

CITY OF CHARLOTTESVILLE, VIRGINIA
CITY COUNCIL AGENDA



Agenda Date:	February 16, 2021
Action Required:	Local COVID Ordinance: Amend or Repeal
Presenter:	Lloyd Snook, City Councilor
Staff Contacts:	Lisa Robertson, Chief Deputy/Acting City Attorney
Title:	Local COVID Ordinance-Status Review

Background:

The Charlottesville City Council has enacted a local ordinance to prevent the spread of the Novel Coronavirus (“Covid 19”), pursuant to authority set forth in Section 14 of the City Charter. Previously, on December 10, 2020 City Council amended its local ordinance to bring it into closer conformance with the Executive Orders issued by the Governor of Virginia, including an amendment designed to utilize the Governor’s restriction as to the permissible size of a “gathering”. As part of the December 10, 2020 amendment, the local ordinance specified that Council’s local restrictions are intended to supplement the Governor’s Executive Orders. City Council retained local restrictions on the numbers of persons allowed at food establishments, and maintained a broader definition of the term “gatherings” than that utilized by the Governor. Additionally, the City’s local ordinance requires a warning to be given to a property owner or tenant prior to enforcing any state-imposed restrictions on the size of a “gathering”.

Discussion:

Recently City Council has been receiving requests from City residents to allow recreational team sports activities to commence within the City, without being subject to the Governor’s restrictions on the size of a “gathering”. (The City’s ordinance defines a “gathering” to include any *sporting event*.)

The term *sporting event* is not part of the Governor’s definition of a “gathering”. The Governor’s Executive Order carves out a category for “Recreational Sports” which are not covered by the Governor’s restrictions as to the size of a gathering. Youth sports are lawfully taking place within the County, and on some privately controlled fields within the City, under the guidelines set out in the Governor’s Executive Orders. (Albemarle County’s local ordinance defines a “gathering” in the same manner as the Governor’s Executive Orders).

City Council has at least three options:

- (1) No change (no action required): City Council may, after discussing the matter, decide not to amend or change the existing ordinance in any way. If Council leaves the Ordinance as-is, a reasonable interpretation of the word “sporting event” within the City’s local definition of a “gathering” is that City Council intends that only those sports which can be played with 10 or fewer people, with social distancing maintained, will be lawful under the City’s

local ordinance.

- (2) Amend the Current Ordinance (adopt an amended Ordinance): if Council wishes: to clarify that City Council desires for “recreational sports” to be allowed in accordance with the Governor’s Executive Orders and the Department of Health’s Guidelines, City Council could adopt an Ordinance amending and reenacting its existing local ordinance, to revise its definition of “gathering” to match both the Governor’s and Albemarle County’s. (**Attachment A** to this Memo is a proposed Amendment). City Council could also amend the definition of “gathering” to a different extent than is set forth within Attachment A.
- (3) Repeal the Current Ordinance (adopt an Ordinance to repeal the existing Ordinance): if Council wishes, it could repeal the current local ordinance, and allow activities and gatherings subject only to the Governor’s Executive Orders. (**Attachment B** to this Memo is an Ordinance repealing the current Ordinance).

Alignment with Council Vision Areas and Strategic Plan:

Each of Council’s options can be said to align with one or more Council Vision Areas.

Community Engagement: N/A

Budgetary Impact: Allowing recreational sports to recommence within City-owned and controlled facilities (fields, swimming pools, recreation centers, etc.) may require the City to employ, or re-employ, staff who support these programs.

Recommendation: None

Alternatives: None

Attachments:

Attachment A: Ordinance amending and Re-Enacting the local COVID Ordinance

Attachment B: Ordinance repealing the local COVID Ordinance

ATTACHMENT A

ORDINANCE

TO AMEND AND RE-ENACT THE ORDINANCE ADOPTED ON DECEMBER 10, 2020 DECEMBER 7, 2020 TO PREVENT THE SPREAD OF THE NOVEL CORONAVIRUS, SARS-CoV-2, AND THE DISEASE IT CAUSES, COMMONLY REFERRED TO AS COVID-19

WHEREAS, on March 11, 2020, the World Health Organization declared the outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, commonly referred to as COVID-19, a pandemic (for reference in this ordinance, this virus and the disease that it causes are referred to as “COVID-19”); and

WHEREAS, City Manager and Director of Emergency Management, Dr. Tarron J. Richardson, declared the potential spread of COVID-19 an emergency on March 12, 2020 pursuant to a Resolution adopted by the Charlottesville City Council; and

WHEREAS, also on March 12, 2020, Governor Ralph S. Northam issued Executive Order Number Fifty-One (“EO 51”) declaring a state of emergency for the Commonwealth of Virginia because of the COVID-19 pandemic; EO 51 acknowledged the existence of a public health emergency arising from the COVID-19 pandemic and that it constitutes a “disaster” as defined by Virginia Code § 44-146.16 because of the public health threat presented by a communicable disease anticipated to spread; and

WHEREAS, COVID-19 spreads person to person and, at this time, it appears that COVID-19 is spread primarily through respiratory droplets, which can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs; spread is more likely when people are in close contact with one another (within about six feet)¹; and.

WHEREAS, COVID-19 is extremely easy to transmit, can be transmitted by infected people who show no symptoms, and the population has not developed herd immunity²; and

WHEREAS, at this time, there is no known cure, no effective treatment, no vaccine, and because people may be infected but asymptomatic, they may unwittingly infect others³; and

WHEREAS, the World Health Organization, the United States Centers for Disease Control and Prevention (“Centers for Disease Control”) and the Virginia Department of Health have identified several behaviors and practices that are fundamental in controlling the spread of COVID-19 in the community: frequently washing hands, sanitizing frequently touched surfaces, wearing a cloth face covering when in public, maintaining a separation of at least six feet between people (“social distancing” or “physical distancing”), limiting the size of gatherings in public places, and limiting the duration of gatherings⁴; and

WHEREAS, with respect to people wearing face coverings when in public, current evidence suggests that transmission of COVID-19 occurs primarily between people through direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions, or through their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings; and some outbreak reports related to indoor crowded spaces have suggested the possibility of aerosol transmission, combined with droplet transmission, for example, during choir practice, in food establishments, or in fitness classes⁵;

and

WHEREAS, according to the World Health Organization, fabric face coverings, “if made and worn properly, can serve as a barrier to droplets expelled from the wearer into the air and environment,” however, these face coverings “must be used as part of a comprehensive package of preventive measures, which includes frequent hand hygiene, physical distancing when possible, respiratory etiquette, environmental cleaning and disinfection,” and recommended precautions also include “avoiding indoor crowded gatherings as much as possible, in particular when physical distancing is not feasible, and ensuring good environmental ventilation in any closed setting”⁶; and

WHEREAS, the World Health Organization advises that people take a number of precautions, including: (i) maintaining social distancing because when someone coughs, sneezes, or speaks they spray small liquid droplets from their nose or mouth which may contain virus, and if other persons are too close, they can breathe in the droplets, including the COVID-19 virus, if the person coughing, sneezing, or speaking has the disease; and (ii) avoiding crowded places because when people are in crowds, they are more likely to come into close contact with someone that has COVID-19 and it is more difficult to maintain social distancing⁷; and

WHEREAS, the Centers for Disease Control caution that: (i) the more people a person interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading; (ii) the higher level of community transmission in the area that a gathering is being held, the higher the risk of COVID-19 spreading during the gathering; and (iii) large in-person gatherings where it is difficult for persons to remain spaced at least six feet apart and attendees travel from outside the local area pose the highest risk of COVID-19 spreading⁸; and

WHEREAS, the Centers for Disease Control state that cloth face coverings are strongly encouraged in settings where persons might raise their voice (*e.g.*, shouting, chanting, singing)⁹; and

WHEREAS, the Centers for Disease Control advise, in restaurants: (i) wearing cloth face coverings when less than six feet apart from other people or indoors; (ii) wearing face coverings as much as possible when not eating; (iii) maintaining a proper social distancing if persons are sitting with others who do not live with the person; and (iv) sitting outside when possible¹⁰; and

WHEREAS, for these and related reasons, the Virginia Department of Health has stated that those businesses that operate indoors and at higher capacity, where physical distancing “recommendations” are not observed, sharing objects is permitted, and persons are not wearing cloth face coverings, create higher risk for the transmission of COVID-19¹¹; and

WHEREAS, since Governor Northam issued EO 51 on March 13, 2020, he has issued several more Executive Orders jointly with Orders of Public Health Emergency issued by M. Norman Oliver, MD, MA, State Health Commissioner, pertaining to COVID-19; as of the date of adoption of this ordinance, “Executive Order Number Sixty-Seven (2020) and Order of Public Health Emergency Seven, Phase Three Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)” (collectively referred to as “EO 67”)¹², which became effective at 12:00 a.m. on July 1, 2020, is in effect; and

WHEREAS, as of July 21, 2020, the spread of COVID-19 in the Commonwealth, in the Thomas Jefferson Health District of which the City is a member, and in the City itself, has been

increasing since late June, shortly before EO 67 moved the Commonwealth into “Phase 3” of its reopening plan, the curve in the positivity rate of persons tested for COVID-19 is no longer flattened, and the community is currently experiencing more transmission of COVID-19.

NOW, THEREFORE, BE IT ORDAINED by the Council of Charlottesville, Virginia, that the City’s “ORDINANCE TO PREVENT THE SPREAD OF THE NOVEL CORONAVIRUS, SARS-CoV-2, AND THE DISEASE IT CAUSES, COMMONLY REFERRED TO AS COVID-19”, adopted on **December 10 7, 2020**, is hereby amended and reenacted, as follows:

Sec. 1. Purpose

For the reasons stated in the recitals, the purpose of this ordinance is to prevent the spread of COVID-19.

Sec. 2. Authority

This ordinance is authorized by §14 of the Charlottesville City Charter, which enables the City Council to enact ordinances to “prevent the introduction or spreading of contagious or infectious diseases, and prevent and suppress diseases generally.”

Sec. 3. Definitions

The following definitions apply to this ordinance:

- A. “Expressive activity” means a non-commercial activity in which a person intends to convey a lawful message through speech or conduct that is likely to be perceived by an observer of the speech or conduct, and includes any lawful public gathering, demonstration, procession, or parade in which the primary purpose is to exercise the rights of free speech or peaceable assembly.
- B. “Face covering” means an item normally made of cloth or various other materials with elastic bands or cloth ties to secure over the wearer’s nose and mouth in an effort to contain or reduce the spread of potentially infectious respiratory secretions at the source (*i.e.*, the person’s nose and mouth).
- C. “Food establishment” means a food establishment as defined in 12VAC5-421-10 and the term includes, but is not limited, any place where food is prepared for service to the public on or off the premises, or any place where food is served, including restaurants, lunchrooms, short order places, cafeterias, coffee shops, cafes, taverns, delicatessens, dining accommodations of public or private clubs. For purposes of this ordinance, “food establishment” does not include kitchen facilities of hospitals and nursing homes, dining accommodations of public and private schools and institutions of higher education, and kitchen areas of local correctional facilities subject to standards adopted under Virginia Code § 53.1-68.
- D. **“Gathering” includes, but is not limited to, parties, celebrations, or means a planned or spontaneous indoor or outdoor, or both, event with people participating or attending for a common purpose such as a community event, festival, conference, parade, wedding, sporting event, party (including parties at private residences), celebration, and other social events, whether they occur indoors or outdoors. The presence of individuals performing functions of their employment or assembled in an educational instructional setting is not a “gathering”. The presence of individuals in a particular location, such as a park or retail**

business is not a “gathering” so long as individuals do not congregate. “Gathering” does not include a place of employment where persons are present to perform their functions of employment, events or activities on the grounds of an institution of higher education or school-owned property that are institution or school related, or persons engaging in religious exercise at their religious institution or other place of religious significance.

- E.. “Micro-producers” means the retail shop, bar, tasting room, tap-room, restaurant or other similar facility of a microbrewery, microwinery, or microdistillery, in which twenty-five (25) percent or more of the facility's production is sold directly to the consumer on-site.
- F. “Public place” means any place other than a person’s residence or personal vehicle that is indoors, or the indoor portion of the place, or outdoors where at least six feet of physical distancing between persons not living in the same household cannot be maintained, and generally open to the public including, but not limited to, retail stores, food establishments, theaters, personal care and personal grooming services, and transportation other than a personal vehicle. “Public place” does not include institutions of higher education and other schools, fitness and other exercise facilities, religious institutions, indoor shooting ranges, and the City courthouse buildings.
- G. “Small brewery” means the retail shop, bar, tasting room, tap-room, restaurant or other similar facility of the small brewery which sells directly to the consumer.

Sec. 4. Limitation on the Number of Persons at Food Establishments

- A. *Indoor occupancy.* Indoor occupancy at food establishments, micro-producers, and small breweries must not be more than 50 percent of the lowest occupancy load on the certificate of occupancy issued by the City of Charlottesville. If the building or structure does not have an occupancy load established on a certificate of occupancy issued by the City of Charlottesville, indoor occupancy must not be more than 50 persons.
- B. *Persons at gathering are counted.* Persons participating in or attending a gathering within a food establishment, micro-producer or small brewery who are indoors count towards the occupancy limits established by this section.
- C. *Persons working not counted.* The employees or independent contractors of any food establishment, micro-producer, or small brewery do not count towards the occupancy limits established by this section.
- D. *State requirements, recommendations, and guidance.* This section does not affect any governmental workplace safety regulations, or any other state or federal laws related to the COVID-19 pandemic.

Sec. 5. [this section is reserved]

Sec. 6. Face Coverings

- A. *Face coverings required.* Face coverings must be worn by all persons in public places except as provided in Sections 6(B) and (C).
- B. *Persons not required to wear face coverings.* Face coverings are not required to be worn by

the following persons:

1. *Children.* Children under the age of 5.
2. *Wearing face covering poses certain risks.* Persons for whom wearing a face covering poses a substantial mental or physical health, safety, or security risk such as persons who have trouble breathing or are unconscious, incapacitated, or otherwise unable to remove the face covering without assistance. For this exception to apply to any person claiming that wearing a face covering poses a substantial mental or physical health risk: (i) the person must present a valid document from a physician or other health care practitioner licensed, accredited, or certified to perform specified health care services, including mental health services, consistent with State law, specifying the medical necessity for not wearing a face covering and the date on which the person may begin wearing a face covering again; and (ii) the public place is unable to provide goods, services, or activities outdoors to the person or to the adult accompanying a child 5 years of age or under.
3. *Certain employees.* On-duty employees of the public place for which workplace safety regulations promulgated by the State Safety and Health Codes Board, or face covering rules established by an applicable Executive Order of the Governor or an Order of Public Health Emergency by the State Health Commissioner, apply.

C. *Circumstances when face coverings are not required to be worn by any persons.* Face coverings are not required to be worn by persons in the following circumstances:

1. *Outdoor activities.* While persons are engaged in outdoor activities in public places such as parks and other open spaces, provided that at least six feet of distance, or any greater minimum physical distancing established by state law, is maintained.
2. *Eating or drinking.* While a person is eating food or drinking a beverage.
3. *End of waiver of Virginia Code § 18.2-422.* When the waiver of Virginia Code § 18.2-422, currently established in EO 67, Section (C)(3), or as it may be further amended or superseded, ends.

D. *Responsibility of adults accompanying minors.* Adults accompanying minors between the ages of 5 years old and 17 years old must attempt to prompt the minor to wear face coverings while in public places.

Sec. 7. Effect of More Restrictive Executive Order or Order of Public Health Emergency

The restrictions within this Ordinance shall supplement any restrictions imposed by executive order of the Governor of Virginia due to COVID-19, or by any Order of Public Health Emergency issued by the Virginia State Health Commissioner due to COVID-19, and all such state-issued restrictions are incorporated herein by reference, as they exist on the date this Ordinance is adopted, and as they may hereafter be amended. In the event that any such state-imposed restriction is more restrictive than an express provision within this Ordinance, the more restrictive state-imposed requirement shall govern.

Sec. 8. Penalties

A. *Penalty for violation of Section 4.* A violation of Section 4 by the owner of the food

establishment, micro-producer, or small brewery and any manager or assistant manager, however titled, responsible for the operation and management of the food establishment, micro-producer, or small brewery, after first being warned by a law enforcement to lower the establishment's occupancy, is punishable as a Class 3 misdemeanor. Section 4(D) is not enforced pursuant to this ordinance.

- B. *Violation of state-imposed restrictions on the size of a gathering—warnings required.* Prior to enforcing any state-imposed restriction of the size of public and private in-person gatherings as to the owner or tenant of the private property on which the gathering is located, a law enforcement officer shall first give a warning to the owner or tenant. Prior to enforcing any state-imposed restriction of the size of public and private in-person gatherings, as to any person attending the gathering, a law enforcement officer shall first give a warning to such person to disperse from the gathering because it exceeds the state's size limitation for gatherings, and the law enforcement officer shall allow a reasonable period of time, not to exceed two minutes, for such person to disperse from the gathering.
- C. *Penalty for violation of Section 6.* A violation of Section 6 by any person subject to its requirements, after first being warned by a law enforcement officer to apply a face covering, is punishable as a Class 4 misdemeanor. No person under the age of 18 years old is subject to a criminal penalty for failing to wear a face covering.
- D. *Injunctive relief.* The City, the City Council, and any City officer authorized by law, may seek to enjoin the continuing violation of any provision of this ordinance by bringing a proceeding for an injunction in any court of competent jurisdiction.

Sec 9. Duration

This ordinance is effective 12:01 a.m., December 11, 2020 and shall expire upon the cessation of the City's Declaration of Emergency of March 12, 2020, unless amended by the Charlottesville City Council.

Sec. 10. Effect of this Ordinance on the Powers of the Director of Emergency Management

This ordinance does not affect the powers of the City Manager, acting as the Director of Emergency Management, pursuant to Virginia Code § 44-146.21 during the COVID-19 disaster.

Sec. 11. Severability

It is the intention of the City Council that any part of this ordinance is severable. If any part is declared unconstitutional or invalid by the valid judgment or decree of a court of competent jurisdiction, the unconstitutionality or invalidity does not affect any other part of this ordinance.

Sec. 12. Waiver of Three Day Intervention

This ordinance is adopted with the vote of four-fifths of City Councilors on the date of its introduction. The requirement in Charlottesville City Code Section 2-97 that three days intervene between an ordinance's introduction and its passage is waived.

ATTACHMENT B

ORDINANCE

REPEALING THE CITY'S ORDINANCE TO PREVENT THE SPREAD OF THE NOVEL CORONAVIRUS, SARS-CoV-2, AND THE DISEASE IT CAUSES, COMMONLY REFERRED TO AS COVID-19 (AS AMENDED THROUGH DECEMBER 10, 2020)

BE IT ORDAINED that the Charlottesville City Council does hereby repeal, in its entirety, the Ordinance adopted by City Council to Prevent the Spread of the Novel Coronavirus, SARS-CoV-2, and the Disease it Causes, commonly referred to as Covid-19, as such ordinance was adopted by Council and amended from time to time (as most recently amended and reenacted on December 10, 2020).

¹ *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *1 (D. Ariz. July 14, 2020) and cases and authorities cited therein.

² *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *1 (D. Ariz. July 14, 2020) and cases and authorities cited therein.

³ *South Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (May 29, 2020) (Roberts concurring in denial of application for injunctive relief); on the fact that there is no effective treatment as of the date of this ordinance, see also https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters?gclid=EAJaIQobChMI9IvSvJPK6gIVGrbICh2TYw9QEAAAYASAAEgKjDfD_BwE#medicines; <https://www.health.harvard.edu/diseases-and-conditions/treatments-for-covid-19>; <https://www.mayoclinic.org/diseases-conditions/coronavirus/diagnosis-treatment/drc-20479976>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> and <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> and links therein; <https://www.vdh.virginia.gov/coronavirus/#COVID-19-resources> and links therein.

⁵ World Health Organization Scientific Brief, July 9, 2020 <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

⁶ World Health Organization Scientific Brief, July 9, 2020 <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>; see also Statement of Dr. Michael Ryan, World Health Organization COVID-19 Virtual Press Conference, transcript page 12, https://www.who.int/docs/default-source/coronaviruse/transcripts/covid-19-virtual-press-conference---17-july.pdf?sfvrsn=dd7f91a1_0 (“So it’s all about the setting, it is about the duration you spend in that setting and it’s about the intensity of the activities that you participate in in that setting and when you get into a particular setting, a very overcrowded situation in an indoor environment then effectively all bets are off because so many of the modes of transmission come into play; the aerosol route, the airborne route, the fomite or contamination route. So the more close you are to other people, the more you are inside, the more the activity is intense or involves very close social contact the more that multiple modes of transmission come into play. So in that sense it is about you understanding your risk, it is about you managing that risk and being aware of the situation that you find yourself in personally and reducing that risk for you, for your family, for your children and for your community. It is important, as I’ve said previously, that governments communicate those risks very, very carefully and it is also important that providers, authorities and others ensure that those environments are as safe as possible and that the risks are also managed.”)

⁷ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>.

⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>; see also <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>.

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html>.

¹¹ <https://www.vdh.virginia.gov/coronavirus/schools-workplaces-community-locations/businesses/>.

¹² [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).