

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE GOVERNOR

STATE HOUSE • ROOM 271
BOSTON, MASSACHUSETTS 02133
TEL: (617) 725-4030 • FAX: (617) 727-8290

GOVERNOR'S LEGAL OFFICE

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

ROBERT C. ROSS
CHIEF LEGAL COUNSEL

MICHAEL A. KANEB
DEPUTY CHIEF LEGAL COUNSEL

ELIZABETH F. DENNISTON
DEPUTY LEGAL COUNSEL

KIRK G. HANSON
DEPUTY LEGAL COUNSEL

NICHOLAS D. BRANDT
DEPUTY LEGAL COUNSEL

LAUREN GREENE PETRIGNO
DEPUTY LEGAL COUNSEL

March 25, 2020

Dear Municipal Chief Executive Officer:

I write to provide guidance regarding the effect of the Governor's March 23, 2020 Order "Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More than 10 People" insofar as the Order intersects with municipal efforts to address the COVID-19 crisis.

The Governor's Essential Services Order has two functions. First, the Order closes a broad range of public spaces, workplaces, and other establishments in order to reduce unnecessary movement of Commonwealth residents outside of the home and, in so doing, limit the spread of this highly contagious and potentially deadly virus. Second, the Order designates a range of critical services and functions as "COVID-19 Essential Services" to ensure their continued operation during the state of emergency in order to protect the public health and welfare of the Commonwealth and support community resilience and continuity of response efforts. Correspondingly, the Order designates workers engaged in delivering these critical services and functions as members of the "COVID-19 Essential Workforce." Taken together, these designations seek to ensure that COVID-19 Essential Services continue without interruption during the period of the declared emergency.

The Baker-Polito Administration recognizes the value of local decision making in most circumstances. Nevertheless, ensuring an effective response to the COVID-19 emergency requires the Administration to prioritize consistency and clarity of action. A key requirement of any effective, statewide response will be that public officials avoid conflicting directives and duplication of efforts. The Massachusetts Civil Defense Act, the authority under which the Governor issued the Order, reflects the necessity for unified statewide directives in a time of crisis. Section 8A of the Act provides that that any rule, regulation, ordinance or by-law issued by a municipality or other political subdivision of the Commonwealth "shall be inoperative" to the extent that such provision is inconsistent with any order issued by the Governor during the period of the emergency.

Accordingly, the Order the Governor signed on Monday includes the following provision to ensure unitary management of this crisis:

This Order supersedes and makes inoperative any order or rule issued by a municipality that will or might in any way impede or interfere with the achievement of the objectives of this Order. With respect to work and travel in particular, any order or rule issued by a municipality is hereby made inoperative to the extent: (1) such municipal order or rule will or might interfere with provisions of this Order ensuring the continued operation of COVID-19 Essential Services; or (2) such municipal order or rule will or might interfere with the free travel anywhere within the Commonwealth of any person who is a member of any COVID-19 Essential Workforce where such travel is made in connection with the ongoing operation of COVID-19 Essential Services.

One important area in which the potential for conflict has presented itself is in questions surrounding the continuing operation of construction projects. A number of municipalities have announced policies to address construction work during the state of emergency that conflict with the terms of the Order. Exhibit A of the Order contains two entries that designate construction projects as COVID-19 Essential Services and identify workers engaged in construction projects as included within the Order's COVID-19 Essential Workforce:

- Guidance: Workers – including contracted vendors – involved in the construction of critical or strategic infrastructure including public works construction, airport operations, water, sewer, gas, electrical, nuclear, oil refining and other critical energy services, roads and highways, public transportation, solid waste collection and removal, and internet, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services)
- Guidance: Construction Workers who support the construction, operation, inspection, and maintenance of construction sites and construction projects (including housing construction)

Accordingly, the Order provides that all construction projects are to “continue operations during the state of emergency, but to do so with allowance for social distancing protocols consistent with guidance provided by the Department of Public Health.” Local policies, regulations, or directives that provide otherwise are in direct conflict with the Order and should be withdrawn.

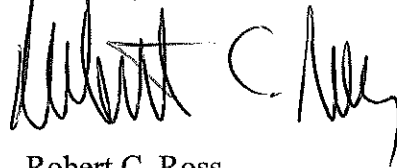
The Baker-Polito Administration is aware that cities and towns and local Boards of Health quite sensibly have raised questions about how to manage the health risks of COVID-19 in the context of an active construction site. In order to address these same concerns, Commonwealth agencies that undertake horizontal and vertical construction have adopted a detailed set of safety practices for all construction projects sponsored or managed by their agencies. The Commonwealth also plans to ensure that each project sponsored or managed by a state agency observes a “safety stand-down day” within the next week. This stand-down is

designed to ensure that all workers involved in the project are familiar with the health safety practices required for the continued operation of Commonwealth construction projects. I am attaching the Commonwealth's construction site safety policy to this guidance for your review. The Administration encourages all cities and towns to issue similar requirements for construction projects undertaken by private owners.

Unitary management in this crisis will be essential to ensuring an appropriate balance statewide between taking actions necessary to combat the spread of COVID-19 and avoiding unnecessary hardships to the public and supporting community resilience over the weeks and months it may take for this crisis to run its course. The economic disruption and interruption in critical services and functions that could result from halting construction projects abruptly would be felt statewide and not simply in the locality where a particular project sits. For these reasons, construction projects should continue as long as they observe social distancing protocols and otherwise can continue to operate safely.

The Baker-Polito Administration recognizes and values the unceasing efforts of local officials to support an effective statewide response to COVID-19. We will continue to work with cities and towns to ensure a consistent application of the Governor's Essential Services Order and to provide for effective enforcement of proper COVID-19 safety protocols at active construction sites.

Sincerely,

A handwritten signature in black ink, appearing to read 'Robert C. Ross', written over a faint, illegible printed name.

Robert C. Ross
Chief Legal Counsel

Cc: Geoffrey Beckwith, Massachusetts Municipal Association

Enclosure