



**Community Meeting – September 10, 2020  
4:00 p.m.  
Proposed Ordinance #2020-19 – Civil  
Emergency Provisions  
Questions Received with Responses**

**Question #1** - Submitted by Brian Lynch: I wish to request that the borough attorney be made available during the September 10 meeting to address a specific legal issue within the proposed amendments to Petersburg Borough Code Chapter 3.72. Specifically, Section 3.72.060(A)(3) **Prohibit gatherings of persons in excess of a specified number** in relation to church services. The Petersburg Ministerial Association has testified, as have others, that this section violates the First Amendment to the United States Constitution. I wish to have the attorney address this concern and to specifically discuss the Compelling Governmental Interest Test and the associated scrutiny that would be applicable to this section and why, in the case of a civil emergency, restrictions on public gatherings, including church services, would not necessarily violate the First Amendment.

**Reply to Q #1:** The United States Supreme Court, over 115 years ago in the case of Jacobsen v. Massachusetts, held that constitutional rights may be reasonably restricted to combat a public health emergency. Jacobsen addressed a law enacted to combat an outbreak of smallpox, and the Court upheld the law, stating that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Communities have the right to protect themselves against epidemics which threaten their residents, and individual rights may at times "be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Under Jacobsen, emergency measures may be implemented so long as the measures bear some real or substantial relationship to the public health crisis, and do not represent a "plain, palpable" invasion of a clearly protected right.

This test was applied recently in a case brought in California against 'shelter-in-place' orders issued in response to the coronavirus pandemic. The plaintiffs there asserted that the orders violated their right to the free exercise of religion under the First Amendment of the US Constitution. The court held that the orders met the test set out in Jacobson. The restrictions were intended to slow the spread of the virus, and thus had a substantial relationship to the covid-19 pandemic, and the orders did not invade the plaintiffs' free exercise of religion as while they were unable to gather together in-person, they could freely practice their religion by other means, including gathering virtually or by telephone, or practicing with other members of their household.

The court in that case also held that a higher standard of constitutional scrutiny was met -- the rational basis review. This is the test that generally applies to laws that are neutral in their wording and are generally applicable. Under that review, a government must demonstrate that the order is rationally related to a legitimate governmental interest. The court found that the orders were neutral on their face - they did not make reference to or discriminate against any particular religious practice or belief -- and were neutral in their application -- they applied to both religious and secular conduct in an equitable and reasonable way. The court held that the shelter-in-place restrictions were rationally related to the legitimate interest in slowing the spread of covid-19, and thus could be upheld on that basis.

The highest standard of judicial review is known as 'strict scrutiny.' This would apply to laws which were not neutral, or not generally applicable. In other words, the law in some fashion applies to religious beliefs or practices in a manner that is discriminatory or inapplicable to other nonreligious conduct. In those cases, the governmental entity will be required to demonstrate a compelling governmental interest in order to uphold the law.

How does this discussion apply to proposed Ordinance #2020-19, specifically Section 3.72.060(A)(3)? That provision allows the Borough, by emergency order, to prohibit gatherings of persons in excess of a specified number. This could obviously impact the gathering together of individuals for many purposes, including for religious practice. Such an order would be subject to judicial review as outlined above. To protect both individual rights and the public at large, the Borough should ensure that such a gathering restriction relates to the emergency at hand and operates in an equitable and reasonable manner to both religious and nonreligious activity.

So, in short, while individual constitutional rights do not disappear during a public health crisis, it is well-established that those rights can be reasonably restricted. Those restrictions however must be related to and directed at the public health crisis and be nondiscriminatory.

**Question #2** - Submitted by Jeff Meucci: Will adopting this ordinance permanently change life as we know it in Petersburg?

**Reply to Q #2:** No. Life will not change. However, in the event of another emergency, or the extension of Federal, State and Local health mandates or actions related to disasters, the framework would be in place to ensure that procedures and safeguards are followed by the Borough Assembly and staff while acting in a manner consistent with providing for public health and safety. The ordinance at its core allows the Borough to respond to a local emergency in a prescribed fashion. The provisions or prescriptions are not used unless there is an emergency declaration required in Petersburg. Therefore, normal everyday life in Petersburg is unaffected by the ordinance. It is only in times of disaster or emergency when the ordinance could be utilized in order to systematically address the need for public health and safety protections in the preservation of life and property. Having an

organized and pre-planned system for addressing emergencies and disasters is a core function of a local government.

**Question #3** – Submitted by Jeff Meucci: Since we have had the emergency ordinance in effect for the past few months, have we closed any businesses, imposed any curfews, prohibited any gatherings or evacuated persons from designated areas?

**Reply to Q #3:** In the early days of this pandemic, the Assembly passed Public Health Mandate #1, which directed folks to shelter in place as much as possible and closed certain nonessential businesses. That health mandate was almost immediately overtaken by numerous state health orders, and the Borough's health mandate expired about 14 days after it was enacted, on April 9<sup>th</sup>. Since that date, no further local orders have been issued that close non-essential businesses. No local evacuation or curfew orders have been issued, nor orders limiting the number of persons in a single gathering.

**Question #4** – Submitted by Jeff Meucci: If Ordinance #2020-19 is passed in its third reading, will the Borough Assembly have the final say on all matters under the ordinance?

**Reply to Q #4:** Yes. As drafted, the Assembly has the final say on all emergency response matters. This has been the practice throughout the current health emergency. The ordinance does allow for certain actions to be initiated by the Manager or the Incident Commander. These actions would be required under a fast moving and exigent circumstance when it is impractical or impossible to first convene an Assembly meeting to receive direction from the elected body. These more pressing actions could include: evacuation of a specified area, closure of a road or area to travel in the case of a danger caused by an earthquake or tsunami, and other provisions not listed but that might be needed to immediately protect life and property. However, all actions by borough staff in the protection of life and property can be quickly removed, canceled or modified by the Assembly once it meets and considers the conditions and situational hazards presented by the particular emergency/disaster that has arisen.

**Question #5** – Submitted by Jeff Meucci: Does the Borough already have the authority to issue emergency orders and mandates, as set out in draft Ordinance 2020-19?

**Reply to Q #5:** Yes. The authority of the Borough to both adopt this ordinance and issue emergency health mandates is based upon its status as a home rule borough and on its police powers. Accordingly, the Borough has authority to enact public health measures provided that those measures do not violate its own home rule charter, or impermissibly conflict with federal or state law.

Under the Alaska Constitution, (Article X, §11) home rule cities and boroughs like Petersburg can exercise "all legislative powers not prohibited by law or by charter." This same provision is repeated in Alaska Statute at section 29.04.010. The Alaska Constitution specifically intended to provide for "maximum local self-government" (Article X, §1), without traditional restrictions on the local exercise of powers.

Additionally, the Borough possesses what are known as 'police powers'. This doesn't relate to the police department, but is the term that has been used by courts for over a hundred years to refer to the fundamental right of a state or local government to make laws necessary to protect the welfare, safety and health of the public in cases where that right wasn't retained by the federal government. Adopting the emergency health and safety measures found in this ordinance would be permissible under the Borough's police powers.

State statutes addressing emergencies are found in the Alaska Disaster Act (AS 26.23.010-26.23.240). No provision of this proposed ordinance conflicts with those statutes. Under AS 26.23.060, each city and borough of the State is primarily responsible for its own disaster preparedness and coordination.

**Question #6** – Submitted by Jeff Meucci: If the Borough already has the authority to issue emergency orders, why is the update to the code needed?

**Reply to Q #6:** The current version of Chapter 3.72 was adopted by the then-city some 15 years ago and it needs to be brought current in certain aspects. In addition to changing 'city' to 'borough', the proposed revisions update the chapter to use the broader term of 'emergencies' as defined by Alaska Statutes, specifically the Alaska Disaster Act. Second, it is important for the code to refer to the authority of the borough manager to issue an emergency proclamation under Alaska Statute 26.23.140. While that authority is already found in state statute, you have to know to look for it there. It is much more straightforward for it to be set out in the local code book that is more familiar to staff and residents. Third, the current code language does not have any procedures or safeguards in place for enactment of emergency health and safety orders, like those that have been issued by both the state and the borough during the current pandemic. While the borough has the authority to issue health alerts and mandates, adding language regarding issuance of orders provides guidance for both the assembly and for residents. The proposed changes to the chapter set out who can issue the orders, who can terminate the orders, the subject of the orders, and they provide safeguards when rights are going to be temporarily restricted. Under section 3.72.060B, an order is required to state the known facts upon which the order is issued, it has to contain a statement that the order is found to be in the best interests of public health and safety and thus the situation requires a temporary limitation on rights, and the order must indicate that the measures are being implemented with the least restrictive means available or possible. So, while it is well-established that certain rights can be temporarily restricted in the case of public emergencies, the intent of this section is to ensure that those measures are being taken by the least

restrictive means. Fourth, chapter 3.72 should include language clarifying that orders issued would supersede other conflicting borough ordinances, so that there is no ambiguity. That language isn't in the current chapter. And lastly, it is important to update the code language as to violations. Existing code section 3.72.040 currently establishes interference with emergency services as a misdemeanor. The Borough has been transitioning for the last several years to having violations of the code be primarily minor offenses, not criminal misdemeanors. If charged as a borough misdemeanor (versus a state misdemeanor), the borough would have the obligation to both prosecute the case and to provide the defendant, at the borough's expense, an attorney if he or she cannot afford one.

To reiterate, the borough has the authority to enact public health measures, either under the current language of Chapter 3.72 or the proposed revised version, however the updated chapter would provide a clear framework for responding to emergencies, by including both procedures and safeguards, and ensure that there is specificity and transparency in the process. Updating Chapter 3.72 will provide the public easy access to what they may expect from the borough in the event of a disaster or emergency.

**Question #7** – Submitted by Marjorie Oines: Request for addition to the Petersburg Borough Ordinance #2020-19 as follows:

WHEREAS, it is understood that the police and borough officials are not able to fully protect all residents in the borough.

The following addition can be placed under 3.72.060 A. as number 2. Then move the other numbers to the next sequence.

As an assurance to our residents they are given the responsibility and right to protect themselves and their property. It also assures residents that items residents use to protect themselves will not be confiscated from their homes.

**Reply to Q #7:** The right to bear arms in defense of self or others is specifically guaranteed under the Alaska Constitution (Art. I, §19), and the authority to regulate firearms has been specifically reserved to the State of Alaska -- municipalities, including home rule municipalities, are very limited in what they are allowed to enact - generally, municipal firearms laws must be identical to state laws. If there is a concern that the Borough would seize firearms in the event of an emergency, this is also specifically addressed in state statute, where it provides that nothing in the Disaster Act "authorizes the confiscation of a firearm lawfully owned, possessed, or carried by a law-abiding citizen." (AS 26.23.200).