

MEMO

Legal Department

To: Mayor Haila, Ames City Council

From: Mark O. Lambert, City Attorney

Date: July 10, 2020

Subject: Local responses to the COVID-19/coronavirus pandemic

At the June 24, 2020 Council meeting, the Council approved a motion asking for a memo on what the City can and cannot do legally regarding COVID-19 mitigation, keeping in mind the Story County Department of Public Health's recent statement on COVID-19.

This memo is separated into three sections: 1) Face coverings, 2) Bars, and 3) Other.

FACE COVERINGS:

There has been an ongoing question of whether a Mayor or a City Council has the authority to issue a mandatory face covering order or ordinance for residents out and about in the community. Public attention has increased on this issue after the mayor of the City of Muscatine, Iowa issued an emergency proclamation requiring most people in the city to wear face coverings when out in public.

In March 2020, when many were calling upon Governor Reynolds to issue a "shelter in place" or "stay at home" order, several cities in Iowa were considering having their mayors' issue such an order. Some municipal attorneys believed that mayors had such authority, many others (including yours truly) questioned whether mayors had such authority, and some thought they did not.

On March 9, 2020, the Governor issued the first of her 17 proclamations declaring a "Public Health Emergency Disaster." The first order dealt primarily with suspension of some regulatory matters due to the pandemic. The Governor issued her second proclamation March 17, 2020 – in this proclamation, the

Governor closed bars and restaurants and many other types of businesses, and also prohibited mass gatherings of more than 10 people. The cities that were considering issuing local shelter-in-place orders apparently decided not to since the Governor was taking some type of action.

On March 24, 2020, the Iowa Attorney General's office issued an "informal opinion" in which it concluded that cities and counties did not have the authority to issue public-health-related orders, such as "shelter in place" orders, because that authority belonged to the Governor and the Iowa Department of Public Health. While the Attorney General's office concluded that the Governor could delegate such authority to local governments, she has not done so. An informal opinion is a quicker opinion than a formal opinion, which is extensively researched and published for future reference. Just for clarification, an Attorney General's opinion is considered persuasive, but not authoritative like a court decision would be; those opinions are the legal analysis of the Attorney General's office, and they are given great weight by government officials. Certainly, it's possible that the Attorney General could be wrong in any given analysis, but it is not likely since the Attorney General's Office is regarded as the expert on interpreting Iowa law, especially regarding issues of governmental authority. It is important to note, however, that the Attorney General's opinions with the current public-health-related issues is lacking an analysis of Home Rule authority.

Here's the conclusion of the Attorney General's first informal opinion:

“Conclusion: While cities and counties have police powers to protect the health and safety of their citizens, the State has the authority to declare and coordinate the response to a public health disaster. This includes the power of the Governor to sub-delegate administrative authority to cities and counties, including the power to restrict movement within communities by these local authorities. This power also would allow the Governor discretion to retain such powers and not delegate this authority to cities or counties.”

The same analysis would apply to local ordinances requiring the wearing of face coverings. The Governor and IDPH would have such authority, but local governments do not. The Governor may delegate such authority to local

governments, but she has not done so. In discussions with other city attorneys in Iowa, there is general agreement that cities lack the authority given the Attorney General's opinion.

On June 23, 2020, the Iowa Attorney General's office issued a second informal opinion, in the form of a response to an inquiry state senator from Iowa City, specifically about "requiring patrons of businesses to wear face coverings." This second opinion also states that the Governor's proclamations preempt local governments from acting independently of the Governor's proclamation, and indicates that in the absence of Governor's proclamation, it appears that Iowa law grants such authority to the county boards of health: "Finally, local regulation of this nature, if not preempted under the current Emergency Disaster Proclamations, would likely be under the jurisdiction of local boards of health under their power under Iowa Code Section 137.104(1)(b) (enclosed) to, "make and enforce such reasonable rules and regulations, not inconsistent with law and the rules of the state board, as may be necessary for the protection and improvement of the public health."

On Sunday, July 5, 2020, the Mayor of Muscatine, Iowa issued an emergency proclamation, effective July 6, that requires most people in that city to wear face coverings while in indoor or outdoor public spaces, with some exceptions. In media reports, the Mayor said that she checked with her city attorney (from a Des Moines law firm), who had given approval to the proclamation. On Monday, July 6, the interim Muscatine County Attorney issued a press release stating that he believed the Muscatine Mayor had overstepped her authority and that therefore his office would not prosecute people charged with municipal infractions for not wearing a face covering.

Iowa cities have Home Rule Authority¹. Also, the mayor has emergency powers under Iowa Code section 372.14(2): "The mayor may take command of the police

¹ Iowa Constitution, Article III, Section 38A. "**Municipal home rule.** Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. The rule or proposition of law that a municipal corporation possesses and can exercise only those powers

and govern the city by proclamation, upon making a determination that a time of emergency or public danger exists. Within the city limits, the mayor has all the powers conferred upon the sheriff to suppress disorders.”² These are the two provisions of Iowa law that the Muscatine mayor relied upon.

I wish the Attorney General’s informal opinions had analyzed Home Rule authority, but they did not directly do so. Generally, under Home Rule authority, a city may enact a law or policy as long as it does not conflict with state law. “An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with state law” which means when the city ordinance “prohibits an act permitted by statute or permits an act prohibited by statute.”³

The Attorney General’s second opinion indicates that any regulation by local governments on the matters of wearing Personal Protective Equipment conflict with the Governor’s proclamations, and the Governor’s and the IDPH’s authority to issue public health proclamations. There is a reasonable argument that requiring people, when in public spaces and businesses, to wear face coverings adds to the Governor’s proclamation, but does not conflict with it.

granted in express words is not a part of the law of this state.” See also: Iowa Code section 364.1: “A city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the...health...of its residents.”

² There is no case law defining the extent of the mayor’s emergency authority under this Iowa Code section, and there does not appear to be a clear definition in the Iowa Code of what a sheriff’s authority is, other than broad law enforcement authority. So, it is unclear exactly what powers a mayor has if he or she issues an emergency proclamation, other than assuming control of the police department to “suppress disorders.” It is uncertain if that would include public-health-related orders, but I think that would be extending the statute beyond its plain meaning.

³ *Baker v. City of Iowa City*, 750 N.W. 2d 93, 99-100 (Iowa 2008). See also: *BeeRite Tire Disposal/Recycling v. City of Rhodes*, 646 N.W. 2d 857, 859 (Iowa App. 2002). See also: Iowa Code section 364.2(3): “An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.”

The Governor's emergency powers stem from Chapter 29C ("Emergency Management") of the Code of Iowa.⁴ This is a statute giving the Governor an incredible amount of authority – including the authority to suspend any statute or regulatory provision of Iowa law. It also includes this sentence, in section 29C.6 (8): "Delegate any administrative authority vested in the governor under this chapter and provide for the sub delegation of any such authority." The powers of the Governor when a disaster proclamation has been issued are so far-reaching, I can understand why the Attorney General felt that the Governor has exclusive control over anything issued in her proclamations. In the Iowa Department of Public Health (IDPH) chapter of the Iowa Code, section 135.144 addresses public health disasters. It says that the IDPH in conjunction with the Governor, may engage in actions to address a public health emergency, including at subsection (3): "Take reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that all cases of communicable disease are properly identified, controlled, and treated." The Iowa Code's grant of authority to IDPH and the Governor is extensive and detailed, and it is not unreasonable to conclude it is also exclusive, although that is not explicitly stated. Given that Iowa Code section 29C.6(8) allows the Governor to delegate her emergency authority it is reasonable to conclude that her authority is exclusive. The Governor has not delegated any of her emergency authority to local governments, and she recently indicated she might be open to doing so.

All said, the Attorney General has twice issued informal opinions that local governments do not have the authority to issue public-health requirements beyond the Governor's proclamations. Although there is perhaps a defensible argument that local governments may act through Home Rule authority, **my advice is that the when the Governor has invoked her emergency authority, a city does not have the legal authority to require persons to wear face coverings while out in public places and businesses. I advise that the City Council follow the Attorney General's opinions.**

I do note, however, that the City retains control over its own property and buildings. The City may lawfully require persons entering City buildings to wear

⁴ The second informal opinion from the Iowa Attorney General's office has a typo in it, and refers to Chapter 28C, when it is actually 29C.

face coverings, if the Council chooses to require that (just like businesses may choose to require their customers to wear face coverings).

BARS:

From reports that we have heard regarding bars in Ames, it appears that there are some bars that are not following the social distancing requirements of the Governor's proclamations. Keep in mind that the wording of the Governor's proclamation allows bars to be open only if they abide by the social distancing rules set out. If they are not following the social distancing requirements, the bars cannot lawfully remain open. It then becomes a matter of how the City will enforce the social distancing guidelines in the Governor's proclamations.

Under the Governor's most recent proclamation, I think the City can just order the bar to shut down for a brief period of time if we discover they are not requiring social distancing. **From the Governor's most recent proclamation:**

SECTION Two. Pursuant to Iowa Code § 135.144 (3), and in conjunction with the Iowa Department of Public Health, unless otherwise modified by subsequent proclamation or order of the Iowa Department of Public Health, I hereby order that effective at 12:01 a.m. on June 26, 2020 and until 11:59 p.m. on July 25, 2020:

A. Restaurants and bars: A restaurant or bar, including a wedding reception venue, winery, brewery, distillery, country club, or other social or fraternal club, may reopen or remain open to serve food and beverages on its premises, but only to the extent that it complies with the following requirements:

(1) Social distancing: The establishment must ensure at least six feet of physical distance between each group or individual dining or drinking alone. Seating at booths closer than six feet may satisfy this requirement if the booths are separated by a barrier of a sufficient height to fully separate seated customers. All patrons must have a seat at a table or

bar, and an establishment must limit patrons from congregating together closer than six feet.

(2) Other social distancing, hygiene, and public health measures: The restaurant shall also implement reasonable measures under the circumstances of each restaurant to ensure social distancing of employees and customers, increased hygiene practices, and other public health measures to reduce the risk of transmission of COVID-19 consistent with guidance issued by the Iowa Department of Inspections and Appeals and the Iowa Department of Public Health.

[Underlining added]

Although there is no longer the “50% of capacity” restriction in the Governor’s order, the current language is still very restrictive.

A bar may be open but “only to the extent it complies with” social distancing guidelines, which require:

- 1. Six feet of physical distance between each group or individual dining or drinking alone.**
- 2. All patrons must have a seat at a table or bar**
- 3. The establishment must limit patrons from congregating together closer than six feet.**

If the bar isn’t doing these things, they are not allowed to be open under the Governor’s proclamation. If they are violating the Governor’s proclamation, the City has the authority to order to cite the owner or manager with a simple misdemeanor: In her proclamation, the Governor specifically states: “all peace officers of the state are hereby called upon to assist in the enforcement of the provisions of this Proclamation.” (Per Iowa Code section 135.35).

Bar owners/managers violating the Governor’s proclamation could be charged with a simple misdemeanor under this section of the Iowa Code:

135.38 Penalty. Any person who knowingly violates any provision of this chapter, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a simple misdemeanor.

In addition, the Police Department would have the authority to order the bar to be closed temporarily (I'd suggest a day) for being open unlawfully.

Another enforcement approach is to work to suspend (or for severe violations, revoke) the establishment's liquor licenses/permits for a period of time, or to impose a civil penalty. The liquor licenses are issued by the Iowa Alcoholic Beverages Division, with the approval of the "local authority" which would be the City of Ames.

The Iowa Code, at section 123.39 *et seq.*, states that the **local authority may suspend liquor licenses/permits for a period of not more than one year, revoke the license or permit, or impose a civil penalty not to exceed \$1,000 per violation.**

The City Council would have to take action to impose penalties of license/permit suspension or revocation, or imposing a civil penalty. This would be done at a Council meeting, and in the interest of due process the bar owner should receive notice and would have the opportunity to be heard. After the City imposes a penalty, the bar owner could appeal the Council's decision to the Alcoholic Beverages Division.

My recommendation for a course of action would be:

1. The City Attorney sends a letter to all liquor/beer license holders in Ames, informing/reminding them in detail of the social-distancing restrictions in

the Governor's proclamation, and informing them that abiding by those requirements is a condition of remaining open.

2. The warning letter informs the bar owners that the following actions could take place if they are found to be in violation of the Governor's proclamation:
 - a. The bar owner or manager may be charged with a simple misdemeanor.
 - b. The bar may be ordered to close temporarily as it is in violation of the Governor's proclamation and not lawfully allowed to operate.
 - c. The bar's liquor/beer licenses/permits may be suspended for a period of up to one year, or revoked, or a civil penalty of up to \$1,000 could be assessed.
3. The Police Department will do spot checks to evaluate compliance and educate or enforce as necessary. In addition to monitoring compliance and, if necessary, citing bar operators for non-compliance, the Police Department will report any pattern of violations to the City Council.

OTHER:

On June 25, 2020, the Story County Board of Health issued its "COVID-19 Mitigation Guidance for Story County – Recommendations from the Story County Board of Health." [Attached]. These are guidelines, and do not have the force of law.

The guidelines are recommendations for daycares, schools, events/gatherings/religious services, sporting events, Iowa State University, shared or congregate housing facilities, and businesses.

The League of Women Voters of Ames and Story County sent a letter to the Council "proposing a partnership to promote wearing face coverings inside public places throughout our community." As a response to this, the League was invited

to and participated in a Communicators meeting hosted by the City on July 9th. The purpose of this meeting was to partner with entities in carrying-out a community-wide message using ISU's Cyclones Care campaign centering around wearing face coverings, social distancing, washing hands, and staying home when sick. There appears to be consensus with using the Cyclones Care campaign to provide a consistent and unified message throughout the community. The City Council, however, could choose to participate in another type of partnership with the League of Women Voters of Ames and Story County or any other entity that extends an invitation.

ATTACHMENTS:

1. Attorney General's 3-24-2020 informal opinion
2. Attorney General's 6-23-2020 informal opinion
3. Muscatine mayor's proclamation.
4. Muscatine County Attorney's press release
5. Guidance issued by the Story County Board of Public Health
6. Letter from League of Women Voters of Ames and Story County

From: Adams, Heather [AG]

Sent: Tuesday, March 24, 2020 5:07 PM

To: Langholz, Sam <sam.langholz@iowa.gov>; Michael Boal <michael.boal@iowa.gov>

Cc: Reisetter, Sarah [IDPH] <Sarah.Reisetter@idph.iowa.gov>

Subject: county and city authority

You have asked for analysis on the question of the legal authority of counties and cities to enact local measures to require citizens of their jurisdictions to shelter in place during the current health public health disaster emergency. This analysis was drafted by Mike Bennett in my office with a review by Jeff Thompson, myself, and others. Please let us know if you have any further questions or research requests in this area.

County and City Home Rules Powers:

Article III, Section 38A and Section 39A contain the City and County Home Rule provisions in the Iowa Constitution. The powers granted cities and counties under these constitutional amendments are to determine their local affairs and government, not inconsistent with the laws of the General Assembly, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. Counties are also constrained in their home rule powers if that power conflicts with the power of a city, providing a city power will prevail within its jurisdiction.

When an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute, the ordinance is considered inconsistent with state law and is preempted. See City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990). Implied preemption occurs when the legislature has covered a subject by statutes in such a manner as to demonstrate a legislative intention that the field shall be preempted by state law.

The powers exercised by cities under the Home Rule Amendments have been generally categorized as “police powers”. These include the power of cities and counties to protect rights, privileges, and property of the city and county and to preserve and improve the peace, safety, welfare, comfort and convenience of their residents. Iowa Code Section 331.301 (county) and Iowa Code Section 364.1 (City). These powers may be exercised by cities and counties subject to limitations expressly imposed by a state law, and are barred if such actions are irreconcilable with state law. Under Iowa Code Sections 331.301 and 364.3, City mayors are further empowered to govern the city by proclamation during a time of emergency or public danger. Iowa Code Section 372.14.

These authorities generally indicate authority for cities and counties to act to protect the safety of the residents of their communities yet require cities and counties to yield where the powers are inconsistent with powers of the state.

State Powers

A public health disaster is defined in Iowa law as a state of disaster emergency proclaimed by the Governor in consultation with the Department of Public Health for a

disaster that involves an imminent threat of a health condition caused by the appearance of a novel infectious agent and that poses a high probability of a large number of serious health consequences. Iowa Code § 135.140(6). During a public health disaster, the Governor and the Department of Public Health have broad legal authority to take all reasonable measures necessary to prevent the transmission of the virus and to prevent, control, and treat the infectious disease. These legal authorities are contained in part at Iowa Code sections 135.144 and 29C.6. These authorities include the powers to “control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises in such area.” Iowa Code § 29C.6(15).

Iowa Code Section 29C.6 (8) allows the Governor to delegate and sub-delegate any administrative authority under the Emergency Management Chapter. This indicates the Governor may delegate powers under emergency powers under that section to local authorities to address the current public health emergency, including the power to place restrictions on movement within the communities. This likewise indicates the Governor may choose not to delegate this authority to local agencies.

Conclusion: While cities and counties have police powers to protect the health and safety of their citizens, the State has the authority to declare and coordinate the response to a public health disaster. This includes the power of the Governor to sub-delegate administrative authority to cities and counties, including the power to restrict movement within communities by these local authorities. This power also would allow the Governor discretion to retain such powers and not delegate this authority to cities or counties.



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THOMAS J. MILLER
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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

June 23, 2020

The Honorable Zach Wahls
201 E 9th St., #415
Coralville, IA 52241
zach.wahls@legis.iowa.gov

Dear Senator Wahls:

You contacted the Iowa Attorney General's Office regarding the power of cities or counties to pass local regulations requiring patrons of business to wear masks. A similar question was answered by this office in a question from city officials in March of this year regarding the power of local officials to issue shelter in place orders. I have attached a copy of that analysis to this correspondence for your review.

In this previous analysis, we determined that while the Statewide Disaster Emergency Proclamations are in place, the Governor retains the power to delegate, sub-delegate, or retain the administrative authority under Iowa Code Chapter 28C (Emergency Management) to issue directives of this nature. *Please see* Iowa Code Section 28C.6(8) (enclosed). Iowa Code Section 135.144(3) and (9) (enclosed) empowers the Iowa Department of Public Health, in conjunction with the Governor, to take reasonable measures as necessary to prevent the transmission of infectious disease, to inform the public when a public health disaster has been declared or terminated, and to inform the public of the protective measures to take during the disaster.

The Governor has addressed usage of personal protective equipment (PPE) in prior proclamations, including the proclamations of 5/25/2020 and 6/10/2020, which are still applicable and which provide that in re-opening of public use facilities and businesses that proprietors must adhere to hygiene practices and public health measures consistent with guidance issued by the Iowa Department of Public Health. Any local action or regulation would need to be consistent and compliant with the Governor's Proclamations and the Iowa Department of Public Health Directives in scope and remedies while the Governor's Emergency Proclamations are in place.

Finally, local regulation of this nature, if not preempted under the current Emergency Disaster Proclamations, would likely be under the jurisdiction of local boards of health under their power under Iowa Code Section 137.104(1)(b) (enclosed) to, "make and enforce such reasonable rules and regulations, not inconsistent with law and the rules of the state board, as may be necessary for the protection and improvement of the public health."

The Honorable Zach Wahls
State Senator
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I hope you find this helpful in answering this question. Please be advised this contains the results of my research and analysis on your question but is not an official opinion of the Iowa Attorney General's Office.

Best regards,

Michael L. Bennett
Assistant Iowa Attorney General
PATC Division
michael.bennett2@ag.iowa.gov

Proclamation of the Mayor
Face Covering Mandate - City Wide

WHEREAS, The World Health Organization has declared the Novel Coronavirus 2019 (Covid-19) a pandemic; and

WHEREAS, The President of the United States and Governor of Iowa have declared National and State Emergency Proclamations; and

WHEREAS, Muscatine Mayor Diana Broderson in collaboration with Muscatine County and other Mayors of the Municipal Jurisdictions within Muscatine County made a Declaration of Disaster Emergency on 3-24-2020 in effect until cancelled or 9-23-2020; and

WHEREAS, The impact of the pandemic continues to meet the parameters of a civil emergency; and

WHEREAS, Covid-19 spreads mainly from person to person through respiratory droplets when infected people cough, sneeze, or talk; and

WHEREAS, Evidence based data demonstrates that wearing a cloth face covering reduces an infected person's chance of spreading the infection to others; and

WHEREAS, Reducing the spread of Covid-19 will allow the economic community to remain open to the public during the pandemic; and

WHEREAS, Many people in the City of Muscatine regularly wear face coverings when in public, requiring all people in the City of Muscatine to wear face coverings in public will help control and prevent the spread of Covid-19 in the City of Muscatine while at the same time allowing the economic community to continue providing service in the City;

NOW, THEREFORE, I, Diana L. Broderson, Mayor of the City of Muscatine, Iowa as a result of the above noted situation, and under the Constitution of the State of Iowa Article III, Section 38A, Iowa Code §372.14(2), Muscatine City Code 1-7-2, and other applicable authority do hereby order the following:

Section 1

Every person in the City of Muscatine must wear a face covering that covers their nose and mouth when in any indoor or outdoor public setting, including, but not limited to:

- Inside any building, including but not limited to, any business open to the public;
- Healthcare settings, including but not limited to a, hospital, medical clinic, laboratory; pharmacy, veterinary clinic, physician or dentist office, and blood bank;
- While in line waiting for or riding on public transit or any vehicle for hire;

- Outdoor areas, including but not limited to, public parks, trails, streets, sidewalks, lines for entry or exit for service, and recreation areas where a 6 foot social distance is not maintained between any non-household member at all times;

Section 2

Individuals may remove their face coverings under the follow conditions:

- While seated at a restaurant or other food or drink establishment when tables and are spaced at least 6 feet apart at all times;
- While engaged in outdoor or indoor sports, including but not limited to, walking, biking, hiking, and where a 6 foot social distance is maintained between any non-household member at all times;
- Face covering requirements for individuals in team sports will follow the State of Iowa recommendations;
- When any party to a communication is deaf or hard of hearing and not wearing a face covering is essential to communication;
- While obtaining a service that requires temporary removal of a face covering;
- When sleeping;
- When necessary to confirm the individual's identity;
- When federal or state law prohibits wearing a face covering or requires the removal of the face covering;

Section 3

Individuals exempt from required face covering usage:

- Children aged two or under;
- Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering. These individuals are asked to provide documentation if requested and should make social distancing between non-household members a priority;
- Incarcerated individuals;

Section 4

For purposes of this Order, face covering means a cloth or plastic face shield that covers the nose and mouth and can be:

- Homemade sewn with straps tied around the head or secured around the ears;
- Multiple layers of fabric tied around the head;
- Factory made or made at home;

Section 5

Members of the public are required by law to comply with this order and violations will be addressed through:

- Enforcement will be duly provided by the Muscatine Police Department and any other legal authority in the City of Muscatine;
- Violators will be guilty of a Municipal Infraction and punishable as provided in Section 1-3 of the City Code;

If this action and the order of another agency or official are in conflict, the more protective requirement will apply. This Order shall take effect on July 6, at 6 am. The sunset of this declaration will be six months from the date enacted unless sooner terminated or extended in writing.

Mayor Diana L. Broderson

City of Muscatine

Date

THE OFFICE OF

THE MUSCATINE COUNTY ATTORNEY

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MEMORANDUM RE MASK PROCLAMATION

To: Muscatine County Board of Supervisors
Muscatine County Sheriff, Officials and Employees

From: James P. Barry
Muscatine County Attorney

Re: City of Muscatine – COVID Mask Proclamation 7-5-20

Date: July 6, 2020

Dear Board Members, Elected Officials, County Employees and Law Enforcement Personnel:

Today has dawned with much discussion as to the appropriateness of the Proclamation issued by the Mayor of Muscatine on July 5, 2020 and specifically regarding the “mandatory” use of face masks (which took effect at 6:00 a.m. on today’s date) in response to the Covid-19 pandemic.

As I stated at the Board meeting this morning, I have reached out to the Attorney General’s Office for some additional clarification and specifically sought their input in light of the media reports that they had shared an “opinion” that the mandate may not be consistent with Iowa law.

As of the issuance of this Memo, I have not heard back from that office, but have reviewed several items that the office has previously issued in 2020 regarding the same or similar issues. That information is attached hereto for your review and convenience and contains numerous legal references that do not bear repeating herein.

Please keep in mind that the information provided by the Attorney General’s Office was provided in their official capacity to person(s) that they represent and is not offered as legal advice to Muscatine County. This Memo is intended to serve that function on behalf of Muscatine County and other governmental entities should seek their own independent legal advice as they deem necessary.

Given the foregoing and my previous experience with these type matters, I am not confident that the Attorney General will or should respond further or give additional advice/clarification. That experience coupled with the need for law enforcement, county officials and the public to understand immediately what my office is willing to do in response to the proclamation, I felt compelled to issue this Memo and then to prevent needless confusion and disagreement.

In light of these comments, I would offer the following:

1. First, I am not the attorney for the City of Muscatine and cannot comment on the steps taken to date or offer legal advice to them or on their behalf. I will leave that to the City Attorney or others that have

been empowered to make those decisions on their behalf. That said, I have offered my opinion to the Mayor, City Attorney and City Police Chief in advance of the release of this Memo, so that they are aware of my thoughts and advice to Muscatine County officials and employees.

2. Second, I am not in a position or qualified to argue about the health consequences or debate that side of the equation. All health matters are better left to the health professionals and my focus herein should simply be limited to the “legality or enforcement of the proclamation” as it impacts Muscatine County operations and this office.
3. Third, the legal opinion outlined herein may need to be revised, at a later date, if the Attorney General provides additional insight/clarification and/or the Governor of this State directs or otherwise delegates her powers/authority to the cities of this State
4. Fourth, this opinion relates directly to the application of the mandate to Muscatine County operations and then specifically to the enforcement of violations by this office. By way of clarification, the Muscatine County Attorney’s Office does perform the prosecutorial function for City of Muscatine for municipal infractions and has done so since 2014. This memo will have no impact on other infractions.
5. Fifth, based upon my review of the law and for the same reasons outlined in the attachments hereto, I am of the opinion that the Mayor has exceeded the authority granted her under Iowa law by issuing the “mask mandate”. In short, this is because the Governor has previously issued clear directive as to the use of PPE during the pandemic, what the Mayor has required as of today is not consistent with the Governor’s Proclamation(s) and that the power to issue such a mandate has not otherwise been delegated by Governor to the City/Mayor.
6. Sixth, so long as County offices remain closed to the public, I am advising Muscatine County, all elected officials and employees to abide by the Governor’s proclamations regarding the pandemic and until further clarification or different directives are issued, but then so long as they are performing their official governmental functions/duties. What they do in their personal lives or which is above and beyond what the Governor has stated in her Proclamations are matters left to them as individuals.
7. Seventh, under the current law, my office is not in a position to enforce any municipal infraction citations issued by any entity on behalf of the City in violation of the Mayor’s Mask Proclamation. That said, I am not and cannot offer protection to individuals that are issued a warning or a citation while they are in public and as may be enforced by other entities.
8. Eight, I urge all citizens to be mindful of the position law enforcement personnel are currently placed in as a result of the Mayor’s Proclamation and the contents this Memo. Further, I urge all citizens to be respectful in any encounter with law enforcement and to be respectful with other citizens who have differing opinions as to the necessity of using mask at all times versus not.

In the end, we are all part of the same community and should endeavor to be respectful and polite to others even when we share different opinions. That principal, along with the rule of law, are part of the underlying foundation that has made this community, county, state and country successful and should continue to be the case moving forward and despite any controversy/dispute health related or otherwise.

Respectfully Submitted,


James P. Barry
Interim Muscatine County Attorney

THOMAS J. MILLER
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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

June 23, 2020

The Honorable Zach Wahls
201 E 9th St., #415
Coralville, IA 52241
zach.wahls@legis.iowa.gov

Dear Senator Wahls:

You contacted the Iowa Attorney General's Office regarding the power of cities or counties to pass local regulations requiring patrons of business to wear masks. A similar question was answered by this office in a question from city officials in March of this year regarding the power of local officials to issue shelter in place orders. I have attached a copy of that analysis to this correspondence for your review.

In this previous analysis, we determined that while the Statewide Disaster Emergency Proclamations are in place, the Governor retains the power to delegate, sub-delegate, or retain the administrative authority under Iowa Code Chapter 28C (Emergency Management) to issue directives of this nature. *Please see* Iowa Code Section 28C.6(8) (enclosed). Iowa Code Section 135.144(3) and (9) (enclosed) empowers the Iowa Department of Public Health, in conjunction with the Governor, to take reasonable measures as necessary to prevent the transmission of infectious disease, to inform the public when a public health disaster has been declared or terminated, and to inform the public of the protective measures to take during the disaster.

The Governor has addressed usage of personal protective equipment (PPE) in prior proclamations, including the proclamations of 5/25/2020 and 6/10/2020, which are still applicable and which provide that in re-opening of public use facilities and businesses that proprietors must adhere to hygiene practices and public health measures consistent with guidance issued by the Iowa Department of Public Health. Any local action or regulation would need to be consistent and compliant with the Governor's Proclamations and the Iowa Department of Public Health Directives in scope and remedies while the Governor's Emergency Proclamations are in place.

Finally, local regulation of this nature, if not preempted under the current Emergency Disaster Proclamations, would likely be under the jurisdiction of local boards of health under their power under Iowa Code Section 137.104(1)(b) (enclosed) to, "make and enforce such reasonable rules and regulations, not inconsistent with law and the rules of the state board, as may be necessary for the protection and improvement of the public health."

The Honorable Zach Wahls
State Senator
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I hope you find this helpful in answering this question. Please be advised this contains the results of my research and analysis on your question but is not an official opinion of the Iowa Attorney General's Office.

Best regards,

Michael L. Bennett
Assistant Iowa Attorney General
PATC Division
michael.bennett2@ag.iowa.gov

Cited Authorities

Iowa Code 29C.6(8)

29C.6 Proclamation of disaster emergency by governor.

In exercising the governor's powers and duties under this chapter and to effect the policy and purpose, the governor may:

8. Delegate any administrative authority vested in the governor under this chapter and provide for the subdelegation of any such authority.

Iowa Code 135.144(3)&(9)

135.144 Additional duties of the department related to a public health disaster

3. Take reasonable measures as necessary to prevent the transmission of infectious disease and to ensure that all cases of communicable disease are properly identified, controlled, and treated.

9. Inform the public when a public health disaster has been declared or terminated, about protective measures to take during the disaster, and about actions being taken to control the disaster.

Iowa Code 137.104(1)(b)

137.104 Local boards of health — powers and duties

1. A local board of health shall:

b. Make and enforce such reasonable rules and regulations not inconsistent with law and the rules of the state board as may be necessary for the protection and improvement of the public health.

Legal Memo from the Attorney General's Office

County and City Home Rules Powers:

Article III, Section 38A and Section 39A contain the City and County Home Rule provisions in the Iowa Constitution. The powers granted cities and counties under these constitutional amendments are to determine their local affairs and government, not inconsistent with the laws of the General Assembly, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. Counties are also constrained in their home rule powers if that power conflicts with the power of a city, providing a city power will prevail within its jurisdiction.

When an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute, the ordinance is considered inconsistent with state law and is preempted. See City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990). Implied preemption occurs when the legislature has covered a subject by statutes in such a manner as to demonstrate a legislative intention that the field shall be preempted by state law.

The powers exercised by cities under the Home Rule Amendments have been generally categorized as "police powers". These include the power of cities and counties to protect rights, privileges, and property of the city and county and to preserve and improve the peace, safety, welfare, comfort and convenience of their residents. Iowa Code Section 331.301 (county) and Iowa Code Section 364.1 (City). These powers may be exercised by cities and counties subject to limitations expressly imposed by a state law, and are barred if such actions are irreconcilable with state law. Under Iowa Code Sections 331.301 and 364.3, City mayors are further empowered to govern the city by proclamation during a time of emergency or public danger. Iowa Code Section 372.14.

These authorities generally indicate authority for cities and counties to act to protect the safety of the residents of their communities yet require cities and counties to yield where the powers are inconsistent with powers of the state.

State Powers

A public health disaster is defined in Iowa law as a state of disaster emergency proclaimed by the Governor in consultation with the Department of Public Health for a disaster that involves an imminent threat of a health condition caused by the appearance of a novel infectious agent and that poses a high probability of a large number of serious health consequences. Iowa Code § 135.140(6). During a public health disaster, the Governor and the Department of Public Health have broad legal authority to take all reasonable measures necessary to prevent the transmission of the virus and to prevent, control, and treat the infectious disease. These legal authorities are contained in part at Iowa Code sections 135.144 and 29C.6. These authorities include the powers

to “control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises in such area.” Iowa Code § 29C.6(15).

Iowa Code Section 29C.6 (8) allows the Governor to delegate and sub-delegate any administrative authority under the Emergency Management Chapter. This indicates the Governor may delegate powers under emergency powers under that section to local authorities to address the current public health emergency, including the power to place restrictions on movement within the communities. This likewise indicates the Governor may choose not to delegate this authority to local agencies.

Conclusion: While cities and counties have police powers to protect the health and safety of their citizens, the State has the authority to declare and coordinate the response to a public health disaster. This includes the power of the Governor to sub-delegate administrative authority to cities and counties, including the power to restrict movement within communities by these local authorities. This power also would allow the Governor discretion to retain such powers and not delegate this authority to cities or counties.

COVID-19 Mitigation Guidance for Story County- Recommendations from the Story County Board of Health

With the current surge of COVID-19 that the county is experiencing, as well as the anticipation of the return of university students from all over the country, it is important that everyone in the county should continue to practice mitigation to prevent the spread of COVID-19. We recommend the following based on published standards and guidance from the Centers for Disease Control and Prevention (CDC) and the Iowa Department of Public Health (IDPH), as well as common sense. Detailed guidance from these entities are available and should be followed; the information below is meant to share minimum guidelines and emphasize key points important in our community. Anyone reading this will notice the emphasis on wearing face coverings. We cannot emphasize enough the importance of wearing properly fitted face coverings, including cloth face coverings and face shields, worn over the nose and mouth when out in public or around people. Surgical grade masks and N-95 respirators are also effective but should be reserved for healthcare workers and other medical first responders. Individuals who should not wear face coverings include children under the age of two or anyone who has trouble breathing or is unable to remove the face covering without assistance.

1. Daycare. Face coverings in young children are hard to keep on and not recommended by the CDC for children under 2 years old. However, face coverings should be worn by all providers of care as well as staff and others occupying the daycare space such as parents. Hand cleansing stations should be plentiful and frequently used. Children should be kept in as small of groups as possible and the groups should not mix at playtime, outings and lunch. Temperature screening of all entering children, staff, and other individuals with a contactless thermometer is highly recommended. We recommend this guidance for both institutional and small, in-home daycares.

2. Pre-K to 12 schools. When schools resume in the fall we recommend the following minimum measures. All staff should be required to wear face coverings at all times when they are around students or other staff. Face coverings should be considered on students as applicable. Social distancing in classes, minimizing classroom changes, staggered lunches and recesses as well as temperature screenings should be followed. Hand cleansing should be frequently practiced and encouraged.

3. Events/gatherings and religious services. Social distancing (at least 6 feet—or about 2 arms' length) should be practiced. People who have already been in contact with each other and feel comfortable that they are all practicing social isolation (such as families) can be grouped together. Groups less than ten are recommended. Face coverings should be required for all present. Hand cleansing stations should be plentiful and encouraged to be used. We recommend individually, pre-packaged foods rather than communal foods. We recommend that the event organizers make sure mitigation measures such as use of face coverings continue to be practiced after the event if participants continue to congregate in the area. Contactless temperature screening should be implemented when feasible.

4. Sporting events and athletic teams. While we understand that wearing a face covering during the strenuous activity of sports may be very difficult, at a minimum, all coaches, officials, support staff, spectators, and athletes who are not playing should wear a face covering at all times while other people are present. Sporting events should practice social distancing for spectators as well as athletes when they are not playing. Screening of athletes and staff daily with a contactless thermometer is indicated. Group meetings and/or meals should be put on hold at this time and remote meetings should be used. Exercise sessions, such as weightlifting and/or swimming, should be staggered to allow social distancing.

Restrooms should be monitored to limit crowding. Concession stands should be closed. Hand cleansing should be frequently practiced and encouraged.

5. Iowa State University. Detailed guidance from Iowa State University is available and should be followed; to supplement these guidelines and emphasize key points, we recommend the following minimum measures. Face coverings should be required for all students in classes and when in university buildings. University sponsored gatherings should be cancelled unless the recommended practices (see events/gatherings and sporting events above) can be followed. Hand cleansing stations should be plentiful and encouraged.

Students should be encouraged, in the strongest language the university can legally use, to practice mitigation principles when off campus and when using mass transit.

Group living situations, such as dormitories and fraternities/sororities are a special and difficult situation. However, certain practices can be used to mitigate risks. Face coverings should be worn at all times except when in sleeping chambers with roommates. Dining should be staggered to allow social distancing. Hand cleansing should be encouraged. Social events should be cancelled unless the principles outlined in events/gatherings and/or sporting events, as applicable, can be followed. All group living situations need to develop a plan of how to isolate a resident who is found to be COVID-19 infected.

We strongly recommend that Iowa State University prohibit spectators at sporting events this fall. Please only broadcast them. We cannot think of any way these events can be made even remotely safe with the masses of people from throughout Iowa, and other states, who routinely attend these events. Please do it for the health of our community.

6. Shared or congregate housing facilities. These facilities should continue to follow published CDC guidelines.

7. Businesses. Businesses should require their staff to wear face coverings, and practice social distancing when possible. We also strongly encourage businesses to require that customers wear face coverings. Sick employees should be allowed to stay home.

With the current rise in cases in Story County, we strongly recommend these guidelines are followed. We fully understand that what we are proposing is difficult and also that no mitigation plan is foolproof. However, if these principles are followed we can get and keep this virus under control until the availability of a vaccine. As a County Board of Health, our duties include the protection of public health of the residents of Story County; thus, our recommendations are made in light of what is best for the public's health, and we stand by our recommendations.



Dear Representative Martin,

The League of Women Voters of Ames and Story County (LWV-ASC) is proposing a partnership to promote wearing masks inside public places throughout our community. Initially we are contacting the Ames Chamber of Commerce, Ames City Council, the office of the Mayor, Iowa State University, and Mary Greeley Medical Center to join with us in our campaign. The importance of masks in decreasing the spread of Covid is well documented. We believe our community will respond positively to the message that wearing a mask protects your friends, neighbors, and the healthcare workers in our community. Wearing masks is a critical part of keeping both workers and business patrons healthy, so that businesses can reopen more safely and can stay opened. Presenting a public and consistent message from the leaders in our community will demonstrate clearly that Ames is working to promote the health and well-being of all our community members.

By joining in our collaborative we may ask for your cooperation and collaboration in writing and signing joint letters to the editor or op eds; distributing emails to your mailing lists, and actively promoting the wearing of a mask within your headquarters or public spaces. Moreover, we would like to add your support to our efforts to encourage ALL businesses in our community to require customers or others (excepting those with medical reasons or very young children) entering their establishment to wear a mask. All members of the alliance must be ready to actively enforce the wearing of masks by distributing or selling a mask (at a minimal charge) to those visiting your premises who do not have one.

Together we can help Story County to decrease the incidence of Covid-19 and promote the health and safety of those who live in our community. Please respond to this message by sending a note to Prez.LWV@gmail.com to let us know of your interest. Please provide a contact person and contact information for this endeavor. We will be in touch shortly to discuss details.

Sincerely,

A handwritten signature in cursive script that reads "Linda Serra Hagedorn". The signature is written in black ink on a light-colored background.

Linda Serra Hagedorn, Ph.D. President
Prez.LWV@gmail.com; 515-450-5261