

**Newburyport Board of Health Public Hearing
December 19, 2013**

Date of Approval: 1/16/2014

Attendees:

Chairperson of the Board: Dr. Robin Blair

Board Member: Dr. Susan Beluk

Board Member: Patricia Lawrence

City Health Director: Robert Bracey

Energy & Recycle Coordinator: Molly Ettenborough

Ron Beauregard – Director of Healthy Communities, Tobacco Control Program

Cheryl Sbarra, J.D.. Director, Tobacco Control Program. Senior Staff

Attorney, Massachusetts Association of Health Boards

Note Taker: Patricia McAlarney

Call to Order: 7:04 PM – Dr. Blair called the meeting to order.

Approval of Minutes: *Dr. Beluk moved to approve the Minutes of the November 21, 2013 Board Meeting. The motion was seconded by Dr. Blair. Patricia Lawrence reserved the right to add corrections to the Minutes, if necessary.*

Dr. Blair announced to all in attendance that this would be a meeting, not a public hearing. Any decisions that are made tonight will be presented to the City Solicitor for further consideration. Dr. Blair stated that there has been some misunderstanding and bad publicity concerning the role of the Health Director in establishing Rules and Regulations. Dr. Blair explained that the role of the Health Director is to enforce rules that have been passed by the Board of Health. Dr. Blair also announced that since tonight's meeting is not a public hearing there will be limited opportunity for public comments. Anyone wishing to address the Board at the meeting was asked to provide their name, place of business and/or address and to limit their comments to three minutes or less.

Public Comments:

Rob Germinara, 2 Ashland Street stated that he doubted that anyone in attendance at the meeting this evening has any disrespect for the Health Director Mr. Bracey; who, he stated, is an asset to the City. Mr. Germinara said that he is here representing himself as a taxpayer and as a former business owner of Caldwell Corner. He reminded the Board of the issues he presented at the November Hearing related to smoking on the property adjacent to the hospital and encouraged the Board to consider following the tobacco model of the states that have banned tobacco products entirely. He also stated that he does not support the increase in the age at which someone can purchase cigarettes and encouraged the Board not to penalize or hurt the

City's small businesses. Dr. Blair stated that the issue of public smoking is not on the evening's agenda; and may be addressed at a future meeting.

John Magro, Richdale, said that he hopes that the Board will be sensitive to the needs of the small businesses. He emphasized that the non-transferability of the tobacco permit would greatly diminish the value of the small business when an owner decides to retire and sell the company.

Dana Walantuck, Black Duck, stated that he seconds the emotions of Mr. Magro and hopes that the Board will be sensitive to small businesses. He also stated that it is likely that underage smokers aren't purchasing tobacco in Newburyport; they are probably buying cigarettes in NH in order to save money. He questioned whether the stamp on the cigarette packages is ever checked to see where the product was purchased.

Ann Ormond, Newburyport Chamber of Commerce, stated that she is speaking on behalf of businesses in Newburyport. While she agrees that there are issues of young people smoking, she doesn't want to see the small businesses hurt unnecessarily and the jump in age from 18 to 21 for the purchase of tobacco products is too sudden. She also stated that she is not in support of disallowing the transfer of permit when a business is sold. Ms. Ormond said that her Board is meeting the next evening and they will decide if they want to take a position on this issue.

Dr. Blair asked whether there were any further comments from the public. Hearing none, he announced that the Public Comment portion of the meeting had ended.

Energy & Recycle Coordinator, Molly Ettenborough – Request from Foundry Square Condominiums:

Molly Ettenborough presented a request from Foundry Square to allow them to have the City pick up the resident's trash and recycling. She explained that the Foundry Square Condominium was originally built on a private road which made them ineligible for municipal services, such as trash collection. An Impact Fee was applied to the Foundry. In 2003 there was a Board of Health Ruling that if a condominium association could prove that it was at least 75% owner occupied, they could request use of City Services. Ms. Ettenborough noted that Foundry Square had complied with the 60 day notice of request to the Board of Health and they are more than 75% owner occupied. Dr. Beluk questioned whether other condominiums receive City trash and recycle services. Ms. Ettenborough stated that many condominiums that don't qualify for services are still receiving them because of various exceptions and grandfathering that have taken place over the years. The Foundry is following the rules and have demonstrated that they qualify. Dr. Beluk questioned what the impact would be of approving the request; how many additional barrels would be put out on Merrimac Street? Ms. Ettenborough stated that the rule is that each unit may put out three barrels or five bags of trash and there are 17 units at the Foundry. She stated that she would educate the owners and stress recycling requirements as a means of

trying to minimize the number of barrels. Molly Ettenborough stated that another option would be to ask Mello to place a dumpster at the Foundry.

Dr. Blair suggested that the request be approved on a trial basis and the situation be monitored. If there is a negative impact on traffic and/or pedestrian traffic, the Board can reconsider. Molly Ettenborough suggested that the Foundry could be asked to approach City Council and the Planning Board to have the road accepted as a City road. Dr. Beluk suggested that the condominium residents be asked to agree to use fewer barrels. Patricia Lawrence stated that the Board may not have the right to require that some residents use fewer barrels than are allowed by others. She also noted that it may be very expensive to change the road and maintain it as a public road. Molly Ettenborough suggested that the Board could require that only bags (no barrels) are used. Dr. Blair noted that the issue with bags is that animals may rip them open. Dr. Beluk stated that she is not prepared to vote on this issue at this time. Molly Ettenborough offered to accompany Dr. Beluk on a visit to the site sometime before the next meeting. The Foundry Square request for municipal trash and recycle services will be tabled until the next Board Meeting.

Landfill Area: Dr. Beluk asked Molly Ettenborough whether there have been any recent issues with the flare at the landfill. Molly Ettenborough stated that the landfill is overseen by the Mayor's Office.

Christmas Tree Pick Up: Molly Ettenborough announced that the Yard Waste Facility is now closed for the season. The City will pick up Christmas Trees curbside throughout January, at no charge. Any trees collected before January 11 will be brought to Newbury to be burned in a community bonfire.

Proposed Changes to Tobacco Regulations:

Dr. Blair reminded all those present that because this is a Board Meeting there will be no input from the public during the discussions. He stated that there are two or three items from the proposed changes to the tobacco regulations that are under scrutiny; the other items were not contended and will not be part of this evening's discussion. The first item to be discussed is the age for purchasing tobacco. The proposed change was that no person could sell tobacco products to anyone under 21 years of age. There has been some discussion that the age could be raised initially from 18 to 19 years of age; and then, in the future the Board could determine whether it should be raised again. Tonight the Board needs to discuss the raise from 18 to 19 or 18 to 21. Patricia Lawrence stated that the Board wants to get cigarettes out of the high school, which is why the original proposal was to increase the age for purchasing tobacco to 21. The Beacon Coalition has reported that 20% of highschool students smoke cigarettes. Dr. Beluk stated that an increase to age 19 would be a moderate increase, but a big step for getting cigarettes out of the high school. She said that she suspects that students get cigarettes from other means, not necessarily making the purchase themselves. Since the latest round of testing has just recently been completed, Dr. Beluk questioned how many years it would take to see a statistical change if the increased purchase age were to be implemented. Cheryl Sbarra, Director of the

Tobacco Control Program, noted that Needham, MA had raised the purchase age in increments ending in 2005 when the purchase age reached 21 however, because no baseline data had been taken before the increases began, there is no statistical comparison that can be made. She did note, however, that Needham does have a lower rate of smokers than other communities. Needham also does four tobacco compliance checks per year and has significant anti-smoking education programs at the schools. Patricia Lawrence noted that there is a great deal of information from the Centers for Disease Control (CDC) that indicates that the younger a person is when they start smoking the more likely that they will smoke long term; this is because until a person has reached age 25 -27 the prefrontal lobe of their brain is not fully developed. Cheryl Sbarra added that 90% of smokers start smoking before the age of 19. Dr. Blair stated that he was in favor of raising the purchase age to 19, as opposed to 21, for the time being. Dr. Beluk agreed and stated that it seemed like a reasonable first step.

Ron Beauregard noted that the Food and Drug Administration (FDA) now has jurisdiction over tobacco and has conducted compliance checks. One problem with the FDA checks is the time delay in reporting results from checks (The compliance checks that took place in the summer were not reported until the fall.) Ron Beauregard stated, however, that since the FDA will also be conducting compliance checks, it may now be possible to use some of the funds that had been spent on compliance checks on education and policy instead. Dr. Beluk stated that she had been unaware that the FDA was conducting compliance checks in Newburyport and she said that she doesn't understand why non-compliance (failures) that are identified by the FDA are not counted as a violation. Ron Beauregard stated that the Tobacco Program is not comfortable using the FDA letter of non-compliance when his agency wasn't present to witness the violation and ensure that due process took place. The penalties for an establishment with multiple infractions from the FDA would be \$3000 to \$4000. Ron Beauregard stated that he considers his job to be to educate owners & employees, not just enforce the rules. He noted that the Regulation changes being proposed by the Board will make Newburyport the toughest in the area; and would make Newburyport second only to Methuen in fines (Methuen charges \$300). Also, the proposed cigar regulation is one of the strongest in the state. He stated that he would provide the Board with data, such as the compliance rate for Newburyport (which are well within normal range.)

Dr. Blair announced that the second proposed change to be discussed at tonight's meeting relates to limiting the number of tobacco permits issued and not issuing tobacco permits to owners of new or previously existing businesses. After consideration of the original proposed change, in conjunction with legal advice, the Board will now consider allowing businesses that are being sold to allow the new owner an opportunity to apply for a permit to sell tobacco provided the application is made to the Board within a certain period of time, perhaps 30 or 60 days from the date the business was purchased. Health Director, Bob Bracey, explained that if an establishment goes out of business and there is no new owner and the building is dormant for 30 days or more, then the permit will be permanently expired. Ron

Beauregard added that the proposal will not allow for any new tobacco permits to be issued; only new owners of establishments that were previously permitted to sell tobacco would be eligible to submit an application. Dr. Beluk pointed out that use of the word “transfer” of permits can be confusing since the permits are not transferred from one owner to another. Ron Beauregard agreed and noted section 4.4.012 of the sample regulation contains language that describes what the Board is proposing. Ron Beauregard suggested that this language be used in the final draft. Dr. Blair commented that it is the responsibility of the owner of an establishment to ensure compliance with all regulations.

The new proposal eliminated a third offense. Ron Beauregard stated that the rationale for keeping a third offense option (which would include language allowing for revocation of the permit/license) is that it addresses the possibility that the infractions may have been a minor violation (an example of which would be not posting the required signage.) It is also imperative that the penalty includes an opportunity for a fair hearing. Dr. Blair noted that it was the Board’s intention that the violations would refer to the actual sale of tobacco products to underage customers. Patricia Lawrence stated that the Board would, however, also take into account whether an establishment continually violated regulations; even if these violations were for the lesser infractions. Cheryl Sbarra explained that inclusion of a hearing when revocation of a permit is possible is mandatory. She noted that one community lost their court case, against an establishment for which the tobacco permit had been revoked, because they could not identify on the record the nature of the egregious behavior. Ron Beauregard stated that he commended the Newburyport Board of Health for taking such a firm stance on these issues. He noted that the proposal looks to increase the tolling period for subsequent offenses to three years; and stated that communities’ tolling periods are typically 24 – 36 months. He stated that, in his experience, establishments react seriously to even a first offense since the seriousness of any subsequent offense is “over their heads.” Ron Beauregard also mentioned, as a suggestion to the Board, that some communities have instituted a requirement that every customer’s age be confirmed in lieu of a seven day suspension for an offense. Director, Robert Bracey, stated that the education component is significant in addressing any offense. Mr. Bracey suggested the Board consider a six month “All-ID” policy in lieu of the seven day suspension for second offense violations. Ron Beauregard stated that the All-ID policy can be effective since it removes all discretion and makes for good business practice.

Robert Bracey suggested that mandatory education be included as a component of first offense. Dr. Beluk questioned how the education piece would be funded. Ron Beauregard stated that the cost of education is currently included in the services that his agency provides. He also noted that having a discussion with employees and reviewing with them the regulations and general good practices (such as requiring identification from anyone who appears to be under 27 years of age) is usually sufficient for education. Ron Beauregard stated that most violations are caused by employees, rather than owners or managers. Dr. Beluk suggested that if the education component is added, it should be required to be completed within a given time frame.

She also suggested that requirement for a hearing be included in the second offense violation. Patricia Lawrence stated that she is not in favor of the three-offense option. Ron Beauregard noted that the vast majority of offenses are a result of a mistake; and not evidence of an establishment 'trying to make an extra buck' It is also common for younger, less mature employees to sell to underage customers. He stated that employees must be age 16 or over in order to sell cigarettes, but business owners don't generally hire employees at this young age. Dr. Beluk stated that she favors the three-offense ("three strikes you're out") proposal since it is step approach and includes room for dialogue with the establishment. She also stated that she supports including any violations issued from FDA compliance checks, since they may serve as 'red flags.' Cheryl Sbarra stated that there may be legal issues surrounding the time delay in the issuance of an FDA non-compliance violation and the reporting of that violation; however, there are some pilot programs that have addressed this issue. Cheryl Sbarra also stated that she is not aware of any Board of Health regulations that include only a two offense violation system; however, this can be legally done.

Dr. Blair stated that the Board has listened to the concern of small businesses and has made enormous concessions to the original proposal. The compromise that is currently being considered has taken 'off the table' the issue of non-transfer of permit for owners that are selling their business; and has reduced the age increase for customers to purchase tobacco products from 21 to 19 years of age. The issue currently under discussion involves the handling of establishments that violate the regulations. Patricia Lawrence reminded those in attendance that the members of the Board of Health took an oath to do the best for the health of the community.

Dr. Blair reminded those in attendance that the public comment period of the meeting had ended and that this portion of the meeting is for Board discussion only.

Dr. Blair summarized the current proposal:

First Violation would include -\$200 fine and mandatory education

Second Violation: \$250 fine, a hearing before the Board of Health and a seven day suspension with potential for reinstatement.

Third Offense: \$300 fine, a hearing before the Board of Health and a thirty day suspension with potential for revocation of the permit.

Dr. Blair stated that the Board will not vote on the proposal until a completed draft of the regulations has been reviewed by the Board. A public hearing will take place at the February 13, 2014 Board of Health meeting. Cheryl Sbarra stated that her agency will plan to have the draft proposal completed for review within the next two weeks. The Board can discuss the draft at the January meeting in preparation for a public hearing on February 13. Dr. Blair asked the Board Members to confirm that they all informally agree to the following:

- The age to purchase tobacco products will be raised from 18 to 19. (In the future, the Board may consider a further increase.)
- No new permits will be issued. The number of permits will decrease by attrition.

Patricia Lawrence stated the number of violations that will be allowed before a permit is revoked remains unresolved.

Robert Bracey suggested that the Board of Health, in conjunction with the Tobacco Control Program, consider offering an annual or bi-annual training session for establishments that sell tobacco. Ron Beauregard confirmed that he would be willing and able to run these training sessions.

Meeting adjourned.