



COLORADO
MUNICIPAL
LEAGUE

Navigating Public Health Orders

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Authority to issue Public Health Orders

Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358 (1905)

Lawrence v. Colorado, Civil Action No. 1:20-cv-00862-DDD-SKC, 2020 U.S. Dist. LEXIS 92910 (D. Colo. Apr. 19, 2020)

County Authority to Establish Orders

The County's Public Health Director is given broad authority under state statute to, among other things

- "exercise . . . control over property and over the persons of people"
- where the Director "may find necessary for the protection of the public health[,]" to "prohibit gatherings of people when necessary to protect public health[,]"
- "control the causes of epidemic or communicable diseases or conditions affecting public health."

See C.R.S § 25-1-506(b)(V)-(VI).

County Authority to Establish Orders

- PH Directors are authorized to “investigate and control the causes of epidemic or communicable diseases and conditions affecting public health.” C.R.S. § 25-1-506(3)(b)(V).
- PH Directors may “establish, maintain, and enforce isolation and quarantine, and in pursuance thereof, and for this purpose only, to exercise physical control over property and over the persons of the people within the jurisdiction of the agency as the agency may find necessary for the protection of the public health.” C.R.S. § 25-1-506(3)(b)(VI).
- PH Directors may “investigate and abate nuisances when necessary in order to eliminate sources of epidemic or communicable diseases and conditions affecting public health.” C.R.S. § 25-1-506(3)(b)(VII).

County Authority to Establish Orders

Federal Case law also provides authority.

- Counties (and municipalities) had (and have) a government interest in protecting public safety when the community faces a disaster.
 - See, e.g., *Jacobson v. Mass.*, 197 U.S. 11, 26-27 (1905) (upholding a Massachusetts law requiring mandatory smallpox vaccinations); *Miller v. Campbell County*, 945 F.2d 348 (10th Cir. 1991) (upholding county's order of evacuation for a subdivision infiltrated by lethal gas); *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (upholding a 3-month-long curfew as a result of Hurricane Andrew that required people to stay in their homes); *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. September 24, 2010) (rejecting claim that the Constitution provides exemption from public health laws).
- PH Directors generally have the authority to control individual behavior in this way cannot seriously be questioned in this emergency circumstance.
 - *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (citing "long line" of cases sustaining the use of state police powers against challenges under the Due Process and Takings Clauses of the federal Constitution). Federal courts have long concluded that, in an emergency situation, fundamental rights may be temporarily limited or suspended. The power of the government to act quickly and decisively in the face of a looming disaster increases with the proximity and size of the public danger. See, e.g., *Yakus v. United States*, 321 U.S. 414, 422-23, 431-49 (1944) (emergency caused by World War II justifies price controls and significant administrative restrictions on commerce).

Use of Authority

Reverse Quarantine Order – Keep Out!

- Does not restrict travel – limits exposure to COVID
- Control the causes of the COVID-19 pandemic by establishing a reverse quarantine that exercises control over property and the people within the jurisdiction
- Limits travel by non-Local Residents while they are in the jurisdiction and directing who may use certain recreational properties within the county
- Abates a nuisance (outdoor recreation activity by non-Local Residents who have other opportunities in their home jurisdiction)

Use of Authority

Road Closures

- Some counties discussed closing county roads in order to limit overall movement and the entry of visitors.
- *Board of County Commissioners of County of Logan v. Vandemoer*, 205 P.3d 423 (Colo. App. 2008) suggest limits on County authority over county roads
 - Only applies where contrary to state interest
- **No contrary state interest in limiting COVID**
 - Opinion of Ken Salazar, Colorado Attorney General, June 27, 2002 (citing *In re Interrogatories of the Governor on Chapter 118*, Session Laws 135, 52 P.2d 663, 667 (Colo. 1935))

Enforcement

Section 25-1-515(3)

- Any person, association, or corporation, or the officers thereof, who violates any provision of this section is guilty of a class 1 misdemeanor and, upon conviction thereof, shall be punished pursuant to the provisions of section 18-1.3-501, C.R.S.
- In addition to the fine or imprisonment, the person, association, or corporation shall be liable for any expense incurred by health authorities in removing any nuisance, source of filth, or cause of sickness.
- Conviction under the penalty provisions of this part 5 or any other public health law shall not relieve any person from any civil action in damages that may exist for an injury resulting from any violation of the public health laws.

Boulder Emergency Order 2020-4

- No person shall violate any emergency order issued by the Colorado Department of Health and Environment, Executive Order issued by the Governor of the State of Colorado or order issued by Boulder County Public Health.

Enforcement (ADA)

Red Herring – COVID Constitutes a Direct Threat

- A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
- If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
- The CDC has specifically provided COVID-19 is a direct threat:

"Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists."

Municipal Authority to Establish Orders

- Section 31-15-401(1)(b) provides municipalities have the power to “do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”
- Home Rule (Colorado Const. Art. XX, sec. 6).
 - Article XVII, Section 1, City of Lone Tree Home Rule Charter
 - In the event of an immediate danger or threat to the preservation of the public health, welfare, peace, safety, or property, the Mayor, with the assistance of the City Manager, shall assume the authority to execute any action necessary for the protection of life and property. Such authority may include, but not be limited to, establishing regulations governing conduct and activities related to the cause of the emergency, and if the emergency continues, the Mayor, or in the Mayor's absence, the Mayor Pro-Tem, or in the absence of the Mayor Pro-Tem, the City Manager, shall convene the Council to take such action as the Council deems necessary. Article XVII, Section 1, City of Lone Tree Home Rule Charter

Municipal Authority to Establish Orders

Ordinance

- Whenever the mayor proclaims that an emergency condition exists, the mayor shall have the authority to make any or all of the following orders in the proclamation:
 - (1) To order the closing of all retail malt, vinous and spirituous liquor outlets, and all fermented malt beverage outlets, and to order the closing of all private clubs wherein the consumption of intoxicating liquor or beer is permitted;
 - (2) To order the discontinuance of the selling, distributing or giving away of gasoline or other flammable or combustible products in any container other than a gasoline tank properly affixed to a motor vehicle;
 - (3) To order the closing of gasoline stations and other establishments whose business activity is the sale, distribution or dispensing of flammable or combustible materials;
 - (4) To order the discontinuance of the selling, distributing, or giving away of any firearms or ammunition of any character whatsoever, and to order the closing of any or all establishments or portions thereof which engage in the sale, distribution, or giving away of firearms and/or ammunition;
 - (5) To designate certain areas of the city as being restricted against entry therein by any unauthorized persons, except bona fide residents living or working within the restricted area;
 - (6) To declare a public curfew prohibiting all persons, except those expressly authorized, from being upon the public streets or in any public place in the city during certain hours;
 - (7) To establish a communications headquarters for the dissemination of all public information and reports relating to the emergency.

Section 6-5, City of Alamosa Municipal Code

Municipal Orders

Mask Order

- Enforcement
 - Civil
 - Criminal
- Who is subject to enforcement
 - Individuals
 - Businesses
 - Both
- Where
 - Indoors
 - Indoors and Outdoors
- Conflict with County Order

Other Municipal Orders

- Prohibiting Public Attendance at Council Meetings
- Prohibiting Large Gatherings
- Stay at Home
- Curbside Delivery of Marijuana
- Prohibiting in Persons Meetings of Boards and Commissions
- Suspending Non-renewable Bag Fee
- Closing Parks Facilities
- Delegating Authority to Extend Deadlines
- Suspending Rules to Allow for Operation of COVID Recovery Center
- Allowing the Use of Public Rights of Way for Restaurants
- Simplifying Public Nuisance Rules

Conflict - What Controls?

- State orders
 - Executive Order versus Public Health Order
- State versus County
- State versus Municipality
- County versus Municipality

Should Municipalities Be In the PHO Game?

- No Municipal Public Health Department
- Limited Access to Experts
- Experts Who Do Inform Councils Have Their Own Agendas
 - Hospital Advising Reopening
- Councils likely do not have the ability to realistically evaluate underlying science
- Health by politics
- Conflict with County PHO and County messaging

Variations

Appendix G to Amended State PHO

- Criteria

- 1) The local public health agency endorses the alternative plan;
- 2) Local hospitals can verify that they have the capacity to serve all people needing their care;
- 3) The county commissioners vote affirmatively to adopt the alternative plan in place of the state Safer-At-Home order

- Municipalities have a significant role to play

- Epidemiologists don't know what the community needs

- Municipalities work to identify low-exposure activities, with high abilities to do prevention

- Municipalities could impose orders more strict than the state

Miscellaneous Thoughts

- Need to avoid giving legal advice to individuals who are not your clients
- Coordination of information between counties and municipalities has not always been well done
- Emphasize the need to get information out to non-English speaking populations
- Communication with County is key
 - County needs to be encouraged to communicate upcoming orders so businesses and municipalities are not scrambling to comply
- Top down approach fails
- Tomorrow will come



THANK YOU



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