



MEMORANDUM

Date: March 29, 2021

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Response to Supervisor Steve Christy's Request Relating to the Mask Ordinance**

Please see the attached memorandum from Health Department Director Dr. Theresa Cullen outlining the two areas of metrics that are to be achieved if the County is to lift our public mask requirements. (Attachment 1) This memorandum is provided in response to Supervisor Christy's request for metrics related to Pima County's mask ordinance.

Since masks are the most cost efficient and perhaps most effective method of preventing the spread of COVID-19, I would not envision these metrics will be met in the near term. We will continue to monitor infection rates, hospitalization and deaths related to COVID-19 to determine when these metrics will be met.

I am providing a copy of recent Attorney-Client Privilege/Confidential communication from the County Attorney regarding the effect of the Governor's recent Executive Orders related to prohibiting any city, town or county that has a rule requiring face coverings. (Attachment 2) The County Attorney's opinion concludes that the County face covering Resolution 2020-96 is in effect and has not been superseded by the Governor's Executive Order. This Attorney Client Privilege document will not be disclosed to persons other than County officials and employees involved in this matter.

CHH/anc

Attachments

c: The Honorable Laura Conover, Pima County Attorney
Jan Leshner, Chief Deputy County Administrator
Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer,
Health and Community Services
Jonathan Pinkney, Deputy County Attorney

ATTACHMENT 1

Date: March 26, 2021

To: Chuck Huckelberry
County Administrator

From: Theresa Cullen, MD, MS
Health Department Director

Via: Francisco Garcia, MD, MPH
Deputy County Administrator
& Health Services

Re: Response to Supervisor Christy's Request for Metrics Related to Masking

During the March 24, 2021 Emergency Meeting of the Board of Supervisor we were asked by Supervisor Christy to articulate specific criteria for when the Health Department would recommend the lifting of mask mandate in Pima County.

It would be acceptable to lift mask mandates when the following metrics are achieved:

1. The number of new cases is less than 10 cases/100,000 per week for two weeks in a row;

This will be documented by the Health Department in our "Case, Death, and COVID-19 Like Illness Report" available on the Pima County COVID-19 Data Report page. Further these data can be independently confirmed on the Arizona Department of Health Services website. This measure will lag behind by 12 days due to delayed reporting that is inherent in this type of data.

2. "Herd immunity" may be assumed when 75% of the population has been fully vaccinated (two doses for Pfizer or Moderna and a single dose for Janssen) in Pima County.

This will be documented on the Arizona Department of Health Services website when the number of fully vaccinated persons is reported at 783,506. We note that individuals who are within 90 days of a recent COVID infection may also be protected. However, that number is difficult to estimate and will become smaller as case counts continue to drop.

These public health metrics are offered to inform the policy conversation of the Board, with the full awareness that the Board of Supervisors has the ability to lift the mask mandate at any time and using any criteria of their choosing.

c: Jan Leshner, Chief Deputy County Administrator

ATTACHMENT 2



MEMORANDUM

PIMA COUNTY ATTORNEY'S OFFICE | CIVIL DIVISION

32 N. Stone Ave., Suite 2100

Tucson, AZ 85701

(520) 724-5700 | Fax: (520) 620-6556

Attorney-Client Privilege / Confidential

This is a privileged attorney-client communication and should not be disclosed to persons other than Pima County officials and employees involved in the matter that is the subject of the communication. The privilege is held by Pima County and can be waived only by an official action of the Board of Supervisors.

To: C.H. Huckelberry, County Administrator

Cc: Laura Conover, Pima County Attorney

From: Jonathan Pinkney, Deputy County Attorney

Date: March 26, 2021

Subject: Governor's Executive Orders and the Ability of Pima County to Continue to Enforce Certain Public Health Mandates During a Public Health Emergency Related to the Coronavirus Pandemic

On March 25, 2021, Governor Ducey issued Executive Order 2021-06, rescinding his prior COVID-19 executive orders 2020-09, 2020-36, 2020-40, 2020-43, 2020-47, 2020-52, and 2020-59, and providing,

Pursuant to A.R.S. § 26-307, no county, city or town may make or issue any order, rule, or regulation that conflicts with or is in addition to the policy, directives or intent of this or any other Executive Order relating to the COVID-19 public health emergency, or any other order, rule or regulation that was not in place as of March 11, 2020. This includes but is not limited to mandated use of face coverings. Any city, town, or county that has a rule, regulation or ordinance not in place [sic] as of March 11, 2020 that is in conflict with the provisions of this order shall not be enforced. Political subdivisions [sic] maintain the right to set and enforce mitigation policies in their own government buildings and on public transportation, including, but not limited to, requiring face coverings.

Although A.R.S. § 26-307(A) provides that "counties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions but

such shall not be inconsistent with orders, rules and regulations promulgated by the governor,” it does not mean what the Governor apparently thinks it means. Most critically, it is inconceivable that § 26-307 should be read to give the Governor authority to nullify, by executive order, the County’s statutory authority to enact reasonable public health measures.

Counties are political subdivisions of the state that derive their authority from the Legislature. They have those authorities expressly granted by statute or necessarily implied from an express grant. *Rodgers v. Huckelberry*, 243 Ariz. 427, 429, ¶ 5 (App. 2017). Various statutes give counties broad authority to regulate the public health.

Counties may:

- “[a]dopt provisions necessary to preserve the health of the county, and provide for the expenses thereof,” A.R.S. § 11-251(17);
- “[m]ake and enforce all local, police, sanitary and other regulations not in conflict with general law,” § 11-251(31); and
- “make regulations necessary for the public health and safety of [its] inhabitants,” A.R.S. § 36-183.02(A).

Indeed, the Arizona Supreme Court held that the authority of county health departments is coextensive with that of the Arizona Department of Health Services (ADHS) and recognized that counties may enact public health measures “equal to or more restrictive” than ADHS rules. *Marsoner v. Pima County*, 166 Ariz. 486, 488-89 (1991); see also A.R.S. § 36-136(J) (counties can adopt “ordinances and rules [that] do not conflict with state law and are equal to or more restrictive than the rules of the director”).

Even with respect to measures promulgated under a state of emergency declaration rather than pursuant to general statutory authority, the prohibition in A.R.S. § 26-307(A) is limited to local orders “necessary for emergency functions” that are “inconsistent with orders, rules and regulations promulgated by the governor.” And the orders at issue here are unrelated to “emergency functions,” as narrowly defined in A.R.S. § 26-301(5)¹. Thus, although Governor Ducey’s order cites § 26-307, it attempts to go much further, purporting to apply to “all” local orders rather than just those “necessary for emergency functions” under Title 26, and purporting to prohibit not just local orders that “conflict with” his order, but also any that are “in addition to” his orders. But he has no authority to go further than the statute.

It is also notable that, as written, Executive Order 2021-06 purports to remove the County’s authority to enforce mitigation measures on its own property other than in its “buildings,” contrary to the County’s broad statutory powers to “[m]ake such orders for the disposition or use of its property as the interests of the inhabitants of the county

¹ “‘Emergency functions’ includes warning and communications services, relocation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant protection, transportation, welfare, public works and engineering, search or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or rescue, hazardous materials, food and energy information and planning and other activities necessary or incidental thereto.” A.R.S. § 26-301(5).

require,” A.R.S. § 11-201(A)4, and specifically to “take care of and manage” property for the use of county fairs, A.R.S. § 11-251.

It is up to the Legislature, not the Governor, to decide what authority it wants to delegate to counties. It has delegated counties broad public health authority, as well as authority over their own property. The Governor cannot, through the exercise of his executive authority, take that away. See *Rios v. Symington*, 172 Ariz. 3, 12 (1992) (Governor lacks the “power to make legislative decisions” and cannot “compromise the achievement of underlying legislative purposes and goals”) (internal quotation marks and citations omitted).

Thus, per the table below, County measures based on the County’s statutory public health authority remain in effect until rescinded by the Board of Supervisors, while measures relying on authority from the Governor’s rescinded Executive Orders should be considered to have been rescinded.

Date	Title	Authority	Status
March 19, 2020	State of Emergency Resolution 2020-18	A.R.S. § 26-311	In effect
May 13, 2020	Measures for Reopening of Businesses Proclamation	EO 2020-33, 2020-34	Superseded by May 21 Proclamation
May 21, 2020	Measures for Reopening of Businesses Proclamation	EO 2020-33, 2020-34	Superseded by July 15 Proclamation
June 19, 2020	Face Covering Resolution 2020-49	A.R.S. §§ 11-251, 36-183.02	Superseded by Res. 2020-96
July 15, 2020	Minimum Health Standards for Businesses Proclamation	EO 2020-43, 2020-47	Superseded by December 4 Proclamation
December 4, 2020	Face Covering Resolution 2020-96	A.R.S. §§ 11-251, 36-183.02	In effect
December 4, 2020	Minimum Health Standards for Businesses Proclamation	EO 2020-59	Rescinded per EO 2021-06
December 15, 2020	Curfew Resolution 2020-98	A.R.S. §§ 11-251, 36-183.02	Subject to judicial stay / Expired