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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2581CV00398

ASCEND MASS, LLC & others[1]

vs.

CITY OF NEWTON

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (PAPER No. 18)

INTRODUCTION

On February 14, 2025, plaintiffs Ascend Mass, LLC ("Ascend"), Cypress Tree Management, Inc. d/b/a Redi ("Cypress Tree"), and Garden Remedies, Inc. ("Garden Remedies) (collectively, the "Plaintiffs") filed the Complaint and Jury Demand (the "Complaint") (Paper No. 1) against defendant City of Newton (the "City"), where the Plaintiffs operate marijuana establishments, alleging that the City owes them millions of dollars in fees they paid to the City pursuant to the host community agreement ("HCA") each executed with the City. More specifically, the Plaintiffs assert claims against the City for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), unjust enrichment (Count III), and declaratory judgment (Count IV).

[1] Cypress Tree Management, Inc. d/b/a REDI, and Garden Remedies, Inc.

On March 17, 2025, the City filed Defendant City of Newton's Answer to Complaint and Counterclaim (the "Counterclaim") (Paper No. 6), asserting various affirmative defenses, as well as counterclaims against Ascend and Redi for breach of contract (Counterclaim I), breach of the implied covenant of good faith and fair dealing (Counterclaim II), and declaratory judgment (Counterclaim III).

This matter is now before the court on Plaintiffs' Motion for Summary Judgment on All Claims (the "Motion") (Paper No. 18), wherein the Plaintiffs seek judgment as a matter of law in their favor on all their claims as well as the City's counterclaims. For the reasons explained below, after hearing on March 31, 2026, review of the summary judgment record, and examination of the applicable legal authorities, the Motion will be **ALLOWED** in part and **DENIED** in part.

EXHIBTS 26 AND 28

As an initial matter, the court addresses concerns that the Plaintiffs raise regarding Exhibits 26 and 26. While they have not formally moved to strike these exhibits, in Plaintiffs' Reply Memorandum in Further Support of Their Motion for Summary Judgment (Paper 18.4), they argue that, in deciding the Motion, the court should not rely on these exhibits.

Exhibit 26 is the affidavit of Shin-Yi Lau, the City's Commissioner of Health and Human Services. Therein, the Commissioner makes general averments about the risk factors associated with those who experience mental health challenges developing substance abuse problems. The Commissioner does not specifically aver that Newton is experiencing these risk factors, or if so, that Newton's experience of these risk factors increased or changed as a result of the Plaintiffs' operations in Newton. The Commissioner also avers that "Newton PATH evaluated the impact of the operation of marijuana establishments in the City"; however, the

Commissioner does not explain how Newton PATH conducted this evaluation or, more significantly, whether Newton PATH evaluated the impact the Plaintiffs' specific operations had on the City. The Plaintiffs argue that the Commissioner's conclusory statements, which are unsupported by any admissible evidence, are insufficient to satisfy the City's burden to establish a triable issue of material fact. The court agrees with the Plaintiffs. Affidavits in opposition to summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mass. R. Civ. P. 56(e). These requirements are mandatory. Thus, to satisfy its burden at summary judgment, the non-moving party cannot rely on "[c]onclusory statements, general denials, and factual allegations not based on personal knowledge"; instead, the non-moving party must point to specific facts that are supported by competent evidence. Madsen v. Erwin, 395 Mass. 715, 721 (1985). The identified portions of the Commissioner's affidavit do not meet this standard.

Exhibit 28 is the affidavit of Casey Ngo-Miller, the Assistant Superintendent of Student Services for Newton Public Schools. Therein, the Assistant Superintendent avers that "[a]n increased use of cannabis products by students since marijuana establishments opened in the City has been reported to me by the department heads of counseling in both high schools in Newton." J.A., Ex. 28, para. 3. As the Plaintiffs argue, this averment constitutes hearsay that cannot be used to defeat summary judgment. See Locator Servs. Grp., Ltd. v. Treasurer & Receiver Gen., 443 Mass. 837, 865 (2005) (stating that Massachusetts "recognize[s] that '[h]earsay in an affidavit is unacceptable to defeat summary judgment'"), quoting Madsen, 395 Mass. at 721. Moreover, the court concludes that this averment is also barred by the "sham affidavit" rule, which provides that "a party who has been examined at length on deposition" cannot raise an issue of fact for purposes of summary judgment "simply by submitting an affidavit contradicting his own prior testimony[,]" Benvenuto v. 204 Hanover, LLC, 97 Mass. App. Ct. 140, 144 (2020) (internal quotations and citation omitted), because Maureen Lemieux

("Lemieux"), the City's Chief Financial Officer and its Mass. R. Civ. P. 30(b)(6) ("Rule 30(b)(6)") witness, testified that the results of the 2023 Newton Public Schools Youth Risk Behavior Survey indicated that, between 2012 and 2023, marijuana use had actually decreased among high schoolers in the Newton public school system. In resolving the Motion, the court does not rely on any hearsay statements.

BACKGROUND

I. Relevant Law

A. The Statutory and Regulatory Framework

The recreational marijuana act (the "Act"), which was enacted in 2016, and codified at G. L. c. 94G, §§ 1 *et seq.*, provides for the sale of marijuana to adults for recreational use and empowers the Cannabis Control Commission (the "Commission") to oversee and regulate the use and distribution of recreational marijuana, including the issuance of licenses to prospective marijuana establishments. Mederi, Inc. v. Salem, 488 Mass. 60, 61-62 (2021). "Chapter 94G gives municipalities the power to regulate the operation of recreational marijuana establishments within their borders," and "to determine the conditions under which they are willing to 'host' retail marijuana establishments." Id. at 62-63. The Act requires municipalities to execute "host community agreements" with retail marijuana establishments, and states that an HCA "may" include a community impact fee ("CIF"). Id. at 63.

Since adoption of the Act, the Legislature has amended the provisions that concern CIFs. For purposes of the present case, the court is primarily concerned with

G. L. c. 94G, § 3(d), inserted by St. 2017, c. 55, § 25 (effective July 28, 2017) (the "Pre-2022 Version").[2]

The Pre-2022 Version states that the HCA between the municipality and the marijuana establishment "*may* include a [CIF] for the host community," but, if included, the CIF *must* "be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment," and it cannot exceed "more than . . . [three percent] of the gross sales of the marijuana establishment." G. L. c. 94G, § 3(d) (2017) (emphasis added). The Pre-2022 Version also prohibits the CIF from being effective for longer than five years. G. L. c. 94G, § 3(d) (2017). Lastly, the Pre-2022 Version states that "[a]ny cost to a city or town imposed by the operation of a marijuana establishment . . . shall be documented and considered a public record as defined by clause Twenty-sixth of section 7 of chapter 4." G. L. c. 94G, § 3(d) (2017).[3]

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[2] In 2022, the Legislature adopted St. 2022, c. 180, § 10 (effective November 9, 2022) (the "Post-2022 Version"), amending chapter 94G. In Haverhill Stem LLC v. Fiorentini ("Haverhill Stem"), the court concluded that the Post-2022 Version and its related regulations did not apply retroactively to HCAs entered into prior to the effective date of that amendment. No. 2177CV00375, 2024 WL 3047937, at *7-9 (Mass. Super. Ct. Jun. 10, 2024) (Karp, J.). While that decision is not binding, the court agrees with the well-reasoned analysis and concludes that the Post-2022 Version does not apply to the HCAs at issue in this case. Thus, the court's description of the relevant law is focused on the Pre-2022 Version and its related regulations.

[3] The Post-2022 Version alters parts of the Pre-2022 Version. First, the Post-2022 Version prohibits the CIF from being effective after a marijuana establishment's eighth year of operation and from "mandat[ing] a certain percentage of total or gross sales as the . . . [CIF]," G. L. c. 94G, § 3(d)(2)(i)(C), (E) (2022). Second, the Post-2022 Version requires that host communities "document" any "cost imposed . . . by the operation of a marijuana establishment," and "transmit[]" that documentation to the relevant marijuana establishment," noting that this documentation "shall be a public record as defined by clause Twenty-sixth of section 7 of chapter 4 and chapter 66." G. L. c. 94G, § 3(d)(2)(iii) (2022). In addition, the Post-2022 Version adds some provisions to G. L. c. 94G, § 3. First, the CIF "shall encompass all payments and obligations between the host community and the marijuana establishment[.]" G. L. c. 94G, § 3(d)(2)(ii) (2022). Accordingly, neither the CIF nor the HCA can require the marijuana establishment to make, or promise to make in the future, monetary payments, in-kind contributions, or charitable contributions. G. L. c. 94G, § 3(d)(2)(ii) (2022). Second, the Post-2022 Version directs the timing of CIF payments. G. L. c. 94G, § 3(d)(2)(1)(D), (d)(2)(ii) (2022). Finally, the Post-2022 Version provides marijuana establishments with a private right of action

II. Factual Background

The undisputed material facts viewed in the light most favorable to the City, as the nonmoving party, are taken from the Defendant City of Newton's Response to Plaintiffs' Statement of Undisputed Material Facts Pursuant to Rule 9A (Paper No. 18.3), and the exhibits referenced therein, which are contained in the Joint Appendix of Exhibits. Certain additional facts not referenced here may be discussed during the court's discussion of the parties' arguments.

After passage of the Act, the City decided to become a host community. At that time, the City put together a task force ("Newton PATH"), which included members from health and human services, police, fire, courts, hospitals, public schools, as well as other community partners who work in the recovery community. Newton PATH developed a list of priorities related to the expenditure of CIF payments. J.A., Ex. 26. Based on these priorities, Newton PATH made a wide range of recommendations concerning the City's spending of CIF payments, including, among other things: drug recognition training for designated police officers; Narcan kits for all first responders; training in how to respond to drug-related incidents for first responders; jail diversion clinicians; the hiring of guidance counselors and/or social workers with experience in addressing substance use and abuse; the hiring of school nurses to decrease the student-to-nurse ratios; health and wellness teachers, to provide substance use and abuse community education programs, to promote fact-based knowledge regarding the

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against its host community if the marijuana establishment "believes the information documented and transmitted by a host community [regarding CIF payments] is not reasonably related to the actual costs imposed upon the host community in the preceding year by the operation of the marijuana establishment[.]" G. L. c. 94G, § 3(d)(2)(iii)(2022).

risks of substance use and abuse; social services for residents with substance use and abuse needs; recovery coaches to provide long-term support for community members; funding for residents seeking treatment for substance use and abuse issues; funding for residents in long-term recovery, who need work-related and educational programming; and Narcan kits for free distribution to the community. J.A., Ex. 26. There is no indication that any of these recommendations were tied to concerns Newton PATH had about a specific marijuana establishment's impact or potential impact on the City.

On April 12, 2018, Garden Remedies executed an HCA with the City (the "Original Garden Remedies HCA"), J.A., Ex. 1; on April 30, 2019, Cypress Tree executed an HCA with the City (the "Original Cypress Tree HCA"), J.A., Ex. 2; and, on June 8, 2019, Ascend executed an HCA with the City (the "Original Ascend HCA"), J.A., Ex. 3.[4]

The material terms of the Original HCAs are largely identical. They do not specifically use the phrase "reasonably related." Instead, the Original HCAs state that the marijuana establishment "agrees to make payments to the City"; that these payments shall be held "for the purposes of addressing the public health, safety, education, administrative, infrastructure and other effects or impacts as may be identified of the . . . [marijuana establishment] on the City and on its municipal and school programs, services, personnel, and facilities"; that these payments "shall be used at the City's sole discretion"; and that the payments "shall be made on a quarterly basis and shall represent 3% [of the] gross revenues from relevant sales made in the

[4] Throughout this Memorandum of Decision and Order, the court refers to the Original Garden Remedies HCA, the Original Cypress Tree HCA, and the Original Ascend HCA collectively, as the "Original HCAs."

preceding quarter." J.A., Ex. 1-3. In addition, the Original HCAs specifically state that the parties thereto "agree that the terms, conditions, and funds required . . . are reasonable and directly proportional to the costs of addressing the potential health, safety, and other effects or impacts of the . . . [marijuana establishment] on the City." J.A., Ex. 1-3.

Garden Remedies paid the City $1,704,175.00, Cypress Tree paid the City $200,937.00, and Ascend paid the City $492,855.00, in CIF payments, under the Original HCAs.

Each marijuana establishment in the City is assigned its own account number, which is used to document and track the establishment's CIF payments, which are deposited into the City's general fund. The expenditures the City paid with the CIF payments it collected from the Plaintiffs were not assessed against any specific marijuana establishment; instead, the expenditures were assessed against the total pool of CIF payments collected from the Plaintiffs' marijuana establishments.

There is no dispute concerning how the City used the CIF payments it collected from the Plaintiffs. The City spent $71,734.00 on a community resource dog, Officer Leo; $500,000.00 for the design of the pilot program for the redevelopment of Washington Street; $63,750.00 for substance abuse services provided via contract with the Gavin Foundation; $220,000.00 for counseling services provided by Riverside Community Care, Inc. ("Riverside"), including the provision of a school-based emergency services clinician; $1,108,030.00 for educational programming (the "NPS Curriculum"), including programming directed at substance use and abuse prevention, screening, and support; $601,808.00 for two part-time psychologists to work as substance abuse counselors in the Newton public school system; $26,820.00 on a drug drop-off kiosk; and $1,769.00 for the purchase of Narcan kits for free distribution to the community. J.A., Ex. 12.

DISCUSSION

The Plaintiffs seek summary judgment in their favor on all of their claims, as well as on the City's counterclaims because, according to them, the CIF payments, which the City collected from them pursuant to the Original HCAs, were unlawful under the Act. More specifically, the Plaintiffs contend that the CIF payments were not "reasonably related" to actual costs imposed on the City by operation of their marijuana establishments, as required by the Act. The City opposes summary judgment. It argues that the CIF payments it collected from the Plaintiffs were consistent with both the Original HCAs and the Act. Further, the City contends that, to the extent there is a question regarding whether the CIF payments met the Act's relatedness requirement, this presents an issue of fact that cannot be resolved properly at summary judgment. Below, the court addresses these arguments in more detail.

I. Standard of Review

"'Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.'" Barbetti v. Stempniewicz, 490 Mass. 98, 107 (2022), quoting Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 330 (2021); see also Mass. R. Civ. P. 56(c). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." Scholz v. Delp, 473 Mass. 242, 249 (2015), citing Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 32 (2006).

The moving party may satisfy its burden by submitting affirmative evidence negating an essential element of the opposing party's case, or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706. 714 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). The opposing party cannot defeat summary judgment by resting on its pleadings and mere assertions of unsupported disputed facts. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

In undertaking the above analysis, the court considers all factual allegations, and draws all reasonable inferences therefrom, in favor of the nonmoving party. See Bellmar v. Moore, 495 Mass. 578, 581 (2025), citing HSBC Bank USA, N.A. v. Morris, 490 Mass. 332, 326-327 (2022). However, it does not weigh evidence, assess credibility, or find facts. Drakopoulos v. United States Bank Nat'l Ass'n, 465 Mass. 775, 788 (2013) (citation omitted). Moreover, the court is mindful that "[a] dispute about a material fact is genuine [only] when the evidence is such that a reasonable jury could return a verdict for the nonmoving party, and a fact is material [only] when it might affect the outcome of the suit under the governing law." Dennis v. Kaskel, 79 Mass. App. Ct. 736, 740-741 (2011) (quotations and citation omitted).

II. Analysis

A. The CIF Payments the City Collected from the Plaintiffs were Not Lawful under the Pre-2022 Version of the Act

In the court's view, all of the Plaintiffs' claims and the City's counterclaims relate to whether the CIF payments imposed by the City, pursuant to the Original HCAs, were lawful under the Act. Thus, the court addresses this issue before discussing the elements of the individual claims at issue in this case.

The Pre-2022 Version states that an HCA between a marijuana establishment and a host community may require the marijuana establishment to pay a CIF, so long as the CIF meets certain criteria. Specifically, for purposes of the current matter, the CIF must be "reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment[.]" G. L. c. 94G, § 3(d) (2017). There are no appellate-level cases addressing this provision. The court in Haverhill Stem, however, discusses this provision, specifically addressing the meaning of both the term "reasonably related," 2024 WL 3047937, at *12-14, and the phrase "costs imposed upon the municipality by the operation of the marijuana establishment[,]" id. at *14-16. In resolving the Motion, the court sees no basis to depart from that case's well-reasoned interpretation of the Pre-2022 Version.

In Haverhill Stem, the court noted that the Act did not define the term "reasonably related." Id. at *12. Thereafter, following traditional principles of statutory interpretation, which counsel applying the plain meaning to statutory language, the court looked to how dictionaries define the words "reasonably" and "related." Id. at *13. Based on these dictionary definitions, the court concluded "that the term 'reasonably related' as used in . . . [the Pre-2022 Version] . . . means 'connected to a fair or moderate degree.'" Id.

Next, the court rejected Haverhill's argument that CIF payments could be used to pay for "[m]arijuana use and abuse educational programming, substance abuse prevention and treatment programs, school studies as to perceptions regarding marijuana usage amongst youth, efforts to track and address increasing marijuana usage by students" because "these items represent[ed] costs 'reasonably related' to *legalized marijuana*." Id. at *14. According to the court:

> [C]osts that are reasonably related to the impact of legalized marijuana, in general, are not what . . . [the Pre-2022 Version] requires with respect CIFs. Rather, . . . [the Pre-2022 Version] expressly requires that . . . CIF [payments] 'shall be reasonably related to the costs imposed upon the municipality *by the operation of the marijuana establishment*,' . . . and not that . . . CIF [payments] shall be reasonably related to the costs imposed *by legalized marijuana generally*.

Id., quoting G. L. c. 94G, § 3(d) (2017).

Subsequently, Haverhill Stem addressed the meaning of the phrase "costs imposed upon the municipality by the operation of [Stem's] marijuana establishment[.]" Id. Relying, again, on pertinent dictionary definitions, the court concluded that, when "reading the word 'costs' in the context of the phrase 'costs imposed,'" the term "'costs' refers to *actual costs* imposed on . . . [Haverhill][,]" rejecting the idea that the phrase meant "costs imposed upon Haverhill *by legalized marijuana generally*." Id. at *15 (emphasis added). Instead, because the Legislature used the words "'by operation of the marijuana establishment,'" and the Pre-2022 Version "use[d] the term 'marijuana establishment' to refer to a particular marijuana establishment . . . not to marijuana establishments collectively or generally," the court concluded that "the plain meaning of 'by operation of the marijuana establishment'" meant "'by operation of the particular marijuana establishment with which the municipality has the HCA.'" Id.

Applying the holding from Haverhill Stem to the current matter, it is clear that, to be deemed lawful under the Act, the CIF payments, which the City imposed on and collected from the Plaintiffs, must be connected to a fair or moderate degree to actual costs imposed on the City by operation of the Plaintiffs' particular marijuana establishments.

The City spent the money it collected from the Plaintiffs as CIF payments under the Original HCAs on seven specific items: (1) Officer Leo; (2) the design for the redevelopment of Washington Street; (3) a contract with the Gavin Foundation for the provision of substance abuse services; (4) counseling services provided by Riverside; (5) the NPS Curriculum, which included programming directed at substance use prevention, screening, and support; (5) two part-time psychologists, who were hired to work as substance abuse counselors in the Newton public school system; (6) a drug drop-off kiosk; and (7) Narcan kits for free distribution to the community. It argues that whether these items were "reasonably related" to the Plaintiffs' marijuana establishments presents an issue of fact that cannot be resolved at summary judgment. The court is not convinced.

While it is true that reasonableness is generally a question of fact, to overcome summary judgment, the City is required to point to specific record evidence demonstrating that, at the very least, there are disputed issues of fact regarding whether the CIF payments it collected pursuant to the Original HCAs were connected in some way to costs it actually incurred as a result of the Plaintiffs' business operations. And aside from its own conclusory assertions, which are not sufficient to defeat summary judgment, the City points to no such record evidence.[5]

More specifically, the City argues that it spent the funds collected as CIF payments under the Original HCAs on public health, safety, education, infrastructure, and on its municipal and school programs, services, personnel, and facilities. And that each of the seven items on which it spent CIF funds was reasonably related to the Plaintiffs' operations in the City. A close review of the summary judgment record, however, demonstrates the flaws in these arguments. Although undoubtedly worthwhile from a societal perspective, the City points to no record evidence demonstrating even an issue of fact concerning whether its expenditures were connected or related to actual costs imposed on it by operation of the Plaintiffs' marijuana establishments, which is what the Act requires.[6] While the City disagrees, in the court's view, at most, its expenditures relate to costs it expected to incur as a result of the risks associated with providing greater access to marijuana generally, not to actual costs caused by the Plaintiffs' particular marijuana establishments. Review of the seven items on which the City spent CIF funds and the related record evidence supports this conclusion.

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[5] "[M]ere allegations and conclusory denials . . . cannot defeat summary judgment." Carroll v. Select Bd. of Norwell, 493 Mass. 178, 190 (2024). Similarly, "[b]are assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment." Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). Instead, "an affirmative response . . . is crucial to . . . [the opposing party's] ability to survive summary judgment." Carroll, 493 Mass. at 191. In fact, "[i]t is . . . incumbent on the nonmovant . . . to demonstrate the existence of a dispute as to the material facts . . . with admissible evidence[,]" and this demonstration "must be made on the basis of 'specific facts.'" Regis Coll. v. Weston, 462 Mass. 280, 292 (2012) (citations omitted).

[6] In fact, in the court's view, the City points to no record evidence sufficient to demonstrate that it incurred *any actual costs* as a result of the Plaintiffs' business operations.

Officer Leo:

The City spent $71,734.00 of the CIF payments it collected from the Plaintiffs to purchase and train Officer Leo, a community resource dog. The City asserts that Officer Leo was purchased to help reach young people in the community, in order to provide education and support for substance abuse issues. According to the City, Officer Leo encourages students to approach and engage with school resource officers about making healthy choices regarding drugs and alcohol, including healthy choices about marijuana usage. The City, however, points to no record evidence demonstrating a connection between the need for Officer Leo and any of the Plaintiffs' operations in the City. Even accepting the City's assertion that Officer Leo was purchased to help educate young people about substance abuse issues, there is no indication that the substance abuse issues in question were specifically related to either marijuana or, more importantly, the Plaintiffs' business operations. In other words, there is no record evidence that the City incurred the costs associated with purchasing and training Officer Leo *because of* the Plaintiffs' specific marijuana establishments.

The Design for Washington Street:

The City spent $500,000 of the CIF payments it collected from the Plaintiffs for the design plan for the redevelopment of Washington Street. Washington Street is a major thoroughfare in the City. The City argues that the Plaintiffs' marijuana establishments, two of which are located on Washington Street, bring additional people and traffic into the City, resulting in the need for improvements and redevelopment of this thoroughfare. The problem, however, is that, aside from its own conclusory assertions, the City points to no record evidence demonstrating that there has actually been an increase in visitors and/or traffic to the City as a result of the Plaintiffs' business operations. Moreover, any claim that the Plaintiffs' business operations required the redevelopment of Washington Street is belied by record evidence that the City's plans for Washington Street's redevelopment began well before the legalization of marijuana, J.A., Ex. 17, pp. 97-98, and the City points to no record evidence demonstrating that it was required to change or expand these plans as a result of the Plaintiffs' operations. There is no record evidence that the City incurred the costs associated with Washington Street's redevelopment, in particular, the costs for the design of that redevelopment, which was paid for entirely with CIF funds, *because of* the Plaintiffs' business operations.

Substance Abuse Services:

The City spent $63,750.00 and $220,000 of the CIF payments it collected from the Plaintiffs for, respectively, substance abuse services provided via contract with the Gavin Foundation and counseling services provided by Riverside. The City asserts that the substance abuse services and counseling provided by the Gavin Foundation and Riverside were reasonably related to the Plaintiffs' business operations because it determined this to be so. More is required to meet the Act's relatedness requirement. The City points to no record evidence addressing what portion of the services provided by the Gavin Foundation and Riverside related to marijuana usage. More significantly, the City points to no record evidence demonstrating that the need for substance abuse services and counseling services increased in the City *because of* the Plaintiffs' operation of their marijuana establishments.

School Programming:

The City spent $1,108,030.00 of the CIF payments it collected from the Plaintiffs on the NPS Curriculum, which included educational programming directed at addressing substance use and abuse prevention, screening, and support in Newton's public schools. In addition, the City spent $601,808.00 on two part-time psychologists to work as substance abuse counselors in its public school system. The City argues that these costs were necessary because the operation of marijuana establishments in the City increased access to marijuana and the risk of use and abuse among students, prompting a need for more comprehensive programming and additional counselors. The flaw in this argument is that it is about concerns related to marijuana establishments in the City generally, not the Plaintiffs' specific operations. The City points to no admissible record evidence demonstrating that there was an increase in substance abuse among the City's student population after the Plaintiffs opened their marijuana establishments. There is no record evidence that the NPS Curriculum and the additional counselors the City hired were necessary *because of* the Plaintiffs' business operations in the City.

The Drug Drop-Off Kiosk:

The City spent $26,820.00 of the CIF payments it collected from the Plaintiffs for a drug drop-off kiosk. The City argues that having a secure location for people to dispose of unused drugs and medication, including marijuana, prevents misuse and accidental poisoning, especially among young people, and that the drop-off kiosk is reasonably related to the Plaintiffs' operations in the City because marijuana is one of the substances that can be dropped off. The court is not convinced. There is no record evidence that the Plaintiffs' marijuana establishments caused an increase in the quantity of unused drugs in the City, such that the drop-off kiosk was a necessary consequence of their business operations. In fact, there is no record evidence that any marijuana or, more specifically, that any marijuana that originated from the Plaintiffs' business operations was ever dropped off at the kiosk. There is no record evidence that the City incurred the costs associated with the drug drop-off kiosk *because of* the Plaintiffs' operations in the City.

Free Narcan Kits:

The City spent $1,769.00 of the CIF payments it collected from the Plaintiffs for the free distribution of Narcan kits. The City makes little effort to show how this expenditure is connected to the Plaintiffs' operations in the City, stating only that Narcan can be administered to stop a drug overdose, and that the free distribution of Narcan kits helped address public health concerns in the City. Such assertions are not sufficient to demonstrate that the purchase and free distribution of the Narcan kits was "reasonably related" to an actual cost imposed on the City by the Plaintiffs' operations. Narcan is a treatment used to reverse the effects of an opioid overdose; there is no record evidence that Narcan is effective as to marijuana. The City has not shown that it incurred the costs associated with purchasing and freely distributing the Narcan kits *because of* the Plaintiffs' marijuana establishments.

In sum, the City has no reasonable expectation of proving that the CIF payments it collected from the Plaintiffs, pursuant to the Original HCAs, were lawful. The City points to no record evidence sufficient to establish even an issue of fact concerning whether the seven items on which it spent CIF funds were connected to a fair or moderate degree to actual costs imposed on it by operation of the Plaintiffs' marijuana establishments. At most, the City is only able to establish that the CIF funds were spent on matters related to legalized marijuana generally, and/or to the general operation of marijuana establishments in the City. This is not sufficient to meet the Pre-2022 Version's relatedness requirement.[7] With this in mind, the court now addresses the individual claims, counterclaims, and affirmative defenses at issue in this case.

B. The Plaintiffs' Claims

The Plaintiffs assert claims against the City for breach for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), unjust enrichment (Count III), and declaratory judgment (Count IV). Since their claim for declaratory judgment involves their primary request for relief, the court addresses this claim first.

[7] In Haverhill Stem, the court's interpretation of the Pre-2022 Version "d[id] not foreclose . . . [Haverhill] from arguing that certain 'costs imposed upon the municipality by the operation of the marijuana establishment' may be determined by calculating Stem's proportional share of a cost imposed upon . . .[Haverhill] by the collective operation of all of the marijuana establishments operating within . . . [Haverhill]." 2024 WL 3047937 at *16. The City argues that this is what it did in this case. The court need not address this argument in detail. Before addressing any claim of apportionment, a host community must first establish that the CIF payments it collects are connected to actual costs imposed on it by the collective operation of the marijuana establishments within its borders. Here, as discussed above, the City does not point to any record evidence demonstrating that the seven items on which it spent CIF funds were related to actual costs it incurred as a result of the Plaintiffs' operations in the City. Moreover, there is no record evidence that the City apportioned the cost of those seven items among all of the marijuana establishments within the City based on the impact of each establishment on the City's need for the identified item. For example, the City collected CIF payments equal to three percent of the Plaintiffs' gross revenues from relevant sales and placed this money in the City's general fund. Thereafter, once the City decided what items it wanted to use the CIF fund for, the payment for that item was made directly from the general fund, without calculating each individual marijuana establishment's proportionate share of the item's cost.

1. Declaratory Judgment (Count IV)

The Plaintiffs seek a declaration, among other things, that the CIF payments the City collected, pursuant to the Original HCAs, were unlawful under the Pre-2022 Version, and that, therefore, the City is required to return the funds it collected to the Plaintiffs. A claim for declaratory judgment is the appropriate vehicle by which to address the Plaintiff's requested relief.

"A party may seek a declaratory judgment 'in any case in which an actual controversy has arisen.'" Kain v. Department of Envtl. Prot., 474 Mass. 278, 281 (2016), quoting G. L. c. 231A, § 1.

> An "actual controversy" exists when there is "a real disputed caused by the assertion by one party of a legal relation, status, or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation."

Wells Fargo Fin. Mass., Inc. v. Mulvey, 93 Mass. App. Ct. 768, 771 (2018) (citation omitted). More importantly, for purposes of the current matter, "[a] dispute over an official interpretation of a statute constitutes a justiciable controversy for purposes of declaratory relief." Kain, 474 Mass. at 281 (quotations and citation omitted).

For the reasons explained above—the City's inability to point to record evidence demonstrating that the CIF payments it collected from the Plaintiffs were reasonably related to any actual costs it incurred as a result of the Plaintiffs' business operations in the City—the Motion will be **ALLOWED** as to the Plaintiffs' claim for declaratory judgment (Count IV). Accordingly, the court shall enter a declaratory judgment, pursuant to G. L. c. 231A, § 1, that: (1) during the terms of the Original HCAs, the City did not incur any actual costs reasonably related to the Plaintiffs' operation of their marijuana establishments in the City; and (2) the CIF payments that the City collected from the Plaintiffs, pursuant to the Original HCAs, were unlawful under the Pre-2022 Version and must be repaid to the Plaintiffs.[8]

2. Breach of Contract (Count I)

"To prevail on a claim for breach of contract, a plaintiff must demonstrate that there was an agreement between the parties; the agreement was supported by consideration; the plaintiff was ready, willing, and able to perform his or her part of the contract; the defendant committed a breach of the contract; and the plaintiff suffered harm as a result." Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 690 (2016) (citation omitted). The Plaintiffs argue that they are entitled to summary judgment on their claim for breach of contract because the City breached the Original HCAs by collecting and retaining CIFs that were not reasonable and directly proportional to the costs their marijuana establishments had on the City. The court is not convinced.

[8] The Plaintiffs requested additional declarations, which the court declines to order. First, the Plaintiffs requested a declaration that the City is not entitled to any future payments from the Plaintiffs for CIF payments under the Original HCAs. The court declines to enter a declaration based on the speculative assumption that, at some point in the future, the City might assess new CIFs against the Plaintiffs under the Original HCAs, where the Original HCAs have expired and the parties have entered into new HCAs which now govern their relationship. Second, the Plaintiffs requested a declaration ordering the City to comply with the law as to its future assessment of CIFs. The court declines to enter a declaration concerning the City's future assessment of CIFs, where there is no record evidence that the City is not in compliance with the Post-2022 Version. Lastly, the Plaintiffs requested a declaration requiring the City to pay the Plaintiffs' attorneys' fees and costs. Again, the court declines to enter such a declaration. While the Post-2022 Version grants marijuana establishments a private right of action against host communities that charge CIFs unrelated to the actual costs imposed upon them by the establishment's operations, which may include the recovery of attorneys' fees and cost, see G. L. c. 94G, § 3(d)(2)(iii) (2022), the Pre-2022 Version does not appear to contain any similar provision. The Plaintiffs may file a separate motion for attorneys' fees and costs, if they feel one is warranted.

In support of their claim of breach, the Plaintiffs rely on the fourth paragraph of the Original HCAs. This provision states as follows: "WHEREAS, the parties agree that the terms, conditions, and funds required herein are reasonable and directly proportional to the costs of addressing the potential health, safety, and other effects or impacts of the . . . [marijuana establishment] on the City." In the court's view, applying basic principles of contract interpretation, which require the court "to read the agreement as a whole, so as to give it effect as a rational business instrument . . . in a manner which will effectuate the intent of the parties," Sunrise Equip. & Excavation, Inc. v. Construction Mgmt. & Builders, Inc., 104 Mass. App. Ct. 669, 676 (2024) (quotations and citation omitted), this provision does not contain a legally binding obligation requiring that the City's assessment of costs against the Plaintiffs be reasonable and proportional. Instead, this provision is merely a statement of intent. Like most "whereas" clauses, this provision, along with the Original HCAs' other whereas clauses, explains the parties' goals and outlines their purposes in entering into the agreement. See Mirra v. Mirra, No. 1484CV03857-BLS2, 34 Mass. L. Rptr. 41, 2017 WL 439586, at *3 (Mass. Super. Ct. Jan. 2017) (Salinger, J.) (noting that courts should use "statements of intent and other recitals in 'whereas' clauses" to "aid . . . [in] construing the substantive provisions of a written contract").[9]

Because the Plaintiffs cannot establish that the City breached any provision of the Original HCAs, they are not entitled to summary judgment on their breach of

[9] See also, e.g., Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC, 938 F.3d 113, 127 (4th Cir. 2019) (stating that "[c]ontracts often contain recitals," set forth "at the beginning of the agreement in 'whereas' clauses," which do not make binding promises but merely recite background information about factual context or the parties' intentions . . . . [which] may aid the court in interpreting the contract's operative terms").

contract claim. In fact, because there are no disputed issues of material fact and no evidence of any breach by the City, the court concludes that the City is entitled to judgment as a matter of law on this claim, even though it did not cross-move for summary judgment. See BourgeoisWhite, LLP v. Sterling Lion, LLC, 91 Mass. App. Ct. 114, 118-119 (2017) ("[b]ecause by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts") (quotations and citation omitted); see also Mass. R. Civ. P. 56(c) ("[s]ummary judgment, when appropriate, may be rendered against the moving party"). Thus, the Motion will be **DENIED**, and summary judgment shall enter in favor of the City on the Plaintiffs' claim for breach of contract.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II)

"The covenant of good faith and fair dealing is implied in every contract[.]" Classic Restaurant Concepts, LLC v. President and Fellows of Harvard Coll., 104 Mass. App. Ct. 323, 328 (2024) (quotations and citation omitted). This "implied covenant . . . provides that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471-472 (1991) (quotations and citation omitted). However, the implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." Boston Med. Ctr. Corp. v. Secretary of Executive Off. of Health & Human Servs., 463 Mass. 447, 460 (2012). In other words, it only governs "the manner in which existing contractual duties are performed." Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 289 (2007).

In this case, the basis for the Plaintiffs' claim for breach of the implied covenant is exactly the same as their breach of contract claim—that the City breached the implied covenant by collecting and retaining CIFs that the Plaintiffs contend were not reasonable or directly proportional to the cost their marijuana establishments imposed on the City. Because the implied covenant does not create rights greater than those provided in the underlying contract and because the court has already concluded that the Original HCAs did not contain any provision requiring that the City's assessment of CIFs be reasonable and proportional to the impact the Plaintiffs' operations had on the City, the City's assessment of CIFs outside these parameters cannot constitute a breach of the covenant of good faith and fair dealing.[10]

Thus, the court concludes that, not only are the Plaintiffs not entitled to summary judgment in their favor on this claim, but that judgment as a matter of law must enter in favor of the City. See BourgeoisWhite, LLP, 91 Mass. App. Ct. at 118-119; see also Mass. R. Civ. P. 56(c). Thus, the Motion will be **DENIED**, and summary judgment shall enter in favor of the City on the Plaintiffs' claim for breach of the implied covenant.

4. Unjust Enrichment (Count IV)

"Unjust enrichment is the retention of money or property of another against the fundament principles of just or equity and good conscience." Tedeschi-Freij v. Percy Law Group, P.C., 99 Mass. App. Ct. 772, 780 (2021) (quotations and citation omitted).

[10] The court also notes that "[u]sually, a breach of the implied covenant involves 'bad faith' conduct 'implicating a dishonest purpose, consciousness of wrong, or ill will in the nature of . . . fraud." Targus Group Internat'l, Inc. v. Sherman, 76 Mass. App. Ct. 421, 435 (2010). And in this case, there is no record evidence that the City acted with such bad faith. The Act was adopted in 2016, and when the parties executed the Original HCAs, in 2018 and 2019, there was still confusion and little guidance about the interpretation of the Act's various provisions. This is evidenced by the amendments the Legislature has adopted to help clarify the provisions related to CIFs.

"Whether the benefit was unjust turns on the reasonable expectations of the parties." Bonina v. Sheppard, 91 Mass. App. Ct. 622, 625 (2017) (quotations and citation omitted). "However, '[t]he fact that a person [or entity] has benefited from another is not of itself sufficient to require the other to make restitution[.]'" Id., quoting Keller v. O'Brien, 425 Mass. 774, 778 (1997). More significantly for current purposes, it is well established that "[a]n equitable remedy for unjust enrichment is not available to a party with an adequate remedy at law." Santagate v. Tower, 64 Mass. App. Ct. 324, 329 (2005).

The Plaintiffs allege the City has been unjustly enriched because it assessed and retained CIFs that were not reasonably related to any actual costs imposed on it by their marijuana operations. Essentially, the Plaintiffs assert the same theory of recovery as asserted in their contract-based claims. The court is not convinced that the Plaintiffs have any viable claim for unjust enrichment against the City.

Accepting that City collected and retained the Plaintiffs' funds in circumstances contrary to established principles of equity and good conscience, the Plaintiffs have other adequate remedies, as evidenced by the court's decision that declaratory judgment must enter requiring the City to return the CIFs assessed against the Plaintiffs pursuant to the Original HCAs. Even when a statute does not provide for a private right of action, as is the case with the Pre-2022 Version, a plaintiff claiming a statutory violation may seek declaratory relief, as the Plaintiffs did in this case. See, e.g., State Police Assoc. of Mass. v. Alben, 97 Mass. App. Ct. 366, 370 (2020) ("[a] plaintiff may seek . . . declaratory relief . . . even if the relevant statute does not provide a private right of action") (quotations and citation omitted). In the court's view, the claim for unjust enrichment cannot lie where it will afford the Plaintiffs no greater relief than the court has already awarded in connection with their claim for declaratory judgment. See Szalla v. Locke, 421 Mass. 448, 454 (1995) ("[w]here the same acts cause the same injury under more than one theory [of recovery], duplicative damage[s] will not be permitted," and "[t]he plaintiff must elect from among the counts").

The Motion will be **DENIED**, and summary judgment shall enter in favor of the City on the Plaintiffs' claim for unjust enrichment (Count III).

C. The City's Affirmative Defenses

In the Counterclaim, the City asserts a number of affirmative defenses. In the court's view, none of these defenses warrants a different outcome on the Plaintiffs' declaratory judgment claim. To the extent that these defenses relate to the viability of the Original HCAs and the Plaintiffs' obligations thereunder, as discussed below, the City cannot enforce contract terms that are contrary to statute.

D. The City's Counterclaims

The City asserts a counterclaim against Ascend and Cypress Tree (the "Counterclaim Defendants") for breach of contract (Counterclaim I), alleging they breached the original HCAs they executed with the City by failing to make the quarterly payments agreed to therein. The City also asserts a counterclaim for breach of the implied covenant of good faith and fair dealing (Counterclaim II), which is based on the same allegation. Lastly, the City asserts a counterclaim for declaratory judgment (Counterclaim III) about the Counterclaim Defendants' obligations under the original HCAs they executed with the City.[11] In the Motion, the Plaintiffs argue that the

[11] In particular, the City requests a declaration ordering that: (1) the Original Ascend HCA and the Original Cypress Tree HCA are binding contracts; (2) both the Original Ascend HCA and the

Counterclaim Defendants are entitled to summary judgment on all counterclaims because, regardless of what the Original Ascend HCA and the Original Cypress Tree HCA state about the Counterclaim Defendants' payment obligations, the City cannot enforce a payment obligation that is contrary to the Pre-2022 Version. The court agrees with the Plaintiffs.

"[T]he general rule of our law is freedom of contract, which rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements." Nicosia v. Burn, LLC, 496 Mass. 792, 796-797 (2025) (quotations and citation omitted). Nevertheless, "public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced." Gattineri v. Wynn MA, LLC, 493 Mass. 13, 19-20 (2023) (quotations and citation omitted). Of particular relevance to the current matter, a contract or contract provision that violates a statute may be deemed void as against public policy. See Saggese v. Kelley, 445 Mass. 434, 440 (2005).

> Whether a contract made in violation of a statute is void depends upon the terms of the statute and the nature of the violation. If a statute does not declare a contract made in violation of its terms to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that the statute was intended to be directory, and not prohibitory, of the contract. On the other hand, even if a statute does not expressly provide that a contract made in violation of its terms is invalid, the contract will be deemed void if doing so is necessary to accomplish the statute's objectives.

Original Cypress Tree HCA comply with G. L. c. 94G, § 3(d) (2017); (3) Ascend breached the Original Ascend HCA and Cypress Tree breached the Original Cypress Tree HCA; and (4) Ascend and Cypress Tree are required to make to the City the payments they agreed to in the Original Ascend HCA and the Original Cypress Tree HCA, respectively.

Baltazar Contractors, Inc. v. Lunenburg, 65 Mass. App. Ct. 718, 720-721 (2006) (citations omitted).

When determining whether a contract should be deemed void, identifying the public policy underlying the legislation at issue is a question of law to be determined by the court. Green v. Richmond, 369 Mass. 47, 51 (1975). "'Public policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." Beacon Hill Civic Ass'n v. Ristorante Toscano, 422 Mass. 318, 321 (1996) (citations omitted). "In determining the public interest and welfare in these circumstances, [the courts] . . . look to the Legislature's statutory enactment." Id. Ultimately, for a contract or contractual provision to be void as against public policy, "[t]he grounds for [the] . . . public policy exception must be clear in the acts of the Legislature or the decisions of th[e] [Supreme Judicial Court]." Nicosia, 496 Mass. at 796.

In Beacon Hill Civic Ass'n, the contract at issue involved a promise by a restaurant owner not to seek a general alcohol license in exchange for a promise by a neighborhood association not to oppose the restaurant's application for a beer and wine license. 422 Mass. at 319. The restaurant obtained a beer and wine license, and years later, applied for an all-alcohol license. A lawsuit then ensued. Id. at 320. The neighborhood association asserted that the restaurant had contractually waived its right to seek an all-alcohol license. Id. at 322. The Supreme Judicial Court, however, declared the parties' contract void on public policy grounds. According to the Court, because the right to apply for an alcohol license was governed by a comprehensive statutory scheme adopted by the Legislature to address various public policy concerns, the parties' attempt to override the law via contract amounted to a violation of public policy, which made the contract unenforceable. Id. at 322-323.

The reasoning from Beacon Hill Civic Ass'n applies equally to this matter. The Act, which was adopted in 2016, and amended the following year by St. 2017, c. 55, entitled "An Act to ensure safe access to marijuana," reflects the Legislature's intent that the new marijuana industry be regulated for the general safety of the public. The Act provides for the sale of recreational marijuana to adults, and it includes comprehensive requirements regarding licensing and HCAs, which are overseen by the Commission, for the protection of both the general public and those seeking to operate marijuana establishments within the Commonwealth. See generally Mederi, Inc., 488 Mass. at 61-64. It would be contrary to public policy to allow individuals and municipalities to enter into contracts concerning the sale and distribution of marijuana that do not comply with the Act or its related regulations.

The Pre-2022 Version requires that CIFs be "reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment[.]" G. L. c. 94G, § 3(d) (2017). The City cannot enforce a contractual term that calls for a CIF based on different criteria because such a term is void as against public policy.

The Motion will be **ALLOWED** as to the City's counterclaims for breach of contract (Counterclaim I), breach of the implied covenant of good faith and fair dealing (Counterclaim II), and declaratory judgment (Counterclaim III).

CONCLUSION AND ORDER

For the reasons explained above, it is hereby **ORDERED** that:

1. The Plaintiffs' Motion for Summary Judgment (Paper No. 18) is **ALLOWED**, as to the Plaintiffs' claim for declaratory judgment (Count IV), and the City's counterclaims for breach of contract (Counterclaim I), breach of the implied covenant of good faith and fair dealing (Counterclaim II), and declaratory judgment (Counterclaim III). Summary judgment shall enter in favor of the Plaintiffs on these claims.
2. The Plaintiffs' Motion for Summary Judgment is **DENIED**, as to the Plaintiffs' claims for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and unjust enrichment (Count III). Summary judgment shall enter in favor of the City on these claims.

Accordingly, pursuant to G. L. c. 231A, § 1, the court **ORDERS** and **DECLARES** that: (1) during the terms of the Original HCAs, the City did not incur any actual costs reasonably related to the Plaintiffs' operation of their marijuana establishments in the City; and (2) the CIF payments that the City collected from the Plaintiffs, pursuant to the Original HCAs, were unlawful under the Pre-2022 Version and must be repaid to the Plaintiffs.

SO ORDERED.

Asha White

Asha White
Justice of the Superior Court

August _4_, 2026