

MEMO

Legal Department

To: Mayor Haila and Ames City Council

From: Mark O. Lambert, City Attorney

Date: May 21, 2021

Subject: Item No. 30: HF 847, new state law on local face covering ordinances.

I am providing this memo to update you on the new state law regarding face covering ordinances. On May 19, 2021 an amendment was introduced and offered to HF 847 (an education bill) that preempts in certain ways face-covering ordinances or policies for school districts, counties, and cities. The Legislature passed the bill later that same day. For this memo, I will focus only on the impact to city governments. The Governor signed this legislation into law at approximately 12:30 a.m. on May 20, 2021. The language of the bill made these provisions become effective upon the Governor's signature (and not July 1, as is the typical start date for new laws). So the law is now in effect.

Regarding cities, the new law states:

“A city shall not adopt an ordinance, motion, resolution, or amendment, or use any other means, that requires the owner of real property to implement a policy relating to the use of facial coverings that is more stringent than a policy imposed by the state.”

City attorneys throughout Iowa have been attempting to interpret exactly what effect this new law has on existing face-covering ordinances (or mayoral proclamations). I have discussed this matter with several other city attorneys. Below is my interpretation and legal advice on what this new law means for the City's ordinance.

First, the Legislature wrote that “a city shall not adopt an ordinance....” There is a long-standing rule of law that statutes are prospective in nature (provisions

are effective from the point of the statute becoming law, and going forward), and do not apply retroactively unless the law explicitly states that it applies retroactively. The new law states that a city shall not “adopt” an ordinance – that is effective in the future, from the point that the Governor signed it – in other words, “from now on, cities can’t adopt ordinances on this topic.” The legislation does not say “or enforce.” Typically, when the Legislature wants a city to stop enforcing an existing policy too, the language says, “A city shall not adopt or enforce...” The “or enforce” language is what stops a city from enforcing a current ordinance. Saying “shall not adopt” without the “or enforce” prohibits a city from adopting a new ordinance on the topic but does not prevent the city from enforcing a current ordinance on that topic. There are multiple instances in the Iowa Code where the Legislature has written “shall not adopt or enforce an ordinance that...” including at least one other piece of legislation passed this session.¹ The Iowa Supreme Court has held that when the Legislature typically uses certain wording, and then chooses not to use that wording, that is indication of the Legislature’s intent, as the Legislature is presumed to be aware of the wording in other statutes. So, my conclusion is that the new law only prohibits certain city face-covering ordinances being adopted from now on and does not invalidate any current ordinances.

The next issue to ponder is what the Legislature meant by “the owner of real property.” The City owns real property, so a facial reading of the law would seem to indicate that it applies to city property as well as private property. But, the understanding around the Legislature (which would hold no weight in a court’s determination) was that it meant “private property” and not city-owned property. The media reports have indicated that mask ordinances affecting

¹ A few of many examples: “**A city shall not adopt or enforce** zoning regulations or other ordinances which disallow the plans and specifications of a proposed residential structure solely because the proposed structure is a manufactured home.” Iowa Code section 414.28; “**A city shall not adopt or enforce** any ordinance imposing any limitation on the amount of rent that can be charged for leasing private residential or commercial property.” Iowa Code section 364.3; “**A city shall not adopt or enforce** any regulation, restriction, or other ordinance, including a conditional use permit requirement, relating to short-term rental properties within the city.” Iowa Code section 414.1(d)(2).

private property would not be allowed, but cities could still have such ordinances regarding the city's property. I think it is fair to assume that the Legislature meant "private property" here, even though they wrote "real property." I would note, that if the Legislature had intended to make the law apply to both private and public property, there would have been no need for the "owner of real property" language.

Let's look at what the law prohibits. "A city shall not adopt an ordinance...that **requires the owner of real [private] property to implement a policy relating to the use of facial coverings that is more stringent than a policy imposed by the state.**" [Underlining and boldface added]. There are face-covering ordinances (or mayoral proclamations) in Iowa that required businesses to implement the city ordinance, by requiring the business to ensure that customers wore face coverings and/or that signs be posted saying face coverings were required, and there were penalties in the law for businesses that failed to comply. This type of ordinance is now prohibited from being adopted, under the new state law. The Ames ordinance only regulates the behavior of *individuals*, not businesses. The Ames ordinance does not require businesses to ensure that customers wear masks. Many businesses have chosen to do so, but that is not required under the ordinance.

In summary, my conclusions about the new state law are:

1. The new law only prohibits new ordinances and does not preempt existing ordinances.
2. The law states that a city shall not adopt an ordinance requiring the owner of private property to implement a policy relating to the use of face coverings that is more stringent than a policy imposed by the State of Iowa.
3. Because the City's ordinance is an existing ordinance, and because the City's ordinance does not require the owner of private property to implement a policy relating to face coverings, this new state law has no

impact on the Ames ordinance, and the entirety of the Ames ordinance remains valid until it expires or is repealed.

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