

Governor Baker Declares a State of Emergency in Response to Spread of Novel Coronavirus COVID-19

By now, you have likely heard about Governor Baker's issuance of Executive Order No. 591 yesterday afternoon, declaring a State of Emergency, in response to the growing number of presumed positive cases of COVID-19 in Massachusetts. This declaration is in effect until further notice, and will be revisited in 30 days, if not sooner. Amongst other things, the Governor recommended that "large" group activities should be limited, if possible, and, further, that persons who are likely to be highly susceptible to the COVID-19 virus not participate in such group activities.

While this declaration enables the Governor to take or authorize certain emergency actions at the state level, including imposing curfews, travel bans, and road and building closures, it does not confer upon local chief executive officers any similar authorities. In many communities, administrative and executive officials have been examining their emergency response plans in recent days, to determine what actions may be authorized at the local level in response to the spread of COVID-19. The Governor's declaration of a State of Emergency reinforces the need for communities to have reasonably and thoughtfully considered how its elected and appointed officials and personnel will respond to this fast moving and continuously evolving situation. We suggest that whenever possible, you choose approaches that are limited, practical and planned, and avoid reactionary responses. While we all need to be prepared to respond quickly to this rapidly-changing landscape, we also need to be mindful that we cannot predict what the situation will be in a week or a month, and therefore, we also suggest limiting decision-making to matters for which immediate decisions or planning must be addressed.

The conduct of municipal and other governmental operations is subject to significant statutory and regulatory governance. There may be compromises that have to be made; each situation must be carefully analyzed on a case by case basis, balancing the relative benefits and harms of action or inaction.

In order to assist you in your emergency preparedness efforts, we have compiled some useful information. We will continue to update this information as necessary and appropriate, particularly in light of any new legislative, judicial, or administrative agency action(s). Also, to the extent we are able, we will also post updates on our website at www.k-plaw.com.

Coronavirus "hotline": In addition to the information provided below, we have designated a group of KP Law attorneys to respond to your coronavirus questions on an expedited basis. Those attorneys are: Janelle M. Austin, Gregg J. Corbo, Deborah I. Ecker, Lauren F. Goldberg, Michele E. Randazzo, and Mark R. Reich. They can be reached via a dedicated e-mail address, coronavirusinfo@k-plaw.com. One of these designated attorneys will respond promptly to your inquiries. In some instances, you may be referred to your primary or labor contact, and you should of course feel free to contact your primary and/or labor attorney(s) directly with COVID-19 related questions.

Updated Information on COVID-19: The state's website, at <https://www.mass.gov/resource/information-on-the-outbreak-of-coronavirus-disease-2019-covid-19>, contains the latest information from the Department of Public

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Health. The federal Centers for Disease Control (“CDC”) website can be accessed at the following link:
<https://www.cdc.gov/coronavirus/2019-nCoV/index.html>.

Emergency Powers of Municipalities: [Click here](#) for our summary of the Emergency Powers of Municipalities. This summary covers such topics as emergency waivers from public bidding and procurement laws, expenditure of monies in excess of existing appropriations to address “major disasters,” and the imposition of local curfews. Be reminded that the Governor’s declaration does not automatically grant similar authority to cities and towns. To the extent that there is interest in declaring a “local” state of emergency, analyzing what action can or should be taken as a result thereof involves analysis of a municipality’s emergency powers generally, and the particular issue being addressed.

Board of Health Authority to Address COVID-19: We have received many questions about the role of local boards of health with respect to infectious diseases. Of course, as you are well aware, effective emergency response plans include a coordination of efforts on the part of all public health and safety personnel, as well as with the municipality’s executive branch, and throughout all levels of government. We will provide more detailed guidance as to the powers and duties of local boards of health in a separate document.

Rescheduling or Continuation of Upcoming Town Meetings: As we approach the spring town meeting season, some towns are deciding whether they should reschedule or postpone town meeting, particularly in those towns with early meetings. The process for rescheduling or postponing town meeting depends upon whether the warrant for the meeting has been posted or not.

1. If the warrant for Town Meeting has not been posted:
 - a. If the date of town meeting is not set by charter or bylaw, the Board of Selectmen/ Selectboard can delay scheduling the meeting, in order to see how the situation develops; or
 - b. If the date of town meeting is set by charter, special act or bylaw, G.L. c.39, §9, authorizes the Board, notwithstanding the same, to hold town meeting at a date later than normal, and absent further legislative or judicial action, on or before June 30, 2020. If a municipality experiences circumstances that make it very difficult or impossible to meet this June 30th deadline, there may be legislative, judicial and/or administrative options to address that community-specific situation.
2. If the warrant for town meeting has been posted:
 - a. There is a specific process under which the Moderator, may, in advance, recess and continue town meeting due to weather-related or public safety emergencies. That process is set forth in G.L. c.39, §10A. [Click here](#) for our summary of that process.
 - b. The traditional process for continuing Town Meeting may be used when no quorum is required, i.e., the Moderator and Town Clerk appear for the meeting with one or two others, a vote is taken to continue the meeting to a specified time, date and place. Often, tools such as running a banner on cable tv, on the Town’s website, or even use of reverse 911 can help to “get the word out”.

- c. If a meeting is already underway, in accord with G.L. c.39, §10, the Moderator may, if they determine that qualified voters are being excluded for whatever reason, with the approval of the Board, recess the meeting to another date, not later than fourteen days following the date of said meeting,

Town Elections: Unlike for Town Meetings, there is no ready statutory mechanism by which Town Elections can be postponed or rescheduled. As recently as yesterday, the State Elections Division contacted city/town clerks with respect to contingency planning for elections and town meetings. We further understand that the Elections Division expects to re-file legislation that it generally files annually, to provide it with authority to postpone or reschedule an election, and make temporary changes to process, to allow for the orderly administration of elections. In the meantime, however, changes cannot be made to the schedule and process for upcoming town elections, unless and until further authorization is received from the Legislature and/or the courts, as necessary. If a municipality is interested in changing the date of its election, because it is concerned that it will not have a sufficient number of poll workers, or that turnout will be low, for example, this statutory scheme and these practical issues must be analyzed to determine whether some reasonable approach can be taken. As of this writing it has been reported that the Secretary of the Commonwealth has filed legislation to address some of these issues.

Conducting, Rescheduling, or Continuing Public Meetings (other than Town Meetings): You will likely be faced with questions concerning the postponement or cancellation of meetings of public bodies, including “public hearings.” As a general rule, “public meetings” need only comply with the notice and posting requirements under the Open Meeting Law (“OML”), while “public hearings” often have additional notice, posting, and in some instance, advertising, requirements. Local charter, special act, or by-law/ordinance provisions may provide even further community-specific notice, posting, and/or publication requirements for either public meetings or public hearings, or both. It is, of course, possible that the Division of Open Government could relax the rules on remote participation, or provide other guidance concerning what constitutes an “emergency” for purposes of the law, which may help communities avoid cancellation of meetings. Such guidance would likely “alter” the general rules typically applicable to holding open meetings. Even if such guidance is issued, we recommend complying with the law to the extent possible to minimize potential challenges.

With that in mind, here are some general considerations when determining whether to cancel, postpone, or continue a public meeting or a public hearing. If the meeting can or should be held, then consider the location of the meeting. What is the anticipated turnout? Does the room provide enough space to allow for social distancing? Can the agenda be shortened to include only those items that are essential? Can some board members participate remotely? Can the meeting be live-streamed or videoed and played on the cable channel? Can relevant documents be posted on the municipality’s website so that persons not in attendance can follow along? Is there a way to use the internet, skype, Facebook live or other streaming service, to allow the public access to the meeting? Has the room in which the meeting is to take place been cleaned and disinfected? Does the municipality have tissues and disinfectant wipes available? Will the meeting notice remind people to stay home if they are sick, exposed to COVID-19, or recently been to a Level III travel warning country?

Also, please note the following:

1. **Public Meeting:** The OML allows for “emergency” meetings that do not comply with the strict notice and posting requirements that otherwise apply to meetings of public bodies. An “emergency” is defined under the OML as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” G.L. c.30A, §18. It is reasonably foreseeable that you may be faced

with a situation calling for an emergency meeting of a public body (such as to determine any necessary local response to a presumed positive or confirmed case of COVID-19 within your community, decide the need for government closures, and/or to exercise emergency powers). In these types of situations, a public body may meet with less than 48 hours' advance notice and posting of the agenda, and in our opinion, may "meet" via telephone where in person attendance is impossible or ill-advised (particularly where a member or members of the public body have been diagnosed with COVID-19 or been exposed to someone so diagnosed). In any event, however, the standard "rules" with respect to emergency meetings still apply – comply with the law to the extent possible. For example, if possible, post the meeting as soon as is reasonable; meet in a public place where the public has access, if possible; take detailed minutes, including taking and recording a roll call on all votes; and, later, ratify, validate and confirm any actions taken at an emergency meeting, at the next-regularly scheduled meeting by including an item on the agenda for such purposes

2. **Public Hearing:** A public hearing is subject to different laws, case law and substantive considerations, in addition to OML requirements. Once notice of a public hearing has been published or provided in accordance with the underlying statutory scheme, cancellation of that hearing can trigger the requirement to re-advertise or re-publish the hearing notice, may require that new notifications to abutters or other parties in interest be mailed (depending upon the applicable statutory requirements), and importantly, may result in a constructive grant or approval, where the public body does not act within statutorily-established deadlines.

Where circumstances dictate that a public hearing ought not to go forward because of weather or other emergency, we typically suggest that the Town Hall or other meeting location be opened for such purposes (where possible), and that a quorum of the board or committee appear at the stated time and place solely for the purpose of opening the hearing and continuing it to a stated time, date and place that also complies with the OML (i.e., at least 48 hours later, not counting weekends and holidays, so that notice under the OML can be posted). If it is not possible for a quorum to meet, we typically advise that less than a quorum could appear for such purposes. We generally take the position that, as a matter of parliamentary procedure, the only action a public body may take when less than a quorum is present is to continue a meeting/hearing to a different time, date and place. Even so, it is always possible that such action could be challenged, and we strongly recommend obtaining the written assent of the applicant to any continuation of a public hearing, whenever possible.

School Closures: In connection with the Governor's declaration of a State of Emergency, the Department of Elementary and Secondary Education ("DESE") has issued guidance relative to school closures, found at <http://www.doe.mass.edu/sfs/emergencyplan/covid19.html>. The guidance provides for relief from certain attendance and school year requirements. We understand that DESE will continue to provide updated information as the situation develops.

Employment Impacts of Government Closures, and Mandated vs. Voluntary Quarantines of Personnel: There are numerous personnel-related questions that arise in the event of a department, building, or government closure, and mandatory or voluntary quarantines. Because of significant local variations in terms of employee demographics, unionized vs. nonunionized staff, and locally-adopted policies, procedures and by-laws, the answers to these questions may not necessarily be the same from community to community. As a result, you are encouraged to contact your Labor Counsel for specific advice as to how to handle the employment impacts of governmental closures and quarantines. We are developing a list of employment-related "Frequently Asked Questions (FAQ)," and we will inform you when that FAQ is available.

Annual Budgets: In the unlikely event that budgets cannot be voted by June 30, 2020, be aware of the following. General Laws c.43, §32, addressing CITY budgets provides, in relevant part, “Notwithstanding any provisions of this section to the contrary, the mayor may submit to the city council a continuing appropriation budget for said city on a month by month basis for a period not to exceed three months if said city has not approved an operating budget for the fiscal year because of circumstances beyond its control.” Similarly, in accord with G.L. c.71, §16B, although preceded by certain other requirements, it appears that there is some precedent for DESE to “certify an amount sufficient for the operation of the district and order the appropriation thereof in an amount not less than 1/12 of the total budget approved by the region in the most recent fiscal year. Similar sums shall be certified and appropriated for each successive month to insure the continued provision of services by the district until such time as a budget is adopted and approved by the regional committee and member towns in the manner otherwise provided herein.” As of this writing, there is no similar statutory authority granted for TOWNS to establish a 1/12 budget.

Access to Counsel: Finally, be aware that in the event our offices, or even our building in Boston, were closed, we will continue to be reachable, whether on our office phones or mobile phones, as well as by e-mail. Should it be needed, we will update our office line to provide dial by name instructions. As noted above, we will also continue to monitor our hotline at coronavirusinfo@k-plaw.com to provide swift answers to pressing problems. To the extent appropriate, we will try to update an FAQ on our website, posting responses to questions that would be useful for all clients.

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