

Town of Concord
Board of Health

Minutes of the Meeting
January 21, 2020

PRESENT: Dr. Deborah Greene
Mark Haddad, Esq.
Alma Healey, RN
Raymond Considine
Jill Block

Susan G. Rask, Public Health Director
Karen M. Byrne, Administrative Assistant
Mina Makarious, Town Counsel

OTHERS: Stephen Lyon (sp?), 15 Commonwealth Ave, citizen; Greg D'Agostino, New England Convenience Stores and Energy Marketers of Massachusetts (NECSEMA); Victor Patel, 1637 Sudbury Rd; William Putnam, Cumberland Farms, 120 Thoreau Street; Michela Mosh, 86 Davidson Rd., Boxborough (student)

1. OPEN MEETING

The Chairman opened the meeting at 7:00 p.m.

2. STAFF REPORTS

Public Health Director Susan Rask provided the Board with copies of the newly adopted regulations from the Massachusetts Department of Public Health effective June 2020 "105 CMR 665.000, Minimum Standards for Retail Sale of Tobacco and Electronic Nicotine Delivery Systems." PHD Rask said that copies were made available to compare the Board's proposed regulation against the State's newly adopted regulation.

3. DISCUSSION/DELIBERATIONS - TOBACCO REGULATIONS

Following the (2) Public Hearings on November 18, 2019 and December 16, 2019 on "Concord Board of Health Regulation - Restricting the Sale of Tobacco Products" the Board of Health decided to take this opportunity to deliberate on the significant revisions to its current Regulation regarding the "Sale of Tobacco Products and Nicotine Delivery Products" considering all comments and information provided to it during those hearings and as part of the public records.

Before deliberations, Board members felt that it would be beneficial to have Town Counsel, Mina Makarious, of Anderson Krieger briefly summarize the key differences between the MDPH's new regulation and the Board's proposed tobacco regulation.

Background Summary Information from Town Counsel

Mr. Makarious summarized how the Board of Health's proposed tobacco regulation compared to the MDPH/State's new regulation (effective June 2020) and point out some key differences (the major distinction is the flavor ban):

- “Smoking Bars” - allowed under the new state law will be allowed to sell approved products **(State Regulation s)**
 - The way that Concord's proposed regulation is drafted smoking bars would not be allowed in Concord and is defined in the language of “who can sell” which only includes retail establishments (as they are today) or adult only retail establishments (if the proposed regulations are adopted).
- Prohibits the sale of Electronic Nicotine Delivery Systems (ENDS) with a nicotine concentration over 35 milligrams per milliliter outside of age-restricted establishments. **(State Regulations)**
- “Cigarettes, menthol cigarettes, cigars, flavored cigars, and other tobacco products, unflavored e-cigarettes **can be sold** in either **tobacco retailer establishment and/or smoking bar** with a nicotine concentration of less than 35 milligrams/milliliter **(State Regulation s)**
- “Adult Only Retail Stores” - cigarettes, including menthol, cigars and flavored cigars and other flavored tobacco products can be sold **(State Regulation s)**
 - **Flavored tobacco prohibited for sale** in Adult only Retail Stores **(Concord Regulations)**
- E-Cigarettes - can be sold 35 milligrams/ml or less in both regular retail stores and Adult only Retail Stores **(State Regulations)** flavored and unflavored.
 - Unflavored e-cigarettes 35 mg/ml or less can be sold in Adult Only Retail Stores **(Concord Proposed Regulations)**
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Attorney Makarious noted that in Concord's proposed regulation FDA approved smoking cessation products are exempt from the regulations. He said it was not clear what DPH's thinking was but perhaps they were allowing the lower nicotine products to be sold for cessation purposes.

Town Counsel said that the other main difference is what would happen to existing retail establishments that are opened and accessed by people under 21 years of age.

- Under proposed state regulations retail establishments could sell cigarettes, including menthol, cigars, including flavored cigars and other tobacco products except for e-cigarettes - no flavored tobacco **(State Regulation) - however,**
- In Concord if the Board's proposed regulation is adopted:
 - Retail Establishments could sell unflavored cigarettes, unflavored cigars, and other tobacco products (no e-cigarettes) until their existing Tobacco Sales Permit expires on May 31, 2020; after that date, those permits would be phased out and

only licensed Adult Only Retail Establishments could sell tobacco/nicotine products within the parameters of the new proposed regulations.

Lastly, as it pertained to definitions and sales, Attorney Makarious stated that there were some distinctions between the two regulations (State/Concord) but there were far fewer than when the Board started the process in earnest in October. Mr. Makarious said that the State for a variety of reasons “stepped up its game” relative to the tobacco regulations.

Town Counsel reviewed another feature of MDPH/States Regulations relative to the “fine structure” for violations to the State Law. He said that it had literally been decades since the State had addressed the amount of fines that could be levied against a violator. Attorney Makarious said that the “Fine Schedule” under state law had always tracked similar to what the Town had under the non-criminal disposition statute Chapter 40, section 21D. The new State Regulations now authorize both the DPH and local enforcement officials including Boards of Health and their designees to issue fines for certain state law violations of \$1,000, \$2,000 and \$5,000 (1st, 2nd, 3rd offenses).

He said the key violations are sales under the minimum sales age (21) and sales of flavored tobacco or e-cigarettes of the higher nicotine content where they should not be sold. Town Counsel said what this essentially does is mandate that local officials use the higher state penalties for violations of state law. However, Mr. Makarious noted that if you have other requirements that are local only those items would continue to fall under the non-criminal disposition process which is a more traditional set of fines (and those fines are under a statutory (\$100, \$200, \$300) cap).

Attorney Makarious said that the process was relatively the same for fines although there was now guidance from DPH on how to implement the state penalties and instructions for providing notice of the hearing procedures, etc. For the sake of discussion, Town Counsel said that the Board now has some enhanced enforcement capacity regardless of what it decided relative to its proposed regulation because the State has become more restrictive and because the State has upped the penalties.

Discussion Continued

Dr. Greene said she was disappointed to report that regardless of claims to the contrary from business owners and their attorneys that Concord retailers consistently had 100% compliance to local and state regulations relating to selling tobacco products to minors over the past several years, that one of the licensed tobacco sales establishments had sold a pack of cigarettes to a minor during a youth tobacco compliance check earlier in the day (1/21/20) and in her opinion, that was a problem.

Ray Considine felt that compliance checks needed to occur more regularly in order to be effective. Because Concord was not part of a regional tobacco compliance program, PHD Rask noted that resources/staff were limited for these types of inspections. Currently, the Health Division works with Maureen Buzby, Mystic Valley Tobacco Control Coordinator for the City of Melrose who works with trained youth (18, 19, and 20 years of age) to conduct “sting” purchase inspections. Ms. Rask said these inspections were conducted twice a year in addition to the FDA checks. Board members inquired whether these could be increased

and/or if additional fees could be imposed upon retailers with tobacco licenses to cover costs. After further discussion, the topic was deferred until staff could obtain additional information.

The Board went on to discuss at length the information it learned over the past several months as well as reviewed testimony from interested parties including residents, physicians, school officials, business owners and their representatives at the (2) public hearings held in November and December. Board members felt that much more had to be done to de-normalize vaping and traditional tobacco products starting with but, not limited to, how the industry targets youth through advertisement. Dr. Greene felt that continued efforts by the Board whether through regulations and/or working with the convenience store retailers to achieve that goal was important. She said that it was a known fact that young people frequented convenience stores often and that the advertisements to entice kids to smoke was undeniable and whatever steps to prevent children from becoming lifelong nicotine addicts was important.

After much consideration and discussion, consensus was to table any vote on the proposed regulation “Restricting the Sale of Tobacco Products” until June 1st at which time the Board will have had an opportunity to see how the State’s new tobacco/vaping regulation and restrictions play out. Although the Board felt strongly that the claims of “adult rights” and civil liberties fell short when it came to the public health of the community as a whole, particularly in youth, it also felt this approach was prudent at this time.

Jill Block moved to table the proposed regulation “Restricting the Sale of Tobacco Products” for reconsideration after June 1, 2020 at the June Board of Health meeting. Mark Haddad seconded it. All VOTED in favor. (The motion carried 5-0).

4. BOARD MEMBER REPORTS

Board members commended Chairman Dr. Greene on an article published in the Emerson Hospital Health Works on the “Truth about Vaping”. A link to an accompanying podcast is on the Board of Health/Town Website.

Dr. Greene advised all that the 2019-2020 influenza season was terrible and encouraged immunization for anyone who had not received a flu shot.

Board members asked the Health Director to compile some information relative to electromagnetic radiation exposure on human health.

5. STAFF REPORTS (Continued)

PHD Rask recapped a MDPH meeting she attended on Eastern Equine Encephalitis (EEE) reevaluating both the state and local public health response as a whole during last summer’s EEE crisis. As a whole, PHD Rask felt that the response had been good but that officials agreed that more “pre-packaged” language for the layman about the disease cycle, etc., was needed. Because EEE usually runs in a three (3) year cycle she anticipated that MDPH would have additional information for the public available in plenty of time for the next mosquito season.

PHD Rask also noted that she was shocked to learn that the Central Massachusetts Regional Mosquito Programs costs were significantly higher than the \$20,000 Concord contracted with the Eastern Middlesex Mosquito Control Program (EMMCP). Most of the towns in Central Mass were asked to commit between \$60-80,000 and the majority of them could not sustain that funding. Ms. Rask said that EMMCP has always worked with Concord and allowed it to purchase services “a la carte” for example, no spraying but treating the catch basins and testing mosquitos for West Nile Virus and EEE.

Both Dr. Greene and Mark Haddad felt it important to apprise Concord Schools of what was learned at the seminar and that it was likely going to be another active year with field closures similar to 2019; this way officials would not be taken off guard.

6. MINUTES AND BOARD CALENDAR

The next regularly scheduled meeting of the Board of Health is February 11, 2020.

The December minutes will be discussed and reviewed at the February meeting.

7. MISCELLANEOUS

The Board circled back to briefly discuss Electromagnetic Fields (EMFs) and smart meters. The Health Department has been contacted by residents (pro/con) on this topic and PHD Rask said it would be likely that the Board would be asked at some point to weigh in on the issue. In discussions with other interested parties, including former Select Board (BOH Liaison) member Alice Kaufman, PHD Rask conveyed that consensus has been that the science was quite complex and should be left to State and Federal authorities who understand it.

Board members agreed noting they did not have the expertise to fully ingest and/or research the topic; nor make informed opinions on it. PHD Rask stated that first and foremost the Board of Health was a Town Regulatory Board with a finite set of regulations within its purview. She reminded the Board that it had no regulatory authority or obligation under State Law to oversee or be involved.

After a brief discussion, Mark Haddad asked Ms. Rask if she staff could compile some additional information relating to (EMF's) and smart meters for the next meeting. Regardless of the Board's authority he felt it would be good to familiarize themselves on the topic.

The meeting adjourned at approximately 9:15 p.m.

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Respectfully submitted by,

Karen M. O’Keefe-Byrne
Administrative Assistant
Concord Board of Health

Dr. Deborah Greene, Chairman

Mark Haddad, Esq.

Jill Block

Alma Healey, RN

Raymond Considine