
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
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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
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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.