

TO: MAYOR ROY D. BUOL AND MEMBERS OF THE CITY COUNCIL

**FROM: CRENN BRUMWELL, CITY ATTORNEY
TERI GOODMAN, ASSISTANT CITY MANAGER
MARK DALSING, CHIEF OF POLICE**

DATE: AUGUST 5, 2020

**RE: FACE COVERING REQUIREMENT ANALYSIS
CAPACITY LIMITATION RESTRICTION**

Background

The City has received requests from members of the Dubuque School Board, community organizations, and citizens to consider a face covering requirement.

Additionally, the White House Coronavirus Taskforce report placed Iowa in the red zone for cases, with Dubuque County as one of the counties with the highest number of new cases in the 3-weeks preceding the report and the City of Dubuque is the largest municipality in Dubuque County. The White House Coronavirus Taskforce report made a number of recommendations for red zones including, but not limited to, closing bars and gyms and creating outdoor dining opportunities within pedestrian areas.

I am writing to provide information and analysis regarding the possibility of requiring face coverings within the City of Dubuque and the implementation of capacity limitations for some businesses.

Governor Reynolds has indicated the Governor's emergency management authority occupies the field for purposes of preemption and therefore local governments are not authorized to implement face mask mandates or other local regulations. The Governor's position has been that she has the authority to delegate that authority to local entities, but she has opted not to do so. The Iowa Attorney General's Office has provided some analysis in support of this position, which I'm attaching as Exhibit A.

Home Rule Authority

Cities have questioned the Governor's position as it doesn't take into consideration cities' Home Rule Authority. Home Rule Authority has been discussed in my city attorneys group as a possible option for establishing local mandates. Attached as Exhibit B is a

document written by Frank Feilmeyer, an Iowa municipal attorney, analyzing Home Rule Authority in Iowa which I will now summarize.

Iowa voters in 1968 passed the Home Rule Amendment to the Iowa Constitution which constitutionalized local control in the State of Iowa. The Home Rule Amendment became Article III, Section 38A of the Iowa Constitution granting municipalities the power to determine their local affairs and governing not inconsistent with the laws of the general assembly. Chapter 364 of the Iowa Code reaffirms the constitutional grant of home rule authority to municipalities:

“to exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges and property of the city or its residents, and improve the peace, safety, health, welfare and convenience of its residents.”

A “city may exercise its general powers subject only to limitations expressly imposed by a state or city law,” and the exercise of a city power “is not inconsistent with a state law unless it is irreconcilable with the state law.” Iowa Code §§ 364.2(2) and (3).

The necessary analysis has not been done at the state level as to whether local face mask mandates are irreconcilable with the Governor’s emergency management action. Until that analysis is done, or a court settles the question of preemption, the matter may be considered unsettled.

Under Home Rule Authority, a city may set standards “more stringent than those imposed by state law, unless a state law provides otherwise.” Iowa Code § 364.3(a); *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990); *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978).

Options

Under Home Rule Authority, in my opinion, the City is within its authority and acts in good faith if the City Council opts to institute a face covering requirement, capacity limitations, or both. The options for acting are:

- 1) Mayoral Proclamation under Iowa Code § 372.14(2) which authorizes the Mayor “to govern the city by proclamation, upon making a determination that a time of emergency or public danger exists”;
or
- 2) Ordinance

There are implications based on which option the City Council may consider adopting.

Proclamation

A violation of a proclamation is a simple misdemeanor which is a criminal charge subject to a minimum fine of \$65, plus a state surcharge and court costs which results in a total fine of approximately \$140. A criminal charge will appear on an individual’s

criminal record in addition to having a financial impact during already turbulent economic times.

Ordinance

An ordinance offers more flexibility as the City Council can set the fine and the procedure for processing. This would allow violations to be processed similar to a parking ticket with a nominal fine and opportunity to pay the violation at City Hall. If an individual wanted to challenge a violation, it would be done through the municipal infraction process which is a civil process. This would not appear on a criminal background check. It should be noted that if a municipal infraction is issued, it is processed through the court system will result in court costs of \$85.

Enforcement Concerns

With either option, there will be a need or expectation for enforcement. Enforcement will inevitably fall upon the Dubuque Police Department. As a mask mandate would be new, we do not know what the impact would be on calls for service. Anecdotally, we can look at the differences between private businesses requiring masks compared to those that don't to get an idea of what level of voluntary compliance we may see. Ultimately, there will be calls for service as community members will likely complain to the Police Department about violations of the mandate. Police response will be prioritized based on other pending calls for service at the time. A delay in response could result in complaints from the original callers. Responding officers will be tasked with enforcing the mandate. Enforcement actions can range from education, warning, and arrest. Officers would be strongly encouraged to attempt to gain compliance through conversations with offenders. Officers could be provided with masks to offer individuals who don't have a mask. If those efforts fail, officers' next actions will be based on which option the City Council adopts. For a simple misdemeanor, arrest could result. Arrest does not necessarily mean custodial arrest where a person is taken into custody and taken to jail. Arrest also includes citing and releasing, which would be a preferred method of enforcement but could result in custodial arrest and jailing should a person refuse to comply with the cite-and-release process or the behavior escalates to a violation of other laws such as disorderly conduct or Interference with official acts. If an ordinance is adopted, officers would issue the violation to individuals.

Some additional concerns for the Police Department include the current public sentiment about "over-policing," especially regarding traditionally marginalized communities and communities of color. There will also be concerns about private property owners resisting the City's efforts to enforce on their private property versus public property.

Private businesses have always had the option to enforce mask wearing. In these cases, if a patron refuses to wear a mask per the business's rules, it would fall into a "right to refuse service" afforded any business, and people that fail to comply can be charged with Trespassing should police be called, and they can't rectify the situation. This trespass option would be an option to coincide with a local mask ordinance. If a business is trying to enforce the mandate but a customer fails to comply, the customer can be asked to leave, or charged with a violation of the mandate or Trespassing.

Additional Concerns

As the Governor's office has indicated the City is not authorized to act, there could be an injunctive action or lawsuit by the Governor/Attorney General's Office to challenge the City's action. To date there has been no action by the Governor or Attorney General against Muscatine or Iowa City for their face covering requirements. In the event a lawsuit was filed by the Attorney General's office the Iowa League would support city/members. In the opinion of the League, preemption does not exist in this situation, and so local control appears to be defensible. It is always difficult to say how authority threatened might react.

Other possible concerns resulting from a City of Dubuque mask mandate are political in nature and might potentially impact desired funding and/or policy. In the case of school districts defying the Governor's directives to open and provide specific required days of education, the Governor is taking a hard line and refusing to grant education credits for the days not in school and requiring students to make up those days at the end of the school year. Governor Reynolds did state, however, that her decision was based on bi-partisan legislation that passed unanimously at the end of session. While there is no way to know what specific consequences could result, the Governor may look for other avenues to hold local governments accountable.

It should be noted that other jurisdictions, including, but not limited to, Linn County and Polk County and their respective boards of health are also considering a mask mandate.

Proposals for Council Discussion

- Proclamation requiring face coverings
- Proclamation requiring face coverings and limiting the capacity of bars, restaurants, and gyms to fifty-percent (50%)
- Ordinance requiring face coverings
- Ordinance requiring face coverings and limiting the capacity of bars, restaurants, and gyms to fifty-percent (50%)

Conclusion

Staff will be available to answer City Council questions.

cc: Michael C. Van Milligen, City Manager
Cori Burbach, Assistant City Manager
Mary Rose Corrigan, Public Health Specialist

EXHIBIT A

THOMAS J. MILLER
ATTORNEY GENERAL



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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.

EXHIBIT B

Iowa Constitution gives local leaders power over face mask policy

By Frank Feilmeyer - July 21, 2020



Gov. Kim Reynolds is in conflict with some Iowa communities over whether local leaders can impose orders requiring face masks in public. (Photo courtesy of the State of Utah)

What do an unlicensed vehicle and a face mask have in common with a Civil War era judge? The answer, I think, is that the Home Rule Amendment to the Iowa Constitution overturned that judge's view of local governments and gave cities and counties some say over what you must do with them.

In 1990, Stan Gruen fought the City of Des Moines to the Iowa Supreme Court over a \$100 penalty for keeping an unlicensed vehicle on his property. He did not dispute that he was in violation of the city's ordinance. He argued that there was nothing in state law that prevented him from keeping an unlicensed vehicle on his property.

The state, you see, has very clearly occupied the field on vehicle regulations. As the Supreme Court put it, "Gruen's argument boils down to one proposition: because the general assembly has provided that he may lawfully possess unregistered vehicles under certain conditions, the city may not in any manner regulate where or how he parks those vehicles."

If you consider, for a moment, smoking regulations or even when and where you can carry a firearm, Gruen's argument made some sense. When the General Assembly speaks, the subordinate local governments must abide by the state's specific legislation. In fact, until 1968, Iowa lived – as many states still do – under the "Dillon Rule."

Justice John Forest Dillon served on the Iowa Supreme Court from 1862 to 1868. His 1868 opinion in *Clinton v. Cedar Rapids and the Missouri River Railroad* articulated the rule that local governments have only the specific powers given by the legislature. Conversely, Dillon would say, local governments have no power not expressly given them.



In 1968 and 1978, the People of Iowa expressed exactly the opposite in a pair of Home Rule amendments — one for cities and later one for counties. We expressly abolished the Dillon Rule: “The Rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.”

So, it might be lawful to keep an unlicensed vehicle, but the Iowa Supreme Court said that the city could tell Mr. Gruen when and where he could store it. If state law and local law could be harmonized, then the local ordinance did not run afoul of the state law. Why? Home rule.

“Under home rule,” the Supreme Court has ruled, “a city has the power to enact an ordinance on a matter which is also the subject of statute if the ordinance and statute can be harmonized and reconciled.” Equally important, the General Assembly codified this saying, “An exercise of a city power is not inconsistent with a state law unless it is *irreconcilable* with the state law.”

Now, like unlicensed vehicles, the question is whether local government has anything to say about mandatory personal protective equipment (PPE) when the state has a law or even might have a rule. Two attorney general opinions and comments of Gov. Kim Reynolds rest on the assertion that the governor’s emergency management authority occupies the field and local governments have nothing to say about PPE. These assertions run counter to the Iowa Constitution and multiple Iowa Supreme Court rulings and overlook a couple of fundamental things.

One fundamental issue overlooked is that, whether folks at the state level like it or not, our Constitution literally grants local governments “home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government.” The courts have repeatedly said this means a local action must be *irreconcilable* with the state action. That is a pretty high bar. Moreover, where possible the courts are supposed to try to harmonize the local and state actions.

When the court ruled against Stan Gruen, it said, “A municipal ordinance is irreconcilable with a law of the General Assembly and, therefore, preempted by it, when the ordinance ‘prohibits an act permitted by statute, or permits an act prohibited by a statute.’” This leads to the other fundamental issue overlooked: the Iowa Constitution requires one to go deeper and actually to test the local action for whether it is irreconcilable and cannot be harmonized with state action.

The argument seems to boil down to the same one made by Stan Gruen. The emergency management power has been exercised. The governor could make a proclamation about mandatory PPE use. Consequently, this power is exclusive to the state — even if it would be the same rule made by a city or county.

Make no mistake, the breadth of the governor’s emergency management power is breathtaking. Likewise, state and local boards of health have substantial public health rule-making authority. If none of these have taken an action and a city were to step into the breach — fully assessing their almost fiduciary obligation to promote the health and safety of *their* citizens as permitted by the Home Rule Amendment— what exactly is so *irreconcilable* with state action?

The only scenario where a local rule requiring mandatory PPE would be irreconcilable with a state rule is when there is an actual state rule prohibiting PPE. Leaving to another time whether this would ever be an appropriate or lawful order for a state official to give, it seems to me that every other scenario is logically consistent with and completely reconcilable with a local rule requiring the use of PPE. If the state came along with an order for the use of PPE, for example, it would be the same and, by definition, *not irreconcilable*.



If the state has no rule about where to park your unlicensed vehicle or when and where to put on your face mask but a local government does, what would be inconsistent or irreconcilable? Saying that the state has occupied the field is only part of the analysis. The Iowa Constitution says you have to find the inconsistency and try to harmonize. When there is the *absence* of a state rule — when and where to park your unlicensed vehicle or when and where to wear your face mask — it simply is not logically sound to say that a city's or county's rule is irreconcilable with the state law.

One can disagree about whether local government *should* be making their own rules mandating PPE. That is a healthy debate to have. The issues are complex. On one hand, cities and counties do not have the same access to experts and the bigger picture. There are enforcement and compliance issues. On the other hand, cities and counties have a better handle on what the local hospitals can handle. Local governments have a better feel for their unique problems, like concentrations of factory and meat processing jobs, college students, vulnerable populations, access to medical care, or areas at high susceptibility of disease transmission. On the subjective question of whether local rules are a good idea, you can draw your own conclusions.

On the objective issue of whether a city or county *could* have a local rule about PPE, I think Home Rule does allow local governments to take stock of their own situations and have their own rules. It is not enough to say that a state official could imagine a state rule that would conflict. It is also not enough that the state actually has a rule. State and local rules must actually be in conflict for the local rule to be inappropriate.

Iowa has had Home Rule for more than 50 years. It is time to let old Judge Dillon rest in peace.

Frank Feilmeyer

Frank Feilmeyer lives in and has practiced law in Ames for 29 years and was a judicial law clerk for the Iowa Court of Appeals. Frank has practiced municipal law for 29 years and was the president of the Iowa Municipal Attorneys Association from 2006-2007.