# The Legal Handbook for

# Massachusetts Boards of Health

## 3rd Edition


# INTRODUCTION

From its beginning in 1966, the Conservation Law Foundation dealt with issues relating to boards of health. It was soon apparent that although health boards are among the most powerful of local authorities, there were few resources to assist them in their tasks. In 1980, CLF began a project designed to provide information and assistance to local health officials in Massachusetts. During the first two years, CLF Senior Attorney Judith Pickett answered hundreds of letters and calls from health agents and health board members across the state on a wide range of topics. The information most frequently requested was incorporated in the original **Legal Handbook for Boards of Health** which was published in 1982.

During that same year, the Conservation Law Foundation recognized the need for a non-profit organization dedicated to local health boards. By sponsoring formative meetings and promoting the cause of local health boards, CLF helped to make the idea of the Massachusetts Association of Health Boards a reality. MAHB, incorporated in 1982, is a non-profit organization dedicated to the promotion of public and environmental health through the education and support of boards of health.

Our first decade saw many changes in the laws governing public and environmental health. In addition to continuing assistance from CLF, MAHB developed an informal network of attorneys who have served as legal advisors on a broad range of issues relating to boards of health. As time passed and laws and regulations changed, the **Legal Handbook** needed updating. With the help of our legal advisors and the generous permission of CLF, we attempted to preserve the best of the original, with revisions and additions as needed.

Since the early 2000's MAHB has focused on assuring that local boards of health are properly resourced with the knowledge, regulatory information, legal guidance and professional standards needed to regulate issues, businesses and public institutions in a way that most optimally serves the public health across the Commonwealth. We have placed great emphasis on our annual Certificate Programs in order to offer professional development to board of health members and health staff. An introduction and review of areas of jurisdiction and best practices is offered annually in these programs for the benefit of newly seated board members. The other educational programs include a panoply of highly relevant and contemporary topics covering issues ranging from Title 5 well and septic regulation, to human sex trafficking, to board governance, to battling opioids, to dealing with environmental issues and emergency preparedness, and of course tobacco and vaping.

As we approach the quarter century mark, MAHB is endeavoring to expand its presence into the local community by offering enrichment opportunities for local boards to invite MAHB's speakers from other communities to address common issues and to perhaps offer solutions to locally pressing issues. We offer an ever-expanding list of form regulations for our members to download and custom tailor to their own specifications. Our Executive Board members have varying backgrounds and are always available to any local boards to discuss and assist with any unique issues. As of the date of publication, our Executive Director and Chief Legal Counsel is assisting several municipalities in litigation involving the sale of flavored smoking materials.

This handbook is organized into four major sections. The first section describes the "tools" of legal control - statutes, regulations, and cases. The next section describes the organization and administration of boards of health. It is remarkable how often the rules of procedure are unintentionally violated, sometimes jeopardizing the board's ability to enforce its regulations and maintain credibility within the community. Procedural regularity is essential to enforcement of any law. The remainder of the book covers a partial listing of activities regulated by boards of health. Each of these activities is assigned a different chapter number to accommodate future updates, ease of use of the manual and to facilitate additional commentary on new topics.

While the original handbook, contained appendices of model environmental regulations, those were deleted from the prior revision because MAHB has compiled a comprehensive model environmental health code and many regulation examples and models are available on our website www.mahb.org. It is relevant to note, however, that one of the most important responsibilities of health boards is the protection of public and private water supplies which can only be accomplished through the adoption of local regulations. Appendix A offers a model regulation regarding special accounts to pay for consultants to assist in plan review. Appendix B provides additional practical information concerning the adoption of regulations. Appendix C provides sample enabling language for the non-criminal disposition of violations of municipal by-laws, rules and regulations, an important enforcement tool available to boards of health. Appendix D is a draft Animal Regulation with an eye towards the newly enacted Agriculture Statute, which became effective in January of 2021. Finally, Appendix E is a collection of relevant COVID-19 Emergency Orders and procedural documents relating to the enforcement of those orders. Because the COVID-19 epidemic was in full effect at the time of publication, MAHB is planning to update this Guide at an appropriate juncture.

In partnership with the Massachusetts Department of Public Health and The Massachusetts Department of Environmental Protection, MAHB also publishes the ***Guidebook for Massachusetts Boards of Health***, which covers in greater detail the many areas of public health that boards of health are responsible for under Massachusetts laws and regulations.

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# ACKNOWLEDGMENTS

Creation of the original handbook was the joint responsibility of Judith Pickett, then Senior Attorney at the Conservation Law Foundation, and Lyn White, Environmental Health Project Director, with the assistance of Kenneth T. Hoffman, Staff Attorney and numerous technical and legal interns.

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In 1991, the Conservation Law Foundation authorized MAHB to reprint sections of the original Handbook, and incorporate them into the second edition. Our special thanks to CLF, for the support and confidence they have given us, and to the attorneys who have contributed to this book.

The 2011 edition was edited and reviewed by MAHB Senior Staff Attorney Cheryl Sbarra and Attorney Laura Richards.

Funding for the 2021 edition was by a grant from the Massachusetts Department of Public Health.

In 2021 the Handbook underwent significant revision with updating of case law and many new sections added. A significant review of the Open Meeting Law, Public Records Law and Conflicts of Interest was undertaken, resulting in a new Chapter 3, dedicated exclusively to those regulations. Also, we have revised our chapter on tobacco products, Chapter 12, inasmuch as the law has been greatly expanded and many developments have occurred and are occurring at the time of publication in the area of tobacco regulation largely spurred by developments in the regulation of flavored smoking consumption by vape and by traditional cigarette. Simultaneous with the publication of this volume, there has been a call for the total banning of all flavored products with the exception of tobacco flavored vape products. In addition, Chapter 13 addresses the sale of cannabis, which has also been recently legalized in Massachusetts for both medical and adult use. The chapters on these topics were authored by MAHB Executive Director and Chief Legal Counsel, Cheryl Sbarra, who is a nationally recognized authority on this topic, and the editor of this edition wishes to thank her for her input and time in developing those particular chapters.

We have added Chapter 16, on public health considerations in ruling on matters involving agriculture, in recognition of the fact that as urban sprawl continues to impinge on open spaces, and living situations increasingly border on farms and ranches, there are emerging issues and new legislation dealing with this topic.

This Handbook is intended to be used as a guide to the laws pertaining to local health boards. It does not constitute legal advice. The authors and MAHB advise all local boards of health to consult with your Town Council or City Solicitor for all legal matters.

# Contents

# CHAPTER 1

# STATUTES, REGULATIONS, AND CASES:

# What They Are, How To Find Them

## Statutes

A Massachusetts statute is an act passed by the legislature which becomes the law of the state. The words "law," "statute," "legislation," "bill," "act," and "regulation" are frequently used as if they were synonymous. They are not.

*Legislation* is the creation, usually by a vote of a representative body, of rules to order behavior which are called *laws.* A *bill*, a piece of proposed legislation, originates as a petition filed in the office of the House or Senate Clerk before the legislature convenes. Each bill is numbered and designated as to whether it originates in the House or the Senate.

If the bill is passed by the Legislature, it becomes an *act*. Each act is numbered in chronological order of enactment and becomes a *chapter* in the list of acts passed in one legislative session.

For instance, a COVID-19 Liability Protection bill was filed in the Senate in 2020 as S.2640. The bill was passed by both the House and Senate. It was the sixty-fourth act passed by the 2020 Legislative Session and signed into law by the Governor, therefore is referred to as Chapter 64 of the Acts of 2020.

The act that is passed is either a special law or a general law. A *special law*, sometimes referred to as a *special act* of the legislature, regulates the conduct and relationship of particular persons or a particular place and is not applicable throughout the Commonwealth. For example, a special act may authorize a recall petition in a specific municipality; it may designate that a certain intersection be named after a veteran; or it may change the number of members of a Board of Health. An example of such a *special act* occurred when the Framingham Town Meeting changed the composition of its Board of Health from 3 members to five. This was known as Chapter 126 of the Acts of 2016, An Act Increasing the Membership of the Board of Health in the Town of Framingham.[1] Another example is Chapter 147 of the Acts of 1995 that abolished the Boston Department of Health and Hospitals and established the Boston Public Health Commission. A *general law* concerns the whole Commonwealth and is the law of the state. The Hazardous Waste Act Chapter 508 of the Acts of 1980 is a

[1] The Town of Framingham Board of Health was changed back to a three-person board by the City Charter when Framingham converted from a town form of government to a city on January 1, 2018. At the time of publication, the Framingham City Council is writing an Act to return the board to five members.

general law.

The general laws which are enacted by the legislature are called *statutes*. The general laws, which are applicable throughout the state, are recorded in an official set of books called the Massachusetts General Laws, abbreviated as Mass. Gen. Laws, or M.G.L. There are approximately fifty volumes in the published set, with each volume divided into chapters. These chapters have no relationship to the chronologically numbered chapters of acts passed by the legislature.

Each general law enacted by the legislature adds, amends, or repeals either an entire chapter or just a section of a given chapter of the Massachusetts General Laws. For instance, Chapter 508 of the Acts of 1980 has twelve sections. Sections 1-3 amend Mass. Gen. Laws c.21C, the Hazardous Waste Management Act; Section 4 establishes a new section of the Mass. Gen. Laws, c. 111, § 150B, giving local boards of health statutory authority over establishing waste facilities and site assignments;[2] Section 5 amends Mass. Gen. Laws c. 40A, the Zoning Act; and so on. Once the act has been passed by the legislature, pertinent sections of the act should be cited by reference to the Mass. Gen. Laws. One should not refer to Section 4 of Chapter 508 of the Acts of 1980, but to the permanent, codified provisions of Mass. Gen. Laws c. 111, § 150B.

References to statutes are called citations and look like this: G.L. c. 111 §§ 122 *et seq.* The first number (111) refers to the chapter. The number following the section sign refers to the section of the chapter. "*Et seq*." (et sequitur) means the listed section as well as the ones following it. The use of "*et seq"* only applies in the event that more than one consecutive section of the given chapter governs the issue being written about. In the event that multiple but non-consecutive sections of the same chapter apply, the statutory provisions are written in this format: G.L. c. 111 §§ 36, 41 and 57. The volume number is not used in a citation.

Printed versions of the Massachusetts General Laws are kept up to date with annual supplements, referred to as "pocket parts," which slip into the back cover of each volume. Since the legislature continually amends statutes, you must always remember to check the current pocket supplement at the back of the volume, find the chapter and section you are researching, and note any changes in it. Anything in the pocket part supersedes material in the regular volume. Of course, on-line versions of the M.G.L. are available by a search engine entry referring to "Mass General Laws c. XX, Sec YYY" or at https://malegislature.gov/Laws/GeneralLaws/ , which allows the user to simply plug in the Chapter and Section numbers.

It is easy to find a statute when you know its citation; sometimes, however, you may want to look up a statute without knowing the citation. Use the General Index volumes which are part of the set of Massachusetts General Laws. For instance, to find

[2] Site assignment is a particularly tricky function of local boards of health. This topic is discussed elsewhere in this Manual at Chapters 9 & 10, as a means to regulating potential noisome trades and nuisances.

the livestock disease control law, you might look under “livestock,” “agriculture,” or “animal diseases.” If you started with “livestock” or “agriculture,” you would come across a direction to look up “animal diseases,” which would, in turn, give you the citation to Chapter 129. Remember that the indices themselves have pocket parts at the back; make sure that your information is correct. Similar to the above on-line search, the homepage for the M.G.L. has a “search box” that allows the user to enter a descriptive word search, and it will pop up all results in the statutes where that descriptive word or combination of words appears with hyperlinks to each of those statutes.

The Massachusetts General Laws can be found in most municipal libraries and town halls, in public law libraries located in county courthouses and at the State House Library in Boston, or online at https://malegislature.gov/Laws/GeneralLaws.

## Regulations

While the legislature makes the laws of the state, it usually delegates the authority to implement the laws to administrative agencies such as the Massachusetts Department of Environmental Protection (DEP), the Department of Public Health (DPH), or to municipal boards, such as local boards of health. Such delegation of authority must be authorized by a statute. For instance, Mass. Gen. Laws c. 111 § 31B authorizes boards of health to “make rules and regulations for the control of the removal, transportation, and disposal of garbage or other offensive substances.”

The legislature transfers these functions to administrative agencies which provide the necessary expertise and specialization because it is impractical for the legislature to become involved in issuing licenses, finding facts, or developing regulations.

Note that a town meeting or a city council is the municipal equivalent of the state legislature. The legislative bodies of cities pass ordinances; those of towns pass bylaws. Either way, they become the law of the municipality. Mass. Gen. Laws. c. 111, § 31 enables local boards of health to enact reasonable local public health regulations. These regulations stand on the same footing as state statutes, regulations, ordinances and bylaws. In addition, a city ordinance or town bylaw may delegate authority to enforce ordinances and bylaws to local administrative agencies such as the planning board or board of health.

The *regulations* adopted by state agencies are codified into the Code of Massachusetts Regulations, cited as C.M.R. These regulations can be purchased for a nominal fee at the State Book Store, State House, Boston, 02133, or from the individual agencies. They can also be found online,[3] as can most laws. Municipal bylaws, ordinances and regulations are available fat the city or town clerk’s office, online at the city or town website, or from the individual boards.

[3] The entire volume of the Code of Massachusetts Regulations can be found at the website https://www.mass.gov/code-of-massachusetts-regulations-cmr and is searchable by CMR number or by subject.

An administrative agency, like a local board of health can enact regulations that mirror a state law or a state regulation. This is usually done when a board wishes to locally enforce the state law. For instance, the state law that prohibits the sale of tobacco to persons under the minimum legal sales age cannot be enforced by a local board of health, unless the state law is incorporated into a local board of health regulation. The local regulation may provide for the issuance of permits or licenses, may establish reasonable standards and requirements, or may set out enforcement and penalty mechanisms. Once promulgated, a regulation has the force of law, and a violation of the regulation incurs penalties, just as a violation of the statute does This was the ruling in the case of *United States v. Mersky*, 361 U.S. 431 (1960).

So long as there is a rational relationship between the regulation and the statute, there is a presumption that the regulation is valid. *Colella v. State Racing Commission,* 360 Mass. 152 (1971); *Brackett v. Civil Service Commission*, 447 Mass. 233 (2006). There must be "reasonable justification" for the law. *Sherman v. Town of Randolph*, 472 Mass. 802 (2015), (Reasonable justification "means 'done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.'")

## Cases

Massachusetts courts are divided into trial courts and appellate (or review) courts. The trial courts are the District and Superior and Housing Courts, and the review courts are the Appeals Court and the Supreme Judicial Court. The 62 Massachusetts District Courts, typically, are associated with municipalities, although not all cities and towns have a district court within the limits of the city or town; and the 20 Superior Courts are regionalized by counties, with large counties having multiple Superior Court houses[4]. Housing Courts are now available in all counties of the Commonwealth and are used primarily for housing code violations. The review courts are courts of record; that is, they record their written decisions in annual reports. These annual reports, dating back to 1804, constitute the case law of the Commonwealth.

Massachusetts cases are reported in several sets of books. The official reporter for Supreme Judicial Court cases is called "Massachusetts Reports." In 1972, an Appeals Court was created, and the official reporter is called "Massachusetts Appeals Court Reports." These reports are arranged in numbered volumes, with the number and the year in which the case was decided embossed on the spine of the book.

A citation to a Massachusetts Supreme Court case looks like this: *Tucker v. Badoian*, 376 Mass. 907 (1978). The name of the case lists the opposing . In a lower court case, the first name is the person who is suing. This person is called the plaintiff. The second name is the person who is being sued. This person is called the defendant. The volume number and identity of the reporter comes next, followed by the page on

[4] Essex County has sessions in Salem, Newburyport, and in Lawrence; while Middlesex has sessions in Lowell and Woburn, and Plymouth County holds court in Plymouth and Brockton.

which the case begins. For instance:

*Tucker v. Badoian*, 376 Mass. 907 (1978)
*Plaintiff v. Defendant*, volume reporter pg. (Date)

The date of the decision is in parentheses. Occasionally, a second number will appear after the page number, for instance “376 Mass. 907, 912 (1978).” The second number, 912, is the page (or pages) of the case where the specific legal issue is discussed.

The reporting system for decisions of the Appeals Court is similar, except that the citation would read “Mass. App. Ct.” instead of “Mass.” Similarly, for the United States Supreme Court, the citation would read “U.S.”

The most recent cases are not reported in bound volumes, but are issued in “advance sheets.” The advance sheets are numbered in the same way as the bound volumes: volume, court, page; i.e. the only difference is that they are paper reproductions collected prior to publication in bound volumes. For those who are eagerly awaiting a decision from the Massachusetts appellate courts, the Appellate Court and SJC publish all of their newest decisions on a web site at https://www.mass.gov/service-details/new-opinions, generally the same day.

All cases referenced in this handbook are appellate court cases. That is, they are recorded cases where a court of review has listened to a complaint claiming that the trial court was in error or that a ruling was made not in accord with the rules of law.

Given a legal problem, attorneys research case law. Courts generally adhere to principles laid down by case law and will apply that principle to all future cases where the facts are substantially the same. This is referred to as *stare decisis*; to stand by or to abide by decided cases on the theory that public policy is best served by not disturbing a settled point of law. This doctrine is commonly referred to as “determining precedence.”

Courts may overturn a settled line of case law and establish a new legal principle where the facts and public policy warrant a departure from precedent. For an example of this, read *Tucker v. Badoian*, 376 Mass. 907, 916 (1978), where the court of its own volition, without a request from the opposing attorneys, determined a new principle with respect to diverting surface water onto neighboring land.

# CHAPTER 2

# ORGANIZATION OF HEALTH BOARDS

## Establishment of Boards of Health

### Elected or Appointed

A board of health is a statutory board created pursuant to G.L. c. 111, § 26 and c. 41, § 1. Whether elected or appointed, its duties and authority are virtually the same. In cities, board of health, usually three members, is appointed by the mayor, subject to confirmation by the board of aldermen or city council, unless otherwise provided in the city charter. One member shall be a physician. Alternatively, the city may provide for the establishment of a health department pursuant to G.L. c. 111, § 26A *et seq*., or the city may establish a different type of organization by a special act of the legislature. G.L. c. 111, § 26.

In towns, the board is usually elected, although many town charters provide for an appointed board. The board of selectmen acts as the board of health where the town has not provided for the establishment of a board of health. G.L. c. 41, § 1.

Boards of health shall consist of three or more members for the term of one or more years. In any case where three or more members are to be elected for terms of more than one year, one-third should be elected annually. A sample town warrant article to establish a board of health reads as follows:

> To see if the town will accept the provisions of Chapter 41, Section 1, and establish the Board of Health of the Town of [ ] for the purposes and with the rights and duties provided by law, to be composed of [3 or more] members to be elected for terms of 3 years such each, except that initial elections shall be: [ ] for one year, [ ] for two years, and [ ] for three years.

The provisions of G.L. c. 41, § 1 are applicable “except when other provision is made by law” or by charter. Since a town charter is the functional equivalent of law, a town charter may make other provisions for the election or appointment of a board of health. G.L. c. 43B, § 20 *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 7,10-11 (1975).

A vote of town meeting may replace a board of health with a department. The health department shall consist of a commissioner of health who shall exercise the duties of the board of health with the advice of an advisory council of health. G.L. c. 111, § 26A. In addition, G.L. c. 41, § 21 allows a vote of a special town meeting or a petition filed by ten percent of the qualified voters at least sixty days before an annual

town meeting to place on the annual town meeting warrant the question of whether the board of selectmen may act as the board of health or may thereafter appoint the board of health. If the voters approve of the question by a majority vote on the ballot, the term of office of the current board terminates upon qualification of their successors. After a vote has been in effect for a period of not less than three years, a town may vote to rescind such action, in whole or in part by a vote at a meeting held at least thirty days before the annual town meeting. This is extremely rare in Massachusetts. In fact, in the few instances where the board of selectmen acted as the board of health, town meetings have repealed this (i.e.: Deerfield, Nantucket, etc.).

If a town votes under G.L. c. 41, § 21 to have its selectmen act as board of health, then G.L. c. 41, § 102 allows the selectmen to appoint an inspector of health to assist the selectmen in the performance of their duties as board of health. If a town does not exceed three thousand inhabitants, the selectmen, acting as the board of health pursuant to § 21, may appoint the school physician to be the inspector of health. In a town that has five thousand or more inhabitants, the board of health must appoint a full-time inspector of health.

## Removal, Resignation of Members

A municipality cannot remove members of a board established under state law, such as a board of health, even where there is cause for removal, unless there is statutory or charter authorization for removal. Since there are no statutory provisions for the removal of members of a *town* board of health, they cannot be dismissed or removed in mid-term unless a charter provision or special legislation so provides. *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 7 (1975); *Attorney General v. Stratton*, 194 Mass. 51, 54-56 (1907). The mayor, however, may remove a member of a *city* board of health for cause and fill the vacancy by appointment. G.L. c. 111, § 26. If a person is removed from a board by mayoral action, the due process provisions and protections of G.L. c. 43, § 61 apply. *Davidson v. City of Pittsfield,* 84 Mass.App.Ct. 1131 (2014).

No resignation of a town official is effective until it is filed with the town clerk or until such later time as specified in the resignation. G.L. c. 41, § 109. An appointed board member may resign by voluntarily tendering his resignation and having it accepted by his appointing authority. *Campbell v. Boston*, 337 Mass. 676, 678 (1958); *Jones v. Town of Wayland,* 374 Mass. 249 (1978).

## Filling a Vacancy

If there is a vacancy in an elected town board of health, the selectmen, along with the remaining members of the board of health, shall fill such vacancy. The board of health must notify the selectmen in writing within one month of the vacancy. In the case of a resignation, the town clerk shall notify the executive officers of the town. The selectmen must give one-week notice of the meeting at which the vacancy will be filled.

A roll call majority vote of the combined boards is required for appointment. If the board of health fails to notify the selectmen within one month of the vacancy, the vacancy shall be filled by the board of selectmen. *See*, G.L. c. 41, § 11. If the board is an appointed board, any vacancy will be filled by the appointing authority.

When a city or town elects a new board member to perform the duties of an existing board member, the term of the existing board member terminates upon qualification of the new board member. G.L. c. 41, § 2; 7 *Op. Att'y Gen.* 417 (1924). G.L. c. 41, § 107 requires every elected and appointed member of a town board to take an oath of office and "before entering upon his official duties, be sworn to the faithful performance thereof."

## Charter Provisions

General Laws Chapter 43B, as well as the Home Rule Amendment, allows municipalities to adopt home rule charters governing their form of government. A charter may establish a unique blend of appointed and elected boards for a particular municipality, may determine the number of members of a board, the term of office and may merge or divide the responsibilities of local offices. A municipal charter is the functional equivalent of law. A charter may make other provisions for the election or appointment of a board of health. *See Del Duca v. Town Administrator of Methuen*, 368 Mass. 1 (1975). A charter supersedes any General Laws to the contrary as to whether a local board such as the board of health is appointed or elected, its composition, and its authority to hire and supervise staff G.L. c. 43B, §20.

# CHAPTER 3

# ADMINISTRATION OF BOARDS OF HEALTH

## Proper Governance of Boards of Health as Public Bodies

There are certain important statutes that boards of health should know and understand in order to function properly and avoid potential embarrassment. They are the Open Meeting Law, G.L. c.39, §23A *et seq*.; the Public Records Laws, G.L. c.66, §5A and §10, and G.L. c.4, §7 and Conflict of Interest Laws found at G.L. c. 268A.

At the outset, since so many unwitting infractions of these laws occur in the setting of a "meeting," we need to define what a "meeting" is, under Massachusetts law. According to the AG, a "meeting" is a deliberation by a public body with respect to any matter within the body's jurisdiction. If a body intends to hold a meeting and deliberate, there must be notice to the public. Because the results of this rule could be detrimental to the business of the public body, there are five statutory exemptions listed in G.L. c. 30A, § 18. These include: on-site inspections, so long as the members do not deliberate; attendance at public or private gatherings, so long as there is no deliberation; at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate; attendance at a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it[5]; or a session of a town meeting convened under Section 9 of Chapter 39 which would include the attendance by a quorum of a public body at any such session. *See Id* at § 18 (a-e). It is common that Boards of Health may have a

[5] While this provision is in the OML, it has limited application to municipal boards, such as boards of health only after a full public hearing on a quasi-judicial matter. In this way, the adjudicatory deliberations conducted by state administrative agencies after adjudicatory hearings have been held are not open to the public. Boards of health often conduct adjudicatory hearings in public. If they have accorded parties their full procedural rights in such adjudicatory proceedings, and have received all evidence presented, the members of the board who are acting "quasi-judicially" in the conduct of the adjudicatory proceeding should be free to discuss the matter privately and to deliberate upon it in reaching their decision behind doors closed to the public. The public is thus denied any right to know directly what were the determinative factors and considerations which actually influenced the members of the board in making their decision except, of course, as the members of board may wish to reveal that information or may feel obliged by law to set forth those factors and considerations in their formal decision. Because the board members are acting as judges in reaching quasi-judicial adjudicatory decisions, they are entitled to reach their decisions in closed meetings just as judges in reaching collegial decisions are entitled to reach their judicial decisions in closed meetings. A proceeding is quasi-judicial when it determines individual rights or interests, as opposed to political or legislative issues. *Warren v. Hazardous Waste Facility Site Safety Council,* 392 Mass. 107, 117, 466 N.E.2d 102 (1984)

town-wide issue that requires coordination with another board, such as planning or the selectmen. In such a situation, if the it is best to notice a joint meeting, so that both boards can discuss the common issues freely.

These laws impose a legal obligation on all municipal boards to conduct their meetings in public, to develop a written record that is the basis for official decisions, and to provide access and a copy of these records to any person.

## Open Meeting Law

While it is mandatory that all Board of Health members become aware of the Open Meeting Law, and that there are mandatory training sessions, Board members are cautioned that the law is constantly evolving, and as elected and appointed officials, board members are held to the standard of knowing the latest developments. The Attorney General's Office has recently revised the Open Meeting Law ("OML") regulations at 940 CMR 29.00 – 29.11. While the intent of several of the amendments was organizational or intended to remove superfluous terms, there are also several important substantive changes. This update summarizes the most important amendments to the regulations, which may be found in their entirety at the Attorney General's website at https://www.mass.gov/the-open-meeting-law. Board members must familiarize themselves with these new regulations, which are currently in effect.

The Open Meeting Law requires that all meetings of governmental bodies be open to the public, and that any person be permitted to attend any of these meetings. Except in an emergency, notice of every board meeting shall be filed with the clerk of the city or town and the notice should also be publicly posted at least forty-eight hours, excluding Saturdays, Sundays and legal holidays, prior to such meetings. The October 6, 2017, revisions to the Code of Massachusetts Regulations give the power to the municipality's Chief Executive, to determine how Open Meeting notices are to be posted, if done in a way other than a bulletin board. This provision allows website notice. But websites are not flawless, so in the event that there is a website crash, there is a short window permitted to perform repairs, after which the meetings must be cancelled, and new notices posted. The revisions also mandate the notice must show the date and time of posting on its face. *See,* 940 C.M.R. Part 29.03 Despite this requirement for open meetings, the law does recognize that public officials may need to conduct certain business privately. As a result, there are ten narrowly construed exemptions to the Open Meeting Law found in G.L. c. 30A, § 21(a)[6] which permit governmental bodies to

[6] "1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual…" This provision lays out extensive protections for the person who is the subject of such a proceeding, which *must* be followed. Board members who are invoking this section are cautioned that they should be familiar with this sub-section.

"2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;

meet in private executive session rather than in a public forum. In addition, there are five mandatory steps to be followed in order to convene an executive session, see G.L. c. 30A, § 21(b).[7] These are discussed below in more detail.

Although there are ten enumerated permissible reasons for Executive Session, not all are applicable to Boards of Health in most instances. The purposes most relevant to boards of health are:

- To discuss the reputation, character, physical condition or mental health, rather than the professional competence, of an individual, or to discuss the discipline or

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3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;

4. To discuss the deployment of security personnel or devices, or strategies with respect thereto;

5. To investigate charges of criminal misconduct or to consider the filing of criminal complaints;

6. To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;

7. To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;

8. To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;

9. To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, …" Again, there are significant caveats that should be looked at by the board prior to invoking this subsection.

"10. to discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier…." This provision is inapplicable to boards of health."

[7] (b) A public body may meet in closed session for 1 or more of the purposes enumerated in subsection (a) provided that:

1. the body has first convened in an open session pursuant to section 21;

2. a majority of members of the body have voted to go into executive session and the vote of each member is recorded by roll call and entered into the minutes;

3. before the executive session, the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;

4. the chair shall publicly announce whether the open session will reconvene at the conclusion of the executive session; and

5. accurate records of the executive session shall be maintained pursuant to section 23.

dismissal of, or to hear complaints or charges brought against a public officer, employee, staff member, or individual, provided that, unless waived by all parties in writing, the individual involved in the executive session has been notified in writing by the board at least forty-eight hours prior to the proposed executive session. The individual involved in such executive session must be notified in writing by the board at least forty-eight hours prior to the proposed executive session, unless such notice is waived by agreement of the parties. An open meeting must be held if the individual involved requests that the meeting be open. If an executive session is held, the individual has the right to be present, to speak on his own behalf and to have counsel or other representative present for the purpose of advising said individual but not to actively participate in the executive session. This purpose may be somewhat limited in the instance of an appointed board, where that board has limited supervisory power over the health agent and the staff. Caution should be taken to assure that the board is not overstepping its authority.

- To conduct collective bargaining sessions or contract negotiations with nonunion personnel. Under this provision, it is important to note that the actual name of the nonunion personnel must be included in the notice of Executive Session as well as in the open session as it moves to convene in executive session. *Wayland School Committee,* OML 2014 – 141. A discussion with the town counsel or city solicitor does not automatically fall under this clause; it applies only if the discussion relates to litigation or collective bargaining strategy. *District Attorney for the Plymouth District v. Board of Selectmen of Middleborough*, 395 Mass. 629 (1985).

- To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the board. The “litigation” part of this application may be used where the board is discussing potential actions such as site assignments and enforcement activities. See *Suffolk Construction v. DCAM,* 449 Mass. 444 (2007). It is interesting to note and observe that many of the OML complaints are filed by litigants who are private parties, and are entitled to meet with their attorneys and freely discuss issues that are privileged between that party and their attorney, but that same party somehow feels that the municipality should not enjoy the same free flow of information with *its* attorney. See OML 2017-176 a complaint against the Harvard Board of Health.

- To investigate charges of criminal misconduct or to discuss the filing of criminal complaints. In the days of boards dealing with sex trafficking being disguised by “body works establishments,” illegal/non-compliant housing accommodations, and various inter-agency functions in which boards participate involving potential criminal issues, this exception is becoming more relevant.

- To comply with the provisions of any general or special law or federal grant-in-aid

requirements. This provision can be tricky, in that the board may have an issue that may be sensitive, and for which a description of the agenda item might possibly compromise the very subject matter to be discussed. The parameters of this provision are laid out in the AG's opinion finding that the State Ethics Commission violated OML by posting insufficient information. That decision, OML 2018-10, distinguishes between justified withholding of detail, and when more detail should be given. It lays out the instances where too much information could compromise confidentiality, versus the public's right to know. A public body entering executive session under Purpose 7 must state the specific law that requires the public body to keep its deliberations confidential, unless doing so would defeat the lawful purpose for secrecy. See *District Attorney for the N. Dist. v. School Committee of Wayland*. 455 Mass. 561, 569 (2009). Similarly, when invoking this ground for purposes of discussing a grant-in-aid that contains confidentiality provisions, the specific federal grant-in-aid provision mandating confidentiality must be mentioned. A thorough search of all decisions of the AG does not turn up a single determination of OML violations where grants-in-aid were the subject, but with increasing trends of boards of health writing and receiving grants, special care must be taken to recognize the potential harm that can come from public action, where the grant calls for discretion.

- To consider and interview applicants for employment by a preliminary screening committee or subcommittee appointed by the board, if an open meeting will have a detrimental effect in obtaining qualified applicants. This does not apply to any meeting to consider and interview applicants who have passed a preliminary screening. There is one seminal decision dealing with screening committees and executive session, and that decision is one of the longest, at 17 pages, and most thorough discussions of how *not* to conduct preliminary screenings. In OML-2011-34, the UMass Board of Trustees did almost everything wrong, and took considerable heat for its transgressions.

- To meet or confer with a mediator with respect to any litigation or decision on any public business within the board's jurisdiction involving another party, provided that the decision to participate in mediation shall be made in open session, the issues and parties involved shall be disclosed, and no actions shall be taken with respect to the mediation without deliberation and approval at an open meeting.

Before an executive session can be held pursuant to one of the exemptions, strict requirements must be met. No executive session shall be held until the board has met in a public session, for which notice has been given. A majority of the board members must vote by roll call to meet in the executive session, and the presiding officer must recite the purpose for the executive session into the record, and the clerk should make an accurate record of the verbiage invoking the executive session, as well as the names of those voting pro and con in the roll-call vote. It is also important that the chair announce, prior to the executive session, whether or not the board will reconvene after the executive session. G.L. c. 30A, § 21(b).

The board of health must also maintain accurate records of its meetings. The records must set forth the date, time, place, members present or absent and the action taken at each meeting, including executive sessions. It need not set forth a verbatim record of the meeting, but can be a summary of proceedings, including minority and majority opinions, where relevant. There can never be a secret ballot in an open meeting. There must be a list of all documents looked at or considered by the Board. The records of each meeting shall become public records and must be available to the public for examination. Records of executive sessions can remain secret only for as long as it is necessary to protect the lawful purpose of the session. If the board was involved in litigation, obviously deliberating about litigation strategy in public would be detrimental to the board's position. All matters to be discussed in anticipation of litigation and during the pendency of the case are shielded from the public and discussed in executive session.

Under the old statutes, restrictions against "meeting" did not apply to any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. G.L. c. 39, § 23B. The current OML eliminated this language, and prohibits "meetings" which instead are defined as "a deliberation by a public body[8] with respect to any matter within the body's jurisdiction," but explicitly excludes "attendance by a quorum[9] of a public body at a public or private gathering, including a conference or training program or a media, social or other event, *so long as the members do not deliberate*." G.L. c. 30A, § 18 (emphasis added). *See, Letter Re: Town of Winchendon Board of Selectmen,* AG Correspondence dated 10/14/10.

The town or city clerk is required under the Open Meeting Law to provide copies of the law to all new board members. Newly appointed or elected board members must sign a certification within two weeks of taking the oath of office. They must certify that they have received copies of the Open Meeting Law, the Open Meeting Regulations, the Attorney General's Open Meeting Law Guide, and copies of any adverse findings by the AGO against that board of health in the past five years. G.L. c. 30A, § 20(h); 940 C.M.R. 29.04. For those being reelected or reappointed, a new certificate must be signed. The members should familiarize themselves with the law, bearing in mind that the purpose of the law is to require that municipal agencies, commissions, boards,

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[8] A "public body" is defined as a "multi-member board, commission, committee or sub-committee … however created, elected, appointed or otherwise constituted, established to serve a public purpose. A subcommittee shall include any multiple member body created to advise or make recommendations to a public body. *See,* Open Meeting Law Guide. There are certain exclusions from the definition of "public body." Specifically excluded are the State Legislature, the judicial branch, not-for-profit organizations, State Constitutional Officers and their committees & subcommittees, Groups that do not take action where no votes are taken or report produced, such as focus groups gathered for fact finding.

[9] A "quorum" under the OML is a simple majority of the board. Therefore, fewer than a majority can get together and discuss committee business without that being considered a "deliberation," provided that those sub-quorum members are not a subcommittee, and that a serial discussion does not result. Extra caution is advised for any of those members to not discuss with or send emails to other members of the board.

committees and subcommittees conduct their business and make their decisions under full public scrutiny. The business of government should be transparent. The Supreme Judicial Court has held that a municipal board violated the state's Open Meeting Law by emailing amongst themselves comments on the performance of their superintendent of schools. In the case, *District Attorney for the Northern District v. School Committee of Wayland*, 455 Mass. 561 (2009), the Chair of the School Committee distributed an aggregation of the Superintendent evaluations, which would have been fine, but along with the aggregation, each of the individual evaluations was sent. The AG ruled that, since they contained opinions, the individual evaluations were "deliberations," and violated OML.

Electronic communication containing "deliberations" between a quorum of a governmental body violates the Open Meeting Law. However, there are certain exemptions from this prohibition. Members of a public body may distribute a communication containing scheduling information and agendas. If there is a document or report to be discussed at the meeting, it can be sent but with no comment whatsoever about the document.

Although meetings of a governmental body are open to the public, no member of the public shall address the body without the permission of the presiding officer. The presiding officer may order disruptive persons to leave. In certain instances, a constable may be ordered to remove a disruptive person from the meeting. G.L. c. 30A, § 20(g).

In 2006, § 23D was added to G.L. c. 39. This section addresses member-voter disqualification at adjudicatory hearings. Upon municipal acceptance of this section, a board member is not disqualified from voting in the matter due to that member's absence from a single session of the hearing at which evidence is received. Prior to voting, the member must certify in writing that he has examined all evidence received at the missed session. This evidence must include an audio or video recording of the missed session or a transcript thereof. A city or town, by ordinance or bylaw, may adopt additional requirements at scheduled board hearings.

In the event of a breach of the OML, aggrieved citizens may file a complaint with the Attorney General under the procedures set forth in G.L. c. 30A, § 23(b). This procedure is available to enforce the OML in the general session as well as executive session. Some cities and towns seem to have disproportionate numbers of complaints. In such instances, there are often concerned citizens who, for a variety of reasons, tend to look for infractions and file a disproportionate number of complaints with the AGO.[10] The recent revisions to the Code of Massachusetts Regulations has taken this into account, and has created an option for public bodies to request mediation with a complainant who has filed five or more complaints within the prior 12 months. This

[10] As of April of 2018, all the boards, committees, commissions, etc. subject to the OML in the Town of Wayland, had 48 OML complaints filed. Of those, 42 were filed by the same citizen. Similarly, the Town of Ashland had 39 complaints, 33 of which were filed by one citizen. Of course not all complaints were found to be violations.

option is for public bodies that respond to frequent complaints from the same complainants and may assist in resolving ongoing conflicts. If the public body requests mediation and the complainant fails to participate, then the Attorney General may decline to review the complaint. 940 CMR § 29.05.

For more information on the Open Meeting Law, see https://www.mass.gov/the-open-meeting-law.

One point must be discussed here, and that is using caution when engaging in social media posting. The issue is pervasive, yet there is very little definition of the board member's responsibilities in this area. There have been surprisingly little OML determinations taking into account how many public officials resort to Facebook and Twitter to tell the world of their issues. In November of 2018, there was a determination in favor of the Provincetown Board of Selectmen. In OML 2018-145, the Attorney General opined: "Nonetheless, we remind the Board that social media may not be used to facilitate discussion between or among a quorum of its members. Where a social media group is closed to the public—as the Provincetown Women's Collective group was in this case—it raises concerns that conversations may be happening outside of public view. When comments are made on an individual public body member's social media account or on an open social media group, those comments are more likely to be targeted towards a general public. When comments are made in a closed group, it is reasonably inferable that posts are directed solely at the members of that group, and, when a quorum of a public body belongs to a closed group, it becomes likely that posts and comments are targeted towards the other public body members. See OML 2017-111 (in determining whether improper deliberation took place, a communicator's intended audience must be examined). While the closed group at issue certainly had a large number of members, it is nonetheless closed to the public, as an administrator's approval is required before individuals may view the posts. We commend Ms. Andrews' removal of herself from the group once this issue was raised."

In another determination in 2018, the AGO stated, "Recognizing that it may be difficult to determine whether communication constitutes deliberation under the Open Meeting Law, our office cautions public bodies on the use of Facebook and other social media." OML 2018-153 (December 10, 2018)

## Public Records Law

The Public Records Law (PRL) reflects the Legislature's judgment that the public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner, and that greater access to information about the actions of public officers and institutions is essential to public confidence in government. *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), *People for the Ethical Treatment of Animals, Inc. (PETA) v. Department of Agricultural Resources*, 477 Mass. 280 (2017).

The Public Records Law is embodied in G.L. c. 66, § 10, and is within the purview of the Secretary of the Commonwealth, while the OML is under the Attorney General. The Public Records Access Regulations are set out in 950 CMR 32.00 *et seq.* In 2016, the Public Records statute underwent some revisions. Acts of 2016, Chapter 121. In this revision, a new position called a Records Access Officer (RAO) was created. Agencies and municipalities are required to designate one or more RAOs and post conspicuously who that is. Under the new law, the RAO is to:

- Coordinate the response to requests for access to public records;
- Assist individuals seeking public records in identifying the records requested;
- Assist the custodian of records in preserving public records; and
- Prepare guidelines that enable requestors to make informed requests.

The new law also mandates that the requested records be produced in an electronic format, unless they are not stored that way. The new law set January 1, 2017, as the date, after which, the RAO must post commonly requested records on their web pages, to the extent feasible.

The right to inspect public records is provided to any person, even if that person is motivated by idle curiosity. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976), *Logan v. Commissioner of Dept. of Indus. Accidents*, 68 Mass.App.Ct. 533, review denied 449 Mass. 1105 (2007). Public records are defined in G.L. c. 4, § 7(26). The definition is very broad and includes practically all information made or received by any board of health officer or employee. The definition includes documents made or received by a public officer or employee including: all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics.

Public records include payroll records, *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 816 (1978); as well as complaints, inspections, reports and correspondence pertaining to housing code violations, *Cunningham v. Health Officer of Chelsea*, 7 Mass. App. Ct. 861 (1979). If a board of health enters into a settlement agreement that has a confidentiality clause as part of the settlement of a lawsuit, that information cannot be withheld if a public records request is properly filed. *Champa v. Weston Public Schools*, 473 Mass 86 (2015). Personally identifying[11] information may be redacted, but the settlement's financial details must remain open to the public. *Id.*

Email is a public record and is subject to the provisions of the Public Records Law. For more information on guidance on retention of email records, see https://www.sec.state.ma.us/pre/prepdf/A-Guide-to-Massachusetts-Public-Records-Law-2017-Edition.pdf

[11] Any inquiries relating to the PRL may be directed to the Division of Public Records, by telephone at (617) 727-2832, Monday-Friday (except holidays) from 8:45 AM to 5:00 PM, or by email at pre@sec.state.ma.us. There is an "attorney of the day" assigned to answer any questions.

Generally, the public records statute favors disclosure by creating a presumption that the record sought is public. *In Re Subpoena Duces Tecum*, 445 Mass. 685 (2006). However, there are twenty specific exemptions to the general rule requiring disclosure of public records. Any materials or data that fall within any of the exemptions need not be made public. *People for the Ethical Treatment of Animals, Inc. (PETA) v. Department of Agricultural Resources,* 477 Mass. 280, 282 (2017). The exemptions include all records that are:

- specifically, or by necessary implication exempted from disclosure by another statute. G.L. c. 4, § 7(26)(a), *Attorney General v. Collector of Lynn,* 377 Mass. 151 (1979);

- related solely to internal personnel rules and practices of the city or town, provided however, that such records shall be withheld only to the extent that is necessary for proper functioning of the municipality. This exemption includes evaluations of public employees. G.L. c. 4, § 7(26)(b); *Connolly v. Bromery*, 15 Mass. App. Ct. 661, 664 (1983);

- personnel and medical files or information; any other documents that would constitute an unwarranted invasion of an individual's personal privacy. G.L. c. 4, § 7(26)(c);

- inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the board. This does not include reasonably completed factual studies. G.L. c. 4, § 7(26)(d);

- notebooks and other materials prepared by an employee which are personal to him and not maintained as part of the files of the town. G.L. c. 4, § 7(26)(e);

- investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest. G.L. c. 4, § 7(26)(f);

- trade secrets or commercial or financial information voluntarily provided to the board for use in developing governmental policy upon a promise of confidentiality. This does not include information submitted as required by law or as a condition of receiving a government contract or benefit. G.L. c. 4, § 7(26)(g);

- proposals and bids to enter into any contract or agreement until the time for the bids or proposals to be opened publicly; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person. G.L. c. 4, § 7(26)(h);

- appraisals of real property until a final agreement is made, or any litigation concerning the appraisal is completed, or the time within which to commence the litigation has expired. G.L. c. 4, § 7(26)(i);

- questions, answers and other materials used to develop, administer or score a test, examination or assessment instrument, provided that these materials are intended to be used again. G.L. c. 4, § 7(26)(l)

- contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self-insured and provides health care benefits to its employees. G.L. c. 4, § 7(26)(m);

- records … which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure, the disclosure of which is likely to jeopardize public safety. G.L. c. 4, § 7(26)(n);

- the home address and home telephone number, of an employee of an agency, department, board, division or authority of the commonwealth, or of a political subdivision thereof, in the custody of a government agency which maintains records identifying persons as falling within those categories, as well as the name, home address and home telephone number of family members of such employees contained in a record in the custody of a government agency. G.L. c. 4, §7 (26)(o).

There are no strict rules that govern the manner in which requests for public information should be made. Requests may be made in person or in writing. Written requests may be made in person, by mail, facsimile or email. An RAO must provide information on her custodian's website with respect to requests for public records. It should be noted, however, that a telephonic request may or may not be honored, at the discretion of the public body. A requester must provide the RAO with a reasonable description of the desired information.

Every person having custody of any public record shall, at reasonable times and without unreasonable delay, permit it to be inspected and examined by any person and shall furnish one copy upon payment of a reasonable fee. If only a portion of a record is

public, and that portion can be separated from the nonpublic portion, the public portion must be made available for inspection. G.L. c. 66, § 10. Unless otherwise prescribed by statute or involving search or segregation time, the reasonable fees to be charged for copies of public records are set by state regulations, which provide, among other charges, that photocopies of a public record shall be no more than twenty cents per page. For copies of public records maintained on microfilm or microfiche the fee shall be no more than twenty-five cents per page. For computer printout copies, the fee may be no more than fifty cents per page. For copies not susceptible to ordinary means of reproduction, the actual cost of providing a copy may be assessed. For requests for non-computerized public records involving search and segregation time, a prorated fee based on the hourly rate of the lowest paid employee capable of performing the task may be assessed in addition to the per page copying fee. For a search of computerized public records, the actual cost incurred from the use of the computer time may be assessed. 950 C.M.R. 32.06. The person for whom a search is made shall pay the actual expenses of such search. G.L. c. 66, § 10(a).

Within ten days after receiving a request for inspection or a copy of a public record, a custodian of a public record must comply with the request. G.L. c. 66, § 10(b) specifies that the request be made either in hand or by first class mail. If the custodian does not comply with the request, the person making the request may petition the state supervisor of records for a determination of whether or not the record requested is a public record. If it is determined by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the request. If the custodian fails to comply with the order, the supervisor of records may notify the attorney general or the district attorney who may take the necessary measures to ensure compliance. G.L. c. 66, § 10(b). There is a presumption that the record sought is public, and the custodian bears the burden of proving that a specific exemption applies. G.L. c. 66, § 10(c), *Globe Newspaper Co. v. Police Com'r of Boston*, 419 Mass. 852 (1995), *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass.App.Ct. 1, review denied 419 Mass. 852 (2003), *Coleman v. Boston Redevelopment Authority*, 61 Mass.App.Ct. 239 (2004). *PETA, supra,* 477 Mass., at 282.

As of January 1, 2017, if a response to a public records request requires more than 2 hours of employee time, a **municipal RAO** may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record. However, the fee shall not exceed $25 an hour, unless approved by the Supervisor of Records. Municipalities with populations of 20,000 people or fewer will be permitted to charge for the first 2 hours of employee time.

Also, as of January 1, 2017, the new law allows the requestor to file an appeal with the Supervisor of Records, who will issue a determination of whether the requested records are public within 10 days of receipt of the request for the appeal. If the issue is taken to court, the litigation will be assigned to the Attorney General, and if the requestor prevails in court, all fees and costs may be awarded to the requestor.

Every board shall designate a person as clerk. The clerk shall enter all the board

votes, orders and proceedings in books and shall have custody of the books. G.L. c. 66, § 6. Boards of health are specifically authorized to appoint a clerk under G.L. c. 111, § 27.

### a. Reference time-table

The day of the request is not factored into the timetables. All times begin on the day following the receipt of the request.

1. Within TEN business days, the *initial response* is due. Failure to initially respond will result in a forfeiture of the right to charge fees for the records. On this day, the records must be produced, or the request must be denied in writing with reasons for denial set forth and invoking one of the twenty listed reasons for exemptions. Under the 2016 revision of this law, the RAO must permit inspection of the documents, even if a copy is not forthcoming.

2. Within TWENTY business days, if additional time is needed, the deadline for petitioning the State Supervisor of Records is 20 business days after service of the original request. Also, if your board is seeking to charge more than $25.00 per hour of employee time for the retrieval, or to charge for time redacting and segregating the documents, that must be in the petition, filed by this time.

3. Within TWENTY-FIVE days of the request, all records must be produced, unless there has been an extension granted by the Supervisor, or if the requestor agrees to an extension.

4. The Supervisor may grant *up to* 30 additional business days for the production, unless the request is deemed frivolous or harassing. This additional 30 days runs from the date the Supervisor grants the extension.

### b. Content of the ten-day response

The response to the request must satisfy nine criteria. The responding board must:

1. Confirm receipt of the request, including the date.

2. Identify which records or categories of records are not within possession or custody of the board, but if the RAO knows where those records may be found, she must identify the agency that has the responsive documents, if known;

3. Identify any records that the RAO is withholding and/or redacting, stating the reasons and should assert the applicable exemptions;

4. Identify records produced or intended to be produced and, if a delay is likely, must give a detailed reason for the additional time.

5. Identify timeframe for production, (which must be within 25 business days after receipt of request without extension) and explain why the request unduly burdens other responsibilities, in the office.

6. If it is going to take more than 25 days to respond, that should be in the ten-day response, and the requester should be put on notice of a possible/actual petition to Supervisor for extension of time. The requestor should be asked to assent to the extension.

7. If it looks as though a modification of the request may ease the burden, this letter should suggest that.

8. A good faith estimate of the retention and reproduction fees should be included in this response. If your municipality has fewer than 20,000 residents, your population may support the imposition of fees.

9. There must be a recitation of the requestor's rights to an administrative appeal to the Supervisor of Records under 950 CMR 32.08(1), and the right to seek judicial review of any unfavorable decision by commencing a civil action in the Superior Court pursuant to G.L. c. 66, § 10A(c).

### c. Enforcement

In 2010, enforcement of the Open Meeting Law was transferred from the 11 District Attorneys to the Attorney General's office. Therefore, the Attorney General's office currently enforces both the Public Records Law and the Open Meeting Law. Complaints concerning either law should be made to the Attorney General, although if any issues arise during the pendency of the Public Records Process, those issues are within the jurisdiction of the Division of Public Records of the Secretary of the Commonwealth. The involvement of the Attorney General is appropriate only after the expiration of all Secretary of State deadlines.

General Laws Chapter 66, § 17C, which regulates the public records, provides that three or more registered voters, the Attorney General or the District Attorney may file a complaint in court requesting that the court order a governmental body to carry out any of the provisions for public notice of meetings, for holding open meetings, or for maintaining public records at its future meetings. In hearing the complaint, the burden rests on the governmental body or official to show by a preponderance of the evidence that the action complained of was in accordance with the law.

The court order may also require the records of any executive session meeting

be made public, unless justice requires that secrecy be preserved. The court order may also include a civil fine against the governmental body of no more than $1,000.00 for each intentional violation of G.L. c. 30A, § 23(c)(4). If the public body was proceeding in good faith reliance on advice of counsel, there will be no fine. G.L. c. 30A, § 23(g); 940 CMR 29.02

## Authority to Hire and Fire

Boards of health have exclusive authority, subject to any contrary provisions in a charter, to hire, fire, supervise and establish contracts with officers, agents, and assistants they deem necessary to execute the health laws and regulations. General Laws chapter 111, § 27 states:

> Every such board shall organize annually by the choice of one of its number as chairman. It may make rules and regulations for its own government and for the government of its officers, agents and assistants. It may appoint a physician to the board, who shall hold his office during its pleasure, may choose a clerk, who in a city shall not be a member of the board, and may employ the necessary officers, agents and assistants to execute the health laws and its regulations. It may fix the salary or other compensation of such physician and its clerk and other agents and assistants.

This does not mean that a three-person board may add a previously unelected or unappointed doctor to the board as a board member. In fact, G.L. c. 111, § 26 mandates that in a city form of government, the mayor must appoint the members of the board, one of whom must be a physician.

Where the legislature delegates a particular job or function to a local body, such as authorizing the board of health to employ agents and fix salaries, the local body becomes an agent of the state for that purpose, as opposed to an agent of the town. *Breault v. Auburn*, 303 Mass. 424, 427-428 (1939); *Board of Health of North Adams v. Mayor of North Adams*, 368 Mass. 554, 567-568 (1975). The court in *Breault* held that the town had no authority to vote at a town meeting to direct the board of health to make a contract with the health agent on different terms from those already agreed upon between the board and the agent. That case held that a municipality cannot exercise control over one whose duties have been defined by the legislature. *See, Anderson v. Selectmen of Wrentham,* 406 Mass. 508 (1990); citing, *Daddario v. Pittsfield*, 301 Mass. 552, 558 (1938).

No bylaw or ordinance can be passed that would conflict with a law established by the general court. Mass. Const. Amend. Art. II, section 1. Due to the express legislative mandate in G.L. c. 111, § 27 giving boards of health power of appointment, removal, and the ability to fix the salary and compensation of its agents, a bylaw or ordinance establishing a practice otherwise would be in conflict with an act of the

legislature. In *Daddario v. Pittsfield*, 301 Mass. 552, 558 (1938), the court held that a municipality can exercise no direction or control over one whose duties have been defined by the legislature. Further, in *Gibney v. Mayor of Fall River*, 306 Mass. 561, 565-566 (1940), the court upheld a board of health's appointment despite the mayor's disapproval precisely for the reason that the power of appointment is within the board of health's authority. However, as noted above, a charter provision to the contrary will supersede G.L. c. 111, § 27.

The courts have interpreted G.L. c. 111, § 27 to support the boards of health in disputes with other town boards and officials on employment matters. Even though the statute and case law clearly establish the board of health's autonomy on employment matters, there is an apparent inconsistency with the provisions of G.L. c. 111, § 27 and the statute governing personnel matters, G.L. c. 41, § 108A, which provides:

> a town bylaw may establish a plan classifying *any or all positions, other than those filled by popular election and those under the direction and control of the school committee*, into groups and classes doing substantially similar work or having substantially equal responsibilities. Such town may in like manner establish a plan establishing minimum and maximum salaries to be paid to employees in positions so classified. [emphasis added]

This statute appears to grant the authority to town meeting to establish a bylaw classifying all town positions excluding elected positions and those under the control of the school committee. Although there is no case directly on point, the principles of conflict jurisprudence indicate that a specific statute, G.L. c. 111, § 27, granting boards of health exclusive authority over their agents and assistants would prevail over a more general statute, G.L. c. 41, § 108A, granting the town the authority to classify all town positions.

The rule that a municipality can exercise no direction or control over a board whose duties have been defined by the legislature is subject to some limitations. While G.L. c. 111, § 27 gives the boards of health exclusive authority to establish salaries, those salaries are subject to provisions of the budget law, G.L. c. 44, § 31:

> No department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department, each item recommended by the mayor and voted by the council in cities, and each item voted by the town meeting in towns, being considered as separate appropriation, except in cases of major disaster, which poses as an immediate threat to the health and safety of persons or property (and then subject to some limitations).

The purpose of the budget law is to prevent expenditures in excess of appropriation. While there are specific instances where the state can order a municipality to pay out funds for public purpose in the absence of an appropriation (statutory obligation to chlorinate municipal water supply, *Commonwealth v. Town of*

*Hudson*, 315 Mass. 335 (1945); fluoridation of water supply pursuant to general law, *Board of Health of North Adams v. Mayor of North Adams*, 368 Mass 554 (1975)), salaries for agents and employees are subject to appropriations made under the provision of the budget law.

In addition, boards of health should be aware that union issues are governed by state and federal labor laws that may preempt local action. As a result, the board of health cannot ignore union issues. While unions confer certain protections to workers, there are occasions where a union's collective bargaining agreement can stand as an impediment to proper public health administration. One example of such a provision is found in bargained items prohibiting non-union members, including department administration, from attending and participating in certain unionized employee actions. For instance, in some collective bargaining agreements the Health Agent or Director or other managerial staff is precluded from going into restaurants with inspectors to evaluate the restaurant's suitability to operate, or even more restrictively the manager cannot attend an inspection for purposes of professional development and training. Similarly, in smaller towns which have one public health nurse, union regulations can be disruptive if that nurse avails him or herself of comp time during peak demand periods such as the weeks leading to the beginning of the school year.

## Authority to Enter into Contracts

It is well settled case law that public officials cannot make contracts on behalf of the municipality without express authority to do so. Public officials have only such powers to enter into contracts as are conferred by express terms or necessary implication of statute. *Fluet v. McCabe*, 299 Mass. 173,178 (1938); *White Construction Co, Inc. v. Commonwealth*, 385 Mass. 1005 (1982); *City of Boston v. Back Bay Cultural Association, Inc.,* 418 Mass 175 (1994) . G. L. c. 40, § 4 enables a municipality to make contracts on such terms and conditions authorized by town meeting or city council with the approval of the mayor or city manager or as otherwise authorized in accordance with a municipal charter. As with public officials generally, members of boards of health cannot enter into contracts without statutory authority. Boards of health cannot contract for legal services or employ counsel unless that power is expressly conferred. *O'Reilly v. Scituate*, 328 Mass. 154 (1951); *Howes v. Essex*, 329 Mass. 381, 384 (1952). A town board has no inherent implied right to counsel. *Board of Public Works of Wellesley v. Board of Selectmen of Wellesley*, 377 Mass. 621 (1979). In that case, the court noted that the purpose of prohibiting municipal boards from retaining separate counsel to initiate litigation is to "prevent confusion or conflict in the direction and management of municipal litigation." *Id*. at 624. The Supreme Judicial Court set forth an established rule as follows:

> It is conventional learning that a municipal department is not permitted to bring suit for the town without specific authorization from the town or from agents entitled to act for it – unless, indeed, there is governing legislation conferring the power on the department.

Boards of Health have specific statutory authority to enter into employment and salary contracts with agents and employees. G.L. c. 111, § 27. Boards may also enter into contracts for specific services as provided in G. L. c. 40, § 4. See, *Marble v. Town of Clinton,* 9 N.E. 2d 522 (1937).

## The Conflict-of-Interest Law

The Conflict-of-Interest Law, G.L. c. 268A, sets minimum standards of ethical conduct for all municipal employees and officials. Board of health members are municipal employees and are bound by the conflict of interest law. Conflict of interest laws may differ between municipal, county and state employees. All municipal employees, whether elected or appointed, full or part-time, paid or unpaid, must abide by the restrictions of the law. The purpose of the law is to ensure that a municipal official or employee's private financial interests and relationships do not conflict with their official municipal responsibilities. The law is written broadly in order to prevent a municipal official from becoming involved in a situation which could result in a conflict or even give the appearance of a conflict.

Some municipal employees may be designated as special municipal employees. A municipal employee may be given special employee status by a vote of the board of selectmen or city council, provided that the employee (1) is not paid; or (2) holds a part-time position which allows them to work at another job during normal work hours; or (3) they were not paid by the city or town for more than 800 working hours during the preceding 365 days. Certain sections of the law apply less restrictively to special employees. It should be noted that a municipal position is designated as having a special status, not an individual. Therefore, all employees holding the same office or position must have the same classification as special municipal employees.

### a) Activities Covered by the Law

The Conflict of Interest Law applies to a variety of activities. For example, Section 2 prohibits bribes. If a board member seeks payment to perform or not perform official duties in a certain manner, the law imposes penalties upon the member seeking to receive the payment as well as the party who offers the payment.

Section 3 of the law applies to the acceptance of gifts. You may not accept a gift or anything of substantial value ($50.00 or more), given to you because of the position you hold on the board, or in return for work you performed that was part of your job responsibilities. Even if a person gives you this gift simply to thank you for doing a good job, you as a board member may not accept the gift. You may accept a gift of less than $50.00 provided that it is not intended as a bribe. *Any bribe*, however, no matter how little its value, will violate the conflict of interest law.

Section 17 pertains to outside activities of municipal officials. Generally, a regular municipal employee cannot be compensated by anyone other than the municipality in relation to any particular matter in which the municipality is a party or has a direct and substantial interest. Even if the interest is held by another agency in the municipality, other than the board of health, you cannot be compensated by another party in relation to the issue. If you are a regular municipal employee, you may not act as an agent or attorney for a private party before city or town boards. This restriction applies whether you are paid or not.

A "special" municipal employee may represent private parties before town boards other than the board of health, unless that representation pertains to a matter in which you participated, or which is now or within the past year was within your official responsibility as a member of the board of health. If your representation would involve matters reviewed by the board of health, you cannot represent a private party before any municipal board.

Section 18 deals with the activities of former municipal employees. It prohibits a former municipal employee from using the relationships which they develop during their employment, and the confidential information which they were privy to, to gain unfair advantages. If you participated in a particular matter as a municipal employee, you can never become involved in that same matter after you leave municipal service. Partners of a former municipal employee are bound by the same restriction for one year. If you had official responsibility for a particular matter as a member of the board, you may not appear personally before any agency of your city or town on behalf of a private party in connection with this matter, for a period of one year after leaving the municipal position.

Under Section 19, you may not act as a board of health member on a matter that affects your own financial interest or that of your immediate family, or that of a business or organization in which you serve as an officer, director, partner or trustee. You must also refrain from acting on matters that affect your business competitors. If a member of a board of health has a member of his or her immediate family that is employed by the health department, or the board, that board member is forbidden to participate in any way in the formulation, adoption or revision of any aspect of the committee's budget which may relate to the wages, hours or conditions of employment of the family member, except that, if particular budget items are considered separately and are approved by a qualified quorum and are included in a consolidated vote on all or part of the budget, the board of health member may participate in the consolidated vote. *Graham v. McGrail,* 370 Mass. 133 (1976).

This section is also referred to as the anti-nepotism statute. As a member of the board of health, you may not have any significant involvement in the hiring of an immediate family member, or in decisions relating to pay raises, promotions, etc. You also may not have day-to-day supervision of an immediate family member. G.L. c. 268A, § 21 (*a*), provides that a violation of the conflict of interest law which has substantially influenced the action taken by the municipal agency, "shall be grounds for

avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third persons require." *Sciuto v. Lawrence,* 389 Mass. 939 (1983) (as a matter of law the violations of § 21(*a*) "substantially influenced" the city council's action in appointing the chief of police).

There are two possible exceptions to this rule. *Appointed* board members may act on matters involving their financial interest if they obtain prior written permission from their appointing authority. The second exception allows members of the board to act on any matter of general policy that affects a substantial segment of the community's population in the same way. In addition, the rule of necessity allows a member with a conflict to act if the board cannot obtain a quorum. If possible, you should obtain advice from counsel or the State Ethics Commission prior to invoking the rule of necessity.

Section 20 concerns municipal contracts. A member of the board of health is prohibited from having a direct or indirect financial interest in a contract made by any municipal agency. If you discover that you have a financial interest in a contract made by a municipal agency, you must fully disclose your financial interest to the agency and terminate or dispose of your interest within thirty days. There are a number of exceptions which allow you to contract with *other* town agencies, such as where it is publicly bid. There are very few instances where you may contract with the board of health, however, you should consult with your city solicitor or town counsel, or the State Ethics Commission for specific questions.

A contract includes a salary from the city or town. Accordingly, holding more than one position where at least one is paid could be a conflict of interest. There are numerous exceptions to this rule, also, which are beyond the scope of this handbook. Consult with your city solicitor or town counsel or the State Ethics Commission for specifics.

Section 23 provides the general standards of conduct that are required of municipal employees. A municipal employee may not: (1) accept other employment involving compensation of substantial value if the responsibilities of the other employment conflict directly with the responsibilities of his public office; (2) use his public position to obtain unfair privileges and advantages that are of substantial value and not available to others; (3) act in such a way that reasonable people would believe that he could be improperly influenced or act in violation of his public duties. A municipal employee can avoid the appearance of a conflict by disclosing, in writing, to his appointing authority, or if an elected official, by disclosing in writing and filing this disclosure with the city or town clerk, any facts or information which might cause a reasonable person to believe that he was being unduly influenced or might be obtaining unfair privileges for himself or others. The seminal case involving illegal gratuities under §21, involved a State Representative who failed to report a series of gifts and gratuities from lobbyists to himself and his family, which resulted in significant fines. *In the Matter of Angelo Scaccia,* Ethics Commission Docket No. 529 (2001).

## Enforcement

The State Ethics Commission was established by the legislature to enforce the conflict-of-interest law. District attorneys and municipal officials also have a responsibility to enforce the law at the municipal level. Anyone can file a complaint if they have reason to believe that the conflict-of-interest law has been violated. You may file a complaint by writing, calling or visiting the State Ethics Commission. The Commission is required by law to keep the identity of all complainants confidential, G.L. c. 268B, § 4, and G.L. c. 268B, § 8, shields a complainant from retribution if they file a complaint with the Commission.

Board members may call the State Ethics Commission's Legal Division for informal advice regarding the conflict-of-interest law. You may also seek written advisory opinions from your town counsel, city solicitor or the State Ethics Commission if you have any questions about the law or about any of your own actions. It is extremely important that you, as a member of the board of health, become familiar with the conflict-of-interest law, and that you seek advice prior to committing any actions which may be a violation of the law.

# CHAPTER 4

# GENERAL AUTHORITY TO REGULATE

Local boards of health are primarily responsible for providing public health services to their communities and protecting those they serve from environmental health risks utilizing a three-pronged approach. First, the board must assess the health needs of the community as a whole. Second, once those needs are identified and quantified, the board must develop policies and procedures to address them. Finally, the board must assure that the resources are procured and deployed in a manner consistent with its goals.

The challenge is in the fluid nature of risk and prevention. Differing issues spawn differing needs; science evolves opening new opportunities on one side or presenting new challenges on the other; and regulations from the state and federal governments redefine the overall regulatory scheme, forcing local boards to be vigilant in order to stay current.

## Health Board Regulations – Background

Charged with the protection of the public health, boards of health fulfill their duty by developing, implementing, and enforcing health laws. "The focus of public health is to protect the health of every member of a community." *American Lithuanian Naturalization Club, Athol, Mass., Inc. & others v. Board of Health of Athol & another*, 446 Mass. 310 (2006). One step in this process is the adoption of local health regulations pursuant to Massachusetts law. Boards of health have statutory powers to develop regulations in many areas of environmental health. G. L. c. 111, § 31 gives boards general regulatory power to adopt reasonable health regulations. Sections 31A and 31B address the removal, transportation and disposal of refuse. Section 122 addresses nuisances, § 127 addresses house drainage and sewer connections. Section 127A addresses the sanitary code and § 143 addresses (noisome/ offensive trades).

Boards of health should be aware that the procedural requirements for adoption of regulations under these different sections may vary. Similarly, appeal and penalty provisions will also differ. Each of these sections and others are examined in greater detail elsewhere in this handbook.

It is a long-settled principle of law that it is manifestly within the police power of the municipality to protect the health, safety and welfare of its residents. *Ralston v. Commissioner of Agric.,* 334 Mass. 51, 57 (1956); *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 138 (1949); *Commonwealth v. Moore,* 214 Mass. 19, 24 (1913). Boards of health are not subject to the state administrative procedure act, G.L. c. 30A §§ 10, 1.

*Arthur D. Little, Inc. v. Com'r of Health*, 395 Mass. 535 (1985). This means that if the record reveals errors of law, someone challenging the board of health decision has a legal right to appeal. *Board of Health of Woburn v. Sousa*, 338 Mass. 547 (1959).

Board of health regulations "stand on the same footing as would a statute, ordinance or bylaw." *Druzik v. Board of Health of Haverhill,* 324 Mass. 129, 138 (1949). *RYO Cigar Ass'n, Inc. v. Boston Public Health Com'n*, 79 Mass.App.Ct. 822 (2011) ("As a general rule, we give health regulations promulgated by local boards like the commission the kind of deference we accord statutes.") *See, Tri–Nel Mgmt., Inc. v. Board of Health of Barnstable,* 433 Mass. 217, 220 (2001); Moreover, "[a]ll rational presumptions are made in favor of the validity of [the regulations]." *Druzik,* 324 Mass. at 134. Courts will only strike a Board of Health regulation when the challenger proves, on the record, "the absence of any conceivable ground upon which [the rule] may be upheld." *Arthur D. Little, Inc. v. Com'r of Health*, 395 Mass. 535 (1985) (quotation and citations omitted). If the public health issue is "fairly debatable," the court cannot substitute its own judgment for that of the Board of Health. *Id*. (citations omitted). This rule preserves the separation between the powers of the legislature and its administrative agencies and those of the judiciary. *Id.* (citations omitted). In addition, said rule acknowledges that Boards of Health are the experts in the area of public health policy. *Id*. (citations omitted).

The Supreme Judicial Court has repeatedly upheld the broad regulatory authority of boards of health. Most recently, the Court upheld a regulation that prohibited all smoking in private clubs. *American Lithuanian Naturalization Club, Athol, Mass., Inc, & others v. Board of Health of Athol & another*, 446 Mass. 310 (2006). The court held that nothing in G.L. c. 111, § 31, or our prior case law warrants a conclusion that members of a community may be protected by health regulations only when they are in a location to which the public has access. Even if smoking members choose to disregard the overwhelming evidence of the serious health consequences of smoking, the board rationally could be concerned about the exposure of non-smokers to a "known human carcinogen" *Id.* Regulatory action under G.L. c. 111, § 143, may be struck down only if it is "shown to be 'unreasonable, arbitrary, whimsical, or capricious.' *New Ventures Associates, LLC v. Board of Health of Newburyport,* 73 Mass. App. Ct. 1116 (2009).

Additionally, boards of health have broad authority to enforce its regulations. *See* G.L. c.111, § 27 (authorizing Boards of Health to "employ the necessary officers, agents and assistants to execute the health laws and its regulations"). Boards may issue enforcement orders. In the event the order is ignored, Boards of Health may seek and obtain injunctive orders in Superior Court ordering a violator to comply with the order or be found in contempt of court. G.L. c. 111, § 187, § 189. Boards of health may also suspend, revoke or refuse to issue a permit after a hearing, notice and opportunity to be heard. *Butler v. Town of E. Bridgewater*, 330 Mass. 33, 38, 110 (1953). In addition, boards may levy specified fines and collect them through criminal proceedings in district court. *E.g.,* G.L. c. 111, § 31; G.L. c. 111, § 122; G. L. c. 111, § 31C. Alternatively, boards may, if authorized by the municipality, issue tickets and thereby collect fines through the less arduous non-criminal method of disposition. G.L. c. 40, § 21D.

Additionally, boards of health may, if authorized by the municipality, suspend any license it has issued to any person who has neglected and/or refused to pay a fine issued under the non-criminal method of disposition. G.L. c. 40, § 57.

A person's business is a property right and is therefore entitled to protection against regulations that violate constitutional guaranties. Unless the regulation is justified as a valid exercise of the police power, the regulation would be declared unconstitutional because enforcement would deprive a person of his property without due process of law. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921), *quoted in S.S. Kresge Co.,* 267 Mass. at 151. Persons regulated pursuant to a valid regulation, however, cannot complain that their business has been injured by the exercise of the police power for the benefit of the public health. "The right to engage in business must yield to the paramount right of government to protect the public health by any rational means." *Druzik,* 324 Mass. at 139; *Lawrence v. Board of Registration in Medicine,* 239 Mass. 424, 428 (1921).

"[T]he regulations should be so clearly expressed that those who may be subject thereto shall not have to guess at its meaning'." *Druzik,* 324 Mass. at 134, *quoted in*, 332 Mass. 721, 726 (1955). Whether it be a regulation or an order by the board of health, it is important that the intent of the board be clear. Plain language and simple drafting are all that is required.

> Boards of health are likely to be composed of laymen not skilled in drafting legal documents, and their orders should be read with this fact in mind. They should be so construed as to ascertain the real substance intended and without too great attention to niceties of wording and arrangement.

*Board of Health of Wareham v. Marine By-Products Co.,* 329 Mass. 174, 177 (1952); *Cochis v. Board of Health of the Town of Canton,* 332 Mass. 726 (1955); *accord*, *Kineen v. Board of Health of Lexington, 214 Mass. 591* (1913), *accord*, *City of Taunton v. Taylor*, 116 Mass. 254, 261 (1874).

Regulations may be prospective in nature. That is, boards of health may require precautions to avoid potential dangers as well as to restrict conditions actually harmful. *City of Waltham v. Mignosa*, 327 Mass. 250, 251-52 (1951); *Commonwealth v. E.E. Wilson Co.*, 241 Mass. 406, 410, (1922); *Town of Holden v. Holden Suburban Supply Co., Inc.,* 343 Mass. 187, 191 (1961).

Regulations adopted pursuant to the board's rule making authority, such as regulations adopted under §31 and §43, do not require a hearing (unless they are relative to Title V, *see*, Chapter 4) or findings of fact. *Arthur D. Little v. Commissioner of Health and Hosp. of Cambridge*, 395 Mass. 535, 543 (1985). "It is well established that agency is not obligated to provide a statement of reasons which support its adoption of a regulation." *Borden, Inc. v. Commissioner of Pub. Health*, 388 Mass. 707, 723 n.9, *cert. denied sub nom. quoted in Arthur D. Little*, 395 Mass. at 543. *Formaldehyde Inst., Inc. v. Frechette*, 464 U.S. 936 (1983).

However, MAHB strongly suggest holding a public hearing before enacting a regulation that affects businesses or members of a municipality. Holding a public hearing gives the board of health an opportunity to hear what the public thinks about a proposal and an opportunity for the public to provide input to the board.

## General Regulatory Powers

§31 of G.L. c. 111, is an unusually broad grant of authority which empowers boards of health to adopt "reasonable health regulations." The power of boards of health to adopt regulations under §31 is extensive. Enactment of §31 "provided a comprehensive, separate, additional source of authority for health regulations." *Board of Health of Woburn v. Sousa*, 338 Mass. 547, 550 (1959). "Section 31 was passed as legislation of broad and general scope, after [the predecessor statutes] had been on the statute books for many years. The legislative history shows no purpose to limit its scope." *Id.* at 551-52.

In *Brielman v. Commissioner of Pub. Health of Pittsfield*, 301 Mass. 407 (1938), the city board of health had adopted a regulation prohibiting the sale of unpasteurized milk unless it had been certified according to provisions of state law. The regulation prevented the sale of three of the eight classes of milk established by the state milk regulation board. The regulation was challenged, and the court stated that boards of health "may make regulations that are more stringent than the general law." *Id.* at 410. A strict insistence upon a high standard of purity and safety in milk, in fact higher than that required by the state, was determined to be well within the police power of the board of health.

Adoption of a regulation under §31 requires a majority vote of the board of health. As mentioned previously, except for Title 5 (septic) regulations, no hearing is required, but a summary of the regulation must be published in a locally published newspaper or, if there is none, in a paper which has local circulation. For Title 5 regulations, a public hearing must be held, and notice of the time, place and subject matter must be published in a newspaper "of general circulation" in the community once in each of two successive weeks. The first publication must be at least 14 days before the hearing. Absent such a newspaper, notice must be posted for 14 days. The board must state at the hearing "the local conditions which exist or reasons for exceeding" Title 5. Boards must file with DEP attested copies of all public health regulations adopted under §31, as also required by c. 21A, §8.

A board of health may fine a violator of health regulations up to $1,000.00 if no penalty by way of fine or imprisonment or both is provided by some other law or in the local regulation. For regulations adopted only pursuant to §31, penalties in excess of $1,000.00 are invalid. *Cochis*, 332 Mass. at 726-27. In order to enforce a fine more than $300 and up to $1000, an application for a criminal complaint must be filed in district or housing court. A fine of $300 or less may be enforced by the noncriminal disposition

procedure. G.L. c. 40, § 21D. See discussion of noncriminal dispositions, below.

# Permits and Fees

## a. General

A board of health can require a permit, set a fee, or require substantive performance standards as part of a regulation. Boards may regulate by describing in a regulation all possible conditions under which an activity can be conducted without substantial injury to the public health without having to include a requirement for a permit. In some instances, it would be difficult, if not impossible, to specify in a regulation conditions under which a person could conduct an activity without board of health review. The board may instead require a permit, whereby the board makes a decision based upon evidence presented on a case by case basis. *Butler v. Town of E. Bridgewater*, 330 Mass. 33, 37 (1953).

Permits and fees may be authorized by a state statute or regulation, such as a construction work permit and fee authorized by Title 5 of the State Environmental Code under 310 C.M.R. §§ 15.02(7) and 15.02(9) (1978), or a permit for the transportation of garbage or refuse required by G.L. c.111, § 31B. Boards of health may also require permits and set fees where there is no direct statutory authorization for a specific type of permit, but a permit is a necessary part of their general regulatory power. For instance, boards of health could adopt regulations, pursuant to their general regulatory powers under G.L. c.111, § 31, to require every person who owns or operates a genetic engineering facility to register and receive a permit prior to operation. Boards may also require an entity that sells tobacco to receive a tobacco sales permit in order to sell and can set a maximum number of permits to be issued.

Boards of health may also be authorized to require permits and set fees pursuant to a town bylaw or city ordinance. If the amount of the fee is not determined by statute, boards may set the amount of the fee. All money received by a municipal officer or department must be turned over, upon receipt, to the municipal treasury for deposit into the general municipal fund. Any money paid into the treasury shall not be later used by the officer or department who received it without an appropriation by means of a revolving fund by town meeting or city ordinance. G.L. c.44, § 53, *Mayor of Haverhill v. Water Comm'r of Haverhill*, 329 Mass. 63, 67-70 (1946). An exception is made for provisions of special acts, for money received under G.L. c.71B (relating to education), and for fees provided for by statute.

## b. Fees and Charges

Fees imposed by the municipality tend to fall into one of two categories: user fees, based on the rights of the municipality as proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power

to regulate particular businesses or activities. *Emerson College v. Boston*, 391 Mass. 415, 424 (1984).

Fees are distinguishable from taxes in that: 1) they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society"; 2) they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service; and 3) the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses*. Id.* at 424-425. *See also, Murphy v. Massachusetts Turnpike Authority*, 462 Mass. 701, 705 (2012). "Fees are not taxes," even if the only way to avoid payment is to relinquish the right to develop one's property. *Denver Street LLC v. Town of Saugus*, 462 Mass. 651 (2012).

The Supreme Judicial Court has upheld the authority of boards of health to require burial permit fees as valid regulatory fees. *Paul F. Silva v. City of Attleboro & others*, 454 Mass. 165 (2009).

The case law is clear that municipal boards and officials do not need statutory authority to adopt licensing and permit fees. Any statutory authorization to a municipality or to a board to regulate includes authorization to require licenses and licensing fees "to cover reasonable expenses incident to the enforcement of the rules." *Commonwealth v. Plaisted*, 148 Mass. 375, 382 (1889), *quoted in Southview Co-operative House. Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 400 (1985); *National Cable Television Ass'n v. United States,* 415 U.S. 336, (1974), (Fees can be considered "paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge ... and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses."

Further, if the authority to regulate includes the authority to require licenses and licensing fees, the authority to regulate also includes the authority to exact fees to defray the cost of conducting hearings and performing other services. *Southview Co-operative House. Corp*., at 400. As the court observed in *Boston v. Schaffer*, 26 Mass. (9 Pick.) 415, 419 (1830), "[t]owns are put to expense in preserving order and it is proper that they should be indemnified for inconveniences or injuries occasioned by employments of this nature." G.L. c. 40, §22F.

Even though boards have inherent authority to adopt licensing and user fees, the legislature has specifically provided statutory authorization for the imposition of such fees and charges. G.L. c. 40, § 22F authorizes municipal boards or officials empowered to issue a license, permit or perform a service or work to fix reasonable fees after the municipality has accepted the provisions of § 22F by a vote of town meeting or the city council. G.L. c. 44, § 53G provides that certain municipal board regulations, including the board of health's regulations adopted under G.L. c. 31, § 111, can provide for the imposition of reasonable fees for the employment of outside consultants.

Municipalities may set fees and charges and if those fees and charges are

currently established by statute, may increase them beyond the state statutory level. General Laws c. 40, § 22F, authorizes municipal boards or officers who issue licenses, permits or certificates to fix reasonable fees for such licenses and permits "issued pursuant to statutes or regulations wherein the entire proceeds of the fee remain with such issuing municipality."

Additionally, § 22F permits an increase of fees and charges beyond the statutory limit, except the board may not supersede fees and charges already set under G.L. c. 6A, §§ 31-37 (health care services approved by the Rate Setting Commission); G.L. c. 80 (betterment assessments); and G.L. c. 83 (sewer assessments).

Boards must be careful which fees and charges it chooses to raise. The fee must be for a license or service authorized by a state statute or regulation, not by a town bylaw or city ordinance. Additionally, the entire proceeds of the fee must be retained by the municipality in its general fund, unless there is a special local appropriation that states otherwise.

More importantly, § 22F authorizes the municipality to fix reasonable charges to be paid for any services rendered or work performed by the municipality or any department, for any person or class of persons.

The municipality must accept the provisions of G.L. c. 40, § 22F by a town meeting vote, by a vote of the city council with the approval of the mayor in cities, or by a vote of the town council in towns with no town meeting.

### c. Revolving, Special, and Enterprise Accounts

Many boards seek the establishment of revolving fund accounts in order to "earmark" receipts to defray the costs of the program the account is tied to. There are specific steps that must be followed to establish such accounts. The Massachusetts Division of Local Services maintains a web page dedicated to revolving accounts setting forth types of accounts, whether it is a Town Meeting/City Council function and how those funds are to be managed.[12]

While in the usual stream, all revenue received by a municipality must be deposited into the general fund, there are methods available for boards of health to set up special accounts that allow revenue/expenditure streams to be segregated from the general fund. These are "Revolving Funds" and "Special" Accounts.

#### i. Revolving Fund

The monies in a revolving fund are segregated from other monies received by a municipality. One advantage to such a fund, is that it creates a pool of monies available

[12] https://www.mass.gov/files/documents/2017/09/08/revolvingfundchartnonschool.pdf.

to finance the board's continuing operations without any fiscal year limitation because the funds are replenished by repaying money into the account. The board replenishes a revolving fund with the fees it collects for a given activity.

There are strict statutory requirements for establishing a revolving fund. Under G.L. c. 44, § 53E½, the requirements for are:

- City/town approval by ordinance or bylaws;
- Specify program and purpose;
- Specify department receipts that may be credited to the fund;
- Department authorized to expend from the fund;
- Limit on the amount that department may spend;
- Expenditures made without appropriation;
- Established by vote of annual town meeting upon recommendation of the board of selectmen, or by the city council in a city upon recommendation of the mayor;
- The fund must be authorized annually.

There are ten specific steps which must be taken in order to establish a revolving fund.

1. Determination by chief financial officer or municipal treasurer if a revolving fund can be established in the first place. No fund can be established if the aggregate of all funds already authorized exceeds ten percent of the total amount raised by taxation in the most recent fiscal year;
2. Board of health must vote to establish a revolving fund. It this is voted affirmatively, the board prepares a warrant article in a town and an ordinance in a city. The input of Town Counsel or the City Solicitor is vital;
3. The warrant article or ordinance is sent to Board of Selectmen, Mayor or City Manager for recommendation to the appropriate legislative body of the town or city;
4. The warrant article or ordinance is then presented at town meeting, city council, etc. for approval. The board members are urged to discuss this article in advance with key legislative branch members;
5. Once up and running, it is not uncommon that the account may need adjustment. Accordingly, the limit on the expenditure cap may need to be increased upon approval of the city council and mayor in a city, or approval of the selectmen (and finance committee if established) in a town;
6. The board of health must keep records of all expenditures and receipts during the year. Revolving funds are a frequent target of Public Records Requests, and all dealings must be well documented;
7. Each year a complete accounting, including a full report of receipts and expenditures must be presented by the board of health at the annual town meeting, or to the executive and legislative branches of a city;
8. If a revolving fund is not reauthorized as part of the mandate for annual approval, in the next fiscal year any balance shall be deemed "surplus revenue" unless there is a vote to transfer the balance to another revolving fund;

9. All earned interest shall become general revenue of the city or town and deposited accordingly;
10. Revolving fund expenditures can be made for wages for full time employees. This is the premise relied upon by certain boards to charge fees for certain services in order to pay or subsidize the wages of inspectors.

Boards of health may have special programs such as occupancy inspection programs, cannabis control programs or other inspector-driven programs, where personnel must be hired, yet municipal funds are scarce. In such a situation, the board may wish to deposit the permitting fees and inspectional fees into a revolving fund and use those monies to pay or subsidize the pay of the employee(s) from those funds.

### ii. Special Account

Under G.L. c. 44, § 53G boards may establish a special account for the *employment of outside consultants* using funds supplied by an applicant for a permit. Such accounts used for employment of outside consultants (i.e., peer review of technical issues like siting a noisome trade, or well water and/or soil testing) are called "Special Accounts." One example of when such an account might be created is if a municipality has a particularly troublesome incidence of c. 21E contaminated "state Super Fund" site.

The municipality could charge offenders permitting and/or inspection fees. Those funds could be placed in a special account to be used to employ a Licensed Site Professional (discussed in this guide in the Chapter 7, the chapter on hazardous waste).

G.L. c. 44, § 53G was amended in 1990, clarifying already existing authority which enabled different municipal boards to establish special accounts for consultant fees and to set out a uniform procedure by which the fees may be imposed and collected. The amendment also sets out an administrative appeal process, but the grounds for appeal are limited to claims that the consultant selected has a conflict of interest.

Pursuant to § 53G, in order to establish special accounts, the board must adopt regulations. The account is generally established by the chief financial officer of a municipality, with funds segregated from other municipal accounts. The funds, plus interest earned, may be expended by the board without appropriation. In most cases once the board has accumulated sufficient funds, a consultant is hired within that budget item. Once the project is completed and the services of the consultant are no longer needed, excess funds, together with interest, must be paid back to the applicant for whom the municipality was providing services.

Section 53G authorizes boards of health to amend regulations adopted pursuant to G.L. c.111, § 31 to establish a fee system which shall be used only for the purpose of employing an outside consultant. Note that the term "consultant" does not include legal counsel. (*See*, section below, "Use of Outside Counsel").

According to the language in § 53G, both the fee schedule and the procedure must be set out within the regulation. The collected fees are held in a segregated account by the city or town treasurer and any unexpended balance, with interest, shall be returned to the applicant. A model board of health regulation is included in Appendix A.

The accountant for the municipality must perform an annual audit to be submitted to the selectman or city council and mayor or city manager. All contracts awarded by the local board under the provisions of § 53G are subject to compliance with the bidding laws of G.L. c. 30B.

Expenditures from this special account may be made at the direction of the board of health without further appropriation as provided in Massachusetts General Laws Chapter 44, § 53G. Expenditures from this special account shall be made only in connection with the review of a specific project or projects for which a review fee has been or will be collected from the applicant. Failure of an applicant to pay a review fee shall be grounds for denial of the permit application.

### iii. Enterprise Fund

There is a third optional non-general-fund account. This is called an "Enterprise Fund." Under G.L. c. 44, § 53F½, an enterprise fund is geared towards a *service.* Like the two accounts discussed above, this is a separate account requiring approval and is established for depositing revenue and expending costs for a particular service. It can only be established for certain narrowly defined purposes. These include operating a utility, health care, recreational, or transportation facility, referred to as the "enterprise." All receipts, revenues, and funds derived from the activities of the enterprise must be deposited into this account.

### iv. Choosing a type of fund

The decision as to which type of fund to use will depend entirely on the circumstances and scope of the funded target. There are seven points to be considered when deciding the best type of account. These are:

- How is the fund to be implemented?
- What are the specific financial requirements?
- What is the scope of the service or program being provided?
- Does the program require capital expenditures?
- What is the revenue source?
- Is the annual level of receipts predictable or does it vary based on arbitrary demand?
- Are there sufficient annual revenues to pay expenses?

Boards of health usually chose a revolving account. It is important to stay on top of the

annual renewal issue, and not let the program and account lapse.

### d. Uniform Procurement Act

During recent years there has been considerable confusion whether the Uniform Procurement Act applies to boards of health and its employment of outside consultants G.L. c.30, *et. seq.* Because the administrative cost of complying with the Uniform Procurement Act often exceeded the actual cost of hiring a consultant, the Massachusetts Department of Public Health requested that the state legislature amend the statute to exclude boards of health from this law. Accordingly, the state legislature amended the Procurement Act to exclude "municipal department[s] of health." G.L. c. 30, § 27.

Although most municipalities call their volunteer boards of health "municipal department[s] of health," no such entity exists in Massachusetts law. To date, no court has reviewed this section of the Procurement Act. The Massachusetts Department of Public Health and most city and town attorneys have, however, interpreted that language as including any entity which may legally perform the function of the board of health including: (1) boards of selectmen; (2) boards of health; (3) health departments; and (4) any entity created by a special act of the legislature.

The Office of the Inspector General has rejected that interpretation and concluded that "municipal department[s] of health" include only *health departments* created pursuant to G.L. c. 111, § 26A. Only a small handful of communities have actually abolished their boards of health and created *health departments.* Boards of health should consult with legal counsel for an opinion about whether the Uniform Procurement Act applies to the employment of outside consultants.

### e. Use of Outside Counsel

Boards may not hire outside attorneys without the approval of the board of selectmen even if consultant funds are available. It is well settled case law that a department of a city or town has no authority to employ counsel, unless there is legislation conferring the power on the municipal board or officer. *O'Reilly v. Scituate*, 328 Mass. 154 (1951); *Varsity Wireless Investors, LLC v. Town of Hamilton,* 370 F.Supp.3d 292, 2019 WL 1440402 (D. MA. 2019).

In the *O'Reilly* case, an attorney with considerable zoning experience was hired by the planning board to advise them of their duties. The planning board relied upon language in their enabling legislation as conferring the necessary authority to employ counsel. The legislation states: "[S]uch board may employ experts and clerical and other assistants." G.L. c. 41, § 81A. The question was whether the word "experts" included legal counsel. The court determined that the language must be explicit in order to hire counsel.

> It is doubtless true that the word expert may be used in a sense that includes counsel, but ordinarily we think of an expert as one who furnishes assistance and advice in fields other than law. When legal counsel is meant it is usual to say so. *O'Reilly* at 155.

The long line of decisions denying inherent or implied right to counsel was affirmed in *Board of Public Works of Wellesley v. Board of Selectmen of Wellesley*, 377 Mass. 621 (1979), where the court stated that there is no "right to engage separate counsel to give advice or to litigate." *Id.* at 628. The only recourse is to request the selectmen permission to engage independent counsel or to seek town meeting approval for independent counsel. *Id*. at 629. This reasoning was relied upon by the Land Court in *Garrett v. Connor,* 2010 WL 53782 (2010). In one recent case, a group of plaintiffs acting *pro se*, were not allowed to proceed in an action against a developer, in part because they were not engaged properly as counsel to litigate on behalf of the planning board*.,* Mass. Land Court, 2016 WL 2986055 (2016).

### f. Municipal Lien Charges

A town may impose a lien upon real estate for any local charge or fee that has not been paid by the due date, "provided that a separate vote at town meeting...is taken for each type of charge or fee." For example, if the board of health sets a fee or a charge pursuant to G.L. c. 40, § 22F, or imposes a fee for the cost of outside consultants, pursuant to G.L. c.44, § 53G, and the applicant fails to pay the consultant fee, the town may place a lien on the subject property. An annual vote of town meeting should authorize the town to place a lien on real property where the applicant has failed to pay building inspector or plumbing inspector fees, consultant fees under G.L. c. 44, § 53G or fees and charges imposed by G.L. c. 40, § 22F.

In the event of a condemnation that gives rise to a cleanup by the municipality, a board of health is empowered to act under the emergency provisions of 105 CMR 400.200(B) and clean or repair any dwelling that it deems may impair the health or safety and well-being of the occupant or public, should the owner be unwilling to do so. The board of health may collect any and all expenses incurred from the responsible party under 105 CMR 410.960.

### g. Permits

If the board of health requires a permit as part of the regulatory process, it should set out standards on which it will rely in reaching a decision to issue a permit. It is not necessary for those standards to be excessively detailed, for it may be impossible "to specify in what circumstances permits should be granted and in what circumstances denied. Each case must depend upon its particular facts." *Butler*, 330 Mass. at 37. Nonetheless, the board is obligated in its regulation to provide a standard or guideline that the board will use in exercising its permit-granting authority.

If a permit is required for an activity, then the board of health, which has the power to grant or to withhold the permit, must decide "in a fair, judicial and reasonable manner upon the evidence as presented...keeping in mind the objects of the applicable regulation." *Butler*, 330 Mass. at 38, *quoted in Sousa*, 338 Mass. at 553, *quoted in McDonald's Corporation v. Board of Selectmen of Randolph*, 9 Mass. App. Ct. 830, 832 (1980). Simply stated, this means that the board must 1) act upon the permit application within a reasonable time and 2) base their decision upon the evidence presented. Note, however, that the board is not compelled to grant a permit. It has discretionary power to deny a permit. There is no absolute right to a permit. *Gulf Oil Corp. v. Board of Appeals of Framingham*, 355 Mass. 275, 277 (1969). A permit is considered a privilege, not a right. A decision by a board can only be overturned if it is "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Hurley v. Keohane*, Land Court 2018 WL 771387 (2018).

The board must act in a timely fashion relative to permits. Complete inaction may be as arbitrary as affirmative action, and it is improper for the board simply to fail to act. *Sousa*, 338 Mass. at 553.

All the information that the board generates or receives during the administrative proceeding constitutes the record. The board must rely upon this evidence, the record, when it makes a decision. A board may not make a decision on the basis of evidence obtained after the closing of the proceeding. *Vitale v. Planning Bd. of Newburyport*,10 Mass. App. Ct. 483, 487 (1980).

An administrative agency, such as the board of health, may reverse a previous decision or make a substantive modification, but it must do so only after notice to, and an opportunity to be heard by, the parties affected. *Huntington v. Zoning Bd. of Appeals of Hadley,* 12 Mass. App. Ct. 710, 714 n.4 (1981); *Vitale v. Planning Bd. Of Newburyport*, 10 Mass. App. Ct. at 487; *Cassani v. Planning Bd. of Hull*, 1 Mass. App. Ct. 451, 456 (1973). Also, this is preconditioned upon the proviso that the change does not adversely prejudice any rights of anyone relying upon the decision. *Shuman v. Aldermen of Newton,* 351 Mass. 758 (1972).

Note that it has been held that a board has:

> "inherent power, without holding a further public hearing, to correct an inadvertent or clerical error in its decision so that the record reflects its true intention... so long as the correction does not constitute a 'reversal of a conscious decision'... does not grant relief different from that originally sought, and does not change the result of the original decision..., and so long as no one relying on the original decision has been prejudiced by the correction."

*Board of Selectmen of Stockbridge v. Monument Inn, Inc.,* 8 Mass. App. Ct. 158, 164 (1979) (citations omitted); *Capobiianco v. Zoning Board of Appeals of the Town of Natick, Land Court,* 2006 WL 1739924 (2006).

### h. Enforcement Orders

Orders of the board of health may be enforced by an application to the Superior Court or the Massachusetts Supreme Judicial Court. G.L. c. 111, § 187 and § 189. All fines and forfeitures incurred under the general laws of the state, or under special laws applicable to a municipality, or local ordinance, bylaw, or regulation shall go to the use of the municipality, and not to the state. G.L. c. 111, § 188.

Boards of health may also file a criminal complaint in district court or, where applicable, housing court for violations of bylaws, orders, ordinances, rules and regulations. G.L. c. 218, § 26.

### i. Non-Criminal Civil Disposition

One of the most effective and least expensive methods of enforcement is G.L. c. 40, § 21D, which allows a municipality to provide for alternative enforcement of its bylaws, rules and regulations by issuing a ticket similar to a parking ticket to violators. Section 21D allows the municipality to provide this enforcement option for the various boards, officers, and departments of the city or town. The bylaw, ordinance, or regulation to be enforced under 21D must provide a specific penalty for violations and no violation can exceed a $300 fine.

The bylaw or regulation that is to be enforced by § 21D must provide a specific penalty for violations, for instance, a monetary fine. Under § 21D, no violation may exceed a three hundred dollar fine. The underlying bylaw or regulation must be in compliance with this limitation, but municipalities often provide for a sliding scale fine within § 21D.

The municipality would have to adopt an omnibus § 21D bylaw or ordinance that lists the bylaws, regulations, or ordinances subject to § 21D enforcement. Appendix C furnishes a portion of an omnibus § 21D bylaw which provides for § 21D enforcement of offenses ranging from animal control to zoning.

The enforcing authority who takes “cognizance” of the violation shall issue a ticket in hand, or give written notice by mail or delivery as soon as possible, but within 15 days of the date of violation. If notice is by mail, a certification of mailing of notice is required. Section 21D provides that a copy of the ticket shall be delivered to the court clerk, who shall maintain a separate docket of all such notices to appear. The city or town clerk should also receive a copy of the ticket.

The ticket gives notice to the alleged violator requiring him or her to appear within 21 days before the district or housing court clerk. The alleged violator may admit to the violation by appearing before the city or town clerk and paying the fine, or by mailing the notice and payment to the municipal clerk. The ticket is a civil penalty, not a criminal penalty. Payment must be by postal note, money order, or check. The municipal clerk must notify the court clerk of payment. Monies received pursuant to a §21D ticket are

deposited into the general fund of the municipality.

Instead of paying the fine to the municipality, the alleged violator may appeal the ticket by filing a notice of appeal with the district court or housing court within 21 days of the date of notice. Following a hearing, the alleged violator shall pay the fine, or, if the court finds that the violation did not occur, a finding is entered that dismisses the matter. The court clerk shall notify the municipal enforcing authority who issued the original ticket of the disposition of the matter which acts as a final disposition.

If the alleged violator fails to appear before the city or town clerk, fails to appeal, or fails to pay the fine, the municipality may file a criminal complaint. Unfortunately, there is no specific penalty for failure to respond to the notice. If the city or town has accepted G.L. c.40, § 57, however, the municipality may by bylaw or ordinance deny any application for, or revoke, or suspend any local license or permit if the alleged violator refuses to pay the fine or to respond to the § 21D ticket. *See*, also § 58.

It is very important that prior to implementation, municipal officials meet with the local district court clerk or housing court clerk to make sure that the clerk's office is familiar with §21D requirements, and to make them aware that this alternative enforcement mechanism is about to be implemented by the municipality. Failure to coordinate with the court clerks, when those courts have not had previous experience with §21D can convert a relatively risk free and inexpensive municipal enforcement option into a bureaucratic problem.

Several cases have discussions of the noncriminal disposition, but none have defined this in the arena of a board of health, as of this writing. *See, Burlington Sand & Gravel v. Town of Harvard,* 31 Mass. App. Ct. 261, (1991) and *Commonwealth v. Weston W.,* 455 Mass. 24 (2009).

# CHAPTER 5

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES:

# Subsurface Sewage Disposal System

## Sewage Systems

### Background

On-site wastewater disposal systems (septic systems) were first used in the early part of the 20th century. Since then, people recognize that septic systems and centralized wastewater treatment plants provide equal pollution control in removal of certain contaminants. The science and technology behind on-site wastewater disposal systems has improved greatly and many states have well-founded policies, procedures and financing mechanisms for on-site wastewater. Here in New England, we have universities which host above ground demonstration and education programs, states which help residents pay for repairs through loans and tax breaks, technology testing sites, and a federal agency just dedicated to improving water quality in our rivers, streams and lakes.

Centralized wastewater systems and on-site wastewater systems offer a solution for controlling pollution. In urban settings, with a high density of houses and industry, a centralized wastewater system is the cost-effective answer. But in a rural area, with few houses, septic systems are the cost-effective answer for the control of pollution from wastewater. Cities and towns are frequently strapped for financial resources, so construction of centralized sewer plants or even laying new pipes in streets has been significantly curtailed. Providing for properly designed, built, and maintained on-site wastewater systems has become a priority for many communities and their residents.

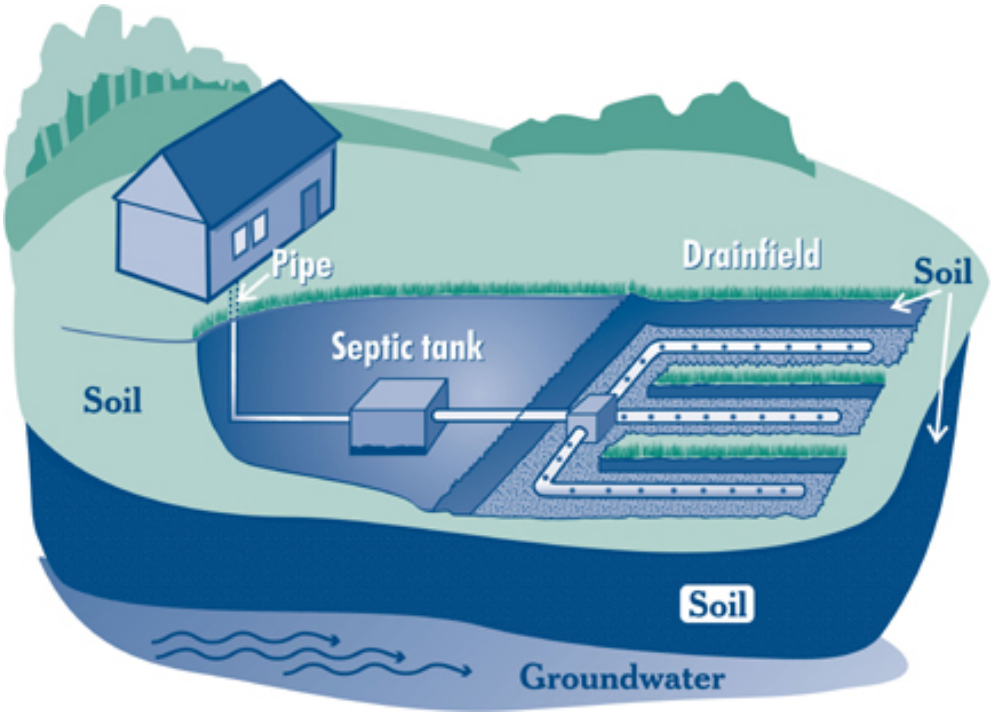
In the early 1900's, the Massachusetts Legislature adopted laws which authorized boards of health to regulate those who build sewage systems and transport sewage. This law is still on the books and allows for the local licensing of septic system construction and pumping, while Title 5 provides the technical standards for local approval of design and construction practices.

### What Is a Septic System?

A septic system is a wastewater treatment and dispersal unit which typically serves a single home or business but could also serve several houses or a

neighborhood. A basic system typically consists of three main parts: a septic tank; a distribution box; and a soil absorption system (typically called a leaching field).

The tank is a box-like structure (usually made of concrete but sometimes of plastic or fiberglass) with an inlet, outlet and access for cleaning. These tanks are intended to always remain full to allow adequate time for settling of material as it makes its way through the water column. Wastewater enters the tank through the inlet. In the tank, solids separate out as sludge, which settles to the bottom, and as scum, which floats to the top. After this period, the wastewater exits the tank through the outlet which is located so that both scum and settled solids are retained inside the septic tank and goes out into the soil absorption area.




Septic tanks must be designed to accommodate the wastewater flow generated in the building(s) they serve. If not, the wastewater will not remain in the tank long enough to allow the removal of settleable solids. Without sufficient time for settlement, or if the tank is not regularly pumped out, solids may be flushed into the soil absorption system, where they may cause clogging and, ultimately, failure of the system.

The distribution box is a simple device to direct the single flow out of the septic system to several parallel portions of the soil absorption system.

While the primary function of the septic tank is solids removal, the soil absorption system removes pollutants from wastewater as it goes from its source of generation to

the receiving environment. The soil absorption system consists of leaching structures which slowly discharge wastewater into the soil. The structures may vary in size and shape, but they are all designed to achieve the purpose of allowing the sewage to soak into the ground and receive final treatment in the soil and sand below it. If the system is well designed and properly installed in unsaturated soils which let the water through neither too swiftly nor too slowly, the wastewater will receive a considerable amount of treatment as it is digested by soil bacteria and filtered through soil particles.

If soils are poorly drained and the system is not designed for that condition, the soil absorption system may clog, leading to sewage back-up, possibly resulting in the overflow of wastewater to the surface of the ground. If the groundwater is too close to the bottom of the soil absorption system, wastewater does not receive proper treatment. This is because most of the treatment takes place in the unsaturated zone between the bottom of the soil absorption system and the water table. Little or no further treatment takes place after wastewater reaches the groundwater. Contamination plumes can travel a long way through groundwater without dispersing.

For these reasons design standards must assure that solids are retained in the septic tank, that the tank has sufficient capacity to allow a reasonable amount of treatment, that effluent is evenly distributed to the soil absorption system, and that the soil absorption system is properly sized, configured, and separated from groundwater at all times of year. These design criteria help to ensure that septic systems meet the requirements of intended use and provide protection for public health, safety, welfare, and the environment.

Title 5 also mandates horizontal setbacks for septic systems. These setbacks establish minimum distances between septic systems and wells, streams, lakes, ponds, wetlands, buildings, water lines and property lines. It is not at all uncommon for a municipality which does not supply sewage services to also not supply potable water to given parts of a city or town. As members of boards of health examine siting of septage, it is crucial that plot plans be closely scrutinized with an eye towards topographical elevation and neighboring water supply. The setbacks serve a number of purposes including to provide room for treatment of wastes, to assure adequate physical space in the event a future repair of a septic system component needs to occur, and to guard against damage from breakout if the system fails. The setbacks are intended to protect public health and prevent contamination of ground and surface waters.

## What is Title 5?

Title 5 is a set of state regulations adopted by the Massachusetts Department of Environmental Protection (DEP) that governs the treatment and disposal of sanitary sewage below the surface of the soil. Approximately one third of Massachusetts residents use subsurface wastewater systems.

Title 5 (a section of the state environmental code found in 310 Code of

Massachusetts Regulations § 115.00) provides **minimum** statewide standards for the design, use, construction and maintenance of septic systems. Title 5 is administered by local boards of health, which may adopt more stringent standards. Originally adopted in 1978, Title 5 was completely revised in the fall of 1994 with slight amendments made subsequently, until the regulation underwent significant revision of several of the more salient Title 5 provisions which became effective on September 9, 2016. See, https://www.mass.gov/files/documents/2017/09/27/310cmr15.pdf, for the full text.

In 2015, Governor Baker issued Executive Order (EO) 562, which mandated that each board, agency, secretariat body under the Executive Department of the state government review each of its corresponding regulations under the Code of Massachusetts Regulations. The EO required that on or before March 31, 2016, those agencies sunset any regulations that are not mandated by law or essential to the *health, safety, environment or welfare* of the residents of the Commonwealth.

On October 9, 2015, the DEP reviewed comments by the Home Builders and Remodelers of Massachusetts (HBRM), which highlighted several issues important to that organization. That document faults local boards of health for, “excessive but not necessarily protective … regulations used as land use tools.” The HBRM critique continues by pointing out that, because of ambitious development over the last three decades, the remaining land available for development are “marginal parcels which leave significant challenges for most of the remaining developable real estate parcels.” The position paper continues with a criticism of the limit of 10,000 gallons of daily design flow per project for a conventional Title 5 septic system. In large projects, this would be prohibitive, as it would require a stand-alone sewage treatment system for developments of over 90 bedrooms. Not surprisingly, HBRM goes on to propose loosening standards for developments with more than 30 units in non-sewered areas.

In addition to those comments, DEP reviewed comments from National Association of Home Builders, which were very similar to and incorporated the HBRM comments; the Town of Harwich, dealing with project funding; The Appalachian Mountain Club, dealing with privy permitting; the US Department of the Interior, dealing with composting projects in National Parklands and actions taken in Vermont and Connecticut; Clivus New England, Inc., dealing with humus/composting toilets; and the Massachusetts Camping Association. The full texts of letters and comments have been posted online at, http://www.mass.gov/eea/docs/dep/service/eo562/eo562title5.pdf.

These regulations are known as a class of rules which are considered “presumptive.” This means that based on DEP’s research, a septic system which is designed, built and maintained in accordance with Title 5 is *presumed* to adequately protect public health and the environment. This standard is not specific to any particular waste stream or location so to provide for the adequate protection, Title 5 provides some measure of safety factors in the regulations. For example, few houses actually use 110 gallons per day per bedroom of water, but to assure that septic systems are designed appropriately for those limited instances where that amount of water is used, all septic systems are constructed based on that amount of flow. Because this is a

presumptive code, and not one based on specific engineering standards for specific waste streams or locations, there is generally no provision in Title 5 to allow for simple adjustments to setback distances or other standards as it relates to individual parcels or projects.

### a. Title 5: Local Regulations, and Boards of Health

Title 5 is the state regulatory code that sets *minimum* standards. Boards of health may determine that unique conditions in their community require the development of different, more stringent standards for the design, construction or maintenance of septic systems.

Boards of health receive their authority to enact regulations directly from the legislature, mainly in G.L. c. 111, and not from the state DEP. Before the state environmental code was severed from the state sanitary code, boards of health could adopt septic-system regulations under several sections of the general laws. Now, however, boards of health should rely on G.L. c. 111, § 31, and not upon § 127A and 127B, which relate to the sanitary code. Authority can also be derived from 310 CMR 11.02., but it is secondary to G.L. c. 111, § 31. However, a board of health is not obliged to state the source of its authority in adopting regulations, according to *Town of Holden v. Holden Suburban Supply Co., Inc.,* 343 Mass. 187, 190 (1961). Title 5 repeats this authority in 15.003, where "specific site or design conditions" require it.

Local regulations adopted before Title 5 was revised remain in effect unless they are less stringent than the revised code. Many municipalities in Massachusetts have enacted regulations which are more restrictive than those imposed by Title 5. These generally relate to increased setbacks from surface waters/wetlands, increased depth to groundwater, time limits for testing annual high groundwater, stricter standards for soil drainage, limitations on placing leach fields in fill, or specific design improvements. It is worth noting that some of the older local regulations might be worth reviewing for consistency with current Title 5 as many of them were adopted to try to fill gaps which existed prior to the most recent amendments to Title 5. Note also that local board of health regulations do not apply to projects authorized under "comprehensive permits" for subsidized housing under Chapter 40B.

In order to adopt regulations relative to Title 5, boards of health must go through the procedures for holding public hearings described in Chapter 3 of this handbook. Note that the board must state at the hearing "the local conditions which exist or reasons for exceeding such minimum requirements" as are found in Title 5. New regulations must also be sent to DEP for their files. Any failure to fulfill the requirements for hearings, publications or notice to DEP will mean that, if the regulation is challenged, it will be unenforceable.

### b. Subdivision Control Laws Related to Sewage Which May Be Implemented by Boards of Health

General Laws, c.111, § 127P contains several traps for boards of health which attempt to limit developers under Title 5 grounds. This statute provides a limited protection to sub-dividers of land against new regulations which the board of health might wish to impose under Title 5. After a landowner files a preliminary subdivision plan, if that plan is followed within seven months by an approved final plan, there is a three-year "freeze" on the regulations applicable to that land, dating from the approval of the plan. If no preliminary plan is filed, or if the seven months runs out, the developer can still get a new freeze date when the final plan is filed. If a board anticipates a subdivision in an area of the municipality that might put an undue burden upon sewage issues, steps must be taken far in advance to place adequate protective regulations on that locality, *even in the absence of a preliminary subdivision plan.* For this reason, boards are urged to review all potentially unsuitable locations in their jurisdiction, and to proactively anticipate development in the future and take protective steps.

If the board adopts new regulations during the period between the filing of the preliminary (or definitive) plan and the end of the freeze period, they will not become effective as to that property until the three-year period is over. This "freeze" also applies to a "perimeter" plan approved under G.L. c. 41, § 81P; but if a developer switches from such a perimeter plan to a superseding plan to subdivide the land, the protection is lost, according to *Independence Park, Inc. v. Board of Health of Barnstable*, 25 Mass. App. Ct. 133 (1987). Under another case involving the same parties, the Massachusetts Supreme Judicial Court decided that, in spite of the freeze, a board of health may make recommendations to the planning board, under the subdivision control act, which supplement but do not contradict its regulations. In *Independence Park, Inc. v. Board of Health of Barnstable*, 403 Mass. 477 (1988), the board of health had recommended to the planning board that it require sewering of a small-lot subdivision.

It should be noted that, under the subdivision control act discussed in Chapter 8 of this handbook, a board of health is supposed to comment to the planning board regarding public health related aspects of a proposed subdivision, but it cannot disapprove a subdivision for the reason that the developer has failed to prove that certain lots meet the requirements of the state or local code. It can, and should, however, require some test holes be dug as part of the review process. G.L. c.41, § 81U states that the board of health may require that approval by the planning board shall be given on condition that no building or structure shall be built or placed upon the areas designated without consent of the board of health. The same section requires the board of health, in its report to the planning board, to make specific findings as to which, if any, areas shown on the plan cannot be used for building sites without injury to the public. "A planning board may not approve a subdivision plan which does not comply with the recommendation of the board of health; the planning board's options in such a case are limited to those of disapproving the plan or modifying it in such fashion as to bring it into conformity with the recommendation of the board of health." *Nexum Development Corp.*

*v. Planning Board of Framingham,* 79 Mass. App. Ct. 117; *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 348, 372 N.E.2d 775 (1978), quoting from *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 173-174, 360 N.E.2d 668 (1977).

Under § 81U of the subdivision law, if a board of health rejects a subdivision plan for reasons connected with suitability for septic systems, the planning board is obliged to reject it as well. This interpretation of the law was supplied by the Supreme Judicial Court in *Loring Hills Development Trust v. Planning Board of Salem*, 374 Mass. 343 (1978).

### c. Summary of Title 5

The layout of Title 5 regulation is written as a regulation. The rules are over 100 pages long, difficult to read for the lay person, organized in a somewhat haphazard manner, and do not follow the typical process seen by a Board of Health. The Title 5 regulations were amended in several parts, effective September 9, 2016, but the revisions only minimally affected the boards of health and their role in septic systems.

Though the code is not organized in this manner, a general summary of the major parts is as follows:

Existing System Inspection – required at time of property transfer to determine if septic system meets standards in regulations.

Licensing and Continuing Education – establishes state licenses for system inspectors, soil evaluators and requires continuing education. Title 5 is silent on board of health licensing of septic system installers and pumpers.

Site/Soil Evaluation – requires comprehensive analysis of ability of the site to accept sewage before a system is designed.

Design and Plan Review – Conceptual – when sewer or on-site solution can be used, what license can design what size of on-site system.

Design & Plan Review – Details Regarding Setbacks – table lists setbacks which are to be met. This is the source of many variance requests. When boards of health are considering variances, much attention needs to be paid to the siting of wells on adjacent properties, and the sufficiency of the ground characteristics to accommodate a septic system.

Design & Plan Review – Details Regarding Components – specific design and construction standards for internal and external components.

Design & Plan Review – Details Regarding Flow – design standards for common types of establishments.

Design & Plan Review – Details Regarding Design – information about types of systems which can be used, information which is to be provided on the plan, etc.

Permits, Variances & Enforcement – describes procedures for sites where the design standards cannot be met including different review levels for new construction versus upgrades (repairs)

Construction – provides some guidance to site contractor for information that might not be on the design plan.

Post-Construction – provides for documentation needed after the site work is done.

Operation & Maintenance – suggestions and requirements for assuring proper long-term operation.

If your board handles a lot of Title 5 issues, the following breakdown may be very handy to facilitate your organization of the myriad of issues that my pop up.

The regulation is written in the following sections:

Subpart A (General Provisions and Enforcement, 15.001 to 15.050) covers definitions (15.002); coordination with local approving authorities (15.003) including the ability of local boards of health to enact more stringent requirements (15.003(3)) and a requirement that local regulations be filed with the DEP's Boston office (15.003(5)); DEP may require the issuance of a groundwater discharge permit for any system over 10,000 g.p.d. but less than 15,000 g.p.d. (15.006); the soil evaluator requirements (15.017 to 15.018); enforcement by local boards of health (15.025); compliance orders by local boards of health (15.026); a ban on siting wells too near septic systems (15.029); and record-keeping requirements for local boards of health (15.030).

Subpart B (Siting of Systems, 15.100 to 15.107) covers the siting of systems, including the site and soil evaluation processes.

Subpart C (Design, Construction, Repair and Replacement of On-Site Sewage Disposal Systems, 15.201 to 15.293) includes flow limits (15.203); minimum setback distance (15.211), depth to groundwater (15.212), nitrogen loading limits (15.214); the requirement of 4 feet of "naturally occurring pervious soil" beneath every soil absorption system (15.240); alternative technology (15.281 to 15.288) and "shared systems" (15.290 to 15.293).

Subpart D (Inspection and Maintenance of Systems, (15.300 to 15.354) covers when an inspection is required (15.301); how an inspection is done (15.302); criteria to determine system failure (15.303 to 15.304); deadlines for completion of upgrades

(15.305); approval of systems inspectors (15.340); requirements for system pumping and routine maintenance (15.351); emergency repairs (15.353) and abandonment of systems (15.354).

Subpart E (15.401 to 15.422) covers local upgrade approvals and variances.

Subpart F (15.500 to 15.505) discusses septage.

Appendix I is a model covenant for a shared system.

Much of this material is not new at all, and the previous legal decisions will still apply. For example, G.L. c. 83, § 11 permits the board of health to require an owner of a building on land abutting a way in which there is a common sewer to connect to the sewer. In *Fluharty v. Board of Selectmen of Sandwich*, 382 Mass. 14 (1980), the court ruled that only the board of health has the power to decide whether to impose this requirement. See also, *Town of Uxbridge v. Travers,* 19 Mass. App. Ct. 951 (1985), to be a valid action regulating sewer connection, it must be instituted by the board of health.

### d. Highlights of Title 5

#### i. Existing Septic System Inspections

Inspection is required under 310 CMR 15.301 whenever title to property is transferred except between husband and wife, between parents and their children, between full siblings and pursuant to some legal proceedings. No inspection is required if a certificate of compliance has been issued within two years. The inspection can take place up to two years before the transfer (three years if the system has been pumped annually). Systems must also be inspected prior to any change in the type of establishment, or increase in design flow, or prior to any expansion of use of the facility for which a building or occupancy permit is required. Shared systems must be inspected every three years.

The results of any inspection required by 310 CMR 15.301 must be submitted to the local board of health on a System Inspection Form approved by the Department within 30 days of the field inspection of the system by the approved System Inspector. If weather at the time of transfer makes the inspection impossible, then the inspection must be performed within six months of the transfer, provided that the seller notifies the buyer of the requirements of 300 CMR 15.300 – 15.305. Failure to complete the Inspection Form is a violation of 310 CMR 15.301. The failure to submit the Inspection Form creates a rebuttable presumption that the required inspection has not been performed. The results of a voluntary inspection of a system need not be reported by the owner or the System Inspector.

Inspection does not mean automatic upgrading. However, cesspools, privies and leach fields must be replaced if they are failing to protect the public health and safety.

Section 15.303 of Title 5, as amended in 1995, gives boards of health considerably more flexibility than was allowed in the version adopted earlier in 1995, with regard to requiring upgrades of systems located near wells, surface water and wetlands. A chart at the end of this section sets out the options. The definition of failure in §15.303 should be read carefully: it gives much more detail than was available under the former Title 5. Failure includes backup, surface breakout, and discovery that a cesspool or any portion of a soil absorption system is located below high groundwater elevation.

The DEP or the local board of health may order a system be upgraded if either finds that it threatens public health, safety, welfare or the environment; or that it may cause damage to property or create a nuisance. 310 CMR 15.305 specifies that the owner or operator of the system must upgrade the system within two years. The DEP or the local board of health may require the upgrade to be completed sooner if an imminent health hazard exists.

In keeping with the prior comments in this chapter, that the recent decades of development have left us with many less-desirable parcels for future development, the rules pertaining to condominium and cooperative developments become more pertinent. Sections 15.301(3)

The power of boards of health to approve upgrades for systems under 10,000 g.p.d. without DEP review, and to grant variances for such upgrades, has also been enlarged by Title 5, §§ 15.402 – 15.405. Systems with design flows between 10,000 and 15,000 g.p.d. must be approved by the DEP. Whenever feasible, a failed or nonconforming system should be brought into full compliance. However, § 15.404 allows for “maximum feasible compliance” where an upgrade to the new standards of the new Title 5 is not feasible. However, this authority is not absolute, for there are still upgrades and variances which may not be allowed (such as increased flows to cesspools and privies) and variances which must be approved by DEP under §§ 410 - 422. For example, under § 404 the four foot distance between a Leach field and a high ground water evaluation elevation can only be slightly varied.

Cesspools and leach fields within 100 feet of a surface water supply or tributary, within a Zone 1 of a public well, within 50 feet of a private well, or between 50 and 100 feet of private well that fails a water analysis test must be replaced. However, due to emergency changes in Title 5 effective in November 1995, systems do not automatically fail just because they are located within 50 feet of non-drinking surface water or wetlands, unless the board of health decides that the leach field or cesspool does not protect public health or the environment, based on specific criteria. Systems with septic tanks and soil absorption systems located within 100 feet of a surface water supply or tributary, within 50 feet of a private well, within Zone 1 of a public well or between 50 and 100 feet of private well that fails a water analysis test must be removed unless the board of health determines the system is protective. All this is found in §15.303(1). Boards of health can consider adopting regulations to deal with this new level of responsibility.

Variances from Title 5 requirements are authorized, but not required, when, "in [the] opinion [of the board of health] (1) the enforcement thereof would do manifest injustice; and (2) the applicant has proved that the same degree of environmental protection required under this Title can be achieved without strict application of the particular provision." 310 Code Mass. Regs. 15.20. *Tirtorella v. Board of Health of Bourne,* 39 Mass .App. Ct. 277 (1995).

### ii. Septic System Design Standards

Upgrades are made much easier, with the local board of health able to allow many compromises, without DEP approval, but subject to specified limits. The principle behind this is "maximum feasible compliance" with the new code (see §15.401-405). Variances, discussed in §7 of this chapter, require DEP approval.

Nitrogen loading limits the number of bedrooms in new construction to one per every 10,000 square feet in Zone II recharge areas for public wells (both delineated and "interim") as well as all lots where there is a septic system and a private well. Use of alternative technology may allow higher densities.

Alternative technologies are becoming available for local use as DEP approves new systems. Boards of Health should adopt regulations to give themselves the authority to impose conditions on these systems. Boards of Health can also adopt regulations assuring special funds to pay for the use of expert consultants to review these new systems.

"Shared" systems are also legal under §290-293 of the code. Such a system is defined as a septic system serving several "facilities", that is, lots in separate ownership. The old code stated that the use of a system by more than one lot was prohibited, and this was upheld in *Post v. DEP*, 402 Mass. 29 (1988). The restriction being removed, use of shared systems up to 10,000 g.p.d. is allowable by the local board of health, subject to DEP approval. Local boards of health may allow the use of shared systems for upgrade of existing systems, for new construction or for increased flow to an existing system. The code attempts to prevent building on more lots in a subdivision than would be allowable under the old code, by limiting the number of units to the number of lots capable of supporting an individual Title 5 system (the degree of proof required is still uncertain). However, once this number is determined, the actual houses can go anywhere on the subdivision and not merely on the areas which meet Title 5. This permits buildings on ridge lines, rocky land and difficult soils, so long as one large area is available for a common leach field.

An application for use of a shared system must include complete plans and specifications for the system; a proposed operation and maintenance plan; a description of the form of ownership which each component of the system will take, together with relevant legal documentation; a description of the proposed financial assurance mechanism to ensure operation and maintenance of the system; and a copy of a

proposed Grant of Title 5 Covenant and Easement essentially identical to the one found at 310 CMR 15.000.

310 CMR 15.291 and 15.292 provides that a local board of health may allow use of shared systems without granting a variance only where the proposed system satisfies the technical requirements of 310 CMR 15.100 through 15.293 without the need for a variance except setbacks from property lines; there will be no new construction or increase in design flow from the facility or facilities to be served by the shared system; the applicant proposes institutional arrangements listed in 310 CMR 15.290(2) and documents essentially identical to the Title 5 Covenant and Easement found at 310 CMR 15.000.

One problem with shared systems is the lack of legal authority for the local board of health to place liens on properties served by a common system, in case the owners fail to pay for maintenance or repairs or replacement. The board can lien the common leach field itself under the code, but that would have little legal affect. This limits the effectiveness of the covenant/easement which the builder must sign to assure the board of health that the system will be insured and properly operated (Appendix 1 of the code). Moreover, a majority of municipal attorneys consulted believe that a local board of health cannot enter into such an agreement without the approval of town meeting, which is required for gifts of “interest in land” to a town. An easement is considered an interest in land. These problems with shared systems remain to be corrected before boards of health can have confidence that there is an enforceable solution, except for remediation. Boards of health can adopt local regulations to give themselves authority to impose conditions on shared systems, or they will not be allowed to do so.

### e. Variances

Variances are covered by §§ 15.410-422 of Title 5. Reference to variances is also found in 310 CMR 11.11, which requires that variances conform to “the spirit of these minimum standards.” Except where these sections state that no variance may be granted (e.g., the prohibition against varying the 4’ of naturally occurring pervious soil under a new system), the board of health may vary provisions of Title 5 when enforcement would be “manifestly unjust” and the applicant proves that the same degree of environmental protection is achieved. For new construction, enforcement of the provision for which the variance is sought must be shown to deprive the applicant of substantially all beneficial use of the property. Note that all these conditions must be met; this is not commonly easy. Every request must be in writing, stating the specific variance sought and the reasons for it. Abutters must be notified by the applicant by certified mail giving the same information, at least ten days before the hearing. The code does not define who is an “abutter” for the purpose of this notice, so it is wise for a board of health to define the term in its own regulations. Certainly, owners of adjacent property should be notified. Care should be taken to examine municipal records and maps in order to assure that all those whose property rights may be impacted by the Board’s action are notified. In many instances this includes property owners on the

opposite side of the street, or owners whose property may have a different street listing but the Board action may impact them because of proximity to the property in question. Every variance, or denial, must also be in writing; reasons for a denial must be briefly listed. A copy of each variance must be posted for thirty days and shall be available to the public in the office of the city or town clerk or the office of the board of health. A request for a variance for a residential facility with four or less units is considered "constructively approved if the local board of heath fails to act upon it within 45 days. For an excellent discussion of variances in the septic context, see *Mullane v. Zadeh,* 2008 WL 4173823. Under Title 5, a board of health "may vary the application of any provisions of 310 CMR 15.000 ... when enforcement ... would be manifestly unjust, considering all relevant facts and circumstances of the individual case; and ... that a level of environmental protection that is *at least* equivalent to that provided under 310 CMR 15.000 can be achieved...." 310 CMR 15.410(1).

One Massachusetts Superior Court case held, "Pursuant to 310 C.M.R. 15.410, a variance may be granted by the board if the person requesting a variance has established that (1) 'enforcement of the provision of 310 C.M.R. 15.000 from which a variance is sought would be manifestly unjust, considering all the relevant facts and circumstances of the individual case'; and that (2) 'a level of environmental protection that is at least equivalent to that provided under 310 C.M.R. 15.000 can be achieved without strict application of the provision of 310 C.M.R. 15.000 from which a variance is sought.'" *Barnes v. Falmouth Board of Health,* 2004 WL 3152195 (2004).

If a board of health is drafting regulations, it is helpful to include language to the effect that it may vary the application of any of its rules and regulations ... when, in its opinion, A) the enforcement thereof would do manifest injustice and B) the applicant has proven that the same degree of environmental protection can be achieved without strict application of the particular provision. The *Mullane* case would support that action.

After the local board of health grants a variance, the applicant must file a copy with the DEP. The DEP must review all issues raised before the board of health and may review other issues as well. The application is deemed approved by the DEP if the DEP, within 30 days, fails to issue a written statement of deficiencies which may include a request for additional information; fails to grant a written approval including any special conditions the DEP believes necessary to protect public health, safety or welfare of the environment; or fails to deny the variance. No work may be done until the DEP approves the variance or the thirty days elapses, but an owner of properties other than the facility discussed above apparently works at his or her own peril. Limited emergency work may be done without a variance, but such work requires a filing within 14 days after the work is done. No DEP review and approval of board of health approved variances is required for variances listed in 310 CMR 15.412(4). A denial of a variance by the board of health or the DEP may direct the applicant to upgrade an existing system.

If the variance is granted under G.L. c. 40A, § 10, then it must be exercised within one year, or it lapses by operation of law, unless the grantee files a timely

application to extend. That extension is only valid for one six-month period. *Cornell v. Board of Appeals of Dracut,* 72 Mass. App. Ct. 390 (2008).

An appeal from a local variance decision may be made in court. An adjudicatory hearing is available for persons dissatisfied by decisions of DEP under Title 5.

## Septage

Septage is "waste from septic systems which are not connected to sewers." *Sewer Comm'rs of Hingham v. Massachusetts Water Resources Auth.,* 400 Mass. 455, 457, 509 N.E.2d 1180 (1987). It is composed of some sewage, but mostly scum and sludge. It should be pumped out regularly and disposed of in a proper facility, such as a sewage treatment plant. There is a shortage of septage facilities in Massachusetts.

Boards of health regulate removal, disposal and transportation of septage under G.L. c.111, §§ 31A, 31B, 31D, 143 and under section 15.19 of Title 5, which authorizes the adoption of local board of health regulations on the subject.

No person may lawfully collect septage without an annual hauler's permit, granted under §31A of the statue and 310 CMR 15.502. An example of the need for a license for septage haulers is found in the case *Leary v. Carver Board of Appeals,* 1992 WL 12151897 (1992), (Land Court of Massachusetts), in which the Town of Carver will only permit licensed haulers to perform services.

The permit application shall contain any information the local board of health requires. All permits expire at the end of the calendar year in which they are issued but may be renewed annually on application. No permits may be transferred without written approval by the board of health. The work must be done in accordance with rules and regulations adopted by the board pursuant to §31B of the statute. The permit must state the site of disposal. Every site of disposal must have the approval of DEP under 310 CMR 15.504(3). Disposal to septage works other than a sewer also requires written approval of the DEP. Section 15.504(4) of Title 5 and G.L. c. 111, § 31D allows the board to set a fee for the use of septage receiving facilities to defray cost of constructing, operating and maintaining the facility. Section 15.505(1) requires health boards to inspect and approve equipment used to remove or transport septage.

Two limitations to board of health authority appear in §31A of Chapter 111. First, no regulations of the board may limit hours of collection in business and industrial zoning districts. Second, the transport into a town of septage from another community does not require a permit from the receiving community's board of health; but haulers must register with that community's board and transport in accordance with its rules. Vehicles owned or contracted to the Commonwealth are exempted from local regulation. However, as discussed elsewhere in this Manual, the board of health has the

statutory power to assign a site for dumping garbage, rubbish or other refuse under G.L. c. 111, § 150A. *Board of Health of Holbrook v. Nelson,* 351 Mass. 17 (1966).

Chapter 111, § 31D permits cities, towns or sewerage districts to site septage disposal works, subject to the approval of the DEP. 310 CMR 15.503 allows local boards of health to regulate transfer stations although the DEP may impose additional requirements. A board of health may also be able to assign a site within the community under §143 of Chapter 111, which provides for assignment of locations for carrying on "noisome and offensive trades." DEP cannot force a municipality to provide such a facility, but it can force the upgrading of a facility if one exists.

## Liability Issues

Who is liable when a septic system malfunctions? The Massachusetts Supreme Judicial Court has held that a builder, contractor, subcontractor, or designer is liable for personal injuries or property damage caused by negligent installation, construction or design of a septic system. Liability will not be imposed unless "it is foreseeable that the work, if negligently done, may cause damage to property or injury to persons living on or using the premises." according to *McDonough v. Whalen*, 365 Mass. 506 at 512 (1974). The same case decided that a violation of Title 5 would constitute evidence of negligence. See also *Morris v. Holt*, 380 Mass. 133 (1980).

The liability doctrine was elaborated in the *Morris v. Holt* decision, where the court held that a subsequent owner, as well as the original purchaser, may recover for the consequences of the negligence of the designer and the installer of a septic system. Here the plaintiff, the third in a succession of owners of the property, successfully sued the original owner for negligently constructing an addition to the house over a cesspool. Because the owner had built the addition himself, the court did not reach the question of whether the homeowner could have been held liable for negligent work done by a contractor. Neither of these decisions imposes any liability on a homeowner who sells a system which then fails, if the homeowner had no reason to believe the system was not working at the time of sale. This is one of the best reasons for the inspection requirement found in the new code. In fact, it is very difficult for a buyer to get his money back because land proves unsuitable to a septic system, because buyers are supposed to know about problems related to high water tables: *Corvich v. Chambers*, 8 Mass. App. Ct. 740 (1979). In *Maloney v. Sargisson*, 18 Mass. Appt. Ct. 341 (1984), the Appeals Court remarked, "Published State regulations about the location of disposal facilities in relation to matters of environmental concern may not be common currency, but neither ought we to consider them in the realm of the esoteric." (*Id,* at 346-7).

In *Van Scoyoc v. Board of Health of Sherborn*, 4 Mass. App. Ct. 97 (1976), the purchasers of a new home brought court action to force the board of health to take action against the homebuilder for failure of the septic system due to improper construction of the leach field. The board directed the builder to correct the problem, but when the builder failed to respond, the board took legal action to force the homeowners

to bring the system into compliance. The court decided that the board could have instituted action to force the homebuilder to comply, but that "there is no requirement that the board of health take action against every person who has contributed to the creation of an unsanitary condition. The board has discretion not only as to whom it will proceed against, but also as to which of the several enforcement methods it may employ." (*Id*. at 101.) When the homeowners argued that there was no evidence that any surface breakout was ongoing, the court held it was not necessary to show that seepage was flowing onto the ground at any given moment: "It is enough that a defect in the system be shown to have resulted in seepage in the past and that such defect has not been corrected." (*Id*. at 102.)

Liability of board of health members for negligent work or permitting is distinctly limited by G.L. c. 258, the general liability law for public employees. Section 2 of the law states that a city or town is liable for injury, death or property damage "in the same manner and to the same extent as a private individual under like circumstances." However, municipal agencies are liable only for negligent or wrongful acts or omissions, but not discretionary acts. A 1993 amendment to G.L. c. 258, § 10 removed any liability of municipal boards for negligent inspections or failure to inspect. Damages cannot exceed $100,000. Board members are shielded from individual liability if acting in the scope of their powers. Moreover, since the Board's duty is to the public at large, and not to individual members of the public, it will be difficult for a landowner to prevail in a private nuisance suit against a town board. *Asiala v. Fitchburg*, 24 Mass. App. Ct 13 (1987) set out that there is a difference between liability for a private nuisance created by a municipality, and negligence of a municipality. The *Asalia* holding was later overruled by *Morrisey v. New England Deaconess Association—Abundant Life Communities, Inc*., 458 Mass. 580 (2010), which held that the provisions of the Massachusetts State Tort Claims Act, G.L. c. 258, do, indeed, apply to nuisance actions brought against municipalities.

Section 9 of c. 258 states that regional or district board of health members can be indemnified as employees of the municipality in which the case arose. In *Piccuirro v. Gaitenby*, 20 Mass. App. Ct. 286 (1985), a broker who was also a health board member was held liable for deceiving a buyer about a defective septic system which he had helped to install while a board member. The sale was rescinded, and the buyer was also awarded triple damages on loss of investment opportunities. This is an example of the extreme unethical misuse of a board member's power and standing, where a board of health member misused his public authority to affect a private transaction, resulting in harm.

If a property owner's tract of land is insufficient to site a septic system on it, there is no inherent right, without first obtaining an easement, to install the system on a neighboring parcel. In *Goulding v. Cook*, 422 Mass. 276 (1996), the Supreme Judicial Court ruled that defendants who installed a septic system on someone else's land were obliged to remove the system and pay damages to the plaintiff neighbors, even though there was no space on the defendants' property for the system.

No court of record has found a board of health liable for system design or failure. On the other hand, the Massachusetts Appeals Court has extended the power of a board of health to deny a variance for environmental, rather than strictly public health, reasons. In *Tortorella v. Board of Health of Bourne*, 39 Mass. App. Ct. 277 (1995), the Massachusetts Appeals Court upheld the denial of a variance by the board of health to install a new septic system which was better than the existing system but did not comply with local health regulations. The most interesting aspect of this denial was that it was based upon the board's opinion that, if the proposed enlargement of the house (to over twice its original size) was allowed, flows to the system would increase and the sensitive area in which the house was located (a coastal flood plain) would be damaged. The enlargement presumed that the house would be used year around, not seasonally as it had been. In upholding this decision, the court put weight on the board's "paramount obligation to protect the environment."

## Enforcement

The revised code makes it clear that both the DEP and the local board of health may enforce its provisions (15.025). The general provisions for board of health enforcement actions are set out in Chapter 4 of this handbook. Board of health orders for compliance are described in section 15.026. What constitutes a violation of Title 5 is described in §§ 15.024, 027, 028, and 029. The revised code is also much clearer on what constitutes "failure" of a septic system: see §§ 15.303 and 304. Title 1 of the state environmental code, found in 310 CMR 11.00, contains more detail on enforcement of the entire code, including Title 5. Right of entry and search warrants are covered in 11.03, emergencies in 11.05, service of orders in 11.07, hearings in 11.08, and appeals in 11.09. The fines provided in Title 1 remain at $10 to $500 under 11.10 but each day the violation persists may be considered a separate offense. The only appeal from local board of health action is to the Superior Court under G.L. c. 21A, § 13.

# CHAPTER 6

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES: DRAINAGE & SOLID WASTE

## Drainage

There are two aspects to the regulation of drainage by boards of health: (1) regulation to ensure adequate drainage of a site and (2) regulation of drainage outlets and structures to protect receiving waters.

### Ensuring Adequate Site Drainage

In *United Reis Homes, Inc. v. Planning Board of Natick*, 359 Mass. 621, 623 (1971) the Supreme Judicial Court held that a board of health may recommend reasonable conditions relating to drainage in its review of a subdivision plan, and that the planning board may incorporate those conditions into its approval of the plan. In *United Reis Homes*, the board of health had recommended that a brook running through the subdivision be piped and that certain lots be filled. These conditions were upheld based on the rationale that "pockets of stagnant water become breeding places for vermin and mosquitoes." The SJC cited to G.L. c. 111, § 31, which vests boards of health with the authority to promulgate reasonable health regulations, and lays out limitations, areas where health regulation can be expansive of other regulations, and sets forth the proper procedure for publication of regulations.

The specific conditions imposed by the board of health in the *United Reis Homes* case would likely be in conflict with state and local wetlands protection requirements today. Nonetheless, the case illustrates that, consistent with those requirements, a board of health has the power to require adequate site drainage facilities and structures in connection with its approval of a subdivision plan. The case also suggests that boards of health have the power to adopt regulations requiring adequate site drainage outside the context of the subdivision control law. This case also affirms that once the board of health has acted by disapproving the subdivision, the planning board is bound by that decision and must deny the application, deferring to the board of health. G.L. c. 41, § 81U ("[I]n the event of disapproval, (the board of health) shall make specific findings as to which, if any, areas shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefor in such report, and where possible, shall make recommendations for the adjustments thereof. Failure of such board or officer to report shall be deemed approval by such board or officer.")

## Preventing Pollution of Water Resources by Drainage Structures

Regulation of drainage of contaminants to surface water and groundwater enjoys a long history pursuant to G.L. c. 111. To prevent contamination of drinking water by human waste, boards of health were given authority early to regulate "house drainage." In a burgeoning industrial society, discharges of other noxious wastes also posed very obvious threats to the public health and convenience. This also attracted the involvement of state authorities; in 1886 the Legislature amended c. 111 to add §§ 159-166. These sections gave what was then the state board of health "supervision of inland waters," supplementing the powers of local boards to prevent noxious discharges to surface waters under their general powers to abate nuisances.

These sections of Chapter 111 remained substantially unchanged for nearly 100 years. In 1951, the Legislature amended Section 159 to include groundwater in the definition of "inland waters" and to give the state board of health the authority to promulgate regulations. Shortly thereafter, the state board of health became the Department of Public Health.

In 1975, the supervision of inland waters was transferred to the Department of Environmental Quality Engineering (now the Department of Environmental Protection or "DEP.") By that time, however, DEP already had broad regulatory powers to control discharges to waters of the commonwealth under the state's Clean Waters Act, G.L. c. 21, § 26 *et seq.,* which was passed in 1966. Since that time, enforcement of the Clean Waters Act has largely superseded the use of chapter 111 to address water quality issues. *See,* 314 CMR 3.01, *et seq.*

Perhaps because water pollution control has long been a duty of state agencies, there is not much law on the authority of local boards of health to control drainage. Nevertheless, such local regulation is becoming a subject of renewed interest. State regulations do not generally concern themselves with the cumulative effects of storm water discharges, or other common drainage problems caused by urbanization. Studies suggest, however, that the cumulative effects of runoff from typical urban and suburban development can include increased levels of sediment, nutrients, bacteria, oxygen demand, oil and grease, trace metals, toxic chemicals, and chlorides in receiving waters.

Several studies have been performed to quantify these impacts and identify "Best Management Practices" or "BMPs" that can sharply reduce the level of contaminants that enter receiving surface waters from new roadways and parking areas. While some of these strategies may be required for a particular project as a result of zoning controls, wetlands protection requirements, or federal storm water regulations, all of these regulatory schemes have jurisdictional limits that permit many projects to escape review. The result may be a cumulative degradation of surface water and groundwater supplies affecting public health and safety.

One example of local enforcement of contaminated drainage and runoff can be found in the enforcement action by the Framingham Board of Health against General Chemical Corp. (GCC), where GCC polluted a multi-acre tract of land and allowed its surface runoff to flow into a brook, which then polluted neighboring properties, and even residential and other properties in two neighboring towns: Natick and Sherborn. *See, https://www.mass.gov/info-details/massdeps-south-framingham-project.*

To the extent that they can be harmonized with existing local regulations, health regulations requiring the use of BMPs in new developments would offer a more consistent approach to this problem than other laws now provide. Given the strength of the evidence available to support such requirements, it is reasonable to expect that such a regulation would be upheld as part of the board's broad regulatory powers under G.L. c.111, § 31.

## Solid Waste Management and Siting Regulation

In Massachusetts, local boards of health have a primary role in assuring the proper management of solid wastes. As discussed below, these responsibilities include regulation and licensure of waste management facilities. In addition, under recent revisions of the law, health departments now partner with other agencies, companies, and the public in providing services affecting solid waste. These steps include programs to increase recycling, to encourage the reduction of waste generation, and to help obtain support (or at least minimize opposition) to new waste management facilities being located in a community. Boards of health play a key role in the development and siting of new solid waste facilities, landfills, and transfer stations. Providing appropriate information to the public and a proper hearing process to allow for comment and review of the permit process is essential.

An important policy decision for a board of health is the appropriateness of moving beyond mandated regulatory roles and working as a community leader in promoting comprehensive waste management systems.

### 1. Overview

Solid waste regulation in Massachusetts has evolved from public health statutes first developed more than one hundred years ago to protect the public from the dangers associated with the handling and disposal of wastes. While the protection of public health remains a principal focus of solid waste regulation, the laws have expanded the range of concerns to include the protection of environmental quality. There has been recent redefinition of the role of local boards of health in the siting of solid waste facilities.

In Massachusetts, boards of health have long been the primary local authority regulating solid waste management and disposal and could determine whether solid

waste disposal facilities would be allowed within their jurisdictions. However, the Commonwealth and the federal government have increased their respective interests in developing more uniform and objective standards for solid waste facility siting and operations.

The DEP defines Solid Waste as "useless, unwanted or discarded solid, liquid or contained gaseous material resulting from industrial, commercial, mining, agricultural, municipal or household activities that is disposed or is stored, treated, processed or transferred pending such disposal, but does not include: … hazardous wastes; sludge or septage; certain types of wastewater treatment facility residuals and sludge ash; coal ash; solid or dissolved materials in irrigation return flows; source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954; materials and by-products generated from and reused within an original manufacturing process; materials which are recycled, composted, or converted; and certain organic materials when handled at a Publicly Owned Treatment Works. *See,* 310 CMR 19.006 and all subsections cited therein for more detail.

Municipal solid wastes (MSW) generally fall into three categories. These include:

- *Garbage,* which usually consists of highly decomposable products, such as food waste products.
- *Trash,* which is generally made up of various bulky waste items, such as a tree stump or branches, discarded mattresses, and old or nonworking appliances. And
- *Rubbish,* generally non-putrefying or slowly decomposable or combustible items, such as paper, glass, cans, and wooden products.

Two important pieces of federal legislation overshadow local regulation of municipal solid waste. The first, the Solid Waste Disposal Act of 1965 was the original legislation applying to waste. That legislation was replaced in 1976 by the Resource Conservation and Recovery Act (RCRA). These pieces of legislation address disposal practices and regulations for the nation. Like the Massachusetts regulations which followed them, these acts concentrate on volume reduction and recycling whenever possible and encourage the development of integrated waste management plans that have proven largely successful. Local health regulations and guidelines are helpful in minimizing increasingly expensive decision-making actions that have produced concern, confusion, and on occasion, confrontational situations.

Massachusetts has attempted to develop a rational solid waste management policy and master plan for meeting the Commonwealth's needs. The first Solid Waste Master Plan, developed in response to the 1987 Solid Waste Management Act, established a hierarchy of solid waste management approaches, favoring source reduction, re-use, composting and recycling. Starting with the 1990 Solid Waste Master Plan Massachusetts has maintained a moratorium that covers construction of additional

municipal solid waste combustion capacity.

There have been several amendments, revisions and modifications of the applicable regulations. In 2014 there was a major re-write of several sections of 310 CMR, the relevant parts of which are discussed below; and in March of 2017, there were additional changes made, also discussed below. Interestingly, most of the regulation of solid wastes focuses on recycling and composting facilities landfills, and energy processing facilities, rather than the regulation of the generators of solid waste.

The following materials give a general overview of the solid waste management regulatory framework, then describe the local approval, or "site assignment" process, and finally address state-permitting of solid waste management facilities. Regional solid waste management and "flow control" of solid waste are noted, as is the Commonwealth's statute for addressing the impacts of unpermitted and "abandoned" solid waste facilities which may pose a danger to public health and the environment. Throughout this chapter, the roles and responsibilities of local boards of health in solid waste management are discussed.

While considering issues surrounding solid waste, it is important to be cognizant of the MassDEP's Master Plan 2010-2020, with its aspired title, "Pathway to Zero Waste." This document was finally adopted in 2013, even though it is intended to cover the decade of 2010 to 2020. This lays out the strategy for eliminating all solid waste in ten years. It can be found online at https://www.mass.gov/files/documents/2016/08/nw/swmp13f.pdf. It lays out the goals of MassDEP, and various strategies including:

a. Strategies to maximize efficiency of materials use, increase recycling and composting, and build markets;
b. Strategies to maximize the environmental performance of solid waste facilities; and
c. Strategies to develop integrated solid waste management systems

This document is supplemented with annual progress reports, which are also located online.

### 2. Solid Waste Management Regulatory Framework

Subtitle D of RCRA, 42 U.S.C. §§ 6901 *et seq*., establishes the framework for federal, state, and local government cooperation in the management of non-hazardous solid wastes. The federal government's role in solid waste management is generally limited to establishing overall national policy objectives, setting minimum technical siting, management, and operational standards to protect human health and the environment and develop measures for the closure and long-term care of solid waste facilities. These minimum federal standards for municipal solid waste facilities are codified at 40 C.F.R. Parts 257 and 258. EPA also retains authority to enforce standards in each state. The actual planning and direct implementation of Subtitle D of

RCRA, however, remain largely state and local functions as each state is authorized to develop state-specific solid waste programs tailored to state and local needs. Pursuant to RCRA, Massachusetts has developed state specific solid waste facility criteria under its statutory authority, G.L. c. 111, §§ 150A and 150½; 310 CMR 19.000.

The US EPA has recommended a 16-phase approach to landfill operation, which local boards of health should keep in mind when examining the issues surrounding siting, building and regulating MSW landfills.

The 16 phases are:

1. Estimating landfill volume requirements.
2. Investigating and selecting potential sites.
3. Determining applicable federal, state, and local requirements.
4. Assessing landfill options for energy and materials recovery.
5. Considering the site's final use.
6. Determining the suitability of sites.
7. Designing the fill area to satisfy plan/permit requirements.
8. Establishing a leachate management plan.
9. Instituting groundwater monitoring.
10. Setting up a gas management plan.
11. Preparing landfill final cover specifications.
12. Obtaining plan and permit approvals.
13. Operating the landfill.
14. Establishing financial assurance for closure and post-closure care.
15. Closing the landfill.
16. Providing post-closure care.

*Source:* www.epa.gov.

### 3. Solid Waste Site Assignment Process

The power of boards of health to regulate solid waste disposal through the site assignment process is well established, and is plenary. No place in any city or town may be operated by any person as a site for a solid waste facility or an expansion of an existing solid waste facility, unless the site has been assigned by the board of health after a public hearing. Where a facility is owned or operated by an agency of the Commonwealth the site must be assigned by the Massachusetts Department of Environmental Protection (DEP) after a public hearing. *See* G.L. c. 111, § 150A; 310 CMR 16.06. In the context of site assignment by boards of health, "solid waste" is defined as useless, unwanted, or discarded solid, liquid or contained gaseous material,

resulting from industrial, commercial, mining, agricultural, municipal or household activities, that is abandoned by being disposed or incinerated or is stored, treated or transferred pending such disposal, incineration or other treatment, 310 CMR 16.02.

Subject to certain exemptions, “solid waste facilities” include sanitary landfills, refuse transfer stations, refuse incinerators, resource recovery facilities, refuse composting plants, and dumping grounds for refuse or any other works for treating, storing, or disposing of refuse. In July of 2010 the Massachusetts Legislature passed an amendment to G.L. c. 111, § 150A that shifts certain siting and permitting obligations from DEP to local boards of health. Assignment regulations set forth at 310 CMR 16.00 -16.40 (the “Site Assignment Regulations”) establish comprehensive procedures which govern the process of application, review, public hearing, and decision by which boards of health and the DEP determine the suitability of a site to expand an existing solid waste management facility or to establish a new solid waste management facility at an unassigned site. However, updates to these regulations will most likely be enacted in light of amendments to the law and the anticipated upcoming guidelines from DEP.

Boards of health should note that certain facilities are not subject to site assignment. Some facilities are exempt because they are regulated under other laws (i.e., hazardous waste facilities, facilities handling certain wastewater treatment plant residuals) or are exempted because they use recyclable materials in their industrial or manufacturing process (i.e., paper mills, asphalt batching plants.) *See* 310 CMR 16.05(6) - (9). Other facilities, including but not limited to: (a) certain recycling operations, recycling drop-off centers, bottle bill handling operations, asphalt, brick and concrete recycling operations (310 CMR 16.05(3)); (b) backyard, leaf, and agricultural waste composting, as well as certain industrial, commercial and institutional site composting (310 CMR 16.05(4)); and (c) dumpsters and roll-offs, certain hospital and laboratory infectious waste storage areas, temporary solid waste vehicle layovers, and wood chipping and shredding operations (310 CMR 16.05(5)), are conditionally exempt from the Site Assignment Regulations provided that the operation incorporates good management practices, prevents unpermitted discharges to the air, water, or other natural resources, and does not create a nuisance.

If exemptions do not apply, the site assignment process is initiated by filing a site assignment application with the local board of health. 310 CMR 16.08 requires the applicant to provide the following:

1) two copies to the local board of health
2) one copy with the local library
3) two copies to the DEP, one to the Business Compliance Division, Boston and one to the regional office in which the proposed site is located
4) one copy to the Department of Public Health, Bureau of Environmental Health Services, Boston
5) one copy each to the board of health and the library of any municipality within ½ mile of the proposed site
6) one copy to the applicable regional planning agency governing the municipality in

which the proposed facility is to be located, and

7) one copy to any person requesting it during the public comment period.

If the Massachusetts Environmental Policy Act (MEPA), G.L. c. 30, §§ 61–62H, is going to apply to the facility at some point in its permitting process, then proponents are encouraged to file the appropriate notification with the MEPA office either before or concurrently with their site assignment. When a board of health evaluates a site, the board should be cognizant of this step, and assure that it has been met, if applicable.

The applicant must pay an Application Fee to the board of health under 310 CMR 16.30. This fee is broken down and assessed as two separate fees, a Technical Fee and a Public Hearing Fee. The Technical Fee covers the board's costs of conducting a review of technical data and the cost of other technical assistance. The board of health must return to the applicant any of the Application Fee in excess of the actual expenditures following the completion of the site assignment process. 310 CMR 16.30(1)(c) allows the Board of Health to establish another system for the assessment and payment of the Application Fee if such system is agreed to by the applicant.

The board of health must issue a finding as to whether the site meets the Massachusetts Department of Environmental Protection's site suitability criteria.

Regulations implementing the Section 150A review standards are broken down into two categories. 310 CMR 16.40. The first category of siting criteria is based on the type of facility proposed (i.e., landfills, combustion facilities, solid waste handling facilities such as transfer stations, and certain recycling and composting facilities). These facility-specific criteria generally include provisions which restrict siting within certain distances from public and private drinking water supplies, provide setback and buffer zone requirements, and restrict proximity to sensitive uses (i.e., schools, licensed daycare centers, senior centers, youth centers, residential dwellings, health care facilities). 310 CMR 16.40(3).

The second category of siting criteria applies generally to all types of facilities and include review of: (a) the proposed facility's proximity to agricultural lands; (b) traffic and site access; (c) impacts on wildlife and wildlife habitats; (d) air quality impacts; (e) potential for the creation of nuisances; (f) size of facility; and (g) protection of open space. Other sources of contamination must be considered to determine whether the projected impact of the proposed facility poses a threat to public health, safety or the environment. Special provisions apply to existing facilities as well as areas previously used for solid waste disposal. Preferential consideration is given to sites located in municipalities not already participating in a regional disposal facility. When the proposed site is located in a community participating in a regional disposal facility, this preference must be weighed against the extent to which the proposed facility meets the municipality's and the region's solid waste management needs and the extent it incorporates recycling, composting or waste diversion activities. 310 CMR. 16.40(4).

The board of health must hold a public hearing within 60 days in order to decide whether to grant or deny a site assignment. 310 CMR 16.20. The public hearing is conducted by an impartial and qualified hearing officer selected by the board. The hearing officer is responsible for conducting the public hearing in an orderly fashion, assuring the presentation of relevant evidence, and assisting the board of health in reaching a decision based on both the evidence presented and on the site suitability criteria.

Within 45 days of the initial date of the public hearing, the board of health must determine if the site is suitable for assignment. G.L. c. 111, § 150A. A positive decision to issue a site assignment may include the board's imposition of reasonable conditions which are necessary to ensure that the facility will not pose a threat to the public health, safety, or the environment. 310 CMR 16.20(12). Such conditions may include, but are not limited to, permitting only certain classes of solid waste to be received at the facility, down-scaling the facility's size, creating larger buffer zones, restricting operating hours, imposing certain traffic restrictions, or requiring additional environmental impact monitoring.

If the board of health makes a finding, based on its review of siting criteria and supported by the hearing record, that the siting would constitute a danger to public health, safety, or environment, the board must issue a written finding rejecting the site assignment. 310 CMR 16.20(10)k. Every final decision must be in writing and signed by the majority of the board of health officials who rendered the decision. Every decision must include a statement of reasons and the facts relied upon by the board in reaching its opinion. G.L. c. 111, § 150B. An appeal of the issuance or denial of a site assignment can be made to the Superior Court.

In 2013 DEP drastically changed its solid waste site assignment regulations under 310 C.M.R. 16.00, and solid waste facility under 310 C.M.R. 19.00, in a manner designed to streamline the siting and permitting process for organics recycling facilities, including anaerobic and other "conversion" gas-producing facilities, which are producing energy-related commodities. These facilities are now exempt from the requirement of obtaining a board of health site assignment, instead seeking either a DEP "permit by rule" or a facility-specific recycling, composting, and conversion (RCC) permit, depending on the size and operational characteristics of the facility.

In order to streamline energy production endeavors, the DEP has relaxed its standards for the handling of recyclable or organic materials and has established a procedure for the determination of beneficial use of other discarded materials. In November 2012, MassDEP promulgated an entirely new set of rules governing RCC facilities.

While structurally, the DEP solid waste regulations date back to 1990, there have been several significant modifications of those regulations since then. *See,* 310 C.M.R. 19.000 (the Part I regulations). For instance, in April 2013, MassDEP passed new site assignment regulations found at 310 C.M.R. 16.00. These regulations created new

exemptions, methods of attaining general, and site-specific permits for RCC facilities that are exempt from 310 C.M.R. 19.00 and are subject to very different procedural substantive standards. As noted above, DEP does not consider facilities that are properly handling recyclable or organic materials to be solid waste facilities. Significant parts of the RCC regulations were revamped effective March 21, 2017. *See*, 310 CMR 4.00 as amended. This amendment can be found on-line at the DEP site at: https://www.mass.gov/files/documents/2017/01/nq/310cmr04.pdf. As of this writing, there have been no significant court cases reviewing any of the modifications.

### 4. Rescission, Modification, or Suspension of Site Assignment

Upon a determination that the operation or maintenance of a facility results in a threat to public health, safety, or the environment, the board of health or DEP may, after notice and a public hearing, rescind, suspend, modify, and/or impose conditions on a site assignment. G.L. c. 111, § 150A, 310 CMR 16.22(1).

The Site Assignment Regulations also describe the conditions under which a new site assignment is required if the type of solid waste activity conducted at the site changes or the amount of the solid waste activity increases significantly. For example, where a site assignment does not contain a condition limiting its use to a particular method of solid waste management, a new or modified site assignment is not required to obtain a permit for any new solid waste management activity at the site. 310 CMR 16.21(2). On the other hand, where a site was assigned for a specific solid waste purpose, a different solid waste activity shall not be conducted at the site without a new or modified site assignment. 310 CMR 16.21(3). Certain exemptions from this requirement apply for certain recycling, composting, or processing activities or a handling facility at a closed or inactive landfill or combustion facility site. 310 CMR 16.21(3)(a) & (b). Special conditions apply to certain refuse disposal incinerators and dumping grounds site assigned under Section 2 of Chapter 310 of the Acts of 1955.

The DEP has made it clear to concerned municipalities that its regulations will not interfere with local zoning bylaws and ordinances. Yet, the effect of local health regulations on siting of solid waste facilities has some ambiguity. There should be communication between the developer, the MassDEP regional office *and* the municipality to address concerns at the outset of any plans for establishing or expanding a facility.

The SJC weighed in on the jurisdictional split between local municipalities and the DEP in the case of *TBI, Inc. v. North Andover Board of Health*, 431 Mass. 9 (2000). That case pitted a favorable site suitability report by MassDEP against the local board of health's denial of TBI's request for a site assignment based on detailed facility air quality design issues and the existence of other solid waste facilities in town. TBI appealed claiming that the BOH had succumbed to local political pressures and overstepped limitations on its review authority set by MassDEP's site assignment regulations. Citing the power of a local board to exclude unwanted facilities, even in the face of a favorable MassDEP site suitability report, the court issued its ruling heavily in favor of the local

board's authority. Notwithstanding this ruling, the solid waste industry still challenges board decisions which it deems too aggressive claiming that local boards tend to give in to what it calls "blatant NIMBYism." For TBI, after it modified its plan to address the issues raised in the site assignment hearing and reapplied, it obtained North Andover's approval, and is now operating its facility after ten years of permitting and litigation.

In *Goldberg v. Board of Health of Granby*, 444 Mass. 627 (2005), the Supreme Judicial Court gave substantial deference to the DEP when citizens challenged decisions rendered by both MassDEP and the Granby Board of Health not to apply setback criteria requiring a 1,000-foot setback from residential homes to the vertical expansion of the Granby landfill. Mass DEP's determined under its major modification to site assignment regulation that a vertical expansion did not trigger the 1,000-foot setback siting criterion. The plaintiffs argued that the statute governing the siting criteria, G.L. c. 111, § 150A½, prohibited MassDEP from applying only certain siting criteria. The court looked to MassDEP's expertise and interpretation of the statute over which it had ""primary responsibility for administering." *Id,* at 633.

In *Theophilopolous v. Board of Health of Salem*, 85 Mass. App. Ct. 90 (2014), the Appeals Court followed *Goldberg* by giving deference to the MassDEP's interpretation of its own site assignment regulations when it overturned a trial court decision that had invalidated a handling facility site assignment modification by the Salem Board of Health based on a strained reading of the site assignment regulations. The court held, "An agency's interpretation of its own regulations is entitled to considerable deference and must be upheld on appeal unless it is inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable."

To see the results of how various courts handle board of health actions on site assignment, we have to examine some trial court level and appeals court cases. In a case in Superior Court, *Browning-Ferris Industries, Inc. v. Board of Health of Fall River*, Suffolk Superior Court, Civil Action No. 03-3524B (2003) ("Fall River"), the Fall River board of health's rescission of the site assignment of a landfill was overturned by a judge because the board applied the incorrect legal standard to the issue of threat to public health, safety. In a case full of twists, turns and intrigue, the Mass. Appeals Court upheld the board of health's rescission of a site assignment in the face of the fact that the board members who voted for rescission were elected on an anti-transfer station platform after a recall election of the former board that had issued the rescinded site assignment. *Abington Transfer Station, LLC v. Board of Health of Abington*, 64 Mass. App. Ct. 1111 (2005) (unpublished decision; text available at 2005 WL 2465739), In its examination of the transfer station's argument that the board members ran and were elected on an anti-transfer station platform, the court stated, "[I]t is not improper for an elected body 'to be sensitive to constituents' pressures or to come to the hearing with a preference as long as no improper motivation such as extraordinary allegiance or monetary gain is present."' *Id,* at *2, quoting *Hood Indus., Inc. v. City Council of Leominster*, 23 Mass. App. Ct. 646, 649 (1987) (it was not improper for members of council to seek information outside a formal hearing on application, or to be sensitive to constituents' pressures, or to come to a hearing with preference as to whether

application should be granted, so long as no improper motivations such as extraordinary allegiance or monetary gain were present).

The rights of "ten-citizen groups," to compel board of health enforcement of site assignment powers are discussed in the case *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass 548 (2012), in which the Supreme Judicial Court clarified the rights of ten-citizen groups to appeal a solid waste site assignment under G.L. c. 111, § 150A. In that case, the Supreme Judicial Court found that the ten-citizen groups had failed to show that they were aggrieved in the "legal sense" or that their "substantial rights" had been "prejudiced."

In reacting to the *TBI* and *Douglas* cases, MassDEP has seemed to realize that there is little political calling to make the statutory changes that would break the siting logjam. The department seems content to rely on existing laws, with minor regulatory and policy changes, to advance its master plan goals. As seen in the *Goldberg, Sturbridge*, and *Theophilopolous* cases cited above, MassDEP is willing to flex its regulatory muscles in favor of new capacity to deal with solid waste, and there is a possibility that the courts may back up the state in locally unpopular MassDEP determinations. The courts have varied in their rulings, so it remains to be seen whether they will eventually ultimately provide relief in the form of judicially declared preemption, or whether the legislature will need to intervene.

### 5. Zoning and Other Local Regulations Affecting Site Assignment

A provision of the State Zoning Act, G.L. c. 40A, § 9 provides that solid waste facilities which have received a site assignment must be permitted to be constructed or expanded in any "industrial zone" unless prohibited by local ordinance in existence as of July 1, 1987. However, local authorities still retain zoning and non-zoning powers to regulate solid waste facilities. For example, municipalities are still permitted to regulate or prohibit solid waste facilities in special resource protection districts, and special permits may be required for facilities which have been categorically or conditionally exempted from the site assignment process. G.L. c. 40A, § 9.

However, municipalities should be aware of court interpretation of passing zoning restrictions. The Land Court, in the case of *Wheelabrator v. Town of Saugus*, 2005 WL 2338672 (Mass. Land Ct. Sept. 26, 2005), held that the Town of Saugus, which passed a zoning bylaw limiting landfill height, overextended its authority in so doing. The regulation was invalidated on three grounds. First, the bylaw violated G.L. c. 40A, § 9, inasmuch as that section prohibits new bylaws from restricting the expansion of solid waste facilities in industrial zones. Second, the Land Court honored a grandfathering of lawful preexisting nonconforming use and ruled that the bylaw did not apply to the landfill because it was such a lawful preexisting nonconforming use under G.L. c. 40A, § 6. Finally, and most relevant to boards of health, the Land Court found that the town's attempt to restrict the height of the landfill was preempted because it "impermissibly interferes with the operation of G.L. c. 111, § 150A.

Although *Wheelabrator* is not an appellate decision and is not as convincing as precedent as an appellate decision, the language of the case is highly instructive vis a vis zoning bylaws and board of health treatment of such regulations.

### 6. Permitting and Management of Solid Waste Facilities

The permitting, management, and closure of solid waste facilities is governed by G.L. c. 111, § 150A and accompanying regulations set forth at 310 CMR 19.000-19.207 (the "Permitting Regulations") which require permitting of new and existing facilities, recycling of certain waste streams, and financial assurance for closure and post-closure of such facilities. The Permitting Regulations apply to all solid waste management activities, including landfills, dumping grounds, transfer stations, solid waste combustion facilities, solid waste processing and handling facilities, recycling facilities, refuse composting facilities and other works or sites for the storage, transfer, treatment, processing or disposal of solid waste and the beneficial use of solid waste. 310 CMR 19.003. Exemptions from the Permitting Regulations are provided for certain facilities, containers and operations. 310 CMR 19.013. The most salient of these exemptions is the exclusion of G.L. c. 21E sites. There is a table of excluded and restricted exemptions found at 310 CMR 19.017(3). As of July 1, 2010, authority to permit, construct, oversee and operate transfer stations with a permitted capacity of 50 tons per day or less has been shifted from DEP to local boards of health.

#### a) New Facilities and Major Expansions of Existing Facilities

Once a board of health issues a site assignment, the next step in the facility review process involves DEP's issuance of a solid waste management facility permit (the "permit") for a new facility. No person may construct, operate, or maintain a facility to store, process, transfer, treat or dispose of solid waste, unless the person has received a permit. 310 CMR 19.020(l)(c) and 19.041. Proposed vertical or lateral expansions of existing facilities also require review and permitting under the Permitting Regulations. 310 CMR 19.032. Oversight authority on "small transfer stations" rests with local boards of health (see above).

Upon receipt of a complete permit application from the applicant, DEP must review the application and issue a draft decision. 310 CMR 19.032(2). A copy of the draft decision is sent to the applicant, the board of health, abutting boards of health and other interested persons. 310 CMR 19.032(3). Notice of DEP's decision, along with opportunity for public comment, is issued and published in the local newspaper. 310 CMR 19.033.

A public hearing on the draft permit is required only if the applicant requests a public hearing, the DEP determines there is sufficient public interest in unresolved issues of concern, or if DEP substantially modifies a draft permit. 310 CMR 19.035. The public hearing is conducted by DEP in the community where the proposed facility is to be located. A hearing officer is appointed by DEP and conducts the hearing.

After the close of the public comment period, or if applicable, the close of the public hearing, whichever is later, DEP issues a final decision on the permit application based on certain site- and facility-specific criteria. 310 CMR 19.036-038. DEP's decision is subject to judicial review under G.L. c. 30A and G.L. c. 111, § 150A. The DEP may defer the effective date of the decision in order to obtain comments prior to a final decision. This provisional decision must be accompanied by a notice stating that written comments may be submitted to the DEP for a period of at least twenty days after the issuance of the provisional decision. The DEP may rescind or modify the provisional decision by written notice. 310 CMR 19.037(4)(a). When no provisional decision is issued, an applicant may file a written request that the decision be deemed provisional. Upon timely filing, the decision shall be deemed a provisional decision with an effective date twenty-one days after the DEP's receipt of the request. 310 CMR 19.037(4)(b).

Upon receipt of a final permit, the applicant must also receive authorization from DEP to construct the facility. 310 CMR 19.041. However, unless otherwise indicated, the DEP shall consider the application for a solid waste management facility or an application to modify a permit as a request for authorization to construct. 310 CMR 19.041(2). When construction has been completed, DEP must issue the applicant a letter of authorization to operate the facility. 310 CMR 19.042.

As set forth in 310 CMR 19.042(3), prior to this,

- the DEP must find that the facility is complete, in construction, staffing and equipment as per the plan;
- all federal, state and local paperwork must be complete;
- a full set of plans must be on file with DEP;
- the facility must be in compliance with recycling requirements; and
- there must be adequate financial assurance to cover costs of closure and post-closure.

Additionally, there must be an agreement that the permit holder will remain jointly and severally liable with the owner or operator of the facility in the event that DEP must bring an enforcement action for improper operation. 310 CMR 19.043(3).

### b) Transferring permits

In 2014, the regulations for a transfer of permits were amended, making it more onerous to affect a transfer. Under the new regulation, 310 CMR 19.044, the transferee must certify to DEP that:

- Notice has been filed in the proper registry of deeds;
- All conditions threatening the environment, public health or public safety, or are a violation of any regulation have been corrected prior to the transfer; and
- That all required financial matters, under 310 CMR 19.051 are in place.

### c) Permitting and Closure of Existing Facilities

In order to continue using a facility after the expiration date of the authorization to operate, the operator must submit an application for renewal of an authorization to operate at least 180 days prior to the expiration date. 310 CMR 19.042(4)(a)(1). In addition, the operator must notify the municipality in which the facility is located as well as the municipalities that are under contract to the facility. 310 CMR 19.042(4)(a)(2). If the DEP determines that the applicant has complied with all requirements of the facility permit the authorization may be reissued. If the applicant has not complied with the requirements, the DEP shall take appropriate action to ensure compliance including a denial of reissuance. 310 CMR 19.042(4)(b).

Any facility that stops accepting solid waste must comply with the requirements of 310 CMR 19.045. Where the closure is voluntary, the owner and/or operator must notify the DEP no later than six months prior to the date that the facility will stop accepting solid waste. 310 CMR 19.045(2). Closure activities must be carried out in compliance with all applicable regulations and the permit. Landfills must meet specific closure requirements set out in 310 CMR 19.140. A facility is not deemed closed until the DEP issues a written determination that the closure has been completed in accordance with the final closure/post-closure plan. 310 CMR 19.045(4).

In the 2014 revisions to the regulations, DEP streamlined certain post-closure uses of landfills. Among the streamlined procedures are provisions for operators of permitted transfer stations to self-certify rather than file for full-blown permit renewals. 310 C.M.R. §§ 19.029, 19.035.

Closure of a solid waste facility can be a dirty, dusty and odiferous exercise. Accordingly, the courts recognize that boards of health are justified in holding a hearing to determine that the operation constitutes a noisome trade and taking appropriate steps to demand remediation of the offensive activity. In *New Ventures Associates, LLC v. Board of Health of Newburyport,* 73 Mass. App. Ct. 1116 (2009) (unpublished), a closure was halted by the board of health because it emitted a strong rotten-egg-like odor. The court ruled that since the board had jurisdiction under G.L. c. 111 § 143, and the decision was “not unreasonable, arbitrary, whimsical or capricious,” and there was sufficient evidence, the ruling of the board would stand. *See, Moysenko v. Board of Health of N. Andover,* 347 Mass 305, 308 (1964) for an articulation of the proper standard.

**d) Landfill Assessment, Closure and Post-closure Requirements**

All existing landfills that undergo closure must first complete a Comprehensive Assessment. In addition, the DEP may require landfills that are undergoing an assessment to complete and file closure/post-closure plans. A landfill Assessment is required for any of the following conditions: (1) when obtaining a Site Assignment; (2) when obtaining a permit for expanding an existing landfill; (3) when monitoring results reveal unacceptable contamination of groundwater or surface water or excess leachate or landfill gas; (4) when preparing a landfill for closure; or (5) when the DEP determines that a landfill or dumping ground presents a threat to public health, safety or the

environment. 310 CMR 19.150. In general, the landfill assessment process involves conducting an Initial Site Assessment, a Comprehensive Site Assessment, and a Corrective Action Alternatives Analysis. 310 CMR 19.150(3).

For all landfills that undergo closure, the owner/operator must first develop and submit to DEP for approval a final closure/post-closure plan. Generally, the plan must include a narrative description of the activities necessary to close the landfill, including site preparation; activities necessary to cap and secure the landfill; and activities necessary to maintain and monitor the landfill during the post-closure period. 310 CMR 19.104(6). A facility is deemed closed on the date of the DEP's written determination that the closure of the facility has been completed in accordance with the permit. The post-closure period begins on the date of the DEP's determination. 310 CMR 19.140(6). The post-closure period extends for a minimum of thirty years although the DEP may reduce this time period if it finds that a shorter period is sufficient to protect the public health, safety and the environment. 310 CMR 19.142.

#### e) Modifications, Suspension or Revocation of a Permit

The DEP may rescind, suspend, or modify a permit when it determines that the operation and maintenance of a facility results in a threat to public health, safety, or the environment. (310 CMR 19.040). An owner of a facility may seek to modify certain conditions in an existing permit upon application and approval by DEP (310 CMR 19.039). The board of health is not expressly granted rights to comment on any proposed rescission, suspension, or modification of a permit but should submit comments to DEP to ensure DEP receives local input on the DEP action**.**

### 7. Solid Waste Facilities

Massachusetts General Law c. 21H, inserted by Chapter 584 of the Acts of 1987, contains provisions for financial assistance to cities and towns for the construction, remediation and closure of solid waste facilities. Under the Statute, the DEP is given the authority to remediate sites where waste has been deposited, seek recovery of its response costs, and force "responsible parties" to undertake remediation. G.L. c. 21H, § 4. The DEP may seek recovery of costs from the owner of any existing or closed facility, or "any other person who is otherwise legally responsible for the pollution or threat of pollution," and up to three times the costs of such assessment, containment, closure and remediation. Joint and several liability exists among the site owners and others who are "legally responsible." *Id*.

As of this date, the DEP has not obtained funding in amounts allowing it to respond to solid waste facility investigation and response in the manner that it has under the state superfund program. G.L. c. 21E ("Chapter 21E"). Notably, the statute, unlike Chapter 21E, does not impose express strict, joint and several liability on the generators or transporters of solid waste found at problem sites, nor does it provide for a "super lien" or a private cause of action either to enforce the Statute or to recover damages or response costs.

### 8. Transfer Stations

A transfer station is a handling facility where solid wastes are brought and then stored or transferred to vehicles for further transport to a location for ultimate disposal. Oversight authority on “small transfer stations” rests with local boards of health (see above). As with other solid waste facilities, transfer stations are subject to both solid waste facility site assignment regulations (310 CMR 16.00) and the solid waste facility permitting regulations (310 CMR 19.00). Note that facilities and operations exempted from site assignment under the Site Assignment Regulations are also exempt from the Permitting Regulations;(310 CMR 19.201). Amendments to both the Site Assignment Regulations and Permitting Regulations exempt certain hospital and laboratory infectious waste storage areas, operations which collect recyclables or certain compostables for shipment to a recycling market, and the temporary layover of solid waste collection vehicles containing solid waste. 310 CMR 16.05.

The permitting regulations also contain standards for the design and operation of transfer stations (310 CMR 19.205). Design requirements for new transfer stations include provisions for site equipment, weighing facilities, adequate access, fencing, fire protection, and litter, dust, insect and rodent control. Operational standards include measures for emergency planning, accident prevention and safety, and recycling. Special wastes are not allowed at transfer stations without prior DEP approval. As noted previously, additional guidance may be issued by DEP relative to Section 150A .

### 9. Special Wastes

No solid waste management facility shall receive, store, process, treat or dispose of a special waste unless: such facility possesses a valid site assignment, plan approval or permit and any other required DEP authorizations; has received written DEP approval to handle the special waste in accordance with 310 CMR 19.061(5); and manages the special waste in accordance with 310 CMR 19.061(6).

A special waste is a type of solid waste which, because of its unique chemical or physical state or quantity, requires special handling or management to prevent adverse impacts during transportation, storage, processing, treatment, or disposal of the waste. 310 CMR 19.006. The definition of special waste excludes household wastes that are not defined as hazardous wastes. Certain special wastes are “listed” by the DEP, including asbestos-containing waste material, certain infectious wastes, and sludges (i.e., wastewater treatment, drinking water treatment, and industrial process wastewater treatment sludges). 310 CMR 19.061(3). If not listed as special waste, certain solid wastes may be classified by DEP as special wastes and require such wastes to be managed accordingly. (310 CMR 19.061(5).

Applications to manage special wastes at a facility must be made by the solid waste facility that intends to handle the special waste and approved by DEP (310 CMR 19.061(4). Typically, the generator of the special waste contacts the solid waste facility

which, in turn, submits the application to DEP. The DEP is not required to consult with the local board of health prior to acting on an application but must notify the board of its action.

Within 14 days of receiving notification, however, the board of health may request DEP to rescind or modify an approval for handling the special waste if handling such waste would have an adverse impact. 310 CMR 19.061(5)(f)(2). DEP must modify or rescind an approval if the board of health demonstrates to DEP's satisfaction that acceptance of the special waste under conditions imposed by DEP is likely to result in an adverse impact. 310 CMR 19.061(5)(g).

Certain other wastes, though not specifically identified as special wastes, are subject to special handling conditions imposed by DEP. For example, coal ash is not defined as a solid waste if used as a component of concrete block manufacture, aggregate, fill, base for road construction, or for other commercial or industrial uses. G.L. c. 111, § 150A. If permitted by the local board of health with DEP approval, coal ash may not be considered a solid waste if used as cover over sanitary landfills. G.L. c. 111, § 150A; *See* DEP Solid Waste Policy #SWM-3, "Coal Ash Landfill Cover and Disposal Policy." (May 18, 1983). On the other hand, oil ash is treated as a special waste to be disposed of only in sanitary landfills. *See* DEP Solid Waste Policy #SWM-2, "Interim Oil Ash Disposal Policy." (February 7, 1983). Other wastes requiring special handling are urea formaldehyde foam insulation (UFFI), municipal solid waste ash from resource recovery facilities, and tires. *See* DEP Solid Waste Policy #SWM-4, "Policy for Disposal of UFFI." (April 4, 1988); DEP Solid Waste Policy #SWM-7, "Ash Management and Disposal Policy." (May 13, 1987, revised August 3, 1988).

### 10. Transportation, Disposal, and Flow Control of Municipal Solid Waste

Flow control is a term used to describe the flow (i.e., transportation and disposal) of solid waste into, out of, and through a municipality. Boards of health are granted authority to regulate, to a limited extent, the collection and transportation of solid waste. G.L. c. 111, §§ 31A and 31B.

No person shall remove or transport garbage or other offensive substances through the streets of a city or town without receiving a one-year permit from the board of health, G.L. c. 111, § 31A. *City of Malden v. McCormack*, 318 Mass. 729, 731 (1945). Only in towns in which the garbage is both *removed* and *transported* is a permit required. If garbage is only being transported, but not removed, in a town, the transporter need only register that such transportation is occurring and is in compliance with the board of health regulations. *Id.* One of the objectives of this statute is to enable the board of health to learn where such offensive substances or garbage are to be disposed of and thus have some control over their use or disposition if it is to be within the town. *Cochis v. Board of Health of Canton*, 332 Mass. 721, 726 (1955).

Boards of health have authority to make rules and regulations for the control of the removal, transportation, and disposal of garbage or other offensive substances. G.L.

c. 111, § 31B. Maximum penalties for violations of regulations promulgated under § 31A or § 31B have increased from fifty dollars to no more than one thousand dollars. Regulations on the collection and transportation of garbage and other offensive substances should be adopted pursuant to this authority and not under the general powers conferred on boards of health by G.L. c. 111, § 122, which regulates nuisances. *City of Malden v. Flynn*, 318 Mass. 276, 278 (1945).

The Massachusetts Department of Public Safety's Board of Fire Prevention promulgated regulations governing the storing or handling of combustible rubbish both inside and in the vicinity of buildings and structures. 527 C.M.R. 34.00. The regulations also require owners and lessees of buildings which have metal rubbish containers (of 6 cubic yards or more in size and emptied by mechanical assistance) to obtain a permit from the local fire department. 527 C.M.R. 34.03. Other restrictions govern special fire hazard rubbish (34.04), all rubbish containers (34.05), waste storage rooms (34.06), and waste chutes (34.07).

Moreover, the original authors were aware of at least three local flow-control bylaws in the Towns of Franklin, Amherst and Barnstable. The Franklin bylaw was the subject of litigation and was upheld by the Massachusetts Appeals Court in 1989 in *Lomberto v. Town of Franklin*, 27 Mass. App. Ct. 797 (1989), where the court reasoned that a board of health is empowered to determine what was beneficial to public health in a town. But other bylaw provisions were later invalidated in the *Bonollo* decision noted below.

The Franklin bylaw prohibited the board of health from issuing waste removal permits under G.L. c. 111, § 31A to any person picking up solid waste from residential properties (one- or two-family dwellings) unless that person held a contract with the Town for curbside collection. Further, the bylaw required any company with a curbside collection contract with the Town to deliver the waste to the regional resource recovery facility, with whom the Town had a disposal contract. The Town's bylaw did not conflict with G.L. c. 111, § 31A, which allows permits to be issued to commercial waste haulers and those collecting solid waste from three-family units.

The Town selected, through a bidding process, a hauler to perform curbside solid waste collection from one- and two-family residences within the Town. However, a waste hauler, who did not bid on the contract challenged the bylaw as being inconsistent with and preempted by the state common carrier law, G.L. c. 159B (which permits the Department of Public Utilities to issue a common carrier certificate for transportation of waste materials, scrap metals, sand, gravel, etc. within a 25-mile radius of Franklin). The Court held that since Chapter 159B did not expressly preempt any local waste hauling regulations, the bylaw was not preempted and that Chapter 159B must be read together with Chapter 111 to allow some measure of regulation at the local level. The carrier also challenged the bylaw as one not enacted for true public health reasons. The Court, however, found the bylaw was entirely consistent with Chapter 111, §§ 31A and 31B.

U.S. Supreme Court decisions and other court decisions have placed the validity of flow control bylaws, such as the Franklin bylaw, in doubt. In May 1994, in the case of *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677(1994), the U.S. Supreme Court struck down a local flow control ordinance in the State of New York which required trash haulers to deliver all solid waste within the Town to be processed or handled at the Town's transfer station, thereby prohibiting the trash hauler from depositing the waste out of state. The Court held that the ordinance discriminated against interstate commerce, and thus, was invalid under the Interstate Commerce Clause of the U.S. Constitution.

Citing the *Carbone* decision, in April 1995, the U.S. District Court for the District of Massachusetts, in *Bonollo Rubbish Removal, Inc. v. Town of Franklin, et al*. (Civ. No. 94-CV-10808), struck down a portion of the Town of Franklin's flow control bylaw which required trash haulers not under contract with, but with a local permit from, the Town of Franklin to dispose of trash collected in Franklin exclusively at a certain waste to energy facility. As noted by the court in *Bonollo*, the trash hauler, Bonollo, applied for and received a permit in 1990 to remove and transport residential solid waste from buildings with three or more dwelling units, subject to the disposal requirements of the bylaw. In April 1994, the local board of health revoked Bonollo's permit because, among other things, Bonollo failed to deliver all waste collected in Franklin to the designated trash to energy facility. In fact, Bonollo delivered waste to an out of state facility which charged a tipping fee which was more than $17.00 less than the fee charged by Franklin's designated trash to energy facility.

Subsequently, Bonollo filed an action seeking to prevent the town from revoking the permit due to concerns with, among other matters, the validity of the bylaw in light of the Commerce Clause. Thereafter, the *Carbone* decision was issued by the U.S. Supreme Court and, as a result, the board of health reinstated Bonollo's permit. In February 1995, the bylaw was amended by the Town to provide that the exclusive delivery provisions applied only to haulers under contract with the Town. As a result, the bylaw was no longer applicable to Bonollo. The court found however that in light of the *Carbone* decision, the bylaw in effect prior to the February 1995 bylaw amendment violated the Interstate Commerce Clause of the U.S. Constitution and was thus invalid despite the fact that the bylaw was lawfully enacted under state law.

However, a Second Circuit Federal Court decision, *United Haulers Ass'n. v. Oneida-Herkimer Solid Waste Management Authority,* 261 F. 3rd 245 (2nd Cir. 2001), *cert denied*, 122 S. Ct. 815 (2002) held that a local flow control regulation can be used to direct solid waste to publicly owned facilities without violating the Commerce Clause to the U.S. Constitution.

In summary, given the implications of these decisions, such local bylaws and regulations should be carefully drafted to avoid state and federal constitutional claims of commerce clause violations.

## 11. Regional Refuse Disposal Facilities

Cities and towns may establish regional refuse disposal districts which will organize, construct, finance, operate and maintain regional refuse disposal facilities serving the disposal needs of member communities within the district. G.L. c. 40, § 44A-L. Initially, a city or town may, by vote of city council or town meeting, create an unpaid regional disposal committee for purposes of creating a regional refuse disposal district. The regional refuse disposal planning board, consisting of only those communities voting in favor of a regional refuse disposal district, may develop an agreement describing the sharing of construction and operating costs, the selection of members to the regional refuse disposal district committee, the area in which the facility will be sited, and the procedure for budgeting and cost allocation. All plans for refuse disposal facilities, however, are subject to DEP approval. Once established, the district may, among other things, sue or be sued, purchase or take land by eminent domain, receive and disburse funds, assess member cities and towns, engage legal counsel, hire employees, and raise funds through the issuance of bonds.

A number of regional districts have been formed in Massachusetts, including the Carver, Wareham, and Marion Regional Refuse Disposal District; Franklin County (serving all 20 communities in the county); North Berkshire County (serving 13 communities); South Berkshire County (serving 10 communities); and Martha's Vineyard Regional Refuse Disposal District. A number of communities are participating in regional collaboration for household hazardous waste collection.

## 12. DEP Policies, Permitting Guidance, Technical Reports

Board members and agents are urged to obtain and review the numerous policies, guidance documents, and solid waste subject profiles (including a three-page list of all such documents) available from the DEP. Available guidance documents include facility permitting, financial assurance, curbside and commercial recycling, recycling ordinances and bylaws, municipal user fees, transfer stations, municipal composting and solid waste handling and disposal.

# CHAPTER 7

# HAZARDOUS WASTE FACILITY SITE ASSIGNMENT

## Hazardous Waste in Massachusetts

In Massachusetts, the term “hazardous waste” means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness or pose a substantial present or potential hazard to human health, safety, or welfare or to the environment when improperly treated, stored, transported, used or disposed of, or otherwise managed. 310 CMR 30.010.

Toxic waste sites, even those which have undergone a rigorous site assignment by boards of health, threaten the public health and the safety of drinking water supplies. The state Superfund law, G.L. c. 21E, was originally enacted in 1983 and created the state’s waste site cleanup program. The regulations which implement c. 21E are called the Massachusetts Contingency Plan (MCP).

Because there are such numerous “21E sites,” DEP was overburdened with the obligation to oversee cleanup of thousands of toxic sites, it couldn’t mobilize at a fast-enough pace. This led to the 1992 amendments, which privatized the program. Instead of the limited number of DEP employees attempting in vain to try to maintain a case load allowing thorough inspection of all waste sites, the new law mandated that potentially responsible parties, who were saddled with responsibility to clean up a contaminated site, had to hire “licensed site professionals” (LSP) to oversee most cleanups with limited DEP oversight. This freed the DEP to focus its resources on the most severe sites and on certain key stages of testing and cleanup.

Typically, under the statute and regulations, when a contaminated site is discovered, the responsible party has a year to clean it up. After a year if the site is not cleaned up, which happens regularly, the LSP will determine the site’s severity of pollution, called a tier designation. Sites are ranked according to how contaminated and hazardous they are, and designated Tier 1A, 1B, 1C, or 2. In order for active concerned citizens to stay abreast of the issues, and to participate in the process, ten residents may request that the site adopt a Public Involvement Plan (PIP) to give the public information about the cleanup and input into the cleanup process. Upon requesting a PIP, the responsible party must prepare a PIP that establishes the community involvement process for the remainder of the cleanup.

Massachusetts also has a Technical Assistance Grant (TAG) program which helps cities and towns determine how to clean up polluted sites. It should be kept in

mind that in budget crisis years, grants may not be available. It a TAG is attained once a site is tier-classified it can be used to hire consultants to interpret technical information and give the community expert analysis about the cleanup approach being taken, to make information about a site more accessible to the general public, or to produce newsletters or provide for other means of public education.[13]

## Hazardous Waste Facility Site Assignment

### 1. G.L. c. 111, § 150B.

Pursuant to G.L. c. 111, § 150B, no place in any municipality may be established, maintained or operated as a hazardous waste facility unless it has been assigned as a hazardous waste facility site by the local board of health. If the facility is to be established, maintained or operated by a state agency, then the site assignment will be made by DEP. A state facility would be immune from local zoning requirements. *County Commissioners of Bristol v. Conservation Commission of Dartmouth*, 380 Mass. 706 (1980); *Town of Bourne v. Plante*, 429 Mass. 329 (1999); *Hill v. Russell*, Massachusetts Land Court., 2015 WL 2450627 (2015).

Section 150B applies to facilities that store, treat, or dispose of hazardous waste, except for those facilities that were lawfully organized and in existence on May 1, 1980, if they were either properly licensed or exempt from licensing on that date. If any such facility has its license revoked and reapplies, then the provisions of § 150B apply unless such facility is under a federal, state or court-imposed receivership. Section 150B also applies to facilities seeking to increase their capacity to store, treat, or dispose of hazardous waste, unless the increase was either permitted under an existing site assignment or approved by DEP pursuant to G.L. c. 21C prior to April 24, 1992. Section 150B does not apply to generators that store, treat, process or dispose of hazardous waste produced exclusively on-site (except that it does apply to such generators that dispose of hazardous waste into or on the land) or to facilities that handle materials not considered to be hazardous waste pursuant to DEP's Chapter 21C regulations.

The assignment of a site as a hazardous waste facility is subject to the § 150B limitation that the facility imposes no significantly greater danger to the public health or public safety than the dangers that currently exist in the conduct and operation of other Massachusetts industrial and commercial enterprises not engaged in treatment, processing, or disposal of hazardous waste, but utilizing processes that are comparable. Upon receipt of an application for a site assignment, the board of health must notify DEP.

The board of health must hold a hearing, at which time it must consider and evaluate evidence presented by all interested persons of the relative potential dangers. Every decision of the board of health to assign or refuse to assign a site must be in

[13] *See*: http://www.mass.gov/dep/cleanup/laws/bhfs.doc

writing and must include a statement of reasons and facts relied upon by the board in reaching its decision. Any person aggrieved by the board's decision *refusing to assign* a site may appeal to the Superior Court within 30 days of the publication of the decision. Any person aggrieved by the decision of the board *assigning* a site may appeal within 30 days to DEP. The Board of Health must make its decision to grant or deny the site assignment within 60 days of submission of the application.

The board of health or DEP, upon its own initiative or upon the complaint of any aggrieved person, may rescind, suspend, or modify a site assignment after a public hearing and a determination that the maintenance and operation of a facility has resulted in a significant danger to the public health or is not in compliance with the terms of the site assignment or of a siting agreement entered into between the town and the facility operator pursuant to G.L. c. 21D. This decision must also be in writing and must include a statement of reasons and facts relied upon by the board. Any person aggrieved by the action of the board of health or DEP in rescinding, suspending, or modifying an assignment may, within thirty days, appeal to the Superior Court.

DEP is instructed by § 150B to adopt regulations and is authorized to issue orders to enforce the provisions of the section. In 1992, DEP proposed a set of regulations to 'implement' § 150B, which went far beyond mere enforcement. DEP later withdrew its proposal, however, due to widespread public opposition. The DEP has issued regulations regarding hazardous waste which are found at 990 CMR 1.00 through 16.00 and 310 CMR 30.000. The purpose of these regulations is to enforce c. 21D.

Any person who fails to operate and maintain a facility in accordance with the provisions of this section or in accordance with any promulgated regulations is subject to a fine of not less than $100 and no more than $25,000, or imprisonment for no more than one year or both such fine and imprisonment. Alternatively, violators shall be subject to civil penalties not to exceed $25,000 for each violation. A very salient point is that each day's failure to comply constitutes a separate violation.

This Act provides home rule control over the siting of hazardous waste facilities. While some believe that § 150B gives the local board of health ultimate control of the siting of such facilities, the Act actually does not give the boards total control over the siting process. An amendment to the Zoning Act and the standards set forth in § 150B severely limit any municipal control as explained below.

In *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 409 Mass.834 (1991), the Supreme Judicial Court ruled that § 150B applied to a hazardous waste treatment and storage facility which was established prior to the statute's effective date. Subsequently, however, the Legislature amended § 150B to exempt facilities that were lawfully operating in 1980 from the site assignment requirement. The Supreme Judicial Court upheld this amendment in a later case of the same name, *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree,* 415 Mass. 876 (1993); *Lyons v. Boston Public Health Commission*, 2000 WL 1163838 (2000).

At the same time that section 150B was amended, the Legislature also adopted an amendment to G.L. c. 21C, § 5, to exempt hazardous waste facilities that were lawfully licensed and in operation in 1980 from the provisions of G.L. c. 111, §§ 143 (noisome trades) and 151 (noxious or offensive trades or occupations). However, the amendment specifically reserved to boards of health the right to enforce G.L. c. 111, § 31 (health regulations), § 31C (atmospheric pollution regulations), § 122 (regulation of nuisances), § 123 (nuisance abatements by owners) and § 125 (nuisance abatements by the board) with respect to hazardous waste treatment, storage or disposal facilities.

### a. Standards for Site Assignment

In approving or disapproving a site assignment, the board of health must apply the standard set forth in G.L. c. 111, § 150B. As mentioned above, the assignment of a site is subject to the limitation that the facility impose no significantly great danger to the public health or public safety from fire, explosion, pollution, discharge of hazardous substances, or other construction or operational factors than the dangers that currently exist in the conduct and operation of other industrial and commercial enterprises in the commonwealth not engaged in the treatment, processing or disposal of hazardous waste, but utilizing processes that are comparable.

It is not entirely clear how this “standard” is to be applied. Boards of health are limited to looking at Massachusetts facilities that are not engaged in the treatment, processing, or disposal of hazardous waste. Boards of health are apparently directed to make sure that no facility imposes a significantly greater danger than the dangers that currently exist in the operation of a non-hazardous facility that *utilizes comparable processes*. Does this mean that in storing spent solvents, a solvent recovery facility must be held to a standard that it create no greater danger in storage than does a dry cleaning establishment that stores spent solvents? How does the board determine what are comparable processes and how does the board determine if the facility would cause a significantly greater danger than the comparable process?

The question of how to find comparable facilities and apply the section 150B standard is not readily answerable. The difficulties encountered by DEP in attempting to formulate regulatory standards to be applied in site assignment apparently contributed to its decision to withdraw its proposed regulations.

#### 1. G.L. c. 40A, §9 (Zoning Act)

Section 9 of the Zoning Act was amended in 1980 to allow a hazardous waste facility to be permitted to be constructed as of right on any locus presently zoned for industrial use, provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established and declared to be in full force and effect by the Hazardous Waste Facility Site Safety Council pursuant to G.L. c. 21D §12.

In 1996, however, section 4 of Chapter 21D, which established the Site Safety Council, was repealed, thereby abolishing the Council. The remaining provisions of Chapter 21D were left intact, however, Thus, while section 12 of Chapter 21D is still in effect, it is unclear how a siting agreement can ever become effective under that section.

In *Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107 (1984), the Supreme Judicial Court ruled that section 9 of the Zoning Act grants a developer an absolute right to construct and operate a hazardous waste facility on a site zoned for industrial use *at the time the developer files its Notice of Intent with the Site Safety Council and specified its proposed site.* This absolute right was said to arise once a siting agreement has been established for the facility and all necessary permits and licenses have been obtained. Further, the SJC has ruled that in a case where the Saugus Town Meeting passed an article which sought to limit a developer from impermissibly attempting to curtail the expansion of a solid waste facility, the SJC ruled that it is impermissible under the plain language of the statute to attempt to do so. The court also found that it also is contrary to the clearly articulated legislative scheme. "The purpose of the fourteenth paragraph of §9 has aptly been described as 'to increase hazardous waste treatment capacity in the Commonwealth**.**'" *Wheelabrator Land Resources, Inc. v, Town of Saugus*, 2005 WL 2338672 (2005).

Section 9 further states that, once a notice of intent has been submitted, a municipality may not adopt any zoning change which would exclude the facility from the locus specified in the notice of intent, but may adopt a zoning change following the final disapproval and exhaustion of appeals required by law and 40A. This means that, while a municipality may ordinarily change its zoning provisions at any time, once a developer files a notice of intent to site a hazardous waste facility in a community, all local zoning changes that would exclude the facility from the locus specified in the Notice of Intent are prohibited. However, the municipality is not prevented from adopting a zoning change relative to the proposed locus for the facility once there has been final disapproval and exhaustion of appeals.

In *Clean Harbors of Braintree, Inc. v. Town of Braintree*, Misc. No. 131008 (Land Ct. July 26, 1989), a case of the same name, but earlier than the two mentioned above, the court ruled that C. 21D, § 9 prohibited the Town from applying height restrictions and other dimensional requirements to a hazardous waste incinerator proposed to be sited in the Town, even though the restrictions had been adopted prior to the filing of the Notice of Intent. This ruling was subsequently vacated by the Supreme Judicial Court, dismissed without prejudice when the incinerator proposal was withdrawn (February 26, 1991).

# CHAPTER 8

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES: Subdivisions

## Subdivision Control Law

G.L. c.41, §§ 81K through 81GG is known as the Subdivision Control Act. It is a comprehensive scheme designed primarily to protect the welfare and safety of a community by regulating the layout and construction of adequate roadways and to provide for the installation of utilities. *Meyer v. Planning Board of Westport*, 29 Mass. App. Ct. 167, 170 (1990). "Subdivision control also has as a major purpose ensuring that the subdivision provides adequate drainage, sewerage, and water facilities without harmful effect to adjoining land and to the lots in the subdivision." *Meyer*, 29 Mass. App. Ct. at 170.

### Jurisdiction

There appears to be considerable confusion over the scope of the board of health review of subdivision plans. The board of health has the authority to consider any subject that is generally within the legal authority of the board to regulate. The law has recently been utilized to address public health, safety and welfare issues such as lighting, sidewalks and other means of providing the opportunity for physical activity in communities.

It is well established that boards of health have the authority to regulate drainage and to consider potential drainage problems in their review of a subdivision plan. *United Reis Homes, Inc. v. Planning Board of Natick*, 359 Mass. 621, 623 (1971). The board may also make recommendations on a defective sewer line, *Loring Hills Developers Trust v. Planning Board of Salem*, 374 Mass. 343, 346 (1978); on-site sewage disposal, *Doeblin v. Tinkham Development Corp.*, 7 Mass. App. Ct. 720, 722 (1979); and *Fairbairn v. Planning Board of Barnstable*, 5 Mass. App. Ct. 171, 183-85 (1977); potential contamination of municipal well fields or any other subject channeled by statute for board of health review, *Vitale v. Planning Board of Newburyport*,10 Mass. App. Ct. 483, 486 (1980). In any event, if a board of health has made recommendations pertaining to the approval of a subdivision, the planning board is not free to disregard those recommendations. *Nexum Development Corp. v. Planning Board of Framingham,* 79 Mass App. 117 (2011) "A planning board may not approve a subdivision plan which does not comply with the recommendation of the board of health; the planning board's options in such a case are limited to those of disapproving the plan or modifying it in such fashion as to bring it into conformity with the recommendation of the board of health." (*citing Doeblin and Fairbairn, supra.)*

Unlike the broad jurisdiction of the board of health, the basis for disapproval by the planning board is limited to the contents of regulations adopted by the planning board under Section 81Q of the Subdivision Control Act. G.L. c. 41, § 81M. The planning board may not act on the basis of generalized community concerns, or because it feels general public considerations make such action desirable, but only on the basis of duly-adopted reasonable rules and regulations. *Vitale*, 10 Mass. App. Ct. at 485.

The scope of authority of the board of health may overlap with planning board regulations. Both the board of health and the planning board may legitimately concern themselves with water pollution likely to result from a subdivision plan. If the board of health disapproves the plan on this ground, the planning board may not approve it. *Loring Hills*, 374 Mass. at 346 (1978). If, however, the board of health approves, the planning board may nevertheless disapprove *if it has established regulations dealing with water pollution and if the plan violates those regulations. Vitale*, 10 Mass. App. Ct. at 485; *Patelle v. Planning Board of Woburn*, 6 Mass. App. Ct. 951 (1978); *Fairbairn*, 5 Mass. App. Ct. at 176-177; *Nexum* 79 Mass App. At 122.

## Procedure

Preliminary subdivision plans in a residential zone may be submitted to the board of health (or the board or officer having the powers and duties normally vested in the board of health) for its recommendation. Written notice that such plan has been submitted must be given to the clerk of the city or town. For nonresidential subdivisions, a preliminary plan must be submitted together with written notice to the town or city clerk. G.L. c. 41, § 81S. Definitive subdivision plans *must* be submitted to both the planning board and the board of health. G.L. c. 41, § 81U; *Doeblin*, 7 Mass. App. Ct. at 721. After a definitive plan is filed, the board of health has forty-five (45) days to submit a written report to the planning board approving, denying, or modifying the plan. Failure of the board of health to submit a written report within the forty-five day period is deemed approval. G.L. c. 41, § 81U. *Crocker v. Martha's Vineyard Commission,* 407 Mass. 77 at Fn. 7 (1990).

In the event that the board of health disapproves a plan, it must indicate in its report the specific areas, if any, on the plan that are unsuitable for building sites, and must include the reasons supporting its determination of unsuitability. In this case, the planning board may modify the plan so that it conforms to the recommendations of the board of health and may then approve it. G.L. c. 41, § 81U; *Loring Hills*, 374 Mass. at 348; *Fairbairn*, 5 Mass. App. Ct. at 173-174. In addition, the board of health may make its approval of a plan conditional.

> If the report of the board of health or board or officer having like powers and duties shall so require, the approval by the planning board shall be on condition that no building or structure shall be built or placed upon the areas designated without consent by such board of health or officer.

G.L. c. 41, § 81U. The board of health must also send a copy of its report to the person who submitted the plan.

After receiving the board of health report, the planning board must make its decision. The planning board, however, is limited by the board of health's recommendation. If the board of health has disapproved a plan, the planning board *may not* approve it. *Fairbairn*, 5 Mass. App. Ct. at 173; *Loring Hills,* 374 Mass. at 348.

> [A] planning board may not approve a subdivision plan which does not comply with the recommendations of the board of health; the planning board's options in such a case are limited to those of disapproving the plan or modifying it in such fashion as to bring it into conformity with the recommendation of the board of health. *Fairbairn*, 5 Mass. App. Ct. at 173, 174; *Nexum,* 79 Mass App. at 122.

The developer has a constitutional right to a hearing before the board considers formulating an adverse recommendation. *Fairbairn*, 5 Mass. App. Ct. at 180. "The developer must be advised of all the facts and other material in the possession of the board on which it intends to rely, and he must be given the opportunity to produce all relevant evidence, to cross-examine witnesses, and to present argument." *Fairbairn*, 5 Mass. App. Ct. at 182; *Vitale*, 10 Mass. App. Ct. at 487-488.

## Recommendations and Standards

The standard to be applied by the board of health in deciding whether to approve or disapprove a plan in whole or in part (or to require the imposition of conditions) is found in § 81U, namely, whether "the lots shown on such a plan [can] be used for building sites without injury to the public health." *Fairbairn*, 5 Mass. App. Ct. at 182-183.

G.L. c. 41, § 81U makes a clear distinction between the planning board's obligatory reliance on its own regulations and the authority of the board of health to approve or disapprove. A planning board may not deny a permit unless there is a regulation or other authority existent at the time of the ruling, which gives that board grounds to deny. A board of health has far more latitude, so long as its denial is based upon public health grounds.

> The planning board shall approve, or, if such plan does not comply with the subdivision control law or the rules and regulations of the planning board or the recommendations of the health board or officer shall modify and approve or shall disapprove such plan. G.L. c. 41, § 81U.

By the terms of § 81U, the board of health is obligated to make recommendations. The case law is clear on the issue that the boards of health recommendations are to be based on the boards "own analysis of any health problems

which might exist." *Strand v. Planning Board of Sudbury*, 5 Mass. App. Ct. 18, 23 (1977).

The board of health is not limited to only those considerations set forth in its regulations, if any. It need only limit its recommendations to the analysis of health problems. G.L. c. 41, § 81U requires compliance with planning board *regulations* and the *recommendations* from the board of health. The board of health is an extraordinary municipal board with far ranging powers and duties necessary for the protection of public health and safety. The Board has been cloaked with more statutory authority than most municipal boards and officers. This power rests on the paramount power and authority of the board to protect public health and safety. *See City of Salem v. Eastern Railroad Company*, 98 Mass. 431, 443 (1868).

Given the distinction in § 81U between planning board *regulations* and board of health *recommendations,* it should come as no surprise that the board of health is not obligated to pass regulations on a subject before it can make public health recommendations. Unlike the planning board, whose basis of disapproval is predicated upon the contents of the subdivision regulations, the board of health may consider and act upon any subject that is generally within its subject matter jurisdiction, whether or not the subjects are set forth in a specific regulation. *Independence Park, Inc. v. Board of Health of Barnstable*, 403 Mass. 477, 480 (1988); *Selectmen of Ayer v. Planning Board of Ayer*, 3 Mass. App. Ct. 545, 548 (1975); *Doeblin*, 7 Mass. App. Ct. at 721-722 (1979); *Vitale*, 10 Mass. App. Ct. at 486. However, the board's recommendation may not contradict an existing board of health regulation. *Independence Park,* 403 Mass. at 481.

It should be noted that the board of health may not base a denial upon failure to comply with Title 5 of the State Environmental Code, which regulates the location, design, construction, and maintenance of subsurface disposal systems. Since there is no way of telling whether any given lot within the subdivision will meet the requirements of Title 5 until the lot owner proposes to locate his dwelling and fix the number of bedrooms, it is unreasonable for the board of health to predicate a denial upon Title 5. *Fairbairn*, 5 Mass. App. Ct. at 184-185.

## Security

The Subdivision Control Act requires that the planning board hold security for "the construction of ways and the installation of municipal services." G.L. c. 41, § 81U. In *United Reis Homes,* 359 Mass. at 624-625, it was held that the board of health had the authority to require a bond to cover lot drainage. " . . . [W]e believe the board of health had discretion to make such a requirement if reasonable in the circumstances, since it has the power instead to withhold approval of a plan until the necessary drainage work is actually completed. Allowing a performance bond is a favor to developers, a privilege extended by the municipalities." *See*, Yearwood, *Accepted Controls of Land Subdivision*, 45 Journal of Urban Law, 217, 242-46.

## Local Subsurface Disposal System Regulations Frozen

The filing for subdivision approval also has the effect of freezing board of health subsurface disposal system regulations with regard to that particular plan. G.L. c. 111, § 127P places a freeze on both endorsed "subdivision approval not required" and approved definitive subdivision plans to protect the plans from changes in the state environmental code and local board of health regulations. The provisions of the code and the board of health regulations in effect at the time of submission, and during any appeal relative to the plan, shall govern the plan for a period of three years from the date of approval or endorsement. *Independence Park, Inc. v. Board of Health of Barnstable*, 25 Mass. App. Ct. 133, 134 (1987).

# CHAPTER 9

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES:

# Offensive or Noisome Trades

## Noisome Trades

Boards of health may regulate offensive trades or occupations under G.L. c. 111, §§ 143-150. No trade or employment which may result in a nuisance, be harmful to the inhabitants, injurious to their estates, dangerous to public health, or may be attended by noisome and injurious odors, shall be established in a municipality unless the board of health, after a public hearing, has assigned a location for such trade or occupation. G.L. c. 111, § 143. These location assignments must be entered into the city or town records and may be revoked or amended with conditions when the board of health thinks it is proper to do so. M.G.L. c. 111, § 143.

Section 143 does not apply to hazardous waste facilities governed by § 150B or to refuse treatment or disposal facilities governed by § 150A. *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 409 Mass. 834, 839 (1991); *American Friends Service Committee v. Commissioner of DEP*, 30 Mass. App. Ct. 457, 461 (1991).

Contrary to popular misconception, a "noisome" trade need not be the operation of a loud, obnoxious or noisy business. The term "noisome" derives from Middle English "noiesom" or "noysome," from "noy," harm, short for "anoy," from Old French, from "anoier," to annoy. In usage the term is interchangeable with "n*oxious,"* however there is a tendency to make a distinction between them, applying *noxious* to things that inflict evil directly; as, a noxious plant, noxious practices, etc., and ***noisome*** to things that operate with a remoter influence; as, noisome vapors, a noisome pestilence, etc. The term, "noisome," has the additional sense of disgusting. *Leominster Materials Corporation v. Town of Lancaster*, 56 Mass. App. Ct 820 (2002)

No potentially offensive trade, such as a fat rendering plant can locate within a municipality until the board of health has assigned a site for such facility. Boards of health are empowered to confine offensive trades or occupations to a particular part of the municipality or to prohibit them altogether. *Town of Lincoln v. Murphy*, 314 Mass. 16, 20 (1943). The board of health cannot assign any part of a municipality as a suitable place for a potentially offensive trade if such use is prohibited by zoning regulations. *Id.*

The *Town of Lincoln* case is clear that, just as the planning board must defer to the board of health if there are health ramifications to a development as discussed in Chapter 8 on Subdivisions, the board of health is constrained by zoning regulations in

the siting process for a noisome trade use.

There has been confusion where an agricultural use is involved. The case *Building Inspector of Mansfield v. Curvin,* 22 Mass. App. Ct. 401 (1986), involves the siting of a piggery in an area of Mansfield which was agricultural farmland. In Massachusetts, a tract of land of five or more acres, which is used for ”the raising of livestock, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes....” is considered agricultural land. In addition, G.L. c. 111, which is the part of the General Laws which addresses public health concerns, defines agriculture and farming to “include farming in all its branches and ... the raising of livestock, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur bearing animals....” So, even a piggery on a tract of land of five or more acres, which is the classic example of a “noisome trade,” cannot be prohibited by a zoning regulation, and the city cannot deem it as noisome.

However, an older case, which is still good law says that just because a trade or business is authorized by local zoning to a site within a specific district does not mean that the business has a right to create a nuisance. “If there are reasons apart from the zoning law why the business may not be legally carried on in the district, the zoning law furnishes no protection to it.” *Marshall v. Holbrook*, 276 Mass. 341,34 (1931). So, depending upon the situation, the law could go either way, so caution should be exercised prior to boards taking action. It is best to run this situation by your town counsel or city solicitor.

The trade or occupation itself need not in fact, be deemed a nuisance or offensive before the board of health acts to prohibit it. It is enough if it is conceivable that there might be circumstances where that trade or occupation might become a nuisance. *Moysenko v. Board of Health of North Andover*, 347 Mass. 305, 308 (1964); *City of Waltham v. Mignosa*, 327 Mass. 250, 252 (1951). Occupations that the court has found to be potentially offensive include the keeping of pigs and the dumping of garbage without a permit, *Inhabitants of Swansea v. Pivo*, 265 Mass. 520, 522-23 (1929); the manufacturing of fish meal and fish oil, *Board of Health of Wareham v. Marine By-Products Co*., 329 Mass. 174, 177 (1952); and the operation of a turkey farm, *Mignosa*, 327 Mass. at 252.

## Procedure

The board must schedule and conduct a public hearing to determine whether a trade or occupation may cause harm to the public. If the board finds that the trade or occupation may be harmful, the record of the proceeding must support that fact. If the board finds no possible danger to the public, it must issue an order of site assignment. *American Friends Service Committee*, 30 Mass. App. Ct. at 460.

DEP is mandated by G.L. c. 111, § 143 to give advice, if so requested, to the board of health on the site assignment. If the board issues an order of prohibition it must

be served pursuant to the provisions of c. 111, § 146. The statute provides that the board shall take all necessary measures to prevent any exercise of the prohibited trade or employment, and any person who refuses or neglects for twenty-four hours to obey the order shall forfeit not less than fifty nor more than five hundred dollars.

## Administrative Review

General Law c. 111, § 143 allows any aggrieved person to appeal the site assignment to DEP. An "aggrieved person" could include an owner or occupant of the site, abutters, neighbors, or any person with a substantial grievance. The appeal must be taken within sixty days from assignment. DEP may, after a hearing, rescind, modify, or amend such assignment. The assignment of a place or building that subsequently becomes a nuisance after site assignment because of odors or "exhalations there-from," or is otherwise offensive or dangerous may be revoked by order of the Superior Court after a complaint by any person. The court may order that the nuisance be prevented or removed. G.L. c. 111, § 144. Anyone injured by such nuisance may institute an action to recover damages. G.L. c. 111, § 145. A board of health may delegate or otherwise empower another agency within the municipality to act on its behalf by special statute. *DeVincent v. Curtin*, 319 Mass. 170, (1946).

## Judicial Review

General Law c. 111, § 147 allows any aggrieved person to bypass administrative review and proceed directly to court. An aggrieved person may, within three days after the service of the order upon him, give written notice of appeal to the board of health or DEP and file a petition for a trial by jury in Superior Court. This is substantially different from the nuisance provisions under G. L. c. 111, § 122, *et seq*. which do not allow judicial review of the board of health's determination except in three specific instances. *See*, 179 Mass. 385, 387-388 (1901). The court may allow additional filing time pursuant to G.L c. 111, § 147, but ordinarily failure to file within the three-day time period is fatal. *Id, at 171.* In the event that the board of health has delegated the issuance of an order of abatement of nuisance to another body, the orders of the authorized body are not reviewable if they pertain to abatement of the nuisance, in the same way that the actions of a board of health are not reviewable in court. *Id.*

A person can apply for special authorization from the board of health to continue the prohibited trade or employment while the appeal is pending. If permission is not sought or granted, the offensive trade must be suspended during the appeal proceedings. If the trade continues, in violation of the order and without special authorization, the appeal will be dismissed. G.L. c. 111, § 148; *Board of Health of Franklin v. Hass*, 342 Mass. 421, 424-425 (1961); *City of Revere v. Blaustein*, 320 Mass. 81, 83 (1946). The court may affirm, alter, or annul the order. G.L. c. 111, § 149. If the order is affirmed, the board of health shall recover costs. If the order is annulled and the petitioner was not specially authorized to exercise such trade or employment

during the appeal proceedings, he shall recover costs and damages against the town. If the order is annulled and he was specially authorized to continue his trade, the court has discretionary authority to assess costs, but not damages. G.L. c. 111, § 150.

Judicial review is only available under § 147 "to those who are aggrieved in a 'legal sense' and can show that their 'substantial rights' have been 'prejudiced'." *Leominster Materials Corporation v. Town of Lancaster*, 56 Mass. App. Ct 820 (2002). In this case, a concrete company, LMC, appealed from a decision of the Leominster Board of Health which prohibited LMC from building and operating a concrete and rock crushing plant until the board determined whether the proposed activity was a noisome trade. The board of health required LMC to submit a site assignment application to the board after which the board would conduct a public hearing in accordance with G.L. c. 111, § 143. The company did not file an application for site assignment but instead filed a complaint seeking to annul the board's determination that the plant may be a noisome trade and to vacate the board's order prohibiting the operation of the proposed plant pending further proceedings. The Court found that the board's order was interlocutory and not a final determination that LMC was forbidden to operate anywhere or only at certain places in the town. The Court held that the concept of being aggrieved so as to be entitled to judicial review did not extend to interlocutory orders. It further held that until the board considered the matter and forbade or circumscribed the proposed operations, LMC had not been harmed in a legal sense, was not aggrieved and had no right to judicial review pursuant to G.L. c. 111, § 147.

One example of where a board of health staved off a protracted battle in a similar circumstance occurred in Framingham, when a concrete batch plant announced its intention to purchase property for a facility on land abutting a car wash. The car wash operator contacted the Board of Health expressing concerns about the fugitive dust, not only in terms of occupational health, but also because the dust might collect on the cars as they exited the car wash, leaving undesirable effects. In that instance, the Board reached out to the prospective buyer and seller, and put them on notice that, should the plan move forward, no sale should be completed until the Board weighs in on the issue and a site assignment would be inevitable for the Board to perform its function. This proactive step prevented potentially years of costly litigation as the concrete company went elsewhere with its operation.

Note that G.L. c. 111, § 143 does not directly authorize DEP to affirm a board of health order. This raises some interesting legal questions relating to damages. The statute authorizes compensating damages (and in some instances costs) for the successful petitioner and those damages are recoverable from the municipality. This is reasonable if the contested order is a municipal order. However, if the order is a state order, then the state should bear the burden of damages if the petitioner is successful in contesting the order. The Wetlands Act, G.L. c. 131, § 40, is similar to the provisions of G.L. c. 111, §§ 143 *et seq*. The initial order is issued by a municipal agency, but it can be appealed to the state, which may issue a superseding state order. It was held in *Hamilton v. Conservation Commission of Orleans*, 12 Mass. App. Ct. 359, 369 (1981) that when the state agency exercises its authority pursuant to the Act, the agency "is the

party which would bear the liability for any taking which results." *See also, Grasso v. City of New Bedford*, 55 Mass. App. Ct. 1116 (2002) (Unpublished).

# CHAPTER 10

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES: Nuisance

## Nuisance Defined

In Massachusetts, a nuisance is a "public nuisance" when it interferes with the exercise of a public right by directly encroaching on public property or by causing common injury. *Town of Hull v. Massachusetts Port Authority,* 441 Mass. 508 (2004). Conversely, the doctrine of "private nuisance" is defined as being actionable when a property owner creates, permits, or maintains a condition or activity on its property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another. *Taygeta Corp. v. Varian Associates, Inc.*, 436 Mass. 217 (2002).

### Board Jurisdiction

Boards of health are authorized by G.L. c. 111, § 122 to examine all nuisances which, in their opinion, may be injurious to the public health, and shall destroy, remove or prevent the same. (Under the provisions of G.L. c. 139, § 3, the city council or the town selectmen have the same power to abate and remove a nuisance as is given the boards of health.) They shall make regulations for public health and safety, violations of which shall be punished by a fine not exceeding one thousand dollars.

Courts have granted wide discretion to boards of health in their determination of what constitutes a nuisance. Examples include the filling of a mill pond without providing for proper drainage, *City of Salem v. Eastern Railroad Corporation,* 98 Mass. 431, 445 (1868); a dump that became a breeding ground for a new and more active species of flying cockroaches, *Maynard v. The Carey Construction Co.,* 302 Mass. 530, 531 (1939); pollution of a water supply, *Stone v. Heath*, 179 Mass. 385, 388 (1901); a trucking operation, *Weltshe v. Graf*, 323 Mass. 498, 500 (1948); and a dangerous and dilapidated building, *City of Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345, 348-49 (1979).

Even where an activity is permitted by zoning, it may be declared a nuisance and the activity abated. In *Marshall v. Holbrook*, 276 Mass. 341 (1931), a manufacturer erected a building used as a drop forge plant in which two drop hammers, or rams, struck a blow at intervals of one second.

> The noise of the large hammer at a distance of one mile sounds like the pounding on a piece of steel with a hand hammer by someone in the next room with the door closed. In the plaintiffs' houses the noise is loud and

disagreeable. It is a heavy thud with a metallic clang.

*Id.,* at 343. The court held that locating his business in an area zoned for such a use gave the defendant no right to operate his plant so as to create a nuisance. The defendant was enjoined from operating the drop forge hammers in such a way as to create a nuisance. Similarly, the issuance of a state or local permit or license does not immunize the holder from liability for nuisance which results from the permitted or licensed activity. *Lummis v. Lilly*, 385 Mass. 41, 46-47 (1982).

In *Davis v. Sawyer*, 133 Mass. 289 (1882), neighbors of a factory complained of excessive noise from a bell which rang in order to awaken mill workers in the community. The court issued an injunction against the factory owners, who then sought legislative intervention, and a statute was passed, saying:

"Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours as the board of aldermen of cities and the selectmen of towns may in writing designate." St. of 1883, *c.* 84.

The Selectmen of Plymouth had granted a license for the use of the bell at a meeting on April 18, 1883, which was upheld by the SJC. *Sawyer v. Davis*, 136 Mass. 239 (1883).

Thus, acts which might otherwise be a nuisance may be legalized by a statute, *Marshall v. Holbrook*, 276 Mass 341 (1931) at 346-347; *Commonwealth v. Packard*, 185 Mass. 64, 65-66 (1904). In *Moysenko v. Board of Health of North Andover*, 347 Mass. 305, 307-308 (1964), the board declared a piggery located in a district zoned for agriculture a nuisance because of associated odors. *See also, Ryder v. Board of Health of Town of Lexington,* 273 Mass. 177, 180-181 (1930); *Commonwealth v. Perry*, 139 Mass. 198, 201 (1885). However, G.L. c.111, §125A (which deals with agricultural nuisances) was amended to exempt from constituting a nuisance, activities related to generally accepted farming procedures, such as odors resulting from the normal maintenance of livestock or the spreading of manure, and noise resulting from livestock or farm equipment. These amendments preempt earlier case law relating to nuisance and farming. In contemporary times, there is much more synergy between boards of health and agricultural boards. There is also a considerable amount of legislative action in this arena, so boards are cautioned to look into any potentially relevant recent legislation. For more on this relationship, see Chapter 16.

## Procedure

After the board of health has determined that a nuisance exists, it shall order the owner or occupant of any private premises, at his own expense, to remove the nuisance within twenty-four hours or a reasonable time period. G.L. c. 111, § 123. The owner or occupant is subject to a one thousand dollar penalty for every day in which he knowingly violates the order. G.L. c. 111, § 123. The order must be in writing and may

be served personally to the owner, occupant or authorized agent; or the order may be left at the last known address of the above listed persons; or a copy may be sent by registered mail. If the owner or occupant is unknown, the order may be served by posting the order on the premises and by advertising for three out of five consecutive days in a newspaper within the municipality in which the building is located. G.L. c. 111, § 124.

## Municipal Abatement

If the owner or occupant fails to comply with the order, the board may abate the nuisance at the expense of the owner or occupant. G.L. c. 111, § 125. Expenses incurred constitute a debt due the municipality and shall be recovered by the town in an action in contract. G.L. c. 111, §§ 115 and 125. This means that the municipality can hire a person or firm, under contract, to remove the nuisance. Furthermore, this expense may be recovered by the municipality in subsequent court action against the owner or occupant under the legal theory that there is a duty created by statute for abatement of a nuisance with an implied promise by the owner or occupant to pay it. *See, Train v. Boston Disinfecting Company*, 144 Mass. 523, 532-533 (1887).

In the *Train* case, the Boston Board of Health passed a regulation requiring all imported rags to be disinfected under the supervision of and in a manner satisfactory to the Board of Health before arriving in port.

> The board of health might certainly delegate the work to an independent contractor; it was not necessarily to be done by it or its immediate servants, and under its personal supervision; it was sufficient if it prescribed the method, and that this was complied with. It had a right to make a reasonable contract for the disinfection of the goods; the duty of paying for the expenses thus incurred was by the statute cast upon the plaintiffs; and their promise to pay therefore is one implied by law. Where a party is subject to such a duty, this obligation is to be performed, and the law will, of its own force, imply a promise even against his protestation and express declaration. Such a contract necessarily implies a lien in favor of the contractor into whose hands the goods are taken for disinfection, to secure him for the expenses properly incurred in his work. *Id*., at 533 (citations omitted).

The costs of abating the nuisance may also be placed as a municipal lien against the property. If the lien remains unpaid, the board of health shall certify the debt to the board of assessors, who shall add the debt to the real estate tax on the property. The tax collector has all the same powers and duties with respect to collecting the debt as the annual taxes upon the real estate, including the sale or taking of the land for non-payment. G.L. c. 111, § 125; G.L. c. 139, § 3A. *See, Massachusetts Department of Revenue Guideline Release* No. 92-208. The same procedure is also applicable to clean up of buildings unfit for human habitation. G.L. c. 111, § 127B.

## Judicial Review

An order issued by the board of health pursuant to G.L. c. 111, § 122 is not subject to judicial review and revision. That is, the court has no power to question whether there was a nuisance or to enjoin (or prevent) the board of health from acting to abate the nuisance. *Stone v. Heath*, 179 Mass. at 387.

The decision of the board is not, however, final and conclusive in regard to whether the issue complained of is a nuisance. The order establishes for the time being, that there is a nuisance. The question of whether there was a nuisance, or, if there was one, whether it was caused or maintained by the parties charged, may be litigated in a proceeding instituted against them to recover expenses of abatement; it may be litigated by the parties to recover loss or damage; or it may be litigated by parties in action brought against them for failure to comply with the orders of the board in abating the nuisance. *Id.*, at 387-388; *DeVincent v. Public Welfare Commission of Waltham*, 319 Mass. 170-171 (1946); *Kineen v. Lexington Board of Health*, 214 Mass. 587, 591-92 (1913).

In *City of Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345 (1979), the city notified defendant Eisenbeiser that his building had been declared a nuisance, but the notice failed to inform him that he could or should remove the nuisance himself, and it did not specify any time period within which to do so, as required by Section 123 of the nuisance statute. The city demolished the building while the order was being appealed. The court awarded Eisenbeiser damages for wrongful demolition and stated that the city had no authority to demolish the building without evidence that the party had failed to comply with the order.

Any person who conveys a parcel of real estate with the intent to evade an order shall be punished by a fine of not more than two thousand dollars, or by imprisonment or jail for not more than one year, or both. The amount of money paid for the real estate or the relationship of the seller to the buyer shall be evidence of intent to evade the order. G.L. c. 111, § 127O.

# CHAPTER 11

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES:

# Lead Paint

## Lead Dangers

Lead is a naturally occurring toxic metal. Its widespread use and reckless handling have resulted in extensive world-wide environmental contamination, leading to significant public health problems in many parts of the world.

While some sources of environmental contamination include mining, smelting, manufacturing, and recycling activities, the continued use in our country of leaded paint, leaded gasoline, and leaded aviation fuel has contaminated our air and ground, and that contamination will be with us for centuries. Today, most of global lead consumption is for the manufacture of lead-acid batteries for motor vehicles. Lead is, however, also found in many domestic products, such as pigments, paints, solder, stained glass, lead crystal glassware, ammunition, ceramic glazes, jewelry, toys and in some cosmetics and even in traditional medicines. Drinking water delivered through lead pipes or pipes joined with lead solder may contain lead. Much of the lead in global commerce is now obtained from recycling.

Young children are particularly vulnerable to the toxic effects of lead and can suffer profound and permanent adverse health effects, particularly affecting the development of the brain and nervous system. Lead also causes long-term harm in adults, including increased risk of high blood pressure and kidney damage. Exposure of pregnant women to high levels of lead can cause miscarriage, stillbirth, premature birth and low birth weight.

### Overview: G.L. c. 111, § 197, et seq.

The Massachusetts lead law ensures the detection and prevention of childhood lead poisoning. At the heart of the lead law is the requirement that owners of most pre-1978 residential properties (both rental and owner-occupied) correct specified lead-based paint hazards when the property is occupied by a child under the age of six. G.L. c. 111, § 197. Boards of health (and local sanitary code enforcement agencies), along with the Director of the Department of Public Health's Childhood Lead Poisoning Prevention Program ("the State Program"), are responsible for enforcement of the lead law. G.L. c. 111, § 198. Like the DPH regulations, the remainder of this section will refer to "code enforcement agencies" which include but are not limited to boards of health.

Regulations implementing the lead law were substantially revised in response to

amendments to the law enacted as Chapter 482 of the Acts of 1993. Chapter 482 gives owners more flexibility to comply with the lead law, including authorizing the use of temporary "interim control" measures and allowing owners and their agents to conduct certain abatement activities themselves instead of using licensed de-leaders. Boards of health should consult the State Program for the most current information on regulatory changes.

Lead paint hazards include loose lead paint, lead paint on windows and friction surfaces, and other surfaces accessible to children. Owners are responsible for complying with the law. This includes owners of rental property as well as owners living in their own single-family home. Financial help is available through tax credits, grants and loans. Details are available on the Massachusetts Department of Public Health's web page.[14]

## Authority, Jurisdiction and Responsibility

DPH's State Program and local code enforcement agencies have concurrent responsibility and authority to enforce the lead law. Both the State Program and local boards of health are authorized to enforce the lead law "in the same manner and with the same authority as they may enforce the sanitary code." G.L. c. 111, § 198. A local code enforcement agency, such as a board of health is obligated to inspect for lead paint whenever it conducts an inspection for Sanitary Code violations pursuant to 105 CMR 410.822(B) in a dwelling unit or residential premises constructed before 1978, where a child under the age of six resides. 105 CMR 460.700(B).

Code enforcement agencies must comply with regulations issued by DPH setting out their implementation and enforcement responsibilities, including requirements for reporting the results of enforcement actions to DPH. G.L. c. 111, § 198. The regulations are set out at 105 CMR 460.000. In general, board of health activities focus in three areas: conducting lead paint inspections and lead determinations, initiating enforcement actions against residential property owners, and overseeing the safety of de-leading activities.

## Inspections and Lead Determinations

Board of health personnel who conduct lead paint inspections, like private sector lead inspectors, must be trained and licensed by DPH. G.L. c. 111, § 197B(a); 105 CMR 460.400. Like licensed private lead inspectors, code enforcement personnel who are licensed as lead inspectors may conduct both initial inspections and pre-occupancy inspections following completion of actions to correct lead law violations. If no violations are identified initially then a "Letter of Full Initial Compliance" is issued. 105 CMR 460.760(D)(2)(a). If no violations are found after compliance activities, inspectors may

[14] https://www.mass.gov/service-details/learn-about-massachusetts-lead-law

issue the owner a “Letter of Full De-leading Compliance.” G.L. c. 111, § 197; 105 CMR 460.760(D)(2)(b). Having a Letter of Compliance accords property owners certain benefits with respect to insurance and liability. G.L. c. 111, § 199; G.L. c. 175, § 111H. It also allows owners to be eligible for the full amount of the state income tax credit available pursuant to 830 CMR 62.6.3; 105 CMR 460.760(D).

Code enforcement agencies can also have personnel trained to do “lead determinations”, rather than becoming fully licensed lead paint inspectors. Lead determination inspectors cannot, however issue letters of compliance. In lieu of a complete lead inspection, the lead determination enforcement procedure may be followed at the time of the Sanitary Code inspection. A “lead determination” is a procedure which is faster than a full inspection and does not require the use of a special X-Ray Fluorescence machine. Instead, a special chemical, which can be obtained from the DPH, is used. The lead determination enforcement procedure may be done in one of two ways:

1. A code enforcement inspector performs the lead determination enforcement procedure on a minimum of five surfaces specified by the State Program. If no violations are found the inspector shall continue to perform the procedure until at least one lead violation is found or until a complete lead inspection is performed. 105 CMR 460.700(B)(2)(a).

2. A code enforcement lead determination inspector performs the procedure on a minimum of five surfaces specified by the State Program. If no violations are found, the inspector shall continue to test up to fifteen additional surfaces until at least one lead violation is found. If no violations are found, the case shall be referred to a code enforcement inspector who shall conduct the lead determination enforcement procedure within ten working days. If no code enforcement inspector is available, the code enforcement lead determination inspector must refer the case to the Director of the State Program within two days of the lead determination. 105 CMR 460.700(B)(2)(b).

If at least one surface has a lead violation the code enforcement agency must issue an Order to Correct Violations. This Order is enforceable through judicial proceedings. 105 CMR 460.700(B)(3).

DPH regulations set out priorities which must be followed by code enforcement agencies when conducting lead paint inspections or lead determinations. 105 CMR 460.710. The highest priority is dwelling units occupied by lead poisoned children, 105 CMR 460.710(A), which cannot be inspected by licensed private inspectors but must receive a full inspection by a DPH or code enforcement inspector.

The next highest priority is dwelling units occupied by a child whose blood lead level is elevated, but below 25 micrograms per deciliter. 105 CMR 460.710(B). The third

highest priority is units occupied by a child under six years of age where the occupant has requested an inspection. 105 CMR 460.710(C). While the lead law previously provided that occupant-requested inspections should be performed within ten days, this provision was made "subject to appropriation" in the 1993 amendments. G.L. c. 111, § 194. Boards may respond to occupant requests by performing either a lead inspection or a lead determination. 105 CMR 460.700.

While boards of health have been concerned about potential tort liability if they fail to conduct lead inspections or conduct them improperly, amendments to the Massachusetts Tort Claims Act should protect boards against most such claims. State and municipal agencies can no longer be sued based on their failure to conduct an inspection, or the conduct of an inadequate or negligent inspection, to determine whether a property complies with or violates any law or regulation, including the lead law. G.L. c. 258, § 10(f). However, a lawsuit may be brought if a public employee makes "explicit and specific assurances of safety or assistance" to the direct victim or a member of his family or household and injury results in part from reliance on those assurances. G.L. c. 258, § 10(j)(1). Because that section further provides that an inspection report shall not constitute such "assurances," boards can limit their liability by restricting their communications about the lead law status of properties to the contents of inspection reports. That statute explicitly provides that the Massachusetts Tort Claims Act shall not apply to "any claim based upon the failure to inspect, or an inadequate or negligent inspection, of any property, real or personal, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health…" *Id. See, Campbell v. Boston Housing Authority,* 443 Mass. 574 (2005), for a discussion of this statute in the setting of lead inspections.

## Enforcement

The lead law provides that boards of health and other code enforcement agencies "shall enforce [the lead law] in the same manner and with the same authority as they may enforce the sanitary code." G.L. c. 111, § 198. DPH regulations require code enforcement agencies to follow prescribed time limits for enforcement and give preferences to violations of the lead law over all other sanitary code violations except other emergency matters. 105 CMR 460.700(C). Standards for licensed inspectors are rigorous and can be found in the Massachusetts Regulations at 105 CMR 460.430.

If any inspector finds violations during an initial inspection, a notice that the premises contain dangerous levels of lead must be posted immediately. The results of the inspection must be reported to the owner, the tenants of the affected unit, and DPH's lead program within a specified time period. 105 CMR 750(A). Code enforcement inspectors must additionally provide the owner with information on methods of correcting the violation and issue an Order to Correct Violations if a child under the age of six resides in the unit. 105 CMR 460.750(B). Depending on whether the unit is occupied by a lead poisoned child, the location of the violations and the owner's need for financial assistance, the Order gives owners up to 120 days to correct violations. 105

CMR 460.751.

After the expiration of the regulatory time periods for owners to act, code enforcement agencies must initiate judicial proceedings within seven working days. Boards and other code enforcement agencies may bring either criminal proceedings seeking enforcement of penalties or a civil action for injunctive relief. 105 CMR 460.800. Five working days after the close of each quarter, code enforcement agencies must submit a quarterly report to DPH's lead program on the status of lead law and enforcement activities. This report must include the status of all uncorrected lead violations, all violations corrected, legal action taken regarding each uncorrected violation and the procedural history and current status of such legal actions. 105 CMR 460.770.

## De-leading Safety

Under the lead law, the Department of Public Health establishes regulations to protect the safety of occupants during de-leading activities. Under certain circumstances, owners may be required to use licensed de-leaders and to ensure that occupants are kept out of the premises or work area. G.L. c. 111, § 197. Both licensed de-leaders and owners and their agents undertaking lead law compliance activities must follow safe work practices. 105 CMR 460.160, 460.175. In addition, the Department of Labor and Industries establishes regulations to protect the safety of workers conducting both de-leading and renovation activities which disturb lead-based paint. G.L. c. 111, § 197B(c).

Boards of health (or other local code enforcement agencies) should receive at least ten days advance notice of de-leading work being conducted by licensed de-leaders or by owners or their agents.105 CMR 460.150. Boards of health are authorized to check work sites to ensure compliance with the lead law and regulations and can issue an immediate cease work order to any person who violates a license or lead law regulation "if such violation will endanger or materially impair the health or well-being of any occupant of a residential premises, any lead paint inspector, any de-leader or any person employed in performing renovations or rehabilitation in a manner that disturbs" lead-based paint. G.L. c. 111, § 197B(f)(3).

Although DPH's lead program is responsible for promulgating regulations concerning acceptable methods for removing exterior lead-based paint, code enforcement agencies are responsible for enforcing these exterior de-leading regulations. G.L. c. 111, § 198. The 1993 amendments, however, deleted previous statutory language which had authorized boards of health to ban or more stringently regulate methods for removal of exterior paint containing dangerous levels of lead.

# CHAPTER 12

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES:

# Tobacco and Vaping Products

## Authority

### Authority to Enact Board of Health Tobacco Regulations

As described in Chapter 3, G.L. ch.111, § 31 authorizes local boards of health to enact reasonable health regulations. Virtually all board of health regulations relative to tobacco have been enacted pursuant to the broad power granted to boards pursuant § 31. The Supreme Judicial Court has consistently affirmed the authority of boards of health to regulate tobacco pursuant to § 31. "We have repeatedly observed that this statute has granted boards of health plenary power to issue reasonable, general health regulations. (citations omitted). . . .Moreover, we have previously recognized the ill effects of tobacco use . . . as a legitimate municipal health concern justifying municipal regulation of tobacco products." *Tri-Nel Management et al v. Board of Health of Barnstable et al*, 433 Mass. 217, 222, 741 N. E. 2nd. 37 (2001) and *American Lithuanian Naturalization Club, Athol, Mass., Inc.,& others v. Board of Health of Athol & another*, 446 Mass. 310 844 N.E. 2nd 231 (2006).

A board of health regulation "stands on the same footing as would a statute, ordinance or by-law." *Druzik v. Board of Health of Haverhill,* 324 Mass. 129, 138, 488 N.E.2nd 367 (1949). Moreover, "[a]ll rational presumptions are made in favor of the validity of [the regulations]." *Id*. Courts will only strike a board of health regulation when the challenger proves, on the record, "the absence of any conceivable ground upon which [the rule] may be upheld." *Arthur D. Little, Inc. v. Com'r of Health*, 395 Mass. 535, 481 N.E.2nd 441, 453 (1985) (citations omitted). If the public health issue is "fairly debatable," the court cannot substitute its own judgment for that of the Board of Health. *Id*. (citations omitted). The court instead defers to the board's "expertise and experience." *Tri-Nel Management et al v. Board of Health of Barnstable et al, supra*, at 219. "Given the . . . scientific studies on the ill effects of ETS [environmental tobacco smoke] exposure generally and the board's expertise in this subject matter, we conclude that the board's [ETS] regulation [100% ban on smoking in restaurants and bars] is within the standard of reasonableness." *Id*. at 219.

### Additional Municipal Authority to Regulate Tobacco

In addition to local board of health authority to enact tobacco control regulations, municipalities may also enact local tobacco control measures as bylaws (towns) or

ordinances (cities). The Home Rule Amendment to the Massachusetts Constitution, adopted in 1966, grants broad legislative authority to cities and towns. It empowers municipalities to enact tobacco control measures designed to protect the public health and welfare. The Home Rule Amendment reads, in part, that "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or bylaws, exercise any power or function which the general court [legislature] has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court, and which is not denied, either expressly or by clear implication, to the city or town by its charter." Mass. Const. Amend. Art. 2 §6.

### Limits of Board of Health and Municipal Authority to Regulate Tobacco

Local tobacco control measures must be consistent with and not in conflict with state and federal laws. State and federal public health laws set forth minimum standards. Local government can adopt stricter public health measures, as long as the measures adopted are consistent with state and federal law. In *Take Five Vending, Ltd. v. Provincetown,* 415 Mass. 741, 615 N.E.2d 576 (1993), the court ruled that a bylaw that prohibited tobacco vending machines was entirely consistent with a state law that prohibited vending machine sales to minors. The local measure "augment[ed]" the state law. *Id*., at 745.

## Massachusetts Statewide Secondhand Smoke Law

### Massachusetts Smoke-Free Workplace Law

The Massachusetts Smoke-Free Workplace Law (G.L. c. 270, § 22) was enacted by the Massachusetts Legislature to protect workers from health hazards resulting from exposure to secondhand smoke. It is the state law that sets forth minimum standards for restricting smoking in enclosed workplaces.

All enclosed workplaces with one or more employees must be smoke-free. Limited exceptions are noted below.

Key provisions of the law include the following:

- An employer is responsible for providing a smoke-free environment for all employees working in an enclosed workplace.
- Smoking is prohibited in all enclosed workplaces including, but not limited to the following: common work areas, hallways, conference and meeting rooms, offices, employee lounges, restrooms and staircases; auditoriums, theaters, concert halls and convention centers; museums, libraries, schools, colleges and classrooms; restaurants, bars, taverns, food courts and supermarkets; medical facilities, health facilities, child care centers, camps for school age

children; public, private and technical schools; public transportation such as trains, planes, taxis, buses, airports, train and bus stations, terminals and enclosed outdoor platforms; and public buildings owned by the commonwealth or a political subdivision, such as a city or town.

- Exemptions where smoking may be permitted if certain conditions are met (please see full text of law for exemption details, conditions, and requirements):

    1. Private residences, except when the residence is being used to operate a group childcare center, school age day care center, school age day or overnight camp, a health care related office or a facility licensed by the office of childcare services.
    2. Membership associations (Private Clubs) defined as non-profit voluntary groups, organized under M.G.L. Chapter 180, while not open to either the public or non-members who are not invited guests.
    3. Guest rooms in hotels, motels, or similar accommodations that have been designated as “smoking” rooms.
    4. Retail tobacco stores that are not required to possess a retail food permit whose primary purpose is to sell tobacco and tobacco paraphernalia, in which the sale of other products is merely incidental and which prohibit the entry of anyone under the age of twenty-one (21) years.
    5. Smoking bars, including cigar, hookah and any vaping bars that derive a majority of their revenue from tobacco sales, can demonstrate that the local board of health has given the proposed establishment a tobacco sales permit, and are granted a permit from the Department of Revenue (DOR). A smoking bar that receives a DOR permit must demonstrate quarterly that the establishment derives a majority of its income from the sale of tobacco. Before granting a permit the DOR will review the business plan of the proposed smoking bar.
    6. Religious ceremonies where smoking is part of the ritual.
    7. State licensed nursing homes that have received approval from the local board of health may have a designated smoking area for permanent residents only.
    8. Tobacco laboratories/tobacco testing facilities that conduct medical or scientific research on tobacco smoke.

- Signage is required to indicate where smoking is not permitted or for those areas exempt from the law.

- Smoking in a place where it is prohibited may result in a $100 civil fine to the smoker. Employers or business owners may receive fines ranging from $100 to $300 for permitting smoking. Local boards of health, municipal governments, the

Alcoholic Beverages Control Commission and the Department of Public Health may enforce this law. In practice, local boards of health are the primary enforcers.

In 2018, the law was amended to include the use of electronic cigarettes (vaping products) in the definition of smoking and thereby prohibiting the use of electronic cigarettes in all enclosed workplaces as well.

> "Smoking" or "smoke", the inhaling, exhaling, burning or carrying of a lighted or heated cigar, cigarette, pipe or other tobacco product intended for inhalation in any manner or form, including the use of electronic cigarettes, electronic cigars, electronic pipes or other similar products that rely on vaporization or aerosolization."

For more information on secondhand smoke laws and regulations, please see https://www.mass.gov/massachusetts-tobacco-cessation-and-prevention-program-mtcp.

## Local Secondhand Smoke Laws

Cities and towns may enact local laws that are stricter than the state law. For instance, many municipalities have enacted regulations that prohibit smoking in private clubs, nursing homes, retail tobacco stores and outdoor areas of restaurants and bars. These regulations are all stricter than the state law. Local regulation templates can be found at www.mahb.org.

## Tobacco Sales Laws

Tobacco sales laws have evolved significantly in recent years. The startling increase in youth use of vaping products, respiratory diseases and deaths associated with the use of electronic cigarettes and the burgeoning supply of "youth friendly" new flavored tobacco products on the market have driven and continue to drive this evolution.

### Federal Tobacco Sales Laws

In 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) into law. This law gives the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products, including the marketing and promotion of tobacco products. It also gives the FDA the authority to set performance standards for tobacco products, including the authority to regulate (but not ban) the nicotine content in products. As a result of this law, the FDA enacted tobacco sales regulations that include the following provisions:

1. Graphic warning labels on the top half of the front and back of cigarette packs are required. While the effective date of this provision was 2012, the provision is currently in litigation filed by the tobacco industry.
2. Warnings are required in ads and on smokeless tobacco. (2012).
3. Flavored cigarettes are banned, except menthol, mint and wintergreen. Since this "ban" went into effect, the availability of flavored tobacco products other than cigarettes (cigars, blunt wraps, vaping products, etc.) have significantly increased.
4. Prohibits the terms "light", "low tar", and "mild."
5. Prohibits the use of color or images in most ads at the point of sale of tobacco and in publications with high youth readership. This provision is currently in litigation as well.
6. Restricts vending machines to adult-only establishments. They cannot be in private clubs because private clubs permit youth to enter during public events.
7. Bans free samples of cigarettes.

On December 20, 2019, President Trump signed legislation to increase the minimum legal sales age of all tobacco products, including electronic tobacco products to twenty-one (21) years, effective immediately.

In January 2020, the FDA issued a policy that prohibits flavored, cartridge-based electronic products, including mint and fruit flavors, but not menthol products. Cartridge or pod based flavored products are products like JUUL and Blu. Vape pens, tanks and flavored nicotine liquid products are not included in this policy. In addition, cartridge or pod-based products that are menthol or tobacco flavored can still be sold pursuant to federal law. For more information on federal actions, *see* https://www.fda.gov/tobacco-products.

## Massachusetts Tobacco Sales Law

On November 27, 2019, Governor Baker signed into law An Act Modernizing Tobacco Control. The law amends G.L. c. 270, § 6 and other tobacco-related laws. The law does the following:

- Bans the sale of ALL flavored tobacco products, including menthol, mint and wintergreen products except in smoking bars for on-site consumption ONLY. This includes all flavored vaping products.
- Increases retailer fines for selling to a person under 21, selling a flavored product and other violations to $1000 for a first offense, $2000 for a second violation and $5000 for a third violation.
- Restricts the sale of vaping products and liquid nicotine products with more than 35 mg/ml to adult-only retail tobacco stores.
- Adds an excise tax of 75% of wholesale on e-cigarettes, including the devices as well.

- Adds the ability for the state lottery director to suspend or revoke an establishment's lottery license for selling untaxed vaping products.
- Amends the definition of tobacco product to include "electronic cigarettes, electronic cigars, electronic pipes, electronic nicotine delivery systems or any other similar products that rely on vaporization or aerosolization *regardless of nicotine content*."
    - While products containing cannabis are specifically exempt from the law, those that include industrial hemp (CBD) are not.
- Adds a definition for "tobacco product flavor enhancer."
    - "Any product designed, manufactured, produced, marketed or sold to produce a characterizing flavor when added to any tobacco product." (Think about flavored water enhancers.)
- Bans tobacco product flavor enhancers, except in smoking bars for on-site consumption ONLY.

The effective date for the ban on ALL flavored vaping products, including menthol, mint and wintergreen is immediately upon signage (November 27, 2019). All other provisions of the law, including the ban on ALL flavored combustible tobacco products, including menthol, mint and wintergreen cigarettes go into effect on June 1, 2020.

The Department of Public Health (DPH) is charged with promulgating regulations relative enforcement of the tobacco sales provisions in the law (G.L. c. 270, § 6). The regulations designate local boards of health as the primary enforcement agents. For more information on the regulations, please see https://mass.gov/newtobaccolaw.

## Local Tobacco Sales Laws

As mentioned previously, cities and towns can enact laws that further restrict the sale of tobacco products. Additional elements municipalities are including in local regulations include, but are not limited to:

- Including a more comprehensive definition of adult-only retail tobacco store.
- Prohibiting smoking bars.
    - This provision would eliminate the exemption in the state law that permits flavored tobacco products in smoking bars for on-site consumption only.
- Banning the sale of inexpensive single cigars.
- Capping and reducing the number of tobacco sales permits.
- Banning new tobacco sales permits within 500 feet of a school.
- Banning new tobacco sales permits within 500 feet on an existing permit.

A local regulation template can be found at www.mahb.org. Boards of health are encouraged to contact Cheryl Sbarra, Executive Director and Senior Staff Attorney for MAHB at sbarra@mahb.org or at (781) 721-0183 for more information.

## Additional Resources

There are several valuable resources available to boards of health. These include the Department of Public Health websites at www.mass.gov/dph/mtcp, www.makesmokinghistory.org and www.mass.gov/newtobaccolaw.org.

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# CHAPTER 13

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES:

# Cannabis and Cannabidiol (CBD)

## An Act to Ensure Safe Access to Marijuana (G.L. c. 94G)

The state legislature passed, and the Governor signed the above-noted law effective July 29, 2017. The law legalizes the adult-use of cannabis as regulated by the Cannabis Control Commission (CCC) housed at the Office of the Treasury. The CCC has sole jurisdiction to promulgate regulations prior to licensing a cannabis establishment; to supervise the industry; to implement a state licensing system; and to investigate and enforce any violations. The CCC also has sole jurisdiction over the Medical Marijuana Program.

The CCC is funded by a 20% tax on adult-use cannabis. The excise tax on retail sales is 10.75%. The sales tax is 6.25%, and there is an optional local sales tax of 3% if desired by a municipality. There is no tax on medical marijuana. In addition to implementing, administering and enforcing the law, CCC is charged with funding prevention, treatment and early intervention programs, public safety, municipal police training, programing for restorative justice, jail diversion, workforce development, technical assistance for the industry and providing mentoring services for economically-disadvantaged persons in municipalities disproportionately impacted by high arrest rates and incarceration for cannabis offenses.

The law created a Cannabis Advisory Board, and members include the following:

- Commissioner of Public Health
- Commissioner of Revenue
- Commissioner of Agricultural Resources
- State Police representative
- Massachusetts Municipal Association
- Qualifying medical marijuana patient
- Marijuana cultivation, retailing and manufacturing experts
- Experts in social justice, criminal justice reform, minority-owned businesses, women-owned businesses and prevention and treatment of substance use disorders.

The research agenda of the CCC includes public health impacts, patterns of use, methods of consumption, social and economic trends of cannabis, incidents of impaired driving and creating a baseline study. For more information on the CCC, including the

types of licenses available, fees for licenses and guidance documents, please see, https://mass-cannabis-control.com/.

Certain issues have arisen during the roll out of this new program in Massachusetts. One involves the Host Community Agreements (HCA) that cannabis establishment applicants and municipalities must sign. The HCA describes the responsibilities between the host community and the establishments. It may include a "community impact fee" reasonably related to costs imposed on a municipality relative to the operation of the establishment. In no event should the fee be more than 3% of the gross sales of cannabis and for no longer than 5 years. Some examples of approved fees are traffic design studies, environmental impact studies and substance use disorder prevention programs.

The HCA must be in place before the CCC will consider an application. Some cannabis advocates and applicants allege that some municipalities seek more money than is permissible by law through donations and charitable contributions and have asked the CCC to review the agreements. The CCC does not believe that its members have the legal authority to review the content of the agreements. Amid a federal investigation into some of these HCA's the CCC formally requested that the Legislature grant it the authority to oversee the content of the agreements. The SJC heard oral arguments on February 3, 2021, in the case of *Mederi v. City of Salem*, relative to the legality of HCA's.

Another issue concerns the definition of "drug paraphernalia" contained in G.L. c. 94C as it relates to the definition of "marijuana accessories" contained in G.L. 94G. Marijuana accessories are defined as "equipment, products, devices or materials of any kind that are intended or designed for use in . . . ingesting, inhaling or otherwise introducing marijuana into the human body." The definition of drug paraphernalia includes "water pipes . . . roach clips . . . electric pipes . . . bongs . . ." These items are illegal drug paraphernalia pursuant to the C. 94C, but legal marijuana accessories pursuant to c. 94G.

G.L. c. 94G prohibits the consumption of cannabis in a public place and the smoking of cannabis where smoking is prohibited. This means that cannabis use is prohibited in *any public place including outdoor public places.* So, effectively this means that the only places one can use cannabis is in a private home or vehicle. The exemption for social consumption establishments as proposed by the CCC needs legislation before it can be implemented.

Lastly, cannabis is still illegal on the federal level. This presents many challenges, including the challenge of finding a bank to use for a cannabis business. As a result, many of these businesses are cash businesses, which can result in security risks.

## Cannabidiol (CBD) and Hemp

CBD is one of the 113 identified cannabinoids found in cannabis. Years ago, there was a distinction between “hemp” plants which were grown for fiber and seed oil and contained non-euphoric CBD and “drug” plants which were rich in euphoric tetrahydrocannabinol (THC). However currently the plants are virtually identical. Both plants contain THC. This distinction is the amount of THC in the plant. If the plant has less than 0.3% of THC, it is considered industrial hemp, and if the plant has more than 0.3%, it is considered a cannabis plant. Hemp is not intoxicating. The only way to distinguish between the plants is through laboratory testing of the THC level.

## 2018 Federal Farm Bill

This federal law removed hemp from the federal Controlled Substances Act, thereby legalizing it. Hemp is now a legal agricultural crop governed by the United States Department of Agriculture (USDA) and MDAR. The federal Food and Drug Administration (FDA) has the legal authority to address public health requirements for all hemp-derived products. The FDA prohibits any food or other “consumable” product containing CBD from interstate commerce without its approval. The FDA also prohibits one from claiming a “therapeutic benefit” unless approved by the FDA. Epidiolix, a drug for the treatment of epilepsy has been approved by the FDA.

The FDA prohibits selling food containing CBD. It also prohibits the sale of any food containing THC, however cannabis food and beverages are legal pursuant the Massachusetts law because they are not classified as “food” for the purposes of the Food Code. However, DPH has issued policy guidance consistent with the FDA that prohibits the sale of food or other consumable products that contain CBD. Any product, including food that contains hemp seed oil, hulled hemp seeds and hemp seed protein are permissible since these products are “generally recognized as safe (GRAS).

## Commercial Industrial Hemp Program (G.L. c. 128, §§ 116 – 123)

The above-described Act Ensuring Safe Access to Marijuana designated the Massachusetts Department of Agricultural Resources (MDAR) with sole jurisdiction over industrial hemp. MDAR established the Commercial Industrial Hemp Program in 2018. G.L. c. 128, §§ 116 – 123 address MDAR responsibilities relative to hemp. MDAR must regulate all hemp activities, including but not limited to administering a licensing and registration program for the cultivation, processing, and sale of products.

MDAR has not enacted any regulations, however it has promulgated an “Interim Policy” which can be found on MDAR’s website https://www.mass.gov/industrial-hemp-program. For issues relative to food safety MDAR directs readers to the DPH Food Safety Program. For issues relative to enforcement, MDAR refers readers to local boards of health.

There has been much confusion in the retail environment because MDAR currently requires licenses for cultivation/growing and processing. However, MDAR states that there are no licenses available for retailers. MDAR's website states that it is not regulating the retail market and that a license from MDAR to sell CBD products is not necessary. This creates a bit of a conundrum. First, the state law requires MDAR to regulate all hemp activities including the sale of products. Second, this creates a unique challenge for local boards of health, since MDAR directs readers to local boards of health for enforcement.

MDAR lists the following as approved hemp-derived products on its website:

- Hemp seed, hemp seed oil, hulled hemp
- Hemp seed powder
- Hemp protein
- Clothing
- Building material
- Items made from hemp fiber; and
- Flower/plant from a Massachusetts licensed grower to a Massachusetts licensed grower or processor.

MDAR lists the following as hemp products not approved for sale:

- Food products containing CBD
- Any product containing hemp-derived CBD that makes therapeutic/medicinal claims
- Any product that contains hemp as a dietary supplement
- Animal feed that contains any hemp product; and
- Unprocessed or raw plant material, including the flower, that is meant for sale to a consumer
    - The rationale is that unprocessed or raw hemp plant material, including a hemp flower looks just like an unprocessed or raw cannabis material, including a cannabis flower and there is no way to distinguish them at retail.

## Proposed State Amendments to Adult-Use Cannabis and CBD Laws

Cannabis and CBD related issues are new to Massachusetts and, as a result, there are and will continue to be lessons learned. Many bills were introduced in 2019-2020 legislative session to address some of these issues. They include the following:

1. A bill filed by the Governor to strengthen penalties for driving under the influence of cannabis.
2. A bill to amend the social consumption provisions of the law so that the CCC can move forward on its social consumption pilot program which would permit these establishments without holding a community-wide vote first.

3. A bill to protect workers who fail cannabis tests.
4. A bill to permit the CCC to regulate and review the contents of host community agreements.
5. A bill to legalize edible CBD products.

The first and fourth bills appear to have the strongest legislative support at the time of publication of this handbook.

## Local Laws

Generally speaking, this state law is not preemptive, which means cities and towns can further regulation adult-use cannabis and CBD. Sample templates are on MAHB's website, www.mahb.org. Boards of health are encouraged to contact Cheryl Sbarra, Executive Director and Senior Staff Attorney or MAHB at sbarra@mahb.org or at (781) 721-0183 for more information.

# CHAPTER 14

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES: Air / Noise Pollution

## Multi-agency Regulatory Scheme

Enforcement of ambient air quality standards is vested in many agencies from the Federal Environmental Protection Agency (EPA) to the Massachusetts Department of Environmental Protection, to the local board of health. While ambient (outdoor) air quality standards are primarily federal and state level responsibilities, and national standards have been established for six ambient air contaminants, cities and towns must ultimately be in compliance with those standards. Local boards of health may be actively involved in helping to implement and maintain community programs to meet specific air quality objectives. Additionally, local boards of health are generally in the best position to proactively identify and address specific concerns within their jurisdictions.

There are fewer federal comprehensive regulatory programs governing indoor air quality, which forces heightened local board of health involvement as a key factor in protecting public health. Local boards of health monitor such indoor air quality issues as asthma rates in children, radon gas, mold growth, carbon monoxide, sick building syndrome, and air quality at specific places such as schools or indoor pools. In Massachusetts, local boards of health also focus on indoor air quality by administering grants and devoting municipal resources to promote and implement healthy homes programs, allowing holistic approaches to problems or risks associated with unsafe housing. It is within the powers of local boards of health to determine the level of involvement by their health departments, directly affecting the quality of air in their communities.

There is an increased awareness of environmental influence on our day to day living. Boards of health already track and regulate the water in swimming pools in Massachusetts, but they should also be aware of potential air quality problems indoor public swimming pools.[15] Irritants such as chloramines can build up in the air around swimming pools. Chloramines are a by-product of chlorine disinfection of pools and are caused when chlorine binds with the sweat or urine from swimmers. This explains reports of difficulty breathing, wheezing, lung disease, or asthma in swimmers, who are breathing extremely deeply while working out. Chloramines can also cause people to

[15] Boards of Health are responsible for the enforcement of Chapter V of the State Sanitary Code: Minimum Standards for Swimming Pools, 105 CMR 435.000. Enforcement includes issuing annual permits, conducting examinations, issuing orders, holding hearings, granting variances, and taking water samples.

develop sensitivities to fungal or bacterial irritants which are at an increased risk for presence in pools. Without adequate fresh air around swimming pools, irritants can accumulate and reach unhealthy levels. This is an increased risk in states where weather decreases the likelihood of outdoor air mixing with the ventilation of the room.

While super-chlorination can remove byproducts from the pool water, it is a sensible health regulation to require that swimmers take showers before using the pool in order to reduce the amount of body waste entering a pool. Boards of health should also ensure that air quality is monitored at public indoor swimming pools, a step that is currently overlooked. The CDC's Agency for Toxic Substances and Disease Registry maintains a very helpful series of web pages addressing indoor air quality, found at http://www.atsdr.cdc.gov/.[16]

Another frequently overlooked potentially dangerous item is the ventilation system of a building, which may bring pollution inside. Poor air exchange systems and insufficient amounts of fresh air often adversely affect health. Environmental science has defined a new disease, called "building related illness" (BRI), where a specific health effect can be related to a specific source within a building. The most publicized BRI is Legionnaires' disease, a form of pneumonia possibly caused by contaminated water in central air conditioning units. A less-known, but probably more prevalent form of BRI is hypersensitivity pneumonitis, which is presents with a range of influenza- or pneumonia-like symptoms caused by contaminated home humidifiers and building heating, ventilation, and air conditioning units.

Another well publicized indoor air health issue, "sick building syndrome," (SBS) occurs where occupants experience a variety of health effects that are difficult to link to a specific source. Symptoms of SBS include irritated breathing passages, headaches, fatigue, nasal discomfort, nausea, and general discomfort.

Once the source of indoor air quality problems is isolated, boards of health should assure that the source of the contamination be removed as the first action. In addition, the board should insist upon changing the ventilation system where conditions warrant and introducing air cleaners as additional steps that could be taken to improve indoor air quality.

Should the board decide upon duct cleaning and the use of ozone generators for remediation, it should be recognized that these methods are considered controversial and may lead to a challenge as studies on the benefits of routine duct cleaning are inconclusive. In addition, there is little evidence that proves that ozone generators improve air quality. In fact, there is a "Catch-22" effect, because the ozone levels created by the generators can be a harmful pollutant. More information on both of these

[16] One such page is at https://www.atsdr.cdc.gov/csem/csem.asp?csem=33&po=7

issues can be found online at the Indoor Air Quality section of the US EPA Office of Air and Radiation website at www.epa.gov/iaq/.

Some boards of health are addressing home air quality through an emerging holistic approach called the “healthy homes” approach. This is a comprehensive way to reduce injury and risk from housing. This integrated approach takes into account the people living in the home, the structure, and the potential hazards. The basic considerations for a healthy home include protection from the elements; a thermal environment that will avoid undue heat loss, both from the building and from the bodies of the inhabitants; an atmosphere of reasonable chemical purity; adequate daylight illumination without undue daylight glare, direct sunlight; adequate artificial illumination; protection from excessive noise; and adequate space for exercise and play. According to “healthy homes” principles, a home should be kept dry, clean, ventilated, pest-free, contaminant-free, and properly maintained. There are several on-line training options available from the federal government.

Whether or not a community adopts the healthy homes approach, it is advisable for boards of health to educate their constituents to discontinue using chemical-laden or toxic household cleaners and other products which can contribute to indoor air pollution. Many of these products contaminate the air and can be harmful immediately. Less obvious are products which accumulate over time, ultimately resulting in health problems. Household products have been linked to allergy, light headedness, respiratory diseases, and cancer.

Boards of health should also monitor and assess indoor air quality in high traffic buildings, especially in schools. Poor indoor air quality at schools has been shown to affect concentration and performance, as well as cause long-term health problems like asthma. In Massachusetts, school windows can remain closed for several months, allowing little to no fresh air into the school building. Indoor air pollutants in schools include elements brought into the building from outdoor air sources such as pollen and dust; industrial and vehicle emissions; underground sources such as radon; heating or air conditioning units; emissions from office equipment, carpets or labs; cleaning items; pesticides; and furnishings. Boards of health should combine their efforts with school departments and assure a safe learning environment.[17]

Local boards of health should be proactive in addressing key IAQ issues by taking the lead in planning and managing resources during a crisis and coordinating municipal agencies to improve conditions where poor air quality exists. As our climate changes, the role of boards of health in disaster management increases. After a severe rain event, flooding is more prevalent than ever before. In affected homes and other

[17] The EPA’s *The Indoor Air Quality Tools for Schools* program provides resources to help schools identify and solve indoor air problems. More information is available at http://www.epa.gov/iaq/schools/.

locations, standing water and wet carpets, curtains, etc. promotes the growth of disease-causing microorganisms, threatening public health. Too many communities lack proper emergency preparedness for such events, and this is squarely within the purview of the local board of health. MAHB can provide information and other resources to assist its member boards with this essential function. It is clear that prior planning plays an important role in maintaining public health. Again, local boards of health should coordinate other agencies to implement disaster and emergency plans well before a disaster occurs.

## Authority

Boards of health derive authority from several sources to regulate activities that cause air pollution, or that generate levels of noise that are detrimental to the public health and welfare. These include the powers of boards of health (1) to abate nuisances under G.L. c. 111, § 122; (2) to regulate and control atmospheric pollution under G.L. c. 111, § 31C; (3) to regulate noisome trades; and (4) to enforce the regulations promulgated under Chapter 111, § 142A-142M by the Department of Environmental Protection (DEP) with respect to noise, dust, odor and other specific activities (310 CMR 7.00).

## DEP Regulations

Sections 142A-142M of Chapter 111 constitutes Massachusetts' "Clean Air Act." Under Sections 142A and 142B, DEP is authorized to "adopt or amend regulations to prevent pollution or contamination of the atmosphere ...." These regulations appear at 310 CMR 7.00. Chapter 111, Section 142B also authorizes the Superior Court to enforce these regulations on petition of the DEP "or any person authorized by" DEP. In 310 CMR 7.52, DEP has expressly conferred such enforcement authority on certain local officials, including "board of health officials," with regard to specified sections of its regulations. The enforcement power is also conferred on police and fire department personnel and the building inspector. The sections that can be enforced by local officials include those dealing with (1) open burning (310 CMR 7.07); (2) domestic incinerators (310 CMR 7.08); (3) dust, odor, construction and demolition (310 CMR 7.09); (4) noise (310 CMR 7.10); (5) motor vehicles and diesel trains (specifically, their noise and exhaust impacts, 310 CMR 7.11); and (6) asbestos (310 CMR 7.15).

Most of these regulations start with a general prohibition against the conduct of these activities in a manner that will "cause or contribute to a condition of air pollution." In that context, "air pollution" is defined by 310 CMR 7.00 as:

> the presence in the ambient air space of one or more air contaminants or combinations thereof in such concentrations and of such duration as to:
>
> (a) cause a nuisance;
>
> (b) be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or

(c) unreasonably interfere with the comfortable enjoyment of life and property of the conduct of business.

DEP has formulated some more specific standards for some of the activities within the jurisdiction of boards of health. For others, particularly dust and odor, a more subjective application of the above definition may be the only standard that local officials can apply.

### a. Open Burning

Open burning of any combustible material is prohibited except under limited circumstances. The exceptions include fires used for cooking purposes, the burning of brush for the clearing of agricultural land, and, between January 15th and May 1st, burning of brush by homeowners. DEP may also approve open burning where no alternative suitable method of disposal is available. All open burning must be conducted without creating a nuisance, and under a permit issued by the Fire Department or Fire Commissioner under G.L. Chapter 48, § 13.

### b. Incinerators

The rules regarding commercial incinerators are administered exclusively by DEP. Domestic incinerators may not be sold or operated unless their design and standard operating procedure have been approved by DEP. Even approved incinerators may not be operated, however, in a manner that causes a condition of air pollution in the opinion of DEP after the operator has been notified of that opinion.

### c. Dust, Odor, Construction and Demolition

The DEP regulation, found at 310 CMR 7.09, provides that:

> No person having control of any dust or odor generating operations shall permit emissions there from which cause or contribute to a condition of air pollution.

This regulation includes a long list of examples of "dust or odor generating operations," but the list is not intended to be exclusive. It is also important that the preceding chapters on noisome trades and nuisances, Chapters 9 and 10 respectively, be read in conjunction with this one, when it comes to dust or noise generators.

Dust and odor impacts can be very difficult to quantify with any kind of precision. For that reason, citizen complaints and first-hand observations can be a sufficient basis for a finding that a nuisance condition exists. *See, Town of Shrewsbury v. Comm'r of the Department of Environmental Quality Engineering*, 38 Mass. App. Ct. 946, 948 (1994). In that case, which stemmed from complaints of odors from a municipal composting facility, the DEP hearing officer rejected the scientific techniques used to quantify odors as having "virtually no probative value," and relied instead on the incidence and nature of the complaints from nearby property owners. The Appeals Court upheld that decision.

### d. Noise

The DEP regulation on noise is similar to the regulation on dust and odor, except it excludes noise that is generated by properly permitted "parades, public gatherings, or sporting events," domestic power tools and equipment used between 7 a.m. and 9 p.m., public safety vehicles and public safety or civil defense activities.

As with noise and odor, subjective criteria may be good evidence of a nuisance condition. Noise is easier to measure, however, and DEP has developed guidelines for determining whether noise is excessive. The guidelines establish total decibel limitations measured at the property line, and limitations on "tonal noise;" elevated levels of noise within a distinct range that produce a persistent hum or tone.

### e. Transportation Media

The DEP regulations allow boards of health to regulate the noise and exhaust impacts from motor vehicles and trains when those vehicles are not moving. (Emissions from mobile sources are regulated separately.) It prohibits the idling of motor vehicles in excess of five minutes, and diesel trains in excess of thirty minutes, unless such idling is necessary for proper maintenance or for conducting repairs.

### f. Asbestos

The DEP regulation on asbestos (310 CMR 7.15) prohibits demolition/renovation, installation, reinstallation, handling, transporting, storage or disposal of a facility or facility component that contains asbestos which causes or contributes to a condition of air pollution.

The regulation requires that the owner/operator of any demolition/renovation project involving asbestos-containing material to notify DEP, and to follow specified procedures for controlling asbestos emissions, using air cleaning equipment and proper disposal. All of these provisions except notice to DEP are enforceable by the local board of health.

All of the foregoing regulations can be enforced by local boards of health by means of a civil action in the Superior Court. To the best of our knowledge and belief, DEP has not funded any staff positions dedicated to enforcement of the regulations pertaining to dust, noise and odor, relying entirely on local boards of health for such enforcement. There are, however, resources available pertaining to asbestos remediation in several sections of the DEP website, with a particularly helpful guide found at https://www.mass.gov/guides/massdep-asbestos-construction-demolition-notifications.

Chapter 111, Section 142B expressly provides that this section shall not operate to abrogate any of the powers and duties, as defined by general or special law, of any agency or political subdivision of the commonwealth. Consequently, the DEP regulations can be used in conjunction with the powers boards of health hold independent of those regulations to control nuisances and noisome trades, and to adopt reasonable health regulations, as explained below.

## Abatement of Nuisances (See, Chapter 10)

It is well settled case law that an activity that generates excessive amounts of noise, odor or other irritants is subject to the issuance of an abatement order from the local board of health. *See, Marshall v. Holbrook*, 276 Mass. 341 (1931) (noise of hammers used in a drop forge plant that caused "loud and disagreeable" noises in houses one mile away found to be a nuisance); *Moysenko v. Board of Health of North Andover*, 347 Mass. 305, 307-308 (1964) (piggery found to be a nuisance due to associated odors). The procedure for issuing and enforcing an abatement order under G.L. c. 111, § 122 is explained in greater detail in Chapter 10 of this Handbook.

A possible disadvantage of relying on the authority of G.L. c. 111, § 122, the nuisance statute, is that it offers no objective standards for determining whether the activity is sufficiently offensive to constitute a nuisance, leaving it to a court to determine whether the board's determination was reasonable. As discussed elsewhere in this handbook, courts are loath to substitute their judgment for the judgment of a local board of health and, as a result, most courts will generally uphold the board's determination that a nuisance exists. When used in combination with the DEP regulations, however, Section 122 is a powerful tool. Section 142B does not give local boards of health the power to issue administrative orders, only to seek relief in court. The board could issue such an order under Section 122, using the standard enumerated in the DEP regulations as evidence of the nuisance condition. In this way, an administrative order under Section 122 can be a mechanism for enforcing the DEP regulations without resorting to court action in the first instance.

## Local Regulations

Under the provisions of G.L. c. 111, § 31C, a local board may:

> regulate and control atmospheric pollution, including, but not limited to, the emission of smoke, particulate matter, soot, cinders, ashes, toxic and radioactive substances, fumes, vapors, gases, industrial odors and dusts as may arise within its bounds and which constitutes a nuisance, a danger to the public health, or impair the public comfort and convenience.

Unlike an abatement order directed to a particular activity, such regulations operate prospectively, and can be drafted to incorporate more objective standards to be used to determine when a violation has occurred. As with many other forms of environmental regulation, a local board of health may treat the DEP regulations as providing a

minimum standard only, and may promulgate stricter or more detailed regulations of its own. Any regulations approved under G.L. c. 111, § 31C must be submitted to DEP for approval. DEP is directed to advise local boards "in all matters of atmospheric pollution," and it is authorized to assume joint jurisdiction with local boards to address specific sources of air pollution when those sources are located in another town. Violations of regulations adopted under § 31C carry a penalty of between $1,000 and $5,000 for the first offense, and between $5,000 and $10,000 for each subsequent offense.

Regulations adopted under this section need not be limited to controls on direct sources of emissions. In *Fitz-Inn Auto Parks, Inc. v. Boston*, 389 Mass. 79, 82 (1983), the Supreme Judicial Court upheld a regulation under § 31C which imposed a limit on the number of permitted off-street commercial parking spaces in designated portions of Boston as a "reasonable means of regulating and controlling air pollution." This decision suggests that a board of health may supplement DEP's direct regulation of emissions by regulating the time, place and manner of various air pollution generating activities.

For pollutants that are difficult to measure, such as dust and odor, the nuisance standard used in the DEP regulations may be adequate. Noise standards are more easily developed, and many boards of health have adopted regulations to impose stricter limitations on noise, particularly to protect sensitive receptors (such as schools, hospitals or nursing homes) or to preserve the rural character of a particular area. Section 31C does not expressly require that noise regulations be submitted to DEP for approval; however, because DEP's regulations treat noise as a form of atmospheric pollution, it would probably be prudent to do so.

## Noisome Trades: Air/Noise Aspect (Also see, Chapter 9)

In addition to regulating noise, dust, odor and other irritants by prohibiting particular impacts, local boards of health may also regulate commercial activities that are likely to produce such impacts as "noisome trades." The procedures for regulating noisome or offensive trades are addressed in more detail in Chapter 9 of this Handbook.

Once a particular activity is designated as a "noisome trade," it cannot be conducted within the municipality without a "site assignment" from the local board of health. Such a site assignment can be given subject to conditions, including restrictions on hours of operation, the use of particular dust or odor control measures, and other like conditions. The site assignment may, by its terms, require annual or other periodic renewal. The board may develop new conditions at the time of renewal, or it may decline to renew the site assignment. *See, Waltham v. Mignosa*, 327 Mass. 250, 251-253 (1951). It is likely that the board would have to offer a good reason to refuse to renew such a permit; in general, however, the board does not need to demonstrate that a nuisance exists in order to deny a site assignment for an activity, provided that the activity is one that <u>may</u> create nuisance conditions. *Id.* The aggrieved party is not free to challenge the regulation of the board of health on a reasonableness basis. *Id,* at 252, which gives plenary power to local boards of health.

# CHAPTER 15

# AUTHORITY TO REGULATE SPECIFIC ACTIVITIES: Betterments

## Betterments, General

A "betterment" is an *improvement* put upon an estate which enhances its value more than mere repairs. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. *Black's Law Dictionary*, Online edition, 2019.

### Authority & Board Jurisdiction

The public health remediation statute, Section 127B½ of Chapter 111 gives Boards of Health special authority to address the specific health hazards of inadequate septage systems, the release of home heating oil, and dangerous lead paint levels. The section provides for municipal funding of remediation, subject to reimbursement and the procedural requirements of the betterments provision of G.L. c. 80, where a dwelling is a public health hazard subject to the provisions of G.L. c. 111, § 127B, due to one of these three specific problems.

### Process

In order to be eligible for remediation under this section, the owner of any such dwelling must first petition the board of health to agree to remediate the situation. This petitioning may occur prior to or in the course of Section 127B proceedings in relation to the dwelling. Section 127B gives boards of health the authority, upon a determination that a building "is unfit for human habitation, or is or may become a nuisance, or is a cause of sickness or home accident to its occupants or the public," to order the occupants to vacate, remediate the problem, or otherwise to comply with regulations that are being violated. The section also provides a procedure for eviction and allows for demolition in some situations, with the costs to be borne by the owner.

Once an agreement is reached between the Board and the property owner, the Board may enter into contracts with third parties to repair or replace the defective septic system, or to remove the underground storage tank or lead paint. Such contracts will be subject to laws generally applicable to municipal contracts (including, for example, procurement laws).

There are limitations to the remedies under section 127B½, however. For example,

for a home serviced by an inadequate septic system and located in a neighborhood that has municipal sewerage, the section does not provide for connection to the sewerage system. Rather, relief is limited to "caus[ing] the premises to be serviced by a septic system." Connection to the town sewers would have to be funded under the "traditional" betterment law, M.G.L. c. 80.

Any agreement between a board and the owner to remediate under section 127B½ is "subject to appropriation." Therefore, the municipality must budget funds for projects in advance, or enter into agreements subject to appropriation by the governing body. All costs, however, are ultimately borne by the owner, not the municipality. Property owners will be billed regularly with their property tax bills.

## Interest Charges

The municipality can charge interest, pursuant to G.L. c. 80, § 13, upon apportionment of a betterments assessment at a rate of either 5% or not more than two percent more than the municipality's borrowing cost. Section 127B½ provides that the rate charged to the owner is to be determined by the city or town treasurer by agreement with the owner.

## Liability

While G.L. c. 80, § 4 expressly excuses the owner from personal liability for a betterment assessment, section 127B½ extends liability to the owner. This change gives the municipality the option to sue the owner personally for the debt or to proceed against the property itself, with the owner liable for any deficiency.

However, a municipality is not insulated from liability for the untoward effects of becoming involved in remediating an environmental hazard on private property. Since the contractor undertaking the work is doing so as an agent of the Board, the Board can be held responsible for deficiencies in the contractor's work, if such deficiencies cause harm. Therefore, it is important to be certain that the contractor is properly insured and that both the contractor and the property owner agree to indemnify the Board and the municipality against any such harms.

## Restrictions

As in Chapter 80, the betterment may not be apportioned for a period of longer than twenty years. Section 127B½ also provides that municipal borrowing to fund the remediation may not exceed twenty years. The municipality does not include the assessed costs of the betterment within the Proposition 2½ property tax levy limits. Therefore, any borrowing by the municipality pursuant to this section does not reduce the municipality's ability to borrow for other purposes. However, any municipality that wishes to issue bonds to fund payments under section 127B ½ should consult its bond

counsel to determine whether the bonds will be taxable. In addition, the Massachusetts Department of Revenue's Informational Guideline Release No. 94-208 (November 1994) should be consulted for the mechanics of implementing section 127B ½.

An agreement under section 127B½ does not expose an owner to liability for breach of any contractual agreements not to encumber the property.

Any agreement to remediate made under section 127B½ does not in any way impair the board's power to evict to protect the public health, under § 127B. However, such an eviction proceeding also does not affect the rights conferred and duties imposed by an agreement for remediation under the Betterments Law.

Citizens may challenge the validity of a betterment assessment, however there is a very short window of opportunity to file such a challenge. *Cook v. Board of Assessors of Wayland,* 2003 WL 25795769 (2003), finding that a challenge to the validity of a betterment assessment must be filed within sixty days of the proceeding, in some instances. It can also be challenged in a declaratory judgment action – again this challenge is limited in time to being made prior to the commitment of the betterment to the tax assessor. *Id. See also, Zambernardi v. Selectmen of Wilmington,* 2 Mass. App. Ct. 873 (1974).

# CHAPTER 16

# AGRICULTURAL ISSUES AND CONSIDERATIONS

## What is Agriculture?

The legal dictionary definition of agriculture, as defined by Black's Law Dictionary as "[t]he science or art of cultivating soil, harvesting crops, and raising livestock." Black's Law Dictionary 69 (7th ed. 1999). It is not limited to only 'farming.' While agriculture includes farming activities such as preparing soil, planting seeds, and raising and harvesting crops, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, ranching, riding stables, firewood operations, and landscape operations. *Valley Green Glo, supra.*

Under the Massachusetts General Laws, "farming" and those who are designated as "farmers" are defined in G.L. c. 128 § 1A as:

> Section 1A. ''Farming'' or ''agriculture'' shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

This statute is mentioned here, as it is referenced in several places as part of other statutory provisions which call for regulation of farms and farmers discussed below.

## Economic Impact on Massachusetts:

By whatever semantic definition one defines farming in Massachusetts, it remains the fact that the industry is large in this state, and that the culture of Massachusetts farms differs in a couple of big ways from those of the traditional "farm belt." This state has 7,241 farms on 491,653 acres, employing 25,920 individuals

generating an annual market value of over $475 million in agricultural goods. The average farm produces $65,624 worth of agricultural products on 68 acres.[18]

The key cultural feature of Massachusetts agriculture which differs from the large "farm belt" states, is that, unlike Iowa, Nebraska, Pennsylvania and other mainly agrarian states, while Massachusetts ranks 5th in the nation for *direct market* sales with over $100 million, and ranks 3rd in the nation for *direct market sales per farm* at $55,384, direct market sales account for 21.1% of the state's total sales of agricultural products; that is the highest proportion in the country. Additionally, Massachusetts ranks 8th in the nation for direct sales per capita.[19] Our farm products are traditionally sold in a farm stand, generally on the farm property, and mainly sold to people who drive to the farm stand and purchase direct from the farmer. While many farms sell to commercial distributors, nearly 85% of our farm revenue is generated by customers of the farm or participants in a farm's Community Supported Agriculture (CSA) agreements.

Small and family orientated farm culture is prevalent in Massachusetts agriculture. The USDA defines small farms as farms with agricultural sales below $250,000. Small farms account for 94.2% of farms in Massachusetts while family or individually owned farms account for 79.7% of Massachusetts farms. Unfortunately, the industry is aging with the average principal operator being 59.1 years old, with females representing 38.5% of all principal operators.[20]

## Right to Farm:

### 1. Doctrine and Policy

In Massachusetts actions by local boards of health which involve farmland are generally challenged by the landowner on grounds of "Right to Farm." The Right to Farm is a law which was first enacted in this state because of urban sprawl. Many communities see a diminution of farmland as real estate developers began to purchase tracts of farmland to develop new homes. While farms had predated the newly neighboring residences by decades, if not centuries, and while there is an allure to living near rolling hills of corn, tomatoes, apples and livestock, some homeowners discovered the downside to their new neighborhoods.

While generally thought of as aesthetically pleasing, not all farms grow domestic flowers and hay. Farming is more than a pretty convenience – It is big business,

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[18] *Agricultural Resources Facts and Statistics: Statistics on agriculture in Massachusetts, ©2020;* https://www.mass.gov/info-details/agricultural-resources-facts-and-statistics#current-statistics- (last accessed 2/4/20)

[19] *Id.*

[20] *Id.*

generating hundreds of millions of dollars in annual revenue and comprising nearly 10% of the Commonwealth's land mass.[21]

As the new landowners in modern developments began to settle into their newly developed country estates, the "little things" started to bother them. The roosters wake up early. So do the neighbors. The tractors start to plow the fields at dawn, maybe a truck arrives at midnight to be loaded with milk from the storage tank. The fields may be deep green with fresh vegetation, but to achieve that, the farmer must fertilize them. While transporting the cow manure from the livestock fields to the wheat fields on a flatbed trailer in the rain, a certain percentage of manure dissolves and oozes off the trailer onto the roadway just inches from the million-dollar home's driveway. The irate neighbors finally reach their boiling point. They haven't slept a night since moving in. The noise doesn't stop, trucks in and out at all hours, smelly field operations going on, animal noises at all hours and now they can't even get their mail without having to wash their shoes off. They call their lawyer and are advised that they can bring a costly suit and possibly not win, and worse, they will litigate for years; or maybe it is easier and far faster and more economical to call the Board of Health and ask for a hearing on a nuisance complaint. When dealing with health regulation of farms and their neighbors, it is essential that the board members be conversant in the "Right to Farm" laws.

Right to farm bylaws are intended to promote agricultural opportunity and to allow farming operations to flourish with minimal conflict with abutters and town agencies.

### 2. Statutory and Constitutional Authority

When the complaint for nuisance reaches the board of health, the board may find that it is powerless and that it must deny the claim and rule in favor of the farm, which is immune from action local boards of health and the courts, so long as the farmers use "accepted and standard farming practices." Since Massachusetts adopted this doctrine in 1979, every other state has followed suit with a protective system of protecting farmers whose farms may be smelly, noisy, ugly or have dangerous structures.

Article 97 of the Massachusetts Constitution ensures "the protection of the people in their right to the conservation, development and utilization of the agricultural...and other natural resources."

Generally, a "farm" must contain five or more acres of land. If the tract of land is not five acres but is two or more acres and generates a gross income of at least $1000 per acre, that parcel is also entitled to the protections of the right to farm laws. By stating that no local Zoning By-Law may prohibit, unreasonably regulate, or require a

[21] Massachusetts has 4,989,071 acres of land mass. *www.massaudubon.org › advocacy › losing-ground-report › fast-facts*

special permit for the use of land for the primary purpose of agriculture, G.L. c. 40A, § 3, furthers this goal. That provision states in part:

> **Section 3.** No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture,[22] …, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, …, including those facilities for the sale of produce, wine and dairy products, provided that either during the months of June, July, August and September of each year or during the harvest season of the primary crop raised on land of the owner or lessee, 25 per cent of such products for sale, … have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale, … have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture, …, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least $1,000 per acre based on gross sales dollars in area not zoned for agriculture….

With the recent legalization of cannabis cultivation and sale, it is important to note that not all right to farm protections under Article 97 apply to the agricultural definition of cannabis. For instance, the zoning exemptions of regular agriculture do not apply to cannabis.

> For the purposes of this section, the term ‘‘agriculture’’ shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof; provided, however, that ***the terms agriculture***, … ***shall not include the growing, cultivation, distribution or dispensation of marijuana*** as defined in section 2 of chapter 369 of the acts of 2012, marihuana as defined in section 1 of chapter 94C or marijuana or marihuana as defined in section 1 of chapter 94G; and provided further, that ***nothing in this section shall preclude a municipality from establishing zoning by-laws or ordinances which allow commercial marijuana growing and***

[22] Specifically included with this definition of “agriculture,” are aquaculture, silviculture, horticulture, floriculture or viticulture.

> ***cultivation on land used for commercial agriculture***, aquaculture, floriculture, or horticulture. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

Other state laws provide additional protection and incentives for agriculture. For instance, G.L. c. 90, § 9, the provision governing registration of motor vehicles, exempts farm vehicles under certain circumstances, from mandatory registration with the state Department of Motor vehicles.

> A tractor, trailer or truck may be operated without such registration upon any way for a distance not exceeding one-half mile, if said tractor, trailer or truck is used exclusively for agricultural purposes, or between one-half mile and 10 miles if said tractor, trailer or truck is used exclusively for agricultural purposes and the owner thereof maintains in full force a policy of liability insurance …

Agriculture in Massachusetts is defined by several Appeals Courts by relying upon G.L. c. 61A, § 1[23], and c. 128, § 1A. *See, Valley Green Grow, Inc. v. Town of Charlton,* Massachusetts Land Court, 2019 WL 3815837 (2019)[24], *Cotton Tree Service, Inc. v. Zoning Bd. of Appeals of Westhampton,* 89 Mass. App. Ct. 1136 (2016); and *Steege v. Board of Appeals of Stow,* **26 Mass. App. Ct. 970 (1988).**

Cities and towns in Massachusetts are free to adopt right to farm bylaws or ordinances under Article 89 of the Massachusetts Constitution, the "Home Rule Amendment." There are several excellent boilerplate forms for this on-line. [25]

### a. Potential for Conflict:

By their nature, farms may create conflict with their surrounding non-agricultural neighbors. Specifically, farming operations include:

- operation and transportation of slow-moving farm equipment over roads within the town, which may slow traffic at inconvenient hours and cause traffic congestion;
- control of pests, including, but not limited to, insects , weeds, predators and disease organism of plants and animals, and may result in airborne transmission of herbicides and pesticides;

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[23] Land shall be deemed to be in agricultural use when primarily and directly used in raising animals, including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purpose of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market.

[24] Adopting the language of G.L. c. 128, § 1A, *supra.*

[25] https://www.mass.gov/files/documents/2016/08/nv/farmbylaw.pdf

- application of manure, fertilizers and pesticides, which will spread noxious odors to surrounding properties;
- conducting agriculture-related educational and farm-based recreational activities, including agri-tourism, provided that the activities are related to marketing the agricultural output or services of the farm, which – while promoting community education – may also increase traffic;
- processing and packaging of the agricultural output of the farm and the operation of a farmer's market or farm stand including signage thereto, resulting in delivery truck traffic and potentially non-conforming signage;
- maintenance, repair, or storage of seasonal equipment, or apparatus which is potentially a source of noise; and
- on-farm relocation of earth and the clearing of ground for farming operations, resulting in noise, and potentially unsightly piles of dirt, manure and mulch.

These activities may occur at inopportune times such as holidays, weekends, night or on weekdays. It is generally accepted that the open space, economic, aesthetic, and healthy food opportunities brought to a community by its farms outweigh the burden on the town. But to the neighbor of a loud, smelly farm, there may be times when there is little charm in the rustic barn with its silo situated on a rolling green hill.

### b. Dispute Resolution

Of course, the right to farm does not totally preempt aggrieved citizens from seeking relief. Chief among complaints against farmers are chemical-related injuries to neighbors' plants resulting from drifting herbicides, excessive noise, odor, and insect infestations. Under the statutes, acts which would ordinarily be deemed a nuisance if not carried out on a farm and which could ordinarily be brought before the board of health, are not usually redressable as a nuisance under certain circumstances. Under G.L. c. 111, § 125A:

> "odor from the normal maintenance of livestock or the spreading of manure upon agricultural and horticultural or farming lands, or noise from livestock or farm equipment used in normal, generally acceptable farming procedures or from plowing or cultivation operations upon agricultural and horticultural or farming lands shall not be deemed to constitute a nuisance."

In its simplest terms, this means that if a farm-related nuisance is brought before the board of health, the board must first determine whether the complained-of act is part of a normal, generally accepted farming procedure. If it is, then the board cannot entertain the nuisance complaint. One scenario that is not uncommon occurs where the farmer is transporting manure between fields over public ways and the manure falls off the truck in front of a home. This issue may be dealt with by the board of health.

The more difficult issue arises when the board is faced with a practice which is *not* within the normal, generally acceptable farming procedure. In this day of modern genetic-based farm technology, many farms are using cutting edge, still unproven

methods. These farms may well be subject to nuisance complaints before the local board of health. The procedures for nuisance are well covered in Chapter 10 of this book on “Nuisance.”

If the complainant has a valid claim, §125A provides that the board must issue, “a written notice of an order to abate the (nuisance) within ten days after receipt of such notice.” *See,* §124. Section 125A continues, “If no petition for review is filed as herein provided, or upon final order of the court, said board may then proceed as provided (by applicable statutes and order abatement or removal of the nuisance), or in the order of the court,” if the issue has been litigated in the district court. There is a right to appeal under the statute, and if there has been such an appeal, “the court shall give notice thereof to said board, shall hear all pertinent evidence and determine the facts, and upon the facts as so determined review said order and affirm, annul, alter or modify the same as justice may require.” The issue will then be remanded by the court to the local board of health.

An important series of events has recently occurred in North Carolina, and these events may give rise to other litigation across the nation. There had been a series of personal injury and nuisance suits filed in that state against a hog processing corporation, Murphy-Brown. The filing of those suits triggered intense lobbying efforts by the meat packing industry, resulting in the passage of the North Carolina Farm Act of 2018, which enhances right to farm considerations and diminishes the rights of neighbors as hog farms move from small family-owned ventures to being operated by large multinational corporations, was passed. That bill was vetoed by the Governor, but the veto was overridden in very contentious legislative proceedings.

At the time of this publication, there is a major showdown between farmers claiming they have a right to farm and neighboring residents and businesses in North Carolina, which bears mention. About 500 plaintiffs have joined in 29 cases filed in the U.S. District Court for the District of North Carolina. So far there have been five trials and the defendant Smithfield Hog Production has been ordered to pay out around half a billion dollars in damages. The juries in those cases found willful and wanton misconduct in the way and manner in which the hog ranchers abused the hogs and in their handling of the carcasses of the animals they disposed of after processing, as well as some that died from mishandling. The farms were also using a novel method of disposing of the feces, using anaerobic lagoons, which caused the surrounding area to become unlivable because of the odor, as the feces are treated by liquification and sprayed all over the fields. The first three verdicts totaled over half a billion dollars, so the industry took to the more business-friendly state legislature for relief while the cases were on appeal.

Following intense lobbying efforts by the meat packing industry, the North Carolina Farm Act of 2018 was passed. This statute enhances right to farm considerations and diminishes the rights of neighbors to file suit, as hog farms move from small family-owned ventures to being operated by large multinational corporations. That bill was vetoed by the Governor, but the veto was overridden in very contentious

legislative proceedings. The new statute resulted in many of the cases being dismissed on appeal and foreclosed the filing of many subsequent cases.[26]

### c. Right to cultivate cannabis (For more on Cannabis and CBD, see Chapter 13)

With the recent legislation allowing the growth and consumption of cannabis, certain municipalities have attempted to circumvent the right to farm by bylaw and ordinance. A corporation proposed taking over a one-million square foot orchard in the town of Charlton in order to grow cannabis. Valley Green Grow, Inc. submitted a site plan to the Charlton Planning Board in 2018. In January of 2019 the planning board rejected the site plan and subsequently rejected the subdivision plan on the grounds that the plans amounted to a proposal to use the land for light manufacturing, a use not permitted on land which is zoned for agriculture.

Valley Green Grow filed an appeal in the Land Court, which disagreed with the planning board decision and returned the plans back to the planning board with instructions to restart the proceedings. The judge held that in the context of the town's bylaw cannabis cultivation is agriculture and the project was allowed as a matter of right. *Valley Green Grow, Inc. v. Town of Charlton,* 2019 WL 3815837 (Land Court, 2019).

The *Valley Green Grow* case presents an extremely contemporary case pitting a cannabis grower against a town with a restrictive bylaw which provides that the only approved uses are those expressly permitted under Charlton's bylaw which sets out four categories of allowed agricultural use. These are (1) "[r]aising and keeping of livestock...on a parcel over five (5) acres;" (2) "[r]aising and keeping of livestock...on a parcel of five (5) or fewer acres;" (3) "[r]aising of crops, whether for sale or personal consumption, on a parcel of any size;" and (4) "[i]ndoor commercial horticulture/floriculture establishments (e.g., greenhouses)." The town sought to block the cultivation of Marijuana as a prohibited use. The Land Court analyzed existing zoning regulations and statutory exemptions, looked at definitions of "raising crops," "horticulture/floriculture," and concluded that although G.L. c. 40A, § 3 expressly excepts activities relating to marijuana from the definition of agriculture applicable to that section,[27] the legislature was aware that there was an exception carved out for zoning purposes under amendments to the zoning statutes, and did not invoke those amendments in G.L. c. 61A, §§ 1 & 2, nor G.L. c. 128, § 1A, and held that growth or

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[26] *Lewis v. Murphy-Brown*, No. 7:19–CV–127–BR (E.D. N.C. March 16, 2020)

[27] [T]he term horticulture shall include the growing and keeping of nursery stock and the sale thereof; provided, however, that the terms agriculture, aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana … and provided further, that nothing in this section shall preclude a municipality from establishing zoning by-laws or ordinances which allow commercial marijuana growing and cultivation on land used for commercial agriculture, aquaculture, floriculture, or horticulture….

cultivation of marijuana is likely an agricultural activity which, if not otherwise addressed, would be exempt from zoning.

# Public Health Considerations in Agriculture

## Background

While public health programs in various cities and towns are expanding to subsume topics such as the importance of nutrition, open space impacts on health, physical activity and risk, and concern for environmental impact of various activities; local boards of health must remain vigilant in the consideration of the overall impact on agriculture on these topics. An increasing number of boards are including community health in their purview, and the corps of community health workers is confronted with novel agricultural-based issues.

This concern spans a panoply of topics as farm risk is examined. Public health policy makers and enforcement personnel should consider risks of animal-acquired infection, heat related illnesses, noise, pesticides and chemicals and unsanitary conditions. In particularly agrarian areas of the state, health inspectors and other environmental agents should be trained to have a watchful eye for other farm-related risks such as proper ladder usage, fall risk, respiratory irritants, etc., and should not hesitate to call in other agencies more equipped to deal with those risks. Agencies such as OSHA, Mass Ag and the Mass Division of Labor Standards are equipped to take action to prevent injuries on farms, as some issues may be beyond the scope of a health inspection.

Looking at farmworker health, the general belief is that agricultural workers are healthier than urban-dwelling and non-farm rural populations. Such factors as healthier lifestyle, drinking/smoking habits, physical activity and healthier diet are all believed to be relevant factors. However, farming itself and farming-related tasks entail significant hazards to the health and well-being of farmers. Factors such as long hours in hazardous and physically demanding work environments, exposure to a wide range of occupational hazards such as ergonomic stress, sunlight, viruses, inorganic dust, pesticides and other chemicals have been investigated as possible risk factors for the reported adverse health effects. These adverse effects include musculoskeletal disorders, respiratory diseases, injuries, cardiovascular diseases, pesticide poisoning and neurological dysfunction.

Unfortunately, farmworker stress has been recently recognized as an important public health concern. Stressors inherent in farm work and lifestyle, such as uncertain and fluctuating economic prospects are associated with poor physical and mental health outcomes and result in deleterious effects on cognitive function, depression and high

rates of suicide. [28] Much has been written on the issue of mental health among farmers.[29]

## Legislation Affecting Boards of Health and Agriculture

Because of many of the issues discussed in this chapter, representatives of various agricultural interests and MAHB have been discussing local board impact on agricultural activities and how to better coordinate the potentially competing interests in such a way as to assure optimal public health conditions, while allowing free-flowing agriculture within that parameter. After many meetings, hearings and revisions, the Legislature has passed a bill, signed into law on January 11, 2021, Chapter 321 of the Acts of 2021.

That statute amends G.L. c. 111, § 31, the statute that addresses the impact of health regulations upon agriculture, by imposing certain conditions on board of health regulation of farmers markets, farms, non-commercial keeping of poultry, livestock or bees; or the non-commercial production of fruit, vegetables or horticultural plants. If a municipality has an agricultural commission, the board of health must submit any proposed regulation to that commission and allow it to opt to have a public meeting and to return written recommendations and comments to the board within 45 days unless the agricultural commission waives that period. This entire process can be set aside should the board of health determine that the conditions under consideration constitute a health emergency, in which case the board, or it's agent may issue an order requiring that the subject of the emergency be addressed forthwith, without notice of a hearing as the board deems necessary. This action must comply with local emergency enforcement procedures.[30]

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[28] Arcury T., Quandt S.A. *Living and working safely: Challenges for migrant and seasonal farmworkers*. N. C. Med. J. 2011;72:466–470; Nguyen H.T., Quandt S.A., Grzywacz J.G., Chen H., Galván L., Kitner-Triolo M.H., Arcury T.A. *Stress and cognitive function in Latino farmworkers*. Am. J. Ind. Med. 2012;55:707–713.

[29] Yazd SD, Wheeler SA, Zuo A; *Key Risk Factors Affecting Farmers' Mental Health: A Systematic Review.* Int J Environ Res Public Health. 2019 Dec; 16(23): 4849. Published online 2019 Dec 2

[30] The language of Ch. 321 of the Acts of 2020 strikes paragraph 2 of G.L. c. 111, § 31, and adds: In a municipality with a municipal agricultural commission established pursuant to section 8L of chapter 40, the board of health shall, prior to enacting any regulation that impacts: (i) farmers markets as defined in department regulations; (ii) farms as defined in section 1A of chapter 128; (iii) the non-commercial keeping of poultry, livestock or bees; or (iv) the non-commercial production of fruit, vegetables or horticultural plants, provide the municipal agricultural commission with a copy of the proposed regulation. The municipal agricultural commission shall have a 45-day review period during which the commission may hold a public meeting and may provide written comments and recommendations to the board of health relative to the proposed regulation. Upon a majority vote of the members, the agricultural commission may waive the 45-day review period.

If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency. The board of health shall comply with the local

## Agriculture and the Climate Crisis

Because of the complexities of issues surrounding the climate crisis, the US Government has put together an ad hoc Interagency Working Group on Climate Change and Health (IWG)[31] to identify and recommend mitigation and research steps for consideration. Unlike other climatological working groups, this particular one has examined human health aspects and has concentrated on 11 health categories that are more likely to be of public health interest. These diseases include asthma, allergies, and airway diseases; cancer; cardiovascular disease and stroke; alterations in normal development; heat-related morbidity and mortality; mental health and stress disorders; neurological diseases and disorders; nutrition and food-borne illness; vector-borne and zoonotic disease; waterborne disease; weather-related morbidity and mortality.[32] We will look at the seven most critical issues to the public health aspects of farmers and those in the farming community.

## Asthma and Allergy

The presence of agricultural operations has a negative effect on populations that suffer asthma and respiratory allergies. While asthma is the second leading cause of chronic childhood illness, the prevalence of it is highest in adult populations. There are many risk factors for asthma found on almost every farm, and while the farm workers are at high risk, so too are the neighbors of the farms where airborne contaminates can escape every time the wind blows. Most common allergens include: Plant farms: grain dust (all types of grain); Animal farms: cow dander and urine, egg yolk proteins, fungi, grain mites and weevils, meal worms, pig urine and dander, poultry mites and dander; and chemicals such as antibiotics used in feed (spiramycin, amprolium) formaldehyde and glutaraldehyde.[33] Unprecedented wind events associated with climate change have driven allergens for farther distances than previously seen, increasing community asthma risk among all ages. Issues of spreading dust are clearly a public health issue for consideration by local boards of health.

## Cancer

Cancer caused by many traditional farm-related events is well studied and well documented. Farmers spend – literally – all day outdoors through a variety of seasons.

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enforcement emergency procedures set forth in department regulations, as amended from time to time.

[31] Comprised of staffing from CDC, HHs/OS, EPA, NASA, NIEHS, NIH/Fogarty, NOAA, DOS, USDA, USGCRP

[32] https://www.niehs.nih.gov/health/materials/a_human_health_perspective_on_climate_change_full_report_508.pdf

[33] Physician's Newsletter, Vol. 2, No. 2, a series of the Center for Michigan Agricultural Safety and Health, Michigan State University, East Lansing, Michigan.

Their exposure to sunlight in not avoidable as they tend their fields and their herds. While we know much about the dangers of prolonged ultraviolet radiation exposure, and the links to various cancers, there is less literature on, and appreciation for, the dangers of the chemicals and toxins that farmers are exposed to on a regular basis. The NIH calls for further study on these. That agency has highlighted fuel sources as a potential source of carcinogenesis and is committing resources to studying alternative fuels and new battery technology in order to lessen cancer risk among farmers. NIH states in their most recent relevant study, "Better understanding of climate change impacts on the capacity of ocean and coastal systems to provide cancer curative agents and other health-enhancing products is also needed."[34]

## Cardiovascular Disease

Similar to the above discussion of cancer risk, higher temperatures, heat waves, extreme weather, and changes in air quality all have a contributing negative effect on farmers' cardiovascular health. The NIH calls for the collection of data which should be applied to the development of health risk assessment models, so that public health professionals can devise early warning systems and health communication strategies targeting vulnerable farmers. As discussed below, air pollution and climate change are exacerbating the potential for risk, and public health policies fostering reductions in air pollution due to climate change would diminish the cardiovascular risk for farmers.

## Heat-Related Morbidity & Mortality

As we continue to experience the effects of climate change, there are increasing concerns about heat-related illness and deaths that are likely to increase. Aggressive public health interventions such as heat wave response plans and health alert warning systems can minimize morbidity and mortality. With our state's wide weather ranges, community health workers within our boards of health should define environmental risk factors, identifying vulnerable populations, and developing effective risk communication and prevention strategies. The state Department of Public Health has launched several initiatives that our boards should be aware of and should provide public education about – not just to farmers, but to all.

## Neurological Disorders

Research in the area of neurological risk for farmers is being focused on understanding the mechanisms and effects of human exposure to neurological hazards such as biotoxins which are found in stagnant water sources on farms causing algal blooms, as well as pesticides which are often evolving to meet challenges as various weed cultures morph and become resistant. Boards of health in particularly agrarian sectors of the Commonwealth should be prepared to provide resources to farmers who may be vulnerable to these issues.

[34] See, Footnote 14, at Pg. 17.

## Vector borne & Zoonotic Diseases

In some parts of the state, the local boards of health are plagued by increasing vector borne illnesses as our populations shift and areas surrounding farmlands are developed for residential use. Deer ticks are especially troublesome on Martha's Vineyard and in the Berkshires, where large herds of deer roam free of human contact for all but 3-4 months each year. Farmers with acres of pastures are at particular risk. Our recent climate changes have caused related expansions in vector ranges, shortening of pathogen incubation periods, and disruption and relocation of large human populations. These can add up to public health threats which are largely avoidable through proper public education, again by boards of health and their community health agents who should take steps in affected areas to improve risk communication and prevention strategies.

## Waterborne Diseases

According to the Congressional Research Service, Massachusetts has the 10th largest coastline in the US, with 192 miles of coastline.[35] In addition, there are over 3000 lakes and ponds in our state.[36] There are, unfortunately, as many public health risks as there are bodies of water. Boards of health that have public beaches within their jurisdiction are charged with the responsibility of assuring safe human contact with these bodies of water. Factors such as increases in water temperature, precipitation frequency and severity, evaporation-transpiration rates, and changes in coastal ecosystem health could increase the incidence of water contamination with harmful pathogens and chemicals, resulting in increased human exposure. Farmers must be vigilant to watch for potential contamination from bodies of water on their property so that food sources may protected from contamination, especially in light of the predominant number of farms in this state that sell through direct marketing, as discussed above. Local boards of health should monitor water quality if there is a question of potential spread of illness from a water supply feeding the produce on a farm.

# Inter-Agency Enforcement and Cooperation

Subject to the "right-to-farm" discussion above, it may be necessary for the local board of health to contact the Department of Agriculture or the Division of Labor Standards for assistance in enforcement. Since the COVID-19 emergency, there has been much appreciation for the functions of each of these enforcement agencies, and local boards should not feel intimidated by reaching out for help.

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[35] https://fas.org/sgp/crs/misc/RS21729.pdf, although the actual measurement including inlets and shoreline is 1,519 miles.

[36] https://www.mass.gov/service-details/lakes-and-ponds-program-publications

# CHAPTER 17

# EMERGING AND ANCILLARY ISSUES

## Introduction

Since the original publication and 2011 update of this Legal Handbook, new public health legal issues and trends have emerged. This Chapter will address several of these issues, including legal issues relative to emergency preparedness, legal issues relative to attempts to regionalize the delivery of public health services; legal issues relative to merging public health inspectional services into general inspectional service departments and the introduction of adult use cannabis sales. Each category is addressed separately.

## Emergency Preparedness

*Author's Note: This guide was finalized, and publication began during the State of Public Health Emergency resulting from the COVID-19 Pandemic. This section cannot be completed at this time, as there remain many open questions and will be a number of Executive Orders and Guidances published as a result of that pandemic. This Guide will be supplemented at the time with a series of procedural best practices and a collection of guidances written by MAHB and made available to local boards of health during the pendency of the emergency. That chapter will be added, and all subscribers and purchasers of this Handbook will receive the update as soon as it is completed and available.*

The tragic events on 9/11, and those associated with the COVID-19 pandemic caused the nation to re-examine legal issues surrounding emergency preparedness, specifically isolation and quarantine. In examining existing statutes, and regulations in 2001, it became clear that most of the existing laws were out of date and rarely used. It also became clear that the systems for reporting communicable diseases and surveillance of diseases required revisiting.

The Department of Public Health amended 105 CMR 300.000, effective July 25, 2008 (*Reportable Diseases, Surveillance and Isolation and Quarantine Requirements).* A summary of the amendments can be located at http://www.mass.gov/dph. Type into the search box "summary of amendments reportable diseases" and click on the appropriate title. New definitions were added to the regulation, including but not limited to Novel Influenza A viruses. Additional diseases and/or conditions were added to the category of "reportable diseases" and others were removed.

Isolation and quarantine requirements were amended to more accurately reflect standard practices and guidelines from the Centers for Disease Control and Prevention. The procedures for isolation and quarantine are outlined in 105 CMR 300.210. This is a new section of the regulation which deals with methods, scope and rationale for quarantine. It contains instructions on what information must be included in an order of isolation or quarantine, requirements for isolation and quarantine, including isolation and quarantine in a geographical area, as well as administrative appeal procedures.

Dates and locations of trainings on the Legal Nuts and Bolts of Isolation and Quarantine can be found at http://www.masslocalinstitute.org. This site has several on-line training opportunities for public health advocates, regulators and professionals. In addition, MAHB generally has at least one if not more educational seminars covering a variety of emergency preparedness topics at its annual Certificate Programs each fall.

# Efforts to Regionalize and Share the Delivery of Public Health Services

## State Action for Public Health Excellence Program (SAPHE)

Governor Baker has signed the SAPHE Act into law. This act establishes a program to implement the three recommendations of the Special Commission on Local and regional Public Health[37] in its final report.[38]

The SAPHE Act was enacted during the COVID-19 Emergency, so as of this writing, it is too soon to discuss the rollout and implementation of the provisions of that program, but this section of the Legal Handbook will be updated and those who have purchased this volume will receive an update as soon as practicable.

The provisions of the Act are aimed at modernizing and standardizing public health services delivery across the Commonwealth. The Special Commission expressed a concern that many local public health departments were falling short of meeting requirements, and that our state has not kept pace with national standards, and that in order to do so, there must be clear, comprehensive, uniform and quantifying goals.

The Special Commission proposed a two-step process to bring on a transformation. First, local health departments must be brought into compliance with the existing statutes and regulations. Second, they must anticipate the adoption of the

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[37] The 25-member Special Commission on Local & Regional Public Health, created by the legislature in 2016, included representatives of the legislature, local public health workforce, Executive Office of Administration & Finance and other executive branch agencies, MA Taxpayers Foundation, MA Municipal Association, health care providers, and academia.

[38] https://www.mass.gov/files/documents/2019/07/15/blueprint-public-health-excellence-2019.pdf

Foundational Public Health Services (FPHS), which is a set of seven cross-cutting capabilities[39] and five program areas[40] that all health departments should meet. Higher standards will compel a higher level of functioning across the local public health system, improving outcomes and reducing disparities.

**a. Ensuring that all members of the local public health workforce have access to essential training.**

The first directive of the Act directs the Department of Public Health to hold the Foundations of Public Health Course free of charge at least four times a year in geographically diverse areas of the state. As discussed above in this Handbook, the fact that there are 351 local boards of health in the Commonwealth has led to various issues involving equity, business competition and local enforcement. This measure is aimed at ensuring consistency among the local boards and assuring optimal educational opportunities for all public health workers. It also will lead to more uniform credentialing, more predictable inter-municipal continuity and a more sustainable workforce.

**b. Creating an incentive grant program to support more effective and efficient delivery of services by increasing sharing across municipalities.**

The second directive creates the SAPHE Program itself. SAPHE is a grant program that incentivizes health departments to adopt best practices including workforce standards, data reporting, and sharing of services across municipalities to increase capacity and ability to meet statutory requirements.

**c. Moving Massachusetts toward national standards for a 21st century public health system.**

The third directive of SAPHE directs the Special Commission on Local and Regional Public Health to determine and assess a foundational standard for local public health services in Massachusetts in alignment with national standards. This step will, if properly administered and adhered to, lead to national accreditation of many, if not all, of our boards of health. This work is being continued by the Coalition for Local Public Health, which is a coalition of health organizations including Massachusetts Association of Health Boards, Massachusetts Association of Public Health Nurses, Massachusetts Environmental Health Association, Massachusetts Health Officers Association, Massachusetts Public Health Association and Western Massachusetts Public Health Association.

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[39] The seven cross-cutting capabilities are: assessment/surveillance, emergency preparedness, policy development & support, communications, community partnership development, organizational administrative competencies, and accountability/performance management.

[40] The five program areas are: communicable disease control, chronic disease and injury prevention, environmental public health, maternal child and family health, access to and linkage with clinical care. http://phnci.org/uploads/resource-files/FPHS-Factsheet-November-2018.pdf.

As the emergency conditions created by the COVID-19 pandemic wind down, the SAPHE Act will undoubtedly build on the positive experiences and rise to prominence that affect local boards of health and propel our 351 local boards of health in new and exciting directions.

### d. SAPHE 2.0 Act (2021)

As of the date of publication, there is a revised proposed bill being introduced to strengthen and broaden the aspirations of the original SAPHE Act. This is mentioned here to eliminate any potential for confusion between the original legislation discussed above, and any subsequent enactments which may occur after publication of this legal guide. Should that legislation succeed, this section will be supplemented.

## Regionalization

The delivery of public health services in Massachusetts happens locally through the state's 351 local boards of health. Many of these boards are chronically underfunded and not able to maintain the 10 essential services of public health departments.[41] For the past several years, a number of cities and towns have been exploring collaborative relationships as a means of providing public health services. The benefits of this approach are thought to be consistency and equity in services provided throughout Massachusetts, access to a broader range of services and expertise than that which is available in each individual local health department, maximum impact for a limited number of resources and improved opportunities to seek grants and other resources.

The Massachusetts Public Health Regionalization Working Group was established as part of the Public Health Regionalization Project facilitated by the Boston University School of Public Health.[42] Its goal is to strengthen the Massachusetts public health system by creating a sustainable, regional system for the equitable delivery of local public health services across the Commonwealth. The core principles that govern the work of the group are the following:

1. Preservation of legal authority of local boards of health;
2. Goal is to augment the public health workforce;
3. Regionalization efforts need to be adequately funded;
4. One size does not fit all. Regional needs very and cities and towns should be able to cluster in ways that meet their needs.

On January 15, 2009, Governor Patrick signed into law, an Act Relative to Public

[41] For more information on the 10 essential services of public health, see, www.cdc.gov/nphpsp/.
[42] For more information on the project, see, http://sph.bu.edu/Regionalization/.

Health Regionalization[43]. The law amended G.L. Chapter 111, Sections 27A, B and C. The amendments remove barriers in the old law and encourage the voluntary formation of public health districts. Key features of the law include the following:

1. Boards of health must vote to approve the formation of health districts. Under the old law, only city councils and town meetings had the authority to approve health districts. Now approval requires votes from both the board of health and the city council or town meeting.
2. Home rule and local legal authority are protected. Under the old law, municipalities that formed health districts were required to transfer their policy making authority to the district. The amendment gives the municipalities the flexibility to decide whether to transfer or retain their board of health authority.

There are several widely acknowledged advantages to regionalization of health services. Regionalizing promotes consistent standard of care and equal level of services among municipalities in the same geographic area. Sharing resources in a region allows each local health department to deliver the range of services their specific community requires, which none of the departments might have been able to deliver independently. This method allows communities to access the skills they need, when they need them even if those skills are not resident within their own health department, by offering economies of scale for communities who band together. By partnering with smaller surrounding communities, larger districts have greater capacity to apply for grants and are more competitive in grant applications, potentially bringing additional resources to their communities, because their service area will include communities that would never have qualified for those grants on their own. Finally, this sharing of resources opens up greater cooperation and communication, leading to a more standardized training system, which will yield a stronger and better prepared local public health workforce.

In addition to creating health districts pursuant to Sections 27A and B, municipalities can enter into intermunicipal agreements pursuant to G. L. Chapter 40, Section 4(A) in an effort to regionalize the delivery of public health services. A “Tool Kit” has been created to assist cities and towns considering these collaborative efforts. The kit contains legal document templates, a roadmap to getting started, a template for town by town comparisons of characteristics, staffing levels, public health duties, etc. and case studies of municipalities that have regionalized. It can be found at http://sph.bu.edu/Regionalization.

In 2011, the Department of Public Health awarded District Incentive Grants to 11 groups of municipalities that demonstrated intent to execute or explore the possibility of entering into formal agreements to create public health districts. These grants were planning grants, which enabled the recipients to submit proposals for implementation grants. Of those applications, five regional districts were established. These include The Berkshire Public Health Alliance, consisting of 22

[43] The bill that was signed into law was drafted by Cheryl Sbarra, J.D. and Laura Richards, J.D. of MAHB.

municipalities; the Central MA Regional Public Health Alliance, consisting of 7 municipalities in the greater Worcester area; the Cooperative Public Health Service, consisting of ten towns; the Montachusett Public Health Network, an eleven town collaborative; and the eight-member North Shore Public Health Services Program.

These grants are funded under the federal Patient Protection and Affordable Care Act of 2010 as part of the U.S. Centers for Disease Control and Prevention (CDC) "Strengthening Public Health Infrastructure to Improve Health Outcomes" initiative. MAHB is providing legal and fiscal technical assistance to the grant recipients.

Under the SAPHE Program, discussed above, several sharing arrangements between boards of health have been established. These arrangements have been established under that program, and are independent and separate from the regionalization efforts discussed in this section.

## Public Health Inspectional Services – Trends, Issues, Concerns

At the time of publication of the third edition of the Legal Handbook, a trend had emerged toward consolidating public health inspectional services with general inspectional services. It is usually driven by a perceived economic benefit in integrating municipal government. It usually yields many surprises that for the most part are not beneficial to the delivery of public health services. It is usually done through municipal charter changes or through vote of town meetings under terms of the local charter.

Municipal charters establish the framework for local government. A charter defines a municipality's organization, the responsibility of its officials, many of its powers, and its relationship to its constituents. Home Rule Charter changes require an extensive process. First, local voters much approve a ballot questions that asks if the municipality should adopt a charter commission. If the vote is affirmative, the commission must be formed and must act within 18 months. Local voters must approve the final charter. There is no need for legislative approval of home rule charters.

Special Act Charters require legislative approval and begin as home rule petitions. A charter commission is not required. As long as the charter change does not infringe on state authority, this type of charter change usually passes through the legislature easily.

Model government plans are another means of establishing the framework for local government in cities. The type of plan determines the type of governmental structure.

Enforcement of the State Sanitary Code and other public health regulations and laws can become a designated function of inspectional services by means of any of the above-described vehicles. However, issues can arise relative to the legal authority to enact regulations, to issue variances to health orders, to address nuisance issues and to condemn structures that are threats to public health. This departmental design can

actually be deleterious to the health of the community as the inspectors become distanced from the board of health, which they are agents of. Issues arise relative to the broad public health protection afforded by boards of health versus the specific code enforcement activities of inspectional services. For example, housing inspectors working under building inspectors are not well represented at DPH Community Sanitation Department trainings. This disconnect may have serious ramifications for local public health. Although some may not wish to acknowledge this, there is a fundamental difference in the mindset and philosophy between building and wiring inspectors, whose objective regulations are strictly adhered to, and environmental health inspectors who are called upon to make subjective determinations which are in "shades" of differences. Health inspectors deal with human social and emotional wellness issues, while building inspectors deal with code enforcement.

Some municipalities have successfully housed public health inspectional services in general inspectional services. Those that have done this have specific agreements in place that clearly designate the duties and obligations of public health and inspectional services. It is clear in the agreements that the board of health retains its legal authority, that monthly reports are submitted to the board of health, that public health threats are immediately reported to the health director and that the board of health retains its authority to address all aspects of the public health of the municipality.

## Food Code Revisions:

As of October 15, 2018, Massachusetts boards of health began to integrate the "Voluntary National Retail Food Regulatory Program Standards." In 2015, the FDA awarded a grant to Melrose and Wakefield as the lead communities, along with Medford, Malden and Winchester to begin this integration, which was to take place from 2015 to 2019. This new set of standards was intended to streamline the implementation of a uniform food code, by adopting the 2013 Federal Food Code, augmenting that with the 2015 Amendments and Annex 1 of the Federal Food Code as a local regulation. There were still state regulations in place at 105 CMR 590.000 *et seq,* which referenced the 1999 Federal Food Code. At this point in time, this new combination of the 2013 Federal Regulations has been merged with various state amendments and is being adopted across the Commonwealth.

To further confuse matters, this merged code has not yet been officially sanctioned by either the MA Food Protection Program or the FDA. It is provided to assist inspectors in their regulatory work. Annex 1 has not been adopted by the State or some communities which have their own local regulation. In the event of a conflict, those communities that have a local regulation, must follow the strictest interpretation between the two. Annex 1 of the Federal Food Code has some important administrative differences, but 590.000 is sometimes stricter.[44]

[44] The adoptive language of the new Food Code states, "590.001(A) Adoption of 2013 Food Code. In addition to the provisions set forth in 105 CMR 590.001(B) through 590.18, the Department of Public Health hereby adopts and incorporates by reference the 2013 Food Code (not including Annexes 1

As we move forward with this new integration, our sister organization, Massachusetts Health Officers Association (MHOA) has compiled a "living document," which is perpetually being revised as health departments encounter unique or unanticipated situations in their inspection work. This document is available online at the MHOA web site, https://mhoa.com/wp-content/uploads/2018/12/Annotated-Merged-Code-Dec-2018.pdf.

In Massachusetts, the Department of Public Health regulates retail food establishments (restaurants, grocery stores, etc.) and institutional food services (schools, prisons, hospitals, nursing homes, etc.) under 105 CMR 590.000, pursuant to G.L. c. 94 §§ 305A, 305B, 146, 189 and 189A; c. 111 §§ 5 and 127A. Concurrently, local Boards of Health draw their jurisdiction from the retail food code, 105 CMR 590.000 which mandates two annual inspections, code enforcement activities, and the issuance of annual operating permits for retail and for non-state owned institutional food establishments. In addition, DPH maintains concurrent authority to enforce the provisions of the retail food code, if needed. 105 CMR 590.000 adopts the FDA Retail Food Code ("Food Code") and adds Massachusetts-specific supplements. The Food Code is a "living document," and is updated regularly and provides a national standard and scientifically sound technical and legal bases for regulating the retail and institutional food service industry. As of this writing, 105 CMR 590.000 references the 1999 Food Code. The proposed amendments to the regulation incorporate the 2013 Food Code and its 2015 supplement.

According to DPH, revising 105 CMR 590.000 with the most recent version of the FDA Food Code and updating appropriate Massachusetts supplements is intended to: provide uniform standards for inspections, training and implementation for public health and for retail food establishments across the Commonwealth; meet CDC's foodborne illness reduction goals as cited in 2015 Prevention Status Report for Food Safety for Massachusetts; Strengthen requirements for reporting foodborne illnesses and restricting ill food employees to protect the public and industry from potentially devastating health consequences and financial losses; and update safety measures, streamline administrative processes, and keep current with trends in the food industry. [45]

As part of this process, the DPH solicited comments from health departments

through 8), as amended by the Supplement to the 2013 Food Code, ("2013 Food Code") published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration, Washington, D.C. 20204 provided, however, that the Department does not adopt those provisions of the 2013 Food Code, which are specifically stricken or modified by 105 CMR 590.000.

[45] http://blog.mass.gov/publichealth/wp-content/uploads/sites/11/2018/09/PHC-Retail-Food-Final-Presentation-9.7.18-FINAL.pdf

and local boards, as it set forth with its revision process.[46] Prior to the hearing and comment process, DPH made several proactive changes. These included:

- "Time/Temperature Control for Safety (TCS)" foods replaced "Potentially Hazardous" Foods (PHFs)", and require adjustment for acidity and moisture content when determining which foods require temperature controls to limit microorganism growth;

- Added provisions on "Cut Leafy Greens", including lettuce, spinach, kale, and chard with shredded or chopped green leaves to be defined as TCS foods, which require specific cooling and holding temperatures to address outbreaks traced back to leafy greens;

- Required establishments to post a conspicuous sign which tells customers that a copy of last inspection report is available upon request;

- Allowed Boards of Health to specifically license Shared Kitchens and Farmers Markets, with associated standards, to recognize and regulate emerging trends in evolving food industry.[47]

In addition to the Department-imposed changes, the process involved extensive input from public health professionals and regulators. For instance, prior to the changes, even though the terms "Cottage Food Operation" and "Cottage Food Products" were used in the regulation, these terms were not defined. The new regulation defined these as referring to home kitchen production of items such as baked goods, jams, and jellies for sale directly to the consumer.

In another example, the previous definition of "Food Establishment" indicated such establishments include catering operations providing food directly to consumers or to a conveyance used to transport people; and do not include produce stands offering whole, uncut fresh fruits and vegetables. The definition was silent on cooking classes. The post comment changes clarify that "Food Establishments" do not include cooking classes, farm trucks, or businesses that sell only unprocessed honey, pure maple products, farm fresh eggs stored at a particular temperature, and uncut fruits and

[46] Public hearings for the proposed amendments were held on November 30 and December 1, 2016 and public comments were received until December 30, 2016. Consistent with Executive Order 518, which requires all sanitary code regulations be reviewed by the state's Building Code Coordinating Council (BCCC), proposed amendments were reviewed by interested BCCC members, such as individuals from the Office of Public Safety, plumbing board, and electrical board. This review concluded that there was no conflict in jurisdiction or subject matter.

[47] http://blog.mass.gov/publichealth/wp-content/uploads/sites/11/2018/09/PHC-Retail-Food-Final-Presentation-9.7.18-FINAL.pdf

vegetables,

The term “food employee,” included any individual working with unpackaged food, food equipment or utensils, or food contact surfaces. Post comment changes clarify that this definition does not include unprocessed honey, pure maple products, farm fresh eggs stored at a particular temperature, and uncut fruits and vegetables, keeping definitions consistent.

Interestingly, the pre-comment revision adopted wholesale the Food Code’s language addressing exclusion of or restrictions on employees with diseases transmissible through food. The post comment changes amend the Food Code’s language addressing diseases transmissible through food to be consistent with DPH regulation for reportable diseases (105 CMR 300.000).

The prior regulation included a section describing shared kitchens and incubator operations which provide fledgling food retailers or preparers with kitchen access and professional equipment. The regulation also indicated such operations must be approved by the local board of health and operated in accordance with DPH guidance. The new standard streamlines this section by designating shared kitchens and incubator operations as both “Leased Commercial Kitchens” and clarifying approval and operating standards.

The old regulation included a section addressing approval of raw bars by local boards of health, as well as record-keeping procedures. Upon review of comments and the regulation, this section was deleted because it is duplicative of provisions elsewhere in the regulation and the language was confusing. Because of potential confusion, it was decided that DPH will issue guidance if necessary, to clarify any procedures for raw bars.[48]

Board of health members are urged to go online and review materials provided by our sister organizations, MHOA and MEHA. These standards are subject to revision as time goes on and new situations are encountered.

## Cell Tower Radiation Exposure

In recent years, there has been an increase in awareness of electromagnetic fields emitted from antennae mounted on cellular towers. With increasing regularity, boards of health are consulted for their input as towers are erected on properties that are close to, or even on properties with high density populations. The revenue generated by renting properties to cellular technology companies can be considerable, and municipalities, schools, houses of worship and commercial property owners can be considerable. The fact that towers are ubiquitous must not be confused with the presumption that they do not present certain health risks.

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[48] *Id.*

The issue of cell tower safety is one which is of uncertain scientific proof, conflicting studies, epidemiologic uncertainty and resulting considerable uncertainty. To confound matters, the FCC has preempted local government action where a local board or commission cannot deny a permit application based upon real or perceived risk. In order to effectively block the placement of a cell tower, the municipality must find other grounds than health risk and radiation exposure.

The majority of studies in the US, upon which the FCC bases its presumption of safety of cell towers, have concluded that the actual risk needs further study. The body of science outside the US includes studies that demonstrate everything from "no known risk," to a doubling or more than doubling of the risk of cancer within certain distances from the cellular antennae mounted on the towers. The FCC says that while some experimental data have suggested a "possible link between exposure and tumor formation in animals exposed under certain specific conditions," the results have not been independently replicated, and the current literature concludes that "further research is needed." Also, notably, the FCC's primary jurisdiction does not lie in the health and safety area, and it acknowledges that it must rely on other agencies and organizations for guidance in these matters. FCC also calls for specific studies including chronic (lifetime) animal exposures, which should "be given the highest priority." According to the FCC's scientists, chronic animal exposures should be performed both with and without the application of chemical initiating agents to investigate tumor promotion in addition to tumorigenesis. According to the FCC, Identification of potential risks should include end points other than brain cancer (e.g., ocular effects of RF radiation exposure).[49]

The world literature is more comprehensive. A study of cancer patients in Germany found a 3.29 times greater risk of cancer ($p < 0.01$) in patients with residence closer than 400 meters to a cell phone tower. Risk of breast cancer was 3.4 times greater, and average age of diagnosis of breast cancer was 19 years earlier.[50] Similarly, a study in Israel found women living within 350 meters of a cell phone tower to have over 10 times greater risk of cancer than the community as a whole ($p < 0.0001$).[51] More recently, in a case/control study of cancer patients residing near a cell phone transmission tower in Austria, those with external residential exposures of greater than 1000 µW/m2 (> 0.1 µW/cm2 ) had a breast cancer risk that was 23 times higher ($p = 0.0007$) and brain tumor risk was 121 times higher ($p = 0.001$) than controls.[52]

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[49] Picano, et al, *Cancer and non-cancer brain and eye effects of chronic low-dose ionizing radiation exposure*, BMC Cancer. 2012; 12: 157.

[50] Eger H, Hagen K, Lucas B, Vogel P, Voit H. *The Influence of Being Physically Near to a Cell Phone Transmission Mast on the Incidence of Cancer*. Umwelt Medizin Gesellschaft (2004); 17(4):1-7.

[51] Wolf R, Wolf D. *Increased Incidence of Cancer Near a Cell-Phone Transmitter Station*. International Journal of Cancer Prevention (2004); 1(2):1-19.

[52] Oberfeld G. *Environmental Epidemiological Study of Cancer Incidence in the Municipalities of Hausmannstätten & Vasoldsberg (Austria).* Provincial Government of Styria, Department 8B, Provincial Public Health Office, Graz, Austria (2008): 1-10.

As of this writing, there has been one case in the Massachusetts courts testing whether municipalities can block cell tower construction. That case was in the federal courts, *Southwestern Bell Mobile Systems v. Todd,* 244 F. 3rd 51 (CA 1, 2001). In the *Todd* case, Southwestern Bell wanted to site an antenna on grounds near two housing developments and between two schools. The city of Leicester moved to block the placement of the tower. The zoning board rejected the application citing several reasons. The US District Court did not look at the issue of whether there were any associated public health risks in that case, but instead allowed Leicester to block the particular tower because the FAA demanded that it must be painted red and white and have a flashing beacon on top, because of its proximity to the flight path for Worcester Airport. The FAA regulation allows municipalities to deny permits if the tower does not blend into the area aesthetically. The opinion of the District Judge was upheld by the US First Circuit Court of Appeals.

There have, however, been challenges to placement of towers based upon health risk. Although none have been reported by Massachusetts Courts, there are several cases that deal with this issue squarely on point. The issue is couched in the doctrine of "federal preemption."

It has long been acknowledged that it was Congress's intent that the FCC exclusively regulate technical matters of radio broadcasting technology. *See Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n.6, 83 S. Ct. 1759, 10 L.Ed. 2d 983 (1963). Implicit in this rationale is the authority to regulate personal wireless communications on the basis of health effects of radio frequency interference. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000).

The statute states that "[n]o state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). "As is always the case in preemption analysis, Congressional intent is the 'ultimate touchstone.'" *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, (1992).

In *Cellular Phone Taskforce*, the Second Circuit addressed the preemption provision of the Telecommunications Act. The dismissal of the arguments advanced by the citizen's groups, highlight the sources of the controversy. More specifically, the Taskforce argued that: the FCC failed to give due consideration to scientific evidence of low level ("nonthermal") RFR hazards; even though the FCC acknowledged that it was not looking at any health risk issues as part of its regulatory process and would defer to the proper government agencies charged with protecting the health and welfare of the citizenry, it did not heed the advice from those other government agencies and

standards setting organizations, such as the EPA; the FDA, OSHA, NIOSH and ANSI; the exemption of certain categories of towers, such as lower power rooftop antennae and antennae over 10 meters above ground, from demonstrating safe RFR exposure levels did not take into account the additive effects of other nearby towers or that persons in nearby tall buildings could be overexposed; and therefore, the FCC exceeded its authority in preempting state and local governments from regulating wireless tower operation based on environmental concerns. These concerns fell on deaf ears when the court dismissed them as it gave strict construction to the statute.

The court held that Section 332(c)(7)(B)(iv)**"** preempt[s] state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe." 205 F.3d, at 88; *Freeman,* 204 F.3d at 320 ("federal law has preempted the field of RF interference regulation"). *See generally City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–700 (1984). "[There is] no doubt that Congress may preempt state and local governments from regulating the operation and construction ... of personal wireless communications facilities." *Cellular Phone Taskforce*, 205 F.3d at 96. *See, Abraham v. Town of Huntington,* 018 WL 2304779 (2018).

If a successful challenge to a placement of a cell tower is to be mounted, it will have to be grounded in something other than public health risk from radio frequency.

At the time this guide went to press, there was an appellate case pending before the D.C. Circuit Court of Appeals in which the central issue was whether the terms of the telecommunications act of 1996 was so outdated that it has become inoperable. The signals by the court during the argument were that it is conceivable that the regulation preempting local enforcement on health grounds may be set aside by judicial action. *Environmental Health Trust v. Federal Communications Commission,* Docket No. 20-1025, Argued January 21, 2021.