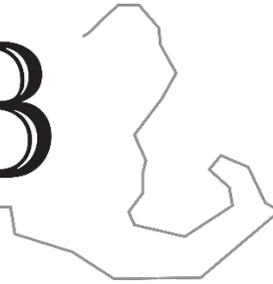


# MAHIB

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## MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS COVID-19

### The Role of the Board of Health in the Postponement/Continuance of Town Meeting May 12, 2020

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.**

**Question:** What role does a local Board of Health have in postponing or continuing a town meeting during the COVID-19 state of emergency?

**Background:** Massachusetts General Laws c. 39, § 10A was amended by Chapter 53 of the Acts of 2020, "An Act to Address Challenges Faced by Municipalities and State Authorities Resulting From COVID-19," on April 3, 2020. The recent amendment of the statute was accomplished in order to add "public health officials" to the process for continuing town meeting dates to a later date. Previously, the statute applied only to public safety emergency situations and weather related emergencies in order to postpone a town meeting.

Under the current statute, the procedures are divided into 2 categories. First, is the procedure to be followed if the *warrant for the town meeting has already been posted* at the time of the emergency necessitating the continuance. The second is the procedure to be followed if the *warrant has not yet been posted* as of the time of the declaration of an emergency.

**Town Meeting Warrant Posted:**

The procedure established for when the town meeting has been posted already calls for the town moderator to consult with local public health officials or public safety officials and the board of selectman to determine whether it is appropriate to recess and continue a town meeting previously called. If the decision to postpone is made the moderator may extend the date for a period of up to 30 days from the original date. That extension may be renewed should the condition still exist at the time of the rescheduled session. All subsequent continuances may be done for periods of up to 30 days at a time, until the time that the emergency has been rescinded. In any event, the session must be held within 30 days of the rescission of the state of emergency. If the moderator wants to extend beyond the date of the rescission of the emergency declaration, that must be announced by the moderator within 5 days following the end of the emergency. This additional post-rescission 30 day period was added to allow the moderator ample time to prepare all documentation and notifications necessary to administer a town meeting.

The discussions between the moderator and the health officials and select board are not considered “deliberations” for open meeting purposes, if the only subject of that discussion is the recess and continuance.

Because of social distancing requirements currently in place, it is possible a given town may not have a facility large enough to hold a town meeting within its borders. The statute allows a town meeting to occur at a suitable location in a neighboring municipality.

Another provision in the amended statute places the responsibility upon a public health or public safety official who must be designated by the board of selectman to submit a report to the Attorney General providing the public health based justification for the declaration that the time meeting is to be postponed.

**Town Meeting Warrant Not Yet Posted:**

Where the town meeting warrant has not yet been posted, the amended G.L. c. 39, § 10A also provides for a procedure to be followed. In such a situation the board of selectman can vote to supersede any charter or by law provisions which require the town meeting to occur during any particular period of time. Such a continued town meeting would be scheduled applying the regular procedures for scheduling any other town meeting not in the face of an emergency situation.

**Board of Health Role:**

The role of the local board of health in the postponement of a town meeting is somewhat limited. While the moderator must confer with health officials or public safety officials as part of the scheduling process, there is nothing in the statute to require the moderator to accede to the wishes of the LBOH. However, if the LBOH reasonably believes that holding a town meeting could place the attendees in a position of danger, and if the moderator refuses to postpone the town meeting, the LBOH is always free to exert its traditional statutory powers under G.L. c. 111, §§ 95 – 105, which grant the board “broad authority to implement safeguards to prevent the spread of infectious disease.”

The LBOH should look at particular facts and circumstances facing the town at the particular time. If there is probable cause to believe that there is an infectious disease presenting a threat to the public health, and if the facts and circumstances known to a LBOH at the time are sufficient to warrant a person to reasonably believe that the town meeting members are likely to be exposed to an infectious disease, the LBOH may take reasonable steps to protect the uninfected members of town meeting. The power of an LBOH to enforce reasonable protective measures to prevent the spread of communicable diseases has been acknowledged for well over a century.<sup>1</sup>

The LBOH should follow the reasoning that if there is any possibility that a town meeting member is COVID-positive, then it is a reasonable step for the board to protect the other members of town meeting from the spread of that infectious disease. In such an instance, the LBOH may issue an order that will halt the town meeting, should there be no logical cooperation by the select board or the moderator. This would be a last resort, but it would be effective.

In addition, under G.L. c. 111, § 104, “if a disease dangerous to the public health exists in a town, the selectman 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 maybe most effectual for the common safety.” This statute, in particular, differs from other statutorily imposed powers of boards of health, in that it requires a meeting of the minds between the board of health and the board of selectman or other CEO of a municipality.

**Conclusion:** In order to assure a reasoned decision it is important that the LBOH or its agent meet with the other officials who have responsibility for such a decision, in order to fully vet all options and assure buy-in from the other municipal agencies.

Under the new statutory scheme, the LBOH is not the sole decision maker without input of the board of selectman. Here, the LBOH should be prepared to discuss all options while maintaining its ultimate position of strength.

In addition to the above, it is worth looking at the nuisance powers of a board of health as another possible last resort, which removes all other agencies including the moderator from the equation. That is the strength of the LBOH, referred to above. Should the LBOH be placed in a position where it must exert its authority pursuant to the nuisance statute, it should make certain to provide ample written documentation that the board believes the COVID pandemic presents a threat to the public health of the town meeting members, and that the actions taken by the board are reasonably related to the protection of public health. This language will give the LBOH the strongest footing, should the actions of the board be challenged in court.

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<sup>1</sup> *Brown v. Murdock*, 140 Mass. 314 (1885).

As a final note should a town meeting be convened, the enforcement of masks and social distancing remains in the hands of the LBOH, and all such prerequisites must be met in order to hold any public meetings in person.

**Pending legislation:**

At the time of this Guidance Document, there is legislation pending in the House of Representatives, which has passed the Senate, which may have tangential effect upon the actual administration of the town meeting process. This legislation does not contain any provisions that affect any health-related decisions or actions.

SB. 2680, "An Act Relative to Municipal Governance During the COVID-19 Emergency, was passed on May 4, 2020, and is now pending before the House Committee on Ways and Means. The provisions of this bill include such measures as re-defining a quorum of an "open town meeting," along with budget implementation procedures, and notifications of the Attorney General of actions affecting such "open" town meeting. The bill also lays out the procedural considerations of a remote "representative" town meeting, including ADA compliance, choice of remote platforms (i.e.: Zoom, Webex, etc.), and how to deal with a month-to-month budget. There are no LBOH issues raised anywhere in the pending legislation, other than those where the delay may have an impact upon the board of health budget line item.