

**TOWN OF CROMWELL
TOWN COUNCIL
SPECIAL MEETING
TUESDAY MAY 26, 2020
4:30 P.M. COUNCIL CHAMBERS via Zoom & Livestreaming**

RECEIVED FOR RECORD
Jun 02, 2020 11:50A
JoAnn Doyle
TOWN CLERK
CROMWELL, CT



MINUTES

Present: Mayor E. Faienza, Deputy Mayor J. Donohue, P. Ahlquist, J. Henehan,
S. Fortenbach, J. Demetriades

Absent: A. Waters

Also Present: Town Manager A. Salvatore, Director of Finance M. Sylvester,
Zoom Technician A. Armetta

Zoom: Re Matus, Secretary, K. Olson Town Attorney, and P. Das Attorney

A. CALL TO ORDER

Mayor Faienza called the meeting to order at 4:32 p.m.

B. APPROVAL OF AGENDA

Motion made by S. Fortenbach seconded by J. Donohue and *unanimously carried* to approve the agendas published.

C. NEW BUSINESS

1. Discussion and action on declaration to Governor Lamont.

a. Possible Executive Session to discuss draft declaration.

Mayor Faienza read the draft declaration into the record. (attached)
Town Attorney K. Olson commented that Graduation & religious are separate issues and are not included in the draft declaration; they should be handled separately. Graduation should be discussed with the Board of Education. Attorney Olson also stated that the tenor of the declaration was drafted as requested by the majority vote of the Town Council.

Councilor Demetriades read his comments into the record. (attached)
Discussion followed.

Motion made by P. Ahlquist seconded by S. Fortenbach and *carried* to approve the declaration (with the correction that it was not unanimously approved).

Aye; P. Ahlquist, J. Henehan, J. Donohue, E. Faienza, S. Fortenbach

Nay: J. Demetriades

Mayor Faienza stated that A. Waters was unable to attend this afternoons meeting but is in favor of the draft declaration.

D. ADJOURN

Motion made by J. Donohue seconded by J. Henehan and *unanimously carried* to adjourn the meeting at 4:55 p.m.

Respectfully submitted,

Re Matus
Secretary

To: Cromwell Town Council
From: Town Councilperson James Demetriades
Re: Public Comments on the Declaration
Date: 5-26-2020

I would like to provide my written feedback regarding this declaration that Attorney Olson has drafted and take the opportunity to share my concerns regarding both the content and tone of the document.

As a threshold matter, this is not what we discussed drafting. The motion passed at the May 19, 2020 council meeting authorized the town attorney to draft a declaration to request the governor allow small businesses to open and to permit outside graduation. The motion did not, however, contemplate including a commentary regarding the legality or constitutionality of the Governor's executive orders.

I am likewise concerned about us going into executive session to review the declaration without having presented the draft for public comment. We may be in danger of violating FOIA by drafting this public document without public input. FOIA generally requires all public agencies to open their meetings, hearings, and other proceedings to the public, however, there are a few valid reasons to enter in executive session. Executive sessions may be held to discuss; 1) individual officers or employees; 2. strategies and negotiations about pending claims or pending litigation involving the agency or a member; 3. security matters; 4. real estate transactions by a political subdivision when publicity would likely cause a price increase; or 5. any matter that would result in disclosing a public record that is exempt from disclosure (CGS § 1-200(6)). I do not believe that reviewing a declaration would fall under any of these categories. A declaration by the town council is not a legal claim or litigation.

Ultimately, this declaration is not what is in the best interest of the Town nor the best interest of the health and safety of our residents. This declaration does nothing to help those who are suffering nor does it demonstrate steps that the town has taken to prepare to allow businesses to safely reopen. During our last executive session, I warned about pursuing a Quotidian quest against the State while we should instead focus on making substantive investments to help our small businesses. We should be calling for expanded unemployment protections, stockpiling PPE for distribution to prepare for a second wave of the COVID-19 outbreak and developing grant programs to help our businesses reopen. I am extremely disappointed with the content of this declaration as it not only strayed from what we discussed but has become the center of a media circus that is sowing more division and taking the attention away from generating solutions. We have a responsibility to be good stewards of the town and, it is my strong opinion that this letter is not in the best interest of the health and safety of our citizens nor the best use of our town resources.

As to the content of the declaration, I disagree with the analysis provided regarding the constitutionality of the executive orders themselves by our Town Attorney. As background, the Connecticut Legislature delegated authority to the governor under Connecticut General Statutes § 28-9(b) which, in summary, states that, if the Governor declares a civil preparedness or public health emergency, he "may modify or suspend in whole or in part ... any statute, regulation or requirement" that he finds to be "in conflict with the efficient and expeditious execution of civil

preparedness functions or the protection of the public health." It is clear that Governor Lamont declared a valid civil preparedness and public health emergency as defined by the delegating statute. The Governor may amend, modify, or suspend statutes that conflict with the efficient and expeditious response by the executive of the government to an unprecedented and developing emergency. This power is broadly construed. The case law Olson has cited is unpersuasive and non-binding in this jurisdiction as they involve different executive orders from different governors in different states.

I will also point to the recent denial of a motion for a temporary restraining order and preliminary injunction by the Connecticut District Court. There, the plaintiffs challenged Governor Lamont's executive orders banning non-essential gatherings of people and ordering that bars and restaurants close their on-premises operations. The Plaintiffs claimed that the Governor's orders presented a "substantial and undue burden" on the right to pursue and honest living, violating the 14th Amendment of the United States Constitution and Article I Section 8 of the Connecticut Constitution. The Plaintiffs presented similar arguments to that which are raised in our draft declaration and which were raised by some members of the council, namely, that the Executive Orders are a great hardship to business and they are losing money everyday and if the Executive Orders are not stayed the businesses may cease to operate entirely. Further, Judge Shea opined that even if the Constitution protects a "right to earn an honest living," states have broad powers to protect public health during epidemics. Please see <https://docs.justia.com/cases/federal/district-courts/connecticut/ctdce/3:2020cv00464/138829/32>

The Governor has broad discretion under this statutory authority to act to protect the public health and well-being in light of a pandemic. It is clear that the legal precedent supports the governor's actions, therefore, the intent of this declaration should not be to challenge the legality of the executive order, but, rather, ask the Governor take into consideration other factors to possibly allow additional small businesses to re-open. This letter's tone does not appear to be drafted to engender a discussion about how to safely re-open the Cromwell economy. I am troubled that, with the declaration as drafted, we risk and foreclose any opportunity to discuss how to devise a path forward within the confines of the statutory and case law.

I deeply wish I could support what should have been a clear declaration in support of our local businesses but cannot support this declaration unless serious and substantive revisions are made to both its tone and content.

**DECLARATION
OF THE
TOWN OF CROMWELL TOWN COUNCIL**

WHEREAS, on March 10, 2020, the Governor of the State of Connecticut, Ned Lamont, issued declarations of public health and civil preparedness emergencies, proclaiming a state of emergency throughout the State of Connecticut as a result of the coronavirus disease 2019 (COVID-19) outbreak; and

WHEREAS the Governor thereafter issued a number of executive orders including those commanding the closure of several businesses throughout the state that were deemed non-essential in an effort to prevent the spread of the disease; and

WHEREAS, as of May 20, 2020, the Governor is permitting several businesses in the state to reopen in accordance with social distancing guidelines and Sector Rules issued on May 18, 2020; and

WHEREAS, the Governor's existing orders are still preventing many businesses, and particularly small businesses operating within the Town of Cromwell, from reopening despite these businesses being ready, willing and able to reopen in accordance with all social distancing guidelines and the Sector Rules; and

WHEREAS, the Town of Cromwell Town Council finds that the Governor's delay in allowing these businesses to reopen is not justified either legally or realistically for the following reasons:

A. The Governor's Reopening Plan Treats Cromwell's Business Owners Unequally and Unfairly

The Town of Cromwell recognizes that, during a public health emergency, the Governor wields significant power to take steps reasonably necessary to lessen the spread of the virus and to protect the public. See Jacobson v. Massachusetts, 197 U.S. 11, 27, 25 S.Ct. 358, 49 L.Ed. 643 (1905). However, that power is not absolute and must be measured with the constitutional rights of Connecticut's citizens. As the Wisconsin Supreme Court and the United States Department of Justice have explained:

"There is no pandemic exception ... to the fundamental liberties the Constitution safeguards. Indeed, 'individual rights secured by the Constitution do not disappear during a public health crisis.' These individual rights, including the protections in the Bill of Rights made applicable to the states through the Fourteenth Amendment, are always in force and restrain government action."

Wisconsin Legislature v. Palm, --- N.W.2d --- (Wis. May 13, 2020) (quoting U.S. Department of Justice).

Cromwell's small businesses have the constitutional right to pursue their trades and to be treated equally with "essential" businesses, including their big box store competitors. In Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304 (1979), the Connecticut Supreme Court struck down Connecticut's blue laws on equal protection grounds because the statute's classifications of which businesses were permitted to operate on Sundays were "too arbitrary, discriminatory, and unreasonable to comport with the requirements of equal protection and due process."

There is no difference between the equal protection rights at issue in Caldor and those currently being infringed by the Governor's orders. The Governor is permitting Walmart, Home Depot, and other large retailers to welcome customers into their stores. To be sure, these "essential" businesses are required to comply with social distancing, occupancy limits, mask

wearing, and other restrictions to protect the public health. Our small businesses are entitled to the same opportunity to get back to work that those businesses exempted from the Governor's orders enjoy. Our businesses are willing and able to abide by the additional regulations and there is no legitimate reason to selectively keep them shut down. It is fundamentally unfair and patently unconstitutional to bar them from opening.

B. There Is No Justifiable Basis For Assuming the Operation of Small Businesses Presents A Higher Risk of COVID-19 Spread

While the Town Council appreciates the significant health risks occasioned by the spread of COVID-19 and the Governor's need to be cautious as the state reopens, the inequity of the Governor's orders as it relates to smaller business operations is even more apparent when considering the risk of exposure that has been deemed tolerable in allowing the larger department stores and home improvement businesses to operate. Many of these larger businesses are patronized by hundreds of people at one time and encompass much larger areas requiring routine sanitation. When compared to the risk of exposure for small businesses commanding much lower occupancy at any given time and the ability to provide more regular and complete sanitation, there is no appropriate justification related to public health to keep them shuttered.

WHEREAS, in setting forth this Declaration, the Town Council fully understands the serious and unprecedented time we are in. The Governor has been given a tremendous amount of leeway during the pandemic to issue orders to promote the public health. But, as the U. S. Court of Appeals for the Sixth Circuit recently put it, "[w]hile the law may take periodic naps during a pandemic, we will not let it sleep through one." Roberts v. Neace, 958 F.3d at ____ (6th Cir. May 9, 2020). The Governor's selective prohibition against our Town's businesses operating is illegal and unjustified and must be immediately revoked.

In accordance with the foregoing principles, NOW, THEREFORE,

THE TOWN OF CROMWELL TOWN COUNCIL HEREBY DECLARES THAT:

The operation of each and every business located within the Town of Cromwell borders is essential to the general health and well-being of its residents and the economic viability of its community;

Each and every business operating within the Town of Cromwell that is prepared to reopen and conduct its business in accordance with all social distancing guidelines and the Sector Rules should be permitted to immediately reopen;

The Cromwell Town Council stands beside and wholly supports its local business owners in collectively calling for the Governor to immediately lift any restrictions on the reopening of businesses that are prepared to do so in accordance with all social distancing guidelines and the Sector Rules; and

All executive orders that perpetuate the unconstitutional and unwarranted disparate treatment of Cromwell businesses are hereby denounced.

Hereby declared this 27th day of May, 2020

Town of Cromwell Town Council


By: Enzo Faienza, Mayor

Duly Authorized By Majority Consent of the Cromwell Town Council