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St. Clair County Health Department  
Attn: Dr. Annette Mercatante  
3415 28<sup>th</sup> Street  
Port Huron, Michigan 48060

Dear Dr. Mercatante:

I am writing regarding questions which have been raised concerning a provision of Senate Bill 82, the appropriations act (the “ Budget Act”) for the fiscal year ending September 30, 2022. Specifically, Section 250 of the Budget Act prohibits the “director or local health officer to issue or enforce any orders or other directives that require an individual in this state who is under the age of 18 to wear a mask or face covering” (the “Masking Provision”). As explained herein, the Masking Provision of the Budget Act is unconstitutional and unenforceable.

Authority for Masking Order in the Public Health Code

The Michigan Public Health Code (the “Health Code”) gives authority to the local health officer to issue emergency orders restricting the gathering of people and establishing “procedures to be followed by persons, including a local governmental entity, during the epidemic to insure continuation of essential public health services.” MCL §333.2453. It is well accepted this provision of the Health Code grants local health departments authority to issue and enforce masking orders in response to the COVID-19 epidemic.

Enforceability of the Masking Provision

The Masking Provision is contained within the Budget Act. Although it purports to restrict the authority of local health officers to issue mask order, the Legislature did not amend the Health Code. There are several legal reasons why the Masking Provision is unenforceable the most prominent of which are set forth below.

The Masking Provision is a standalone provision contained in the Budget Act. Although the Budget Act is an appropriations bill, the Masking Provision is not related to or tied to appropriations. The Masking Provision is what is commonly referred to a “boilerplate” language. The State Budget Office defines boilerplate as language in a bill or act which provides legislative intent or clarification concerning appropriations. Boilerplate language is not the proper means to amend, revise, or revoke authority specifically granted under the Health Code. In fact, historically, similar attempts to amend statutes pursuant to language in appropriations bills have been determined unenforceable. The Michigan Supreme Court held that conditions attached to

appropriations acts which amount to legislative invasion of foreign fields are invalid. *Lewis v State*, 352 Mich 422, 430 (1958). In *Civil Service Com'n of Michigan v Auditor General*, the Supreme Court held a provision in an appropriation bill that sought to usurp the authority vested in the Civil Service Commission to fix rates of compensation of employees was unconstitutional. 302 Mich 673 (1942).

The Michigan Constitution contains restrictions and requirements for legislation. Specifically, Michigan's Constitution's title object clause provides that "no law shall embrace more than one object, which shall be expressed in its title." Mich. Const. 1963, Art. IV; §24. The Michigan Constitution further provides "no law shall be revised, altered, or amended by reference to its title only." Mich. Const. 1963, Art. IV; §25. Michigan Courts and Michigan Attorneys General from both political parties have addressed these constitutional provisions and their applicability to appropriation acts and other legislation several times.

In 2005, Attorney General, Mike Cox, issued an opinion concerning the enforceability of provisions of an appropriations act that purposed to revise other statutes concerning the management of the Mackinac Bridge Authority. OAG 2005-2006, No 7179. Attorney General Cox confirmed the Michigan Constitution prohibition prohibiting revising a statute by reference only is applicable to appropriations bills. Mich. Const. 1963, Art. IV; §25. According to the Attorney General Cox, "if the Legislature intends to revise, alter, or amend a statute, it must use the constitutionally prescribed process to actually revise, alter, or amend the statute." Applying this principal, Attorney General Cox determined that provisions of an appropriations act which prohibited transfers from the Mackinac Bridge Authority to the state treasurer were not enforceable because their effect was to amend other statutory provisions and prevented the state treasurer from carrying out his statutory duties.

Attorney General Cox's opinion in 2005, relied, in part, on and referenced a 1982 opinion from Attorney General Frank Kelley, which reached the same conclusion. OAG 1981-1982, No 6036. In 1982, Attorney General Kelley reviewed an appropriations bill in light of the requirements of Mich. Const. 1963, Art. IV; §25. Attorney General Kelley opined that "where an appropriation bill dispenses with or makes changes in another statute, the amended provisions must be reenacted and republished." OAG 1981-1982, No 6036. Failure to follow the full legislative process to amend a statute, renders those portions of an appropriations bill unenforceable. Similarly, Michigan Courts have reached the same conclusion. In *City of Livonia v Dep't of Social Services*, the Michigan Supreme Court explained that Art. 4, § 25 is violated if a statute "dispenses with or changes any provision" of another statute without following the legislative process, including republishing / re-enacting the amended statute. 423 Mich 466, 490 n 15 (1985), quoting *Dearborn v Dep't of Social Services*, 120 Mich App 125, 133-134 (1982). In other words, merely referencing another statute in appropriations act is permissible. However, if the legislature intends to revise, alter, or amend a statute through an appropriations act, such is not permissible. Rather, the full legislative process must be carried out with respect to the amended act. Importantly, in cases where a provision of an appropriations act is unenforceable, only that provision is unenforceable. The remaining provisions of the act, to the extent lawful, are enforceable.

Conclusion

Enforceability of the Masking Provision of the Budget Act depends on whether it is consistent with the Michigan Constitution. The relevant question is whether the Masking Provision of the Budget Act seeks to revise, amend, or alter the Health Code. The Masking Provision restricts the authority of local health officers to issue or enforce masking orders for individuals under the age of 18. However, the Health Code clearly grants local health officials such authority. MCL §333.2453. Accordingly, the Budget Act seeks to revise, amend, or alter the Health Code without going through the required legislative procedure to amend the Health Code. In my opinion, the Masking Provision of the Budget Act violates Art. IV; §24-25 of the Michigan Constitution and is, therefore, unenforceable. As noted above, historically, Michigan Courts and both Republican and Democrat Attorney Generals have reached similar conclusions applying the same constitutional provisions.

Very truly yours,

FLETCHER FEALKO  
SHOUDY & FRANCIS, P.C.



Gary A. Fletcher

Cc: St. Clair County Board of Commissioners  
Karry Hepting, St. Clair County Administrator/Controller