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ATTORNEY GENERAL'S GUIDANCE ON LOCAL AUTHORITY AMID COVID-19

The Attorney General's Office has recently received many inquiries from municipal officials regarding their power to protect their communities after Governor Baker declared a state of emergency pursuant to Chapter 639 of the Acts of 1950 (the Civil Defense Act, or "CDA") and G.L. c. 17, § 2A. Municipalities should consult with their municipal counsel in view of the circumstances present in each community and the requirements of any applicable charter, by-law, ordinance, or other law. Subject to that limitation, we offer the following general guidance.

Municipalities have an important role to play in protecting the health and welfare of their citizens. Common ways that they might do so in a public health emergency are discussed below.

1. *Can a municipality impose a curfew?*

Yes. There are several sources of authority for a municipality to adopt a curfew, including:

1. G.L. c. 40, § 37A, which specifically authorizes municipalities to impose curfews of up to 72 hours in cases of "riot or other form of civil disorder," including a continuing series of curfews if certain procedural requirements are met;
2. G.L. c. 40, § 21(1), which authorizes towns to adopt by-laws "[f]or . . . preserving peace and good order";
3. The general municipal police power and/or public health power, which may support the imposition of a curfew by executive order; and

4. The home rule power to adopt ordinances or by-laws that authorize the imposition of curfews, *see* Home Rule Amendment, Mass. Const. amend. art. 2 § 6 (as amended by amend. art. 89).

2. *Can a municipality restrict the movement of vehicles on roads?*

Yes. A municipality “may restrict or prohibit the movement or presence of . . . vehicles . . . in or on public ways and places,” subject to certain limitations, pursuant to G.L. c. 40, § 37A.

3. *Can a municipality further restrict the number of people who gather in one place beyond the 10-person limit established by the Governor?*

Yes. A municipality “may restrict or prohibit the movement or presence of persons . . . in or on public ways and places,” subject to certain limitations, pursuant to G.L. c. 40, § 37A.

4. *Can a municipality require people to wear face coverings in public?*

Yes. A municipality, through its Board of Health, can “use all possible care” to prevent the spread of infection, which may include issuing an order or reasonable regulations to require people to wear face coverings in public. G.L. c. 111, §§ 26-26C, 31, 104. However, the municipality should consider adopting appropriate exemptions for those persons for whom a mask may pose increased health concerns. As an alternative, a municipality may also encourage people to wear face coverings in public on an advisory basis.

5. *Can a municipality order the National Guard to patrol in its community?*

Not directly, and because their use may be reimbursable by federal disaster relief, requests for the National Guard should be made through MEMA. Specifically, in certain situations involving “public catastrophe or natural disaster,” or where civilian law enforcement needs additional support, a sheriff, mayor, city manager, or selectmen may request - through MEMA - the National Guard “to aid the civil authorit[ies]” G.L. c. 33, § 41.

7. *Who has the authority to enforce the Governor’s Executive Order on “Essential Services”?*

When the Governor first established the “Essential Services” Order on March 23, 2020, he stated that enforcement would be handled primarily at the local level. Therefore, Mayors, City Managers, Town Managers and Town Administrators have the authority to make the enforcement decisions necessary to carry out this Order in their respective municipality.

For a business not covered under the Governor’s “COVID-19 Essential Services” Order and accompanying guidance, a designation request can be made at www.mass.gov/forms/essential-service-designation-request . And any questions can be directed to covid19.biz@mass.gov.

8. *Can a municipal order or advisory be preempted or overruled by an action of the Governor?*

Yes. In a state of emergency, the CDA deems inoperative any ordinance, by-law, municipal order or advisory that is inconsistent with an Order of the Governor.

Specific to curfews and other municipal restrictions on traffic and public gatherings authorized under G.L. c. 40, § 37A, that same statute also authorizes the Governor to modify or revoke a municipally-imposed curfew or restriction on traffic when (as is currently the case) he is acting under authority granted to him under the CDA.

However, this should **not** deter a municipality from enacting an advisory or order in the absence of gubernatorial action. Municipalities may have different needs than what may be necessary statewide, and municipal leaders are well positioned to know their specific municipality’s needs.

9. *Can a municipality issue an “advisory” rather than an “order”?*

Yes. An “advisory” is just that – advice from municipal officials about what citizens ought to do or not do. For example, municipalities may consider issuing advisories urging residents to wear face masks in public, comply with a curfew, or other actions addressed in this Guidance. A municipal advisory is a powerful tool that leverages municipal leaders’ “bully pulpit” and their connections to their community.

We encourage municipalities to consult with municipal counsel when considering the issuance of an advisory.

10. *Can a town delay its Town Meeting?*

Yes. If the warrant for a Town Meeting has not yet been posted in accordance with G.L. c. 39, § 10, the selectmen may vote to delay the date of the meeting.

If the warrant was previously posted, the recently-enacted Chapter 53 of the Acts of 2020, authorizes the moderator to delay the meeting for a period of up to 30 days, with the option to renew the delay for periods of up to 30 days at a time. The amendments contained in Chapter 53 require that the meeting be convened within 30 days of the rescission of the declaration of emergency and, subject to that limitation, permit the meeting to occur later than June 30. The legislation establishes procedural requirements including notice to the Attorney General of the delay.

11. *Do we still need to follow the Open Meeting Law?*

Yes, but the law has been modified. The Governor issued an Executive Order on March 12, 2020 that relieves public bodies from the requirement in the Open Meeting Law that meetings be conducted in a public place that is open and physically accessible to the public, provided that the public body makes provision to ensure public access to the deliberations of the public body through adequate, alternative means. “Adequate, alternative means” may include, without limitation, providing public access through telephone, internet, or satellite enabled audio or video conferencing or any other technology that enables the public to clearly follow the proceedings of the public body in real time. A municipal public body that for reasons of economic hardship and despite best efforts is unable to provide alternative means of public access in real time may instead post on its municipal website a full and complete transcript, recording, or other comprehensive record of the proceedings as soon as practicable afterwards.

In addition, all members of a public body may participate in a meeting remotely; the Open Meeting Law’s requirement that a quorum of the body and the chair be physically present at the meeting location is suspended.

All other provisions of the Open Meeting Law, such as the requirements regarding posting notice of meetings and creating and maintaining accurate meeting minutes, as well as the limited, enumerated purposes for holding an executive session, remain in effect.

If you have any questions, please do not hesitate to contact Alicia Rebello-Pradas, Chief of Policy and Government at (617) 963-2057 or at alicia.rebello-pradas@mass.gov.