Resources

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- **Hemp Program FAQs**
- **“Is it legal to manufacture delta-8 THC from hemp?”**
- *“Because delta-8 is not naturally occurring in hemp (except for possible trace amounts), to produce delta-8 THC in commercial quantities it must be derived from hemp synthetically. While the Farm Bill did remove hemp from the Controlled Substances Act, it did not impact the control status of synthetically derived cannabinoids, thus delta-8 THC remains a controlled substance, regardless of the source. **As a result, we do not allow hemp-derived delta-8 THC products to be processed or sold in Massachusetts.**”*

## Court's Ruling

### *AK FUTURES, LLC V. BOYD STREET DISTRO, LLC, 35 F. 4<sup>th</sup> 682 (2022)*

- The language in the Farm Act is “. . . unambiguous and precludes a distinction based on manufacturing method.”
- “Clear statutory text overrides a contrary agency interpretation.”
- “. . . [C]ourts will allow neither ambiguous legislative history, nor speculation about congressional intent to ‘muddy’ clear statutory language.”
- **“Regardless of the wisdom of legalizing delta-8 THC products, this Court will not substitute its own policy judgement for that of Congress... If [the defendant] is correct and Congress inadvertently created a loophole legalizing vaping products containing delta-\* THC, then it is for Congress to fix its mistake.”**



# Possible local strategies for hemp-derived products.

- Completely unregulated federally.
- No state regulations.
- Age-restrict products.
- Require sales permit.
- Require products come from an approved source licensed either by MDAR or equivalent.
- Require products be tested by approved independent laboratory.
- Exempt FDA approved medications (Epidiolex).
- Ban self-service displays.
- Ban vending machines.
- **RESOURCES?**



# Contact information



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