
Dear Eric:

As everyone knows, we are in the midst of a tragically unique threat to public health and safety which has caused our Governor to issue declarations of public health and civil preparedness emergencies throughout the State of Connecticut and a series of follow up Executive Orders beginning with 7 and 7A and as of today numbering sixteen (16), all the way to 7P.

Under our federal system, the police power, the power to act in the interests of the health, safety and welfare of the public, belongs to state governments.

The authority of the Governor to issue this long and growing series of Executive Orders is clear and certain. It comes from the public policy making body of the State of Connecticut, the General Assembly. See, generally, Section 19a-131a of the Connecticut General Statutes regarding “Declaration of public health emergency by Governor,” and Section 28-9 regarding “Civil preparedness or public health emergency; Governor’s powers. Modification or suspension of statutes, regulations or other requirements.”

Pursuant to sections 19a-131a and 28-9(a), the Governor proclaimed a state of emergency on March 10, 2020. Pursuant to section 28-9(b), “[f]ollowing the Governor’s proclamation of a civil preparedness emergency or declaration of a public health emergency pursuant to Section 19a-131a, the Governor may modify or suspend in whole or in part, by order as herein provided, any statute, regulation, or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the expeditious execution of civil preparedness functions “or the protection of public health.” [Emphasis added]

The emergency situation in Connecticut is getting exponentially worse by the day. The Governor recently stated that the “surge” of the disease has started here, and the President of the United States has considered an “enforceable quarantine” of New York, New Jersey and parts of Connecticut.
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At the same time, the Town of Andover is in the midst of its important annual process of adopting a Town budget for the next fiscal year beginning July 1, 2020. In “normal” times, this process is governed by provisions of the Town Charter, most notably Chapter III, Section 303, Annual Town Meeting, Chapter VIII, Section 802, Duties on the Budget, and especially Chapter VIII, section 803, The Annual Town Budget Meeting and Referendum.

At this time, the town/education budget is the responsibility of the members of the Town Board of Finance per Charter Sections 802B and C for their review, public hearing and additional preparation and likely change before they send it to the Section 803A Annual Town Meeting, to be held “on one of the first ten business days of May,” which this year is any such day between May 1 and May 14, 2020.

As you know, several of the Executive Orders issued by the Governor have addressed the process by which Connecticut towns adopt their budgets, but none more than Executive Order No. 71, issued on March 21, 2020. Paragraph 13 of that Order provides in its entirety as follows:

13. Suspension of In-Person Budget Adoption Requirements for Municipalities. Notwithstanding any contrary provision of the Connecticut General Statutes, including Title 7, or any special act, municipal charter, or ordinance that conflicts with this order, the legislative body of a municipality or, in a municipality where the legislative body is a town meeting, the board of selectmen, shall authorize the budget-making authority within said municipality to adopt a budget for the July 1, 2020 – June 30, 2021 fiscal year and to set a mill rate sufficient, in addition to the other estimated yearly income of such town and in addition to such revenue surplus, if any, as may be appropriated, not only to pay the expenses of the municipality for said fiscal year, but also to absorb the revenue deficit of such town, if any, at the beginning of said fiscal year without holding votes required by charter or without complying with any in-person budget adoption requirements, including but not limited to, annual town meetings requiring votes, referendum, and special town meetings. In so acting, the budget making authority of the municipality shall comply with public meeting requirements consistent with requirements set forth in Executive Order 7B and shall thereby take all reasonable steps to publicize the draft municipal budget for said fiscal year and to receive public comment thereon, including but not limited to publishing draft budgets on the website and providing an email address or other means for the public to submit timely comments on the proposed budget. [Emphasis added].
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You have asked me as town attorney for my legal opinion on whether the Governor’s Order No. 71 requires or rather simply suggests that the Town of Andover forego a traditional part of its normal Charter required budget process, that is, the Annual Town Budget Meeting and Referendum, and simply leave it to the Board of Finance, the apparent “budget-making authority,” to process and finally determine with only the level of public input required by Executive Orders 71 and 78, substantial though it may be, leaving the public with considerable input into the budget making process, but ceding control to the duly elected members of the Town of Andover Board of Finance, pending sufficient abatement of the crisis.

On Tuesday, March 24, immediately after holding a virtual town meeting via the internet, the nearby Town of Vernon held an apparently carefully controlled drive-up town meeting in which 55 voters participated to approve by a 54 to one count an initiative to take almost 3 million dollars in previously appropriated funds from their capital nonrecurring account to pay off leases on various town vehicles and avoid interest, a move that had apparently been in the works for several months prior to the COVID-19 crisis.

A much larger town than Andover, Vernon reportedly plans to do their budget referendum on April 28, presumably in much the same way. We shall see what happens with that. By the way, the Vernon drive up vote on March 24 was a town meeting not covered by Executive Order 71, paragraph 13. In an official publication entitled “Frequently Asked Questions on the State of Connecticut’s actions related to COVID-19,” updated to March 25, 2020, it is stated that “The Office of the Governor is examining whether there is a need for further action regarding other elections that are held at town meetings and considering other feedback from municipalities on items or proceedings that may not be covered by EO 7B, 7C and 71.”

Late last week, in our phone conversation, you implied that some in Andover may be wondering why in a smaller town where budget referendum turnouts average in the lower hundreds, the Town of Andover could not follow through on its Town Charter mandated process. It was then that you requested my opinion on application of Executive Order #71, paragraph 13 to the Town of Andover. After substantial legal and other research and due consideration and analysis of such an important legal issue, here is my opinion.

The main question is whether the Governor’s Order No. 71 requires or instead just suggests that the Town of Andover forego a traditional part of its normal Charter required budget process, the Annual Town Budget Meeting and Referendum, and leave it to the Board of Finance to decide. In legal terms, is the Order mandatory or directory? If it is mandatory, the Town lacks discretion to hold the Annual Budget Meeting and Referendum, even if it is done with special safeguards like Vernon used for its town meeting. If it is merely directory, then
Andover could go forward in the usual way, as long as the Town complies with the other elements of any other legitimate emergency order effective now or at the time of whatever event the Town decides to undertake. Given the current nature and extent of the crisis and our public health and safety future in the hopefully shorter run, that could be difficult to do.

The legal analysis must begin with a careful look at and review of the express language of paragraph 13 of Order No. 71. Per Town of Andover Charter Section 301, the Town Meeting is “the legislative body of the Town.” So, in the Andover context, per paragraph 13, “the board of selectmen shall authorize the budget-making authority within said municipality to adopt a budget for the July 1, 2020 – June 30, 20-21 fiscal year . . .” [Emphasis added]. Per Connecticut General Statutes section “7-381. Definitions,” the budget-making authority in any town like Andover which has a board of finance “charged with preparing the budget,” is of course the Board of Finance. See also, Charter section 802B, which expressly refers to the Andover Board of Finance “preparing the proposed budget . . .” [Emphasis added].

With that in mind, at first glance, it seems apparent to the naked eye that Order No. 71, paragraph 13 absolutely requires that the Town of Andover Board of Selectmen must authorize the Board of Finance to adopt the budget without resort to the Annual Town Budget Meeting and Budget Referendum mandated by the Charter in Section 803. But, as set forth in some caselaw of the State of Connecticut, “shall does not always mean shall.” In this context, however, I believe “shall” does mean “shall” here and that the Board of Selectmen has no choice but to authorize the Board of Finance to do what the plain language of paragraph 13 appears to require the Board of Selectmen to do.

The issue of whether “shall” does mean “shall” arises because of Connecticut court decisions like John Doe v. Statewide Grievance Committee, 240 Conn. 671, 681 (1997), that note the proposition that “Definitive words, such as ‘must’ or ‘shall,’ ordinarily express legislative mandates of a nondirectory (in other words, mandatory) nature... We have noted, however, that the use of the word ‘shall’ though significant, does not invariably establish a mandatory duty.” [Emphasis added].

Since most of the separate emergency orders of the Governor pertaining to COVID-19 amount to the override or setting aside of State or municipal legislative provisions, it is appropriate to look to the principles of statutory construction for enlightenment. The Connecticut General Assembly has established rules for the construction of statutes. Connecticut General Statutes section 1-1 “Words and phrases, Construction of Statutes,” begins by asserting that (a) In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language..."
Next, General Statutes section 1-2z is the **Plain meaning rule**. It provides that “The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. [Emphasis added]. Note the General Assembly’s use of “shall” to clearly express this particular mandate. In my view, paragraph 13 of Executive Order 71 is in the final analysis, “plain and unambiguous.”

To digress a bit, one may wonder why, if the Board of Finance is indeed the intended proper authority to prepare and finalize the town budget, why did the Governor bother to require the Board of Selectmen in our instance to “authorize the budget-making authority,” however much of a formality it would be, to require the Board of Finance to prepare and finalize the budget, albeit with substantial input from but not formal control by the voters? Why did the Governor not simply give that authority directly to the Board of Finance in this situation?

There are likely two reasons for that. First, the Board of Selectmen in a town like Andover, per General Statutes section 7-12, **Duties of selectmen**, “shall superintend the concerns of the town.” See also, Charter Chapter IV and especially Chapter IV, Section 406 regarding the **Emergency Powers** of the Andover Board of Selectmen. In Andover, the BOS is in charge. The Governor would have been remiss to ignore the legal axiom that any such emergency action in a town meeting/selectmen town like Andover must begin with the Board of Selectmen, even if such action is just a formality as it seems to be in this case.

Looking back at paragraph 13, another reason why formality action is required to be taken by elected officials with general overall authority like the Andover Board of Selectmen to formally pass full budget responsibility on to the town’s budget-making authority is the fact that some towns having town councils with overall authority other than boards of selectmen like Andover, towns like Mansfield or larger cities like Hartford, Waterbury or New Britain, do not have budget making authorities other than the town council, and so given the way paragraph 13 was written, joining town council towns with board of selectmen towns, any initial action needed to come from the public body with general overall authority.

As noted above, in my opinion, despite the possible “shall means shall?” issue in paragraph 13 of Executive Order 71, the provision is **plain and unambiguous,** and therefore formality action of the Board of Selectmen to authorize the Board of Finance to take control (with public input) of the Town of Andover budget process is mandatory and required and not directory or optional. Nevertheless, per General Statutes section 1-2z, even if the Governor’s Order is not “plain and unambiguous,” enabling a look beyond the words of the Order to its context, the
case in favor of Board of Finance control with substantial public input, but without traditional budget town meeting and referendum control, is even more compelling.

In his very first Executive Order No. 7, dated March 12, 2020, our Governor noted, among other things, that “COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death; and the World Health Organization has declared the COVID-19 outbreak a pandemic; and To reduce spread of COVID-19, the United States Centers for Disease Control and Prevention and the Connecticut Department of Public Health recommend implementation of community mitigation strategies to increase containment of the virus and to slow down the transmission of the virus, including cancellation of large gatherings and social distancing in smaller gatherings.”

On March 14, 2020, Order No. 7B was issued by the Governor, who again noted all of the above, and also, among many other things, noted that “attendance at public meetings and proceedings is likely to increase the risk of transmission of COVID-19,” and also that “the current licensed bed capacity within the State of Connecticut may be insufficient to accommodate and facilitate the safe and effective treatment of individuals diagnosed with COVID-19.”

At the same time, in an obvious response to his expressed concern about “attendance at public meetings,” in paragraph 1 of that Order No. 7B, the Governor did “ORDER AND DIRECT:

1. Suspension of In-Person Open Meeting Requirements. Sections 1-206, 1-225, and 1-226 of the Connecticut General Statutes, and any open meeting provision of any municipal charter, ordinance, or regulation that conflicts with this order, are suspended to the extent necessary to permit any public agency to meet and take such actions authorized by the law without permitting or requiring in-person public access to such meetings, and to hold such meetings or proceedings remotely by conference call, video conference or other technology, . . .”

Paragraph 1 goes on to add a long list of requirements that municipalities must satisfy regarding public involvement in such proceedings in order to be able to be in compliance with the law. These are the same requirements referred to in paragraph 13 of Executive Order no. 7I, fully quoted above, when a town is legally excused from In-Person Budget Adoption Requirements for Municipalities, as required by said paragraph 13.

Next, on March 15, 2020, in Executive Order 7C, after repeating all of the foregoing concerns, among many others, the Governor, using the word “may” rather than “shall” gave local officials
the authority to extend “all municipal budget deadlines for the fiscal year ending June 30, 2021 that fall on any date prior to and including May 15, 2020 . . . by thirty (30) days.”

On information and belief, several towns have already taken the action necessary to extend their budgetary deadlines. Per Town of Andover Charter Section 802, the Board of Finance must complete its proposed budget, hold at least one public hearing by May 1, 2020, and then per Charter Section 803 send the budget to the Annual Town Budget Meeting no later than May 14, 2020. Since both of these events are now scheduled to occur before May 15, the Board of Selectmen is free to extend either or both by up to thirty (30) days.

The COVID-19 crisis is a situation that changes daily. It seems unlikely, but if an extension is approved, we get incredibly lucky, and the Governor’s future Orders somehow permit what now seems forbidden and impossible due to paragraph 13 of Order No. 71, perhaps, unlikely though it may be, a town meeting and referendum could conceivably still occur in the Town of Andover in timely fashion in 2020.

There is much more detail in later editions of the Governor’s Executive Orders that is worthy of note, including but not limited to the closing of bars, malls, and public places of amusement, among other facilities to severely limit in-person public interaction and the even more rapid and extensive spread of this highly contagious deadly disease.

In this context, which is much more pervasive and extensive and dangerous than I need to further explain here, can there be any doubt that the implementation of paragraph 13 of Executive Order 71 is mandatory and not directory, shall and must be complied with, and does not leave it to the discretion of the Town of Andover or any other town to bypass it?

If the health care concerns of the Governor for our people were not enough, we must also pay heed to the economic danger we face from the drastic but admittedly necessary reductions in commerce and employment we must now endure because of COVID-19 and the ramifications it will have for our State and the Town of Andover in combination with our health care crisis.
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The Governor’s plan to help mandate the reduction of public interaction and the spread of disease by declaring a mandatory moratorium on budget town meetings and referenda must also be intended to better ensure that town budgets are developed and created in timely fashion before the end of the current fiscal year, if at all possible, and that local town meeting or referendum budget battles whether in person or by mail or by other means, which seem more likely in these suddenly dire economic times, do not go on into the fall and winter and distract and hinder our municipal governments and employees, especially our valiant local emergency providers, from doing their best as always to help those in medical and other need.

Finally, in paragraph 2 of Executive Order no. 7H, on March 20, the day before the Governor issued Order 71 including paragraph 13, the Governor officially implemented his Coordinated Response Effort, as follows:

“Effective immediately and for the duration of the public health and civil preparedness emergency, notwithstanding Section 28-8a of the Connecticut General Statutes, in order to ensure the coordinated, clear and expeditious execution of civil preparedness functions for the protection of the public health, and pursuant to my emergency powers, including but not limited to Section 28-9(b) of the Connecticut General Statutes, no municipal chief executive officer or designee may enact or enforce any order that conflicts with any of the provisions of any of my Executive Orders or an order issued by an executive agency pursuant to the existing public health and civil preparedness emergency, or issue any shelter-in-place order or order prohibiting travel, unless they first seek and receive written permission from the Department of Emergency Services and Public Protection. The provisions of this order shall not be deemed to invalidate any order previously issued by a municipal chief executive or designee or preclude a municipality from enforcing any existing local rule or ordinance that does not conflict with my executive order issued pursuant to my March 10, 2020 declaration of public health and civil preparedness emergency.” [Emphasis Added].

General Statutes 28-8a, which is partially set aside by the foregoing Order is the statute authorizing local executive authorities to declare and act upon a local state of emergency, action that was properly and effectively taken in Andover with my assistance not long after the Governor declared a state of emergency statewide. Upon information and belief, among many other things, in making the foregoing Order the Governor is apparently seeking consistency of approach among the 169 towns of our State despite their variations, a sensible goal in my view.
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If all that were not enough, in the aforementioned official publication entitled “Frequently Asked Questions on the State of Connecticut’s actions related to COCID-19,” updated to March 25, 2020, on page 30 in a section entitled “Budget Adoption,” the Office of the Governor or the Governor himself has written that “Meanwhile, any budget action that requires an in-person vote of residents or taxpayers is replaced by the provisions of Executive Order 7I.

In my opinion then as town attorney of the Town of Andover, as of this date, the Board of Selectmen of the Town of Andover is legally bound by paragraph 13 of Executive Order 7I, supported by the above quoted paragraph 2 of Executive Order 7H to authorize the Board of Finance to assume full control of the currently ongoing town budgetary process and determination in lieu of the Annual Budget Town Meeting and Referendum required by the Town Charter, but subject to compliance by the Board with the stringent public input requirements of Executive Orders 7I, paragraph 13 and 7B, paragraph 1, regarding public input.

This opinion is subject to change at any time depending upon situational changes and, more important, changes to the law as embodied in the Executive Orders of the Governor as promulgated or amended, or by any other legally authorized means, including but not limited to an exception granted to the Town by the State Department of Emergency Services and Public Protection per Executive Order 7H, paragraph 2, quoted above.

Please share this opinion with the members of the Board of Selectmen and Board of Finance and whoever else in your opinion needs to have it, and let me know if you need any more from me on this now or in the future.

Very truly yours,

[Signature]

Dennis O’Brien
Town Attorney