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MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS

COVID-19 Guidance – May 15, 2020

Farmers' Markets, Farm Stands, and CSAs

Public health professionals, especially local health departments and boards of health, are facing many questions from local public officials, residents, parents, health care providers, and others about COVID-19. MAHB's series of documents are meant to provide answers and guidance to health departments and boards of health. **This document is provided for educational purposes only and is not to be construed as legal advice. For legal advice, please contact your city or town attorney.**

Going into the summer season, many public health professionals and volunteers are seeking guidance related to the Governor's Declaration of a State of Emergency. Farmers' markets have been deemed essential on the Governor's Essential Services Exhibit. Municipality officials, including local boards of health (LBOH), must balance the interests of the agricultural industry and the residents who require food (and especially, fresh produce), with the municipality's responsibility to protect its residents' public health.

This memorandum will give a very brief review of LBOHs' powers. Then, there will be a brief discussion on the currently declared state of emergency and the designation of farmers' markets as essential services. Following that, this memorandum will give a summary of the Massachusetts Department of Agricultural Resources (MDAR) guidance and the Massachusetts Department of Health's (DPH) Order related to farmers' markets. Lastly, this memorandum will put forth some guidance for LBOH regarding the operation of farmers' markets, including pointing out some sources to help support the promulgation of farmers' market regulations during the COVID-19 pandemic.

AUTHORITY OF LBOH:

Local boards of health's authority comes from a number of sources. LBOH have the authority to make reasonable health regulations.¹ LBOH are responsible for isolating and quarantining

¹ MASS. GEN. LAWS ch. 111, § 31.

residents who have contracted COVID-19 or have been exposed to COVID-19.² LBOH have the authority to remove nuisances in the community, including stopping business operations that are deemed susceptible to the spread of COVID-19.³ LBOH also have well-established emergency powers.⁴

Importantly, with respect to the regulatory authority of LBOH, business interests are subordinate to public health interest. “[T]he right to engage in business must yield to the paramount right of government to protect the public health by any rational means.”⁵

STATE OF EMERGENCY AND ESSENTIAL SERVICES:

On March 10, 2020, Governor Charlie Baker declared a state of emergency pursuant to Chapter 639 of the Acts of 1950 (Civil Defense Act).⁶ In the current state of emergency, Governor Baker has ordered that all businesses and organizations that do not provide COVID-19 Essential Services shall not re-open their brick-and-mortar premises to workers, customers, or the public before May 18, 2020.⁷ According to Exhibit A to COVID-19 Order No. 21, workers supporting farmers’ markets are essential workers.⁸ Guidance issued by the Executive Office of Housing

² MASS. GEN. LAWS ch. 111, §§ 95-105.

³ MASS. GEN. LAWS ch. 111, § 122-25.

⁴ The Massachusetts Sanitary Code permits LBOH to issue orders to address public health emergencies and require actions that are deemed necessary to meet the emergency. 105 CMR 400.200(B). The Department of Environmental Protection’s Environmental Code permits LBOH to issue emergency orders. 310 CMR 11.05.

⁵ *Druzik, et al. vs. Bd. of Health of Haverhill*, 324 Mass. 129, 139 (1949) (citing *Lawrence v. Bd of Registration on Med.*, 239 Mass. 424, 428 (1921)); see also *Tri-Nel Management, Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 225-26 (noting well-settled delegation of regulatory authority to LBOH). In *Lawrence*, the SJC stated, “The right to follow a legitimate calling for any purpose is sacred and is protected both by the Constitution of the United States and that of this Commonwealth . . . It must yield to the paramount right of government to protect the public health by any rational means.” 239 Mass. at 428 (internal citations omitted).

⁶ OFFICE OF THE GOVERNOR, Executive Order No. 591: Declaration of a State of Emergency to Respond to COVID-19, available at <https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-191950>; see 1950 Mass. Acts 521 (providing authority for Governor to declare state of emergency). The Civil Defense Act provides the Governor broad authority in a declared state of emergency. 1950 Mass. Acts 521, §§ 4-5, 7-8, 10.

⁷ OFFICE OF THE GOVERNOR, Order Further Extending the Closing of Certain Workplaces and the Prohibition on Gatherings of More than 10 People (April 28, 2020), available at <https://www.mass.gov/doc/signed-second-extension-of-essential-services-order/download>. Note that the applicable list of Essential Services is attached as Exhibit A to COVID-19 Order No. 21. *Id.*; see *infra* Note 8.

⁸ OFFICE OF THE GOVERNOR, Exhibit A, COVID-19 Order No. 21, available at <https://www.mass.gov/doc/march-31-essential-services-list/download>.

and Economic Development indicates that a business that provides an essential service (farmers' markets) are not required to open, but may open.⁹

In addition to the statewide state of emergency, some local municipalities have invoked their authority to declare local states of emergency under the Civil Defense Act.¹⁰ Under Section 13 of the Civil Defense Act, political subdivisions have the power to exercise the "powers vested under this section," including entering contracts and incurring obligations necessary to protect the public health.¹¹ It has been suggested that the Civil Defense Act is the only authority for local municipalities to declare a state of emergency.¹²

MDAR AND DPH GUIDANCE:

On March 27, 2020, the MDAR published considerations and guidance for farmers' markets, farm stands, and Community Support Agriculture (CSA).¹³ The guidance provided scientific facts related to the virus, SARS-CoV-2, which causes COVID-19. The guidance importantly notes that farmers' markets, farm stands, and CSAs are the "primary sales outlets for many Massachusetts farms." Equally important, farmers' markets, farm stands, and CSAs are essential for maintaining food access.¹⁴

Foreshadowing the Department of Public Health's order related to farmers' markets, farm stands, and CSAs, MDAR provides specific tactics for farmers' markets to operate while putting forth best efforts to minimize opportunities for customers, vendors, and employees to spread COVID-19. These specific tactics are listed below in the "Potential Regulations" section.

⁹ EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, COVID-19 Essential Services FAQs (Updated May 10, 2020), available at <http://www.mass.gov/info-details/covid-19-essential-services-faqs>.

¹⁰ E.g. TOWN OF BROOKLINE, Declaration of Emergency (March 16, 2020), available at <https://www.brooklinema.gov/DocumentCenter/View/21481/2020-03-16-SB-Declaration-of-Emergency?bidId=>; TOWN OF CONCORD, Declaration of Emergency – COVID-19 (March 19, 2020), available at <https://concordma.gov/DocumentCenter/View/24326/Concord-Declaration-of-Emergency?bidId=>.

¹¹ See 1950 Mass. Acts 521, § 13.

¹² PATCH, Under Local State of Emergency: What That Means in Massachusetts (Updated March 17, 2020), available at <https://patch.com/massachusetts/worcester/local-state-emergency-what-means-massachusetts>; but see MASSACHUSETTS MUNICIPAL LAWYERS ASSOCIATION, MMLA COVID-19 Conference Call (March 11, 2020), available at <https://www.massmunilaw.org/wp-content/uploads/2020/03/Summary-of-3.11.20-Conference-Call.pdf> (summarizing discussion naming G.L. c. 40, § 19 (appropriation of money during public exigency), c. 43, §§ 86, 100 (mayoral authority); and c. 111, § 104 (prevention of spread of infection, see above at Note 2) as sources of emergency power).

¹³ MASSACHUSETTS DEPARTMENT OF AGRICULTURAL RESOURCES, BULLETIN: 2020-5, Farmers' Markets, Farm Stands, & CSAs Guidance Memo #5 (March 27, 2020), available at <https://www.mass.gov/doc/mdar-bulletin-farmers-markets-covid-19>.

¹⁴ See id.

On April 27, the Commissioner of DPH issued an Order, pursuant to the authority granted by Section 2A, Chapter 17 of the Massachusetts General Laws.¹⁵ The Order states that “farmers markets, farm stands[,] and CSAs *may remain open*.” The Order specifies that farmers’ markets, farm stands, and CSAs are essential services per Exhibit A and those services’ employees are deemed essential workers. The Order also states that farmers’ markets, farm stands, and CSAs help “ensure access to a strong local food supply and enable farms to continue to grow, harvest and market safe, healthy and local fruits and vegetables.”¹⁶

As alluded to above, the DPH Order also provides safety tactics for the operation of farmers’ markets, farm stands, and CSAs. Similar to those tactics included in the MDAR Bulletin, DPH’s specific orders are listed in the “Potential Regulations” section below.

GUIDANCE FOR LBOH:

Based on the combined authority of the Governor’s Order deeming “workers supporting . . . farmers markets” essential and DPH’s Order that farmers’ markets “may remain open,” LBOH should take concerted efforts to collaborate with local farmers’ market for the opening of summer markets. Any closure and/or delay of farmers’ markets will likely have significant consequences, both economic—diminished sales for local farmers at their primary sales outlets—and public health—diminished food access for vulnerable residents. Also, if a LBOH prevents a farmers’ market from operating against the farmers’ and/or the market manager’s will, the interest of citizens’ constitutional rights must be considered.¹⁷

While it is understood that LBOH are under great strain during this state of emergency because of the statutory obligation of isolating and quarantining residents who have either positively tested for COVID-19 or have been exposed to those who positively tested for COVID-19, LBOH should make it a priority to begin preparations for the summer season with local farmers’ markets, ensuring compliance with the Governor’s Order. If there are questions or concerns related to how to approach your local farmers’ market, Mass Farmers Markets, a 501(c)(3)

¹⁵ DEPARTMENT OF PUBLIC HEALTH, Order of the Commissioner of Public Health for Farmers Markets, Farm Stands and CSAs (April 27, 2020), available at <https://www.mass.gov/doc/farm-stand-order/download>. The Commissioner’s order, the content of which is statutorily required to “take such action and incur such liabilities as [s]he may deem necessary to assure the maintenance of public health and the prevention of disease” or “insure the continuation of essential public health services and the enforcement of the same,” must be approved by the Governor and the Public Health Council. MASS. GEN. LAWS ch 17, § 2A; see PUBLIC HEALTH COUNCIL, available at <https://www.mass.gov/orgs/public-health-council>.

¹⁶ DEPARTMENT OF PUBLIC HEALTH, supra Note 15 (emphasis added).

¹⁷ See supra Note 5.

charitable non-profit organization, is available to assist.¹⁸ Also, consult with your town/city attorney to determine if there are additional funds that can be used for farmers' markets.¹⁹

Considering LBOHs' public health obligations, one might ask the following question: do LBOHs have the authority to restrict local farmers' markets to a greater degree than the restrictions outlined by the DPH Order, to the point where LBOH can altogether cancel local farmers' markets because of COVID-19 concerns?

LBOH are the public-health authorities that are tasked with preventing infectious disease within their municipality's borders by promulgating reasonable regulations. If a LBOH was intent on restricting farmers' markets to a greater degree than the DPH Order, then LBOH would likely point to their authority to "use all possible care to prevent the spread of the infection."²⁰ When invoking that authority, LBOH should recite their mission to protect public safety and also provide documentary evidence to support the reasonableness of the regulation.

However, a different set of concerns must be examined if the LBOH orders that local farmers' markets cannot open within the municipality's borders. If a LBOH was to order the closure of farmers' markets, it would directly conflict with the Governor and Commissioner of DPH's Orders.²¹ It is this author's opinion that in most cases, a challenge by the Commonwealth of any order to close farmers' markets would be successful and the LBOH order would be found invalid because of the Governor's broad emergency authority under the Civil Defense Act.²²

On the other hand, in a circumstance where the municipality itself has declared a state of emergency pursuant to the Civil Defense Act (the same authority invoked by the Governor), then it is arguable that the municipality's efforts to prevent the opening of farmers' markets would be valid. Despite a thorough search, this author has found no precedent where a municipality under a declaration of a state of emergency has issued a binding order that directly conflicts with an Order by the Governor, also under a declaration of a state of emergency. If a municipality did "test the waters," it begs the question of whether the Commonwealth would challenge the municipalities' ability to declare a state of Emergency under the Civil Defense Act, since the Governor's power to declare a state of emergency is explicit and the municipality's power is implicit within Section 13, a commonly cited source of the municipalities' emergency

¹⁸ MASS FARMERS MARKETS, available at <https://www.massfarmersmarkets.org/> (last visited May 9, 2020).

¹⁹ E.g., Article LXXXVIII of the Massachusetts Constitution, MASS. GEN. LAWS ch. 30B, § 8; ch. 40, § 19; ch. 44, § 31; 1950 Mass. Acts 521, §§ 15, 15A; 801 CMR 21.00.

²⁰ MASS. GEN. LAWS ch. 111, § 104.

²¹ As a nuisance, for example. See MASS. GEN. LAWS ch. 111, § 122-25.

²² See EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, supra Note 9 ("If the Governor has deemed your business essential, your city or town is prohibited from deeming your business non-essential and preventing you from remaining open if you are complying with the Governor's order.").

powers.²³ Further, a legal review of the municipality's ability to declare a state of emergency under Section 13 of the Civil Defense Act would certainly involve a review of whether a municipality should wield the powers granted under Section 7 of the Civil Defense Act in the face of an emergency involving an infectious disease pandemic.²⁴ LBOH should consult with their town/city attorney for legal advice before issuing orders related to local farmers' markets this summer season.

POTENTIAL REGULATIONS:²⁵

Prior to the promulgation of farmers' markets regulations, LBOH should have discussions with the local farmers' market to best ensure cooperation for the operation of a safe market this summer season. Some suggested guidelines include the following:

1. Post social distancing signage throughout the market, avoid product samples, minimize the number of touches at vendor tables and sales points, prevent the use of reusable bags, limit the use of tablecloths, clean and sanitize tables at intervals during market operation and at the end of every market, supply handwashing stations for vendors and customers, require the utilization of gloves, and minimize cash transactions;²⁶
2. Limit the number of customers who can enter the market space at one time (10-15 customers per 1,000 sf.); cordon off perimeters to allow for clear entry and egress points; employ signage, floor markers, and cones to direct customers; require police presence; post signage to remind persons not to enter the market if sick; promote pre-bagging, online, and other methods that limit public interactions; and require utilization of face coverings (masks) and gloves;²⁷
3. Farmers' market to set up pre-order or pre-scheduling for shopping, set up special shopping hours for vulnerable populations, restrict pets, restrict touching of products by customers, and restrict eating inside of the farmers' market;²⁸

²³ See PATCH, supra Note 12 (city solicitor quoting Section 13); see also TOWN OF CONCORD, supra Note 10 (invoking section 13).

²⁴ "Each local organization for civil defense shall perform civil defense functions within the territorial limits of the political subdivision within which it is organized, and, in addition, shall conduct such functions outside of such territorial limits as may be required pursuant to the provisions of section seven of this act." 1950 Mass. Acts 521, § 13.

²⁵ Any repetitive potential regulations have been omitted.

²⁶ MASSACHUSETTS DEPARTMENT OF AGRICULTURAL RESOURCES, supra Note 13.

²⁷ DEPARTMENT OF PUBLIC HEALTH, supra Note 15.

²⁸ MASS FARMERS MARKETS, 2020 Farmers Market Shopper Guidelines (on file with Mass Farmers Markets).

4. Limit demonstrations, suspend penalties for last-minute vendor cancellations, require a design to increase social space, and require a welcome booth or entrance booth for crowd control;²⁹
5. Utilize drive-thru options if possible; reduce hours; utilize fencing for crowds; require that markets be held outdoors; ban entertainment, children's activities, and cooking demonstrations; require increased spacing between vendors; and require use of plastic shields;³⁰ and
6. Require rounded prices to avoid the need for coins, elimination of seating, and restrict market to one entrance and one exit.³¹

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²⁹ FARMERS MARKET COALITION, Farmers Market Respond to COVID-19—Best Practices, Examples, and Resources (March 18, 2020), available at <https://farmersmarketcoalition.org/covid-19-crisis-farmers-market-new-guidelines/>.

³⁰ BOSTON.COM, Farmers markets scaling down with eye on safety due to virus (May 2, 2020), available at <https://www.boston.com/news/coronavirus/2020/05/02/farmers-markets-scaling-down-with-eye-on-safety-due-to-virus> (lists precautions taken by foreign-jurisdiction markets).

³¹ PURDUE UNIVERSITY EXTENSION, Food: A Guide for Farmers' Markets to Navigate the COVID-19 Outbreak (April 7, 2020), available at <https://extension.purdue.edu/article/36616>.