Coates' Canons Blog: Taking Local Action to Control COVID-19: What Can a North Carolina Local Health Department Do?

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North Carolina is experiencing increasing numbers of COVID-19 cases and hospitalizations at a particularly challenging time: right as families are preparing to celebrate winter holidays, college students are returning home, and the weather is cooling and making outdoor gatherings less appealing. Recent news about the promise of new vaccines is a powerful light at the end of this tunnel, but we are not out of the tunnel yet and the next few weeks may be especially fraught.

In recent days, public health officials have redoubled their efforts to encourage North Carolinians to observe the three Ws—wear a mask, wait 6 feet apart, and wash your hands frequently—and the Governor has issued new executive orders expanding the mandatory use of face coverings and reducing the sizes of groups that may gather indoors. State officials have also encouraged local governments to consider what actions they may be able to take to decrease the spread of the virus within their jurisdictions. Earlier this week, my colleague Trey Allen addressed the question of whether local governments may impose civil penalties for violations of state orders. Today, I will address the question, what can a local health department do?

Before getting into the question, I need to briefly describe local public health in North Carolina and identify the key local players. North Carolina law requires each county to provide public health services to its residents, but allows county commissioners to choose the type of agency and board that will be responsible for public health. G.S. 130A-34; 153A-77. There is variety in how agencies are organized and governed across the state, but there is a common baseline: every county is served a local public health agency, a local board that is responsible for protecting and promoting the public health, and a local health director who has significant legal powers and duties.

The term “local health department” includes all of the different agency types, and the term “local board of health” includes all the different board types, including a consolidated human services board that is responsible for public health, and including a board of county commissioners that has assumed the powers and duties of a local board of health or consolidated human services board when it is acting in that role. G.S. 130A-2; 130A-43; 153A-77. “Local health director” means the department director, or in the case of a consolidated human services agency, the person who has been designated local health director. G.S. 130A-43; 153A-77(e).

What Can A Local Health Director Do?

A local health director has several legal authorities that are relevant to COVID-19 response, including the authority to issue isolation or quarantine orders, the authority to enforce the North Carolina communicable disease laws through the use of criminal or civil remedies, and the authority to abate imminent hazards.

Isolation or Quarantine Orders

A local health director may issue isolation or quarantine orders when necessary to protect the public health. The State Health Director also has the authority to issue such orders, but the local health director’s authority is independent and does not require state approval. G.S. 130A-145. More detailed information about the isolation and quarantine authority in North Carolina is available here.

An isolation order may be issued to someone who has COVID-19 or is infected with SARS-CoV-2, the coronavirus that causes the disease. A quarantine order may be issued to someone who has been exposed to the virus or is reasonably suspected of having been exposed. In North Carolina, quarantine orders may also be used to limit access to an area or

facility that may be contaminated with an infectious agent, or to limit the freedom of movement of unimmunized persons during an outbreak of a vaccine-preventable disease. See G.S. 130A-2 (defining “isolation authority” and “quarantine authority”).

The health director’s isolation or quarantine authority may be exercised only when and so long as the public health is endangered, all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists. G.S. 130A-145(a). A person who is a subject of an isolation or quarantine order limiting the person’s freedom of movement has certain due process rights, including the right to a prompt hearing in Superior Court. G.S. 130A-145(d).

Isolation and quarantine orders are distinct from instructions an individual may receive to *self-isolate* or *self-quarantine*. Individuals who have COVID-19 symptoms or test positive for the virus that causes it are typically instructed to self-isolate until three conditions are met: (1) 10 days have passed since individual’s positive test or onset of symptoms, (2) the individual has been free of fever without the use of fever-reducing medications for at least 3 days, and (3) the individual’s other symptoms have improved. Similarly, individuals with known exposures to COVID-19 are told to self-quarantine and self-monitor for symptoms for 14 days. These instructions may be given by the individual’s health care provider or a public health official or employee. They are also available online. *[Note: As this post was under review, news broke that the CDC will release new guidelines that shorten the recommended time period for quarantine to 10 days after exposure, or 7 days if the person has a negative test result. I will update this post if and when North Carolina guidelines are modified to match the anticipated CDC guidance.]*

Self-isolation and self-quarantine are communicable disease control measures for COVID-19 and individuals should comply with them, but instructions to self-isolate or self-quarantine do not constitute an isolation or quarantine order under G.S. 130A-145. It is impracticable for public health officials to issue isolation or quarantine orders to all infected or exposed persons with COVID-19 in North Carolina at this time. However, orders might be used, for example, when a person fails to comply with self-isolation or self-quarantine and endangers the public health as a result.

An isolation or quarantine order issued under the authority of G.S. 130A-145 should be captioned “Isolation Order” or “Quarantine Order” and be signed by the health director. It should include the name of the person who is subject to the order, the date of the order, the specific restrictions with which the individual must comply, information about how the individual who is subject to the order may challenge it, and a statement that violating the order could result in criminal charges or an action by the health director for injunctive relief.

Public Health Remedies

North Carolina’s public health code provides several remedies that may be pursued to enforce public health laws or protect the public from serious health threats or nuisances. G.S. Ch. 130A, Art. I, Part 2. Not all of the remedies are applicable to COVID-19. There are two primary remedies that are used to enforce the communicable disease statutes and rules: charging a violator with a misdemeanor, or seeking an injunction against a violator. Another remedy, imminent hazard abatement authority, has been used by the N.C. Secretary of Health & Human Services and some local health directors during the pandemic.

Misdemeanor (G.S. 130A-25)

A person who violates an isolation or quarantine order issued under the authority of G.S. 130A-145 may be charged with a class 1 misdemeanor and, if convicted, sentenced for up to two years. G.S. 130A-25; 14-3.

A class 1 misdemeanor charge may also be brought against a person who violates the communicable disease control measure rules established by the North Carolina Commission for Public Health pursuant to its authority under G.S. 130A-144(g). North Carolina law requires all persons to comply with the Commission’s control measure rules. G.S. 130A-144(f). A person who is convicted of violating G.S. 130A-144(f) may be sentenced for up to two years. G.S. 130A-25(b). For more information about how the required communicable disease control measures are determined for new diseases such as COVID-19, see my July 10th post.

Local health directors are responsible for ensuring that communicable disease control measures are “given.” G.S. 130A-144(e). In practice, this may simply mean ensuring that people are informed about the control measures they are required

to comply with. If a person who has been informed violates a required control measure, the misdemeanor remedy appears to be available to enforce it.

This remedy may also be used when a person violates a local board of health rule. See the section of this post that addresses board of health rulemaking for more information about local rules and COVID-19.

Injunction

Seeking an injunction is another option that is available to a local health director when a person violates an isolation or quarantine order or the communicable disease control measure rules. G.S. 130A-18. A local health director may institute an action for injunctive relief in Superior Court, regardless of whether other remedies for the violation are also available. The State Secretary of Health and Human Services may also use this remedy.

This remedy may also be used when a person violates a local board of health rule. See the section of this post that addresses board of health rulemaking for more information about local rules and COVID-19.

Imminent Hazard Abatement (G.S. 130A-20)

The term “imminent hazard” is defined as “a situation that is likely to cause an immediate threat to human life, an immediate threat of serious physical injury, an immediate threat of serious adverse health effects, or a serious risk of irreparable damage to the environment if no immediate action is taken.” G.S. 130A-2(3).

If a local health director determines that an imminent hazard exists, the director may order the owner, lessee, operator, or other person in charge of the property on which the hazard exists to abate it. G.S. 130A-20. The state Secretary of Health and Human Services also has the authority to order abatement of an imminent hazard.

During the COVID-19 pandemic, imminent hazard abatement authority has been used by the Secretary to order the closure of restaurants, bars, and other businesses throughout the state, and to order the closure of properties that violated mass gathering restrictions imposed by the Governor pursuant to his authority under the North Carolina Emergency Management Act (G.S. Ch. 166A). In another instance, a local health director used imminent hazard abatement authority to order a church that was associated with a large outbreak of COVID-19 to temporarily close. Churches are not subject to the Governor’s mass gathering restrictions, so this action was independent of those orders and based on evidence associating the church with the outbreak.

Other Remedies

Some remedies that are provided in Chapter 130A do not appear to be available to address public health threats associated with COVID-19, including administrative penalties (or monetary fines) and permit actions. Administrative penalties are limited to certain types of violations, such as violations of state or local smoking restrictions. G.S. 130A-22. Opportunities for permit actions, such as a suspension or revocation of a restaurant’s permit to operate, are prescribed by state statutes and regulations. G.S. 130A-23. A local health department does not have the authority to take action on a permit for a violation of state or local emergency orders.

What Can A Local Board of Health Do?

Each local board of health serves as the policy-making, rule-making, and adjudicatory body for public health in the county or counties making up its jurisdiction. G.S. 130A-39. Can a board use its rulemaking authority to impose local requirements related to COVID-19?

Local Board of Health Rulemaking

A local board of health has the authority to adopt rules that are necessary to protect and promote public health within its jurisdiction. G.S. 130A-39.

As I’ve described elsewhere, North Carolina has statewide rules for communicable disease control adopted by the Commission for Public Health. The existence of state regulations limits but does not preclude local public health rules on the same subject matter. The statute that gives boards of health their rulemaking authority expressly authorizes a local

rule in an area that is already regulated by the Commission for Public Health, provided the local rule is more stringent than the statewide rule, and the local board of health has determined that a more stringent rule is needed to protect local public health. G.S. 130A-39(b). There are some statutory limitations to the authority to adopt a more stringent local rule. For example, a board of health is prohibited from making rules pertaining to the grading, operating, and permitting of restaurants. There are statutory limits to local rulemaking related to on-site wastewater management and smoking as well.

The statute does not impose additional limitations—beyond the "more stringent" requirement—on local rules pertaining to communicable disease. However, in *Craig v. County of Chatham*, the North Carolina Supreme Court concluded that more stringent local health rules related to swine farm siting were not authorized "without specific reasons clearly applicable to a local health need," which the Chatham county board had not shown. 356 N.C. 40, 51-52 (2002). Thus, in adopting a local rule that is more stringent than a state rule on the same subject, a local board of health needs to be able to articulate the reasons underlying the need for a higher local standard. This likely means identifying with specificity the local circumstances or conditions that compel a more stringent rule than that provided by the state.

A local board of health contemplating rulemaking must also take into account the *Peedin* test, named for the court case that enunciated it. To be valid, a local board of health rule must:

1. Be related to the promotion or protection of health,
2. Be reasonable in light of the health risk addressed,
3. Not violate any law or constitutional provision,
4. Not be discriminatory, and
5. Not make distinctions based upon policy concerns traditionally reserved for legislative bodies.

City of Roanoke Rapids v. Peedin, 124 N.C. App. 578 (1996).

In *Peedin*, the Court of Appeals struck down a local board of health rule regulating smoking in certain businesses, because the rule created exceptions for some businesses based on policy considerations other than health, including economic considerations and difficulty of enforcement. The court explained that balancing health against other interests is not appropriate for a board of health, but is within the domain of legislative bodies, such as boards of county commissioners.

It may be possible to craft a local public health rule establishing more stringent rules for COVID-19 control that meets the requirements of both *Craig* and *Peedin*. A local board would need to first clarify the state's communicable disease control measure rules that are applicable to the issue. As I explained in my July blog post, this can be complicated when an emerging disease has control measures that are based on CDC guidance that may evolve over time. Nevertheless, state guidance documents and consultation with state public health officials should provide clarity. To satisfy the requirements of *Craig*, a local board would then need to be able to provide evidence of local circumstances or conditions that compel a more stringent local rule. To satisfy *Peedin*, the board should consider all five parts of the test and take particular care not to create distinctions between regulated people or entities that are based on considerations other than the protection of health.

A local board of health rule is valid throughout the county or counties of the board of health's jurisdiction, including within municipal limits. G.S. 130A-39(c). If a local board of health rule is violated, the violator may be charged with a misdemeanor under G.S. 130A-25, or the local health director may seek injunctive relief under G.S. 130A-18. There is no authority to impose administrative penalties (fines) upon those who violate local rules pertaining to communicable disease control. See G.S. 130A-22.

Other Local Board of Health Actions

Local boards of health are charged with protecting and promoting public health in the jurisdictions they serve. G.S. 130A-39(a). Among other things, boards are expected to participate in the establishment of local public health goals, promote the development of public health partnerships, and advocate in the community on behalf of public health. See 10A N.C.A.C. 48B, sec .1300 (accreditation standards for North Carolina boards of health). This suggests that local boards of health should be engaged and active partners in monitoring COVID-19 within their communities and promoting responses that ensure the public health, regardless of whether they also exercise their rule-making authority.

Links

- files.nc.gov/governor/documents/files/EO180-Face-Coverings-Requirements.pdf
- files.nc.gov/governor/documents/files/EO176-Phase-3-ext.pdf
- www.sog.unc.edu/resources/microsites/north-carolina-public-health-law/covid-19-coronavirus
- files.nc.gov/covid/documents/materials-resources/Slow-the-Spread-Avoid-Others.pdf
- apnews.com/article/politics-pandemics-coronavirus-pandemic-fcbc8b93537033b749fb4900ee2027d5
- files.nc.gov/covid/documents/guidance/Abatement-Order-EO141-Final.pdf
- files.nc.gov/covid/documents/Abatement-Order-ACE-Speedway.pdf
- www.mecknc.gov/news/Documents/UHOP%20Order%20of%20Abatement.pdf