



LEGAL AUTHORITY FOR BOARDS OF HEALTH

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CHERYL SBARRA, J.D., DIRECTOR OF LAW AND POLICY,
MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS,
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LEGAL AUTHORITY TO REGULATE PUBLIC HEALTH AND SAFETY

- Federal
- State
 - Primary authority
 - Policy powers
 - Widely accepted function of government to protect public health, even at the expense of an individual's freedom.
 - *“The right to engage in business must yield to the paramount right of government to protect the public health by any rational means.”*

LEGAL AUTHORITY (CONTINUED)

- Local
 - State legislature delegated its power.
 - Extent of delegation varies.
 - Sharing of power.
 - Delegation to locals a primary enforcing agent.
 - Locals have authority to strengthen state law.
 - Locals have absolute authority to regulate.

PREMIER STATUTE, CHAPTER III, SECTION 3I

- Authority to make reasonable health regulations.
 - Authority from the Legislature.
 - Same footing as statute, ordinance, by-law.
 - All rational presumptions in favor of validity of regulation.
 - Challenger must prove absence of ANY CONCEIVABLE GROUND.

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AMERICAN LITHUANIAN NATURALIZATION CLUB OF ATHOL ET
AL VS. BOARD OF HEALTH OF ATHOL
(S.J.C. 2006)

- Athol Board of Health had the authority to prohibit smoking in private clubs pursuant to Chapter III, Section 31.
- Focus of public health is to protect the health of every member of the community, regardless of geography or location.
- Helmets, smoke detectors, lead paint.

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CANNABIS ADVISORY BOARD (CONTINUED)

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

UNITED COMB & NOVELTY CORP. VS. LEOMINSTER BOARD OF HEALTH

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- “When applying the arbitrary and capricious standard, the reviewing court is not authorized to weigh evidence, find facts, exercise discretion, or substitute its judgment for that of the administrative body.”

EXAMPLES OF STATE STATUTES DELEGATING POWER TO LOCAL BOARDS OF HEALTH

- **Chapter III, Section 122 – Nuisance**

- **“The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town.”**

- **Thing, person or act that causes or **MAY** cause injury to the public health.**

- ***“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”***

NUISANCE (CONTINUED)

- Board of Health's obligations:
 - “examine, destroy, remove and prevent as the case may require.”
 - “make regulations relative thereto.”
- Exceptions:
 - Activities that are “generally acceptable farming procedures.”

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NOISOME TRADE, CH. III, SEC. 143-150

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- No trade or business that results in or MAY result in a nuisance, be harmful to the inhabitants, injurious to their estates, dangerous to the public health, or may be attended by noisome and injurious odors shall be established except in such a location as may be assigned by the board of health after a hearing.

LIMITATIONS/CONSIDERATION: WHEN DO YOU ACT AND WHEN DO YOU NOT?

- Is there a state or federal law that prevents you from acting (preemption)?
- Risk assessment
 - Is there a risk of harm to others?
 - Is the risk to “incompetent” persons?
 - Is the risk to an individual?

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CONSIDERATIONS (CONTINUED)



- Is the intervention going to be effective?
- What is the burden to the individual?
- Is it fair and reasonable?
- Are there any transactional limitations?

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- **JUST BECAUSE
YOU CAN
DOESN'T MEAN
YOU SHOULD!**

TYPE OF HEARINGS

Quasi-Legislative

Enacting regulations

Hold hearing – even if not required!

Quasi-Judicial

Holding hearings on orders, permits

Non-Criminal Disposition Hearings (21D)

Clerk Magistrate Hearings (Housing/District Court)

Application for Criminal Complaint

Clerk Magistrate Hearing

If complaint issues, prosecution takes over

INSPECTIONS

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- Authority from state and local law.
- Types of inspections
 - Periodic
 - Complaint driven
- What is you are refused access?
 - Administrative search warrant

ENFORCEMENT

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- Enforcement orders
 - Health orders
- Suspend, revoke, refuse to issue permits
- Fines
- Injunctive orders
 - Judicial

STAFFING

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- Ch. III, Sec. 27
 - Authority to employ necessary staff
 - Agents of board of health
- Charters
 - Town Managers Act
 - City Charters

CHAPTER III, SECTION 27

- Every [board of health] shall organize annually by the choice of one of its number as chairman. It may make rules and regulation for its own government and for the government of its officers, agents and assistants. It may appoint a physician to the board ... May chose a clerk ... 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** its clerk or other agents and assistants.”
- But ... Budget
- But ... Charters

POLITICAL V. LEGAL ISSUES

- MAHB CAN

- Explain legal authority and how charters interplay with legal authority.
- Provide legal education and technical assistance.
- Help draft regulations.
- Meet with municipal attorney.

- MAHB CANNOT

- Represent boards of health.
- Force municipal attorney to come to the table.
- Provide legal advice.

LEGAL LIABILITY

- **Massachusetts Tort Claims Act, M.G.L. Chapter 258**
 - **Public employers** are liable for harm caused by the negligent or wrongful acted or failure to act of any **public employee** who acted **within the scope of his/her employment**. No personal liability.
 - Intentional wrongdoing not covered.
 - Negligent inspection v. inspection while impaired.
 - Cap: \$100,000



WHO IS A **PUBLIC EMPLOYER**

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- Commonwealth of Massachusetts
- City, town, county
- Public health regional district
- Must exercise direction and control over public employee.

COVERED PUBLIC EMPLOYEES – 3-STEP ANALYSIS

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1. Are you an “public employee?”
2. Are you “subject to the direction and control of a “public employer”?”
3. Was the act (or failure to act) within the scope of your employment?

I. PUBLIC EMPLOYEE

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- Officer or employee of a public employer
 - Elected or appointed officials
 - Full or part time
 - Temporary or permanent
 - Compensated or uncompensated

2. SUBJECT TO DIRECTION OR CONTROL OF PUBLIC EMPLOYER?

- Factual question:
- Paid employees doing regular job are under the direction and control.
- Board of Health members are under direction and control of municipality.
 - Working on behalf of municipality.
 - Representing municipality.

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3. WERE YOU ACTING WITHIN THE SCOPE OF YOUR EMPLOYMENT?

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- Was the conduct in question what you were hired to do?
- Did it occur within authorized time and space?
- Was it motivated by a purpose to serve employer?
- Travel to and from home is generally **not** within scope of employment.
- **Merely** being “on call” does not place you within the scope of employment.
 - Once you get the call ...

BOTTOM LINE

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- If you are a **public employee** (BOH member or staff) and you are acting **within the scope of your employment**, the municipality must defend you.
- Unless you did something **intentional, horrendous and very, very wrong, including violating civil rights**.

ADDITIONAL PROTECTION: DISCRETIONARY FUNCTIONS

- Chapter 258, Section 10(b): Protects public employers (cities, towns, boards of health) from any claim based upon the performance or failure to perform a discretionary function . . . **Whether or not the discretion involved is abused.**
- Purpose: to avoid allowing civil claims to be “used as a monkey wrench? In the machinery of government decisions making. (*Cady v. Plymouth-Carver Regional School District* 1983).

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DEFINITION OF “DISCRETIONARY FUNCTION”

- Does the government actor have any discretion at all as to what course of action to follow or is the course of action determined by statute or regulation.
 - For instance – regulation calls for a fine.
- Weighing alternatives and making choices with respect to public policy and planning.

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EXAMPLE OF DISCRETIONARY FUNCTION

- City's exercise of its discretion in deciding not to incur cost of erecting a fence on stairs near children's playground, or to remove snow from the stairs, was based on a determination of allocation of limited resources, which was an integral part of its governmental policy making or planning function, and thus tort action for wrongful death of a child was barred, **even if city's decisions was ill-advised or unreasonable.** *Barrett v. City of Lynn (2001).*

NOT A DISCRETIONARY FUNCTION

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- Negligently supervising a truck driver's operation of a salt truck "does not appear to have a 'close nexus to policy making or planning.'" *Ku v. Town of Framingham* (2004).

FAILURE TO INSPECT – CHAPTER 258, SEC. 10(F)

- No liability for failing to inspect, or inadequately or negligently inspecting real or personal property to determine whether the property complies with or violates any “law, regulation, ordinance or code, or contains a hazard to health or safety ...”
- Cited my municipal attorneys.
- Does this mean you shouldn't inspect?

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INDEMNITY OF MUNICIPAL OFFICIALS: SEC. 13

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- A city or town shall indemnify municipal officers, elected or appointed, from personal financial loss and expense, including legal fees, in an amount not to exceed \$1 mil arising out of a claim by reason of any act or omission, except an intentional violation of civil rights, if at the time of the act or omission, the official was acting within the scope of his/her official duties. **Must be voted by town meeting/city council.**

QUESTIONS

SBARRA@MAHB.ORG

781-721-0183

63 SHORE RD. STE. 25
WINCHESTER, MA 01890



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