

**TESTIMONY IN OPPOSITION TO COUNTY COUNCIL RESOLUTION TO ADOPT
EXECUTIVE ORDER 122-20**

Summary:

This presents testimony in opposition to the Montgomery County Council’s Resolution to adopt Local Executive Order 122-20 (COVID-19 – Local Order Amending and Restating Order dated September 29, 2020). Both Local Executive Order 122-20 and the Council’s resolution presume, without making factual findings to support the presumption, that a 25-person or a 25% indoor capacity restriction (whichever is less) is “necessary and reasonable” in Montgomery County. But the Council and the County Executive only have authority under the Governor’s Executive Order to impose more restrictive conditions on public gatherings if such additionally restrictive measures are “necessary and reasonable.” Governor Hogan’s Executive Order sets a 75% indoor capacity restriction for food service establishments and a 50% indoor capacity restriction on gyms, indoor pools, bowling alleys, and similar establishments (State Executive Order 20-10-16-02). Local Executive Order 122-20 provides no findings that justify the specific additional restriction level of 25%, and thus has failed to show that its stronger restrictions are either “necessary” or “reasonable.” As such, Local Executive Order 122-20 does not comply with State Executive Order 20-10-16-02, and the County Council has no authority to adopt it.

The COVID-19 crisis is serious, and a strong public health response is important. This testimony acknowledges the need for many of the restrictions contained in the Local Order. This crisis does not absolve county officials, however, from acting with caution and within the bounds of their authority when responding to this crisis. The adverse social, psychological and economic effects from additional restrictions on public gatherings are profound. The Local Executive Order does not take these factors into consideration and thus fails to satisfy the “necessary and reasonable” requirement in two ways: (i) it does not provide public health data justifying the downward departure to the specific level of 25% (as opposed to 33% or some other number); and (ii) it does not consider and balance the public health considerations with the adverse social, psychological and economic effects of these further restrictions. The County Council should return the Local Order to the Local Executive to reconsider its scope and basis, with a request that the Local Executive specifically consider and discuss less restrictive measures.

Discussion:

This testimony acknowledges the severe public health threat presented by the COVID-19 pandemic and does not question the County’s general need to respond. Nor does it argue that Montgomery County should simply default to the response levels set forth in the State Executive Order. Rather, this testimony submits that Local Order 122-20, and the Council’s proposed adoption of it on an emergency basis without change, are actions beyond the scope of the County’s legal authority and may not serve its residents well.

Lack of Legal Authority.

Both Local Executive Order 122-20 and the Council's resolution presume, without making factual findings to support the presumption, that a 25-person or a 25% indoor capacity restriction (whichever is less) is "necessary and reasonable" in Montgomery County. There is no discussion of what public health data or studies justify the 25% level, nor is there a discussion of how such a level might adversely affect the social, psychological or economic well-being of county residents. Did the Executive consider 33%? Are there some establishments that could operate at 50%, some at 33%, and others that indeed are only safe at 25%? The lack of a discussion of any findings that justify the specific 25% level, applied uniformly across all businesses and social establishments, results in a failure by the Local Executive to show that the additional restrictions in the Local Order are indeed "necessary and reasonable." The burden is clearly on the Local Executive and the County to make that showing, but the Local Order fails that test.

The Council and the County Executive only have authority under the Governor's Executive Order to impose more restrictive conditions on public gatherings if such additionally restrictive measures are "necessary and reasonable." Governor Hogan's Executive Order sets a 75% indoor capacity restriction for food service establishments and a 50% indoor capacity restriction on gyms, indoor pools, bowling alleys, and similar establishments (State Executive Order 20-10-16-02). Local Executive Order 122-20 provides no findings that justify the specific additional restriction level of 25%, and thus has failed to show that its additional restrictions are either "necessary" or "reasonable." Simply stating that something is so does not make it so.

Consideration of Social and Economic Conditions

There is a wealth of evidence that harsh restrictions on social gatherings have substantial adverse effects. For example, the Great Barrington Declaration, authored by prominent infectious disease epidemiologists and public health scientists, expresses grave concerns about the damaging physical and mental health impacts of the prevailing COVID-19 policies. These scientists and medical practitioners recommend an approach they call Focused Protection. The Great Barrington Declaration has been signed by over 11,700 medical and public health scientists, over 33,000 medical practitioners, and over 617,000 concerned citizens. The Local Executive and the Council aren't required to adopt Focused Protection or similar measures, but it is entirely inappropriate for this and similar credible scientific evidence to be ignored altogether. The failure of Local Executive Order 122-20 to consider and make findings about this sort of contrary evidence calls strongly into question whether the Local Order has justified its increased restrictions as "necessary and reasonable."

Conclusion

For the reasons described above, this testimony recommends that: (i) the Local Order be rejected by the Council and returned to the Local Executive with a request for a more detailed justification of the restrictive measures it proposes, such that the County's "necessary and reasonable" burden is actually satisfied; and (ii) that the Council request that the Executive

consider and discuss alternative, less restrictive measures. If the Local Executive declines to do so, then the Council should amend the Local Order to mitigate the Local Order's harsh restrictions and include the findings required of the County to show that the resulting departure from the State Order are necessary and reasonable.

I am a resident of Washington DC but live near the border of Montgomery County and frequently patronize its restaurants, gyms, social clubs, and other local businesses.

Respectfully submitted,

Carl W. Hampe