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August 6, 2020

Hon. Lauris Olson
Story County Board of Supervisors
900 6th St.
Nevada, IA 50201

RE: Mandating the use of personal protective equipment

Dear Supervisor Olson:

You requested an opinion regarding the authority of the county to mandate the use of personal protective equipment ("PPE"), particularly face masks. I understand that the Story County Board of Health has not yet taken action and that both the Board of Health and the Board of Supervisors may consider such action in the near future. As of the writing of this opinion letter, the governor has made multiple public health emergency proclamations, but so far, has not issued any state-wide mandates for the use of PPE. The Iowa Department of Public Health has recommended the use of face-covering PPE, but also has issued no mandate. The matter is of grave concern to the Board of Supervisors as the fall term at Iowa State University and the state-mandated return to public schools are imminent.

It is my conclusion, based on the Iowa Constitution, multiple Iowa statutes, and a considerable body of Iowa case law, that local government does have authority to regulate aspects of public health. In my opinion, a board of supervisors, acting in concert with the county board of health, has the power to mandate the use of PPE.

Summary of Constitutional and Statutory Authority of the County

1 **Home Rule.** Home Rule authority is generally the power of the county, through its board of supervisors, to govern local affairs in their own discretion, except in those cases where the state has explicitly taken a particular power or specified a particular duty or method.[1] Both the courts and the legislature have helped to define how to reconcile when and how state and local powers are in conflict. This occurs when the power exercised is "inconsistent" or, more specifically, "irreconcilable." This means that the county and state can have same or similar rules,[2] provided (a) that the state has not expressed otherwise, fully occupying the field and (b) that county cannot set standards that are lower than required by state law may be more stringent than state law. The countervailing theory of local authority is that a local govern-

[1] Iowa Constitution in Article 3, Section 39A.

[2] Goodell v. Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998) ("subject to this restriction and principles of preemption, a county may exercise its home rule powers on matters that are also the subject of state law") (citing Decatur County v. PERB, 564 N.W.2d 394, 398 (Iowa 1997); Sioux City Police Officers' Ass'n v. City of Sioux City, 495 N.W.2d 687, 694 (Iowa 1993)).

ment has only the power expressly granted by the state and generally described as the "Dillon Rule."[3]

2 **Constitutional authority.** The "Home Rule" authority of counties is contained in Iowa Constitution in Article 3, Section 39A, approved by voters and effective since November 1978. The power of "Home Rule" was expressly granted: "Counties … are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government …." County Home Rule, however, yields to municipal authority within the city's own jurisdiction if the county rule is in conflict with city rule. The "Dillion Rule" was expressly abolished: "The proposition or rule of law that a county … possesses and can exercise only those powers granted in express words is not a part of the law of this state."

3 **Statutory authority.** The constitutional "Home Rule" authority is codified: "A county 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 rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents."[4] Iowa law places in the hands of the board of supervisors the exercise of all powers and duties of the county.[5] The abolition or the nonexistence of the "Dillon Rule" is also codified: "The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law."[6]

4 **Home Rule conflicts with state authority.** Home Rule authority may not be "inconsistent" with state law, and this is also explicitly included in both the Iowa Constitution and the statutes. The General Assembly defines the term "inconsistent" as meaning "*irreconcilable*."[7] There are two additional statutory provisions that further clarify the meaning of "inconsistent" and "irreconcilable." The General Assembly also provides: "A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. If a procedure is not established by state law, a county may determine its own procedure for exercising the power."[8] In Iowa Code section 331.301(6)(a), the General Assembly provides: "A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." The Iowa Supreme Court has ruled that an "or-

[3] The Iowa Supreme Court in Polk County Bd. of Sup'rs v. Polk Commonwealth Charter Com'n, 522 N.W.2d 783, 790–91 (Iowa 1994) noted: "In Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868), Chief Justice John F. Dillon established a rule for the determination of local government power which came to be known as the 'Dillon Rule.' City of Des Moines v. Master Builders, 498 N.W.2d 702, 703 (Iowa 1993). This rule held that municipal and county governments could only possess and exercise powers which were: '(1) expressly granted by the legislature; (2) necessarily or fairly implied in or incident to the powers expressly granted; and (3) those indispensably essential—not merely convenient—to the declared objects and purposes of the municipality.' Gritton v. City of Des Moines, 247 Iowa 326, 331, 73 N.W.2d 813, 815 (1955)."

[4] Iowa Code § 331.301(1).

[5] Iowa Code § 331.301(2).

[6] Iowa Code § 331.301(3).

[7] Iowa Code § 331.301(4) (emphasis supplied).

[8] Iowa Code § 331.301(5).

dinance 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."[9] It follows that under home rule, local government "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."[10]

5 **Preemption.** State law preemption may be express or implied. "Express preemption occurs when the general assembly has specifically prohibited local action in an area. … Obviously, any local law that regulates in an area the legislature has specifically stated cannot be the subject of local action is irreconcilable with state law."[11] Implied preemption occurs either (a) when a local ordinance allows a lesser standard than required by state law or (b) "when the legislature has 'cover[ed] a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.'"[12] The mere existence of a state law regulating some particular matter does not create preemption. As expressed by the Iowa Supreme Court, "It would be inconsistent with Iowa's county home rule amendment, our home rule statutes and this court's prior cases to imply preemption based on an argument that statewide regulation of an area is preferable to local regulation, in the absence of an expression of legislative intent to completely regulate the area in question."[13]

Summary of Health and Safety Authority of the County

6 **General Home Rule authority.** Iowa Constitution Article 3, Section 39A and Iowa Code section 331.301 give counties the power of Home Rule, which essentially means the power to determine their local affairs without the necessity of a specific grant of state authority. Under the Iowa Code, a county expressly has authority to "exercise any power" and to "perform any function" based on the county's own judgment of what "it deems appropriate" for "safety, health, welfare … of its residents." This is often referred to as the general police power, but it is the basis for the county's general regulatory authority over the conduct of persons within its jurisdiction.

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[9] Baker v. City of Iowa City, 750 N.W.2d 93, 99–100 (Iowa 2008) (quoting City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990) and City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983)) (citing Goodenow v. City Council of Maquoketa, 574 N.W.2d 18, 26 (Iowa 1998); Goodell v. Humboldt County, 575 N.W.2d 486, 500 (Iowa 1998) (applying same analysis to identical provisions governing county home rule authority)).

[10] City of Council Bluffs v. Cain, 342 NW 2d 810, 812 (Iowa 1983) (citing City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 773 (Iowa 1978); Chelsea Theatre Corp. v. Burlington, 258 N.W.2d 372, 373 (Iowa 1977); Airport Commission for City of Cedar Rapids v. Schade, 257 N.W.2d 500, 505 (Iowa 1977); Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975)).

[11] Goodell v. Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998) (citing E.g., Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977) (holding state has expressly proscribed local regulation of obscene materials)).

[12] Goodell v. Humboldt County, 575 N.W.2d 486, 493 (Iowa 1998) (citing City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983); 5 Beth A. Buday & Victoria A. Braucher, McQuillin Municipal Corporations § 15.20, at 109 (3d ed. 1996 rev. vol.) ("Where the state has preempted the field, local law regulating the same subject is inconsistent with the state's transcendent interest, whether or not the terms of the local law actually conflict with the statewide legislation.").

[13] Goodell v. Humboldt County, 575 N.W.2d 486, 498 (Iowa 1998). The Supreme Court noted that a "high degree of expression" would be "required of the legislature" to find preemption. Goodell v. Humboldt County, 575 N.W.2d 486, 499 (Iowa 1998).

7 **Local Public Health Governance Act.** Iowa Code chapter 137 defines the "structure, powers, and duties of local boards of health."[14] The legislature vests in the county board of health "jurisdiction over public health matters in the county"[15] and authority to enforce state health laws, rules, and orders[16] and to make and enforce its own reasonable rules not inconsistent with state law and rules.[17] The local board's rules become effective after the board of health holds a hearing after published notice[18] and the board of supervisors approved the rule and published it.[19]

State laws and actions governing disaster and health.

8 **Disaster powers.** The governor has authority to proclaim a disaster emergency.[20] The governor can suspend state laws, rules, and regulations if there is a specific finding that strict adherence would "prevent, hinder, or delay necessary action in coping with the emergency."[21] This may include laws "limiting local governments in their ability to provide services to aid disaster victims."[22] The governor also may delegate any power under chapter 29C.[23] The disaster power extends to a "public health disaster."[24]

9 **Public health disaster.** The "public health disaster" is a disaster as defined in chapter 29C—that is, anything that, among other things, threatens public health—caused by, among other things, a novel infectious agent and has a high probability of death, disability, or widespread harm or health consequences.[25] Where there exists a public health disaster, Iowa law provides "the department, in conjunction with the governor, *may* …" take various actions, including: "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."[26]

10 **Existing gubernatorial proclamations.** The governor has issued 21 emergency disaster proclamations between March 9, 2020, and July 24, 2020.[27] The governor has explicitly exercised authority under Iowa Code sections 29C.6(1), 135.140(6), and 135.144.[28] In these declarations, the governor has directed certain businesses and certain types of "mass gatherings" to employ social distancing and other public health measures consistent with guidance issued by the Iowa Department of Public Health. There are no references in the governor's latest proc-

[14] Iowa Code § 137.101.
[15] Iowa Code § 137.103(2).
[16] Iowa Code § 137.104(1)(a).
[17] Iowa Code § 137.104(1)(b).
[18] Iowa Code § 137.104(1)(b)(4).
[19] Iowa Code § 137.104(1)(b)(2).
[20] Iowa Code § 29C.6(1).
[21] Iowa Code § 29C.6(6).
[22] Iowa Code § 29C.6(6).
[23] Iowa Code § 29C.6(8).
[24] Iowa Code § 29C.6(1) (cross-referencing the definition in Iowa Code § 135.140).
[25] Iowa Code § 135.140 ("public health disaster" defined) and Iowa Code § 29C.2 ("disaster" defined). The definition includes other causes not relevant to the discussion here.
[26] Iowa Code § 135.144(3) (emphasis supplied).
[27] Covid-19 Proclamations, https://coronavirus.iowa.gov/pages/proclamations (viewed August 6, 2020).
[28] Proclamation of Disaster Emergency dated July 24, 2020.

lamation to masks or face coverings, except that a casino may require them[29] and except to the extent the proclamation incorporates by reference the guidance of the Iowa Department of Public Health, which states that one is "strongly encouraged" to "consider the use of cloth face coverings (when practical)."[30] The governor's widely reported position is that she will not issue a mandatory face-covering order.[31]

11 **Attorney General opinions.** The office of the attorney general has issued two informal opinions, one by Heather Adams on March 24, 2020, and one by Michael L. Bennett on June 23, 2020. In these opinions, the attorney general takes the position that the governor has taken the emergency management powers by proclamation and that these allow her to take measures relating to disease transmission and to delegate (or, in this case, not to delegate) authority.[32] The conclusion of the attorney general's office as stated in these two informal opinions is that the governor's power relating to public health disaster is exclusive.[33] There is no analysis in these opinions of whether a local government's regulations consistent with state laws or regulations would be otherwise enforceable. There is, however, recognition that the local board of health might have continuing authority.[34]

Local authority for face-covering mandates.

The sole fighting issue is whether the existence of Iowa Code chapter 29C or the issuance by the governor of a public health disaster proclamation under chapter 29C is a state regulation that preempts any local government regulation. If one accepts the Iowa Supreme Court's view of preemption, a local mask mandate is preempted by the state only if stated expressly or it can be reasonably implied[35] and cannot otherwise be harmonized with state law.[36]

There is no express statement Iowa state law, rule, regulation, or proclamation mandating a face covering. If that power resides in the governor or the Iowa Department of Public Health under Iowa Code chapters 29C, 135, or 137, it can safely be said that no such rule has been exercised.[37] A local requirement of a face-covering does not appear to be *expressly* preempted and, therefore, if it is preempted at all, could only be preempted by implied preemption.

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[29] Proclamation of Disaster Emergency dated July 24, 2020 § 2(c)(1).

[30] Iowa Department of Public Health, Public Health COVID-19 Reopening Guidance (accessible at https://idph.iowa.gov/Portals/1/userfiles/61/covid19/resources/IDPH%20Reopening%20Guidance%205_12_20.pdf (viewed August 6, 2020)).

[31] See, e.g., Stephen Gruber-Miller, "'There's not a silver bullet': Iowa Gov. Kim Reynolds defends not ordering a mask mandate," Des Moines Register (July 30, 2020) (accessible at https://www.desmoinesregister.com/story/news/politics/2020/07/30/iowa-governor-kim-reynolds-defends-not-ordering-mask-mandate-theres-not-a-silver-bullet/5545145002/ (viewed August 6, 2020)); Erin Murphy, "Gov. Kim Reynolds defends lack of face mask mandate," The Gazette (July 30, 2020) (accessible at https://www.thegazette.com/subject/news/gov-kim-reynolds-defends-lack-of-face-mask-mandate-20200730 (viewed August 6, 2020)).

[32] Michael L. Bennett letter to Senator Zach Wahls, dated June 23, 2020.

[33] Heather L. Adams email to Sam Langolz, Michael Boal, and Sarah Reisetter, dated March 24, 2020.

[34] Michael L. Bennett letter to Senator Zach Wahls, dated June 23, 2020 ("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)").

[35] Goodell v. Humboldt County, 575 N.W.2d 486, 498 (Iowa 1998).

[36] City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990).

[37] See the authority cited in footnotes 30 (Iowa Department of Public Health encouraging use) and 31 (governor remarks resisting state-wide mandate).

The Iowa Supreme Court has said there are two ways that implied preemption may occur. One of those ways is by an action that effectively creates a standard lesser than required by the state. There is, as has been demonstrated, no state standard for face-covering on a state-wide basis, so it can be safely concluded that the existence of a local regulation would not lessen the statewide standard. The other possibility for implied preemption is that the state has completely occupied the field.[38]

The governor and the attorney general appear to have taken the position that the public health disaster effectively occupies the field regarding any type of rules that might include a rule for the use of PPE during this pandemic. The attorney general has not elaborated on the origin of that exclusivity beyond stating that the governor has certain powers in a health emergency and that powers can be delegated (or not). The Iowa Supreme Court, however, set a very important standard: "It would be inconsistent with Iowa's county home rule amendment, our home rule statutes and this court's prior cases to imply preemption based on an argument that statewide regulation of an area is preferable to local regulation, *in the absence of an expression of legislative intent to completely regulate the area in question*."[39]

It is important to understand that it is difficult to cite and to prove the absence or the nonexistence of a particular legislative intent. One has to look for evidence that the legislature did not displace local control with state regulation. The contrary evidence for local control, beyond the basic Constitutional Home Rule, is scattered throughout Iowa law. Assistant Attorney General Bennett, for example, conceded the existence of the local board of health, which has been granted local control over health regulation.[40] The emergency management statute enabling the governor's proclamation nowhere states that the governor's power is exclusive of local government control.[41] This power is given and "may"[42] be exercised by the governor, and there are multiple references in the emergency management law to cooperation with and assistance to local governments. The explicit policy of the State of Iowa is: "*[t]o confer* upon the governor *and upon* the executive heads or *governing bodies of the political subdivisions* of the state the emergency powers"[43] in chapter 29C and "[t]o provide for the rendering of mutual aid *among the political subdivisions*."[44] The legislature has empowered mayors to govern by proclamation[45] and made provision for emergency management agencies at the local level.[46] There is nowhere in Iowa Code chapter 29C an expressed intent by the legislature that state authority is exclusively to be exercised in an

[38] Goodell v. Humboldt County, 575 N.W.2d 486, 493 (Iowa 1998) (citing City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983); 5 Beth A. Buday & Victoria A. Braucher, McQuillin Municipal Corporations § 15.20, at 109 (3d ed. 1996 rev. vol.) ("Where the state has preempted the field, local law regulating the same subject is inconsistent with the state's transcendent interest, whether or not the terms of the local law actually conflict with the statewide legislation.").

[39] Goodell v. Humboldt County, 575 N.W.2d 486, 498 (Iowa 1998). The Supreme Court noted that a "high degree of expression" would be "required of the legislature" to find preemption. Goodell v. Humboldt County, 575 N.W.2d 486, 499 (Iowa 1998).

[40] Michael L. Bennett letter to Senator Zach Wahls, dated June 23, 2020 ("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)").

[41] See Iowa Code § 29C.6.

[42] See Iowa Code § 4.1(3), which distinguishes "may" as conferring a power, while "must" and "shall" impose requirement and duty, respectively.

[43] Iowa Code § 29C.1(2).

[44] Iowa Code § 29C.1(3).

[45] Iowa Code § 378.14(2).

[46] Iowa Code § 29C.9.

emergency. Rather, a closer reading suggests that at least one intent is that the emergency management powers be used in aid of local government. In the broader context of emergencies generally, it could be argued that it is a practical impossibility for local government to be completely displaced. It is exceptionally difficult to say that the General Assembly—with or without explicitly stating its intent—expressed "an intent to completely regulate the area in question."[47] It is very difficult to find a "high degree of expression"[48] for preemption.

There are multiple reasons why local authority is not abrogated even if one were to conclude that the legislature had attempted to occupy the field of how public health emergencies were managed. First, local government remains on the front line regardless of the state response. Local emergency management, board of health, sheriffs, police departments, hospitals, and first responders are the ones on the ground conducting operations regardless of the type of emergency. Second, constitutional law, statutory law, and common law all indicate that a local regulation can coexist with state regulation under the appropriate conditions.

Iowa law allows local regulation to exist when it can be harmonized to the state law.[49] Iowa law further allows local regulation to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise."[50] Neither the governor nor the Iowa Department of Public Health has exercised any power to regulate face-covering during the pandemic. Logically, therefore, in the absence of any state face-covering mandate, there is nothing with which to reconcile a local regulation. It is impossible to conclude that a local regulation is *irreconcilable* with a nonexistent state regulation. If the governor or the Iowa Department of Public Health were to issue a state-wide mandate, one would still have to attempt to harmonize these. However, literally everything else – from a statewide rule for use of a face mask to the complete absence of any rule – is logically consistent and completely reconcilable with local rule requiring the use of a face mask (i.e., not irreconcilable).

The General Assembly has provided certain specific methods of adopting a public health rule through the board of health.[51] The General Assembly has also provided a method[52] for a county to exercise specific health powers in Iowa Code chapter 137. Therefore, notwithstanding the general constitutional Home Rule powers over health, safety, and welfare, the board of supervisors must follow the statutory framework for exercising that power. Consequently, if a county were to exercise the authority to require the use of personal protective equipment generally, that authority would be conferred by an action of the board of health after notice and hearing and the approval by the board of supervisors followed by publication in the newspaper of that action.[53]

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[47] Goodell v. Humboldt County, 575 N.W.2d 486, 498 (Iowa 1998).

[48] Goodell v. Humboldt County, 575 N.W.2d 486, 499 (Iowa 1998).

[49] City of Council Bluffs v. Cain, 342 NW 2d 810, 812 (Iowa 1983) (citing City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 773 (Iowa 1978); Chelsea Theatre Corp. v. Burlington, 258 N.W.2d 372, 373 (Iowa 1977); Airport Commission for City of Cedar Rapids v. Schade, 257 N.W.2d 500, 505 (Iowa 1977); Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975)).

[50] Iowa Code § 331.301(6)(a).

[51] Iowa Code § 137.104(1)(b).

[52] Iowa Code § 331.301(5).

[53] Iowa Code § 137.104(1)(b).

Summary and conclusion.

It is, therefore, my opinion that a county may make and enforce a regulation proposed by the county board of health involving the required use of personal protective equipment notwithstanding any gubernatorial public health disaster proclamation. Any county action undertaken to require the use of PPE under these circumstances is or could be completely reconcilable with any state law, including any present or future public health disaster proclamation.

Please contact me if you have any questions or concerns about this matter.

Sincerely,

Digitally signed by: Franklin J Feilmeyer
DN: CN = Franklin J Feilmeyer email = fjf@singerlaw.com C = US O = Pasley and Singer Law Firm LLP OU = Law Firm General Partner
Date: 2020.08.06 23:04:32 -05'00'

Franklin J. Feilmeyer
Attorney at Law

Iowa Code Annotated
Constitution of the State of Iowa (Annotated) (Refs & Annos)
Article III. Of the Distribution of Powers
Legislative Department

I.C.A. Const. Art. 3, § 39A

§ 39A. Counties home rule

Currentness

Counties or joint county-municipal corporation governments 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 general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.

If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.

The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Credits
Added Nov. 7, 1978.

I. C. A. Const. Art. 3, § 39A, IA CONST Art. 3, § 39A
Current through Nov. 8, 2016, General Election.

End of Document

Iowa Code Annotated
Title IX. Local Government [Chs. 331-420]
Subtitle 1. Counties [Chs. 331-356a]
Chapter 331. County Home Rule Implementation (Refs & Annos)
Subchapter III. Powers and Duties of a County (Refs & Annos)
Part 1. General Powers and Duties (Refs & Annos)

I.C.A. § 331.301

331.301. General powers and limitations

Effective: July 1, 2020
Currentness

<[Text subject to final changes by the Iowa Code Editor for Code 2021.]>

<[Text subject to final changes by the Iowa Code Editor for Code 2021.]>

1. A county 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 rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power.

2. A power of a county is vested in the board, and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law.

3. The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.

4. An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.

5. A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. If a procedure is not established by state law, a county may determine its own procedure for exercising the power.

6. a. A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

b. A county shall not impose any fee or charge on any individual or business licensed by the plumbing and mechanical systems board for the right to perform plumbing, mechanical, HVAC, refrigeration, sheet metal, or hydronic systems work within the scope of the license. This paragraph does not prohibit a county from charging fees for the issuance of permits for, and inspections of, work performed in its jurisdiction.

c. (1) A county shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any state law. For purposes of this paragraph:

(a) "Consumer merchandise" means merchandise offered for sale or lease, or provided with a sale or lease, primarily but not exclusively for personal, family, or household purposes, and includes any container used for consuming, carrying, or transporting such merchandise.

(b) "Container" means a bag, cup, package, container, bottle, or other packaging that is all of the following:

(i) Designed to be either reusable or single-use.

(ii) Made of cloth, paper, plastic, including foamed or expanded plastic, cardboard, corrugated material, aluminum, glass, or postconsumer recycled or similar material or substrates, including coated, laminated, or multilayer substrates.

(iii) Designed for consuming, transporting, or protecting merchandise, food, or beverages from or at a food service or retail facility.

(2) An ordinance, motion, resolution, or amendment adopted prior to March 30, 2017, that violates this paragraph is void and unenforceable on and after March 30, 2017.

(3) This paragraph "c" shall not apply to county solid waste or recycling collection or county solid waste or recycling programs.

d. A county shall not adopt an ordinance, motion, resolution, or amendment, or use any other means, that restricts an owner of real property from refinancing existing debt on, selling, or otherwise transferring title to the property by requiring the owner to take or show compliance with any action with respect to the property or pay any fee before, during, or after refinancing existing debt on, selling, or otherwise transferring title to the property.

7. A county shall not levy a tax unless specifically authorized by a state statute.

8. A county is a body corporate for civil and political purposes and shall have a seal as provided in section 331.552, subsection 4.

9. Supervisors and other county officers may administer oaths and take affirmations as provided in chapter 63A.

10. A county may enter into leases or lease-purchase contracts for real or personal property in accordance with the following terms and procedures:

a. A county shall lease or lease-purchase property only for a term which does not exceed the economic life of the property, as determined by the board.

b. A lease or lease-purchase contract entered into by a county may contain provisions similar to those sometimes found in leases between private parties, including, but not limited to, the obligation of the lessee to pay any of the costs of operation or ownership of the leased property and the right to purchase the leased property.

c. A provision of a lease or lease-purchase contract which stipulates that a portion of the rent payments be applied as interest is subject to chapter 74A. Other laws relating to interest rates do not apply. Chapter 75 is not applicable. A county enterprise is a separate entity under this subsection, whether it is governed by the board or another governing body.

d. The board must follow substantially the same authorization procedure required for the issuance of general obligation bonds issued for the same purpose to authorize a lease or a lease-purchase contract made payable from the debt service fund.

e. The board may authorize a lease or lease-purchase contract which is payable from the general fund if the contract would not cause the total of lease and lease-purchase payments due from the general fund of the county in any single future fiscal year for all lease or lease-purchase contracts in force on the date of the authorization, excluding payments to exercise purchase options or to pay the expenses of operation or ownership of the property, to exceed ten percent of the last certified general fund budget amount in accordance with the following procedures:

(1)(a) The board must follow substantially the authorization procedures of section 331.443 to authorize a lease or lease-purchase contract for personal property which is payable from the general fund. The board must follow substantially the authorization procedures of section 331.443 to authorize a lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease-purchase contract does not exceed the following limits:

(i) Four hundred thousand dollars in a county having a population of twenty-five thousand or less.

(ii) Five hundred thousand dollars in a county having a population of more than twenty-five thousand but not more than fifty thousand.

(iii) Six hundred thousand dollars in a county having a population of more than fifty thousand but not more than one hundred thousand.

(iv) Eight hundred thousand dollars in a county having a population of more than one hundred thousand but not more than two hundred thousand.

(v) One million dollars in a county having a population of more than two hundred thousand.

(b) However, if the principal amount of a lease or lease-purchase contract pursuant to this subparagraph (1) is less than twenty-five thousand dollars, the board may authorize the lease or lease-purchase contract without following the authorization procedures of section 331.443.

(2) The board must follow the following procedures to authorize a lease or lease-purchase contract for real property which is payable from the general fund if the principal amount of the lease or lease-purchase contract exceeds the limits set forth in subparagraph (1):

(a) The board must institute proceedings for entering into a lease or lease-purchase contract payable from the general fund by causing a notice of the meeting to discuss entering into the lease or lease-purchase contract, including a statement of the principal amount and purpose of the lease or lease-purchase and the right to petition for an election, to be published as provided in section 331.305 at least ten days prior to the discussion meeting. No sooner than thirty days following the discussion meeting shall the board hold a meeting at which it is proposed to take action to enter into the lease or lease-purchase contract.

(b)(i) If at any time before the end of the thirty-day period after which a meeting may be held to take action to enter into the lease or lease-purchase contract, a petition is filed with the auditor in the manner provided by section 331.306, asking that the question of entering into the lease or lease-purchase contract be submitted to the registered voters of the county, the board shall either by resolution declare the proposal to enter into the lease or lease-purchase contract to have been abandoned or shall direct the county commissioner of elections to call a special election upon the question of entering into the lease or lease-purchase contract. However, for purposes of this subparagraph (2), the petition shall not require signatures in excess of one thousand persons.

(ii) The question to be placed on the ballot shall be stated affirmatively in substantially the following manner:

Shall the county of .... enter into a lease or lease-purchase contract in an amount of $ .... for the purpose of ....?

(iii) Notice of the election and its conduct shall be in the manner provided in section 331.442, subsections 2 through 4.

(c) If a petition is not filed or if a petition is filed and the proposition of entering into a lease or lease-purchase contract is approved at the election, the board may proceed and enter into the lease or lease-purchase contract.

f. The governing body may authorize a lease or lease-purchase contract payable from the net revenues of a county enterprise or combined county enterprise by following the authorization procedures of section 331.464.

g. A lease or lease-purchase contract to which a county is a party or in which a county has a participatory interest is an obligation of a political subdivision of this state for the purposes of chapters 502 and 636, and is a lawful investment for banks, trust companies, savings associations, investment companies, insurance companies, insurance associations, executors, guardians, trustees, and any other fiduciaries responsible for the investment of funds.

h. Property that is lease-purchased by a county is exempt under section 427.1, subsection 2.

i. A contract for construction by a private party of property to be lease-purchased by a county is a contract for a public improvement and is subject to section 331.341, subsection 1.

11. A county may enter into insurance agreements obligating the county to make payments beyond its current budget year to procure or provide for a policy of insurance, a self-insurance program, or a local government risk pool to protect the county against tort liability, loss of property, or any other risk associated with the operation of the county. Such a self-insurance program or local government risk pool is not insurance and is not subject to regulation under chapters 505 through 523C. However, those self-insurance plans regulated pursuant to section 509A.14 shall remain subject to the requirements of section 509A.14 and rules adopted pursuant to that section.

12. The board of supervisors may credit funds to a reserve for the purposes authorized by subsection 11 of this section; section 331.424, subsection 1, paragraph "a", subparagraph (5); and section 331.441, subsection 2, paragraph "b". Moneys credited to the reserve, and interest earned on such moneys, shall remain in the reserve until expended for purposes authorized by subsection 11 of this section; section 331.424, subsection 1, paragraph "a", subparagraph (5); or section 331.441, subsection 2, paragraph "b".

13. The board of supervisors may waive a tax penalty, interest, or costs related to the collection of a tax if the board finds that a clerical error resulted in the penalty, interest, or cost. This subsection does not apply to bonded special assessments without the approval of the affected taxing jurisdiction.

14. The county may establish a department of public works. The department shall be administered by the county engineer or other person appointed by the board of supervisors. In addition to other duties assigned by the board, the department shall provide technical assistance to political subdivisions in the county including special districts relating to their physical infrastructure and may provide managerial and administrative services for special districts and combined special districts.

15. a. A county may adopt and enforce an ordinance requiring the construction of a storm shelter at a manufactured home community or mobile home park which is constructed after July 1, 1999. In lieu of requiring construction of a storm shelter, a county may require a community or park owner to provide a plan for the evacuation of community or park residents to a safe place of shelter in times of severe weather including tornadoes and high winds if the county determines that a safe place of shelter is available within a reasonable distance of the manufactured home community or mobile home park for use by community or park residents. Each evacuation plan prepared pursuant to this subsection shall be filed with, and approved by, the local emergency management agency. If construction of a storm shelter is required, an ordinance adopted or enforced pursuant to this subsection shall not include any of the following requirements:

(1) That the size of the storm shelter be larger than the equivalent of seven square feet for each manufactured or mobile home space in the manufactured home community or mobile home park.

(2) That the storm shelter include a restroom if the shelter is used exclusively as a storm shelter.

(3) That the storm shelter exceed the construction specifications approved by a licensed professional engineer and presented by the owner of the manufactured home community or mobile home park.

(4) That the shelter be located any closer than one thousand three hundred twenty feet from any manufactured or mobile home in the manufactured home community or mobile home park.

b. For the purposes of this subsection:

(1) "Manufactured home community" means the same as land-leased community defined in sections 335.30A and 414.28A.

(2) "Manufactured home community or mobile home park" means a manufactured home community or mobile home park as defined in section 562B.7.

(3) "Storm shelter" means a single structure or multiple structures designed to provide persons with temporary protection from a storm.

<Text of subsec. 16 eff. until July 15, 2020.>

16. The board of supervisors may by resolution allow a five dollar county enforcement surcharge to be assessed pursuant to section 911.4.

<Text of subsec. 16 eff. July 15, 2020.>

16. [Deleted by Acts 2020 (88 G.A.) S.F. 457, § 1, eff. July 15, 2020.]

17. The board of supervisors may by ordinance or resolution prohibit or limit the use of consumer fireworks or display fireworks, as described in section 727.2, if the board determines that the use of such devices would constitute a threat to public safety or private property, or if the board determines that the use of such devices would constitute a nuisance to neighboring landowners.

18. a. For purposes of this subsection, "short-term rental property" means any individually or collectively owned single-family house or dwelling unit; any unit or group of units in a condominium, cooperative, or timeshare; or an owner-occupied residential home that is offered for a fee for thirty days or less. "Short-term rental property" does not include a unit that is used for any retail, restaurant, banquet space, event center, or other similar use.

b. A county 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 county. A short-term rental property shall be classified as a residential land use for zoning purposes.

c. Notwithstanding paragraph "b", a county may enact or enforce an ordinance that regulates, prohibits, or otherwise limits short-term rental properties for the following primary purposes if enforcement is performed in the same manner as enforcement applicable to similar properties that are not short-term rental properties:

(1) Protection of public health and safety related to fire and building safety, sanitation, or traffic control.

(2) Residential use and zoning purposes related to noise, property maintenance, or nuisance issues.

(3) Limitation or prohibition of use of property to house sex offenders; to manufacture, exhibit, distribute, or sell illegal drugs, liquor, pornography, or obscenity; or to operate an adult-oriented entertainment establishment as described in section 239B.5, subsection 4, paragraph "a".

(4) To provide the county with an emergency contact for a short-term rental property.

d. A county shall not require a license or permit fee for a short-term rental property in the county.

Credits

Added by Acts 1981 (69 G.A.) ch. 117, § 300. Amended by Acts 1985 (71 G.A.) ch. 156, § 1, eff. June 1, 1985; Acts 1986 (71 G.A.) ch. 1211, § 19, eff. June 8, 1986; Acts 1987 (72 G.A.) ch. 115, § 51; Acts 1989 (73 G.A.) ch. 101, § 1; Acts 1992 (74 G.A.) ch. 1138, § 1; Acts 1992 (74 G.A.) ch. 1204, § 8, eff. May 14, 1992; Acts 1995 (76 G.A.) ch. 67, § 53; Acts 1995 (76 G.A.) ch. 206, § 8, eff. Jan. 1, 1996; Acts 1999 (78 G.A.) ch. 186, § 1; Acts 2001 (79 G.A.) ch. 143, § 1; Acts 2001 (79 G.A.) ch. 153, §§ 9, 16; Acts 2004 (80 G.A.) ch. 1119, § 1; Acts 2006 (81 G.A.) ch. 1010, H.F. 2543, § 93; Acts 2009 (83 G.A.) ch. 100, S.F. 457, § 8, eff. May 12, 2009; Acts 2010 (83 G.A.) ch. 1061, S.F. 2237, §§ 131, 132, 177; Acts 2011 (84 G.A.) ch. 100, H.F. 392, § 13, eff. April 28, 2011; Acts 2012 (84 G.A.) ch. 1017, S.F. 2202, § 72; Acts 2013 (85 G.A.) ch. 77, S.F. 427, § 33, eff. April 26, 2013; Acts 2014 (85 G.A.) ch. 1092, H.F. 2423, § 86, eff. July 1, 2014; Acts 2017 (87 G.A.) ch. 20, H.F. 295, § 1, eff. March 30, 2017; Acts 2017 (87 G.A.) ch. 115, S.F. 489, § 6, eff. May 9, 2017; Acts 2018 (87 G.A.) ch. 1075, H.F. 2253, § 10, eff. April 4, 2018; Acts 2018 (87 G.A.) ch. 1013, H.F. 2286, § 1, eff. July 1, 2018; Acts 2018 (87 G.A.) ch. 1172, H.F. 2502, § 74, eff. July 1, 2018; Acts 2020 (88 G.A.) S.F. 457, § 1, eff. July 15, 2020; Acts 2020 (88 G.A.) H.F. 2641, § 147, eff. July 1, 2020.

I. C. A. § 331.301, IA ST § 331.301
Current with the legislation from the 2020 Regular Session, subject to changes made by Iowa Code Editor for Code 2021.

End of Document

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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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 Section137.104(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."

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
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