



The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

DIVISION OF LOCAL MANDATES

ONE WINTER STREET, 9TH FLOOR
BOSTON, MASSACHUSETTS 02108

TEL (617) 727-0980
TEL (800) 462-COST
FAX (617) 727-0984

SUZANNE M. BUMP, ESQ.
AUDITOR

July 21, 2011

Mr. John Kelly, Town Administrator
Town of Orleans
19 School Road
Orleans, Massachusetts 02653

RE: 105 CMR 445.00, *Minimum Standards for Bathing Beaches (State Sanitary Code, Chapter VII)*

Dear Mr. Kelly:

This letter is in response to your inquiry regarding amendments to Department of Public Health (DPH) regulations, 105 CMR 445.00, *Minimum Standards for Bathing Beaches (State Sanitary Code, Chapter VII)*. You express concern that several aspects of the amendments impose new obligations upon the Town of Orleans that did not exist prior to the changes. You note that: bacteriologic sampling and testing of beach waters must be conducted at prescribed intervals; beaches must now be permitted to operate by the Board of Health; and new standards for signage and posting must be met. Specifically, you ask that the Division of Local Mandates (DLM) review the amendments under the provisions of M. G. L. c. 29, § 27C, the Local Mandate Law. It is DLM's opinion that the Local Mandate Law does not apply in this case, primarily because the amendments impose no more than incidental administration expenses upon the Town of Orleans. This opinion is further explained below, first in relation to the beach water testing requirement, and second in relation to the permitting and signage aspects of the regulations.

Beach Water Testing: The Local Mandate Law sets the general rule that post-1980 state laws that impose new costs at the local level must either be fully funded by the Commonwealth, or subject to local acceptance. Pursuant to the Local Mandate Law, in 2000, DLM reviewed the beach water quality testing requirements that were established by Chapter 248 of the Acts of 2000. In relevant part, that law doubled the frequency of required beach water testing, from twice monthly to once per week during the bathing season. (We point out that the frequency of the testing requirement was not increased by the recent DPH regulatory amendments that are the subject of this request from Orleans.) In a December 29, 2000 letter to the Chairmen of the Joint Committee on Natural Resources and Agriculture and Senate and House Ways and Means Committees, DLM determined that the Local Mandate Law applied to the municipal expense of conducting the additional tests, and estimated statewide local compliance costs at approximately \$400,000. Nonetheless, no community filed a complaint on Chapter 248, presumably because new federal aid substantially covered the additional cost. The December 29, 2000 determination does not apply to the Orleans request because DPH has reported to this Division that Barnstable County has its own laboratory and that the County provides for the collection of samples and bacteriologic testing for communities within its boundaries at no charge. Accordingly, there is no financial impact of this aspect of the law or recent DPH regulations upon the Town of Orleans.

Permitting and Signage: One exception to the Local Mandate Law is that the Commonwealth need not assume the cost of mandates that impose only “incidental local administration expenses.” M. G. L. c. 29, § 27C (a), (c). The Supreme Judicial Court defines this term as “...relatively minor expenses related to the management of municipal services...subordinate consequences of a municipality’s fulfillment of primary obligations.” See *City of Worcester v. the Governor*, 417 Mass. 751, 758 (1994). In light of the *Worcester* case, DLM concludes that the regulations at issue impose no more than incidental administrative expenses upon the Town of Orleans. DPH staff explains that one reason for adding the new beach permitting requirement is to provide a source of revenue through permit fees to offset any administration costs that may arise. Although each community may set its own price for a beach permit, DPH inquiries of communities and states already doing this found an average fee of approximately \$150. Finally, DPH has made signs available at a cost of \$10 each for beach operators to use to satisfy the new requirement that a sign be placed at each beach access point. These signs must identify the beach operator and permit number, state dates of operation, and note that the beach water is not tested outside of the dates of operation. DPH data indicates that there are eleven town-operated beaches in Orleans, so that the cost of complying with this posting requirement should not exceed \$110. This amount could be offset with revenue from permit fees charged to privately operated beaches.

Conclusion: Some time ago, DLM requested information to determine whether the Town of Orleans may be incurring additional costs to comply with the amended regulations beyond these minor components. Since we have received no response, at this time DLM is closing this matter, having concluded that the Local Mandate Law does not apply to costs imposed upon the Town of Orleans by the amendments to 105 CMR 445.00, *Minimum Standards for Bathing Beaches*. It is our opinion that these costs fall within the exception for “incidental local administration expenses” provided by M. G. L. c. 29, § 27C (a), (c).

We appreciate the fact that even “incidental” expenses are difficult to absorb in the current economic climate. However, the Local Mandate Law does not shield local governments from every type of state regulation of local operations. Please be advised that this conclusion does not prejudice your right to seek judicial review of the issues pursuant to M. G. L. c. 29, § 27C (e). Please call me or DLM Legal Counsel, Emily Cousens, with further questions or comments you may have.

Sincerely,

A handwritten signature in dark ink, reading "Vincent P. McCarthy". The signature is written in a cursive, flowing style.

Vincent P. McCarthy, Esq., Director
Division of Local Mandates