



April 15, 2020

Via email

Hon. Gretchen Whitmer
Governor of Michigan
P.O. Box 30013
Lansing, MI 48909

RE: Executive Order 2020-42 and Plant Sales

Dear Governor Whitmer:

I am writing to you regarding Executive Order 2020-42—specifically, its restriction on plant sales in Michigan through April 30, 2020. As the COVID-19 pandemic has taken hold in America, national media outlets such as National Public Radio¹ and the *New York Times*² have reported that Americans are increasingly turning to gardening as a source of safe food and outdoor recreation in these difficult times. Most states, accordingly, have allowed garden centers and nurseries to remain open, subject to reasonable health and safety guidelines, and some—for example, Illinois, Minnesota, and North Carolina—have expressly recognized these businesses as essential or critical. In the current climate, gardening has become, for many Americans, a vital source of sustenance and sanity. Sadly, your recent executive order deprives them of both helpful benefits of gardening.

The order correctly recognizes “food and agriculture” as “critical infrastructure” and accordingly permits grocery stores, restaurants, convenience stores, and other food-related businesses to continue sales, subject to reasonable health and safety restrictions. At the same time, however, the order appears to *prohibit* sales of plants—including vegetable, fruit, and herb plants—by independent nurseries and garden centers.³ That differential treatment—permitting grocery stores to sell vegetables, fruits, and herbs, but prohibiting nurseries and garden centers from selling plants so that Michiganders can grow their *own* vegetables, fruits, and herbs—does not make sense.

¹ Alan Yu, *Fearing Shortages, People Are Planting More Vegetable Gardens*, NPR (Mar. 27, 2020), available at <https://www.npr.org/sections/coronavirus-live-updates/2020/03/27/822514756/fearing-shortages-people-are-planting-more-vegetable-gardens>.

² Tejal Rao, *Food Supply Anxiety Brings Back Victory Gardens*, N.Y. Times (Mar. 25, 2020), available at <https://www.nytimes.com/2020/03/25/dining/victory-gardens-coronavirus.html>.

³ Although the order allows garden centers and nurseries located within grocery or home improvement stores that have a combined total area less than 50,000 square feet to engage in plant sales, independent garden centers and nurseries apparently may not, because the order does not recognize them as critical.

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Growing food at home is the surest and safest way for Michiganders to meet their food needs in the midst of the ongoing pandemic. Indeed, organizations such as the Pan American Health Organization and the International Federation of Red Cross and Red Crescent Societies have long recognized the importance of gardens as a means of fighting food availability problems during pandemics and similar crises.⁴

In addition to impeding the rights of the many Michigan families who seek to grow their own food during this time, your order also closes many Michigan small businesses—independent nurseries and garden centers—that wish to help these families provide for themselves. Meanwhile, the order permits grocery and home improvement stores—at least those with a total floor space below 50,000 square feet—to sell plants. This differential treatment is not simply irrational; it actually threatens the health and safety of the very constituents your order aims to protect. At a time when you are urging Michigan residents to avoid public indoor spaces for their own safety, your order allows them to shop at grocery and home improvement stores—businesses conducted largely, if not exclusively, indoors—while prohibiting them from shopping at garden centers and nurseries—businesses commonly conducted, in large part, outdoors.

Accordingly, we strongly encourage you to clarify or amend Executive Order 2020-42 to allow plant sales by nurseries and garden centers, provided those businesses follow the same health and safety precautions imposed on other businesses that are allowed to remain open. Likewise, should you issue a new executive order after Order 2020-42 expires on April 30, 2020, we strongly recommend that it also allow such plant sales. Your constituents should not have to resort to litigation to correct the current unconstitutional prohibition.

Thank you, and please contact me at (206) 957-1300 should you have any questions.

Sincerely,



Michael Bindas
Senior Attorney
INSTITUTE FOR JUSTICE

cc:

Robert Gordon, Director, Michigan Department of Health and Human Services
Gary McDowell, Director, Michigan Department of Agriculture and Rural Development
Mark Totten, Chief Legal Counsel to the Governor

⁴ Pan American Health Organization, *Leadership During a Pandemic: What Your Municipality Can Do, Tool 7: Food Security During a Pandemic*, available at https://www.paho.org/disasters/index.php?option=com_docman&view=download&category_slug=tools&alias=533-pandinflu-leadershipduring-tool-7&Itemid=1179&lang=en; International Federation of Red Cross and Red Crescent Societies, *Global Food Security Assessment Guidelines* (2007), available at <https://www.ifrc.org/Global/global-fsa-guidelines-en.pdf>.