

## AGENDA REQUEST FORM

**FOR: Council Meeting of June 16, 2020**

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**FROM: Council Member Matthew Petty**

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**ORDINANCE OR RESOLUTION TITLE AND SUBJECT:**

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AN ORDINANCE TO REQUIRE PERSONS TO WEAR FACE MASKS THAT COVER THE NOSTRILS AND MOUTH TO HELP RESTRICT THE SPREAD OF THE COVID-19 VIRUS, TO ESTABLISH REASONABLE EXEMPTIONS, TO OPERATE A NON-EMERGENCY BUSINESS SUPPORT HOTLINE, TO SET PRACTICAL ENFORCEMENT CONDITIONS, AND TO APPROVE A BUDGET ADJUSTMENT

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**APPROVED FOR AGENDA:**

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Approved by email  
**Council Member Matthew Petty**

  
**City Attorney Kit Williams**  
Approved as to form

June 16, 2020  
Date

June 16, 2020  
Date

**TO:** City Council

**FROM:** Matthew Petty, Councilmember

**DATE:** June 16, 2020

**SUBJECT:** An ordinance to require mask wearing, etc

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**Plain language ordinance outline:**

- 1) Masks required in public service areas at businesses, etc.
  - a) Except when eating, drinking, exercising.
  - b) Except in small group settings where social distancing can be followed.
  - c) Except for people with a relevant disabling condition.
  - d) Not applicable outdoors generally, except for events where the format or attendance prevents social distancing.
- 2) Business must post signage.
- 3) Businesses must distribute masks for free or a small fee.
- 4) Budget adjustment of \$100k for a public safety campaign.
  - a) Targets high interaction sites.
  - b) Free masks for businesses to redistribute.
  - c) Sets up non-emergency hotline.
- 5) Sunset clause. Council will consider repeal when the state emergency order ends.
- 6) Practically no penalty on individuals. No access to businesses without a mask. We will distribute a mask to anyone who lacks one.
- 7) No penalty for businesses, except for willful neglect.

**Examples**

- Masks will be required in a mechanic's customer service area, but not in the workshop.
- Masks will be required in a corporate lobby, but generally not in employees-only areas.
- Masks will be required in all public-facing areas in a retail setting, such as a grocery or hardware store.

**Narrative Overview**

This ordinance is intended to support business efforts to implement measures to protect the public health. In addition to requiring masks be worn covering a person's mouth and nostrils, it also creates a business support hotline for all things related to our adaptation to covid-19 and budgets money for a public safety campaign centered on providing masks for free.

The ordinance contains reasonable exemptions for eating, drinking, and exercising. It exempts certain settings and only applies indoors and at crowded events.

The non-emergency hotline is intended for businesses to request technical or field support for anything related to adaptations we must make due to the covid-19 outbreak. Requests may be related to implementation of health directives, expansion into outdoor areas, requests for free masks, or other related inquiries. Emergency calls should still be made using 911.

Practically speaking, this ordinance contains no penalties for individuals or businesses implementing the law in good faith. (This is not to say that individuals who engage in disorderly conduct or threaten or assault another person will not suffer consequences associated with those crimes.) Instead, individuals who will not wear a mask will simply be given a mask and barred from entry until they wear it. Only businesses who willfully neglect this law will suffer a penalty. I have taken this approach to penalization because I believe voluntary compliance will be nearly universal when the public safety campaign is in motion and the community has had time to become familiarized with the requirements.

### **Regarding state and local authority**

Much has been said about the likelihood of a state challenge and its likelihood of success. Regardless of the state's intentions, there are portions of this ordinance that are important to implement and to protect even if the mask requirement is nullified by a court. The public safety campaign and other business support services are essential to drive voluntary compliance with public health best practices like mask-wearing.

With respect to a municipal requirement to wear masks, it is clear this is not a black and white issue. The issue of local control and home rule deserves our zealous defense. I believe that if the Health Department believes a municipal mask policy - especially one crafted with reasonable exceptions - is ineffective at controlling the spread of covid-19, they should have to justify their opinion in a court of law in clear terms the public will understand. Just as important, we must not forget that state directives can be amended in response to changing conditions on a county-by-county or city-by-city basis. The state has many options available to explicitly reconcile past directives with the mask requirement in this proposal and remove all doubt that the expert epidemiological advice regarding masks is, in fact, sound advice.

**ORDINANCE NO. \_\_\_\_\_**

AN ORDINANCE TO REQUIRE PERSONS TO WEAR FACE MASKS THAT COVER THE NOSTRILS AND MOUTH TO HELP RESTRICT THE SPREAD OF THE COVID-19 VIRUS, TO ESTABLISH REASONABLE EXEMPTIONS, TO OPERATE A NON-EMERGENCY BUSINESS SUPPORT HOTLINE, TO SET PRACTICAL ENFORCEMENT CONDITIONS, AND TO APPROVE A BUDGET ADJUSTMENT

**WHEREAS**, the spread of the Covid-19 virus has been accelerating in Washington County; and

**WHEREAS**, the administrator of the Washington Regional Medical System has said it is critically important to take the recent surge in COVID-19 cases seriously, and also has asked the community to “wear a mask when out in public;” and

**WHEREAS**, the Coroner of Washington County, Roger Morris, has reminded people to wear a mask to protect others; and

**WHEREAS**, Jennifer Dillaha of the Arkansas Department of Health, has said that wearing a mask is the most effective action that can be taken to slow the spread of the Covid-19 virus; and

**WHEREAS**, numerous other epidemiologists have insisted that widespread use of a face mask is necessary to prevent the more rapid spread of the Covid-19 virus, especially when humans gather in groups, and thereby necessary for the safety and health of Fayetteville citizens, residents and visitors; and

**WHEREAS**, employees and most members of the public in public service areas of places of public accommodation should be required to wear masks to cover their nostrils and mouth for the health and safety of all, subject to certain exceptions; and

**WHEREAS**, businesses cannot reasonably implement health directives as intended without municipal support services; and

**WHEREAS**, the legal standard of willful neglect can be used to shield any business making a good faith attempt to implement this ordinance from any penalty whatsoever; and

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby determines that the health and safety of Fayetteville residents require that persons within public service areas in all places of public accommodation are required to constantly wear face masks covering the nostrils and mouth of such persons subject to the following exceptions:

- A. Masks may be removed while consuming food or drinking a beverage and exercising if social distancing and disinfection best practices are also followed.
- B. Settings with ten (10) or fewer persons present, such as small business offices which do not serve the public in person, and areas without normal public access, such as semi-private offices and workshops, do not require masks, unless persons cannot follow social distancing best practices
- C. Reasonable accommodations may be made for individuals with a disabling condition that prevents wearing a face mask.
- D. Masks may be removed in outdoor settings generally while best practices to maintain social distance are followed. Masks shall be worn at managed events when attendance and format prevent social distancing.

Section 2: That the City Council of the City of Fayetteville, Arkansas hereby determines that the health and safety of Fayetteville residents require that all businesses, offices, shops, and manufacturing and similar facilities are required to post conspicuous signs at all entrances to their establishment that employees, customers and visitors to their establishment must wear face masks pursuant to the rules stated in Section 1 of this ordinance to be admitted into their premises.

Section 3: That the City Council of the City of Fayetteville, Arkansas hereby determines that places of public accommodation are required to provide disposable face masks for free or a nominal cost for members of the public seeking to enter their establishments and are required to deny entry to members of the public who refuse to wear face masks as required in Section 1.

Section 4: That the City Council of the City of Fayetteville, Arkansas hereby approves a budget adjustment of \$100,000.00 to operate a public safety campaign to raise community rates of mask-wearing,. The campaign shall include the distribution of free face masks to Fayetteville businesses, the operation of a business support hotline, and an outreach strategy focused on high-interaction sites. The non-emergency business support hotline shall be available for businesses to request technical and/or field support for any reason related to our adaptation to the Covid-19 virus, including requesting free masks for distribution to their customers, the creative use of outdoor space, and generally when implementing health directives and emerging best practices.

Section 5: Sunset. After the governor's emergency declaration ends, an ordinance to repeal this ordinance shall be placed on the agenda immediately following the end of the state-declared emergency. The City Council at that time shall act on that ordinance with all haste, either repealing this ordinance in whole, in part, or extending the requirement and associated programs.

Section 6: Penalties on individuals. Individuals which refuse to wear a mask when required will be denied entry to places of accommodation. Places of accommodation may call either the non-emergency hotline for assistance, or they may call 911 if the situation is an emergency. There is no other penalty for refusing to wear a face mask, but disorderly conduct and threatening or assaulting another person are crimes that can still be enforced.

Section 7: Penalties on businesses. No business shall suffer a penalty unless that business fails to implement the requirements of this ordinance due to willful neglect. In that case, failure to enforce

the provisions of this ordinance shall constitute a violation subject to the penalties allowed in §10.99 **General Penalty** of the *Fayetteville Code*.

Section 8: Severability clause. If any provisions, sections or portion of this ordinance is found or determined by a court for any reason to be invalid or unenforceable, those provisions shall be severed from the remaining portions of this ordinance which shall remain effective in the absence of any invalid or unenforceable provisions.

**PASSED** and **APPROVED** this 16<sup>th</sup> day of June, 2020.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**KARA PAXTON**, City Clerk/Treasurer



OFFICE OF THE  
CITY ATTORNEY

## DEPARTMENTAL CORRESPONDENCE



Kit Williams  
City Attorney

Blake Pennington  
Assistant City Attorney

Jodi Batker  
Paralegal

TO: **Mayor Jordan**  
**City Council**

CC: **Susan Norton**, Chief of Staff  
**Mike Reynolds**, Police Chief

FROM: **Kit Williams**, City Attorney

DATE: **June 16, 2020**

RE: **Can the City require facemasks to be worn in places of public accommodation?**

All of Mayor Jordan's previously issued Policies based partially upon Ordinance NO. 6292 and especially Mayor Jordan's most recent **AMENDED AND CONSOLIDATED POLICY**, issued May 16, 2020 (attached) have been legally issued pursuant to his authority.

With the Governor's and Secretary of Health's new directives and regulations allowing relaxations of previous regulations and allowing more businesses to open or expand operations, there are increasing concerns that the Covid-19 virus pandemic could infect more Fayetteville residents especially because the Governor and his Arkansas Health Department have expressly rejected any mandatory facemask wearing by the public. State statutes give very broad authority to city councils to protect the health and safety of their citizens. These broad powers would be primarily limited only by state statutes that might be violated or could preempt the area in which the City Council might attempt to regulate.

I am concerned that the proposed ordinance to require Fayetteville residents and visitors to wear facemasks in most public accommodation buildings and in public service or reception areas within businesses and offices in which more than ten (10) persons would be gathered would be in contravention to the Governor's and Board of Health's direct and express rejection of such regulation. If so, our ordinance could be invalid. With the Governor's repeated statements that only he and the Board of Health can regulate pandemic control measures, a city ordinance attempting to regulate

what the Governor has expressly refused to regulate would almost certainly be challenged in Court by the Attorney General and probably be blocked from ever going into effect.

The state statute that calls into question the City Council's power to enact the proposed facemask wearing requirement ordinance is A.C.A. §20-7-109 **Authority to regulate public health – Exceptions.**

"Power is conferred on the State Board of Health to make **all** necessary and reasonable rules of a general nature for:

(A) The protection of public health and safety;

...

(C) The suppression and prevention of infectious, contagious, and communicable diseases; and

(D) The proper enforcement of quarantine, isolation, and control of such diseases;" (emphasis added)

The key word here is "all" before "necessary and reasonable rules..." The statute's use of "all" could be interpreted by the Courts as preempting any other attempted rules or regulations at the local level on such health issues once the Board of Health has begun its regulating of the Covid-19 virus as an infectious, contagious, and communicable disease.

The Arkansas Supreme Court has interpreted this statutory grant of authority to the Board of Health in very strong terms. It upheld this power of the Board of Health against a Freedom of Religion constitutional challenge.

"The appellants do not have the legal right to resist on religious grounds the enforcement of this health regulation requiring the vaccination of all children as a prerequisite to attendance of (public) schools..." *Wright v. Dewitt School District*, 385 S.W.2d 644, 646 (1965).

"The State Health Department has the authority to promulgate health regulations having the effect of law for the purpose of efficiently controlling communicable diseases." *Id.*

I do not think that the Governor's and the State Board of Health's express decision to forgo any mandatory requirement that persons must wear a facemask in all businesses of public accommodation can be



overridden by a city ordinance despite our general police power. Please find attached my memo of March 13<sup>th</sup>. If this facemask wearing requirement had not been so clearly rejected by the Governor's recent public statements, we could have had some argument that our regulation would not have been in violation of the State's power. But the Governor's clear and express rejection of any requirement for the general public to wear facemasks in places of general public accommodation makes it very difficult to argue that such city ordinance would not be in contravention and opposition to the Governor's Proclamations and the Board of Health's regulations.

As studies have shown that wearing a basic facemask is twice as effective in protecting others as opposed to protecting the wearer, I find it surprising for persons within indoor spaces where social distancing cannot or is not uniformly observed to refuse to wear a facemask. Even if they do not realize it, these persons are telling everyone else that they do not respect your right to be safer from their dangerous, contagious and deadly disease (which they could have with no symptoms). By being unmasked, they are saying their comfort and convenience means more to them than your health or even your life. This is becoming even more dangerous now that Northwest Arkansas has become a national hot spot for the Covid-19 virus pandemic.

## CONCLUSION

I do not believe that the City of Fayetteville can go it alone and mandate facemask wearing anywhere but on our own City property where our ownership rights gives us more power to protect our citizens. I would hope Fayetteville's business owners will exercise their own ownership powers to require that all their customers wear facemasks at least until this rapidly expanding pandemic in Northwest Arkansas subsides.

For my family's health, I will not eat at any restaurant that does not mandate and enforce facemasks and social distancing for employees and customers alike. If enough citizens refuse to frequent restaurants and stores that do not require their customers to wear facemasks and practice social distancing, the economic incentive for these businesses would reverse. We could then see signs advertising safe practices in these businesses.




## OFFICE OF THE MAYOR

Pursuant to Governor Hutchinson's proclamation and directive of March 19, 2020, and all subsequent proclamations and directives as well as Ordinance No. 6292 passed unanimously by the Fayetteville City Council on March 16, 2020, and extended until June 2, 2020 by Resolution No.122-20 passed by the City Council on April 21, 2020, I, Mayor Lioneld Jordan, to assist in the proper and efficient operation of Governor Hutchinson's directives do hereby exercise the authority and power granted to me by those directives and this ordinance and state law by issuing the following Amended and Consolidated Policy in an effort to protect the health, welfare and safety of Fayetteville citizens, residents, visitors and businesses as much as reasonably possible from the Covid-19 pandemic:

### **AMENDED AND CONSOLIDATED POLICY** (Issued May 16, 2020)

**This Amended and Consolidated Policy repeals and replaces all previous policies I have issued with the exception of Policy #4 which remains effective.**

- A. All restaurants and bars and their customers shall continue to abide by all Department of Health regulations and directives of Governor Hutchinson including limitations on occupancy, social distancing and face mask requirements.
- B. The Emergency Rule regarding the sale of Alcoholic Beverage by Alcoholic Beverage Control shall be recognized and followed until ABC ends the effectiveness of this Emergency Rule.
- C. Proper social distancing shall be observed throughout our City Parks. Facilities may continue to be closed to public use by the Parks and Recreation Director upon my request for safety reasons. Governor Hutchinson's recommended social distancing and any masking requirements for persons in parks shall be followed by Fayetteville Parks' visitors. I reserve the right to impose additional safety requirements for City parks.
- D. The ban on restaurants' use of disposable, single—use Expanded Polystyrene Foam (a/k/a "Styrofoam") products scheduled for May 1, 2020 remains delayed until July 1, 2020.
- E. All Fayetteville residents and businesses should follow Governor Hutchinson's proclamations and directives and the Arkansas Department of Health's regulation's concerning necessary social distancing, face mask wearing, limitation on group numbers, hand washing and other minimum safety measures during this pandemic. Fayetteville citizens and visitors whose health may be compromised should follow all safety requirements.

  
LIONELD JORDAN  
Mayor

5/18/20  
Date



OFFICE OF THE  
CITY ATTORNEY

## DEPARTMENTAL CORRESPONDENCE



Kit Williams  
City Attorney

Blake Pennington  
Assistant City Attorney

Jodi Batker  
Paralegal

TO: Mayor Jordan  
City Council

CC: Susan Norton, Chief of Staff  
Paul Becker, Finance Director

FROM: Kit Williams, City Attorney

DATE: March 13, 2020

RE: Local disaster emergency declaration

Arkansas State Law Provides that "A local disaster emergency may be declared only by the chief executive ... of a political subdivision." A.C.A. §12-75-108 **Local disaster emergencies-Declaration.**

"(b)(1) The effect of a declaration of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local or interjurisdictional disaster emergency plans, to authorize the furnishing of aid and assistance thereunder, and to initiate emergency management functions under this chapter."

This State Law authorizes Mayor Jordan to suspend some local regulatory ordinances such as zoning, development and building regulations and "Any other regulatory type ordinances." This last catch-all phrase would provide authority for Mayor Jordan to cancel or suspend existing permits for parades and events which could increase the spread of the corona virus.

Beyond the declaration of local disaster emergency and suspension of appropriate regulatory ordinances and permits, our Mayor is not provided much additional authority. Instead State Law requires that a city "actively and aggressively support the state offices of emergency management and local offices of emergency management (such as the one for Washington County) to the end of providing the best possible preparation for response to or recovery from any emergency situation that may occur." A.C.A. §12-75-116 **State and local governmental entities - Liaison offices.**

Most powers to rapidly react to a disaster emergency is appropriately provided to the Governor who will rely upon the State Health Department and its health experts for proper measures that should be taken in this state (and national) disaster emergency.

"The Governor is responsible for meeting and mitigating, to the maximum extent possible, dangers to the people and property at the state presented or threatened by disasters." A.C.A. §12-75-114 **Governor - Disaster emergency responsibilities.**

"(1) Under this chapter, the Governor may issue executive orders, proclamations, and rules and amend them or rescind them;  
(2) Executive orders, proclamations and regulations have the force and effect of law."

Only cities specifically designated as a local office of emergency management can establish its own local office of emergency management. Otherwise cities "shall receive emergency management support from the county..." A.C.A. §12-75-118. All of these local emergency management offices are supposed to support and follow the Governor's directions and proclamations.

Both cities and counties are legally referred to as "creatures of the State" and created to facilitate the governance of the state. We work best when responding to a state-wide disaster emergency when we support the coordinated efforts of the Governor and state agencies (such as the Department of Health). Local regulatory matters may still be addressed and managed locally, but our primary efforts should be in support of the state-wide effort to control or reduce the spread of this pandemic.

"(a) Each state office of emergency management and local office of emergency management and the officers of each state office of emergency management and local office of emergency management shall execute and enforce such orders and rules as may be made by the Governor under authority of this chapter." A.C.A. §12-75-106 **Enforcement.**