



LEGAL AUTHORITY OF BOARDS OF HEALTH

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Certificate Program Spring
2025

MAHIB

Assisting Massachusetts Boards of Health through
training, technical assistance and legal education



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- **For legal advice, please contact your city or town attorney.**
- **MAHB does not enter into attorney-client relationships.**



MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS

- **Not-for-profit membership association.**
- **Established in 1982 by the Conservation Law Foundation.**
 - Saw need for legal education relative to public health issues for local boards of health.
 - 351 local boards of health with legal authority to enact local public health laws.
- **Provide legal education, technical assistance and training to board of health members, health directors, agents, inspectors, public health nurses and other municipal officials.**



LEGAL AUTHORITY TO REGULATE PUBLIC HEALTH

G.L. C. 111, § 31

- Federal law – minimum standards
- State law:
 - “Through the plain language of G.L. c. 111, §31, the Legislature has delegated to boards of health the authority to ‘make **reasonable health regulations**.’” *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217 (2001).
 - “The protection of public health is within the **police power** of the municipality to **protect the health, safety and welfare** of its residents.” *Druzik et al v. Board of Health of Haverhill*, 324 Mass. 129 (1949).
 - “It is a widely accepted function of government to protect public health, even at the **expense of an individual’s freedom**.” (Id.)
 - “The **right to engage in business must yield** to the paramount right of government to protect the public health by any rational means.” (Id.)

MASSACHUSETTS SUPREME JUDICIAL COURT (SJC) HAS CONSISTENTLY UPHELD THIS AUTHORITY

- Board of health regulations “**stand on the same footing as would a statute, ordinance or by-law.**” *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 138 (1949).
- “**All 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 regulation] may be upheld.”** *Arthur D. Little, Inc. v. Com’r of Health for Cambridge*, 395 Mass. 535 (1985).

UNITED COMB & NOVELTY CORP. V. CITY OF LEOMINSTER BOARD OF HEALTH

17 MASS. L. REP. 233 (2004)

- “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.”

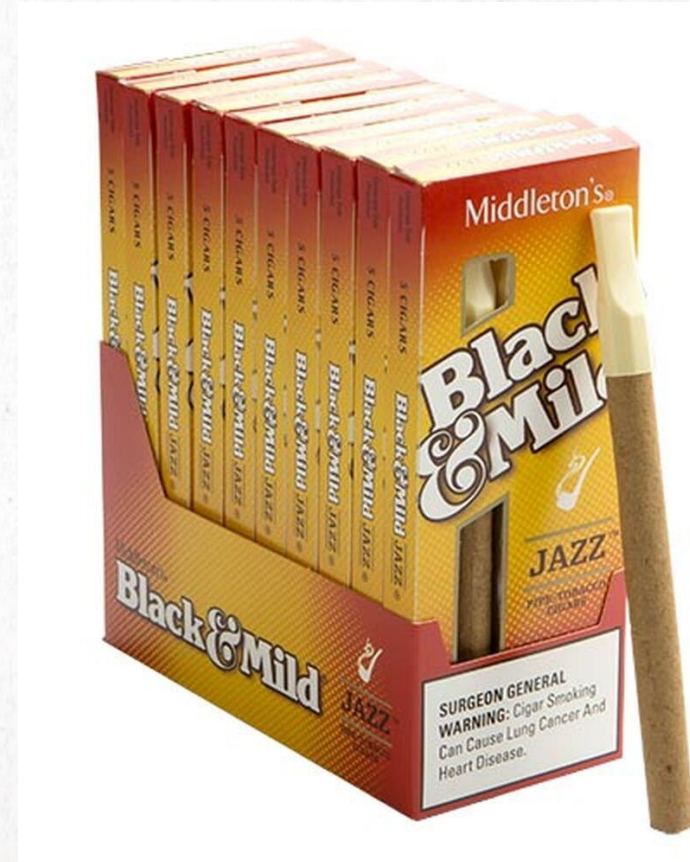
The logo for the Massachusetts Association of Health Boards (MAHBB) features the acronym "MAHBB" in a large, bold, serif font. To the right of the text is a white outline of the state of Massachusetts. Below the acronym, a horizontal line separates it from the organization's mission statement.

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CUMBERLAND FARMS, INC. V. TOWN OF YARMOUTH BOARD OF HEALTH

- Barnstable Superior Court decision, September 27, 2018
- Decision in favor of Board of Health's decision to fine and suspend a tobacco sales permit for selling a flavored tobacco product.
- Smelling the product to determine whether it is flavored is fine.
- CF lost its appeal.



One of America's leading cigar E-tailers Gotham Cigars, is proud to announce the introduction of a new flavor from Black & Mild, Jazz Cigarillos available in a plastic or wood tip.

MIAMI, FL (PRWEB) MARCH 21, 2013

One of America's leading cigar E-tailers [Gotham Cigars](#), is proud to announce the introduction of a new flavor from the well known brand, Black & Mild. Black & Mild got its start in Philadelphia, Pennsylvania in 1856 by a man named John Middleton. In 1997 production was moved to Limerick, Pennsylvania. By November of 2007, the parent company of Philip Morris, Altria, purchased John Middleton, Inc. [Black & Mild's](#) are sold in many different styles. They are made with either a plastic or a wood tip, and are also available untipped, or in a shorter, roughly half the size of a regular Black & Mild version called Shorts. Some popular Black & Mild flavors are wine, regular, royale, mild, and the newest, Jazz.

The [Black & Mild Jazz Cigarillo](#) is available in both plastic and wood tip. The Jazz has a nice slow, even burn all the way through, as well as the smoothness in the smoke that Black & Mild is famous for. The Jazz has its own unique sweet flavor however it is sometimes compared to the flavors found in the Black & Mild Summer Blend. Gotham Cigars is now carrying the Black & Mild Jazz at only \$0.59 a stick. At that price you can't afford not to try it. The experience is unique and worthy of anyone who already enjoys these cigars. The Black & Mild Cigarillo Jazz \$0.79 is sold in a upright box of 25 cigarillos.

Gotham Cigars offers customers one of the country's largest and freshest selections of premium cigars, Machine Made Cigars, [Filtered Cigars](#) and Humidors. Gotham Cigars has received five-star ratings by the most trusted online comparison websites for its huge selection, fast shipping and great customer service, Gotham Cigars has become a favored destination for buying cigars and accessories online in the US. All of their



Black & Mild Jazz Cigarillo

Gotham Cigars is now carrying the Black & Mild Jazz at only \$0.59 a stick. At that price you can't afford not to try it.

Contact Author

MANNY BALANI

Gotham Cigars
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Email >

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“YOU PEOPLE KNOW NOTHING ABOUT TOBACCO FLAVORS”

- The language of the local regulation “**does not require any particular training or scientific expertise** to determine if there is a ‘distinguishable aroma’ perceived by either the sense of smell or taste.”
- In fact, smell is used all the time by health inspectors.
 - Ventilation in restaurants to prevent “obnoxious odors.” (Food code).
 - Pool flotations devices cannot smell like mildew. (105 CMR 158.043).
 - Waste receptacles in multi-unit housing must be sufficient to contain odors. (105 CMR 410.600) (from Public Health Law Centers Amicus Brief).





AMERICAN LITHUANIAN NATURALIZATION CLUB, ATHOL, MASS., INC. VS. BOARD OF HEALTH IN OF ATHOL 446 MASS. 310(2006)

- Athol Board of Health has the legal authority to prohibit smoking in private clubs pursuant to G.L. c. 111, §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.



LIMITATIONS/CONSIDERATIONS: WHEN DO YOU ACT AND WHEN TO 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 those who are more susceptible to harm?
 - Youth, elderly, those with special needs, etc.
 - Is the harm caused by one person against another?
 - Private cause of action.



**JUST BECAUSE YOU CAN
DOESN'T MEAN YOU
SHOULD.**

FACTORS TO CONSIDER

- What is the burden to a person?
- Is the action fair and reasonable?
- Is the action going to be effective?



DELEGATION OF AUTHORITY

- State legislature delegated its authority to local boards of health.
- Extent of delegation varies.
 - Sharing of authority (state sanitary code).
 - Delegation to locals as primary enforcing agent.
- Local boards of health can strengthen state laws.
 - Generally, no preemption.



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ADDITIONAL SPECIFIC AUTHORITY IN CHAPTER 111

- §§ 31A, 31B: removal, transportation and disposal of refuse
- §§ 122, 123: nuisances
- § 127: house drainage and sewer connections
- § 127A: sanitary code, includes housing and food code
- §§ 143-150: noisome trades



NUISANCE LAW

G.L. C. 111, §§ 122, 123

- “The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, which may, in its opinion be injurious to the public health.”
- *“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” (Professor Prosser)*



BOARD OF HEALTH'S OBLIGATIONS

- “examine, destroy, remove and prevent as the case may require.”
- “make regulations relative thereto.”
- Exceptions:
 - Generally acceptable farming procedures.
 - Not best practices.

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GENERALLY ACCEPTED FARMING PROCEDURES FREE RANGE PIGGERY?



FREE RANGE PIGGERY?



FREE RANGE PIGGERY?



FREE RANGE PIGGERY?



DETERMINING WHETHER SOMETHING IS A PUBLIC HEALTH NUISANCE

- In the Board's opinion – judgment call
- Based on public health principles
- Does the condition affect the public?
 - Is the condition contained to one individual or one household?
 - Could the condition spread to neighboring individuals or households?
 - Could the individual spread the nuisance in the community?
 - Is there a real or potential health risk?

ADDITIONAL FACTORS TO CONSIDER

- Could the condition cause transmission of disease?
- Could the condition cause trauma or injury to the public?
- Could the condition cause exposure to hazardous elements or substances?



IF BOARD DETERMINES A NUISANCE EXISTS

C. 111, § 123

- **Issue a Cease-and-Desist Order**
 - To abate the nuisance within 24 hours or within a reasonable time.
 - Subject to \$1000 fine per day for knowingly violating order.
 - To come before the board to present plan to abate the nuisance.
- **If owner does not abate the nuisance:**
 - Municipality may abate it at expense of owner.
 - Lien on property.
- **Templates available.**



NOISOME TRADES

C. 111, §§ 143-150

- No trade or business that results in or may result in a nuisance, be harmful to the inhabitants, or **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.



COMMON EXAMPLES

- **Fat rendering plants**
- **Auto body shops**
- **Manufacturing of fish meal and fish oil**
- **Asphalt plants**
- **Options for boards of health**
 - **Prohibit business from coming to municipality**
 - **Assign a site**
 - **Consult municipal attorney – zoning issues**
 - **Assign conditions on site (hours of operation, etc)**



P.J. KEATING V. ACUSHNET

104 MASS. APP. CT. 64 (2024)

- Neighbors of an asphalt plant complained to the BOH about irritation and sickness they claimed were from fumes and odors from the plant.
- BOH held a hearing and heard testimony from neighbors, the health agent and operator of the plant.
- After the hearing, the board voted that the acts constituted a nuisance and ordered the plant to cease and desist from operations that caused noxious odors and fumes to spread beyond the boundaries of the plant.
- Plant operator appealed to Superior Court. Superior Court held for the plant operator saying the odor did not occur all the time.
- Acushnet appealed and Appeals Court held for the BOH and said that a Court cannot substitute its judgment for the judgment of the BOH.
- There was substantial evidence supporting the board's conclusion and the court will not substitute its judgment for that of the BOH.

LAWS AND REGULATIONS BOARDS OF HEALTH ENFORCE



Manual of Laws and Regulations Relating to Boards of Health

June 2016
Massachusetts Association of Health Boards'
update of the Manual of Laws and Regulations originally created by the
Massachusetts Department of Public Health
250 Washington Street
Boston, MA 02108

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LAWS AND REGULATIONS BOARDS OF HEALTH ENFORCE

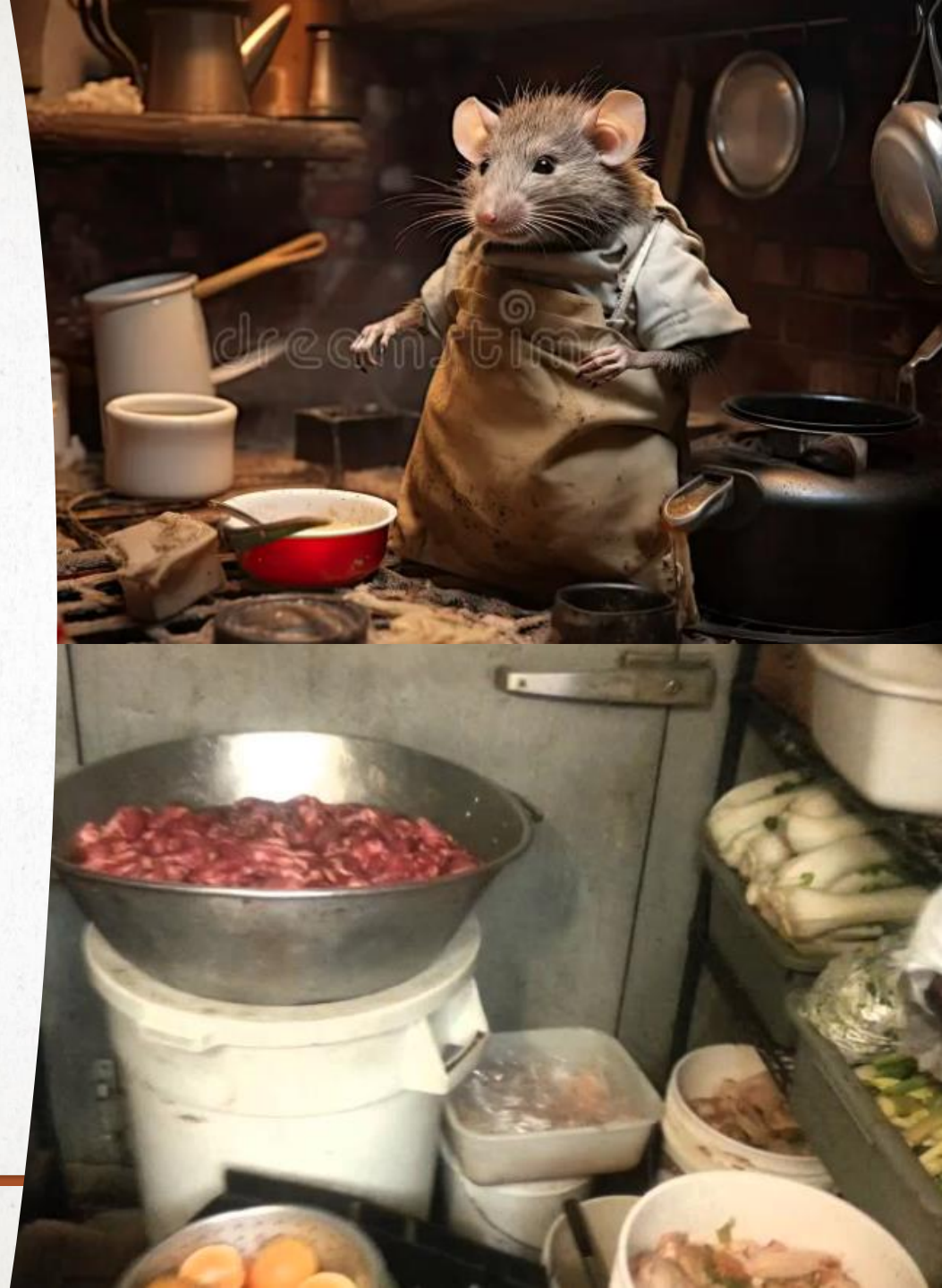
What Do Boards of Health Do in Massachusetts?			
EXCLUSIVE LEGAL AUTHORITY OF MASSACHUSETTS BOARDS OF HEALTH			
Disease Prevention/Control • Vaccination • Isolation/Quarantine • Hospital/Clinical Regulation		Sanitary Code Enforcement • Retail Food Establishments • Beaches/Camps/Farm Labor Camps • Pools/Skating Rinks/Campgrounds	
Food Protection • Eggs/Dairy/Bottled Beverages • Seafood/Shellfish/Slaughterhouses • Frozen Goods/Cold Storage/Farm Products		Environmental Regulation • Hazardous/Solid Wastes • Septage/Garbage • Air/Water Quality/Lead - Mercury Poisoning	
Other Issues Exclusively Regulated by Boards of Health			
Pesticides Nuisances Noisome Trade Animal Inspectons	Animal Trap Use Bath/Sauna Houses Death Certificates Burial Permits	Funeral Directors Cemetery Locations Tanning Facilities Tobacco Control	Subdivisions Fluoride in Water School Physicians School Nurses

AREAS THAT BOARDS OF HEALTH REGULATE

- Safe Drinking Water
- Sanitary Code
- Food Protection
- Restaurant Inspections
- Housing Code
- Septic Systems
- Private Wells
- Lead Inspections
- Disease Outbreaks
- Isolation and Quarantine
- Pesticides
- Tobacco Enforcement
- Vaccines
- Hazardous Waste
- Septage
- Solid Waste
- Air Purity/Pollution
- Issue Burial Permits
- Tanning Facilities
- Body Art
- School Health
- Bathing Beaches
- Campgrounds
- Swimming Pools
- Summer Camps
- Bottled Water
- Seafood and Shellfish **& more**

INSPECTIONS

- Goal: Compliance, not punishment.
- Key means of achieving compliance.
- Authority from state and local law.
- Types of inspections
 - Periodic
 - Complaint driven



WHAT IF YOU ARE REFUSED ACCESS TO A RESIDENCE OR TO AN ESTABLISHMENT?

- The 4th Amendment to the US Constitution safeguards the privacy and security of a person/ property owner from arbitrary intrusions by government officials. (*Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967)).
- The board of health or its authorized agent can “enter, examine . . . and otherwise conduct such examination . . . as is expressly provided . . .”
- “If an owner . . . or other person refuses, impedes . . . or obstructs entry . . . where inspection is authorized . . . The board of health may seek in a court a competent jurisdiction a search warrant . . .”
- **Administrative Search Warrant**
 - The board can request assistance from the police in presenting the warrant to the person.
 - Police cannot use this warrant to search for illegal activities.
 - This is an **administrative** search warrant, not a criminal search warrant.



YOU FIND A VIOLATION – NOW WHAT?

- **Ultimate Goal: Compliance – Not Punishment**
- **Types of fines if non-compliant:**
 - **Non-criminal disposition (G.L. c. 40, §21D)**
 - Civil ticket – maximum fine is \$300 per day.
 - **Cease and Desist/Correction Order (Health Order)**
 - Fines up to \$1000 per day unless specified differently in regulation or specific state law or regulation.
 - Tobacco sales law - \$1000, \$2000, \$5000.
- **Suspension/revocation/non-renewal of local permit**

WHAT IF THEY DON'T PAY OR DON'T STOP BEHAVIOR

- **Failure to pay fine:**
 - **Application for Criminal Complaint**
 - District or Housing Court
 - Show cause hearing before clerk magistrate
 - Complaint issues – arraignment – prosecution
 - Complaint fails to issue – case dismissed
- **Failure to comply with order and/or failure to pay fine:**
 - File for a preliminary injunction – forcing compliance through court order
 - Civil action.



SENIOR JUDGE IRVING R. KAUFMAN, OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, 1973 - 1980

“The judicial system is the most
expensive machine ever invented for
finding out what happened and
what to do about it.”

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