LEGAL OPTIONS IN RESPONSE TO CERTIFICATION AND LETTER FROM STATE HEALTH COMMISSIONER

Special Meeting - Presentation to City Council in Open Session by Request on May 19, 2020
Date: June 2, 2020
Location: Transit Conference Room / Interactive Electronic Broadcast
By: Anthony C. Williams, City Attorney
GOVERNOR’S EXECUTIVE ORDER 51

Commonwealth of Virginia
Office of the Governor

Executive Order

NUMBER FIFTY-ONE (2020)

DECLARATION OF A STATE OF EMERGENCY DUE TO NOVEL CORONAVIRUS (COVID-19)

Importance of the Issue

The Commonwealth of Virginia is monitoring an outbreak of a respiratory illness referred to as the coronavirus (COVID-19), which has spread from Wuhan, Hubei Province, China to more than 60 other locations internationally, including the Commonwealth. The Virginia Department of Health (VDH) has been working with local, state, and federal officials, healthcare and emergency management experts, and various state agencies to form a COVID-19 Taskforce to prepare for and respond to this threat. Given recent confirmed occurrences of COVID-19 within the Commonwealth and in neighboring states, as well as information from the Centers for Disease Control and Prevention, it is anticipated that the disease will spread.

Therefore, on this date, March 12, 2020, I declare that a state of emergency exists in the Commonwealth of Virginia to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat. The anticipated effects of COVID-19 constitute a disaster as described in § 44-44.16 of the Code of Virginia (Code). By virtue of the authority vested in me by Article V, Section 1 of the Constitution of Virginia, by §§ 44-146.17 and 44-75.1 of the Code, as Governor and Director of Emergency Management and Commander-in-Chief of the Commonwealth’s armed forces, I proclaim a state of emergency. Accordingly, I direct state and local governments to render appropriate assistance to prepare for this event, to alleviate any conditions resulting from the situation, and to implement recovery and mitigation operations and activities so as to return impacted areas to pre-event conditions as much as possible. Emergency services shall be conducted in accordance with § 44-146.13 et seq. of the Code.

In order to marshal all public resources and appropriate preparedness, response, and recovery measures, I order the following actions:

A. Implementation by state agencies of the Commonwealth of Virginia Emergency Operations Plan, as amended, along with other appropriate state plans.

B. Activation of the Virginia Emergency Operations Center and the Virginia Emergency Support Team, as directed by the State Coordinator of Emergency Management, to coordinate the provision of assistance to state, local, and tribal governments and to facilitate emergency services assignments to other agencies.

C. Authorization for the heads of executive branch agencies, on behalf of their regulatory boards as appropriate, and with the concurrence of their Cabinet Secretary, to waive any state requirement or regulation, and enter into contracts without regard to normal procedures or formalities, and without regard to application or permit fees or royalties. All waivers issued by agencies shall be posted on their websites.


E. Activation of the Virginia National Guard to State Active Duty.

F. Authorization of a maximum of $10,000,000 in state sum sufficient funds for state and local government mission assignments and state response and recovery operations authorized and coordinated through the Virginia Department of Emergency Management allowable by The Stafford Act, 42 U.S.C. § 5121 et seq. Included in this authorization is $1,000,000 for the Department of Military Affairs, if it is called to State Active Duty.

Effective Date of this Executive Order

This Executive Order shall be effective March 12, 2020, and shall remain in full force and in effect until June 10, 2020 unless superseded or rescinded by further executive order. Termination of this Executive Order is not intended to terminate any federal type benefits granted or to be granted due to injury or death as a result of service under this Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 12th day of March, 2020.

Ralph S. Northam, Governor

Attent:
Kelly Thomasson, Secretary of the Commonwealth
## COVID-19 Cases in Virginia

Dashboard Updated: 5/26/2020, Data entered by 5:00 PM the prior day.

<table>
<thead>
<tr>
<th></th>
<th>Total Cases*</th>
<th>Total Hospitalizations**</th>
<th>Total Deaths</th>
</tr>
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<tbody>
<tr>
<td><strong>Confirmed†</strong></td>
<td>37,440</td>
<td>4,294</td>
<td>1,175</td>
</tr>
<tr>
<td><strong>Probable†</strong></td>
<td>1,902</td>
<td>31</td>
<td>61</td>
</tr>
</tbody>
</table>

*Total Cases include both confirmed and probable cases.** Total Hospitalizations include both confirmed and probable hospitalizations.†Confirmed cases include those that have tested positive for COVID-19. Probable cases include those that have been reported to have COVID-19 but have not been tested.
COVID-19 SPREAD ACROSS THE COMMONWEALTH OF VIRGINIA
COVID-19 SPREAD ACROSS THE COMMONWEALTH OF VIRGINIA
INDEPENDENT LOCALITIES IN VIRGINIA

» 133 Independent Localities in the Commonwealth of Virginia

» 95 Counties

» 38 Cities
<table>
<thead>
<tr>
<th></th>
<th>COMMONWEALTH OF VIRGINIA</th>
<th>PETERSBURG</th>
</tr>
</thead>
<tbody>
<tr>
<td>POPULATION:</td>
<td>8,536,000</td>
<td>32,326</td>
</tr>
<tr>
<td>CASES:</td>
<td>39,342</td>
<td>96</td>
</tr>
<tr>
<td>HOSPITALIZATIONS:</td>
<td>4,325</td>
<td>22</td>
</tr>
<tr>
<td>DEATHS:</td>
<td>1,236</td>
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<td>CASES/POPULATION</td>
<td>0.004</td>
<td>0.002</td>
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<tr>
<td>HOSPITAL/POPULATION X 1000</td>
<td>0.507</td>
<td>0.680</td>
</tr>
<tr>
<td>DEATHS/POPULATION X 1000</td>
<td>0.144</td>
<td>0.061</td>
</tr>
</tbody>
</table>
The Virginia Department of Health maintains a database of over 2500 public waterworks systems in the Commonwealth of Virginia.

Over 700 of these public waterworks systems are operated by a local government.

On March 16, 2020 the Virginia State Corporation Commission issued an Order suspending disconnection of service and tariff provisions in relation to utility services provided in a five-page list of public utilities – PETERSBURG WAS NOT INCLUDED ON THAT LIST.

In addition, utilities owned and operated by local governments are exempt from the Order by statute.

NOTWITHSTANDING PETERSBURG WAS AND REMAINS IN COMPLIANCE WITH THAT ORDER AS PETERSBURG HAS HAD NO DISCONNECT OR SHUT-OFF FOR NONPAYMENT SINCE JANUARY OF 2020 - LONG BEFORE THE DECLARATION OF EMERGENCY BY THE GOVERNOR.
The City purchases water from the Appomattox Regional Water Authority quarterly at a cost of $376,364.14 then re-distributes it to its 12,850 customers.

The City currently employs 34 Public Utility Workers with a fiscal year 2020 budget of $14,722,754.00

Of the 12,850 water accounts that the City has, there are 3,210 delinquent accounts exceeding 90 days past due. (40% are delinquent beyond 90 days past due)

These arrearages represent $3,249,791.00 in uncollected revenues.

The City has not had a single water utility shut-off for delinquency or non-payment since January 31, 2020.
1. Petersburg cannot disconnect service for delinquency and nonpayment during the health emergency.

2. Petersburg must supply water to all occupied residents for the duration of the health emergency.

3. Petersburg must restore all disconnected accounts REGARDLESS if turned off before health crisis.
NOW THEREFORE, pursuant to Code of Virginia §§ 15.2-2119(D)\(^1\) and 15.2-2119.4(D),\(^2\) I, M. Norman Oliver, M.D., M.A., State Health Commissioner, certify that the City of Petersburg shutting off water service during the COVID-19 pandemic at any occupied residence in the City of Petersburg will endanger the health of the occupants of the premises and the health of others. This certification is based upon my expertise as a medical doctor and as the State Health Commissioner, and my reliance on the above-referenced medical guidance from leading health organizations; on the significant threat of community-wide spread of COVID-19, as discussed above; on the significant danger to the citizens of Virginia posed by COVID-19, as discussed above; and on the special risk factors of the population of the City of Petersburg, as discussed above.
Sections 15.2-2119(d) and 2119.4(d)

- Provide that the utility provider may discontinue service upon delinquency/nonpayment of a utility customer. . . “unless health officers certify that shutting off the water will endanger the health of the occupants of the premises or the health of others.”

- Designed to protect individuals who are living at home with critical health needs requiring the continuation of utility service

- Requires an individual health assessment of the Certifying Officer

- In Petersburg’s case, there was no individual health assessment done whatsoever.

- There was no individual person whose health was identified as
  - being in jeopardy as a result of the disconnection of services
  - notwithstanding the fact that there were services
  - disconnected since long before the emergency declaration.
SO WHY PETERSBURG?

1. Petersburg residents are at a higher risk because
   a) Have higher poverty
   b) Have higher obesity

2. BUT PETERSBURG HAS HALF THE STATE AVERAGE OF INFECTIONS AND DEATHS FROM COVID-19

3. And Petersburg has extremely lenient collection practices for water utility
Of the 133 independent counties and cities in Virginia many other localities has the State government issued such restrictions upon?

NONE
Of the 2,500 public water utility systems in Virginia how many other localities has the State government issued such restrictions upon?

NONE
How many times has the Code Section cited by the State Health Commissioner been used to block discontinuation of services without a health assessment of any individual?

NONE
How many times has the Code Section cited by the State Health Commissioner been used to require retroactive reconnection regardless of shut-off date or circumstances?

NONE
Conclusion – Why Petersburg?

- Arbitrary and capricious action
- Disparate impact and/or discriminatory intent
- Detriment of the City of Petersburg and its residents
- And may also amount to an unlawful regulatory taking of property without just compensation by the State
May 14, 2020

Dear Dr. Officers,

City Hall for the City of Petersburg and the City’s Administration have received the May 13, 2020 alert from the accompanying Health Department Certification concerning a recurrence of water quality issues and overall need for water service as required by the Department of Environmental Health. The alert states, among other things, that the department has received evidence of violations of the State Standard for the City of Petersburg and the City’s health officials have recommended that the City of Petersburg takes immediate action to correct the deficiencies cited.

In light of these findings, the City of Petersburg has taken immediate action to ensure the provision of safe and adequate water service to all residents. The city has already initiated steps to address the violations identified by the Health Department. These steps include working closely with the Virginia Department of Health to ensure compliance with all health regulations and protocols.

The City of Petersburg has been working diligently to improve water quality and ensure compliance with all health regulations. The city has invested in infrastructure improvements and continues to monitor water quality closely. The City has also been proactive in providing information and updates to the public, including through regular press releases and social media updates.

The City of Petersburg has been advised that the Health Department has issued a certification letter to the City, which includes the necessary steps to rectify the violations. The City has taken these steps to ensure that the standards are met and that the health and safety of its residents are prioritized.

The City of Petersburg remains committed to providing safe and reliable water service to all its residents. The City has been working closely with the Virginia Department of Health and other regulatory bodies to ensure compliance with all health regulations and protocols.

Sincerely,

[Signature]

City Administrator

City of Petersburg
COMMISSIONER’S RESPONSE

COMMONWEALTH OF VIRGINIA

May 19, 2020

MAYOR SAMUEL PURNAM
Ms. Aisha R. Forde-Hamilton

City Manager, City of Petersburg
120 North Union Street
Petersburg, Virginia 23803

Be: Compliance with Health Officer Certification Pursuant to Code of Virginia §
19.1-329.1. Drinking water contamination during emergencies

Dear Mayor Purnam and Ms. Forde-Hamilton:

This letter follows our discussion on May 19, 2020, with City Attorney, Anthony Williams, Deputy City Manager, Shannon Trout, the Virginia Department of Health Commissioner for Community Services, Rolfe Hickey, Dr. John Hallett, Deputy Director of the Center for Health Districts and Office of Drinking Water Services, Department of Health. We discussed the response to the emergency declared in your resolution of May 14, 2020, and the City’s need to ensure that drinking water is safe for consumption during the pandemic.

We have discussed the current status of the City’s efforts to ensure safe drinking water for all residents, including the ongoing and upcoming projects to improve water quality.

In summary, the City has received a significant increase in demand for water, which has impacted the resources available for water treatment. The City has implemented measures to ensure that all residents have access to safe drinking water during this time.

We appreciate your ongoing efforts to address the challenges posed by the pandemic and the demand for safe drinking water.

Sincerely,

[Signature]

[Applicant Name]

[Office Title]

[Office Name]

[Office Address]
What are the City’s Options?

1. Since the Commissioner has acknowledged the City’s compliance, why not simply continue to comply with the mandate?

From: City Manager <city.manager@petersburg-va.org>
Sent: Tuesday, May 26, 2020 10:48 AM
To: Anthony Williams <awilliams@petersburg-va.org>
Subject: FW: [Redacted]

Hello

This account was closed by the City for non-payment. The last payment on the account was 6/14/2016. The delinquent amount was and remains $4,193. Persons associated with this property continued to steal water (meter tamper) after disconnection so the meter was pulled on 2019. Because the account was listed as inactive for so many years it would not have appeared on our report to be treated as a “new connection” not a reconnection (as previously stated, properties without running water may be deemed uninhabitable on that basis alone).

See below.
Aretha

[Redacted]
What are the City’s Options?

2. Could we try to discuss/negotiate this with the state?

We have had discussions with the State Health Commissioner and Deputy Commissioner to no avail. During those meetings and in the Mayor’s Response Letter, a request was made for the Governor to meet with us on this to which no response was received. The City Attorney, per Council’s direction, requested through the Health Commissioner’s staff that a meeting be facilitated with City officials and the Governor and Health Commissioner, but no response has been received to date.
What are the City’s Options?

3. Could we simply disregard the unclear requirements of the Health Commissioner’s Mandate?

While it is true that the Health Commissioner has no practical means of direct enforcement short of a Court action for injunctive relief, he has broad regulatory authority which could impact the City’s ability to continue operating a water system.

Injunctive relief by the state could result in fines and civil penalties against the City including costs and attorney’s fees.

Additionally, there would be a likelihood of third-party cases, the number and timing of which would be unknown as well as the likely result.
What are the City’s Options?

- 4. **Could we simply sell the water system to a private entity?**

- Yes. Though the value of the water system may diminish as unpaid and uncollectible water bills continue to accumulate during the COVID-19 crisis under the Health Commissioner’s mandate.
What are the City’s Options?

5. Could we file a lawsuit?

- Yes, the City could initiate a lawsuit in either state or federal court.
- There are advantages and disadvantages to each that may be beyond what Council wishes me to discuss at this time (trial strategy).
- The outcome is uncertain as the State will likely bring a claim of Sovereign Immunity.
- But it will likely aid in getting answers to “Why Petersburg?” and ensure that an effort is being made to defend the interests of the City and the rights of our citizens.
THE END

QUESTIONS?