

Christopher A. Cole
~~CC BY-NC-SA~~
~~Rockville, MD 20854~~

BY EMAIL county.council@montgomerycountymd.gov

Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: Board of Health Regulation to adopt an Executive Order 139-20AM COVID-19
Local Order - Amending and Restating Order dated November 10, 2020

Dear Councilmembers:

I am writing regarding the proposed Board of Health regulation to enhance restrictions on County businesses, ostensibly as a result of the COVID pandemic. I urge the Council to scrutinize this proposal carefully and to require that the County Health Officer provide the County Council with *substantial evidence* to support the connection of some of the proposed restrictions to the public health goals.

Specifically, this letter addresses the proposed requirement that indoor retail and other services be limited to 1 customer for every 200 sq. ft of space or 25% occupancy, whichever number is lower. I respectfully submit that there is *no evidence in support of this limit*, much less “substantial evidence” as required by law. The limit does not take into account duration of exposure, mask-wearing among customers and employees, air flow in the indoor space, or whether the space has enhanced filtration or other mitigation measures in place.

State law is quite clear that arbitrary and capricious administrative actions cannot stand. Maryland Code, § 10-203(d) (hereinafter the “APA”). With respect to an agency’s findings of fact, a reviewing court determines “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978).

The proposed restriction on retail capacity must be supported by either robust modeling evidence showing the benefit of this proposed capacity limit on reduction of infection, *or* contact tracing evidence that shows a significant number of COVID cases can be traced to situations where indoor retail exceeded the proposed capacity limits. You must ask the Health Officer to explain such evidence because I strongly suspect that there is none.

I have seen fluid dynamics modeling that shows the spread of virus particles in indoor spaces. Exposure depends on the physical characteristics of the space, the ventilation, duration of persons remaining in the space, and whether the occupants are properly wearing masks. Well-ventilated spaces present low risk in general.

In addition, substantial emerging evidence shows that risks of exposure in indoor retail environments is quite low. The District of Columbia contact tracing data shows that personal care providers (barbers and nail salons, for example), which involve far more intimate contact than merely shopping, can be traced to approximately only 6% of reported cases. Fitness centers were responsible for only 0.5% of reported cases. [Exposure Activities | coronavirus \(dc.gov\)](#). New York City contact tracing data tell a similar story. In New York City, retail was responsible for only 0.6% of all cases. [What New York's Contact Tracing Data Show \(spectrumlocalnews.com\)](#). By contrast, social transmission in homes and other primarily social indoor venues accounts for about 75% of all cases in both D.C. and New York.¹

The District was in fact sued on Friday by the Archdiocese for restricting occupancy of Houses of Worship in the absence of appropriate data in support of the restriction. [ADW-v.-Bowser-Complaint-as-filed.pdf](#)

When the Council contemplates taking action that is anticipated to have a drastically harmful impact to the livelihood of County residents who operate retail establishments, the Council must have a good reason to do so. Moreover, imposition of arbitrary restrictions that lack an evidentiary backing reduces compliance overall and lowers our faith in competent government. Respectfully, the proposed regulation is based on little more than an assumption that reducing capacity “cannot hurt.” The Council owes its constituents a more reasoned analysis than this.

Respectfully submitted,



Christopher A. Cole

12/14/20

¹ I note that the situation for “big box” retailers may be different, as some contact tracing data show more substantial spread tied to these kinds of retailers.