



County of San Mateo

Inter-Departmental Correspondence

Department: BOARD OF SUPERVISORS
DISTRICT 5
File #: 20-585

Board Meeting Date: 8/4/2020

Special Notice / Hearing: None
Vote Required: 4/5

To: Honorable Board of Supervisors
From: Supervisor David J. Canepa, District 5
Supervisor Warren Slocum, District 4
Subject: An Uncodified Urgency Ordinance Adopting Infraction and Administrative Citation
Penalty Structures for Violations of COVID-19 Emergency Health Orders

RECOMMENDATION:

Adopt an uncodified urgency Ordinance (“Ordinance”) adopting infraction and administrative citation penalty structures for violations of COVID-19 emergency health orders.

BACKGROUND:

The novel coronavirus (COVID-19) has caused a fatal global pandemic. Unfortunately, public health data from July 2020 shows that the virus is currently being increasingly transmitted across the State. Although San Mateo County has fared better than many other urban or suburban counties within the state, including other Bay Area counties, health data shows that COVID-19 is still spreading within the County.

COVID-19 appears to be wildly transmissible in settings where individuals have direct contact. Individuals may be infected and contagious with no symptoms (asymptomatic) or may be infected and contagious before developing symptoms (presymptomatic). Asymptomatic or presymptomatic individuals can unknowingly infect others.

A. Local and State Orders Strive to Hamper Transmission of COVID-19.

Current scientific evidence is that the primary way to slow the spread of the virus is to hinder airborne transmission, which can occur through respiratory droplets produced when an infected person coughs, sneezes, talks, or raises their voice. These droplets can land in/on the mouths, noses and eyes of people who are nearby.

Most aspects of the COVID-19 public health orders are intended to reduce transmission of COVID-19 by mandating social distancing or other protective measures, such as wearing face masks, and

limiting in-person interactions where the risk of transmission is high. The consistent compliance with social distancing and use of face masks reduces the likelihood that individuals may transmit or receive the COVID-19 virus while visiting or working at local businesses, including healthcare facilities, or engaging in other activities that bring them into contact with individuals outside their immediate household.

On March 3, 2020, pursuant to Section 101080 of the California Health and Safety Code, the San Mateo County Health Officer declared a local health emergency throughout the County related to COVID-19. Also on March 3, 2020, pursuant to Section 8630 of the California Government Code and Chapter 2.46 of the San Mateo County Ordinance Code, the San Mateo County Director of Emergency Services proclaimed a local emergency throughout San Mateo County related to COVID-19. The Board ratified and extended these declarations of local health emergency, which remain in effect.

On March 4, 2020, California Governor Gavin Newsom issued a Proclamation of State of Emergency related to COVID-19 effective throughout the State of California. On March 12, 2020, Governor Newsom issued Executive Order N-25-20 directing residents to comply with COVID-19 public health guidance. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, which imposed a State Shelter-in-Place Order requiring individuals to remain in their places of residence except as needed to maintain continuity of operations of critical infrastructure, access necessities such as food, prescriptions, and healthcare, or engage in other authorized activities.

On March 16, 2020, County of San Mateo Health Officer Dr. Scott Morrow issued an order that, among other things, directed all individuals currently living within San Mateo County to shelter in their place of residence, and authorized individuals to leave their residences only for certain activities. This order was updated several times, most recently on June 4, 2020, due to evidence of continued significant community transmission of COVID-19 within the County and throughout the Bay Area.

On April 17, 2020, the Health Officer issued a public health emergency order (Order of the Health Officer No. c19-8) requiring individuals to wear face masks in many enumerated high-risk public settings, subject to certain specified exceptions, including for individuals who are not medically capable of complying. This Order was updated on May 19, 2020 (Order of the Health Officer No. c19-8(b) (REVISED)).^[1] Violations of this Order are punishable as a misdemeanor under California Health and Safety Code section 120195 and can carry a fine up to \$1,000, imprisonment up to 90 days, or both.

On May 8, 2020, Governor Newsom announced a plan to allow the limited reopening of some businesses beyond those in the category of essential critical infrastructure, which is part of the "Resilience Roadmap" for California, the multiphase plan to modify the State Shelter Order. On June 16, 2020, the State approved the County's request for a variance allowing the County to align with the Resilience Roadmap for California.

On June 17, 2020, the Health Officer revised the health order ("Current Health Order") to align the County with the State Shelter Order/Resilience Roadmap as to allowed activities while maintaining local face mask and social distancing requirements from prior Health Order No. c19-8(b).^[2] Violations of the Current Health Order remain punishable as a misdemeanor. The Current Health Order (simplified):

- Generally requires that individuals wear face masks when in the presence of other non-household members indoors and when social distancing cannot be maintained outdoors, and

strongly encourages individuals to wear face masks outside their residence even if not required; and

- Outlines social distancing requirements, including limits on gathering sizes while allowing for social bubbles; and
- Requires businesses and other entities to implement a social distancing protocol and written health and safety plans, including requiring employees to comply, taking reasonable measures to remind customers and the public of the requirements, and refusing to serve customers who do not comply.

On June 18, 2020, the California Department of Public Health issued Guidance that “mandates that face coverings be worn state-wide” in specified high-risk situations to limit the spread of COVID-10, subject to enumerated exceptions. ^[3] The State face mask Guidance is consistent with the County’s Current Health Order.

To increase enforcement of COVID-19 public health mandates, on July 1, 2020, Governor Newsom announced the creation of multi-agency teams as part of the Office of Emergency Services. These teams will have the mission of improving compliance with the State health orders. These teams are expected to initially focus on workplaces.

On July 7, 2020, the County Board of Supervisors adopted a resolution urging individuals in the County to comply with State and County face mask orders and directing the County Manager’s office to develop a community outreach program to educate the public about compliance with the face mask requirements, making particular efforts to reach out to populations that are experiencing high rates of COVID-19, including communities of color and low-income communities. These outreach efforts have begun, including outreach on social media, though they take time to gain traction.

B. Transmission of COVID-19 Has Increased in July Despite Health Orders.

At a global, national, state, and local level, the number of confirmed COVID-19 cases has been increasing during the first few weeks of July 2020. Because of limited testing capacity, the number of cases confirmed through testing represents only a small portion of the total number of likely cases. As of July 29, 2020:

- **Global/National:** There have been more than 17.1 million confirmed COVID-19 cases worldwide, with more than 4.5 million confirmed cases in the United States.
- **California:** There have been more than 485,502 confirmed COVID-19 cases, with 8,909 COVID-related deaths. This confirmed case count represents an increase of more than 36% (129,324 cases) in the past 14 days. There are also currently 8,198 hospitalized confirmed or suspected COVID-19 patients statewide, occupying 2,220 Intensive Care Unit (“ICU”) beds.
- **San Mateo County:** There have been 5,398 confirmed cases and 118 deaths. This confirmed case count represents an increase of more than 23% (1,037 cases) in the past 14 days. There are also currently 69 hospitalized confirmed or suspected COVID-19 patients in the County, occupying 17 ICU beds.

The trend of COVID-19 transmission in San Mateo County is increasing at a lower rate than in many other similarly situated urban and suburban areas of the state, including several other Bay Area

counties. However, the County continues to see ongoing transmission, with a current “R-effective” value-measuring the rate at which COVID-19 is spreading—slightly over 1.0. This represents slightly increasing transmission but within the statistical range that the State characterizes as “likely stable.”^[4]

The California Department of Public Health has established a County Monitoring List to track and identify those counties that have surpassed state benchmarks for elevated disease transmission, increasing hospitalizations, or limited hospital capacity.

- On July 13, 2020, California Public Health Officer & Director Sonia Angell issued an Order emphasizing that “statewide data has since demonstrated a significant increase in the spread of COVID-19, resulting in public health conditions that demand measures responsive to those conditions be put into place with haste” and closing statewide operations of all bars and indoor services at various businesses, including restaurants, wineries, movie theaters, and museums.^[5]
- Director Angell’s July 13 Order mandates that counties on the Monitoring List for three consecutive days must close additional indoor operations at gyms, places of worship, protests, officers for non-critical infrastructure sectors, personal care services, hair salons, and malls.
- On July 17, 2020, Governor Newsom released an education plan that requires that schools located in counties on the Monitoring List cannot open for in-person instruction until their county is off the Monitoring List for 14 consecutive days.^[6]

On July 29, 2020, the County was added to the Monitoring List. San Mateo was the last Bay Area county to be added; other Bay Area counties remain on the Monitoring List.

Despite the County and State face mask, social distancing, and other requirements to minimize transmission of COVID-19, some individuals and entities in the County are not consistently complying with these requirements. For example, anecdotal reporting has identified many situations where individuals without face masks attempt to participate in public activities or to engage with local businesses when they do not qualify for an exemption.^[7] Some of these individuals may be unaware of the requirements or may not understand the value of face masks in preventing the spread of COVID-19. At the same time, others may be knowingly flaunting the requirements, perhaps in part because they believe that the mandates will not actually be enforced.

DISCUSSION:

While COVID-19 Health Orders are potentially punishable as a misdemeanor and expose violators to a fine of up to \$1,000 and imprisonment up to 90 days, in many cases a criminal citation is not the most appropriate response to a violation. Criminalizing violations may be overly punitive, consume a high amount of community resources, and take a long time to process. The infraction and administrative citation structures offer additional tools to give the County and cities and towns flexibility and supplement their efforts to encourage compliance and deter violations. Governor Newsom has emphasized that enforcement of COVID-19 public health orders will largely come at the local level, and that the state has budgetary mechanisms to hold local jurisdictions accountable by withholding COVID stimulus funds if they are not enforcing compliance with state public health guidelines.^[8]

Many other counties in the region (including Contra Costa, Marin, Mendocino, Napa, and Yolo) have adopted similar infraction or administrative citation structures to allow them to issue fines to enforce

face mask mandates and other public health orders. Other counties are considering adopting a similar structure. Current county ordinances are summarized in the table below.

	Contra Costa	Marin	Mendocino	Napa	Yolo
Date	July 28	July 21	July 8	July 14	July 7
Scope	All public health orders	All public health orders	All public health orders (admin. citation), face mask orders (infraction)	All public health orders	Face mask orders
Fines	<p><u>Non-commercial:</u> \$100 for 1st violation, \$200 for 2nd, \$500 for 3rd and beyond</p> <p><u>Commercial:</u> \$250 for 1st violation, \$500 for 2nd, \$1,000 for 3rd and beyond</p>	<p><u>Non-commercial:</u> \$25-\$500 per violation</p> <p><u>Commercial:</u> \$250-\$10,000 per violation</p> <p><i>Sliding scale based on risk and culpability factors.</i></p>	<p><u>Non-commercial:</u> max. \$500 fine per violation</p> <p><u>Commercial:</u> max. \$10,000 fine per violation</p> <p>Face mask infractions: \$100 for 1st violation, \$200 for 2nd, \$500 for 3rd and beyond</p>	<p><u>Non-commercial:</u> \$25-\$500 per violation</p> <p><u>Commercial:</u> \$200-\$5,000 per violation</p> <p><i>Sliding scale based on risk and culpability factors.</i></p>	<p><u>Non-commercial:</u> \$25-\$500 per violation</p> <p><u>Commercial:</u> \$250-\$10,000 per violation</p> <p><i>Sliding scale based on risk and culpability factors.</i></p>

Education and warning remain the County’s and cities’ and towns’ primary tools when engaged in public outreach about public health mandates, as the goal is to obtain voluntary compliance. The County and the State continue to expand their efforts to educate the public, including outreach to populations currently experiencing the highest transmission of COVID-19, including communities of color communities and low-income communities. Enforcement Officers are never required to issue an infraction or administrative citation but are empowered to exercise discretion if they feel further education and warnings are more appropriate under the circumstances.

This Ordinance continues to require that any violation can only follow a clear written warning from an Enforcement Officer. This warning must be communicated in a reasonably culturally competent manner to ensure that a party violating a public health order understands what is required. For example, an Enforcement Officer who encounters a Spanish-speaking individual who is violating a face mask order must first warn and educate the individual in Spanish about the requirements and allow the individual to comply before issuing any notice of violation.

There are a few differences between the infraction structure for individuals and non-commercial entities and the administrative citation structure for commercial entities, summarized in the table below. These alternatives impose higher potential fines on commercial entities, whose health order violations jeopardize the health of both employees and customers in an effort to increase profits or minimize costs. Commercial entities are fined based on a sliding scale, which allows a more significant penalty to be imposed when circumstances warrant. By contrast, the lower fine structure for individuals and non-commercial entities creates a deterrent without extracting burdensome fees.

	Infraction	Administrative Citation
Applies to:	Individuals and non-commercial entities	Commercial entities
Enforcement:	Officer must observe violation	Officer can observe violation or receive credible report
Fines:	<ul style="list-style-type: none"> • \$100 for 1st violation • \$200 for 2nd violation • \$500 for additional violations within a year of the first violation 	Min. \$250 and max. \$3,000 per violation, depending on: <ul style="list-style-type: none"> • Gravity of health risk • Prior warnings • Intent to profit from violation • Good faith efforts to comply
Appeal process:	Written dispute decided by neutral dispute officer; no right to appeal further	Written or oral hearing before neutral dispute officer, subsequent right to appeal to superior court

The use of administrative Enforcement Officers-potentially a range of people designated by the County or cities or towns with public health or code enforcement responsibilities-will help minimize the enforcement burden on sworn law enforcement officers, who can focus primarily on their criminal law enforcement responsibilities. This may be particularly valuable in the current political climate, where many individuals have expressed concern about the expansion of law enforcement duties beyond the criminal sphere. Using these civil infractions and administrative citations may also help minimize escalation of the infraction or citation process because parties in violation of the health orders do not face a criminal misdemeanor citation and potential jail time. To the extent enforcement is undertaken by County or city or town law enforcement officers, they remain empowered to exercise discretion to issue either infractions, administrative citations, or misdemeanor citations, as appropriate to the circumstances.

Any cited individual or entity can dispute a violation and fine. For the lower-value infractions, this is a written process; for the higher-value administrative citations to commercial entities, the violator may choose either a written process or a live oral hearing, as required by due process. This creates a mechanism by which parties can clarify the requirements of the COVID-19 health orders and provide additional information that might not be at hand at the moment of the violation.

- The primary anticipated use of disputes would be for individuals who claim a medical exception to wearing a face mask. For repeat individual violators, this includes the right to request a hardship waiver if there has been a genuine effort to comply and the \$200 or \$500 fine creates economic hardship.
- Allowing this separate process can de-escalate the citation process because an individual or entity cited by an Enforcement Officer will have a second opportunity to present information. It also allows the "Dispute Officer" - a person designated by the County's Director of Emergency Services, Mike Callagy - to provide a neutral opinion. This neutral third-party Dispute Officer will also be empowered to exercise discretion to reduce or negate the fine if the circumstances warrant.
- For the more formal administrative citation appeal hearings, the County may recover the costs of the appeals process if it prevails.

FISCAL IMPACT:

No significant fiscal impact is expected. Additional enforcement by County personnel would require some additional expenditure of resources by the County, though any collected fines would offset this expenditure at least in part. The balance between costs and revenue would depend on presently unknowable details about future public activity and enforcement decisions.

[1] <https://www.smchealth.org/sites/main/files/file-attachments/ho_order_c19-8b_face_covering_revised_final.pdf?1589988744>

[2] <https://www.smchealth.org/sites/main/files/file-attachments/ho_order_c19-11_20200617_1.pdf?1592947700>

[3] <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf>

[4] <<https://calcat.covid19.ca.gov/cacovidmodels/>>

[5] <<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-158.aspx>>

[6] <<https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools/>>

[7] <<https://www.sfchronicle.com/bayarea/article/Why-do-some-people-refuse-to-wear-masks-15304985.php>>; <<https://www.sacbee.com/news/coronavirus/article243810462.html>>.

[8] On July 29, 2020, the State announced it was withholding funds from two cities that refused to enforce COVID-19 orders. <<https://www.mercurynews.com/2020/07/29/california-withholds-virus-money-from-2-defiant-cities>>.