

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 80 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 § 44-146.16 of the *Code of Virginia (Code)*. By virtue of the authority vested in me by Article V, Section 7 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.
- D. Activation of § 59.1-525 *et seq.* of the *Code* related to price gouging.
- 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 sooner amended 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

Attest:


Kelly Thomasson, Secretary of the Commonwealth



CORONAVIRUS CURRENT STATISTICS IN COMMONWEALTH OF VIRGINIA



**VIRGINIA'S
HEALTH
IS IN YOUR
HANDS.**

Do your part,
stay at home.

COVID-19 Cases in Virginia



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

**Total
Cases***

39,342

Confirmed+
37,440

Probable+
1,902

**Total
Hospitalizations****

4,325

Confirmed+
4,294

Probable+
31

**Total
Deaths**

1,236

Confirmed+
1,175

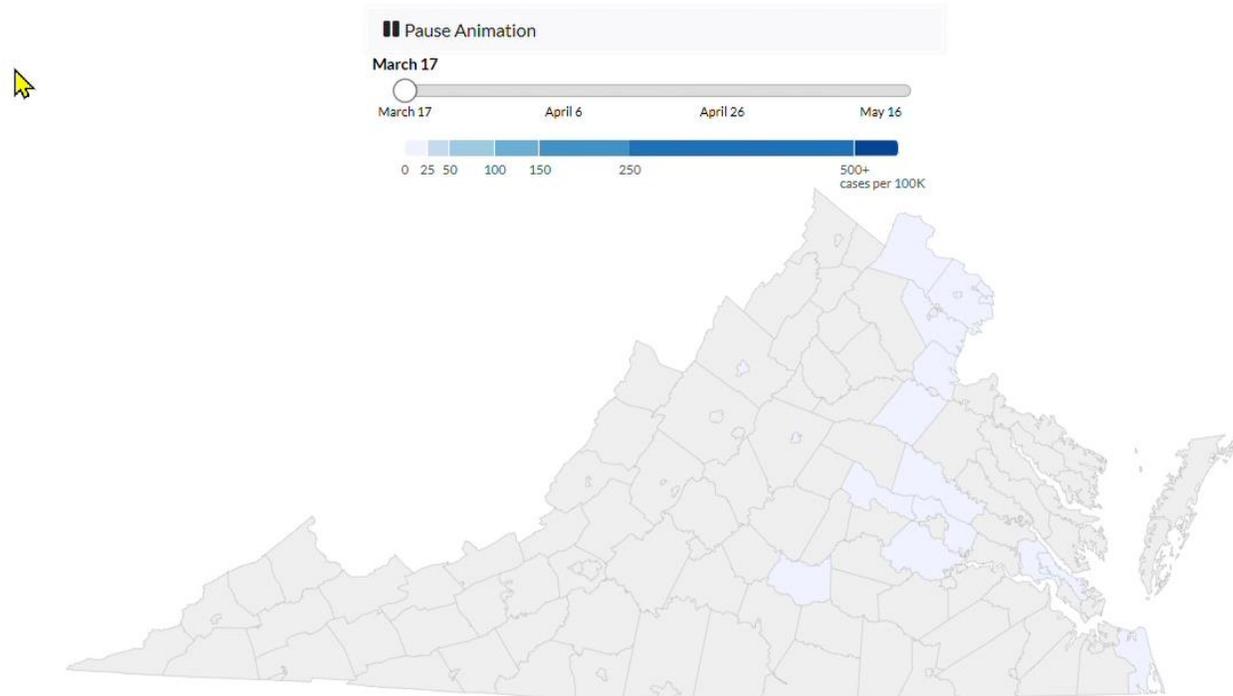
Probable+
61



COVID-19 SPREAD ACROSS THE COMMONWEALTH OF VIRGINIA

Spread of COVID-19

Time lapse shows when cases were reported.



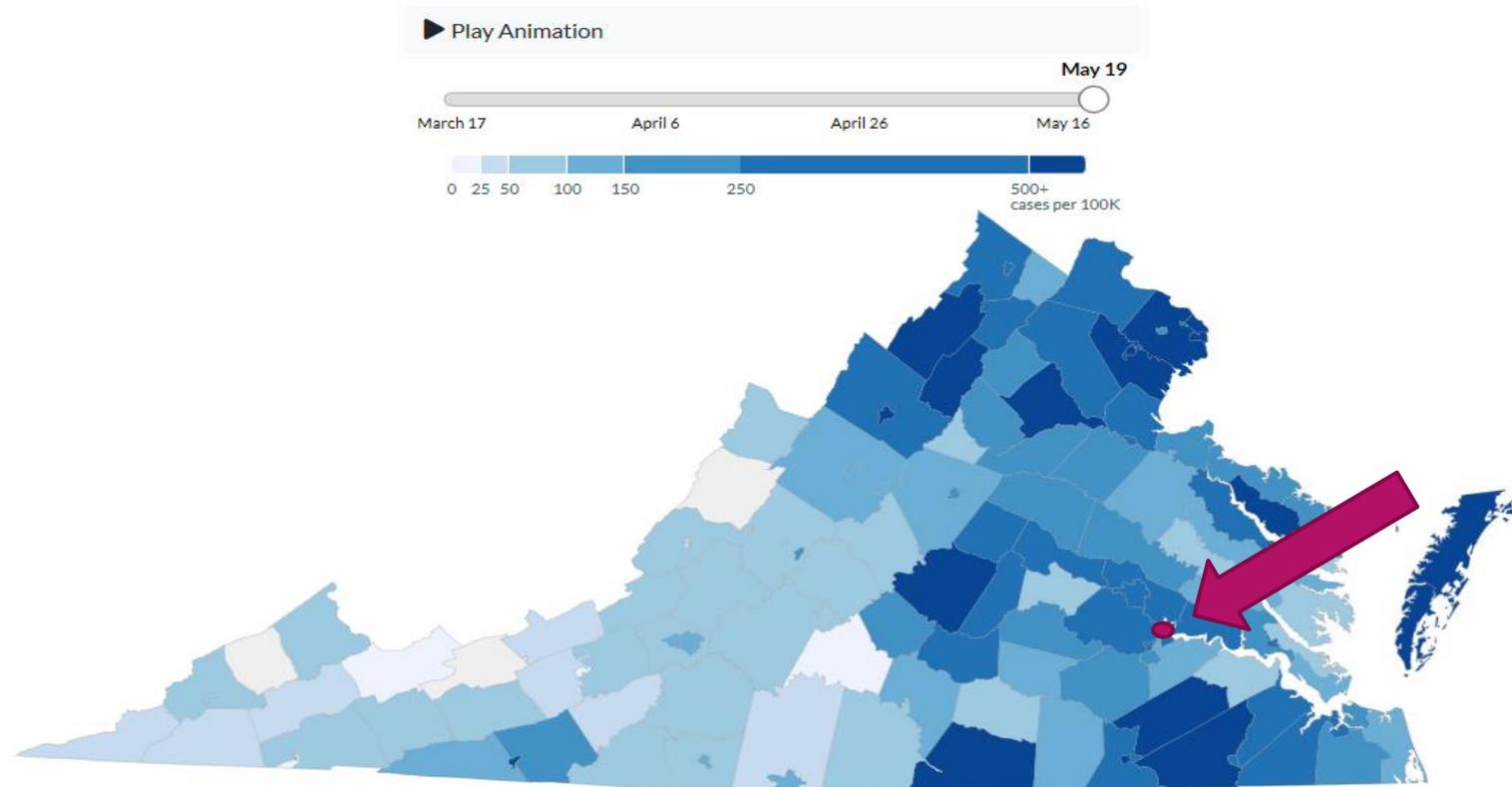
500 or more cases per 100,000



COVID-19 SPREAD ACROSS THE COMMONWEALTH OF VIRGINIA

Spread of COVID-19

Time lapse shows when cases were reported.

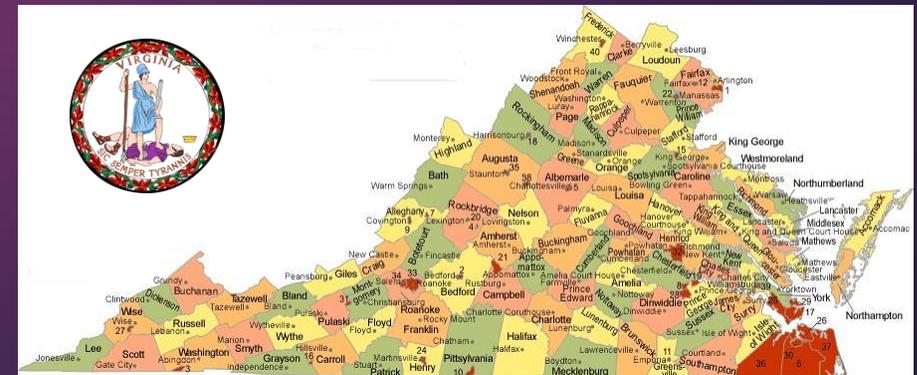


INDEPENDENT LOCALITIES IN VIRGINIA

▶ 133 Independent Localities in the Commonwealth of Virginia

▶ 95 Counties

▶ 38 Cities



COVID-19 STATISTICS FROM VDH WEBSITE ON MAY 26, 2020

	COMMONWEALTH OF VIRGINIA	PETERSBURG
▶ POPULATION:	8,536,000	32,326
▶ CASES:	39,342	96
▶ HOSPITALIZATIONS:	4,325	22
▶ DEATHS:	1,236	2
▶ CASES/POPULATION	.004	.002
▶ HOSPITAL/POPULATION X 1000	.507	.680
▶ DEATHS/POPULATION X 1000	.144	.061



WATERWORKS – (data VDH Publication 4/29/2020

- ▶ 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.



WATERWORKS (Data –as of May 15, 2020)

- ▶ 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.



State Health Commissioner's Letter and Certification

May 10, 2020

Health Officer Certification Pursuant to Code of Virginia §§ 15.2-2119(D) and 15.2-2119.4(D) – Shutting Off Water Will Endanger Health

WHEREAS, Virginia is currently in the midst of the 2019 novel coronavirus (COVID-19) pandemic;

WHEREAS, both the Governor of Virginia and the State Health Commissioner have taken numerous steps to try to slow the spread of this highly transmissible and potentially deadly virus in Virginia;

WHEREAS, on February 7, 2020, the State Health Commissioner issued a Declaration of the 2019 Novel Coronavirus Infection as a Communicable Disease of Public Health Threat for Virginia;

WHEREAS, on March 12, 2020, the Governor of Virginia issued a state of emergency due to the spread of COVID-19;

WHEREAS, on March 17, 2020, the Governor of Virginia and the State Health Commissioner issued Order of Public Health Emergency One (Health Order No. 1), which took significant action in an effort to limit the virus's spread;

WHEREAS, the Governor of Virginia has subsequently executed additional Executive Orders and the State Health Commissioner has issued additional Orders of Public Health Emergency in response to the COVID-19 pandemic; and

WHEREAS, Petersburg residents are at a special risk. The Robert Wood Johnson Foundation's 2020 annual report ranks Petersburg 132 out of 133 Virginia localities in health. Petersburg is one of the least healthy places in Virginia. Petersburg's population struggles with obesity and poverty, which can increase risks of severe illness from the pandemic. Access to running water helps improve hygiene. Running water helps ensure persons can easily and routinely wash their hands and clothes. People need water to keep a sanitary residence and protect themselves and others. All data and recommendations point to the need for running water to reduce risks from the COVID-19 pandemic, especially in Petersburg given its low health ranking.

WHEREAS, without running water, Petersburg residents are at higher risk for serious illness from COVID-19. Residents must stay at home and frequently wash their hands. Persons with long-term health problems or other chronic conditions, the elderly, and those who are immuno-compromised must have running water to protect themselves and prevent the spread of the disease. People of any age who have serious underlying health conditions are at higher risk for severe illness from COVID-19. Residents must stay home as much as possible and running water is a necessity to protect the safety and health of the community.

Ms. Artha R. Ferrell-Benavides
May 10, 2020
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Health Officer Certification
May 10, 2020
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WHEREAS, persons without water are at greater risk of COVID-19. Residents without running water cannot adequately protect themselves or others from COVID-19. Citizens must frequently and routinely wash and clean to prevent illness. The Virginia Department of Health and the Centers for Disease Control and Prevention (CDC) have significant information on their websites about how highly infectious and contagious COVID-19 is and have recommended frequent hand washing to prevent the spread of the disease and to protect oneself from COVID-19.

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.

As such, and in accordance with my certification as a health officer, the City of Petersburg may not cease to provide water during the COVID-19 pandemic to any occupied residence without water service. The City of Petersburg shall provide running water to all occupied residents in Petersburg until the state of emergency declared by Governor Northam in Executive Order 51 is over.

M. Norman Oliver MD
M. Norman Oliver, M.D., M.A.
State Health Commissioner

¹ Code of Virginia § 15.2-2119(D) allows a locality to cease providing water to the owner of real estate when the owner has not paid the full amount due within a certain time period "unless the health officers certify that shutting off the water will endanger the health of the occupants of the premises or the health of others."
² Code of Virginia § 15.2-2119.4(D), in the context of failure by a lessee or tenant to pay the full amount due for water provided, allows a locality to cease providing water "unless the health officers certify that shutting off the water will endanger the health of the occupants of the premises or the health of others."

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.



Legal Authority Cited by Health Commissioner

	Ms. Aretha R. Ferrell-Benavides May 10, 2020 Page
M. Norm State H 176 May 10, 2020 Health Officer Certification Pursuant to	Health Officer Certification May 10, 2020 Colla

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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?

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Health Officer Certification
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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



CITY RESPONSE TO HEALTH COMMISSIONER'S LETTER AND CERTIFICATION



Samuel Parham, Mayor

City of Petersburg

Telephone: (804) 733-2305
City Hall
135 North Union Street
Petersburg, Virginia 23803

sparham@petersburg-va.org

May 14, 2020

VIRGINIA DEPARTMENT OF HEALTH
Attn: Dr. M. Norman Oliver, MD, MA, State Health Commissioner
P.O. Box 2448
Richmond, VA 23218

Re: State Health Commissioner Certification Issued to
The City of Petersburg, Virginia on May 10, 2020

Dear Dr. Oliver:

City Council for the City of Petersburg and the City's Administration have reviewed the May 10, 2020 letter and the accompanying Health Officer Certification commanding a moratorium on water utility shut-offs as well as restoration of accounts that were turned off for nonpayment more than two months in advance of the Declaration of Emergency made by the Governor. Through this mandate, it is our understanding that the state government is commanding that all occupied dwellings in the City be provided water service regardless of their payment status.

Based on the telephone conferences with the Deputy State Health Commissioner held yesterday, and a follow-up telephone conference with you, Petersburg officials have learned (1) that no other locality in the Commonwealth has been issued such a Certification by the State Health Commissioner; (2) that the State Health Department has made no similar mandate to any other locality or utility in the Commonwealth; (3) that the letter and Certification issued by the State Health Commissioner to the City of Petersburg were originated by a contact made by Delegate Lashrese Aird and a single citizen; (4) that no specific follow-up investigation concerning the health condition of any citizen was done based on the foregoing contacts; (5) that the letter and Certification are not based on any health factor associated with any known individual who would be directly impacted by the mandate; and (6) that the letter and Certification are not based on any health-related statistics with respect to the City of Petersburg other than the fact cited in the letter and Certification (that Petersburg residents struggle with obesity and poverty).

1 of 3

In fact, the City of Petersburg would maintain that compared to most cities across the state if not the entire country, its billing and collection practices are far more lenient. The City of Petersburg has 12,850 water accounts with 3,210 delinquent accounts exceeding 90 days past due which represents \$3,249,791.00 in uncollected revenues. Some customers who have delinquencies exceeding two years continue to have water service provided by the City of Petersburg. The last series of water utility shut-offs by the City occurred during the period of July 1, 2019 through January 31, 2020. Since January 31, 2020 (fifty-eight days prior to the Governor's declaration of emergency in relation to the COVID-19 crisis), there has not been a single water utility shut off in the City of Petersburg. Notwithstanding, at the time of the Governor's Declaration of Emergency, there were 264 accounts in suspended status. Of those 264 accounts, the City Manager and her staff personally sought verification of the status and found that 90 were confirmed to be vacant properties; 8 were suspected to be vacant properties; 5 were closed at the request of the account holder; and 147 were found to have reconnected their water without record of authorization by the City. Under §18.2-163 of the Code of Virginia, if anyone, without authorization from the City, tampers with their meter to divert or obtain service after they have been disconnected, it constitutes a Class 1 Misdemeanor which is punishable by up to 12 months in jail and/or a fine \$2,500 in addition to the imposition of civil liability.

Of the remaining 14 accounts, as of the date of this release, 4 have reconnection without record of authorization by the City; 5 were reconnected by the City on May 12, 2020, 3 are under review for reconnection as of the date of this release, and 2 are in such a condition that the plumbing facility for the residence is unable to accept water service. In short, there are currently three 3 accounts of the 12,850 in which the water was shut off prior to the declaration of emergency by the Governor, which are believed by the City to be occupied, and for which water service has not yet been restored by the City.

Petersburg arguably has the most lenient collection practices in the Commonwealth, and the most flexible practices associated with continuing service notwithstanding delinquencies. Accordingly, having been singled out as the only locality in the state to be required by the State Health Commissioner not only to cease shut-offs during the Emergency Declaration, but also to retroactively restore services is troubling. Particularly where State Health Officials made no investigation whatsoever with regard to the health of individual residents impacted by this mandate and made no efforts determine whether or not the structures were occupied or capable of receiving water service. Accordingly, this action is believed by the City to far exceed the authority granted to the State Health Commissioner under the Code of Virginia.

2 of 3

During our telephone conference, when City Officials inquired directly to you "why Petersburg and no one else?" You simply replied citing the fact that Petersburg residents had a higher poverty rate and higher obesity levels than other localities. Not that the City has a higher infection rate for COVID-19, not that the City has a higher mortality rate for COVID-19.

Moreover, while the Code Sections cited in the letter and Certification do preclude a locality from terminating water service where such a Certification has previously been made for an individual whose health or safety would be endangered by the cessation of service, the City does not agree that these provisions allow for a blanket mandate to supply free services absent any specific health data on identified individuals. Indeed, at the time of issuing this letter and Certification, the State had taken no action to determine who could be specifically at risk from cessation of services or even whether or not the impacted properties were even occupied at all.

Notwithstanding, the City, in an effort to work in the spirit of cooperation, has gone door-to-door to ensure that those in need are receiving services. Some members of the governing body have reached out to individuals and community organizations to facilitate charitable donations to cover the cost of restoration and continued service.

It was and remains the hope of the City to work together with the State Government to ensure the health, safety, and welfare of Petersburg residents. To this end, the City is respectfully requesting that you rescind the Certification, and by copy of this letter, I am reiterating my request on behalf of the City that Governor Ralph Northam engage in discussions with me and the City Manager in order to help facilitate rescission of the May 10, 2020 letter and Certification.

Sincerely,


Samuel Parham, Mayor
City of Petersburg, Virginia

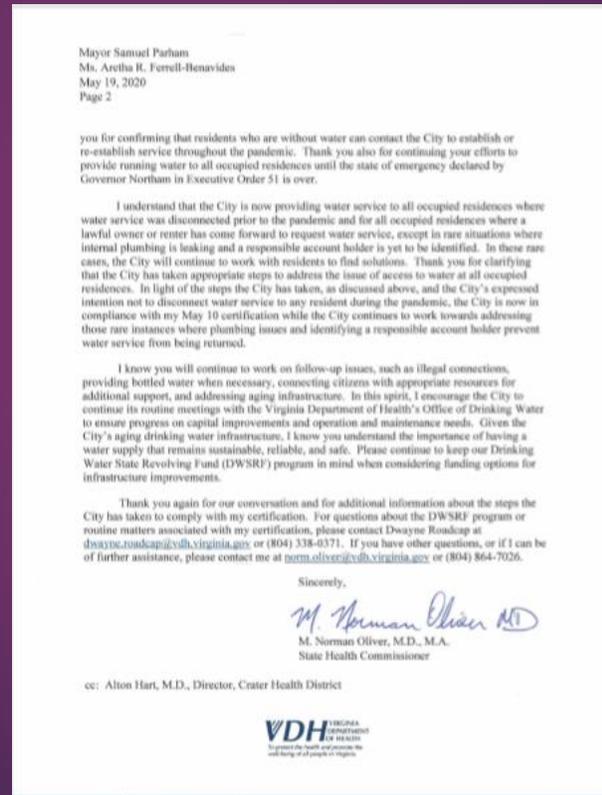
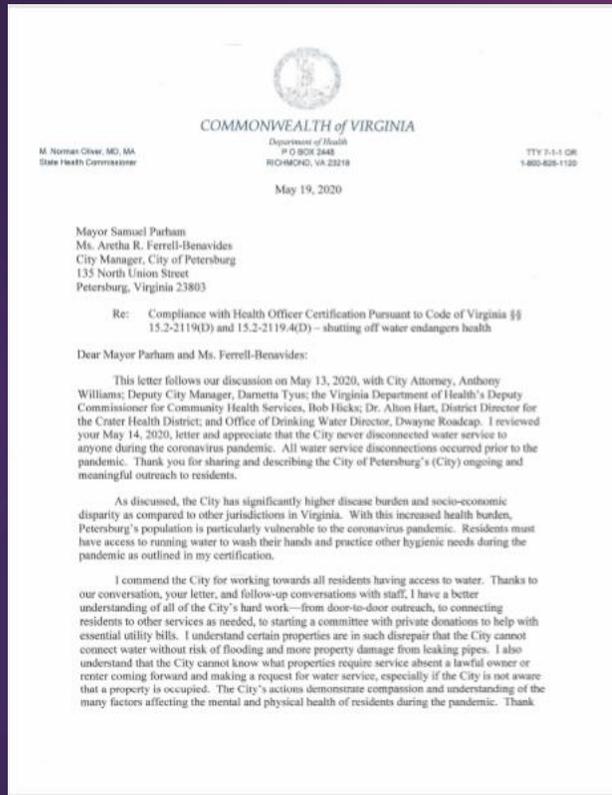

Aretha Ferrell Benavides,
City Manager

CC: Governor Ralph Northam
Honorable Members of Petersburg City Council
Aretha Ferrell Benavides, City Manager
Anthony C. Williams, City Attorney

3 of 3

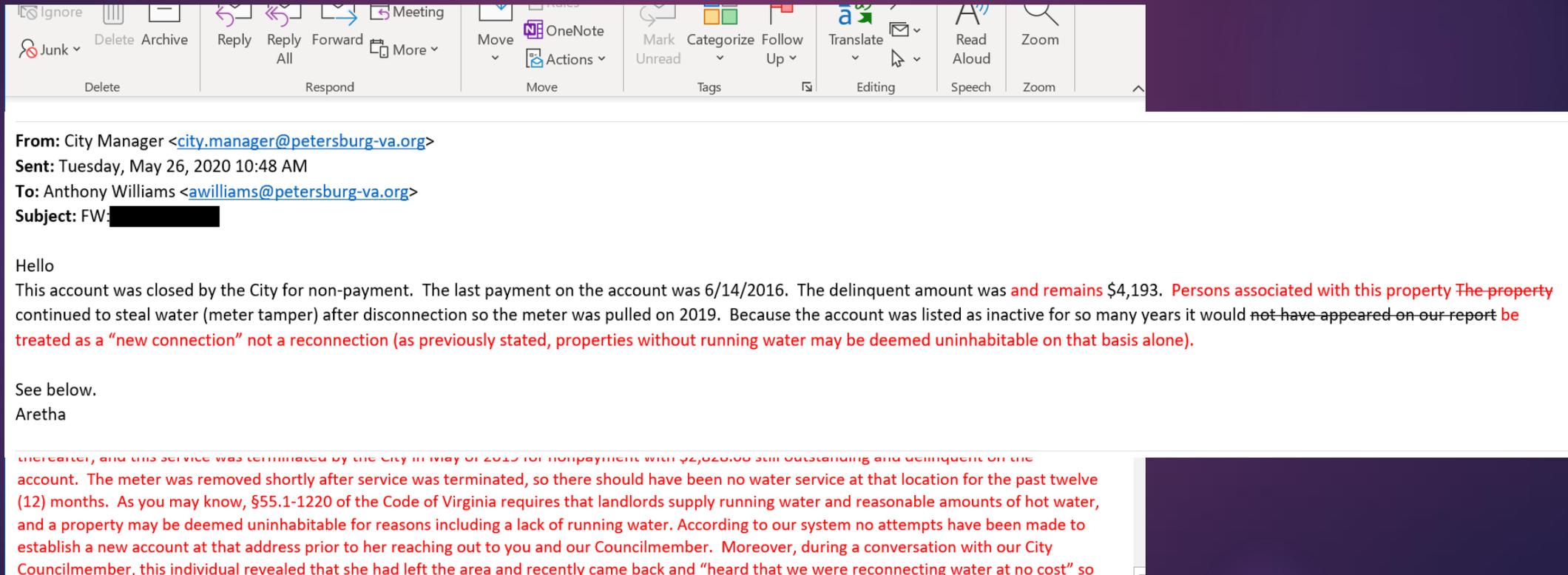


COMMISSIONER'S RESPONSE



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?



The screenshot shows an email interface with a toolbar at the top containing various actions like Ignore, Delete, Archive, Reply, Forward, Meeting, Move, OneNote, Mark Unread, Categorize, Follow Up, Translate, Read Aloud, and Zoom. Below the toolbar, the email header includes:

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]

The body of the email begins with "Hello" and contains the following text:

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 The 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 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

The bottom portion of the screenshot shows a redacted area with some text visible in red, including: "thereafter, and this service was terminated by the City in May of 2019 for non-payment with \$2,020.00 still outstanding and delinquent on the account. The meter was removed shortly after service was terminated, so there should have been no water service at that location for the past twelve (12) months. As you may know, §55.1-1220 of the Code of Virginia requires that landlords supply running water and reasonable amounts of hot water, and a property may be deemed uninhabitable for reasons including a lack of running water. According to our system no attempts have been made to establish a new account at that address prior to her reaching out to you and our Councilmember. Moreover, during a conversation with our City Councilmember, this individual revealed that she had left the area and recently came back and "heard that we were reconnecting water at no cost" so



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?

