

**STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

IN THE MATTER OF:

Docket No.: 20-027914

**Michigan Department of Agriculture and
Rural Development,
Petitioner**

Case No.: N/A

Agency: Agriculture

v

Case Type: AG Food & Dairy

**Moore Murphy Hospitality, L.L.C., d/b/a Iron
Pig Smoke House,
Respondent**

**Filing Type: Summary
Suspension**

**Issued and entered
this 20th day of January 2021
by: Eric J. Feldman
Administrative Law Judge**

DECISION AND ORDER CONTINUING SUMMARY SUSPENSION

PROCEDURAL HISTORY

This matter commenced in accordance with the Administrative Procedures Act of 1969, 1969 PA 306, as amended (APA), Michigan Compiled Laws (MCL) 24.201 *et seq.*, and with the Michigan Food Law Act of 2000, 2000 PA 92, as amended (Food Law), MCL 289.1101, *et seq.*

On December 29, 2020, the Director of the Michigan Department of Agriculture and Rural Development (MDARD/Department), Petitioner, issued an Emergency Summary Suspension Order Pursuant to MCL 289.4125 and MCL 24.292(2) and Notice of Hearing (Emergency Suspension Order) to Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, Respondent, alleging that its continued offering of indoor dining creates an imminent threat to the public health, safety, and welfare, pursuant to MCL 289.4125(4) of the Food Law.¹

On December 29, 2020, the matter was forwarded to the Michigan Office of Administrative Hearings and Rules (MOAHR) to schedule a hearing.

¹ Petitioner's December 2, 2020, Order to Cease and Desist Food Operations filed against Respondent was replaced with the December 29, 2020, Emergency Suspension Order.

On December 29, 2020, MOAHR issued a Notice of Videoconference Hearing, scheduling a videoconference hearing to convene on January 12, 2021. This matter was assigned to the undersigned Administrative Law Judge, Eric J. Feldman.

On December 30, 2020, MOAHR issued an Amended Notice of Videoconference Hearing scheduling a videoconference hearing to convene on January 12, 2021.

On January 4, 2021, the undersigned issued a Summary Suspension Hearing Scheduling Order.

On January 8, 2021, Assistant Attorney General (AAG) Eileen C. Whipple, filed a Notice of Appearance on behalf of Petitioner.

On January 8, 2021, Attorney David M. Delaney, P.L.C., on behalf of Respondent, filed a Notice of Appearance and Respondent's Request to Adjourn January 12, 2021 Summary Suspension Hearing. On January 11, 2021, Petitioner filed its Statement of Opposition to Respondent's Request to Adjourn January 12, 2021 Summary Suspension Hearing.

On January 12, 2021, Petitioner filed copies of its proposed exhibits.

On January 12, 2021, the videoconference hearing commenced, but did not conclude. On January 12, 2021, the undersigned issued an Order Continuing Hearing via videoconference for January 14, 2021.

On January 13, 2021, Petitioner filed its Witness and Exhibit Lists. On January 13, 2021, Respondent also filed a copy of its proposed exhibits.

On January 14, 2021, the videoconference hearing commenced and concluded. The undersigned presided. AAG Whipple appeared on behalf of Petitioner. James Padden, Food Safety and Inspection Program Manager with MDARD, was also present for Petitioner. Attorney Delaney appeared on behalf of Respondent. Ian Murphy, owner of the establishment, was also present for Respondent.

The record closed at the conclusion of the hearing.

WITNESS LIST

1. Chuck Edwards, Health Department of Northwest Michigan.
2. Scott Kendzierski, Health Department of Northwest Michigan.

3. Rodney Blanchard, MDARD.
4. Sgt. Stefan Crane, Gaylord City Police Department.
5. Officer Blake Huff, Gaylord City Police Department.
6. Theodore Orm, Michigan Liquor Control Commission.
7. Bradley Szatkowski, Michigan Liquor Control Commission.
8. Daniel Rademacher, Michigan Liquor Control Commission.
9. Nicole Spires, Health Department of Northwest Michigan.
10. Jay Krystyniak, MDARD.
11. Lisa Peacock, Health Department of Northwest Michigan.
12. Joshua Meyerson, M.D., Health Department of Northwest Michigan.
13. James Padden, MDARD.

EXHIBIT LIST

The following exhibits were offered on behalf of Petitioner and admitted into the record unless otherwise indicated:

1. Petitioner Exhibit 1 is a Michigan Department of Health and Human Services (MDHHS) Epidemic Order, dated November 15, 2020.
2. Petitioner Exhibit 2 is a MDHHS Epidemic Order, dated December 7, 2020.
3. Petitioner Exhibit 3 is a MDHHS Epidemic Order, dated December 18, 2020.
4. Petitioner Exhibit 4 is Petitioner's Complaints for Respondent.
5. Petitioner Exhibit 5 is a Health Department of Northwest Michigan Order to Cease and Desist Food Service Operations.
6. Petitioner Exhibit 6 is a Health Department of Northwest Michigan COVID-19 Otsego County Monthly Summary for November 2020.

7. Petitioner Exhibit 7 is a Health Department of Northwest Michigan Jurisdiction COVID-19 Monthly Summary for November 2020.
8. Petitioner Exhibit 8 is a Gaylord Police Department Case Report, dated November 25, 2020.
9. Petitioner Exhibit 9 is a Health Department of Northwest Michigan COVID-19 Data Dashboard as of January 8, 2021.
10. Petitioner Exhibit 10 is a Michigan Liquor Control Commission (MLCC) Complaint Violation Report, dated November 30, 2020.
11. Petitioner Exhibit 11 is Respondent's Social Media Postings.
12. Petitioner Exhibit 12 is a MLCC Complaint Violation Report, dated December 3, 2020.
13. Petitioner Exhibit 13 is Respondent's Social Media Postings.
14. Petitioner Exhibit 14 is a MLCC Complaint Violation Report, dated January 7, 2021.
15. Petitioner Exhibit 15 is Respondent's Social Media Postings.
16. Petitioner Exhibit 16 is a Photo of Establishment.
17. Petitioner Exhibit 17 is a MLCC Emergency Suspension Order Pursuant to MCL 24.292(2) and Notice of Hearing against Respondent.
18. Petitioner Exhibit 18 is a MLCC Decision and Order issued on December 14, 2020, by ALJ Michael J. St. John.
19. Petitioner Exhibit 19 is Video Evidence from Gaylord Police Department, dated December 4, 2020.
20. Petitioner Exhibit 20 is Video Evidence from Gaylord Police Department, dated December 10, 2020.
21. Petitioner Exhibit 21 is Video Evidence from Gaylord Police Department, dated December 4, 2020.

22. Petitioner Exhibit 22 is Video Evidence from Gaylord Police Department, dated December 9, 2020.
23. Petitioner Exhibit 23 is Respondent's Order to Cease and Desist Food Operations against Respondent, dated December 2, 2020.
24. Petitioner Exhibit 24 is Respondent's Emergency Summary Suspension Order against Respondent, dated December 29, 2020.
25. Petitioner Exhibit 25 is Respondent's Special Report, dated December 29, 2020.
26. Petitioner Exhibit 26 is Respondent's Website.
27. Petitioner Exhibit 27 is CDC Restaurants and Bars – Reduce the Spread of COVID-19.
28. Petitioner Exhibit 28 is COVID-19 Fact Sheet.
29. Petitioner Exhibit 29 is a CDC Study.
30. Petitioner Exhibit 30 is a MDHHS Epidemic Order, dated January 13, 2021.

The following exhibits were offered on behalf of Respondent and admitted into the record unless otherwise indicated:

1. Respondent Exhibit A is By the Facts: 46,000 Data Points regarding Statewide Contact Tracing Data.
2. Respondent Exhibit B is Petitioner's Brief in Support of Plaintiffs' Ex Parte Motion for Temporary Restraining Order, dated December 28, 2020.
3. Respondent Exhibit C is MI COVID Response Data and Modeling Update, dated December 1, 2020.

ISSUE

Whether Petitioner has properly determined that Respondent's conduct constitutes an imminent threat to the public health, safety or welfare, requiring emergency action and a continuation of the summary suspension of Respondent's food establishment license, pursuant to MCL 289.4125 of the Food Law?

APPLICABLE LAW

MCL 289.1107 states as follows, in pertinent part:

Sec. 1107.

As used in this act:

- (a) "Department" means the department of agriculture and rural development.
- (b) "Director" means the director of the department or his or her designee.

* * *

- (p) "Food establishment" means an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, vended, sold, or offered for sale. Food establishment includes, but is not limited to, a food processor, a food warehouse, a food service establishment, a vending machine location, and a retail grocery. Food establishment does not include any of the following:
 - (i) A charitable, religious, fraternal, or other nonprofit organization operating a home-prepared baked goods sale or serving only home-prepared food in connection with its meetings or as part of a fund-raising event.
 - (ii) An inpatient food operation located in a health facility or agency subject to licensure under article 17 of the public health code, MCL 333.20101 to 333.22260.
 - (iii) A food operation located in a prison, jail, state mental health institute, boarding house, fraternity or sorority house, convent, or other facility where the facility is the primary residence for the occupants and the food operation is limited to serving meals to the occupants as part of their living arrangement.

* * *

- (t) "Food service establishment" means a fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub,

drive-in, industrial feeding establishment, private organization serving the public, rental hall, catering kitchen, delicatessen, theater, commissary, food concession, or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment or operation where food is served or provided for the public. Food service establishment does not include any of the following:

- (i) A motel that serves continental breakfasts only.
- (ii) A bed and breakfast that has 10 or fewer sleeping rooms for rent.
- (iii) A bed and breakfast that has more than 10 sleeping rooms for rent, if the bed and breakfast serves continental breakfasts only.
- (iv) A child care organization regulated under 1973 PA 116, MCL 722.111 to 722.128, unless the establishment is carrying out an operation considered by the director to be a food service establishment.

MCL 289.1109 states as follows, in pertinent part:

Sec. 1109.

As used in this act:

* * *

- (c) "Imminent or substantial hazard" means a condition at a food establishment that the director determines requires immediate action to prevent endangering the health of people.

MCL 289.4125 states as follows:

Sec. 4125.

- (1) Before a food establishment license, bottled water registration, or shellfish dealer certificate is issued, the director shall determine if the applicant meets the minimum requirements of this act and rules.
- (2) After an opportunity for a hearing pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the director may revoke or suspend a food establishment license, a

registration for bottled water, or a shellfish dealer certificate issued under this act for failure to comply with requirements of this act or a rule. A person whose food establishment license, registration for bottled water, or shellfish dealer certificate is revoked or suspended shall discontinue the sale and offering for sale of food, the bottled water, or shellfish, respectively, until he or she complies with this act and the director issues a new registration or removes the suspension.

- (3) If a person's food establishment license is revoked for egregious violations under section 5101(a), (b), (c), or (k), the director may refuse to issue or reissue a license to any establishment in which that person has ownership or management interest for a period of 2 years after the revocation.
- (4) Based upon facts submitted by a person familiar with those facts or upon information and belief alleging that an imminent threat to the public health, safety, or welfare exists, the director may summarily suspend a license, registration, or certificate issued under this act. A person whose license, registration, or certificate has been summarily suspended under this section may petition the director to dissolve the order. Upon receipt of such a petition, the director shall immediately schedule a hearing to decide whether to grant or deny the petition to dissolve. The presiding officer shall grant the requested relief dissolving the summary suspension order unless sufficient evidence is presented that an imminent threat to the public health, safety, or welfare exists requiring emergency action and continuation of the director's summary suspension order.

MCL 289.4127 states as follows:

Sec. 4127.

- (1) After the regulatory authority receives a petition for a hearing from a license, registration, or certificate holder whose license, registration, or certificate is summarily suspended under section 4125, the proceedings shall be promptly commenced and determined as required by section 92 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.292.
- (2) This section does not prevent the regulatory authority's immediate reinstatement of a license, registration, or certificate when the regulatory authority determines the public health hazard or nuisance no longer exists.

MCL 24.292(2) states as follows:

If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

FINDINGS OF FACT

The following findings of fact are established based on the entire record in this matter, including the witness testimony and admitted exhibits:

1. The Food Law empowers the Director of MDARD/Petitioner to summarily suspend a food service establishment if the Director determines that an imminent threat to the public, healthy, safety, or welfare exists.
2. Respondent's food establishment license is issued by Petitioner.
3. Respondent is located at 143 West Main Street, Gaylord, Otsego County, Michigan, 49735. Ian Murphy is the owner of the establishment. [Pet. Exh. 12, p. 1.]
4. Respondent is a restaurant/bar that serves food to patrons.
5. On November 15, 2020, the Director of the Michigan Department of Health and Human Services (MDHHS) issued an Emergency Order under MCL 333.2253 – Gatherings and Face Mask Order (Emergency Order).² The Emergency Order stated that the “novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death” and that “COVID-19 spreads through close human contact, even from individuals who may be asymptomatic.” The Emergency Order stated that since October of 2020, there has been an exponential growth in cases. [Pet. Exh. 1, p. 1.]
6. In recognition of the severity, MDHHS issued the Emergency Orders in an attempt to control the epidemic to protect the public health. Specifically, the Emergency Order (i) prohibits indoor gatherings at food establishments under

² On December 7, 2020, December 18, 2020, and January 13, 2021, MDHHS issued similar Emergency Orders that extended the same restrictions for food service establishments. [Pet. Exh. 2, pp. 1-9; Pet. Exh. 3, pp. 1-10; Pet. Exh. 30, pp. 1-10.]

part 3 of the order and (ii) requires face masks to be worn by patrons and staff indoors under part 7 of the order. [Pet. Exh. 1, pp. 1 and 4-6.]

7. The Emergency Order further authorizes that “local health departments are authorized to carry out and enforce the terms of [the] order.” [Pet. Exh. 1, p. 8.]
8. The Health Department of Northwest Michigan (HDNW) is the “local health department” that falls within the jurisdiction of Respondent’s food establishment. HDNW serves four counties, including Otsego County, where Respondent’s establishment is located. [Pet. Exh. 5, p. 1.]
9. From October 26, 2020 to January 8, 2021, Petitioner received multiple complaints from the public alleging that Respondent was open to the public and allowing indoor dining with no restrictions. Rodney Blanchard, a Food Service Specialist with Petitioner,³ is located in the division that handles these complaints. [Pet. Exh. 4, pp. 1-3.]
10. On November 25, 2020, HDNW also received multiple complaints from the public claiming the same allegations against Respondent.
11. On November 25, 2020, Chuck Edwards, an Environmental Health Coordinator for HDNW,⁴ went to Respondent’s establishment and issued HDNW’s Order to Cease and Desist Food Service Operations. As a result of the indoor dining, the order informed Respondent that it was in violation of the MDHHS pandemic orders and the Food Law. Mr. Edwards further observed that Respondent was open for indoor dining, patrons were inside the facility, the staff at the front entrance did not wear face coverings until Mr. Edwards identified himself, and a staff member in the kitchen did not have a face covering. Mr. Edwards spoke to Mr. Murphy, who stated it is not requiring face coverings in the establishment. [Pet. Exh. 5, p. 1.]
12. On November 25, 2020, after HDNW’s cease and desist order was issued, Sgt. Stefan Crane with the Gaylord City Police Department, went to Respondent’s establishment to see if Respondent was in compliance with the cease and desist order. He observed that Respondent was open for indoor dining, patrons were inside the facility, and patrons were not social distancing. He spoke to Mr. Murphy, who stated he would continue to serve indoor dining for financial and

³ Mr. Blanchard’s job responsibilities include working with 45 local health jurisdictions and ensuring that the local health jurisdictions are in compliance with the Food Law.

⁴ Mr. Edwards’s job responsibilities include land use activities, enforcing the Food Law, and handling public health related issues for COVID-19. He has 30-years of experience with HDNW. He received his bachelor’s degree in biology and he is a registered sanitarian.

business purposes. [See Pet. Exh. 8, pp. 1-2.] Sgt. Crane again visited the establishment on December 4 and 9, 2020, and he made similar observations, including body camera footage of his observations. [Pet. Exhs. 21 and 22.]

13. The Michigan Liquor Control Commission (MLCC) also conducted an investigation against Respondent. Petitioner elicited testimony from several investigators from MLCC to recount their observations when they visited the establishment. [See Pet. Exh. 17, pp. 1-14.]
14. On November 25, 2020, Theodore Orm, Investigator with MLCC for 20-years, went to Respondent's establishment. Mr. Orm's responsibilities include enforcement of liquor violations. On his visit, Mr. Orm observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Mr. Orm spoke to Mr. Murphy and Mr. Murphy stated he had a moral and fiduciary responsibility to remain open for indoor dining.
15. On November 30, 2020, HDNW exhausted all of its administrative remedies against Respondent and therefore, HDNW requested assistance from Petitioner.
16. On or about December 2, 2020, Mr. Edwards went to Respondent's establishment and issued it Petitioner's December 2, 2020, Order to Cease and Desist Food Operations. He again observed that Respondent was open for indoor dining, patrons were inside the facility, and staff were not wearing face coverings.
17. On December 2, 2020, Scott Kendzierski, the Director of Environmental Health Services for HDNW,⁵ went to Respondent's establishment and issued a MDHHS citation. He further observed 15-20 patrons in the establishment, neither patrons nor staff were wearing face coverings, and no social distancing taking place. Mr. Kendzierski made the same observations when he visited the establishment on December 18, 2020, and January 5, 2021.
18. On December 2, 2020, Bradley Szatkowski, Investigator with MLCC, went to Respondent's establishment and handed the manager MLCC's Emergency Suspension Order. This Order summarily suspended Respondent's liquor licenses on the premises. Mr. Szatkowski spoke to Mr. Murphy and told him that his liquor license was suspended for violation of the MDHHS epidemic orders. [Pet. Exh. 17, pp. 1-14.]

⁵ Mr. Kendzierski's job responsibilities include managing 14 environmental health programs (including food program), COVID-19 response, managing complaints about COVID-19, and enforcement of COVID-19.

19. On December 3, 2020, Nicole Spires, an Administrative Supervisor with HDNW for 13-years, observed from the outside of the establishment, approximately 30-40 patrons dining inside the establishment and staff not properly wearing face coverings.
20. On December 4 and 10, 2020, Officer Blake Huff with the Gaylord City Police Department went to Respondent's establishment. On these dates, Officer Huff observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Officer Huff documented these encounters at the establishment with body camera footage. [Pet. Exhs. 19 and 20.]
21. On December 29, 2020, Jay Krystyniak⁶, a Food Safety Scientist with Petitioner, went to Respondent's establishment and provided the establishment with Petitioner's December 29, 2020, Emergency Suspension Order. [Pet. Exh. 24, pp. 1-7.] He observed Respondent's establishment was open for indoor dining and several staff were not wearing face coverings. [Pet. Exh. 25, p. 1.]
22. The December 29, 2020, Emergency Suspension Order informed Respondent that its "continued offering of indoor dining creates an imminent threat to the public health, safety, and welfare." As a result, Respondent's food establishment license was summarily suspended. [Pet. Exh. 24, pp. 1-7.]
23. On January 6, 2021, Daniel Rademacher, Investigator with MLCC for 16-years, went to Respondent's establishment. He observed Respondent's establishment was open for indoor dining and neither patrons nor staff were wearing face coverings. Mr. Rademacher took a photo of his observation:

⁶ Mr. Krystyniak's responsibilities include food inspection and ensuring that establishments are in compliance with the Food Law and federal regulations.



[Pet. Exh. 16, p. 1.] The above photo clearly shows that patrons were inside Respondent's establishment and not wearing face coverings.

24. The Centers for Disease Control and Prevention (CDC) states the following about COVID-19:

- It is mainly spread from person to person.
- People can be infected by coming into close contact with one another (within about 6 feet).
- People become infected from respiratory droplets when an infected person coughs, sneezes, or talks.
- One way to protect yourself is to wear a mask that covers your nose and mouth in public settings.

[Pet. Exh. 28, pp. 1-2.]

25. The CDC states there is a high risk of spreading COVID-19 for outdoor and indoor seating with no restrictions at restaurants and bars. The CDC further states there is still a high risk at restaurants and bars even if patrons are sitting at least six feet apart. [Pet. Exh. 27, p. 1.]

26. On September 11, 2020, the U.S. Department of Health and Human Services/CDC released a report entitled “Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities —United States, July 2020,” which stated the following:

Findings from a case-control investigation of symptomatic outpatients from 11 U.S. health care facilities found that close contact with persons with known COVID-19 or going to locations that offer on-site eating and drinking options were associated with COVID-19 positivity. Adults with positive SARS-CoV-2 test results were approximately twice as likely to have reported dining at a restaurant than were those with negative SARS-CoV-2 test results.

* * *

Eating and drinking on-site at locations that offer such options might be important risk factors associated with SARS-CoV-2 infection. Efforts to reduce possible exposures where mask use and social distancing are difficult to maintain, such as when eating and drinking, should be considered to protect customers, employees, and communities.

[Pet. Exh. 29, pp. 1-7.]

27. Otsego County issues monthly summary reports for the county concerning COVID-19 data, as follows:

- a. For November 2020, the county reported an increase in total COVID-19 cases. Specifically, there were 467 total cases, 14 inpatients at the hospital, and 6 deaths.
- b. For December 2020, there were 255 total cases, 5 inpatients at the hospital, and 6 deaths. This appeared to show a decrease in the total case count.

[Pet. Exh. 6, pp. 1-2.]

28. As of January 8, 2021, Otsego County had a total of 1,056 COVID-19 cases and 25 deaths. [Pet. Exh. 9, pp. 1-2.]

29. Lisa Peacock is a Health Officer with HDNW.⁷ Ms. Peacock tracks the COVID-19 epidemic both locally and nationally. For November 2020, Ms. Peacock stated there was a huge increase in COVID-19 numbers, resulting in a public health advisories and statements being issued. Ms. Peacock encourages that the public practice masking and social distancing to avoid the spread of COVID-19. Ms. Peacock issued HDNW's November 25, 2020, Order to Cease and Desist Food Service Operations against Respondent because it violated the indoor dining prohibition. Currently, she acknowledges that the general COVID-19 trends are down, but the data indicates a potential increase in numbers.
30. Ms. Peacock states that the HDNW reports shows that Otsego County is experiencing a surge of COVID-19 cases. She acknowledges there has been no contact tracing that has led back to Respondent.
31. Joshua Meyerson, M.D., is the Medical Director for HDNW.⁸ Dr. Meyerson states that it is hard to contact trace for COVID-19 exposures in restaurant/bars. Dr. Meyerson reiterates that COVID-19 is a respiratory virus that is transmitted through respiratory droplets from person to person. He states it can spread by people talking, coughing, and breathing. He recommends that people have facial coverings and maintain social distancing to avoid the spread of COVID-19.
32. In mid-November 2020, Dr. Meyerson stated they began seeing a ten-fold increase in COVID-19 cases in HDNW jurisdiction (which includes Otsego County). He states they also saw an increase in positivity and HDNW and local hospitals were being stressed to their maximum capacity. He agrees it was correct to issue the pandemic orders and public health advisories to flatten the curve. He states Otsego County is in the highest risk category of "E." He states there is a high risk activity for the spread of COVID-19 for indoor food gathering.
33. James Padden, Food Safety and Inspection Program Manager with MDARD,⁹ stated MDARD took into consideration a number of factors when issuing the

⁷ Ms. Peacock has been a Health Officer for five years and has been with HDNW for 11-years. Her job responsibilities include overall operations and functions of HDNW. She also has been a nurse for 30-years with a master's of science degree in nursing. In regard to COVID-19, her duties have changed to protect the public and serve as the incident commander.

⁸ Dr. Meyerson obtained his medical degree from Tulane School of Medicine in 1992. He is board certified in pediatrics and also obtained a master's degree in public health in 1992. His job responsibilities include guidance and oversight of all the clinical programs, oversight of contact tracing for COVID-19, questions related to transmission of COVID-19, and immunizations and testing for COVID-19.

⁹ Mr. Padden's job responsibilities include managing inspection and food staff for the State of Michigan. He has held his current position for two-years, but has been with MDARD for over 20-years. In regard to COVID-19, his role is to ensure that food establishments are not posing an imminent threat to the public health. He obtained a bachelor's of science degree in biology and minor in physical science.

cease and desist/summary suspension order against Respondent, including consideration of the local health department, MDHHS epidemic orders, CDC guidelines, status of the outbreak both in the state and county levels, masking considerations, and other factors. The MDARD Director ultimately concluded to summarily suspend Respondent's food establishment license in order to control the epidemic.

34. Throughout Respondent's non-compliance, it has consistently advertised/posted on social media that it would remain open, by way of example:



[Pet. Exh. 11, p. 2.]

35. Respondent continues to operate its indoor dining, despite its license being summarily suspended.
36. At the present time, COVID-19 is a pandemic that is continuing, especially in Otsego County where Respondent's establishment is located. Respondent does not qualify for an exception to the indoor gathering prohibition in the MDHHS Epidemic Orders. Respondent has not posed any operational reason for its non-compliance with COVID-19 mitigation measures, other than financial or business concerns.
37. Respondent's management or staff did not misunderstand any of the state and local health department requirements or the cease and desist order.

38. Respondent's ongoing non-compliance with COVID-19 mitigation measures, including offering indoor dining, patrons seating/being less than six feet apart, staff and patrons not wearing face coverings, which are required by the state and local health departments for licensed food establishments, remains an imminent threat to the public health, safety, and welfare.

CONCLUSIONS OF LAW

Petitioner bears the burden of proving, by a preponderance of evidence, that the public health, safety, or welfare requires emergency action and a continuation of the food establishment license suspension. See MCL 289.4125(4) and MCL 24.292(2).

As the Michigan Supreme Court has stated, "[p]roof by a preponderance of the evidence requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *Blue Cross and Blue Shield of Michigan v Milliken*, 422 Mich 1, 89; 367 N.W.2d 1, 44 (1985). Additionally, a preponderance of evidence is evidence which is of a greater weight or more convincing than evidence offered in opposition to it. It is simply that evidence which outweighs the evidence offered to oppose it. *Martucci v Ballenger*, 322 Mich 270, 274 (1948) (citing *Strand v. Chicago & W. M. Ry. Co.*, 67 Mich. 380, 34 N.W. 712, 715).

Here, Petitioner alleges that Respondent's continued offering of indoor dining creates an imminent threat to the public health, safety, or welfare. And therefore, Petitioner requests that this Tribunal continue the summary suspension of Respondent's food establishment license, pursuant to MCL 289.4125(4) of the Food Law.

First, Petitioner elicited testimony from multiple witnesses, including HDNW staff, Gaylord City Police Department officers, MLCC investigators, and Petitioner's staff, who all credibly testified that they conducted on-site visits of Respondent's establishment and confirmed that Respondent was open to the public and allowing indoor dining. These witnesses further credibly testified that neither patrons nor staff were wearing face coverings and no social distancing took place. Many of these testimonies were corroborated by violation reports and/or video evidence. For example, during the hearing, the undersigned watched multiple bodycam footages from the Gaylord City Police Department, which showed that Respondent's establishment was open to the public and allowing indoor dining. In fact, it is not disputed that Respondent consistently advertised/posted on social media that it would remain open. [See Pet. Exhs. 11 and 15.]

Moreover, the evidence establishes that Respondent failed to implement any safety measures to avoid the spread of COVID-19.

Second, Lisa Peacock is the Health Officer with HDNW. Her job responsibilities for Otsego County include the overall operations and functions of HDNW. She credibly testified that the HDNW reports shows that Otsego County has a surge of COVID-19 cases. Of note, she acknowledges there has been no contact tracing that has led back to Respondent.

Third, Dr. Meyerson is the Medical Director with HDNW. He credibly testified that there was a ten-fold increase in COVID-19 cases in mid-November 2020. He also credibly testified that it was proper for the state and local agencies to issue the pandemic orders and public health advisories to flatten the curve.

Fourth, James Padden is the Food Safety and Inspection Program Manager with MDARD. In regard to COVID-19, his role is to ensure that food establishments are not posing an imminent threat to the public health. Mr. Padden credibly testified that Petitioner took into consideration a number of factors when issuing the cease and desist/summary suspension order against Respondent, including consideration of the local health department, MDHHS epidemic orders, CDC guidelines, status of the outbreak both in the state and county levels, and other factors. Ultimately, Mr. Padden credibly testified that it was necessary for the MDARD Director to summarily suspend Respondent's food establishment license in order to control the epidemic.

In response, Respondent did not offer any witnesses to rebut Petitioner's case presentation. Instead, Respondent's counsel made a legal argument that Petitioner's Emergency Suspension Order should have never been issued in the first place and therefore, this matter should be dismissed. Section 4125(4) of the Food Law, MCL 289.4125(4), provides the controlling language for summary suspensions, as follows:

Based upon facts submitted by a person familiar with those facts or upon information and belief alleging that an imminent threat to the public health, safety, or welfare exists, the director may summarily suspend a license, registration, or certificate issued under this act... [Emphasis added.]

Respondent's counsel argued that the Food Law defines "imminent or substantial hazard" under Section 1109(c), MCL 289.1109(c), as follows:

'Imminent or substantial hazard' means a condition at a food establishment that the director determines requires immediate action to prevent endangering the health of people. [Emphasis added.]

Respondent's counsel argues that the definition of "imminent or substantial hazard" applies to summary suspensions under Section 4125. Although the words "imminent or substantial hazard" are not verbatim in Section 4125, Respondent's counsel argues that

“imminent or substantial hazard” is analogous with the summary suspension language of “imminent threat.” Respondent’s counsel basically argues that “imminent or substantial hazard” and “imminent threat” can be used interchangeably.

Respondent’s counsel argues that because the definition of “imminent or substantial hazard” applies to summary suspensions, a “condition” at the food establishment must occur in order to trigger the rights of a summary suspension. For example, Respondent’s counsel argues that this “condition” would be evidence that COVID-19 had been traced back to the establishment. However, Respondent’s counsel states Petitioner has presented no evidence that COVID-19 originated from the establishment. And because there is no evidence that a “condition” occurred at Respondent’s establishment, Respondent’s counsel argues that there can be no imminent threat to the public and the summary suspension must be dismissed.

Although Respondent’s counsel makes an intriguing argument, it is ultimately unpersuasive. A plain reading of Section 1109(c) finds that it is not applicable to Section 4125, but instead, it is applicable to Section 2113. Section 2113(1) of the Food Law, MCL 289.2113(1), provides the controlling language for cease and desist orders, as follows:

The director may order immediate cessation of operation of a food establishment upon a determination that continued operation would create an imminent or substantial hazard to the public health. [Emphasis added.]

In *Sun Valley Foods Co v Ward*, 460 Mich. 230, 236, 596 NW2d 119, 123 (1999), the Michigan Supreme Court stated the following:

The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co.*, 447 Mich. 93, 98, 523 N.W.2d 310 (1994). See also *Nation v W. D. E. Electric Co.*, 454 Mich. 489, 494, 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide ‘the most reliable evidence of its intent....’ *United States v Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 135, 545 NW2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Luttrell v*

Dep't of Corrections, 421 Mich. 93, 365 NW2d 74 (1984).

The language of Section 1109(c) is unambiguous. A plain reading of the word “imminent or substantial hazard” of Section 1109(c) is used only verbatim in the cease and desist language of Section 2113(1). Nowhere in the summary suspension language of Section 4125 do the words “imminent or substantial hazard” appear in this statute. Instead, Section 4125 uses the words “imminent threat,” which is nowhere defined in the Food Law. Respondent is not permitted to apply the definition of “imminent or substantial hazard” to summary suspensions under Section 4125. Because the statute is unambiguous, judicial construction ends here.

Nonetheless, assume the definition of “imminent or substantial hazard” does apply to summary suspensions, Respondent’s argument is still unpersuasive that a “condition” would require evidence of COVID-19 at the establishment. Black’s Law Dictionary defines “condition” as “[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance.” *Black’s Law Dictionary* (11th ed. 2019). “Condition” does not mean there has to be evidence of positive COVID-19 cases, but instead, “conditions” can mean evidence that the food establishment continues indoor dining, or the establishment does not implement social distancing, or the establishment does not require staff or patrons to wear face coverings. All of these are examples of “conditions” at a food establishment that requires immediate action to prevent the spread of COVID-19 to the public. As such, there were “conditions” present at Respondent’s establishment (e.g., no social distancing, no masks) that required the MDARD Director to issue the summary suspension. Again, this analysis assumes that the definition of “imminent or substantial hazard” applies to summary suspensions.

Based on the totality of the hearing record, the undersigned concludes that Petitioner has demonstrated, by a preponderance of the evidence, that Respondent’s actions constitute an imminent threat to the public health, safety, or welfare.

The evidence record is overwhelmingly clear that there is high risk of spreading COVID-19 for indoor seating at restaurants. Despite repeated warnings, cease and desist orders from HDNW and MDARD, and MDHHS epidemic orders, Respondent failed to comply with COVID-19 mitigation measures by its continued offering of indoor dining.

Petitioner’s decision to issue the summary suspension is not only based on the MDHHS emergency orders, but is also based on Petitioner’s own credible documented findings, the local health department (HDNW) credible documented findings, CDC guidelines, and Petitioner’s credible witnesses, who all agree that there is an imminent public health threat posed by Respondent’s continued operation of indoor dining.

The evidence establishes that for several months Respondent has not complied with both local and state health departments COVID-19 mitigation measures. The evidence further establishes that Respondent's management or staff did not misunderstand any of the state and local health department requirements. The evidence further establishes that Respondent's ongoing non-compliance with COVID-19 mitigation measures, including offering indoor dining, patrons seating less than six feet apart, and patrons and staff not wearing face coverings, which are required by the state and local health departments for licensed food establishments, remains an imminent to the public health, safety, and welfare.

In conclusion, Petitioner made its findings that Respondent posed an imminent threat to the public by the evidence record presented at the hearing and has acted within its own authority to issue the summary suspension pursuant to the Food Law, MCL 289.4125 and MCL 289.4127. Accordingly, Petitioner has met its burden of proof to show sufficient evidence for the issuance and continuance of the emergency suspension order.

DECISION

Based on the above findings of fact and conclusions of law, a preponderance of the evidence shows that Respondent, Moore Murphy Hospitality, L.L.C., d/b/a Iron Pig Smoke House, has engaged in conduct that constitutes an ongoing imminent threat to the public health, safety, and welfare under Section 4125 of the Food Law, MCL 289.4125. Petitioner's emergency suspension order is therefore properly continued under that statute and MCL 24.292.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that Respondent's petition to dissolve Respondent's Emergency Suspension Order issued on December 29, 2020, shall be and hereby is **DENIED**, and that the Order is therefore **CONTINUED** under the provisions of MCL 289.4125 and MCL 289.4127.



Eric J. Feldman
Administrative Law Judge

APPEAL PROCEDURES

MCL 24.304(1) provides:

A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms. See also Mich Admin Code R 792.10137, Rule 137.

MCL 289.5115 further states:

When a license holder or registrant has exhausted all administrative remedies available under this act and is aggrieved by a final decision or order in a contested case, the decision or order is subject to direct review by the courts as provided by law.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 20th day of January 2021.



J. Delaney
Michigan Office of Administrative Hearings
and Rules

Via Electronic Mail

David M. Delaney
Attorney at Law
113 North Illinois Avenue, P.O. Box 1771
Gaylord, MI 49734
dmdladyer@gmail.com

Eileen C. Whipple
Department of the Attorney General
P.O. Box 30755
Lansing, MI 48909
whipplee@michigan.gov

Moore Murphy Hospitality, LLC, d/b/a Iron Pig Smoke House
143 W Main Street
Gaylord, MI 49735
theironpigsmokehouse@gmail.com