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

ALL THINGS LEGAL WHAT IS COMING DOWN THE PIKE?

Cheryl Sbarra, Esq.
Massachusetts Environmental Health Association
75th Annual Seminar – May 24, 2023



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Topics

- Legal Authority Refresher
- Nuisance Law
- Newport Non-Menthol Menthol Cigarettes
- Barron v. Town of Southborough
 - Massachusetts Supreme Judicial Court Decision (SJC), March 2023
- Social Consumption Establishments Update

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Legal Authority to Regulate Public Health and Safety

- Federal – minimum standards
- MA Legislature delegated authority to local boards of health
 - To enact “**reasonable health regulations**” *Tri-Nel Management., Inc. v. Board of Health of Barnstable*, 433 Mass. 217 (2001).
- Within **police power** to protect the **health, safety and welfare** of its residents.”
 - “even at the expense of an **individual’s freedom.**”
 - “The right to **engage in business** must yield to the **paramount right** of government to protect the public health by any rational means.” (*Druzik et al v. Board of Health of Haverhill*, 324 Mass. 129 (1949).



SJC has consistently upheld board of health authority to enact reasonable health regulations.

- “**All rational presumptions** are made in favor of the validity of [the regulation].”
- Courts will only strike a board of health regulation when the challenger proves “**the absence of any conceivable ground upon which it may be upheld.**” (*Arthur D. Little, Inc. v. Com’r of Health for Cambridge*, 395 Mass. 535 (1985)).
- The party challenging the regulation must prove that it is “**illegal, arbitrary, or capricious.**” (*Padden v. West Boylston*, 445 Mass. 1104 (2005))
- When making the determination the court cannot “weigh evidence . . . or substitute its judgment for that of the administrative body.” (*United Comb & Novelty Corp. v. City of Leominster Board of Health*, 12 Mass. L. Rep. 233 (2004)).

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Chapter 111, § 31 – General Regulatory Authority

- 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, including housing code and food code.
 - §§ 143-150: noisome/offensive trades



Nuisance Law

“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.”
(G.L. Chapter 111, § 122).

“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.
- In the board’s **opinion**
 - **Judgement call**
 - **Based on public health principles**
- Does the condition affect public health?

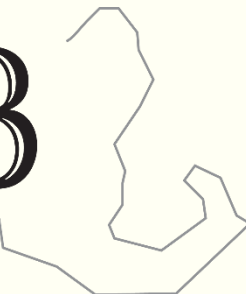


Some Factors to Consider

- Does the condition affect public health?
- Is it contained to one person or household?
- Could the condition spread to other individuals or households?
- Could the individual with the condition spread it in the community?
- Is there a real or potential health risk?
- Can the condition cause or be expected to cause transmission of disease?
- Does the condition constitute or potentially constitute an exposure to hazardous elements?
- Is the subject of the complaint an unsafe structural or environmental condition?

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Isolation and Quarantine and Nuisance Orders during COVID

- Voluntary compliance was the general rule
 - Compliance, not punishment
- Enforcement challenges when faced with non-compliance
 - Positive FedEx driver, teacher, health care worker, etc.
 - Antiquated laws in MA
 - 1907 most recent amendment – reimbursement of wages not more than \$2 a day.
 - 1938 most recent case law – whether a painter was a “wage earner”
 - Little experience and/or guidance
 - Used nuisance statute
 - Drafted Notice of Violation template and Cease and Desist Orders



Final-Notice-of-Violation-3-19-21

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Cheryl Sbarra

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City/Town of _____
Board of Health

NOTICE OF VIOLATION ORDER
PURSUANT TO MASSACHUSETTS EMERGENCY COVID ORDERS
AND/OR M.G.L. c. 111, §§ 122,123
EFFECTIVE IMMEDIATELY

Date: _____

Name of Business/Landowner/Individual: _____
(Hereafter referred to as "Respondent")

Address of Business/Landowner/Individual: _____

The above-named Board of Health, working under the authority of the Governor's Emergency Orders, including, but not limited to, COVID-19 Orders Numbered 26, 33, 36, 37, 38, 40, 41, 43, 45, 49, 50, 55, 57, 58, 59, 60, 62, 63, 66 and M.G.L. c. 111, §§ 122 and 123, hereby issues a **NOTICE OF VIOLATION** to the Respondent identified above, for the reasons stated herein.

The specific violation(s) leading to the issuance of this Notice of Violation include one or more of the following infractions, as indicated by the check marked box:

☐ The Respondent is a business, organization, or enterprise that is not an industry permitted to be open under the currently achieved Phase of the scheduled **"Phased Reopening" plans** as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health and has not closed their physical workplaces and facilities to workers, customers, and the public, pursuant to the applicable Massachusetts COVID-19 Orders.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders mandating the **wearing of facial coverings** as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health, and/or Department of Labor Standards COVID Workplace Safety Standards and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §§122, 123.

☐ **The Respondent has violated applicable laws and regulations pertaining to Isolation and Quarantine as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §§122, 123.**

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public

Health, and/or Department of Labor Standards COVID Workplace Safety Standards regulating **gatherings** and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §122, §123.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health and/or Department of Labor Standards COVID Workplace Safety Standards, regulating **indoor and/or outdoor entertainment** and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §§122, 123.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health and/or Department of Labor Standards COVID Workplace Safety Standards and/or COVID Workplace Safety Standards relative to **immediate, mandatory employer notification to the local board of health of a known positive case** as required in *454 CMR 31.06*.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health and/or Department of Labor Standards Mandatory Safety Standards and/or **COVID Workplace Safety Standards, 454 CMR 31.00 – 31.11.**

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health, and/or Department of Labor Standards COVID Workplace Safety Standards regulating **proper "social distancing" of patrons or guests** and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §§122, 123.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health, and/or Department of Labor Standards COVID Workplace Safety Standards regulating **indoor and/or outdoor recreational activities** and is thereby endangering the general public by nuisance in violation of M.G.L. c. 111, §§122, 123.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health, and/or Department of Labor Standards COVID Workplace Safety Standards regulating **day care services** and is thereby endangering the general public by nuisance in violation of M.G.L. c. 111, §§122, 123.

☐ The Respondent has violated applicable laws and regulations pertaining to COVID-19 Orders as established by The Governor's Executive Orders and/or Orders of the Commissioner of Public Health, and/or Department of Labor Standards COVID Workplace Safety Standards regulating **congregate living facilities** and is thereby endangering the general public pursuant to the nuisance statute in violation of M.G.L. c. 111, §§122, 123.

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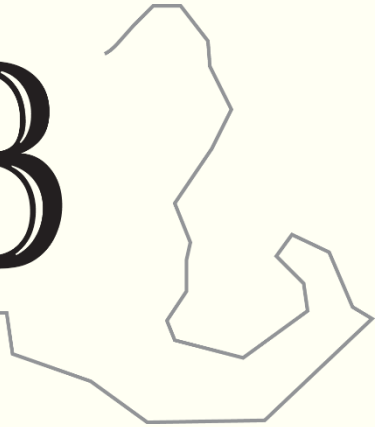
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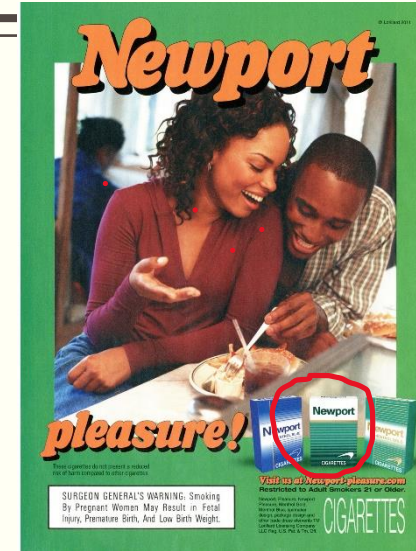
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“New” product, same old story

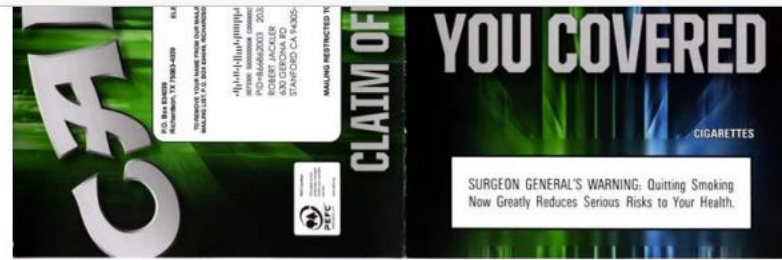
History of menthol and flavor ban

- Flavor
 - Flavors are a critical means of initiating new tobacco users
 - Menthol with its cooling sensation facilitates the initiation of new users
 - Reduces harshness of cigarette use and tobacco taste
- Targeted marketing
 - African Americans, LGBTQIA+, Youth



Newport Menthol Non-Menthol

- MA and CA flavor bans, explicitly including “menthol, mint, [and] wintergreen”
- Replaces Menthol with synthetic coolant to try to circumvent flavor laws.
 - WS-3 (menthol carboxamide): Other uses include chewing gum, breath mints, cooling face cream



CAMEL

CIGARETTES

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

VOID WHERE PROHIBITED. This coupon is good only for brands specified. Void if copied, exchanged, or transferred before acceptance by retailer. Participation in this promotion is at the discretion of the retailer. All promotional costs paid by manufacturer. Limit one coupon per offer specified on front of coupon.

OFFER RESTRICTED TO AGE 21+ TOBACCO CONSUMERS. CONSUMER MUST SHOW VALID FORM OF ID. Consumer must pay any sales tax. Reynolds Marketing Services Company will reimburse you the face value (\$0.91, normal retail price, or normal retail price minus the dollar value printed on front of coupon, whichever is applicable to this coupon offer, 8 cents handling, and postage, provided you and the consumer have complied with the terms of this offer and our coupon redemption policy, incorporated by reference (coupons available). Cash value 1/20 of 1¢. Good only in the U.S.A. Mail to: Reynolds Marketing Services Company, Dept. 12300, 1 Foxcett Dr., Del Rio, TX 78840.

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YOUR FAVORITE MENTHOL STYLES ARE GONE, BUT WE'VE CRAFTED TWO NEW NON-MENTHOL BLENDS WITH YOU IN MIND.

INTRODUCING CRISP NON-MENTHOL

INTRODUCING CRUSH OASIS NON-MENTHOL CAPSULE

Legal Determination: Guidance

- “Characterizing Flavor”
 - “A distinguishable *taste* or aroma, *other than the taste* or aroma of tobacco, imparted or detectable before or during consumption of a tobacco product.”
105 CMR 665.000 (emphasis added)
 - “Menthol, Mint, [and] wintergreen” specifically included in state definition
 - Merriam Webster Dictionary defines taste as “a **sensation** obtained from a substance in the mouth that is typically produced by the stimulation of the sense of taste combined with those of touch and smell.”
- Yarmouth Case
 - Don’t have to be an expert.
 - Multiple factors can be used to determine if a product is flavored.
 - Social media reviews, advertisements, etc.
- Duck test



Why Does RJR think this is a loophole?

- The Yarmouth ruling: *Common knowledge and understanding are sufficient to determine whether a product is flavored.*
 - Neither Board of Health nor Court relied on only aroma.
 - Explicitly stated that determining if a product was flavored did not require expert analysis.
- Unfair and deceptive trade practices.
- Enforce on product because it's flavored.



Chelsea Health Department's Letter to Retailers

Newport Non Menthol letter to Retailers 4.20.23 • Saved to this PC

Cheryl Sbarra

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City of Chelsea
Public Health Department

April 19, 2023

Dear Tobacco Retailer,

We have determined that the new Newport Non-Menthol cigarettes in the green box are flavored tobacco products and cannot be sold in stores that have a Tobacco Product Sales Permit. We will allow a sell-down period for those who currently have them in their stores. **The last date for sales will be June 1, 2023.** Retailers who sell this product after June 1, 2023, will be subject to fines and possible permit suspensions pursuant to 105 CMR 665.000.

The Six City Tobacco Initiative is committed to keeping tobacco and nicotine products out of the hands of young people. Our office can provide retail training information, quitting resources and consultation about products that are allowable for sale. Please feel free to contact us if you need help.

Best regards,

Bonny Carroll
Director, 6 City Tobacco Initiative

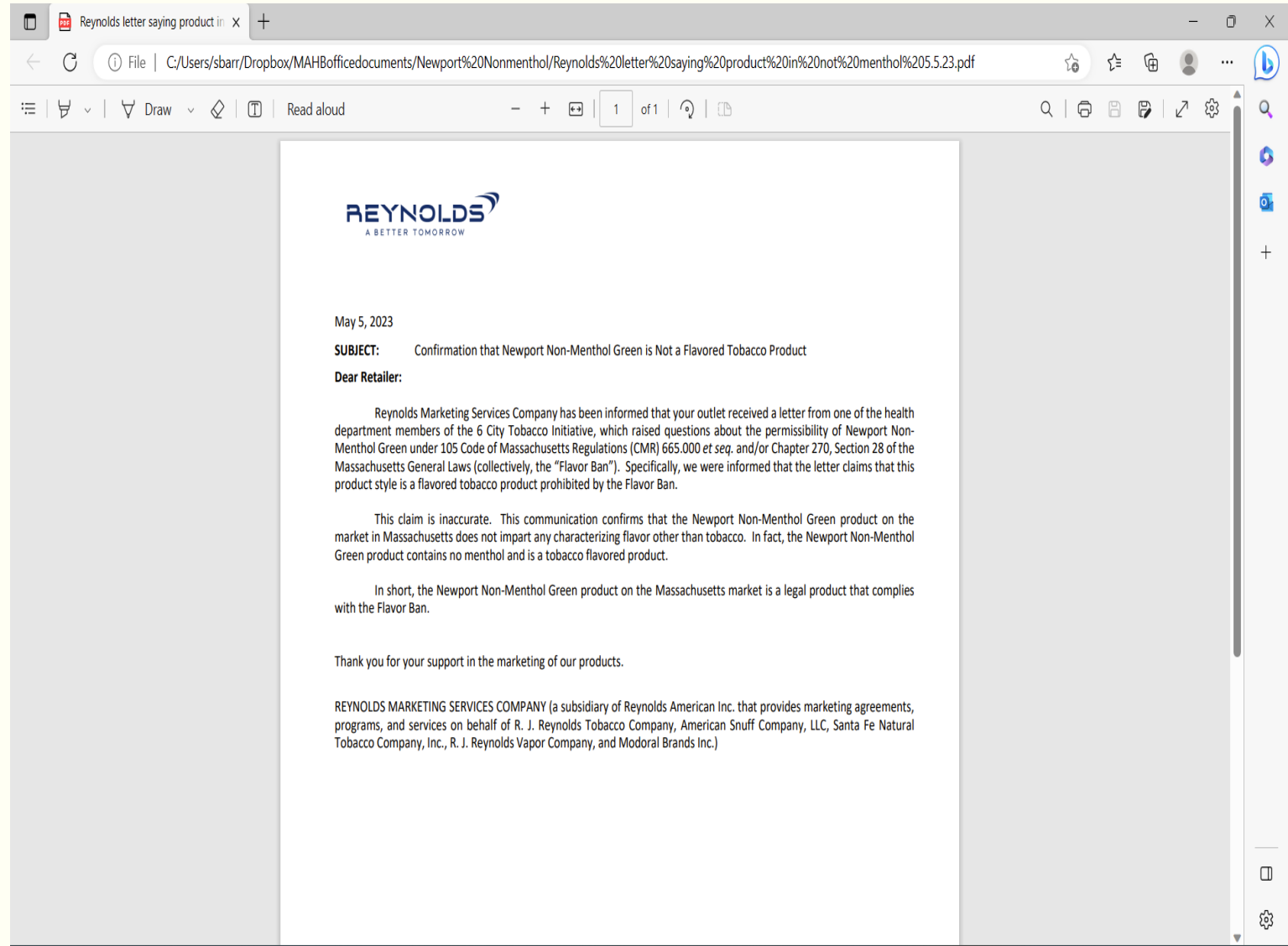
Flor Amaya
Director, Chelsea Health Department

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Reynolds' Response

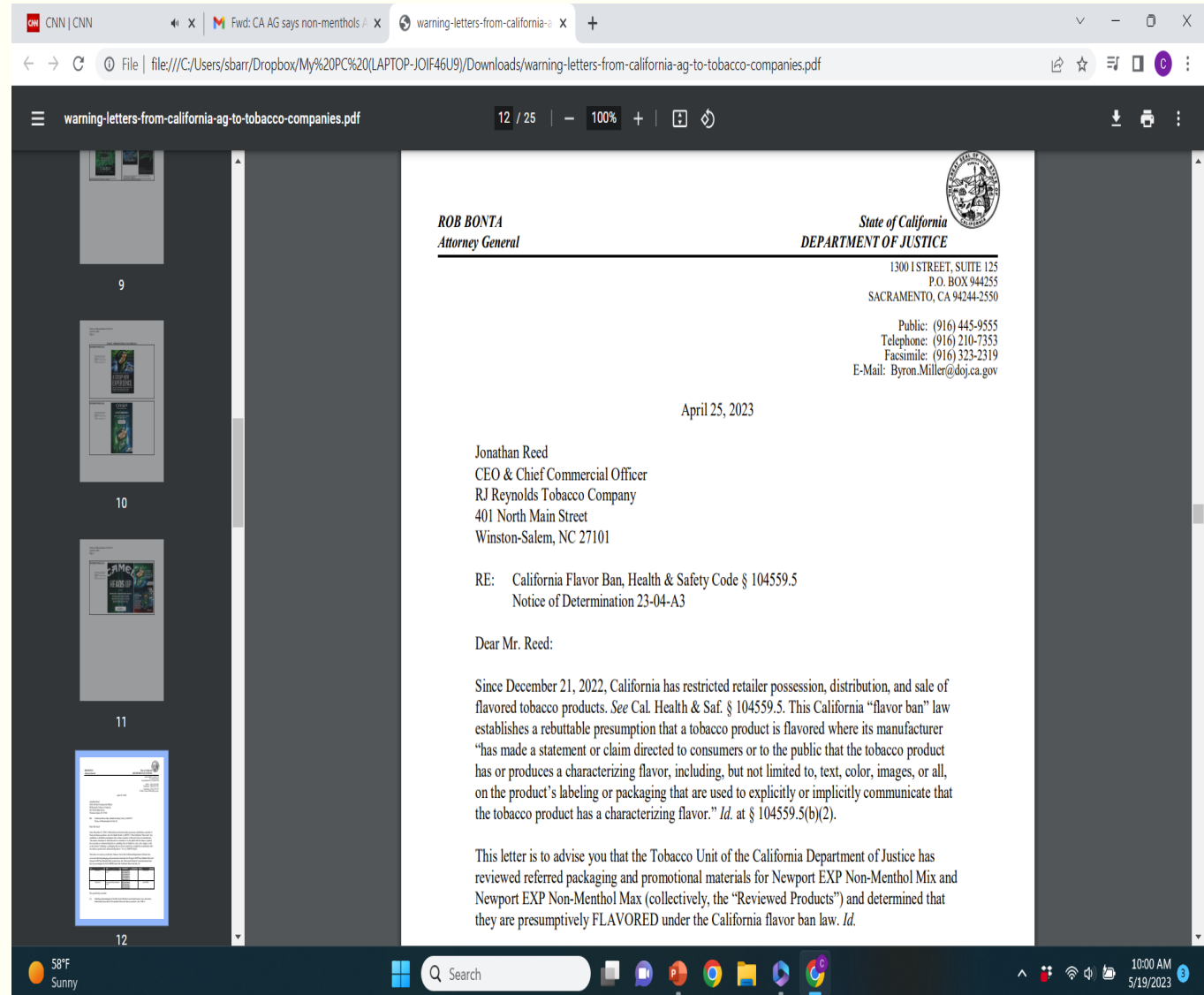
“This claim is inaccurate. . . In fact, the Newport non-Menthol Green product contains no menthol and **is** a tobacco flavored product.”



California Attorney General Orders Products be Removed

“The Tobacco Unit of the California Department of Justice has reviewed the packaging and promotional materials for [Newport Non-Menthol] and . . . determined that they are presumptively **FLAVORED** under the California flavor ban law.”

Reynolds has sued CA.



And Here They Are Again





BARRON V. KOLENDA

SUPREME JUDICIAL COURT
OPEN MEETING LAW

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Members of the public may speak only with Chair's permission

- G.L. c. 30A, § 20 (g)
 - No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.
- Do NOT have to allow public speak,
 - But if you do, it is the same for all.
 - If you don't you are likely to not return after your term is up!

Massachusetts Supreme Judicial Court (SJC) Decision

March 7, 2023

- Southborough Select Board meeting on December 4, 2018
- 5-member elected Board – subject to Open Meeting Law
- During 2018, the Attorney General’s office determined that the Select Board had committed “dozens” of open meeting law violations.
 - Ordered each member to attend in-person open meeting law trainings.

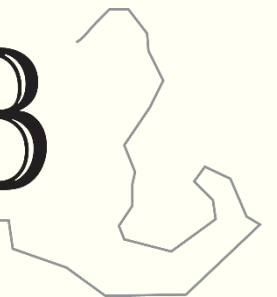


Southborough's Public Comment Policy

- All parties [should] act in a professional and courteous manner when either addressing the [b]oard, or in responding to the public.
- All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the [c]hair, and all persons shall, at the request of the chair, be silent.

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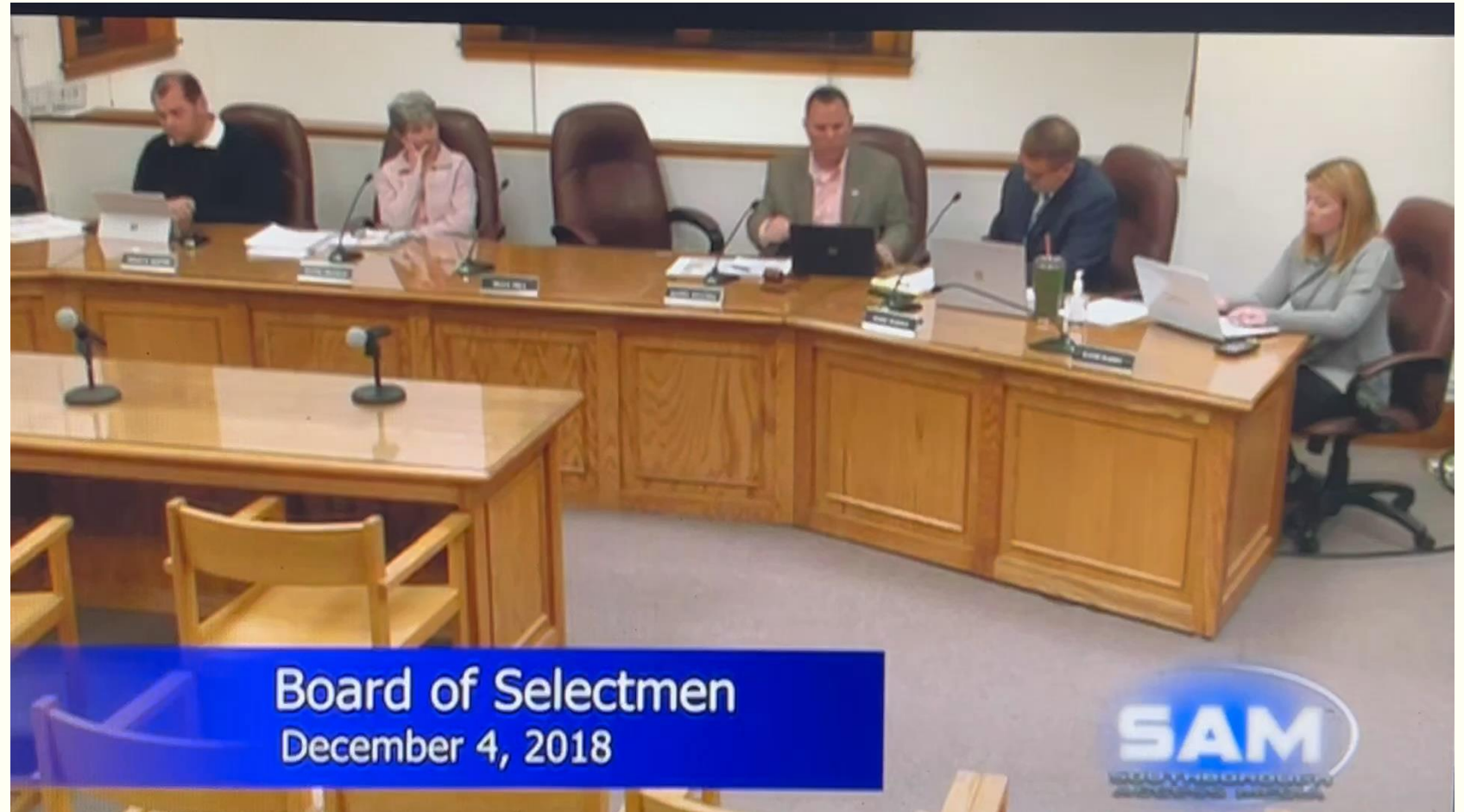
Select Board's Agenda

- Town's budget
 - Possible increase in real estate taxes
- Elevating Town Administrator to position of Town Manager
- Open meeting law violations.
 - They are volunteers
 - Public servants
 - Doing their best
- Meeting lasted about 2.5 hours
- Public Comment Period was opened.
- Chair stated: Remarks must be respectful and courteous, free of rude, personal, or slanderous remarks.



Louise Barron

- Town Resident
- Long time participant in local government



Barron sued Select Board in Superior Court

- **Arguments:**

- She was exercising her constitutionally protected right under Article 19 of the Declaration of Rights “to assemble, speak in a peaceable manner, and petition her town leaders for redress.
- Town’s Public Comment Policy is unconstitutional under Article 16 of the Massachusetts Declaration of Rights protecting free speech.
- Threats to remove her from the meeting for exercising her State constitutional rights violated the Massachusetts Civil Right Act.

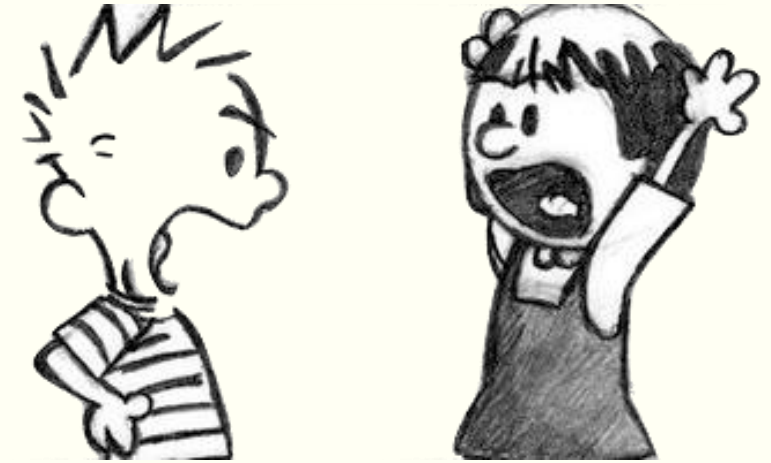
- **Ruling in Superior Court**

- Public Comment Policy was a reasonable restriction on speech.
- Barron appealed to MA Appeals Court.
- SJC on its own initiative transferred case to SJC.



Court's Holding

- Public Comment Policy violates rights protected by the MA Declaration of Rights.
- Civility restraints are forbidden.
- “While civility is, of course, to be encouraged, it cannot be required.
 - MA Constitution provides for a *robust protection of public criticism of governmental action and officials*.
- Time, place and manner restrictions are permissible.
- Threatening to remove Barron from meeting also violated her state constitutional rights.
- *Judgement reversed and Public Comment Policy is declared unconstitutional.*



Residents' Right to Be Rude Upheld by Massachusetts Supreme Court

In an age of division, the court ruled that towns could not mandate polite discourse at public meetings. One official called the decision “very dispiriting.”

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EXPAND

Court's Rationale

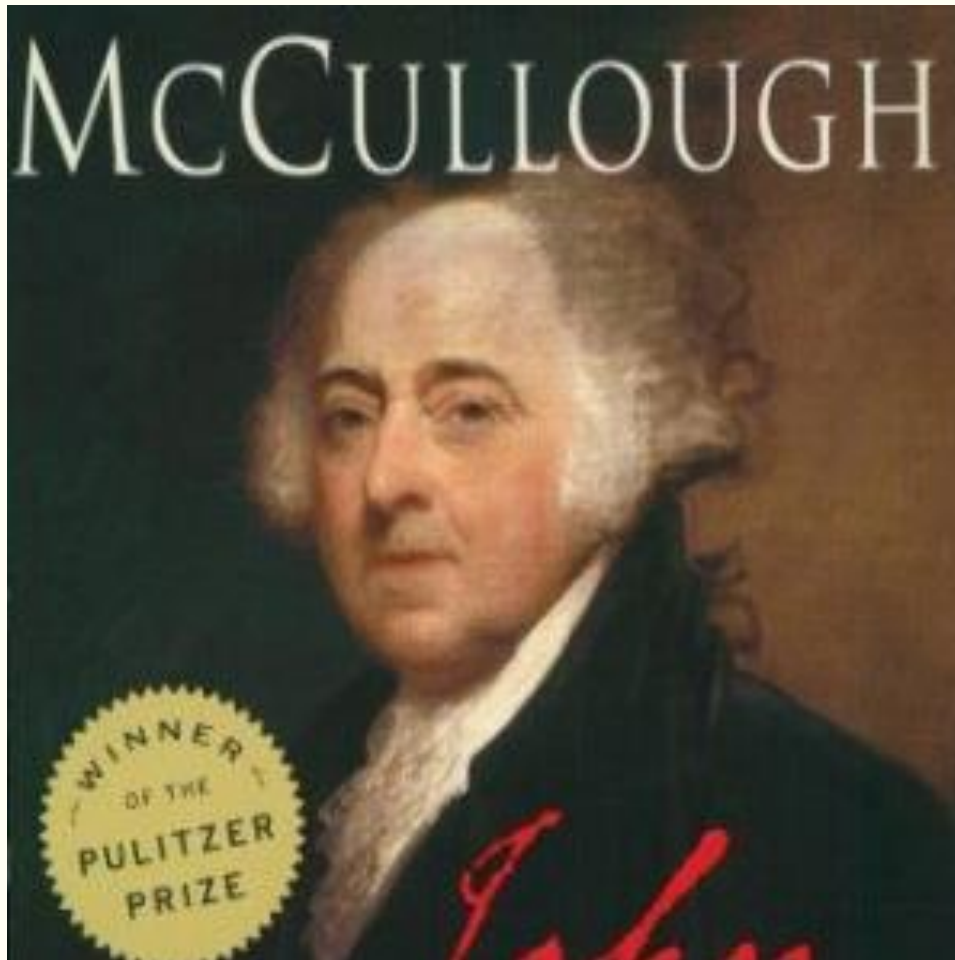
- Article 19 of the Declaration of Rights has an “**illustrious past.**”
 - “The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request the legislative body, by the way of addresses, petitions, or remonstrances, *redress of the wrongs done them, and of the grievances they suffer.*”
- Applies to all government officials, including town officials.
- “As written, this provision expressly envisions a politically active and engaged, *even an aggrieved and angry populace.*”
- Barron assembled with others to request redress of the wrongs she and others claimed had been done to them by town official actions, including noncompliance with the open meeting law.

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Distinct and Identifiable History



- MA Constitution “reflects the spirit of the American Revolution.”
- “The assembly provision arose out of *fierce opposition to governmental authority*, and it was designed to protect such opposition, even if it was rude, personal, and disrespectful to public figures, as the colonists eventually were to the king and his representatives in Massachusetts.”
- Drafted by John Adams and his cousin Samuel Adams.
- “The right of assembly was a most important principle and institution of self-government, as it allowed ‘[every] man, high and low . . . [to speak his senti]ments of public Affairs.’”
- “There was nothing respectful or courteous about the public assemblies of the revolutionary period.”

SO, WHERE DO YOU
DRAW THE LINE AFTER
THE BARRON CASE?



How far can one go?





CANNABIS SOCIAL CONSUMPTION ESTABLISHMENTS

Update

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An Act Relative to Equity in the Cannabis Industry 2022

- Industry not nearly as diverse and equitable as originally intended.
 - Less than 6% were led by economic empowerment entrepreneurs or connected to CCC's social equity program.
 - Law was intended to provide economic opportunities for those previously harmed by harsh drug laws that were inequitably enforced.
- Social consumption establishment do not exist.



New Social Consumption Law

- Municipalities can authorize on-premises establishments by adopting a city ordinance, town bylaw or by a local voter initiative petition.
 - Municipal election no longer required.
- Operators of Social Consumption Establishment limited to Social Equity Program participants and Certified Economic Empowerment Priority applicants.
- CCC will be amending its current regulation on social consumption establishments.
 - Current law requires a pilot program with 12 municipalities including Somerville, Provincetown, North Adams, Amherst, Springfield.
 - Current regulation prohibits smoking tobacco and tobacco vaping products inside.

Massachusetts Municipal Lawyers Association (MMLA)

1. Will serving limits be implemented and how will they be enforced?
2. Will search procedures be required to assure patrons are not bringing in their own products?
3. Can municipalities implement **compliance checks**?
4. Will there be fines for serving persons under 21 or for overserving?
5. Will odor control mechanisms to mitigate **nuisance complaints** from abutters?
6. Will local health inspectors be permitted to inspect **edibles**?
7. Will edibles be considered “food” and thereby subject to the **Food Code**?

-
-
8. **Will edibles be expanded** to include pizza, pasta, etc.?
 9. Can patrons package items to go?
 10. Will establishment have to provide funding for roadside impairment training?



