



MEMORANDUM

TO: Timothy J. Baroody, City Manager

FROM: Kathleen Dooley, City Attorney

DATE: March 17, 2020

RE: Authority to issue local emergency orders

Issue:

You have asked whether you have authority to issue local emergency orders in response to the COVID-19 public health declaration of emergency. The Governor has issued a Declaration of Emergency under Va. Code §44-146.17, and you have issued a Local Declaration of Emergency under Va. Code §44-146.21. City Council is scheduled to hold a special session on March 20, 2020, in part to confirm the local declaration of emergency. You have asked specifically about proposed Emergency Order #1, which you propose to issue today.

Summary of advice:

Yes, there are several overlapping and mutually-reinforcing sources of legal authority to issue local emergency orders, including proposed Emergency Order #1. Since the Governor has issued a Declaration of Emergency, local emergency orders are subject to the “supervision and control” of the Governor or his designated representative (Virginia Department of Emergency Management). They may not conflict with orders issued by the Governor or state law, and they must be reasonable measures to protect the health and safety of persons. Specifically, local authority does extend to orders with regard to the operation of local restaurants and local gatherings, as requested by Dr. Michael McDermott, Director of Mary

Washington Hospital in his letter of March 16, 2020, and as proposed in draft Emergency Order #1.

Local emergency orders carry the force of law. It is unlawful to refuse or neglect to obey any rules and regulations as proclaimed by the director of emergency management.¹

Background:

- **General authority:**

As City Manager, you are the director of emergency management for the City of Fredericksburg.² As such, you are authorized to issue a local declaration of emergency.³ Whenever a local emergency has been declared, the director of emergency management of each political subdivision may issue orders to “control, restrict, allocate or regulate the . . . sale, production and distribution of food . . . [and to] protect the health and safety of persons . . .”⁴ Whenever the Governor has declared a state of emergency, each political subdivision may, under the supervision and control of the Governor or his designated representative, “protect the health and safety of persons and property.”⁵

The Virginia Emergency Services and Disaster Law (Chapter 3.2 of Title 44 of the Virginia Code) supplements, but does not supersede, other general and specific grants of legal authority to local governments to protect the public health.⁶

Fredericksburg City Charter §22(G) is an express grant of authority by the General Assembly to the City Council “to secure the inhabitants from contagious infection, or other dangerous disease, by quarantine or otherwise.”⁷ City Code §26-36 confers general authority to the director of emergency management to issue orders consistent with Va. Code §44-146.21. City Council will be asked to ratify any emergency order you may issue between now and their special meeting on March 20th.

¹ City Code §26-34.

² City Code §26-32.

³ Va. Code §44-146.21(A).

⁴ Va. Code §44-146.21(C).

⁵ Va. Code §44-146.21(C).

⁶ The Act does not include any provision stating that it controls “notwithstanding” any other provision of law, general or special, nor any provision that local authority is superseded by orders of the Governor or the Governor’s declaration of emergency.

⁷ Fredericksburg City Charter §22, “Enumeration,” subsection (G).

Virginia Code §15.2-1102 is a general grant of power to a municipal corporation to “exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order (etc.) of the inhabitants of the municipality.”⁸ In addition, Va. Code §15.2-1700 provides that “any locality may provide for the protection of its inhabitants and property and for the preservation of peace and good order therein.”

In construing a related provision in former Title 15.1 of the Code of Virginia, the Virginia Supreme described the police powers as “broad discretionary powers to protect the public health and general welfare of its residents,” and commented that “to anticipate seemingly unlikely events . . . as public health hazards may be to exercise commendable prudence and foresight. There is no requirement that protective measures be limited to actions taken after a crisis has arisen or a catastrophic disaster has struck.”⁹ In the present public health crisis, where, as the Governor has just observed, the Commonwealth has experienced cases of “community spread” of COVID-19, the spread of the virus through social contact in local establishments is not “seemingly unlikely” and it can be said that this crisis has actually arisen and catastrophic disaster is unfolding at present.

Additional supplemental state legal authority is found in Va. Code §§15.2-900 and 15.2-1115, which authorize a locality or municipal corporation to compel the abatement or removal of all nuisances. City Council has implemented this authority by adoption of City Code Chapter 59, “Nuisances.” This law defines a “nuisance” as “the doing of any act or the omission to perform any duty, or the permitting of any condition or thing to exist that endangers life or health . . .”¹⁰ It is unlawful to maintain a nuisance in the City of Fredericksburg.¹¹ Under ordinary circumstances, an order to abate a public nuisance is preceded by advance notice, reasonable under the circumstances. However, the City Code expressly authorizes that “when, in the opinion of the designated officer, a nuisance constitutes an imminent,

⁸ Va. Code §15.2-1102.

⁹ *McMabon v. City of Virginia Beach*, 221 Va. 102 (1980).

¹⁰ City Code §59-1, Definitions. And see *City of Virginia Beach v. Murphy*, 239 Va. 353 (1990).

¹¹ City Code §59-3.

substantial or compelling threat to the public health or safety, the notice requirement shall be dispensed with, and the City may abate the nuisance as provided herein.”¹²

- **Limitations on or parameters of legal authority:**
 - **Supervision and control of the Commonwealth:**

Emergency actions of a locality, when the Governor has issued a declaration of emergency, are subject to the “supervision and control” of the Governor or his designated representative.¹³ The Governor has not issued an emergency order restricting gatherings or dine-in services as of this writing, although he has offered direction, advice, and encouragement to limit social contact and even small gatherings.¹⁴

In this case, the City has turned to the Virginia Department of Emergency Management for “supervision and control” of the proposed local emergency order. The Virginia Department of Emergency Management is authorized to “coordinate and administer disaster mitigation, preparedness, response, and recovery plans and programs with the proponent federal, state, and local government agencies and related groups,” to “make necessary recommendations to agencies of the federal, state, or local governments on preventative and preparedness measures designed to eliminated or reduce disasters and their impact,” “determine requirements of the Commonwealth and its political subdivisions for those necessities needed in the event of a declared emergency which are not otherwise readily available,” and “assist state agencies and political subdivisions in establishing and operating . . . disaster preparedness activities.”¹⁵

Therefore, the City’s Coordinator of Emergency Services, Chief Allen, forwarded Dr. McDermott’s letter and the City’s draft emergency order to VDEM for their review and advice. VDEM responded via email on March 16, 2020 at 4:34:41 PM EDT that, while VDEM cannot approve the recommendations, it is in a position to support them, and pledged to provide support and coordination as requested.¹⁶ Chief Allen subsequently sent the City’s draft Emergency Order #1 to VDEM.

¹² City Code §59-5.

¹³ Va. Code §44-146.21(C).

¹⁴ March 17, 2020 at 12:30p.m.

¹⁵ Va. Code §44-146.18(B). A “disaster” includes a “communicable disease of public health threat” as determined by the State Health Commissioner. Va. Code §44-146.16.

¹⁶ See email from Mark Stone of the Virginia Department of Emergency Management, attached.

○ **Reasonableness:**

In addition to the “supervision and control” parameter, the method chosen to implement the express grant of the police power at the local level must be “reasonable.”¹⁷ Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable. Any doubt in the reasonableness of the method selected is resolved in favor of the locality.¹⁸

In this case, your proposed Emergency Order #1 is consistent with guidance issued by public health authorities including the World Health Organization, the United States Centers for Disease Control, and the Virginia Department of Health. It has been requested by the Director of Mary Washington Hospital, and is supported by Dr. Denise Bonds, MD, MPH, Director, Thomas Jefferson Health District, VDH, who is acting in the stead of Dr. Brooke Rossheim, Director of the Rappahannock Regional Health District, who is out sick. It is consistent with the recommendations of the Governor of Virginia, and his express encouragement to local governments to limit large gatherings, included in his original Declaration of Emergency and in subsequent communications on COVID-19.

○ **No conflict:**

Finally, a local emergency order may not conflict with the Constitution and laws of the United States and of the Commonwealth.¹⁹ “It is, of course, fundamental that local ordinances must conform to and not be in conflict with the public policy of the State as embodied in its statutes. Indeed, that principle is embodied in our statutes which require that local ordinances must ‘not be inconsistent with’ the state law.”²⁰ “An ordinance may prohibit an act upon which state law is silent or proscribe conduct already proscribed by state law where the ordinance is not inconsistent with state law. It is well settled that a local legislative body, in the exercise of its police power, may forbid the doing of an act where

¹⁷ See, for example, *Commonwealth v. County Bd. of Arlington County*, 217 Va. 558 (1977) and *Tidewater Ass’n of Homebuilders, Inc. v. City of Virginia Beach*, 241 Va. 114.

¹⁸ *Arlington County v. White*, 259 Va. 708, 712 (2000).

¹⁹ Va. Code §1-248.

²⁰ *King v. Arlington County*, 195 Va. 1084, 1090 (1954).

state legislation is silent on the subject. ‘If either is silent where the other speaks, there can be no conflict between them.’”²¹

With respect to the U.S. and Virginia Constitutional prohibitions on the taking of private property, the law is well settled that the abatement of a nuisance by a public body is not a compensable taking.²² Indeed, proposed Emergency Order #1 is consistent with the actions taken in several states and localities, and consistent with the direction and encouragement of the President of the United States and the Governor of the Commonwealth of Virginia.

Conclusion:

As director of emergency management services and City Manager for the City of Fredericksburg, you have legal authority to implement emergency actions, including the issuance of proposed Emergency Order #1, in response to the COVID-19 public health crisis.

²¹ *King v. Arlington County*, 195 Va. 1084, 1091 (1954). See also *Kisely v. City of Falls Church*, 212 Va. 693, 695 (1972); *Wayside Restaurant, Inc. v. City of Virginia Beach*, 215 Va. 231, 233 (1974); *Board of Supervisors of Loudoun County v. Pumphrey*, 221 Va. 205, 206 - 207 (1980); *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 421 - 422 (1981); *Dail v. York County*, 259 Va. 577, 585 (2000); *West Lewinsville Heights Citizens Ass’n v. Board of Sup’rs of Fairfax County*, 270 Va. 259 (2005); 2007 Va. AG 29; *Bragg Hill Corporation v. City of Fredericksburg*, 831 S.E. 2d 483 (2019).

²² *Lee v. City of Norfolk*, 281 Va. 423 (2011) and authorities cited therein.