



COUNTY OF DUTCHESS
DEPARTMENT OF LAW

TO: Marcus J. Molinaro, Dutchess County Executive
Ron Hicks, Assistant County Executive
Adrian H. Anderson, Dutchess County Sheriff
Kirk Imperati, Undersheriff
William V. Grady, Dutchess County District Attorney
Kenneth Roman, Deputy Commissioner of Emergency Response

FROM: Caroline E. Blackburn, Chief Assistant County Attorney *CEB*

DATE: April 15, 2020

RE: Enforcement of Emergency Orders Related to Covid-19
Our File: G-1787

Background:

As you may know, in response to the Covid-19 pandemic, Governor Cuomo has declared a state of emergency in New York pursuant to Section 28 of the NYS Executive Law, and pursuant to Section 29-a, has issued a series of executive orders intended to reduce public density and slow the rate of transmission of this disease. County Executive Molinaro has also declared a local state of emergency in Dutchess County pursuant to Section 24 of the NYS Executive Law, and has also issued a series of emergency orders which are intended to specifically aid Dutchess County residents.

New York State Executive Law 24(5) clearly prescribes that any knowing violation of an emergency order of the County Executive may be punishable as a class B misdemeanor, but Section 29-a of the NYS Executive Law does not as definitively explain how a Governor's executive orders shall be enforced. Instead, the Governor has outlined enforcement parameters within his emergency orders and in guidance documents published by the State.

The purpose of this memorandum is to offer guidance on potential methods of enforcement of the Governor's executive orders and the County Executive's emergency orders, as interpreted by the Dutchess County Department of Law. To the extent this memorandum is forwarded to any party outside County government, such as another municipality within the County or a law enforcement agency, this memorandum shall not constitute formal legal advice, and it cannot not be relied upon as such. Municipalities are urged to consult with their own legal counsel, or in the case of seeking criminal sanctions, the Dutchess County District Attorney's Office, for specific direction on enforcement.

Enforcement Strategy

We urge that enforcement begin with this guiding principle: *“Authorities should use the least invasive enforcement approach necessary to achieve compliance. In other words, unless the circumstances are particularly egregious, authorities should use the first violation as an opportunity to inform [Dutchess County residents] of the orders and their responsibility to protect the health and safety of themselves and others.”* See, “New York State PAUSE Enforcement Assistance Task Force Memorandum, Updated 4/03/2020. If there are continued violations following a verbal instruction or warning, subsequent non-compliance may be handled in various ways depending on the nature of the violation.

Overview of State and Local Orders

As cited above, the Governor and County Executive Molinaro have exercised their powers pursuant to Section 29-a and Section 24 of the NYS Executive law, respectively. This memorandum outlines some of the salient provisions of those orders herein. This list is not exhaustive, and orders are regularly extended and amended on a daily basis. Please be sure to consult the links provided herein for the most recent recitation of the orders. The Governor’s Orders may be accessed at <https://www.governor.ny.gov/executiveorders> and the County Executive’s Orders may be accessed on the Dutchess County website at <https://www.dutchessny.gov/Departments/County-Executive/Executive-Orders.htm>.

Governor Order 202.3:

- Cancels or postpones any large gathering or event of 50 persons or more.
- All restaurants and bars must cease serving on-premises food or beverage. “Take out” or off-premises consumption is permissible, including alcohol, so long as the business has an on-premises license to serve it.
- All gyms, fitness centers and classes, and movie theaters must cease in-person operation to the public.

Governor Order 202.4:

- Local governments shall allow non-essential personnel to be able to work from home or take leave without charge to accruals. Such non-essential personnel shall total no less than fifty-percent (50%) of the total number of employees across the entire workforce of such local government or political subdivision.

Governor Order 202.5:

- Indoor common portions of shopping malls shall close and shall not be accessible to the public. Stores with external access may remain open, but restaurants shall continue to abide by 202.3.
- Places of public amusement (indoor or outdoor) are closed to the public. (i.e. Amusement parks, aquariums, zoos, children’s play centers, bowling alleys). It does not apply to public parks or open recreation areas.

Governor Order 202.7:

- Closes barbershops, hair salons, tattoo and piercing parlors and personal care services.

Governor Order 202.8:

- All businesses and not-for-profit entities shall permit non-essential employees to work-from-home to the extent it can be safely utilized. Employers shall reduce in-person workforce by 100%, except essential services shall be exempted.
- “Any business violating the above order shall be subject to enforcement as if this were a violation of an order pursuant to section 12 of the Public Health Law.”

Governor Order 202.10:

- All non-essential gatherings of individuals of any size for any reason (i.e. parties, celebrations or other social events) are canceled or postponed at this time.

Emergency Order No. 2 of 2020:

- County Executive Molinaro directs that all social, community and public events or gatherings, including Dutchess County sponsored events, where it is anticipated that attendance will exceed 20 persons or more be restricted, cancelled or postponed.

Emergency Order No. 6 of 2020:

- County Executive Molinaro facilitates a county-wide coordination of response by providing municipalities broad authority, on consent, to share facilities, equipment, personnel and/or services (including building code enforcement officers, fire marshals, and law enforcement) and to take whatever steps are necessary to protect life and property and provide emergency assistance.

**Enforcing Continued Violations of Business, Social Density,
and Social Distancing Restrictions**

Public Health Law Violations

Pursuant to Governor’s Executive Order 202.8 and 202.14, all of Governor Cuomo’s executive orders are enforceable as a violation of the NYS Public Health Law Section 12-b(2). That section of the Public Health Law penalizes willful violations by imposing a fine of up to \$10,000, or imprisonment up to one year, or both.¹ Please note, however, that it appears the administrative penalty for “an individual who is participating in any gathering ... or is failing to abide by social distancing restrictions in effect in any place which is not their home” is capped at \$1,000, per Executive Order 202.14. A non-essential business which is out of compliance, however, may be liable for a \$10,000 fine and/or imprisonment up to 1 year pursuant to Orders 202.8 and 202.14.

¹ Please note that when money is assessed pursuant to a statute that makes the behavior a crime, it is characterized as a “fine”, such as with Public Health Law Section 12-b. However, when money is assessed as a penalty and it does not constitute a crime – such as with the Dutchess County or New York Sanitary Codes -- it shall constitute an “administrative penalty”. If a “fine” is assessed where it should have been an “administrative penalty”, or vice versa, the action may be determined to have been without authority, as has been found at least once by the New York State Supreme Court.

Dr. Anil Vaidian, the Dutchess County Commissioner of Behavioral and Community Health, has issued an order requiring that any person who has tested positive for Covid-19 by laboratory test must isolate within his/her residence, and has also restricted the opening of campgrounds, children's seasonal camps, seasonal communities such as co-ops or bungalow communities. The order is in effect until May 30, 2020. Willful violations are punishable pursuant to Section 12-B of the Public Health Law as a criminal misdemeanor and/or with a monetary sanction, depending on the nature of the violation.

Public Health violations are enforced by the NYS Department of Health and the Dutchess County Department of Behavioral and Community Health. To assist local authorities with enforcement of these orders, the Governor established the **New York State PAUSE Enforcement Assistance Task Force**, where individuals may file a complaint regarding the operation of non-essential businesses or gatherings 24 hours a day, 7 days a week by calling **1-833-789-0470**. Additionally, the State assists local authorities "in their front-line role of responding to alleged violations of the orders by providing guidance on available civil and criminal enforcement tools." See, New York State PAUSE Enforcement Assistance Task Force guidance, dated 4/1/2020. You may contact the Department of Behavioral and Community Health with a complaint by telephone at: **(845) 486 – 3400**.

Uniform Code and Local Building Code

The Governor's Executive Order 202.11 generally states that every order related to limiting business operations or limiting gathering in "any space" shall be deemed to be a violation of the Uniform Code or other local building code in effect, and purports to specifically authorize law enforcement – "any state, county, or local police officer authorized to enforce laws within the jurisdiction" – to "remove persons from such space or facility" and issue appearance tickets in the event of a violation. Additionally, fire marshals, and local code enforcement officers are apparently authorized to issue appearance tickets, a Notice of Violation, an Order to Remedy, and/or a Do Not Occupy Order, as authorized by law. The Uniform Code addresses uniform standards and requirements related to occupancy in buildings and places of public assembly. See, *NYS Executive Law 378(2) and (4)*. Local building codes may be specific to a municipality.

Section 29-a of the NYS Executive Law authorizes the Governor to "*suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency*" during a declared state of emergency so long as the law, absent a suspension, would "prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster." Additionally, the Governor has the power to *issue a directive*, by Executive Order, during a declared state of emergency so long as it is necessary to cope with the disaster.

It is apparently under this dual authority that the Governor has suspended various State statutes and concomitantly issued directives to maintain social distancing and eliminate non-essential gatherings of any type. While we are not aware of any authority by which the Governor may make new laws or create new local violations by executive order, even during an emergency, his power to suspend local laws, ordinances and regulations and to issue directives to cope with the emergency may have some effect on a local building code such that code enforcement officers and/or law enforcement could enforce the emergency executive orders. (For example, by directing that certain businesses close to the public and by

banning non-essential gatherings of persons in public places, the Governor has arguably suspended or changed occupancy requirements in certain public buildings which may be enforced locally.) Local municipalities should consult their legal counsel and/or local building code to determine what may be enforced.

Additionally, Order 202.11 states that, “nothing in this provision shall limit the authority of any governmental unit or agency to take such other and/or additional enforcement actions to the extent necessary to ensure compliance with such occupancy-related directives or facility operation-related directives.”

Penal Law

Since the Governor has lawfully directed that non-essential businesses close to the public and has banned all non-essential gatherings pursuant to Section 29-a of the NYS Executive Law, law enforcement may lawfully direct the public to disperse when they are congregating or operating a business in violation of that directive. Guidance from the State remains that first contact between law enforcement and residents should be a verbal reminder to disperse. After consulting the Penal Law, law enforcement could consider using the following criminal laws to enforce aspects of the Governor’s executive orders in instances of continued violations following verbal reminders/warnings: Obstructing Governmental Administration (Penal Law 195.05), Disorderly Conduct (Penal Law 240.20(6)), Criminal Nuisance (Penal Law 240.45(1), and Willful violation of the Public Health Law is a misdemeanor (Public Health Law 12-B).

Additionally, Section 24(5) of the Executive Law clearly states that a willful violation of any local emergency order of the Dutchess County Executive is punishable as a misdemeanor. The full listing of the County Executive Emergency Orders is provided on page 1, via hyperlink, and includes, but is not limited to: a restriction on gatherings exceeding 20 persons or more, closing all Senior Friendship Centers, suspending local tax foreclosure, lifting procurement barriers for local municipalities, reducing fees for public transit, creating emergency homeless and medical shelters, and more.

The District Attorney’s Office should be consulted prior to the issuance of any appearance ticket or accusatory instrument.

Conclusion

Through Executive Orders 202.11 and 202.14, the Governor has empowered local government, through law enforcement, building code inspectors, fire marshals and the like, to issue orders, Notices of Violations, and appearance tickets, as appropriate, for violations of his executive orders. Additionally, the State PAUSE Task Force may be reached at the telephone number above for guidance and to submit a complaint. Ultimately, persuasion and verbal reminders remain the tool of first resort in achieving compliance before resorting to these methods. Other municipalities should consult their own legal counsel, and/or the District Attorney’s Office before proceeding.