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New Jersey State Legislature

OFFICE OF LEGISLATIVE SERVICES

STATE HOUSE ANNEX
PO BOX 008
TRENTON NJ 08623-0068

ALBERT PORRONI
Executive Director
(609) 292-4823

LEGISLATIVE COUNSEL

ALBERT PORRONI
Legislative Counsel

LEONARD J. LAWSON
First Assistant Legislative Counsel

MARCI LEVIN ROEDERMAN
Assistant Legislative Counsel

JAMES G. WILLSON
Senior Legislative Counsel

November 15, 2004

Honorable Joseph Pennacchio
101 Gibraltar Drive, Suite 1-A
Morris Plains, New Jersey 07950

Dear Assemblyman Pennacchio:

You have asked whether Governor James E. McGreevey has the authority to provide by Executive Order No. 139 of 2004 for the establishment of a sterile syringe access program in up to three municipalities. For the reasons set forth below, we believe that it is unclear whether the transmission of HIV/AIDS through intravenous drug use, at this time, constitutes an emergency, but if it does, the means by which Executive Order No. 139 addresses the emergency appear to be beyond those statutorily delegated to the Governor. "[N]o new power or authority is created by a public emergency." 16 Am. Jur. 2d, Constitutional Law, §59 at 428 (1998).

On October 26, 2004, the Governor signed Executive Order No. 139, to be effective immediately and to remain in effect until December 31, 2005. Section 1 of the Executive Order declares, "A State of Emergency exists with regard to the transmission of HIV/AIDS through intravenous drug use." Section 3 of the Executive Order directs:

To combat this Emergency, the Commissioner of Health and Senior Services is authorized to adopt guidelines for the establishment of a sterile syringe access program to provide for the exchange of hypodermic syringes and needles in up to three municipalities in New Jersey that have a high prevalence of HIV/AIDS cases attributable to intravenous drug use. In order to establish a sterile syringe access program, the eligible municipality shall enact an ordinance of its governing body establishing or authorizing establishment of a sterile syringe access program at a fixed location or through a mobile access component. The municipality may operate the program directly or contract with a

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hospital, a health care facility, a federally qualified health center, a public health agency, a substance abuse treatment program, an AIDS service organization or another non-profit entity designated by the municipality.

Neither the New Jersey Constitution nor the statutes define the authority inherent in a Governor's executive order. Corpus Juris Secundum describes, in general, the powers of a governor of a state, "The governor possesses only such powers and duties as are vested by constitutional grant or by statutory grant. The governor's duties under statutory provisions are circumscribed by the terms of the legislation." 81A C.J.S., States, §240 at 514 (2004) That legal encyclopedia goes on to state, "An executive order must be within the authority granted to the governor by the constitution or statutory provisions. 81A C.J.S., States, § 242 at 516.

In examining whether the Governor could convert the position of the New Jersey member of the Waterfront Commission of New York Harbor from a part-time to a full-time post, the court explained the need for a constitutional or statutory basis. "An executive order must find support for its validity either in a state of facts which gives rise to an emergent situation or must be based upon the furtherance of a legislative act or constitutional mandate." DeRosa v. Byrne, 135 N.J.Super. 273, 288 (Ch. Div. 1975), vacated 199 N.J.Super. 132 (App.Div. 1976) citing Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 585 (1952) (a decision invalidating President Truman's order to take over steel mills). Thus, executive orders issued by the Governor, other than those of a ceremonial nature or those creating advisory bodies, must be supported by some constitutional or statutory authority.

Article V, Section I, paragraph 1 of the New Jersey Constitution (1947) provides, "The executive power shall be vested in a Governor." And, paragraph 11 of Section I of Article V, in part, explains, "The Governor shall take care that the laws be faithfully executed. To this end he shall have power, by appropriate action or proceeding in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate, . . ." Several dozen New Jersey statutes give the Governor the authority to accomplish some narrow purpose by executive order. A familiar example of the exercise of the Governor's authority through executive order is the power to issue executive orders in response to emergencies, conferred by N.J.S.A. App.A:9-30 et seq., known as the "Disaster Control Act." In Executive Order No. 139, Governor McGreevey declares "a State of Emergency" and invokes the Disaster Control Act as his statutory authority.

The leading case interpreting the Governor's emergency powers under the Disaster Control Act is Worthington v Sawyer, 88 N.J. 183 (1982). In Worthington, the New Jersey Supreme Court upheld an executive order in which the Governor invoked those emergency powers to alleviate the overcrowding in State prisons by temporarily requiring the incarceration of State

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prisoners in county correctional facilities. The court's reasoning guides an examination of an executive order invoking the Governor's emergency powers. Its analysis requires "a determination as to (1) whether the current crisis constitutes an emergency within the meaning of the Disaster Control Act, and (2) whether the means chosen by the Governor to address the emergency are authorized by the statute." *Id.*, at 192.

The court recounts that the Disaster Control Act, P.L. 1941, c. 393, first empowered the Governor to assist the federal government in its war effort. Subsequently, the act (1) "was broadened to impart wide executive power in providing for civilian defense," (2) "expanded to apply to 'any emergency' resulting from natural causes such as fire, flood or earthquake," and (3) "amended to include emergencies resulting from 'unnatural causes.'" *Id.*, at 192-193. The court in Worthington summarizes the legislative enactments related to the Disaster Control Act, as follows:

These sweeping provisions reveal three general pertinent features of the act. First, the act vests the Governor with broad powers to provide for the health, safety and welfare of the people of the state during any "emergency." N.J.S.A. App.A:9-33, -45. Second, these powers include the authority to centralize control over the resources of the State government and its subdivisions, including the counties, "whether of men, properties or instrumentalities." N.J.S.A. App.A:9-33, -34. Third, a significant purpose of the act is the prevention of harm to life and property. N.J.S.A. App.A:9-33, -45(i). [*Id.*, at 193-194]

The court first addresses whether the prison overcrowding constitutes an emergency within the definitions of the act. N.J.S.A. App.A:9-33.1 defines "emergency" to mean and include "disaster" which means "any unusual incident resulting from natural or unnatural causes which endangers the health, safety or resources of the residents of one or more municipalities of the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services." In the preamble of Executive Order No. 139, Governor McGreevey describes infection by the human immunodeficiency virus (HIV) as a "pandemic" causing some 32,000 deaths in New Jersey and states that:

the lack of sterile syringe access programs in certain New Jersey municipalities creates a threat to the health, safety and welfare of New Jersey residents, one that is too large in scope and unusual in type to be handled by regular municipal operating services, and one that poses a compelling need to act to protect the public interest.

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It is unclear whether the high rates of HIV infection and the multitude of HIV/AIDS cases attributable to transmission through intravenous drug use at this point in time constitute an emergency under the Disaster Control Act. The court in Worthington rejects an "overly narrow interpretation of the scope of the act," stating, "Any grant of executive authority must be construed to accomplish the Legislature's purpose. ... This is especially true when those statutes operate to protect the public health, safety and welfare." [Citations omitted]. Id., at 194. The court concludes that the broadening of the coverage of the act to "any unusual incident which endangers the public health, safety or welfare evidences a legislative intent to expand the category of events which constitute an emergency." Id., at 195. The existence, however, of the multitude of HIV/AIDS cases for decades belies the existence of an emergency now. Eleven years after its decision in Worthington, the New Jersey Supreme Court, in County of Gloucester v. State, 132 N.J. 141 (1993), finds that the prison overcrowding is a long-term problem and no longer qualifies as an emergency under the Disaster Control Act. The court reiterates, "The determination of whether an 'emergency' exists requires a fact-specific analysis. ... There is no temporal rule of thumb for determining when an 'emergency' ceases to exist. Rather, courts should consider the passage of time." [Citations omitted]. Id., at 150. In the case of Executive Order No. 139, a court may consider the passage of time before the Executive Order as evidence of a long-term condition, not an emergency, that "calls for an executive and legislative solution rather than an executive order under the Disaster Control Act." Id., at 151. See, Burlington Food Store, Inc. v. Hoffman, 45 N.J. 214 (1965).

If an emergency is found to exist, under the court's analysis in Worthington, next follows a review of the executive actions taken to determine "whether the actions are authorized by the statute. This involves, first, a determination of whether the Executive Order bears a rational relationship to the legislative goal of protecting the public. Second, the executive action must be closely tailored to the scope of the current emergency situation." Worthington at 197-198.

The recitation of facts related to HIV/AIDS cases in the preamble of Executive Order No. 139 offers the rationale for facilitating the establishment of municipal sterile syringe access programs. The Executive Order bears some rational relationship to the legislative goal of protecting the public, but it does not explain why it applies to only three municipalities, when the preamble implies that the problem is widespread. Nor does it define how the three are to be chosen.

Current law prohibits the possession or distribution of a hypodermic syringe except by a valid prescription. N.J.S.A. 2C:35-6. Despite the statement in the preamble of the Executive Order that some entities "have found sterile syringe access programs to be effective in reducing the transmission of HIV," three municipal sterile syringe access programs, authorized by gubernatorial action alone, may not be the best means of addressing the emergency. New Jersey courts have found needle exchange programs unlawful. "[T]he benefits of such programs remain

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a matter for debate. ... In the New Jersey Legislature, bills have been introduced in both the Senate and Assembly to authorize the distribution of hypodermic needles under the control or supervision of applicable state authorities. None has been enacted. ... Any change respecting the prohibition of N.J.S.A. 2C:36-6 is solely for legislative consideration." State v. McCanna, 314 N.J.Super. 254, 267 (App. Div. 1998): "Defendants would have this court balance such social harm as may be engendered by needle exchanges against the social benefits to be gained in the struggle against AIDS. Such balancing is quintessentially a legislative function." State v. Sorze, 249 N.J.Super. 144, 151 (Law Div. 1991).

Executive Order No. 139 appears to go beyond the actions authorized by the Disaster Control Act because an executive order is not proper authority for a municipality to adopt an ordinance, particularly an ordinance that contravenes a specific criminal statute. The Disaster Control Act gives the Governor control over only the resources of political subdivisions. N.J.S.A. App.A:9-33 and 34. It empowers the Governor only "to make such orders, rules and regulations as may be necessary adequately to meet the various problems presented by any emergency." [Emphasis supplied]. N.J.S.A. App.A:9-45. The Executive Order directs a municipality to enact an ordinance establishing a syringe access program and thus violate a criminal statute at the same time that its own law enforcement officers are responsible for enforcing the statute. Executive Order No. 139 does not address this issue. The court in Worthington allows for such possibility. "To the extent that the executive order suspends the normal operation of the statutes discussed above, it does so pursuant to the emergency powers of the Governor explicitly delegated to him by the Legislature." Worthington at 200. The Executive Order is appropriately silent on any suspension of the criminal statute with regard to a municipality's actions because there is no compelling necessity, or emergency, to infringe upon the Legislature's prerogative to enact laws regulating units of local government or restricting possession of syringes. In Sorze, in 1991, the court points out, "The proscription against unauthorized control or possession of hypodermic needles in New Jersey has existed for almost four decades. ... It has indisputably been considered by successive Legislatures as an important weapon in the struggle against the social evils associated with drug abuse." Id., at 149.

While the Worthington case demonstrates the deference the courts give to the Governor's authority to issue executive orders that declare a state of emergency, it also acknowledges the limitations of the statutory authority. The court summarizes:

While the Disaster Control Act grants broad authority to the Governor to deal with an emergency, his powers under that statute are not without limit. These emergency powers represent an extraordinary delegation of authority by the Legislature to the Executive. Because of the extraordinary nature of that authority, the executive orders must not only bear a rational relationship to the

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goal of protecting the public, but their scope must not exceed the extent of the emergency. The statutory validity of executive actions pursuant to emergency power will depend on the nature of the emergency and the gravity of the threat to the public. [Worthington at 201].

The emergency declared by Executive Order No. 139 is possibly not equivalent to that which constitutes an emergency under the Disaster Control Act. "A governor's proclamation of emergency under an authorizing statute is subject to attack on the ground that no emergency exists." 81A C.L.S., States, §242 at §16. If the long-term condition of the prevalence of HIV/AIDS cases in New Jersey does so constitute an emergency, the Executive Order appears to exercise powers beyond those delegated by the statutes

Very truly yours,

Albert Porroni
Legislative Counsel

By: 
Pamela H. Espensbade
Principal Counsel

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