

**State of Board of Health
June 4, 2020 – 9:00 a.m.
Virtual Meeting – WebEx**

Due to COVID-19, this meeting was conducted in an all-virtual environment.

Members Present: Faye Prichard, Chair; Gary Critzer, Tommy East; James Edmondson; Elizabeth Harrison; Linda Hines, RN; Anna Jeng, ScD; Patricia Kinser, PhD; Wendy Klein, MD; Benita Miller, DDS; Holly Puritz, MD; Jim Shuler, DVM; Stacey Swartz, PharmD; Katherine Waddell; and Mary Margaret Whipple.

VDH Staff Present: Dr. Norm Oliver, State Health Commissioner; Dr. Laurie Forlano, Deputy Commissioner for Population Health; Joe Hilbert, Deputy Commissioner for Governmental and Regulatory Affairs; Mylam Ly, Policy Analyst; Dr. Parham Jaber, Chief Deputy Commissioner for Public Health and Preparedness; Alex Jansson, Policy Analyst; Mike McMahon, Acting Deputy Commissioner for Administration; Rebekah Allen, Senior Policy Analyst; Maria Reppas, Director of the Office of Communications; John Ringer, Director of Public Health Planning and Evaluation; Gary Brown, Director, Office of Emergency Medical Services; Jennifer MacDonald, MPH, BSN, RN, Director, Division of Child and Family Health; Stephanie Gilliam, Deputy Director for Budget; Tammie Smith, Public Relations Coordinator; Richard Watson, Video Conference Engineer; Brad Bradley, Public Health Preparedness Systems Manager

Other Staff: Robin Kurz, Senior Assistant Attorney General; Vanessa MacLeod, Assistant Attorney General; Allyson Tysinger, Senior Assistant Attorney General/Chief, Denise Toney, Laboratory Director, Division of Consolidated Laboratory Services

Call to Order

Ms. Prichard called the meeting to order at 9:05am. A roll call determined there was a quorum present to begin the meeting.

Introductions

Ms. Prichard welcomed those in attendance to the meeting. Ms. Prichard then started the introductions of the Board members and VDH staff present.

Review of Agenda

Mr. Hilbert reviewed the agenda and the items contained in the Board's binder.

Approval of December 12, 2019 Minutes

Dr. Klein made the motion to approve the minutes from the December 12, 2019 meeting with Ms. Hines seconding the motion. The minutes were approved unanimously by roll call vote.

Commissioner's Report

Dr. Oliver provided the Commissioner's Report to the Board. He discussed the novel coronavirus (COVID-19) situation and response:

- Situation Setting
- Current status of COVID-19 in Virginia

- Testing
- Contact Tracing
- Supporting Long-Term Care Facilities and Other Settings
- Federal Stimulus Funding

There was discussion concerning Personal Protective Equipment shortages, interpretation of hospitalization data, how small businesses can implement testing for employees, and the historical perspective of the pandemic.

Regulatory Action Update

Mr. Hilbert reviewed the summary of all pending VDH regulatory actions. Since the December 2019 meeting the Commissioner has approved the five following regulatory actions on behalf of the Board while the Board was not in session:

- Regulations Governing Tourist Establishment Swimming Pools and Other Public Pools (12VAC5-460) – Approved NOIRA
- Regulations for the Licensure of Abortion Facilities (12 VAC5-412) – Approved Final Exempt Action to Repeal Regulations
- Regulations for the Licensure of Nursing Facilities (12VAC5 - 371) – Approved Final Exempt Amendments
- Regulations for the Licensure of Hospices (12VAC5 - 391) – Approved Final Exempt Amendments
- Rules and Regulations for the Licensure of Hospitals in Virginia (12VAC5-410) – Approved Final Exempt Amendments

Mr. Hilbert advised the Board that there are 14 periodic reviews in progress:

- Virginia Emergency Medical Services Regulations (12VAC5-66)
- Regulations for the Repacking of Crabmeat (12VAC5-165)
- Regulations Governing Eligibility Standards and Charges for Medical Services to Individuals (12VAC5-200)
- Methodology to Measure Efficiency and Productivity of Health Care Institutions (12VAC5-216)
- Regulations of the Patient Level Data System (12VAC5-217)
- Rules and Regulations Governing Outpatient Data Reporting (12VAC5-218)
- Virginia Medical Care Facilities Certificate of Public Need Rules and Regulations (12VAC5-220)
- Home Care Organizations Regulations (12VAC5-381)
- Regulations for the Submission of Health Maintenance Organization Quality of Care Performance Information (12VAC5-407)
- Certificate of Quality Assurance of Managed Care Health Insurance Plan Licensees (12VAC5-408)
- Regulations Governing the Virginia Physician Loan Repayment Program (12VAC5-508)
- Guidelines for Virginia General Assembly Nursing Scholarships (12VAC5-510)
- Regulations for Identification of Medically Underserved Areas in Virginia (12VAC5-540)

- Regulations for Alternative Onsite Sewage Systems (12VAC5-613)

Public Comment Period

Following a short break, there were three public speakers that were heard. Two spoke regarding the COVID-19 response and one spoke regarding the Newborn Screening Panel. Additionally, three written public comments were submitted prior to the meeting and these are attached to the minutes.

Regulations for the Licensure of Nursing Facilities (12VAC5-371) – Fast Track Amendments

Ms. Allen presented on Fast track Amendments to the Regulations for the Licensure of Nursing Facilities. These amendments were the result of a periodic review to remove unclear, inconsistent, or outdated information.

Ms. Allen stated that:

- References to outdated vaccination protocols have been updated, as has the associated Documents Incorporated by Reference section, and duplicative requirements were removed.
- A new section and additional definitions have been added to address the statutorily mandated criminal background checks and the remaining sections have been updated for consistency with the statutes and the defined terms in 12VAC5-371-10.

Dr. Kinser made a motion to approve the fast track amendments to the Regulations for the Licensure of Nursing Facilities with Mr. Critzer seconding the motion.

There was discussion concerning facilities established for religious tenets which are exempt from these regulations.

The motion was approved unanimously by roll call vote.

Regulations for the Licensure of Hospitals (12VAC5-410) – Final Amendments

Ms. Allen presented the final amendments. These amendments will bring 12VAC5-410 into conformity with the provisions of Va. Code § 32.1-127.001, which states that “Notwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations...for the licensure of hospitals...that shall include minimum standards for the design and construction of hospitals...consistent with the current edition of the *Guidelines for Design and Construction of Hospital and Health Care Facilities* issued by the American Institute of Architects Academy of Architecture for Health.” The American Institute of Architects Academy of Architecture for Health is now the Facility Guidelines Institute. The 2018 editions of the *Guidelines for Design and Construction of Hospitals* and the *Guidelines for Design and Construction of Outpatient Facilities* are the latest editions.

Ms. Allen stated to the Board that:

- These amendments will increase facility and construction safety protocols in new or renovated hospitals.
- Sections throughout are updated to refer to the 2018 edition of the *Guidelines for Design and Construction of Hospitals*.

Dr. Puritz made a motion to approve the final amendments to the Regulations for the Licensure of Hospitals with Ms. Hines seconding the motion.

There was discussion around whether the amendments were discussed with building code stakeholder groups and if these guidelines were taking priority over local guidelines.

The motion was approved unanimously by roll call vote.

Regulations Governing Virginia Newborn Screening Services (12VAC5-71) – Proposed Amendments

Ms. MacDonald presented the proposed amendments. The proposed regulatory action would amend the existing newborn screening regulation to add spinal muscular atrophy (SMA) and X-linked adrenoleukodystrophy (X-ALD) to the newborn screening panel to bring the screening panel into alignment with the National Recommended Uniform Screening Panel. Screening for SMA and X-ALD can provide affected infants the benefit of early diagnosis and treatment. Screening is an effective diagnostic tool since these disorders cannot be detected at birth through a physical examination.

Dr. Miller made a motion to approve the proposed amendments to the Regulations Governing Virginia Newborn Screening Services with Dr. Kinser seconding the motion.

There was discussion concerning availability of funding for care coordination for those who test positive. The care coordination would be provided through federal Title 5 funding.

The motion was approved unanimously by roll call vote.

Statewide Strategic and Planning Emergency Management Services Plan

Mr. Brown presented the Statewide Strategic and Planning Emergency Medical Services (EMS) Plan to the Board. Section 32.1-111.3 of the Code of Virginia requires the development of a comprehensive, coordinated, statewide emergency medical services plan.

The Board of Health must review, update, and publish the plan triennially, making such revisions as may be necessary to improve the effectiveness and efficiency of the Commonwealth's emergency care system. The objectives of the plan shall include, but not be limited to, the nineteen objectives outlined in Section 32.1-111.3.

The plan is comprised of four main core strategies, with each core strategy having several key strategic initiatives.

Mr. Critzer made a motion to approve the statewide EMS plan with Dr. Swartz seconding the motion.

The motion was approved unanimously by roll call vote.

Legislative Update

Mr. Hilbert presented the legislative update from the 2020 General Assembly Session. He highlighted bills that would have an impact on VDH's work. Subject areas included the following:

- Comprehensive Harm Reduction
- Expedited Partner Therapy
- Community Health Worker and Doula Certification
- Sickle Cell Disease
- EMS Data Sharing
- Shellfish Safety
- Immunization
- Drinking Water Safety
- Telehealth
- Certificate of Public Need
- Prevention and Treatment of Sexual Assault
- Newborn Screening Panel
- Sex Changes on Birth Certificates
- Elimination of Race on Marriage, Divorce, and Annulment Records
- Bloodborne Pathogens
- Long Term Care Issues
- Healthcare Provider Credentialing
- Hospital Licensure
- Incentive and Scholarship and Loan Programs for Nurses and Behavioral Health Providers

There was discussion around multiple bills including the nursing workforce study, sexual assault reporting bills, community health workers, provider credentialing, and civil penalty funding.

Budget Update

Ms. Gilliam presented the budget update from the 2020 General Assembly Session. She pointed out that much of the newly-appropriated funding received by VDH during the session was unallotted during the reconvened session in April 2020.

There was discussion regarding whether any of the COVID-19 response funding was able to support the work of the unallotted projects.

Other Business

Two members wanted to provide member updates. Dr. Swartz discussed the role of community pharmacists in the response to COVID-19 and also the upcoming flu season.

Dr. Jaber clarified from a discussion during the Commissioner's report that VDH and the local emergency management agencies were not going to be providing masks to the general public.

There was next a discussion concerning comments and letters that were received stating the Board had not appropriately used its authority in responding to COVID-19 through various Orders of Public Health Emergency. Ms. Prichard requested that Ms. Kurz speak to the Board

concerning its legal authority. Ms. Kurz stated that the Board meets four times a year, and that the Code of Virginia vests the Commissioner with the full authority of the Board, including the Board's authority to issue emergency orders pursuant to §32.1-13, while the Board is not in Session. These emergency orders are not regulatory actions subject to the Administrative Process Act, consequently they were not posted for notice and public comment on Town Hall.

There was further discussion concerning a letter submitted by several legislators. The Board intends to respond in writing to this letter.

Discussion continued regarding health equity concerns for the COVID-19 response. Multiple members of the Board were interested in working together to come up with recommendations, while recognizing that the control for directives and budgetary considerations are the work of the General Assembly. There was also discussion around being sure that the Board was not developing solutions for communities without hearing from the communities about what is needed. There were clarifications on the Freedom of Information Act requirements for having more than two Board members meet to further develop these recommendations. To begin moving forward, Mr. Edmonson and Dr. Kinser will begin working on a few key items. Future meetings could be called to develop recommendations.

Adjourn

Meeting adjourned at 2:57pm.

A full recording of the meeting can be found [here](#).



Make today a breakthrough.

June 2, 2020

Virginia State Board of Health
c/o Virginia Department of Health
Office of Family Health Services
P.O. Box 2448
Richmond, Virginia 23218-2448

Dear Board of Health Members:

On behalf of Virginia residents impacted by spinal muscular atrophy (SMA), **Cure SMA writes in strong support of the regulatory proposal to add SMA and another condition to the Virginia Newborn Screening System core panel of heritable disorders and genetic diseases.** We respectfully ask the Board to support these changes at your June meeting and to use your influence to ensure the proposed amendment receives priority review throughout the rest of the regulatory process.

SMA is a progressive neurodegenerative disease that can significantly impact an individual's ability to walk, swallow, and—in the most severe cases—even breathe. SMA impacts 1 in 11,000 births in America. In the Commonwealth of Virginia, an estimated nine babies with SMA are born each year and more than 170,000 Virginia residents are carriers of the SMA genetic mutation.ⁱ If both parents are SMA carriers, every child they have together has a 25% chance of being diagnosed with SMA, regardless of race, ethnicity, and gender.

Cure SMA applauds the leadership of the Board of Health and Virginia Genetics Advisory Committee and the dedication of Virginia Department of Health (VDH) staff in helping to place Virginia on the cusp of newborn screening for SMA. The regulatory proposal that the Board will consider at your June 4 meeting would amend the existing Virginia newborn screening regulation (Section 32.1-12) to add SMA and X-linked adrenoleukodystrophy to the state's newborn screening panel. As the VDH Office of Family Health Services described in its accompanying materials, newborn screening is "an effective diagnostic tool" given SMA "cannot be detected at birth through a physical examination."ⁱⁱ Even in the weeks and months after birth, parents of children with SMA reported that they and their pediatrician could not tell if the baby simply had a developmental delay, given the large range of what is "normal" development, or if there were more serious issues.ⁱⁱⁱ

The challenge in diagnosing SMA without newborn screening has expanded during the COVID-19 public health emergency. Overall, the number of children diagnosed with SMA decreased during COVID-19 by 13% in March 2020 and 20% in April 2020, when compared to the monthly averages of the 3 previous years. The overall decline is due to

large drops (40%) in symptomatic SMA diagnoses (i.e., not through a newborn screening program) during March 2020 and April 2020.^{iv} This data may point to the challenge doctors face when wellness checks are delayed or completed virtually, rather than in person. Newborn screening shortens the time to receive a diagnosis, especially in cases where first-time parents may not be aware of delays in developmental milestones and the SMA symptoms to recognize early on.^v

In addition, newborn screening for SMA “can provide affected infants the benefit of early diagnosis and treatment” as referenced by the VDH Office of Family Health Services.^{vi} Today, there are multiple treatments for SMA that make it possible for individuals with SMA to achieve developmental milestones and live full and productive lives. The U.S. Food and Drug Administration (FDA) has approved two treatments for SMA—Spinraza (2016) and Zolgensma (2019). A third treatment, Risdiplam, received FDA priority review consideration, with a decision on its approval expected later this year (2020).^{vii} Clinical data shows that these treatments are most effective when delivered early, and especially when pre-symptomatic.^{viii}

With the Board’s support—and with final action by the Governor to implement the Newborn Screening Program regulations, all Virginia newborns will soon be screened for SMA, giving their parents the information they need to make informed choices about treatment and care. Currently, 26 states screen for SMA, which was added to the federal Recommended Uniform Screening Panel in July 2018. Virginia could be one of the next with prompt action on the proposed regulation.

Thank you for considering the views of Cure SMA and Virginia individuals and families impacted by SMA. Please do not hesitate to contact Cure SMA if you have questions or need additional information. Cure SMA can be reached through Maynard Friesz, Vice President for Policy and Advocacy at Cure SMA, at maynard.friesz@curesma.org or 202-871-8004. Thank you for your consideration.

Thank you for all you do to promote the health and well-being of children living in Virginia.

Sincerely,



Kenneth Hobby
President



Mary Schroth, M.D
Chief Medical Director



Jill Jarecki, PhD
Chief Scientific Officer

ⁱ Cure SMA Virginia State Fact Sheet, 2020 <https://www.curesma.org/wp-content/uploads/2019/11/VA-NOV19-SMA-State-Fact-Sheet.pdf>

ⁱⁱ VA Board of Health June 4, 2020 Meeting Agenda, <https://www.vdh.virginia.gov/content/uploads/sites/4/2020/05/BOH-Q2-2020-Meeting-Materials.pdf>

ⁱⁱⁱ “Understanding the experiences and needs of individuals with Spinal Muscular Atrophy and their parents: a qualitative study,” 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4619513/>

^{iv} 2020 Cure SMA Newly Diagnoses Data, 2020

^v “Understanding the experiences and needs of individuals with Spinal Muscular Atrophy and their parents: a qualitative study,” 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4619513/>

^{vi} VA Board of Health June 4, 2020 Meeting Agenda, <https://www.vdh.virginia.gov/content/uploads/sites/4/2020/05/BOH-Q2-2020-Meeting-Materials.pdf>

^{vii} Treatments for SMA, Cure SMA, 2020, <https://www.curesma.org/treatment/>

^{viii} Opening the window: The case for carrier and perinatal screening for spinal muscular atrophy, 2016, <https://www.ncbi.nlm.nih.gov/pubmed/27460292>



DAVE LaROCK
POST OFFICE BOX 6
HAMILTON, VIRGINIA 20159

THIRTY-THIRD DISTRICT

COMMONWEALTH OF VIRGINIA

HOUSE OF DELEGATES
RICHMOND

COMMITTEE ASSIGNMENTS:
TRANSPORTATION
COUNTIES, CITIES, AND TOWNS
COMMUNICATIONS, TECHNOLOGY
AND INNOVATION

June 3, 2020

Board of Health
c/o Department of Health
109 Governor St.
Richmond, VA 23219

Members of the Board of Health:

We are writing to you specifically to object to the adoption of Public Health Orders 3 (as amended) and 5.

These Orders were issued by the Commissioner of Health under the purported authority of sections 32.1-13 and 32.1-20 of the Virginia Code. We are hereby commenting for the record of the June 4, 2020, meeting. We ask that the Board remain in session and not allow the Commissioner to short-cut the proper processes of the Board with respect to the exercise of any authority under 32.1-13 or other appropriate authority, including outreach to the potentially regulated community and consideration of guidance instead of threats of criminal sanctions. We hope to see this change immediately.

We believe substantial elements of these orders are well outside the authority of the Commissioner and the Board under 32.1-13. These orders were issued without following the Virginia Administrative Process Act. As stated under Section 32.1-24, the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) shall govern the procedures for rendering all case decisions, as defined in § 2.2-4001, and issuing all orders and regulations under the provisions of this Code administered by the Board, the Commissioner or the Department unless exempt from the Administrative Process Act.

Given the weight of health matters impacting Virginia over the past two months, it is unclear why the Board has not been meeting to provide guidance and fulfill important responsibilities. Instead, it appears that two people in the Executive Branch of Virginia—Governor Northam and Commissioner Oliver—as a response to the novel coronavirus (COVID-19), purport to wield immense power to make law through orders with sweeping restrictions on citizens, businesses, and religious organizations; decisions which carry substantial criminal penalties. This needs to end immediately.

These orders elevate certain vague, inflexible, and unworkable recommendations to purportedly legal orders that threaten sanctions of a Class 1 misdemeanor carrying up to 1 year in jail and a \$2,500 fine for each citation. For example, these Executive Orders make the action of being mask-less in certain public places a Class 1 Misdemeanor with punishment on par with Driving Under the Influence (DUI), Reckless Driving, Petit Larceny, Assault and Battery, and Disorderly Conduct. The mask orders went into effect and the continuation of the broad restrictions on assembly and businesses were renewed 79 days after the Governor's declaration of emergency and 101 days after Commissioner Oliver declared COVID-19 a public health threat. Many of these mandates are not appropriate, impermissibly vague and penalize rational behavior. Elements of these orders infringe on Constitutional rights and are not narrowly tailored or clear.

The General Assembly never contemplated delegating authority for a massive regulatory regime through the emergency authorities. Governor Northam and Commissioner Oliver are using these purported authorities over extended periods of time instead of allowing action by the General Assembly. That failure is inexcusable considering the devastating effect of the Orders which have left close to 700,000 Virginians unemployed, churches and businesses severely restricted, and Virginia's economic outlook, including state revenue, tanking. Section 44-146.16 Definitions provides a definition of "emergency", as follows: "Emergency means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof." (emphasis added). Given the length of the current declared emergency, why has the Board not been called into session? There is a clear responsibility of the Board which the Board must not shirk. Furthermore, why hasn't Governor Northam called the General Assembly into session to address such a pervasively broad regulatory scheme?

As the Board moves forward, we ask it respect, to a large measure, that the control of the transmission of COVID-19 depends on the diligence of citizens in their habits. This is true in all settings whether proscribed or not. Many citizens and businesses properly believe that their flexibility, creativity and reasonable cautions would allow business and activities that are valuable to quality of life to proceed with appropriate modifications. These orders override the efforts of businesses and citizens to move forward in responsible ways.

Government guidance is helpful. Criminal penalties for vague, arbitrary, and inflexible rules are not appropriate. We look forward to the board hearing from and providing relief for businesses and citizens so deeply affected by these orders.

Working with the business community and providing citizen guidance is the appropriate role for the Board at this critical time. Businesses will seek guidance, and many may provide their plans and thoughts; consultation is the proper approach; not impermissibly creating law through action of the Executive Branch.

Sincerely,



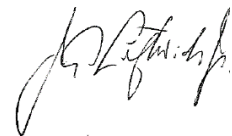
Delegate Dave LaRock, 33rd District



Delegate C. Todd Gilbert
House Republican Leader



Delegate Kathy Byron
House Republican Caucus Chair



Delegate James A. "Jay" Leftwich
House Republican Whip

Nandan Kenkeremath
2707 Fairview Court
Alexandria, Virginia 22311

Members of the Virginia State Board of Health

June 3, 2020

***Re: Comments Concerning Exercise of Authority Under Section 32.1-13 of the Virginia Code
Dramatically Purport To Regulate Businesses and Citizens Over Extended Period Of Time Under
Criminal Sanctions: The Underlying Responsibilities of the Virginia State Board of Health***

Honorable Chairperson Prichard and Honorable Members of the Virginia State Board of Health,

I am a citizen of Virginia who has had substantial concerns with the process behind and the substance within several orders of Governor Northam and Commissioner Oliver regulating citizens and businesses for the purpose of reducing the spread of COVID-19.¹

I am asking that members of the Board assume their responsibilities with respect to the authority exercised by Commissioner Oliver under section 32.1-13. I ask the Board to set aside the dramatic, negative impact of elements of these orders on citizens and businesses and to correct the mistakes of process underlying the use of 32.1-13 in this context and into the future.

Given the weight of health and regulatory matters impacting Virginia over the past two months, it is unclear why the Board has not been meeting to provide guidance and fulfill important responsibilities. Instead, it appears that two people in the Executive Branch of Virginia --Governor Northam and Commissioner Oliver-- purport, on their own, to wield immense power to create law. Given that review of these orders are not on an explicit agenda for the quarterly meeting of the Board on June 4, 2020 and that the Board failed to meet at all in March, April or May, one gets the sense that the weight of these responsibilities have not been apparent to the Board.

I ask that the Board stay in session and begin its actions as soon as possible to correct the situation. Some responsible actions of the Board should follow in a very short time. I believe the Board may not be in a position to logically consider the issue on June 4th itself, as it would take at least a day or two of consideration to understand the initial issues. The Board must understand and consider the application of law. The Board must reach to affected stakeholders to understand the negative impact of policies, provide a public docket and transparency. The stated exercise of authority of the Commissioner under 32.1-13 and 32.1-20 must be reversed as soon as possible for each place where legal and policy justification is not present or not compelling.

These orders purport form a sweeping regulatory regime more substantial than any regulation issued in my lifetime. They have shutdown many businesses over an extended period of time and appear to have no end in

¹ At the current time, these orders include:

Executive Order (EO) 65 and Order of Public Health Emergency Six

EO 63 and Order of Public Health Emergency Five

EO 61 and Order of Public Health Emergency Three (applicable in Northern Virginia and Richmond)

sight. They curtail important civil liberties of the citizens of Virginia. The orders threaten criminal sanctions of up to 1 year in jail and \$25,000. Each day of purported violation can subject a citizen or business to additional and cumulative sanctions.

For his part, Commissioner Oliver is using authority in section 32.1-13 and 32.1-20 of the Virginia Code which provide for the delegation of some limited authority. I believe the current orders and lack of process behind the orders are not in accordance with law, not narrowly tailored enough to protect civil liberties and, often, unwise. Section 32.1-13, is a purported delegation of authority to the Virginia Board of Health. Without question the General Assembly intends the Board to govern the exercise of any purported use of this authority as a general matter. Section 32.1-20 provides authority to the Commissioner when the board is not in session. The section was not intended to abrogate the responsibilities of the board with respect to section 32.1-13. The Board should have gotten into session soon after Commissioner declared COVID-19 a public health threat on February 7, 2020.

That the Board has the basic responsibility is clear by its specific reference in 32.1-13 and the authority described in section 32.1-20. Specifically, the Board can subject any authority of the Commissioner during interim or emergency periods to rules and regulations as may be prescribed by the Board. I recommend the Board issue a rule that the Commissioner may not issue an order that subjects citizens or businesses to penalties for more than 15 days and that any such orders compel a meeting of the Board as soon as possible to consider any furtherance of such order or line of orders.

There is no question that these orders purport to make law. In the first instance, only the General Assembly through certain process can enact law. The General Assembly may delegate certain regulatory functions to administrative agencies where they provide sufficient and articulated principles that allow a regulated agency to fill-in the principles of law.

I would note the distinction between the Board of Public Health or the Commissioner providing information and guidance. For example, wearing a facial covering in buildings may generally be warranted at this time. I am sure building owners, businesses, and event planners may all request that patrons and participants wear masks with the threat that they may not be allowed in as the potential consequence. There may be exceptions for ceremonies, photos, singing, and numerous activities that may be reasonable and sensible. Issuing inflexible purported law on the subject without any public process that subjects citizens and businesses to criminal sanctions as set out in the current scheme is neither warranted nor wise. That is just one example.

There is also actual quarantine and isolation authority that provide protections against government abuse. While I do not suggest use of these authorities, it is worth noting the specificity and protections provided to citizens from the General Assembly.

I ask that these comments, and the comments of other stakeholders be posted in an online public record. I ask that the Board remain in session and not allow the Commissioner to short-cut the proper processes of the Board with respect to the exercise of any authority under 32.1-13 or other appropriate authority, including outreach to the potentially regulated community and consideration of guidance instead of threats of criminal sanctions.

We believe substantial elements of these orders are well outside the authority of the Commissioner and the Board under 32.1-13. These orders were issued without following the Virginia Administrative Process Act (VAPA). As stated under Section 32.1-24, the provisions of the Administrative Process Act (§ 2.2-4000 et seq.)

shall govern the procedures for rendering all case decisions, as defined in §2.2-4001, and issuing all orders and regulations under the provisions of this Code administered by the Board, the Commissioner or the Department unless exempt from the Administrative Process Act. There is no provision stating that section 32.1-13 orders are exempt from VAPA. Even if there were, public process is a prudential measure to add to the rationality and acceptance of any order. Commissioner Oliver declared COVID-19 a public health threat on February 7, 2020. That was over 100 days ago. There has not been an excuse to eliminate public process for quite some time.

Many of these mandates in the orders are not appropriate, impermissibly vague and penalize rational behavior. In particular, elements of the orders infringe on Constitutional rights and are not narrowly tailored or clear. The General Assembly never contemplated delegating authority for a massive regulatory regime through the emergency authorities for extended periods of time.

Section 44-146.16 Definitions provides a definition of "emergency". "Emergency means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof." (emphasis added). If it was such an emergency, why was the Board not called into session? There is a clear responsibility of the Board which the Board must not shirk. I do not know why Governor Northam has not called the General Assembly into place already to address such a regulatory scheme. Similarly, if the situation is so compelling as to use a massive regulatory scheme that kills businesses and civil rights, why has the Board not met on this topic with respect to the authority of the Board under 32.1-13.

I also note that civil liberties like the right of assembly have special status. The orders of the Governor and Commissioner ignore this special status and have not provided orders that are narrowly tailored. Certainly, a limit on the size of assemblies-- such as the limit to 10 that applies under the orders for Northern Virginia at this time-- do not allow for rational, larger assemblies where there is distancing and other measures. There currently are no written exceptions for Constitutionally protected protests. There are no written exceptions for meetings to consider a protest to the order or to engage in political discussion. There is no written exception for a press conference. Local governments are following the orders and not providing facilities that might otherwise be available. Constitutional rights need not proceed amendment by amendment to an unlawful order.

Freedom of assembly and association are at the heart of a long line of cases concerning loitering and curfews. As an example, in *Coates v City of Cincinnati*, 402 U.S. 611 (1971) the Supreme Court reviewed a Cincinnati, Ohio, ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by" In addition to holding the provision void for vagueness, the Court states that the ordinance violates the Constitutional right of free assembly and association.

The Supreme Court has stated that rights may become essential in the pursuit of a livelihood and States must adhere to Due Process in removal of those rights. See *Bell v Burson*, 402 U.S. 535 (1971) removal of drivers licenses. In the instant case, the Orders remove liberties and opportunity to pursue livelihood not on the basis of any fault or any established connection to the specific activities of the specifically adversely affected businesses and ignore responsible steps those businesses can take. It is clear that there are many locations

where an assembly can use social distancing, yet these order prohibit such assembly. The rules undermine businesses and events of all types.

I would further note that the approach in the recent orders to apply law and potential penalties to citizens and businesses in Northern Virginia and Richmond likely runs afoul of certain provisions of the constitution of Virginia. First, the General Assembly may not create local or special laws that run afoul of proscriptions under the Virginia Constitution. Article IV section 14 of the Virginia Constitution states, in part, that the General Assembly shall not enact any local, special, or private law in the following cases:

(1) for the punishment of a crime

(12) regulating labor, trade, mining, or manufacturing, or the rate of interest in money

Article VII on local government and Section 1. Definitions provide more rules under the Virginia Constitution:

....(5) "general law" means a law which on its effective date applies alike to all counties, cities, towns, or regional governments or to a reasonable classification thereof, and (6) "special act" means a law applicable to a county, city, town, or regional government and for enactment shall require an affirmative vote of two-thirds of the members elected to each house of the General Assembly.....(emphasis added)

In this article, whenever the General Assembly is authorized or required to act by general law, no special act for that purpose shall be valid unless this article so provides. (emphasis added)

The Virginia constitution allows for some special laws where the legislature directly applies special supermajority rules. The legislature cannot have delegated authority to the Governor, Board or Commissioner, which the legislature does not have and evades restrictions in the Virginia Constitution. Moreover, the Governor and the Commissioner are often purporting to punish businesses and citizens for issues that the businesses and citizens do not control.

Working with the business community and providing citizen guidance is the appropriate role for the Board at this critical time. Businesses will seek guidance, and many may provide their plans and thoughts. Consultation and communication not impermissibly issuing mandates that fail to follow procedure or responsible rational are not. I would be pleased to follow-up with Members of the Board or relevant staff. I have more detailed assessment of the issues and further comment. Please contact me at nandank@comcast.net.

Sincerely,



Nandan Kenkeremath