COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2019-P-0020

BARNSTABLE, ss.

CUMBERLAND FARMS, INC.,
Plaintiff-Appellant,

v.

TOWN OF YARMOUTH BOARD OF HEALTH,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

AMICUS CURIAE BRIEF OF NEW ENGLAND CONVENIENCE STORE AND ENERGY MARKETERS ASSOCIATION IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

Date: June 28, 2019

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IDENTITY AND INTEREST OF AMICUS

The New England Convenience Store and Energy Marketers Association ("NECSEMA") appears as *amicus curiae* by leave of Court, pursuant to Mass. R. App. P. 17(a). NECSEMA represents and promotes the interests of convenience store and transportation fuel companies across New England. The vast majority of NECSEMA's members are small businesses, including many family-owned and operated businesses. Some of these businesses are established, multi-generational organizations, while many are first-generation American proprietors.

NECSEMA is deeply concerned about ensuring fairness in municipal agency proceedings that affect its members. Many of NECSEMA's members are not well equipped to cope with such proceedings because – as single-store operators or small chains – they are unlikely to have the luxury of in-house counsel or a legal budget. Further, those of NECSEMA's members who are first-generation Americans must also overcome language barriers as well as unfamiliarity with the American legal system. Because these members are not well prepared to deal with the vagaries of ad hoc administrative processes, they are vulnerable to unfair treatment by municipal agencies. Accordingly, procedural clarity and fairness are vital for NECSEMA's members.

Because of its interest in procedural clarity and fairness, NECSEMA asks this Court to provide prospective, generally-applicable guidance on a matter of

state-wide concern by addressing the procedural requirements that boards of health must follow to impose monetary penalties. Specifically, NECSEMA asks the Court to hold that a board of health must pursue fines via either criminal process or the non-criminal disposition process, rather than by administrative hearing. Requiring boards of health to follow these statutorily-prescribed procedures will ensure basic due process for NECSEMA's members.

STATEMENT OF COUNSEL

This *Amicus* Brief was authored by Pierce Atwood LLP on behalf of *Amicus* NECSEMA. No party or party's counsel authored the Brief in whole or in part, or contributed money intended to fund preparing or submitting the Brief. No person or entity other than NECSEMA, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief. Neither NECSEMA nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS

Whether a board of health exceeds its authority by directly imposing a fine after an ad hoc administrative adjudication, rather than by following the statutorily-prescribed process of filing a criminal complaint or seeking non-criminal disposition? The answer is "Yes."

SUMMARY OF ARGUMENT

The Massachusetts Court of Appeals has never addressed whether boards of health are permitted to directly impose fines via administrative hearings, rather than by the statutory non-criminal disposition process. NECSEMA therefore submits this brief not to repeat the arguments of any party, but rather to provide the Court with additional information regarding this important issue. NECSEMA will explain (1) the procedural requirements that boards of health must follow, and (2) how these requirements afford NECSEMA's members due process. Specifically, NECSEMA argues as follows.

Appellee Town of Yarmouth Board of Health ("Board") exceeded its statutory authority by directly imposing a fine after an ad hoc administrative hearing. The Legislature has never explicitly or implicitly authorized boards of health, whose powers are constrained by their enabling acts, to impose fines via an administrative hearing. *Infra*, at 13-19. Accordingly, if a board of health seeks to impose a fine, it is required to use one of two default methods for pursuing a fine – namely, by filing a criminal complaint under Section 1 of Chapter 280, *see* G.L. c. 280, § 1, or by seeking non-criminal disposition under Section 21D of Chapter 40, *see* G.L. c. 40, § 21D. *Infra*, at 19-21. The Board, however, did not follow either of these methods for assessing fines. *Infra*, at 21-24. Instead, it conducted an ad hoc administrative hearing not contemplated by its regulations. *Infra*, at 24-26.

By violating the statutory procedures for imposing civil penalties, the administrative process employed by the Board deprives NECSEMA's members of procedural clarity and fairness. Municipal agencies are not subject to the Administrative Procedure Act's procedural safeguards. *Infra*, at 26-29. Requiring boards of health to follow one of the two statutorily-prescribed methods of collecting fines, rather than permitting them to conduct ad hoc hearings, therefore provides significant protections – such as clear notice and a neutral hearing officer – for those accused of having violated a public health regulation. *Infra*, at 29-35.

In sum, NECSEMA argues that the Board disregarded long-established, well-recognized procedures in order to impose fines extra-judicially, via an ad hoc administrative process. The Board's conduct exceeded its legal authority, and – if permitted to stand – threatens to rob NECSEMA's members of basic due process.

ARGUMENT

NECSEMA urges the Court to reach the question, squarely presented by this case,[1] regarding the administrative authority of boards of health. The Court can and should reverse the judgment of the Superior Court on the grounds that the Board's decisions (1) were not supported by substantial evidence, and (2) were arbitrary and capricious. *See* Appellant's Brief, at 26-49. Reversing on these

[1] Appellant Cumberland Farms, Inc. ("CFI") has raised and preserved the administrative law issue addressed herein. *See* Appellant's Br. at 49-57. It is therefore properly considered by this Court.

grounds alone, however, would not resolve the broader issue regarding the scope of a board of health's authority to impose fines via an administrative proceeding.

This serious administrative law issue, though it occurs in the context of what may be perceived as an insignificant fine, is deserving of the Court's attention. Violations of "important fundamentals of law" should be addressed, even when they occur in the context of small fines, because enforcement of local regulations "may account for [citizens'] principal and most frequent encounters with public administration." *See Crawford v. City of Cambridge*, 25 Mass. App. Ct. 47, 50 (1987). Enforcement of local regulations thus must be "consistent and fair." *Id.*

In this case, the administrative law issue presented has state-wide implications and is likely to recur while evading judicial review. Many individual proprietors and small businesses, including numerous members of NECSEMA, are subject to *ultra vires* administrative actions by boards of health. It is unlikely, however, that extra-judicial fines imposed by a board of health will be challenged in future proceedings. The fines imposed are small and the legal fees required to challenge them are significant, making it probable that the typical NECSEMA member will simply pay the penalty instead of contesting it. Many unsophisticated small businesses simply do not have the capacity to take on expensive, daunting, and time-consuming litigation over small penalties. This issue, in short, is unlikely to appear again before the Appeals Court in the foreseeable future.

Thus, in order to ensure fundamental fairness on a matter of state-wide concern, NECSEMA respectfully requests that the Superior Court's decision be reversed on the grounds that the Board acted *ultra vires* by imposing fines via an ad hoc administrative hearing instead of via statutory procedures.

I. The Board Acted *Ultra Vires* By Imposing Fines Directly After Conducting an Ad Hoc Administrative Hearing.

A board of health, as a municipal agency, may not impose fines via administrative hearings absent statutory authorization. Because the Legislature has not granted to boards of health the authority to impose fines directly, a board of health is constrained to pursue one of two exclusive options in order to enforce its regulations by monetary penalty: file a criminal complaint or initiate the non-criminal disposition process. A board of health certainly cannot pursue fines via an ad hoc administrative hearing without implementing regulations. In this case, the Board's process for imposing a fine was therefore twice flawed: (1) it pursued an administrative hearing, rather than non-criminal disposition, and (2) it did so on an ad hoc basis, without any implementing regulations.

A. The Board was required to file a criminal complaint or follow the non-criminal disposition process in order to impose a fine.

1. The Legislature has not provided express or implied authority for boards of health to impose fines directly.

Boards of health, which are constrained by the scope of their enabling acts, have never been granted authority – either explicitly or implicitly – to directly

impose fines for violation of health regulations by means of administrative hearings. The Board therefore may not pursue recovery of fines by administrative process. *See Burlington Sand & Gravel, Inc. v. Town of Harvard*, 31 Mass. App. Ct. 261, 264-65 (1991) (holding that town could not seek fine via civil counterclaim, but rather only by criminal complaint or non-criminal disposition, where statute did not authorize imposition of fines by civil actions). Accordingly, the Board's decision to impose fines on CFI after conducting an administrative hearing was *ultra vires*. *See Commonwealth v. Maker*, 459 Mass. 46, 50 (2011) (agency action was unlawful because the power exercised was neither expressly delegated nor necessarily implied by statute); *Morey v. Martha's Vineyard Comm'n*, 409 Mass. 813, 818 (1991) (commission's action found to be *ultra vires* because it was "neither expressly nor impliedly" authorized by statute); 38 Mass. Prac. § 3:3 ("When an administrative agency acts outside or beyond the scope of the statutory authority expressly or impliedly conferred upon it by the enabling act, its actions are invalid and are considered to be 'ultra vires.'").

a. Boards of health are constrained by their enabling statutes.

A board of health's authority is confined by the scope of powers delegated to it by the Legislature. A board of health is a "municipal agency." *Clean Harbors of Braintree, Inc. v. Bd. of Health of Braintree*, 415 Mass. 876, 878 (1993). They are created by state statute, *id.*, and their powers derive from those enabling

statutes, *see* G.L. c. 111, § 26 (allowing for appointment of board of health); *id.* § 31 (granting board regulatory authority). *See also* 38 Mass. Prac. § 3:2. As a creature of the State, a board of health "has no inherent authority beyond its enabling act and therefore it may do nothing that contradicts such legislation." *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 421 Mass. 570, 586 (1996); *see* 38 Mass. Prac. §§ 3:2, 3:3. As the Supreme Judicial Court has observed, "[t]he regulatory power of [a] board of health [is] measured and limited by [its] enabling statute." *Commonwealth v. Rivkin*, 329 Mass. 586, 587 (1952).

Because, as a municipal agency, a board of health "has no inherent or common law authority to do anything," but rather is limited by its enabling statute, a board "may act only to the extent that it has express or implied statutory authority to do so." *Comm'r of Revenue v. Marr Scaffolding Co.*, 414 Mass. 489, 493 (1993).[2] *See* 38 Mass. Prac. § 3:3 n.3 ("[A]dministrative agencies have only those

[2] A municipality's broader "home rule" authority, *see* Mass. Const. amend. art. 2, s. 6, does not apply in this case because it is the actions of the Board, not the town, that are at issue. *See Marshfield Family Skateland, Inc. v. Town of Marshfield*, 389 Mass. 436, 440-442 (1983) (noting that the "power of a local licensing board . . . is created and defined entirely by" statute, while a municipality has broader authority (citing *Turnpike Amusement Park, Inc. v. Licensing Comm'n of Cambridge*, 343 Mass. 435, 438 (1962))); *see also Bd. of Public Works of Wellesley v. Bd. of Selectmen of Wellesley*, 377 Mass. 621, 625-30 (1979) (examining powers of a local board of public works as compared to a town). In any event, as discussed in Part I.A.2, *infra*, municipalities themselves are limited to imposing fines either by criminal complaint or non-criminal disposition. *See Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 263-65; G.L. c. 40, § 21; 18 Mass. Prac. § 15.11.

powers expressly or impliedly conferred upon them by" an enabling act). Implied powers "must be essential and not merely convenient to the implementation of express powers conferred by statute," such that they are "powers provided by *necessary* implication." *Greater Boston Real Estate Bd. v. City of Boston*, 397 Mass. 870, 877 (1986) (emphasis added); *see Springfield Pres. Tr., Inc. v. Springfield Library & Museums Ass'n*, 447 Mass. 408, 418 (2006); *Steinbergh v. Rent Control Bd. of Cambridge*, 406 Mass. 147, 150-151 (1989). Boards of health have neither express nor implied power to impose fines via administrative hearing.[3]

b. The Legislature did not expressly authorize boards of health to impose fines extra-judicially.

The enabling statute for boards of health, Section 31 of Chapter 111, does not expressly authorize a board of health to impose fines via an administrative hearing. The statute provides that "[b]oards of health may make reasonable health regulations," G.L. c. 111, § 31, and allows for monetary penalties, *see id.* ("Whoever . . . violates any reasonable health regulation, . . . for which no penalty

[3] In this *amicus* brief, NECSEMA primarily addresses a board of health's authority to impose fines, but does note that there should be a predicate criminal or non-criminal finding of responsibility imposing a fine before a board of health suspends a retail permit. As described in Part II, this will ensure that basic due process is provided to those alleged to have violated health regulations. Ensuring due process in suspending a retail permit is as – or more – important than in the context of imposing fines, as suspending a permit can cost a small business many multiples of any fine imposed for an alleged violation of a health regulation. *See* RA I:100 (CFI would lose more than $15,000 as a result of a week-long permit suspension for its Yarmouth store).

by way of fine . . . is provided by law, shall be punished by a fine of not more than one thousand dollars."). Notably, however, the statute does not grant boards of health the authority to impose fines directly, *i.e.*, without judicial process.

The Legislature could easily have expressly authorized adjudicatory hearings in front of boards of health, but it did not. The Legislature has expressly authorized hearings in many other contexts. *See, e.g.*, G.L. c. 112, § 42A (authorizing hearings before Board of Registration of Pharmacy); *id.* c. 112, § 93 (authorizing hearings before Board of Registration of Chiropractors). For example, the Legislature has statutorily authorized municipalities to, "[a]t local option," establish an administrative process to directly collect "fines for violation of . . . housing, sanitary or municipal snow and ice removal" regulations. 18 Mass. Prac. § 15.11.50; *see* G.L. c. 40U, §§ 1 *et seq.* In so doing, the Legislature also established corresponding procedural safeguards. *See* 18 Mass. Prac. § 15.11.50.[4] By contrast, Section 31 of Chapter 111 contains no language authorizing boards of health to directly collect fines for alleged health violations – much less any procedural safeguards for that process. G.L. c. 111, § 31.

[4] The Legislature imposed notice and hearing requirements, *see* G.L. c. 40U, §§ 6, 9, and expressly allowed an aggrieved person to obtain a hearing before a judicial officer via the non-criminal disposition process, *see id.* § 15. Because the Legislature has not authorized boards of health to hold administrative hearings, none of these statutory protections are available when a board of health directly imposes a fine via an administrative hearing. *See infra*, Part II.A.

The Legislature clearly knew how to authorize municipal agencies to impose fines via administrative process, if it so intended. It simply chose not to give this authority to boards of health. *See Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264 & n.2 (holding statute did not expressly authorize imposition of fines by civil suit, noting that "Legislature was well aware how to provide for civil penalties in legislation, if it decided to do so" but did not); *see also Tortolano v. Lemuel Shattuck Hosp.*, 93 Mass. App. Ct. 773, 779 (2018) (fact that "Legislature knows how to confer a private right of action when it so intends," but chose not to do so, demonstrated that such rights of action were not available).

c. The Legislature did not impliedly authorize boards of health to impose fines extra-judicially.

Nor does Section 31 of Chapter 111 impliedly authorize boards of health to impose fines after conducting an adjudicatory proceeding. As discussed in more detail *infra* at Part I.2, a board of health is authorized to impose fines via two other mechanisms: (1) criminal indictment or complaint, or (2) non-criminal disposition. Typically, prior to 1977, local ordinances were enforced by filing criminal charges against the offender. *See* G.L. c. 280, § 1. In 1977, the Legislature also saw fit to create a means for "non-criminal disposition" of violations of municipal ordinances. *See* G.L. c. 40, § 21D. Municipal agencies can utilize this method if authorized by ordinance. *Id.* Accordingly, there are multiple avenues by which a board of health may pursue assessment of fines for violation of health regulations.

It is therefore not "essential" to the exercise of a board's "express powers conferred by statute" for the board to be able to assess fines via administrative hearings. *Greater Boston Real Estate Bd.*, 397 Mass. at 877. The power to directly impose fines therefore should not be implied. *Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264 (holding that statute did not impliedly authorize imposition of fines by civil suit).

2. The Legislature has only authorized boards of health to impose fines by filing a criminal complaint or pursuing non-criminal disposition.

Because boards of health are not authorized by statute to hold administrative hearings, a board of health has only two methods available to it in order to impose a fine. A board could pursue a criminal indictment, *see* G.L. c. 280, § 1, or, alternatively, could pursue non-criminal disposition (as provided for by local ordinance), *see* G.L. c. 40, § 21D. Because the Legislature did not authorize boards of health to conduct hearings, a board cannot recover a fine other than through criminal process or non-criminal disposition as allowed by statute. *See Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264-65 (criminal complaint or non-criminal disposition only options available to pursue fines, absent other express or implied statutory authority); *see also* 18 Mass. Prac. § 15.11 (noting that fines imposed for violation of town bylaws "*shall* be recovered by indictment or on complaint before a district court, or by noncriminal disposition" (emphasis

added)). Accordingly, the Board should have pursued either criminal process or non-criminal disposition, as prescribed by state law.

Chapter 111, Section 31 authorizes criminal proceedings to enforce local health regulations. Section 31 provides that, if "no penalty by way of fine or imprisonment, or both, is provided by law," then any violation "shall be punished by a fine of not more than one thousand dollars." G.L. c. 111, § 31. This statute "authoriz[es] criminal proceedings for violations of . . . local board of health regulations." *Commonwealth v. Porrazzo*, 25 Mass. App. Ct. 169, 172 (1987); *see City of Waltham v. Mignosa*, 327 Mass. 250, 253 (1951). Boards of health therefore may pursue fines by criminal complaint. *See* G.L. c. 280, § 1 ("Fines and forfeitures exacted as punishments for offences . . . may, unless otherwise provided, be prosecuted for and recovered by indictment or complaint."); *see also Commonwealth v. Racine*, 372 Mass. 631, 631 (1977) (fines imposed after criminal complaint brought in district court). Even after the creation of the non-criminal disposition process in 1977, criminal proceedings remained the *only* method of enforcing local ordinances absent authorization to use the non-criminal disposition process. *See* Mass. Exec. Office of Communities & Development, *A Guide for Using Non-Criminal Disposition for By-Law Enforcement*, at 3 (1991);[5] *id.* at B-1

[5] The Guide is available at https://www.mass.gov/files/documents/2016/09/om/guide-to-c40-s21d.pdf.

(if a town has not adopted the non-criminal disposition process, it may "enforce local by-laws only through the issuance of a criminal complaint").

Because the criminal process may be seen as too burdensome in some cases, the Legislature has adopted an alternative procedure for non-criminal disposition for alleged violations of municipal ordinances. *Id.* at 3. Chapter 40, Section 21D provides that "[a]ny city or town may by ordinance or by-law . . . provide for non-criminal disposition of violations of any . . . regulation of any municipal officer, board or department the violation of which is subject to a specific penalty." G.L. c. 40, § 21D. If a municipality adopts the non-criminal disposition procedure, then municipal officials may provide an alleged offender a written notice identifying the offense and fine. *Id.* Following provision of notice, the alleged offender may either pay the fine to the municipality, or may contest the violation in a hearing before a district court. *Id.* This streamlined process "reduce[s]" the "complexity for all concerned." *A Guide for Using Non-Criminal Disposition*, at 4.

3. The Board acted beyond its authority by failing to follow statutory procedures.

In this case, the Board did not follow either of these statutorily-prescribed methods of assessing fines but instead conducted an administrative hearing. The Board does not contest that it failed to file a criminal complaint or use the non-criminal disposition process. Instead, the Board contends that it "wasn't actually able to utilize" the non-criminal disposition process because the town has not

adopted Chapter 40, Section 21D as a "general bylaw" and, therefore, an administrative hearing "is the only manner in which the Board's . . . Regulations may be enforced." Appellee Br. at 52. That argument fails for two reasons.

First, the Board cites no support in the record for the proposition that the Town of Yarmouth has not adopted regulations authorizing use of the non-criminal disposition process, pursuant to Chapter 40, Section 21D. In fact, it appears that the Town of Yarmouth has adopted Chapter 40, Section 21D as a general by-law.[6] This conclusion is supported by the fact that the Board's own regulations expressly invoke Chapter 40, Section 21D. Section R provides that violations "may be penalized by the non-criminal method of disposition as provided in Massachusetts General Laws, Chapter 40, Section 21D." RA II:71 (§ R). Section Q sets the schedule of fines necessary to invoke the non-criminal disposition process. *Id.* II:70 (§ Q). *See* G.L. c. 40, § 21D (allowing use of non-criminal disposition only if the violation "is subject to a specific penalty").

[6] *See* Town of Yarmouth By-Laws, Part I, c. 25, § 25-1, *available at* https://www.ecode360.com/9083160 ("Any bylaw of the Town of Yarmouth or rule or regulation of its boards, commissions and committees, the violation of which is subject to a specific penalty, may, in the discretion of the Town official who is the appropriate enforcing person, be enforced by the method provided in Section 21D of Chapter 40 of the General Laws."). NECSEMA recognizes that the Court typically does not take judicial notice of town ordinances unless included in the record. *See, e.g.*, *City of Lawrence v. Falzarano*, 380 Mass. 18, 25 n.10 (1980). In this case, that means the Board cannot show that the Town of Yarmouth lacks an ordinance authorizing use of the non-criminal disposition process.

Second, even if the Town of Yarmouth had not authorized the Board to pursue fines via the non-criminal disposition process, that would not mean that the Board could do so via an administrative hearing. Instead, it would mean that the Board would be required to file a criminal complaint or indictment. As discussed above, a criminal complaint is the sole method for collecting a fine where – as here – the Legislature has not authorized administrative hearings for that purpose. *See Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264-65 (penalty has to be pursued via criminal complaint, unless "the city or town has a . . . by-law providing for non-criminal dispositions"); 18 Mass. Prac. § 15.11; *A Guide for Using Non-Criminal Disposition*, at 3, B-1. Indeed, the Board's own regulations recognize that the alternative to the non-criminal disposition process is the filing of "a criminal complaint." RA II:71 (§ R). Contrary to the Board's claims, an administrative hearing was not an available – much less the only – option.

The unpublished decision in *Fanta v. Bd. of Health of Braintree*, 65 Mass. App. Ct. 1126 (2006) (Rule 1:28), is not to the contrary. As an initial matter, that decision was not properly cited or relied upon by the Board. *See* Mass. R. App. P. 1:28; *see also Homer v. Boston Edison Co.*, 45 Mass. App. Ct. 139, 141 (1998). In any event, *Fanta* simply held that a board of health could suspend a tobacco permit because the municipal regulation prohibiting sale of tobacco products to minors was not preempted by state statute. *Fanta*, 65 Mass. App. Ct. at *2-3. It did not

address the issue – squarely presented here – whether a board of health is statutorily permitted to impose a fine other than by criminal complaint or non-criminal disposition, absent statutory authorization by the Legislature.

In sum, the Board acted unlawfully by imposing a fine without either filing a criminal complaint or following the non-criminal disposition process. *See Burlington Sand & Gravel, Inc.*, 31 Mass. App. Ct. at 264-65. The Board's use of an administrative hearing process was an *ultra vires* act.

B. Even if the Board were permitted to impose fines after an administrative hearing, it lacked implementing regulations to conduct such a hearing.

Even if the Legislature had chosen to vest boards of health with the power to impose fines following an administrative hearing, as an alternative to a criminal complaint or non-criminal disposition, they could not exercise that power absent enabling regulations setting out a procedure governing such hearings. Where a municipal agency "has the regulatory authority to create an adjudicatory proceeding . . ., it must do so by regulation." *Water Dep't of Fairhaven v. Dep't of Envtl. Prot.*, 455 Mass. 740, 749-51 (2010). An adjudicative process that is not "authorized by regulation" is "fatal[ly] flaw[ed]." *Id.* That is, if the agency has not "acted by regulation," then an administrative hearing process "cannot survive . . . challenge." *Id.* Although ad hoc administrative proceedings are unlawful, that is exactly what the Board conducted in this case.

Contrary to its claims, the Board has not adopted any regulations authorizing or defining the process for imposing fines via administrative proceedings. *See* Appellee Br. at 52-53. Section Q of the Board's regulations permit a hearing for suspension or revocation of retail sales permits, and defines procedures for such hearings. *See* RA II:71 (§ Q.4) (providing for a hearing "to suspend or revoke a Tobacco Product Sales Permit"). Section Q, however, makes no mention of hearings for imposition of fines – nor are such hearings mentioned elsewhere in the regulations. The express provision for hearings for one purpose suggests the exclusion of administrative hearings for any other purpose. *See generally Livoli v. Zoning Bd. of Appeals of Southborough*, 42 Mass. App. Ct. 921, 922 (1997) (invoking *inclusio unius est exclusio alterius* maxim).

By contrast, as mentioned above, the regulations do expressly recognize the use of criminal process and the non-criminal disposition process. Section R of the Board's regulations mirrors the penal provisions of Chapter 280, Section 1 and Chapter 40, Section 21D. *See* RA II:71. The regulations thus only contemplate imposition of fines pursuant to statutory procedures – not administrative hearings.[7]

[7] It would be unreasonable to construe the Board's regulations as allowing for imposition of fines by administrative hearing simply because Section R states that fines "may" be imposed by non-criminal disposition. This permissive language does not authorize administrative hearings. Instead, the use of permissive language clarifies that non-criminal disposition does not supplant criminal enforcement entirely. *See A Guide for Using Non-Criminal Disposition*, at B-4 (suggesting that

Because the regulations expressly allow suspending or revoking permits by administrative hearings and for imposing fines via statutorily-prescribed judicial methods, it is apparent that the Board's regulations do not permit fines to be imposed via administrative hearings. Nevertheless, the Board undertook to hold ad hoc hearings – which necessarily lacked procedural guidelines – for the purpose of imposing fines. The Board's conduct was *ultra vires* for this additional reason.

II. The Board's Ad Hoc Hearing Circumvented the Procedural Safeguards That the Non-Criminal Disposition Process Would Have Provided.

It is essential for NECSEMA's members, including the many individual proprietorships and family-owned businesses represented by NECSEMA, that they be afforded at least minimal procedural safeguards when accused of violating health regulations. Requiring boards of health to follow the criminal process or non-criminal disposition process will promote fairness and due process.

A. Municipal agencies are not constrained by meaningful procedural safeguards in conducting administrative hearings.

Compelling boards of health to utilize the non-criminal disposition process will ensure some rigor in adjudicating alleged violations of health regulations. Municipal agencies can largely operate without consideration for the procedural safeguards that the Legislature has required state agencies to follow. *See Arthur D.*

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the word "shall" be substituted for the word "may" if a town wishes to completely forego use of "the criminal route for enforcing specific by-law provisions").

Little, Inc. v. Comm'r of Health and Hosps. of Cambridge, 395 Mass. 535, 540 (1985). Accordingly, the requirement that boards of health follow the non-criminal disposition process affords significant benefits.

Although state agencies are governed by the requirements of the Administrative Procedure Act, G.L. c. 30A, § 1 *et seq.* ("APA"), municipal agencies are not. *See* 38 Mass. Prac. § 1:14 n.2 ("There are no comprehensive, specific procedures outlined for municipalities as developed in Chapter 30A." (quoting Massachusetts Legislative Research Council, *Report Relative To A Standard Administrative Procedure Act For Local Governments*, House No. 6009, at 66 (Jan. 31, 1973)).[8] Thus, unlike state agencies, municipal agencies are not statutorily bound to provide "opportunity for full and fair hearing," G.L. c. 30A, § 10, by, among other things: (1) providing "reasonable notice" of the hearing, including time and place, *see id.* § 11(1); (2) observing rules of privilege and relying only on evidence "on which reasonable persons are accustomed to rely in the conduct of serious affairs," *id.* § 11(2); and (3) providing the "right to call and examine witnesses," to "cross-examine witnesses . . . and to submit rebuttal evidence, *id.* § 11(3). "This is not to say that there is no law governing the manner in which municipal officers or agencies shall act." *Report Relative To A Standard Administrative Procedure Act For Local Governments*, at 66; *see Bd. of Assessors*

[8] The Report is available at https://archives.lib.state.ma.us/handle/2452/332875.

of Boston v. Ogden Suffolk Downs, Inc., 398 Mass. 604, 605 (1986) ("although not subject to G.L. c. 30A, the board remains subject to general administrative law principles"). It does mean, however, that municipal agencies lack comprehensive guidance for conducting adjudicatory hearings. Indeed, there are "serious doubts as to the actual existence of written rules and regulations governing the conduct and activities of many local administrative agencies." 38 Mass. Prac. § 1:14 n.8 (citing *Report Relative To A Standard Administrative Procedure Act For Local Governments*, at 13).[9]

The absence of clear procedural safeguards governing municipal agency proceedings presents as great, if not greater, a concern than if state agencies were unconstrained by the APA. "[L]ocal administrative agencies and officials are . . . susceptible to the same kinds of abuses of power as their counterparts at the state and federal level." *See id.* § 1:14 n.9. This susceptibility is magnified because decisions made by municipal agencies "have a direct, vital, and immediate impact upon the citizens of local communities." *Id.* § 1:14 n.3. Additionally, municipal agencies often have great discretion; but, "[r]egrettably, it is in this exercise of discretion that arbitrary action is often evident." *Report Relative To A Standard*

[9] Indeed, in this case, the chairman of the Board complained of the difficulty of handling an administrative hearing without clear ground rules, protesting that Board members are not lawyers. *See* RA III:154 ("Chair Boskey: It's difficult. I feel like we're in a courtroom almost. Ms. Sbarra: It is. Right. It's being made very difficult. Chair Boskey: And remember, Board members are not lawyers.").

Administrative Procedure Act For Local Governments, at 13. Accordingly, "[t]he need for uniform, fair procedural standards for all local administrative agency . . . adjudication, for providing greater openness in all local administrative agency decision-making, and providing restraints upon the exercise of local administrative agency power through broadly applicable provisions and standards for judicial review is arguably greater" than it is for state agencies. 38 Mass. Prac. § 1:14 n.3.

Because of the lack of safeguards and potential for abuse, it is unsurprising that the Legislature has relied on the non-criminal disposition process to ensure procedural regularity in the imposition of fines by municipal agencies absent express statutory authorization accompanied by clear procedural requirements (as the Legislature provided for housing, sanitation, and snow and ice removal fines). Compelling boards of health to use judicial processes provides significant benefits.

B. The Board's hearing lacked the basic procedural safeguards provided by the non-criminal disposition process.

Chief among the procedural benefits of the non-criminal disposition process are clear notice requirements and access to a neutral judicial officer. The non-criminal disposition process ameliorates the lack of standardized notice requirements by creating a uniform, judicially-approved notice. *See* G.L. c. 40 § 21D ("The notice to appear provided for herein shall be printed in such a form as . . . the chief justice of the district courts shall prescribe."). The form requires municipalities to clearly identify the offense, the fine that could be imposed, and

options available to contest the fine.[10] None of these requirements exist in the context of ad hoc municipal administrative proceedings. Moreover, the non-criminal disposition process ameliorates the absence of standard hearing procedures by affording the accused violator the opportunity for a review by a neutral party. *See id.* (if the alleged violation is contested, a "hearing shall be held before a district court judge, clerk, or assistant clerk"). No such neutral arbiter is available in a proceeding before a municipal agency. The importance of the safeguards provided by the non-criminal disposition process are evident when one considers the proceeding conducted by the Board in this case.[11]

1. The non-criminal disposition process would have ensured adequate notice of an alleged violator's rights.

The Board's failure to follow the non-criminal disposition process meant that CFI received a notice of violation that failed even the most elementary notions of fairness and due process. Had the Board instead followed the non-criminal disposition process, the defective notice issues would have been alleviated.

The Board's violation letter did not notify CFI that it had the option to either pay or contest the fine, as the standard citation form would. Instead, it stated without qualification that payment of the fine was mandatory:

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[10] *See* Sample Noncriminal Municipal Citation Form, *available at* https://www.mass.gov/files/documents/2016/08/vq/21d-sample-citation.pdf.

[11] This brief focuses on the non-criminal disposition process, because boards of health are more likely to invoke that process than the criminal process.

> You are in violation of the Board of Health Tobacco Control Section G that prohibits the sale of flavored tobacco, which is found on the MAHB (Massachusetts Association of Health Boards) Flavored Tobacco Guidance Document. You are ordered to pay a fine of $100.00 as required by the Board of Health Tobacco Regulation, Section Q, prior to the Board of Health Meeting of March 20, 2017.

RA IV:127. Compounding this error, the letter further insinuated that the Board would hold a hearing solely to investigate subsequent compliance, rather than to allow the alleged offender the opportunity to contest the fine:

> You or a representative must appear at a Board of Health hearing scheduled for Monday, March 20, 2017 at 5:00 p.m., at Yarmouth Town Hall Hearing Room, 1146 Route 28, South Yarmouth. At the hearing you will need to explain to the board the steps you are taking to prevent flavored tobacco products to be sold from happening in the future.

Id. By contrast, the standard Noncriminal Citation Form clearly states that the alleged offender may contest the fine via a hearing: "**YOU HAVE THE FOLLOWING ALTERNATIVES IN THIS MATTER:** . . . (1) You may **pay** the above noncriminal fine . . . [or] (2) You may **contest** this matter by making a written request for a noncriminal hearing."

While in this case the alleged violator, CFI, happened to be a sophisticated entity with significant legal resources and the capability to challenge the fine despite the inadequate notice, not all of NECSEMA's members are so fortunately situated. To anyone lacking legal training, not to mention first-generation Americans just becoming accustomed to regulatory enforcement, the Board's

notice would effectively deprive them of their right to challenge the fine. A reasonable small business owner would have likely concluded from the notice that he or she was obligated to pay the fine and had no right to appeal. To make matters worse, the Board's notice of violation might be a best-case scenario; it is not entirely clear, given the lack of established administrative procedures, that other boards of health provide any notice of hearing. Requiring boards of health to follow the non-criminal disposition process would remedy this issue.

2. The non-criminal disposition process would have ensured fair proceedings before a neutral arbiter.

Moreover, as CFI has detailed in its brief, the hearing before the Board rather than a neutral arbiter led to imposition of fines after irregular proceedings. Had a neutral arbiter presided, as provided for non-criminal disposition proceedings, these irregularities could have been avoided.

In the most notable irregularity, the Board relied on the "Guidance List" prepared by the Massachusetts Association of Health Boards ("MAHB")[12] as dispositive. That list had not been incorporated into the Board's regulations, and therefore did not have the force of law.[13] Nevertheless, the Board treated the List

[12] The MAHB is a "non-profit organization providing local boards of health with education, technical assistance, and resource development." *See* https://www.mahb.org/about.

[13] The list was subsequently incorporated into the regulations. *See* RA IV:418. Whether incorporated or not, however, the Board's reliance on the MAHB's Guidance List raises significant non-delegation concerns. *See infra*, at 33-34.

as *prima facie* evidence of a violation. *See, e.g.*, RA III:64 ("If it's on the list, it's considered a flavored tobacco."); *id.* III:161 (motion that CFI had "sold flavored tobacco that was on the list, the guidance list from the Massachusetts Association of Health Boards, and that this is subject to fine and the other suspension"). That the Board treated the MAHB Guidance List as dispositive is clear, because, after the removal of certain products from the MAHB Guidance List, the Board stipulated that those products did not violate its regulations – even though the Board had earlier found that they did. *See id.* IV:359.

The Board's treatment of the MAHB Guidance List as *prima facie* evidence of a regulatory offense violates the nondelegation doctrine. It is unconstitutional to delegate legislative powers to private groups by leaving the formation of policy to those groups. *See Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 423-24 (1973) (unlawful to permit manufacturer or distributor of a product to fix the minimum retail price, because that would allow policy decisions to be made private entities); *In re Opinion of the Justices*, 337 Mass. 796, 798-799 (1958) (statutory scheme unlawful because governmental power was effectively being exercised by private groups in that the Board would be a mere agency to rubber stamp private agreements, privately arrived at, and transform them into

binding state agency rules).[14] That is exactly what the Board did: although the Board's regulations prohibit the sale of flavored tobacco products, *see* RA II:65, 69, the Board effectively delegated to MAHB the task of identifying whether any particular product qualifies as a flavored tobacco product. The MAHB, in turn, relied on unidentified internet sources, "field staff," consumers, retailers, and out-of-state municipalities to create its list. RA I:288; *id.* III:157. Rather than providing guidance to the MAHB regarding what products should be included as a flavored tobacco product, the Board rubber stamped that private list, privately arrived at, and transformed it into a binding rule.

The Board's actions subjected CFI to an essentially unreviewable determination made by a private entity. While CFI, again, has the resources and ability to contest this unconstitutional delegation, most of NECSEMA's members do not. Effectively, the Board's unquestioning acceptance of the MAHB Guidance List subjects NECSEMA's members to the arbitrary whims of a private entity and subjects them to an undefined methodology for determining what products do or do not violate the Board's regulations. In short, the Board's actions deprived regulated entities of a uniform, predictable compliance standard. Adjudicating

[14] *Cf. DiLoreto v. Fireman's Fund Ins. Co.*, 383 Mass. 243, 246-47 (1981) (statutory scheme lawful because, unlike *Corning Glass*, it did not "fail[] to provide for participation by any public board or officer in the development or implementation of crucial aspects of the program" or "lack[] any policy or standard to guide the activities of the private parties to whom the power was delegated").

alleged violations of the Board's regulations in front of a neutral arbiter would likely forestall this unlawful procedure.

CONCLUSION

This case presents this Court with the opportunity to provide state-wide guidance to municipal boards of health regarding the procedural process for imposing fines. Because the Legislature has neither expressly nor impliedly authorized boards of health to impose fines directly via administrative hearings, the Court should hold that the Board erred by failing to follow the statutorily-required process of filing a criminal complaint or seeking non-criminal disposition. Requiring boards of health to follow these procedures will ensure due process, as the Legislature provided.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 17(c)(9), I, Joshua D. Dunlap, counsel for Amicus NECSEMA, hereby certify that this Brief complies with the rules of court that pertain to the filing of amicus briefs, including Mass. R. App. P. 17 and 20.

I further certify compliance with the length requirement of Mass. R. App. P. 20(a)(2)(c) by stating the following:

1. This Brief was prepared using Times New Roman font, size 14;

2. This Brief contains 6,531 non-excluded words, as counted by Microsoft Word; and

3. This Brief was prepared using Microsoft Word, included in the 2016 version of the Microsoft Office Professional Plus software package.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e) and 17(c)(10), I, Joshua D. Dunlap, counsel for Amicus NECSEMA, hereby certify under the penalties of perjury, that **on this 28th day of June, 2019**, I served this Brief upon the attorney(s) of record for each party, by the Electronic Filing System on:

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