


MEMORANDUM

TO: Wendy Wiiks, City of Leominster, Chief of Staff

FROM: Robert C. Ross 

DATE: September 18, 2023

RE: Legal Authorities for Actions Potentially to Be Taken by the Executive Branch with Respect to the UMass Memorial HealthAlliance – Clinton Hospital in Leominster

You asked me to review the legal authorities for various possible actions that various entities within the Executive Branch can take with respect to the hospital in Leominster. This summary memorandum incorporates information that has been shared with you and others. I understand that this memorandum may also be shared with others, but if that happens, I also understand that neither you nor I intend that any applicable protection be waived with respect to any other document.

This memorandum will review the legal authorities for the Department of Public Health to conclude its administrative proceeding under 105 CMR 130.122 by ordering the hospital not to close its birthing center on September 22, 2023 as planned. It will also review the legal authority for the Governor and the Department of Public Health to declare a public health emergency and act to prevent the closure of the birthing center, and for the Governor to act under the existing state of emergency in the City of Leominster to prevent that closure.

105 CMR 130.000 – Hospital Licensure

The Department of Public Health has ample authority under its Hospital Licensure regulations to prevent a hospital from closing an essential service, or to take various administrative actions against a hospital that ignores the Department’s instructions with respect to closing an essential service. I reviewed these authorities in the City’s initial comments, dated August 28, 2023, on the hospital’s submission and copy those paragraphs below.

“The following details our specific concerns over the lack of a plan. But the Department must also confront what to do with a submission that falls so short of the Department’s regulatory requirements. Under 105 CMR 130.130, the Department has broad authority to revoke or refuse to renew a hospital’s license. *See, e.g.*, 105 CMR 130.130(B) and (E). The Submission, and the Hospital’s failure to honor commitments made in its prior service closures, show that it lacks “responsibility and suitability to operate a hospital.” If its closure plans proceed, the Hospital will also have violated “any applicable

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provision of 105 CMR 130.000” by closing without submitting in advance a plan that complies with 105 CMR 130.122. In short, the City believes that the Department has the statutory and regulatory power to suspend or revoke the Hospital’s license.

Alternatively, the City believes that the Department can require the Hospital, as a condition of licensure, to withdraw its plans to close the birthing center until the Hospital is able to submit a plan for doing so in compliance with the Department’s regulations. The Department could either require the Hospital to withdraw its Notice, and re-start the entire 90-day clock contemplated in clause (4) of M.G.L. ch. 111, sec. 51G, or require the Hospital to delay its planned closing date until a date that is after the Hospital submits a compliant plan to the Department, and affords the Department an opportunity to offer comments and improvements.”

All of these options remain available to the Department of Public Health, and do not require any additional action by any other entity. In fact, the Department of Public Health has *already concluded* in its September 1 letter that that the hospital’s plan did not satisfy the Department’s requirements:

Consistent with the requirements of MGL c. 111, s. 51G(4) and 105 CMR 130.122, the Department expects the Hospital to have a fully developed and implemented access plan and should not contemplate closure of the Service until the Department deems the essential service process complete. Based upon the information provided to date, the Department does not believe the Hospital’s closure plan is adequate, particularly as related to transportation and community engagement via the HRiA assessment, to allow for closure on September 23, 2023. In your follow up response to the Department, please include a viable closure date beyond September 23, 2023.

In the view of the City, these options would also be appropriate even after the hospital’s revised submission dated September 11, 2023, in which the hospital continued to ignore requirements established by the Department in its September 1, 2023 response to the hospital (such as including a new closure date). The hospital’s continued failings in this regard were detailed by the City of Leominster in comments to the Department of Public Health dated September 12, 2023.

G.L. Ch. 17, Sec. 2A -- Public Health Emergency

As is now well-known from our recent collective experience with the COVID-19 pandemic, Massachusetts has a statutory provision that authorizes the Governor to declare a public health emergency in the Commonwealth. This statute is set forth below:

Section 2A. Upon declaration by the governor that an emergency exists which is detrimental to the public health, the commissioner may, with the approval of the governor and the public health council, during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same.

Upon declaration by the governor that such emergency has terminated, all powers granted to and exercised by the commissioner under this section shall terminate.

G.L. ch. 17, sec. 2A. In addition to Governor Baker's declaration of a public health emergency during the COVID-19 pandemic, Governor Baker also declared a public health emergency with respect to vaping in the fall of 2019 ("Baker declares public health emergency, orders 4-month ban on all vaping products," available at <https://www.bostonglobe.com/news/marijuana/2019/09/24/governor-baker-make-vaping-announcement-amid-spate-lung-illnesses/o8sO6mf3G0mX4mOpLLtcEL/story.html>, accessed on September 15, 2023). Earlier, in 2008, Governor Patrick declared domestic violence to be a public health emergency ("Domestic Violence, Sexual Assault and Stalking in the Workplace Statistics," available at <https://www.mass.gov/info-details/domestic-violence-sexual-assault-and-stalking-in-the-workplace-statistics#:~:text=In%20June%202008%2C%20citing%20the,killings%20so%20far%20this%20year,> accessed on September 15, 2023).

Although it sounds similar to a state of emergency, which was also declared during the COVID-19 pandemic, a public health emergency authorizes different types of actions. The Governor's authority to declare a public health emergency is exceptionally broad – it can be declared with respect to any "emergency" that is detrimental to the public health. The declaration likewise triggers exceptionally broad powers for the Commissioner of Public Health to take any action "he may deem necessary to assure the maintenance of public health and the prevention of disease." Those actions are subject to the approval of the Governor and the approval of the Public Health Council.

Here, if a public health emergency were declared to address the maternal health crisis, in light of the report released earlier this summer by the Department of Public Health, preventing the closure of the birthing center would clearly be a permissible action in response to such a declaration, if approved by the Governor and the Public Health Council.

Chapter 639 of the Acts of 1950 – Civil Defense Act

As you are all too well aware, the Governor declared a state of emergency in the City of Leominster on Tuesday, September 12, 2023, due to the historic rainstorm and consequent flooding that took place in the City the previous day. The Governor's authority to make such a declaration is the Civil Defense Act, Chapter 639 of the Acts of 1950. This statute also provided the authority for Governor Baker's declaration of a state of emergency to respond to the COVID-19 pandemic. Section 7 of the Civil Defense Act describes the extent of the Governor's powers upon the declaration of a state of emergency:

§ 7. Additional Powers of Governor During State of Emergency.

During the effective period of so much of this act as is contingent upon the declaration of a state of emergency as hereinbefore set forth, the governor, in addition to any other

authority vested in him by law, shall have and may exercise any and all authority over persons and property necessary or expedient for meeting said state of emergency, which the general court in the exercise of its constitutional authority may confer upon him as supreme executive magistrate of the commonwealth and commander-in-chief of the military forces thereof, and specifically, but without limiting the generality of the foregoing, the governor shall have and may exercise such authority relative to any or all of the following:---

* * *

- (o) Variance of the terms and conditions of licenses, permits or certificates of registration issued by the commonwealth or any of its agencies or political subdivisions.

Chapter 639 of the Acts of 1950, Sec. 7 (highlighting added). In short, and as summarized in *Desrosiers v. Governor*, 486 Mass. 369, 377 (2020), the statute confers on the Governor “expansive discretionary powers in the face of a declared state of emergency.” Preventing the closure of the birthing center would clearly be “expedient for meeting said emergency.” With roads washed out and emergency vehicles being continuously summoned (and, in one unfortunate case, destroyed), keeping the birthing center in Leominster would contribute to addressing the emergency by minimizing driving and minimizing the burden on first responders.

The statute also confers powers on the Governor to “exercise such [broad] authority” over certain specified subjects. One such subject, singled out in clause (o) above, is “Variance of the terms and conditions of licenses, permits or certificates of registration issued by the commonwealth or any of its agencies or political subdivisions.” As a licensee of the state, the hospital is subject to this emergency power of the Governor, who could (as a condition of the hospital’s licensure) require the hospital to keep the birthing center open.