



The statewide “Stay at Home” Order: How it affects the operations of Colorado municipalities

By CML General Counsel David W. Broadwell, Revised April 8, 2020

On March 25, Gov. Polis used his broad emergency powers to order Coloradans to “stay at home” through April 11. Then on April 6, the Governor extended this order through April 26. This article highlights the various ways the order affects the day-to-day operations of Colorado municipalities.

Since Gov. Polis originally declared a state of emergency on March 11, he has issued several executive orders related to the COVID-19 outbreak. In turn, various state departments have issued their own detailed directives based upon the Governor’s orders. The most important of these are the public health orders issued by the Colorado Department of Public Health and Environment (CDPHE). To understand the meaning of the “stay at home” requirement in the executive order, it is important to have a sense of all of the detailed exceptions to the requirement set forth in the CDPHE order (Public Health Order 20-24), many of which directly provide for the continuity of municipal functions.

Caution!

Important information and guidance from the state and federal government changes daily. For example, after the state issued the original stay at home orders on March 25, the CDPHE order has been revised at least three times. These changes have generally added to and clarified the list of exceptions in the order. Municipal officials should always make sure they are reviewing the most recent version of Public Health Order 20-24.

CML will continue to flag key changes and new developments as they occur, but municipal officials will want to regularly check state websites for the latest news.

How the statewide order relates to existing local emergency orders

Before the statewide order was issued on March 25, many municipalities had already adopted emergency ordinances and procedures governing their own operations. In most cases, these local orders reflected the principles in the new statewide order. For example, public access to city and town halls was restricted, social distancing requirements in the workplace were adopted, other municipal

facilities were shut down, and, to the greatest extent possible, municipal employees who could work from home were already allowed to do so. In the meantime, essential municipal services continue to be provided in cities and towns throughout the state.

Some cities and counties had also issued their own local versions of business closures or “stay at home” orders applicable to the general public. The statewide order issued on March 25 expressly grandfathered these local orders and allowed them to remain in place. However, in the immediate wake of the state order, for the sake of simplicity and consistency, counties throughout the Denver metro area quickly moved to repeal their local orders or conform them to the new statewide requirements. In the meantime, some of the earliest adopters of business closure orders—mountain communities in Pitkin, Gunnison and San Miguel counties among others—have kept their local requirements in place.

Authority to go stricter? The Governor’s statewide order expressly preserves the authority of “local public health authorities” to issue orders that are “more protective” of public health than the statewide standards. This is hugely important because it allows communities to tailor business restrictions to their local circumstances. For example, the statewide order specifically defines lodging as a “Critical Business” and encourages hotels and motels to stay open, yet a number of mountain communities have specifically ordered that lodging businesses, including short-term rental, be closed in order to discourage travel to those communities.

Authority to go less strict? The statewide “Stay at Home” order does not allow a municipality to unilaterally waive or ignore any of the restrictions in the order. Per the direction of the Governor, however, CDPHE intends to set up a process whereby “local public health agencies may apply for relief . . . to more effectively meet local conditions and needs. . . .”

"Critical government functions"

Since the issuance of the statewide “Stay at Home” order, much of the media attention has centered on private businesses that must be shuttered, versus business that are defined as “critical” and are thus allowed to stay open. From a municipal government perspective, the many provisions of the order addressing the continuity of government services are of equal if not greater concern.

General authority to keep government operating. The orders issued by the Governor and CDPHE not only allow key municipal functions and services to continue, they actually say, “The provision, operation and support of . . . government functions shall continue.” The orders broadly exempt the operations of the legislative, executive and judicial branches of government from being shut down. And the definition of “Critical Government Functions” is expansively defined to include, “Any government service required for public health and safety, government functionality, or vital to restoring normal services.”

“Necessary Travel”. Obviously, the rule imposed by the state orders is summed up in three simple words—Stay at home. But the rule is subject to over one hundred exceptions, allowing persons to travel away from home under defined circumstances. For example, one very important element of the CDPHE order relevant to municipalities is this language in the definition of “Necessary Travel”—“For purposes of this Order, travel is Necessary for any of the following purposes: . . . providing or accessing . . . Critical Government Functions . . .” We interpret this language as not only allowing municipal employees to travel to work, but also as allowing citizens to travel away from home in order to “access” government services if necessary. Municipalities throughout the state are implementing measures

allowing citizens to access government services remotely in the spirit of enhancing “social distancing,” but the statewide order does appear to contemplate that citizens may need to leave home to interact with their government under some circumstances.

Specific examples of municipal functions and services that are allowed to continue. In addition to the general authority to keep municipal government going, the CDPHE order calls out specific functions that are expected and encouraged to remain operational. However, municipalities retain discretion to adopt emergency procedures, modify staffing levels, and curtail or postpone some of these activities and services while the orders remain in place:

- Law enforcement.
- Fire and EMT services.
- Emergency management services.
- Building code enforcement.
- Municipal utility operations including electric, water and wastewater.
- Construction, operation and maintenance of municipal infrastructure in general.
- Transportation services.
- Trash and recycling operations.
- Animal shelters.

Exception for government vendors and suppliers. The CDPHE order contains several exceptions that will allow suppliers of goods and services to municipalities to remain in operation. This includes construction contractors working on public works projects. But it also more broadly includes “vendors that provide critical services, products, including logistics, technology support, childcare and services” to sustain Critical Government Functions.

Deciding which municipal employees should work from home. The statewide orders do not dictate exactly what categories of municipal employees should be required to come to work physically, versus being allowed to work from home. Municipalities retain a great deal of discretion to make these determinations for themselves. However municipal managers and human resources professionals may hone in on one particular provision of the statewide CDPHE order: “People at high risk of severe illness from COVID-19 are urged not to leave their residence except as necessary to receive medical care.” The term “high risk” is not defined in the order; however common sense may have already led many municipalities to grant special work-at-home provisions for older employees with underlying medical conditions.

The effect of the Order on specific municipal functions

Public meetings. Well in advance of the issuance of the statewide “Stay at Home” order, municipalities throughout Colorado were already adopting new procedures for conducting “virtual meetings” through technologies such as Zoom and Go-to-Meeting. The CDPHE order does not, however, prevent municipalities from continuing to host live meetings with appropriate social distancing and other precautions in place, and any number of (mostly smaller) municipalities have indicated they intend to do so.

Elections. Approximately a hundred Colorado municipalities successfully completed their regular biennial elections on April 7. The CDPHE order expressly allowed municipal officials and voters to

participate in the election by including the following language in the definition of Essential Government Functions: “Activities related to federal, state, and local elections . . . provided Social Distancing Requirements are observed to the greatest extent possible.”

Municipal regulation: Construction. The “Stay at Home” order broadly exempts “construction” activity throughout Colorado. It also expressly exempts building code enforcement and inspections. Individual municipalities are making their own decisions about how to cope with the statewide public health emergency while continuing to regulate new development, whether it be approval of rezoning applications and site-specific development plans at the planning commission or governing body level, or the issuance of individual building permits and certificates of occupancy at the administrative level. In the short term, some municipalities have delayed new hearings or approval processes. Others have adopted “virtual inspection” tools on the ground to keep projects moving. On April 3, CDPHE issued additional “guidance” for keeping construction worksites safe. This guidance urged the construction industry to focus on “activities that are truly critical” and to defer “non-essential work.”

Municipal regulation: Alcohol and marijuana. The CDPHE order broadly treats liquor-licensed establishments and marijuana stores as “Critical Businesses” that are allowed to remain open. Therefore, given the intimate role municipalities play as the local licensing authority for each of these businesses, we can expect to see a lot of regulatory interaction in this area, both in terms of the licensing process itself as well as adapting to other forms of regulatory relief granted by the state. For example, restaurants and bars already won a historic victory in gaining the ability to sell alcohol beverages in sealed containers for off-premises consumption via the Governor’s executive order of March 20 (D 2020 011). Liquor and marijuana licenses coming up for renewal were granted a 30-day grace period by another executive order issued on March 25 (D 2020 015). And some elements of the marijuana industry are reportedly lobbying for suspension of all state laws that limit marijuana delivery (Current statutes prohibit marijuana delivery in any local jurisdiction that does not affirmatively allow it by ordinance).

Parks, trails and open spaces. The CDPHE order allows citizens to leave their homes to engage in “outdoor activity, such as, by way of example and without limitation, walking, hiking, Nordic skiing, snowshoeing, biking or running” but requires compliance with “Social Distancing Requirements” while people are engaged in these activities. Both before and since the issuance of the latest CDPHE order, municipalities have been generally allowing their parks to remain open. The CDPHE order allows state parks to remain open as well, but specifically closed “playgrounds, picnic areas, other similar areas conducive to public gathering” in state parks. The CDPHE order goes on to say, “For other parks, check with the local jurisdiction and follow any requirements for that jurisdiction.” Thus, municipalities should ensure that their own local emergency orders specifically address congregate facilities in parks.

Enforcement of the statewide Stay at Home Order

Violation of the CDPHE public health order is a criminal offense, a misdemeanor to be exact. State laws also provide for civil remedies, for example court orders shutting down businesses that refuse to comply. State statutes defining the emergency powers of the Governor require all local law enforcement agencies to assist the Governor in the enforcement of his executive orders and the public health orders issued by CDPHE.

The “Stay at Home” order specifically says this about enforcement: “This order will be enforced by any appropriate legal means. Local authorities are encouraged to determine the best course of action to encourage maximum compliance.” (Emphasis supplied.) Reports from all around the state indicate that police departments, county health departments, and other law enforcement authorities are likely to issue warnings and advisements rather than issuing citations or making arrests in the vast majority of cases. To the best of our knowledge, not a single law enforcement agency has reported that they intend to make traffic stops to determine if the driver is engaged in “essential travel.” Instead, law enforcement may tend to intervene when they observe congregate activities in public, or receive citizen complaints about businesses and activities that should be shuttered but remain open.

Even the Governor has conceded that aspects of the order may be practically difficult or impossible for law enforcement to enforce, but he pleads with the general public to honor the “spirit” of the order in the interest of minimizing the risk to public health and safety. An example used by the Governor at his March 27 press conference: even for “Critical Businesses” that are allowed to stay open under the CDPHE order, they should not blithely assume it is “business as usual.” The order specifically mandates that critical businesses must “implement tele-work or other strategies such as staggered work schedules or re-designing workplaces, to create more distance between workers unless doing so would make it impossible to carry out critical functions.” Given the subjectivity of this language, it would be quite difficult to criminally cite a business owner for violating this provision of the Order. But the language in the order still serves the purpose of reminding and admonishing all businesses to do whatever they can to enforce social distancing.