

Guidance: Municipal Authority to Enact Protective Measures Related to COVID-19

Prepared in Cooperation with the Dept. of Law

The determination of a local government's legal authority to enact measures related to COVID-19 is a question for their legal counsel. Such measures may include local health mandates and other restrictions to protect the health and safety of local residents. Unless specifically restricted by the legislature, or preempted by executive action, local governments have broad powers to protect the health and safety of their residents. The following are some legal principles that are useful to a community's analysis (Please note that this Guidance is not intended to provide legal advice. An attorney should be contacted for legal advice.):

1. The **Alaska Constitution**: Article X of the Alaska Constitution establishes the framework for local government in Alaska. Section 1 of Article X makes clear that the purpose of Article X is to provide for maximum local self-government. However, the Alaska Legislature has provided for some severely limited forms of local government.

2. Alaska State Statutes:

A. The Alaska Disaster Act (AS 26.23) provides in part that:

- Local governments have authority to prevent, prepare for, respond to, and recover from disasters (AS 26.23.014(4)).
- A local disaster emergency may be declared by the principle executive officer of a political subdivision (AS 26.23.140).
- A proclamation of disaster emergency by the governor activates local disaster emergency plans (AS 26.23.020(e)).
- AS 26.23.060(b) allows a local government to be responsible for disaster preparedness and coordination of response.
- *It is important to note that AS 26.23 does not confer upon local governments responsibilities that it is not otherwise empowered to perform (AS 26.23.060(h)).*

B. Municipal government statutes (AS 29) provide in part:

- Home rule and first-class boroughs, and home rule, first-class and second-class cities enjoy those powers not otherwise prohibited by law.
- Second class boroughs are unlike all other classes of municipalities in the state and have only those powers conferred to them by law.
- Subject to the provisions of the Alaska Disaster Act, Title 29, and individual municipal codes, home rule and first-class boroughs, and home rule, first-class and second-class cities may generally institute measures necessary to respond to the current declared disaster related to COVID-19 provided such actions are not expressly prohibited by state law, impermissibly conflict with state law, are unconstitutional, or are otherwise preempted by state action.
- Subject to individual municipal codes, and provided such actions are related to a power granted to the borough, second class boroughs may generally institute measures necessary to respond to the current declared disaster related to COVID-19 which are not prohibited by state law, do not impermissibly conflict with state law, are not unconstitutional, or are not otherwise preempted by state action
- Each community must evaluate their own municipal code to determine the scope of their authority to take action during this emergency.

3. Additional Legal Considerations:

- Keep in mind constitutional considerations, such as the freedom of religion, assembly, equal protection and due process, etc.
- State primacy (how do your mandates impact state employees who are working or traveling to your communities), including making sure that the action taken does not conflict with the specific language in existing mandates. Currently, there are only two mandates that contain restrictions most likely to affect what a local government can do:
 - **Mandate 18**: Allows local communities to enact travel restrictions, but cannot require automatic quarantine or measures that prevent travel for (1) critical personal needs, or (2)

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the conduct of essential services/critical infrastructure. Those terms are defined at the following hyperlinks

- [COVID-19 Health Mandate 018](#)
- [COVID-19 Health Mandate 010](#)
- If the above links do not open or become broken, the health mandates can be found at: <https://covid19.alaska.gov/health-mandates/>
- **Mandate 15:** Relates to services by health care providers, supersedes all local health mandates.
- Consider the Americans with Disabilities Act (ADA) when enacting restrictions. For example, allow exceptions for disabled individuals if you impose a mask restriction.

AML Review and Discussion

Many types of local governments do have broad powers, except for second class boroughs whose powers are spelled out in Title 29. There is no existing statute that confers upon second class boroughs public health or safety powers, and in fact the powers of second-class boroughs are limited in statute. The only way for a second-class borough to adopt a power related to public health or safety is through a vote of the people. Title 26 does enable local governments to respond, and the Governor's disaster declaration does activate their emergency plans. However, Title 26 is clear that local governments may not add powers not already conferred. Second-class boroughs whose residents have not approved public health or safety powers may not add these responsibilities during a disaster.

It is very important to point out that second-class boroughs do not have "all other powers not otherwise prohibited by law", or the ability to exercise all powers necessary under a declared emergency in title 26. Per AS 29.04.020 a general law municipality "has legislative powers conferred by law." AS 29 does not confer upon second class boroughs all other powers not otherwise prohibited by law. Instead it painstakingly lists those powers in AS 29 (as well as in a few other statutes) and also allows second class boroughs to exercise powers approved by the voters.

Also, AS 26.23.140 provides that the effect of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local or interjurisdictional disaster emergency plans, and to authorize the furnishing of aid and assistance under those plans. Please note however that AS 26.23.060, which provides for local and interjurisdictional disaster services, clarifies in paragraph (h) that it does not empower a political subdivision to perform responsibilities that it is not otherwise empowered to perform. It is important to understand that the lack of a power means that second-class boroughs cannot legally provide the facility, service or regulations related to a power it does not have.

The questions that remain, then, include:

- Will the Troopers respond to assist in enforcement of local mask mandates?
- To what extent will the State act on behalf of unincorporated communities?
- Where one local government acts and another doesn't in an overlapping jurisdiction, how will the State reconcile the public health needs of those communities?