

## Guidance for Boards of Health Re: COVID-19

As many municipalities across the Commonwealth face public health questions relative to coronavirus (COVID-19), we recognize that local boards of health are on the front lines when it comes to controlling the spread of this disease. To assist in this regard, we are providing the following guidance concerning the authority of local boards of health to issue orders for the protection of public health and the standards by which their actions will be measured.

Before addressing the legal authority of a board of health to impose mandatory safeguards, we wish to point out that the need to protect the public from the spread of illness must be balanced against other significant public interests. The imposition of mandatory safeguards will likely have significant consequences with respect to social, economic and personal liberty interests. Therefore, it is strongly recommended that local boards proceed with caution and consult current guidance from the Massachusetts Department of Public Health (DPH) and the Centers for Disease Control and Prevention (CDC), as well as with other local leaders and affected private parties, prior to issuing orders. We also recommend that local boards consider whether voluntary measures can effectively accomplish the goals of the board.

### 1. What is the Authority of the Board of Health to Implement Safeguards to Prevent the Spread of Infectious Disease?

Local boards of health have broad authority to implement safeguards to prevent the spread of infectious disease, as set forth in Chapter 111, Sections 95 to 105 of the Massachusetts General Laws.

Although the scope of a local board of health's authority to prevent the spread of infectious disease is broad, it is not unlimited. Thus, while a local board of health may use all possible care in preventing the spread of infectious disease, "this care is to be exercised in the modes prescribed by law, and with [due] regard to the [constitutional and statutory] rights of others in their persons and property." Brown v. Murdock, 140 Mass. 314, 323 (1885). In this regard, it is the duty of the local board of health to act in a manner that is objectively reasonable, and in such a way that balances the interests of the individual with the interests of the public at large. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27-28 (1905).

Due to the unique nature of each specific occurrence of an infectious disease, there is no bright-line test that can be used to determine the reasonableness of any particular action. Rather, a local board of health must make its decision based on the particular facts and circumstances facing its municipality at a particular time. In making such decisions, the Board should consider the following:

- Whether there is probable cause to believe that the individual or group of individuals suffer from or have been exposed to an infectious disease that presents a threat to public health; and

- Whether the nature and extent of the board's orders are reasonably related to the protection of public health with respect to that infectious disease.

In other similar civil contexts, the Massachusetts Supreme Judicial Court has found that "probable cause" means that the facts and circumstances known to the board of health at the time were sufficient to warrant a person of reasonable caution in believing that the individual or group of individuals subject to the isolation or quarantine order suffers from or has been exposed to an infectious disease which creates a risk that the person will infect others. See Commonwealth v. Bruno, 432 Mass. 489, 510-511 (2000) (discussing standard for civil commitment of sexually dangerous persons). While this standard does not necessarily require proof that the individual is infected, any order must be, at least, based on evidence that the individual has been exposed to an infectious disease or otherwise presents a threat to the public. Hickox v. Christie, 205 F.Supp.3d 579, 596 (D.N.J. 2016).

In addition to finding that there is probable cause to believe that an individual has been infected with or exposed to an infectious disease, the measures taken to control the spread of that disease must be reasonably related to the protection of public health. This means that any order issued for the protection of the public cannot interfere with individual rights beyond what is reasonably required for the safety of the public. Jacobson, 197 U.S. at 362. Thus, the regulations of the Department of Public Health require that any order of isolation or quarantine should be in the least restrictive setting possible. 105 CMR 300.210(B)(2). In light of this standard, it is recommended that the local board explore other less restrictive means before issuing orders of isolation or quarantine.

## 2. What Actions can Boards of Health Take to Prevent the Spread of Infectious Disease

- **Orders for Isolation and Quarantine**

The grant of authority to local boards of health to control infectious disease includes the ability to order that any sick or infected person be isolated or quarantined. G.L. c. 111, §95.

The CDC defines the terms "Isolation" and "Quarantine", as follows:

- **Isolation** means the separation of a person or group of people known or reasonably believed to be infected with a communicable disease and potentially infectious from those who are not infected to prevent the spread of the communicable disease.
- **Quarantine** means the separation of a person or group of people reasonably believed to have been exposed to a communicable disease but not yet symptomatic from others who have not been so exposed, to prevent the possible spread of the communicable disease.

Additional guidance may be found at <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>.

The DPH provides detailed procedures for issuance of orders for isolation and quarantine. 105 CMR 300.210. Although local boards of health are not required to follow these procedures, they are strongly encouraged to do so. See 105 CMR 300.210(A). These procedures include the issuance of written orders, opportunity for appeal, and requirements for medical monitoring.

**Significantly, please be advised that a person cannot be ordered to leave their home unless a local board of health obtains a warrant from the Superior Court of the county in which the municipality is located. G.L. c. 111, §96; 105 CMR 300.210(E)(2).**

Prior to issuing any mandatory order for isolation or quarantine, it is recommended that the local board contact the affected individual(s) to discuss all available options and to develop mutually agreeable terms, after consultation, given the particular facts and circumstances at issue. The local board should provide as much advance notice as is practicable under the circumstance, to allow parties to arrange their affairs.

- **Orders Closing Public Gatherings or Places**

The Massachusetts General Laws also provide that “[if] a disease dangerous to the public health exists in a town, the selectmen and board of health shall use all possible care to prevent the spread of the infection and may give public notice of infected places by such means as in their judgment may be most effectual for the common safety.” G.L. c. 111, §104. Although it does not appear that this statute has been interpreted by the courts to date, it is apparent that this section would permit the closure of public places and/or gatherings when there are reasonable grounds to believe that such closure will prevent the spread of infection. *See Hickox v. Christie*, 205 F.Supp.2d 579, 596 (D.N.J. 2016) (temporary quarantine is authorized based on risk, or potential risk, for infection, not proof of infection itself). Therefore, when a local board of health, together with the board of selectmen or other chief executive officer, has reasonable grounds to believe that the closure of a public place or gathering is necessary to prevent the spread of disease, it appears that it may order such under this statutory grant of authority.

***It should be noted that, unlike other sources of the local board of health’s authority, orders issued pursuant to G.L. c. 111, §104 must also be approved by the board of selectmen or other chief executive officer of the municipality. The concurrence of the chief executive officer may be particularly important when considering the closure of officially-sanctioned events, meetings of public bodies, or places where governmental services are provided. This may be particularly important with respect to meetings of public bodies who may have to act on applications within certain statutory deadlines or who have to take other actions for the benefit of the public, or with respect to public places that serve vulnerable populations. For this reason, it is also recommended that local boards of health consult with other public officials before imposing mandatory restrictions, and, further consider a full range of options for alternative means for provision of municipal services (such as, for example, providing specific services by telephone or appointment).***

As with orders to isolate or quarantine individuals, it is recommended that any closures be based on probable cause to believe that the gathering or event presents a threat to public health, and that the closure of the gathering or event is reasonably related to the protection of public health with respect to that infectious disease. We recommend that such declarations be made with reference to specific facts that support the need to take the action being required, and that the order be as limited in scope as necessary to quell the threat. We also recommend that any orders be evaluated for consistency and fairness with respect to similarly-situated individuals or groups, and that reasonable efforts be made to accommodate the interests and respect the values of the private parties involved.

- **Other Actions**

Sections 122 to 125 of Chapter 111 of the General Laws authorize local boards of health to examine into all nuisances, sources and filth and causes of sickness within their jurisdiction and to destroy, remove or prevent the same. Likewise, Section 31 of Chapter 111 of the General Laws authorizes local boards of health to adopt reasonable health regulations. These provisions confer upon local boards of health broad discretionary authority to take actions that are reasonably related to the protection of public health, safety and welfare. It is our position that these provisions may be invoked by local boards of health to tailor their response to any threat based on the particular needs of the municipality or a specific situation. As with other actions, any measures implemented under the guise of protecting public health should be based on specific factual information which demonstrates a need for the action, and that the action is reasonably related to the protection of public health, safety and welfare.

### **3. Application of the Open Meeting Law**

Boards of health are reminded that the requirements of the Open Meeting Law, G.L. c. 30A, §§18-25, continue to apply, including the requirement that any discussion amongst a quorum of a multiple member board must be at a public meeting, posted at least forty-eight hours in advance, excluding Saturdays, Sundays and legal holidays. Please be advised that board members should not deliberate over e-mail, text messages or social media, and they should not be discussing substantive matters outside of duly noticed meetings, as required by the Open Meeting Law. Depending upon the specific circumstances of the discussion, however, boards may invoke the emergency procedures for waiving the forty-eight hour notice requirement as set forth in G.L. c. 30A, §20, and they may convene executive sessions pursuant to G.L. c. 30A, §§21(a)(1) or (7), if the proper procedures are followed, and are applicable in a given circumstance.

An “emergency” is defined under the OML as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” G.L. c. 30A, §18. It is reasonably foreseeable that boards of health may be faced with emergencies, such as to consider an appropriate response to a specific threat to the community, decide the need for government closures, and/or to exercise emergency powers. In these types of situations, a board of health may meet with less than 48 hours’ advance notice and posting of the agenda, and in our opinion, may “meet” via telephone where in person attendance is impossible or ill-advised based upon particularly applicable public health circumstances. In any event, however, the standard “rules” with respect to emergency meetings will still apply. In short, comply with the Open Meeting Law as written to the extent possible. For example, if possible: post the meeting as soon as is reasonable; meet in a public place where the public has access; take detailed minutes, including taking and recording a roll call on all votes; and, later, ratify, validate and confirm any actions taken at an emergency meeting, at the next-regularly scheduled meeting by including an item on the agenda for such purposes. Remember that compliance with the law to the extent possible will help to insulate the work of the board of health from procedural challenges.

### **4. Conclusion**

The situation involving the COVID-19 outbreak is evolving as new developments arise on a daily basis. Moreover, the law governing the authority of the government to provide for the protection of the public health and safety is

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complex, requiring the application of legal principles that have not been invoked or analyzed in decades. Therefore, given the significant social, economic and personal liberty interests at stake, prior to issuing orders, local boards of health are strongly encouraged to proceed with caution, consult current guidance from the Massachusetts Department of Public Health (DPH) and the Centers for Disease Control and Prevention (CDC), as well as coordinate closely with the chief executive officer and other municipal officials and local leaders. Local boards should also keep detailed records of their factual findings and conclusions to support any decisions they make.

We will continue to keep you updated regarding any legal implications associated with this ongoing public health matter. We have designated a group of KP Law attorneys to respond to your coronavirus questions on an expedited basis. Those attorneys are: Janelle M. Austin, Gregg J. Corbo, Deborah I. Ecker, Lauren F. Goldberg, Michele E. Randazzo, and Mark R. Reich. They can be reached via a dedicated e-mail address, [coronavirusinfo@kplaw.com](mailto:coronavirusinfo@kplaw.com). One of these designated attorneys will respond promptly to your inquiries. In some instances, you may be referred to your primary or land use contact, and you should of course feel free to contact your primary and/or land use attorney(s) directly with COVID-19 related questions.

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