

ORDINANCE NO. 20-E()

AN EMERGENCY ORDINANCE TO AMEND SECTION 5 OF ORDINANCE NO. 20-E(5), “AN EMERGENCY ORDINANCE TO PREVENT THE SPREAD OF THE NOVEL CORONAVIRUS, SARS–CoV–2, AND THE DISEASE IT CAUSES, COMMONLY REFERRED TO AS COVID-19,” TO REGULATE GATHERINGS AT OUTDOOR HORSE AND OTHER LIVESTOCK SHOWS AND HORSE RACING RACETRACKS

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, on March 12, 2020, the County Executive, acting as the Director of Emergency Management, declared a local emergency because of the COVID-19 pandemic pursuant to his authority under Virginia Code § 44-146.21, and this declaration was confirmed by the Board of Supervisors on March 17, 2020; 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, on March 13, 2020, the President of the United States declared a national emergency in response to the spread of COVID-19; 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)ⁱ; 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 immunityⁱⁱ; 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 othersⁱⁱⁱ; 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 gatherings^{iv}; 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 classes^v; 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”^{vi}; 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 distancing^{vii}; 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 spreading^{viii}; 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)^{ix}; 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 possible^x; 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-19^{xi}; 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”)^{xii}, 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 County is a member, and in the County 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 Board of Supervisors of the County of Albemarle, Virginia, that:

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 Virginia Code § 15.2-1200, which enables the County, through its Board of Supervisors, to adopt “necessary regulations to prevent the spread of contagious diseases among persons . . .” that “are not inconsistent with the general laws of the Commonwealth.” This ordinance is adopted as an emergency ordinance pursuant to Virginia Code § 15.2-1427(F).

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. “Farm winery” means an establishment that is required to be licensed as a farm winery under Virginia Code § 4.1-207.
- D. “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.
- E. “Gathering” 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, concert, festival, conference, parade, wedding, sporting event, party (including parties at private residences), celebration, and other social events. “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.
- F. “Limited brewery” means an establishment that is required to be licensed as a limited brewery under Virginia Code § 4.1-208.
- G. “Limited distillery” means an establishment for which a limited distiller’s license is required under Virginia Code § 4.1-206.

- H. “Public place” means: (i) any indoor place 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; or (ii) any outdoor place where at least six feet of physical distancing between persons not living in the same household cannot be maintained. “Public place” does not include a person’s residence or personal vehicle, institutions of higher education and other schools, fitness and other exercise facilities, religious institutions, indoor shooting ranges, and the County courthouse buildings.

Sec. 4. Limitation on the Number of Persons at Food Establishments, Farm Wineries, Limited Breweries, and Limited Distilleries

- A. *Indoor occupancy.* Indoor occupancy at food establishments, farm wineries, limited breweries, and limited distilleries must not be more than 50 percent of the lowest occupancy load on the certificate of occupancy issued by the County of Albemarle. If the building or structure does not have an occupancy load established on a certificate of occupancy issued by the County of Albemarle, indoor occupancy must not be more than 50 persons.
- B. *Persons at gathering are counted.* Persons participating in or attending a gathering who are indoors count towards the occupancy limits established by this section.
- C. *Persons working not counted.* Persons working at food establishments, farm wineries, limited breweries, or limited distilleries, either as employees or independent contractors, do not count towards the occupancy limits established by this section.
- D. *State requirements, recommendations, and guidance.* Except as provided in Sections 4(A), (B), and (C), this section does not affect any requirement, recommendation, or guidance including, but not limited to, those requiring or recommending physical distancing that apply to food establishments, farm wineries, limited breweries, and limited distilleries established in EO 67, or as it may be further amended or superseded, any Order of Public Health Emergency, any workplace safety regulations, or any other State or federal laws related to the COVID-19 pandemic.

Sec. 5. Limitation of the Number of Attendees at Gatherings

- A. *Gatherings of more than 50 persons prohibited.* All public and private in-person gatherings of more than 50 persons are prohibited except as provided in Section 5(B).
- B. *Gatherings not subject to the 50-person limit.* Section 5(A) does not apply to the following gatherings and, instead, the maximum size for gatherings established in EO 67, or as it may be further amended or superseded, or any Order of Public Health Emergency, applies:
1. Outdoor gatherings at food establishments, and at farm wineries, limited breweries, and limited distilleries for activities and events permitted for those uses under County Code Chapter 18.
 2. Gatherings for religious exercise including, but not limited to, religious ceremonies.
 3. Wedding ceremonies and wedding receptions.
 4. Expressive activity on a public street, public sidewalk, in a public park subject to park rules, and on other public property expressly designated for expressive activity by its governmental owner or occupant.
- C. *Gatherings not subject to the 50-person limit; outdoor horse and other livestock shows and horse racing racetrack events without spectators.* Section 5(A) does not apply to outdoor horse and other

livestock shows and to outdoor horse racing racetrack events at which spectators are not in attendance at either such shows or events, provided that the owners, operators, and participants comply with EO 67, §§ 1, 10(a), and 10(b), all applicable “Guidelines for All Business Sectors” (pages 1-4) incorporated by reference into EO 67 and, for outdoor horse and other livestock shows, the guidelines for the “Horse and Other Livestock Shows” business sector (pages 37-39) and, for outdoor horse racing racetrack events, the guidelines for the “Horse Racing Racetracks: Multi-Day Events” business sector (pages 40-43). A horse or other livestock show is deemed to be conducted outdoors when, because of inclement weather, it is conducted in an open-air structure having a roof.

~~CD.~~ *Persons working not counted.* Persons working at gatherings, either as employees or independent contractors, do not count towards the limit on the number of persons at a gathering.

~~DE.~~ *State requirements, recommendations, and guidance.* Except as provided in Sections 5(A), ~~(B), and (C)~~ through (D), this section does not affect any requirement, recommendation, or guidance including, but not limited to, those requiring or recommending physical distancing, that apply to gatherings established in EO 67, or as it may be further amended or superseded, any Order of Public Health Emergency, any workplace safety regulations, or any other State or federal laws related to the COVID-19 pandemic.

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 10 years of age and under.
 2. *Wearing face covering poses certain risks.* Persons for whom wearing a face covering poses a bona fide and substantial mental or physical health risk, such as persons who have trouble breathing, or poses a safety or security risk to persons who 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 10 years of age or under.
 3. *Certain employees.* On-duty employees covered by workplace safety regulations promulgated by the State Safety and Health Codes Board, or by face covering rules established by an applicable Executive Order of the Governor or an Order of Public Health Emergency by the State Health Commissioner.
- C. *Circumstances when face coverings are not required to be worn by any persons.* Face coverings are not required to be worn by any 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 minimum physical distancing established by any applicable Executive Order of the Governor or Order of Public Health Emergency of the State Health Commissioner 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 should use their best judgment regarding placing face coverings on any minor between the ages of two through nine in public places. Adults accompanying minors between the ages of 10 through 17 must use reasonable efforts 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

Section 4, 5, or 6 does not apply when a more restrictive requirement in an Executive Order or an Order of Public Health Emergency is in effect.

Sec. 8. Penalties

- A. *Penalty for violation of Section 4.* A violation of Section 4 by the owner of the food establishment, farm winery, limited brewery, or limited distillery, and any manager or assistant manager, however titled, responsible for the operation and management of the food establishment, farm winery, limited brewery, or limited distillery on the date of the violation, is punishable as a Class 3 misdemeanor. Section 4(D) is not enforced pursuant to this ordinance.
- B. *Penalty for violation of Section 5.* A violation of Section 5 by the owner or tenant of the private property on which the gathering is located, is punishable as a Class 1 misdemeanor. A violation of Section 5 by any person attending the gathering, after first being warned by a law enforcement officer to disperse from the gathering because it exceeds the limitation for a gathering and having failed to disperse after a reasonable period of time not to exceed two minutes, is punishable as a Class 1 misdemeanor. Section 5(D) is not enforced pursuant to this ordinance.
- C. *Penalty for violation of Section 6.* A violation of Section 6 by any person subject to its requirements is punishable as a Class 1 misdemeanor. No person under the age of 18 is subject to a criminal penalty for failing to wear a face covering.
- D. *Injunctive relief.* The County, the Board of Supervisors, and any County 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 12:00 a.m., August 1, 2020 and expires at 11:59 p.m. on September 29, 2020, or upon the adoption of an ordinance succeeding this ordinance for which notice is provided as required by Virginia Code § 15.2-1427(F), paragraph 1, whichever occurs first.

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

This ordinance does not affect the powers of the County Executive, 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 Board of Supervisors 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.

State law reference – Va. Code §§ 15.2-1200, 15.2-1427(F), 15.2-1429, 15.2-1432, 18.2-11.

I, Claudette K. Borgersen, do hereby certify that the foregoing writing is a true, correct copy of an Ordinance duly adopted by the Board of Supervisors of Albemarle County, Virginia, by a vote of _____ to _____, as recorded below, at a regular meeting held on _____.

Clerk, Board of County Supervisors

	<u>Aye</u>	<u>Nay</u>
Mr. Gallaway	_____	_____
Ms. LaPisto-Kirtley	_____	_____
Ms. Mallek	_____	_____
Ms. McKeel	_____	_____
Ms. Palmer	_____	_____
Ms. Price	_____	_____

ⁱ *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.

ⁱⁱ *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.

ⁱⁱⁱ *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=EAIaIQobChMI9IvSvJPk6gIVGrbICH2TYw9QEAAAYASAAEgKjDfD_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>.

^{iv} 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.

^v 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>.

^{vi} 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.”)

^{vii} <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>.

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- viii <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>.
- ix <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html>.
- x <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html>.
- xi <https://www.vdh.virginia.gov/coronavirus/schools-workplaces-community-locations/businesses/>.
- xii [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).