



The Commonwealth of Massachusetts

Executive Office of Health and Human Services

Department of Public Health

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Fire Department Requests for Chapter II Sanitary Code Inspections: Opinion from the General Counsel Howard S. Wensley, M.S., C.H.O.

The Department of Public Health has been asked with increasing frequency if, upon the request of the fire department, a board of health may enter a dwelling for the purpose of conducting a sanitary code inspection and/or condemning said dwelling. The Office of the General Counsel has opined that a board of health does not have the authority to conduct an inspection without the consent of the occupant and, in most instances, fire personnel do not generally have the authority to order the local board of health to do so. The following is a copy of that opinion:

1. Does the Fire Department regulation 527 CMR 1.103 Section 8 supersede the authority of Articles I and II of the Sanitary Code?
2. Do the Emergency Procedures set forth in the Sanitary Code 105 CMR 400.200B allow for entry without consent of the occupant or a search warrant?

It is my understanding that these questions arise from a situation where the fire department asks a housing inspector to enter the premises of a dwelling in order to condemn the unit as unfit following a fire or due to other conditions. It is my opinion that, in a true emergency situation, housing inspectors could be directed to assist the fire department as part of an emergency response. This authority is limited to true emergency situations and does not include the situation you discuss, i.e., entering a building to conduct an inspection for the purpose of condemning the unit as unfit. As a practical matter, I cannot imagine a true emergency situation requiring immediate action by the fire department, which would require the assistance of a housing inspector. A brief analysis follows.

The Board of Fire Prevention regulations - Massachusetts Fire Safety Code at 527 CMR 1.03 (8) provides, in relevant part, that "[w]henver the maintenance, operation or use of any land, building or structure constitutes a fire or explosion hazard which is dangerous or unsafe, or a menace to the public safety (including, but not limited to, fires, explosions, hazardous material incidents, motor vehicle accidents, structural collapses, mass casualty incidents and emergency extrication incidents) and the action to be taken to eliminate such dangerous or unsafe condition or conditions which create, or tend to create, the same is not specifically provided for in 527 CMR, and unless otherwise prohibited by law, ordinance, by-law, regulation, the head of the fire department is authorized and empowered to take such action as may be necessary to abate such dangerous or unsafe condition or conditions (directing employees of other city or town departments and agencies)" It is clear from the language in this regulation that this emergency authority is to be used only in situations with extremely dangerous circumstances that, if not acted on immediately, would likely result in harm to the general public. The reference to "directing other agency employees" which could include housing inspectors, most probably means policemen, EMTs or other emergency personnel trained to work under extremely dangerous situations.

In all other fire inspection situations, the fire department is not allowed to conduct inspections of dwelling units without the consent of the occupant or owner, or without a specific and properly secured search warrant. 527 CMR 1.03 (3). Therefore, if the Fire Department intends to conduct an inspection, (with or without the assistance of a health inspector) the fire marshal (sic), or his designee, has to first get the consent of the occupant or owner, or secure a warrant to conduct the inspection.

(Does) the Fire Department regulation allowing for emergency entry to abate dangerous conditions "supersede(s)" the provisions of the Sanitary Code which provide the authority for housing inspections and set out the procedures for inspections. The Fire Department regulation does not supersede the procedural protections afforded by the Sanitary Code. The circumstances in which the Fire Department may make requests for assistance from other agencies, departments, or personnel, are those encountered while responding to an emergency or crisis situation. In the narrow situation where an emergency exists, and in the unlikely event that a housing inspector is asked to assist, the housing inspector would be acting under the fire department's authority and direction in conformance with 527 CMR 1.03(8). This does not constitute a "superseding" of the Sanitary Code.

(The) second question (is) whether the emergency procedures described in 105 CMR 400.200 (B) allow for entry without the consent of the occupant or a search warrant. The procedures authorized by this section do not allow housing inspectors to conduct an inspection without consent or a warrant. This section states, in relevant part, "[w]hen an emergency exists in which the interest of protecting the public health requires that ordinary procedures be dispensed with, the board of health or its authorized agent, acting in accordance with the provisions of M.G.L. c. 111, § 30, may without notice or hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to meet the emergency. Notwithstanding any other provision of the State Sanitary Code, any person to whom such order is directed shall comply therewith within the time specified in the order." This section does not authorize entry of a dwelling without consent or a warrant. Rather, this section authorizes the Board of Health to issue an order for correction of emergency conditions without following "ordinary procedures," i.e., prior to any opportunity to request a hearing to contest the existence of the conditions.