

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 21-CV-332

STATE OF VERMONT

v.

HNR DESAUTELS LLC
and
ANDRE M. DESAUTELS

DECISION

The State of Vermont seeks to enjoin Defendants from failing to comply with rules applicable to business operations adopted pursuant to the Governor's Executive Order issued in response to the COVID-19 pandemic. Defendant HNR Desautels LLC is a limited liability company that operates a retail business in Newport, Vermont. Defendant Andre M. Desautels is the owner/member of the LLC.

In this suit, the State alleges that Defendants are in violation of the law for refusing to comply with rules that include the requirement that persons who work in businesses wear masks in the presence of others. The State seeks an injunction and civil fines. Defendants claim that (a) the statute under which the State seeks relief is unconstitutional, (b) the rules on which the claim is based are invalid because they were not adopted in accordance with the Administrative Procedures Act, and (c) there is no violation because Mr. Desautels is not an "employee" and the other person who works in the business is exempt from wearing a mask.

The court issued an *ex parte* Temporary Restraining Order on February 23, 2021 and scheduled a Webex hearing on the request for a Preliminary Injunction for March 5, 2021. The hearing commenced that day and continued on March 8 and 9, 2021. The State was represented by Attorneys Rachel Smith and Ryan Kane. Mr. Desautels participated and was represented by Attorney Deborah Bucknam.

At the hearing, the attorneys agreed that pursuant to V.R.C.P. Rule 65 (b)(2), the preliminary injunction hearing was consolidated with the final hearing and thus the hearing became the trial on the merits of the action. The attorneys further agreed to bifurcate the hearing so that this Decision is on the request for injunctive relief only, with a hearing on civil fines to be scheduled at a later time if warranted.

Based on the evidence, memoranda, and arguments of counsel, the court makes the following findings of fact and conclusions of law, and grants the State's request for an injunction.

Facts

Since 2015, Mr. Desautels, doing business as HNR Desautels LLC, has operated a store on Main Street in Newport. It had a UPS franchise until recently. It offers a wide variety of services to retail customers. It has 200 mailboxes to rent to customers, to whom it provides a physical address (in addition to a regular post office box, so that the store can receive shipped items on their behalf). It also provides packaging and shipping services, printing services, computer services, copying, notary services, shredding, and graphic design services. It is open from 10-5 weekdays and 8-noon on Saturdays. It is staffed by Mr. Desautels and an Assistant Manager.

It had a total of 2700 square feet consisting of a front area where the printers, mailboxes, other services, two cash registers, and a counter were located, and a back area, where Mr. Desautels had a desk.¹ Both he and his assistant work directly with customers.

In March of 2020, when the COVID-19 virus had spread to Vermont, Governor Philip Scott invoked authority under the Emergency Management Chapter of Title 20 of the Vermont Statutes Annotated. He declared an Emergency and issued Executive Order 01-20 (EO 01-20). As the pandemic has continued throughout the past year, EO 01-20 has been extended on a month-by-month basis. Its terms have been restated once and amended with each extension. It has included delegating to the Agency of Commerce and Community Development (ACCD) the authority to establish specific rules relating to business operations.

When businesses were allowed to reopen, those ACCD rules included many requirements designed to permit business activity while limiting the spread of the virus. They included multiple preventive precautions, including social distancing of 6 feet, wearing masks over the nose and mouth, limited occupancy, access to sanitizer or soap and water, frequent cleaning, denial of entry to persons not wearing masks, and many other requirements.

Mr. Desautels testified, and the court finds, that in the store they have attempted to practice social distancing “for the most part,” but have not always done so. When they work with customers they can be within 6 feet. Although there are two signs up in the store about staying 6 feet apart, the Assistant Manager said they practice social distancing “if we can.” They have hand sanitizers at the cash registers, and she wipes down counters and surfaces once a day. There is no evidence that Mr. Desautels objects to pursuing compliance with these requirements.

What is clear is that neither Mr. Desautels nor the Assistant Manager have worn or intend to wear masks, and they do not deny entry to persons without masks. Before addressing more details about compliance issues, it may be helpful to review the chronology of EO 01-20 and related ACCD rules.

¹ The past tense is used, as Mr. Desautels testified that his lease has been terminated. It is unknown what his future business plans are.

Chronology

March 13, 2020: The Governor issued Executive Order 01-20 due to the Covid-19 pandemic (EO 01-20). This declared an Emergency and was entitled the “Stay Home, Stay Safe Order.” It suspended the operation of close contact businesses and businesses not deemed critical to public health and safety and national and economic security. This Emergency Executive Order has been extended monthly and remains in effect to March 15, 2021, with frequent amendments having been made over time as conditions have evolved.

End of April-May, 2020: The Governor delegated authority to the Secretary of ACCD to develop requirements for business operations so that businesses could reopen consistent with measures to prevent the spread of the disease. ACCD began to develop and adopt the workplace requirements described above.

June 15, 2020: Amended and Restated EO 01-20 (Ex. 7) issued.

For businesses, it specified that businesses shall operate only in compliance with ACCD Work Safe Guidelines (page 9). In ¶11 on page 11, it authorized the Secretary of ACCD to implement phased resumption of business operations. For the general public, it stated that people “should” maintain physical distancing, specifically by keeping 6 feet away from others outside one’s household, and by wearing a mask over the nose and mouth.

July 24, 2020: Addendum 2 to Amended and Restated EO 01-20 (Ex. 6)

It established a mask mandate for the general public effective as of August 1, 2020.

For businesses, it designated ACCD Work Safe Guidelines as establishing “limited alternatives to face masks in limited workplace settings.” (Pages 2-3)

Following August 1, 2020: EO 01-20 was extended, with amendments, one month at a time. ACCD Work Safe Guidelines remained in place for businesses.

February 15, 2021: Addendum 11 to Amended and Restated EO 01-20 (Ex. 9).

It cited Vermont statistics of increased cases and deaths in the previous month. It also stated that “modeling studies done for the State clearly show that, but for the mitigation measures taken to date, the number of COVID-19 cases and COVID-19 related deaths in the State would be having a much more devastating effect on Vermonters and would be threatening to overwhelm the capacity of the Vermont health care system.” It was also noted that “numerous tools [are] needed to address response efforts. . . including . . . workplace health and safety requirements. . .” The Order was extended to March 15, 2021.

February 17, 2021: Someone from the Attorney General’s office called Mr. Desautels, apparently having learned that masks were not worn by staff in his store, and advised compliance with the mask rule as a requirement of law. Mr. Desautels then received a telephone call from someone at UPS. He told the UPS person he would not make an employee wear a mask. Subsequently the Attorney General also called him about compliance with the mask requirement. The same day, the UPS national office terminated Defendants’ UPS franchise for failure to comply with Vermont law.

February 18, 2021: Newport police visited Defendants' business for mask compliance. Neither Mr. Desautels nor a female employee nor another person present in the store were wearing masks. Mr. Desautels said he was not going to be wearing a mask. A sign on the front door said, 'we are not wearing masks' but also said that customers could if they wanted.

February 22, 2021: Newport police visited Defendants' business. Mr. Desautels was not wearing a mask.

February 23, 2021: ACCD issued an Update on New Work Safe Additions to the Be Smart, Stay Safe Order to Vermont Businesses and Employers (Ex. 4): It has several major headings under which there are many specific requirements. Two of the major headings are for "all business, non-profit, and government operations," one is for "business customer and general public mask use," there is a section for retail businesses, and there are other sections targeted to other groups and activities. Pertinent excerpts are below from one of the Business segments and from the Business Customer and General Public segment.

Page 3:

"MANDATORY HEALTH & SAFETY REQUIREMENTS FOR ALL BUSINESS, NON-PROFIT & GOVERNMENT OPERATIONS"

"All businesses must follow Vermont Department of Health and CDC guidelines:

...

- Employees must wear face coverings over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or "sneeze guard" is acceptable in lieu of a mask if the employee works alone and does not interact with customers outside the work station."

Page 4:

"Compliance with the Americans with Disabilities Act. . . .The health and safety guidance provided by ACCD does not negate any obligations as outlined by the ADA. . . ."

Pages 5-6:

"BUSINESS CUSTOMER & GENERAL PUBLIC MASK USE"

As of Saturday, August 1, 2020, Vermonters and visitors are required to wear masks or cloth facial coverings over their nose and mouth any time they are in public spaces, indoors or outdoors, where they come in contact with others from outside their households, . . .and where it is not possible to maintain a physical distance of at least six feet.

"Masks or cloth facial coverings are not required when someone is engaged in strenuous exercise or activity, for . . .any child or adult with a medical or developmental issue or challenge that is complicated or irritated by a facial covering, anyone with difficulty breathing or as further set forth in guidance issued by VDH. A person who declines to wear a mask or cloth face covering

because of a medical or developmental issue, or difficulty breathing, shall not be required to produce documentation, or other evidence, verifying the condition.

“Businesses and non-profit and government entities shall implement measures notifying customers or clients of the requirement to wear masks or facial coverings, which may include, but shall not be limited to, posting signage stating that masks or cloth facial coverings are required and denial of entry or service to customers or clients who decline to wear masks or facial coverings.”

ACCD Website: The ACCD maintains a website for businesses with Frequently Asked Questions (FAQs) and responses. (Ex. 5) On page 5 is the question, “Do I need to require my employees to wear masks?” with the response below:

Yes. Employees must wear face coverings over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or “sneeze guard” is acceptable in lieu of a mask. Customers, vendors and visitors are also required to wear face coverings where 6 feet of space between people is not possible (effective August 1, 2020). . . .

In rare circumstances where an employee is physically unable to wear a mask, the employer should require a note from a doctor explaining their need for an accommodation, and the employer should implement other measures to protect the workplace and the employee.

March 5, 2021 (at hearing): Mr. Desautels testified that he had not worn a mask to work during the past year, and that “I will not wear a mask.”

Additional Facts regarding Defendants

Mr. Desautels claims that he is the owner of the business and does not receive W-2 wages and that therefore he is not an employee and not subject to the requirement that “Employees must wear face coverings over their nose and mouth when in the presence of others.” (ACCD Work Safe Guidelines, Ex. 4). His business income is paid to him from HNR Desautels LLC.

Mr. Desautels normally works directly with customers 25-40% of the time he is at work. (The 40% represents the busy Christmas season.) He often works in the back part of the business property where his desk is with the Assistant Manager working in the front with customers. He and the Assistant Manager talk with each other on a regular basis every day. Neither wears a mask. Since the Temporary Restraining Order issued, he has worked primarily in the back office. He talks with the Assistant Manager without wearing a mask, but claims that he is not within 6 feet of her for more than 15 minutes. He claims that although he works with customers, he does not do so for longer than 15 minutes.

He claims that the Assistant Manager is exempt from wearing a mask due to a medical condition. He has not asked for a note from her doctor, as he relies on the provision applicable to the general public that she cannot be asked for documentation. He also believes that under HPPA he is not allowed to ask her about it. He has not taken any precautions to protect her or the customers she works with from exposure to the virus as an accommodation to her condition. He relies on daily cleaning. He testified that he is not aware that anyone has acquired COVID-19 from being in the store.

Mr. Desautels is a basketball referee. He wears a mask during basketball games as he is required to do. The games normally are 1 ½ hours long.

The Assistant Manager is often the only person interacting with customers. There is no translucent shield at the cashier stands, and no “sneeze guards” are used. She does not remain behind the cashier counter but helps customers with the various services available to them in the front part of the store. That was the case before the TRO, and has been the case even more since Mr. Desautels stays primarily in the back. She does not wear a mask. She testified that she tried it at the beginning but it made her anxious and triggered claustrophobia and panic attacks. She went to counselling and learned self-soothing techniques and does not wear a mask.

Facts re ACCD rules

Ted Brady is the Deputy Secretary of ACCD and has worked on ACCD guidance to implement EO 01-20 throughout the pandemic. ACCD has had Work Place rules in effect since early May of 2020.

Exhibit 4 is the current version of the Work Safe Guidance, which is a memo with the rules from the Secretary of ACCD to “Vermont Businesses and Employers.” It states at the beginning that it contains requirements for all Vermonters pursuant to EO 01-20. It is 17 pages long, and contains two full pages specifically applicable to businesses as well as a special section for “Retail Operations.” Other portions apply to other sectors of public life.

It contains comprehensive rules that apply to all businesses, non-profits, and government. Although it often uses language that “Employees must. . .,” ‘employee’ is not defined. Mr. Brady testified that the Work Place requirements are intended to apply to all persons, including owners and self-employed persons, and not just wage earners. It is clear from the document that if the requirements did not apply to all persons who work in business, non-profit, and government settings but only to some of those people, the effectiveness of the requirements in attempting to limit the spread of disease would be seriously diminished, as many persons would be permitted to interact with others in close contact, thereby enabling transmission of the virus.

The Work Place rules for businesses are distinct from the statewide general public requirement that went into effect as of August 1, 2020 that mandated the wearing of masks for all persons in Vermont under specified circumstances with specific exceptions. Under that

requirement for the general public, as it relates to businesses, it is customers who have a medical condition who are the ones not required to produce documentation if their medical condition prevents mask-wearing.

ACCD has supplemented its official Work Place rules document with a section on its website to answer Frequently Asked Questions related to business operations. As noted above, the advice to businesses is not only that employees are required to wear masks, but that those physically unable to do so may be asked for a note from a medical professional explaining the need for accommodation. Given the terms and intent of the detailed and comprehensive requirements and their purpose, it does not follow that an accommodation for a person who cannot wear a mask would include having the person provide direct person to person customer service in a retail store.

Facts re the disease

COVID-19 is a contagious disease that sometimes results in death. It is transmitted from person to person in three ways: when persons inhale large droplets containing the virus from an infected person nearby who breathes, talks, coughs, or sneezes; when persons inhale small airborne droplets that are floating in the air from an infected person, and when virus particles land on a surface that is then touched by someone who then touches their nose or mouth. These transmissions occur when people are in close proximity with each other.

The court heard from two experts, an epidemiologist and a microbiologist. Both experts agree that preventing or slowing the spread of virus to others calls for blocking the transmission of the virus from person to person.

Some people who carry the disease have no symptoms, and are therefore able to transmit it to others without either knowing it. Vermont State epidemiologist Patsy Kelso testified credibly that in only 31% of cases is it possible to identify the source of infection of a person who acquired the disease.

It first appeared in Vermont in March of 2020, and has spread throughout the State through either outbreaks associated with a particular events or locations, or through gradual community spread from one person to another. One infected person can introduce it into a location where it can then cause illness, hospitalization, and possibly death to many others. Vermont has documented that many of the outbreaks in institutional settings in which many have become sick have resulted from a single employee bringing the disease into the environment.

The risk of illness, hospitalization, and death to individuals together with the capacity of the disease to spread rapidly and undetected represents a threat to the health and safety of all persons in Vermont and actual harm and even death to those to whom the virus is transmitted. It is not possible to identify and isolate only individuals carrying the virus.

Face masks, depending on the material from which they are made and how well they fit, can prevent droplets from escaping from an infected person to others and also protect the wearer from inhaling aerosols from others nearby. Other precautions include staying at least 6 feet away from others, avoiding crowds, avoiding poorly ventilated spaces, washing hands often, covering coughs and sneezes, and cleaning and disinfecting. Dr. Kelso testified credibly that the more of the recommended precautions taken, the more effective the prevention effect will be.

Microbiologist Aimee Stephenson reviewed studies on mask wearing. She concludes that there is not strong evidence that wearing cloth masks in community settings (as opposed to medical N 95 masks used in hospital settings) can be relied on as a sole methodology to prevent spread, and that case counts have gone up even in states and during periods when a mask mandate has been in effect. She acknowledges that transmission takes place when people are in close proximity to each other. She also acknowledges that an outcome of death or permanent impairment can result from contracting Covid, though her opinion is that it is rare in healthy people under 50, and she believes that deaths and serious illness among older persons may be affected by comorbidities. She does agree, however, that the greater the number of precautionary practices used, the more unlikely it is that people will become infected with Covid.

In sum, the testimony of both experts was that masks can block transmission of the virus between persons and that the more precautionary measures that are utilized simultaneously, the greater the likely effect in inhibiting the spread of the disease. The ACCD Work Safe rules call for many different precautions to be followed simultaneously. The wearing of cloth face masks by persons in business settings in the presence of others is one of those many precautions.

Conclusions of Law

This is an action to enforce a claimed violation by Defendants of the ACCD Work Safe rules for businesses adopted under Executive Order 01-20. As stated above, Defendants claim that (a) the statute under which the State seeks relief is unconstitutional, (b) the rule on which the claim is based is invalid because it was not adopted in accordance with the Administrative Procedures Act, and (c) there has been no violation.

The Statute

The statute at issue was enacted by the Legislature as the first chapter of Title 20 of the Vermont Statutes Annotated. Title 20 concerns “Internal Security and Public Safety.” Chapter One is entitled Emergency Management. Its purpose and policy is set forth in section 1 and provides that in order to deal with disasters and emergencies and “to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state it is hereby

found and declared to be necessary. . . to confer upon the governor and upon the executive heads . . . the emergency powers provided herein.”

Under 20 V.S.A. §9, “Emergency Powers of Governor,” the Governor may proclaim a state of emergency “in the event of an all-hazards event.” An “all-hazards” event includes any “health or disease-related emergency” which “poses a threat or may pose a threat. . .to. . . public safety in Vermont.” 20 V.S.A. §2 (1). The Governor may exercise the powers “for as long as the Governor determines the emergency to exist.” 20 V.S.A. §9.

Under 20 V.S.A. § 8 (“General Powers of Governor”), the Governor is “authorized and empowered. . .To make, amend and rescind the necessary orders, rules and regulations to carry out the provisions of this chapter.” Enforcement consequences include civil fines of up to \$1,000 per day for each violation of “any rule adopted under this chapter,” and the attorney general is specifically authorized to “bring an action for injunctive relief in the superior court of the county in which a violation occurs to compel compliance with the provisions of this chapter.” 20 V.S.A. § 40.

The State alleges that HNR Desautels LLC and Mr. Desautels violated the ACCD rules for businesses adopted under the authority of this chapter by operating a retail store staffed with persons not wearing masks.

Constitutional challenge

Defendants argue that the statute violates the separation of powers provisions of the United States and Vermont Constitutions because it delegates too much undefined and unlimited legislative authority to the executive branch. Defendants argue that it allows the Governor to make rules that would otherwise be within the exclusive authority of the Legislature and give them the force of law, and is thus in violation of the non-delegation doctrine.

Defendants rely on *Hunter v State*, 2004 VT 108, in which the Vermont Supreme Court framed the issue for analysis this way: “whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.” *Id* at ¶ 21. Defendants argue that what one person deems to be an emergency can be quite different from another’s view of what constitutes an emergency; that, for example, some might consider climate change an emergency, whereas others would not. The argument is that the Governor individually makes that choice, and then has sweeping powers to make rules that are essentially laws which can be enforced through civil penalties and injunctive relief, bypassing the legislative process altogether. They argue that in *Hunter*, although emergency legislation delegating spending power was upheld as constitutional, the reason was that the Legislature defined and limited the delegated powers within the statute, and those powers were needed to address fiscal emergencies that occurred when the Legislature was not in session.

An analysis and result similar to that in *Hunter* is set forth by the United States Supreme Court in *Gundy v. United States*, 139 S. CT. 2116 (2019), in which Plaintiff claimed that a federal sex offender registration and notification statute involved unconstitutional delegation of legislative power to the Attorney General, and the Court held that the delegation did not violate the non-delegation doctrine:

So we have held, time and again, that a statutory delegation is constitutional as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee’s use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. Only after a court has determined a challenged statute’s meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.

Id. at 2123.²

As noted in *Hunter*, a statute enacted by the Legislature is presumed to be constitutional at the beginning of the analysis. *Hunter* at ¶ 31. The next step in the analysis is to examine the statute to determine whether its purpose and principles are sufficiently clear, and whether it contains sufficient limitations and guidance for the exercise of the authority granted, to pass constitutional muster.

The purpose of the Emergency Management statute is defined in Section One, which states that because of the possibility of emergencies, it is necessary to delegate to the Governor and other executive officials certain powers to “preserve the lives and property of the people of the state.” 20 V.S.A. §1. The powers conferred on the Governor may not be exercised unless the circumstances meet the definition of an “all-hazards” event. This is defined in the statute itself to explicitly include among other defined circumstances a “health or disease-related emergency” that poses a threat to property or public safety. 20 V.S.A. §2 (1).

Because the specifics of an all-hazards emergency cannot be known in advance and could cover a wide variety of types of emergencies, the breadth of the powers must reasonably be commensurate with the flexibility needed to respond to whatever emergency might develop. Nonetheless, the statute clearly sets forth the principle that in the event of a disease-related emergency that threatens public safety, the purpose of the delegation of power to the Governor is “to preserve the lives . . . of the people of the state.” 20 V.S.A. § 1 (a).

² Cursory research indicates that the United States Supreme Court has not declared a federal statute to be an impermissible delegation of legislative power since the 1930’s.

The specific powers allotted to the Governor are defined in two separate sections: General Powers of Governor (2 pages long) 20 V.S.A. §8, and Emergency Powers of Governor (2 pages long) 20 V.S.A. §9. They include authority to “make, amend and rescind the necessary orders, rules and regulations” to carry out the legislative purpose (20 V.S.A. §8), and operational powers include the use of services and facilities of various state officials and agencies. 20 V.S.A. §9. The powers are limited by time: the emergency powers are exercisable for only so long as the all-hazards emergency exists. 20 V.S.A. §9. It appears that some form of emergency management statute has been in place in Vermont since 1947.

The powers conferred are ones tailored to flexibility and responsiveness, as it is predictable that in an emergency it may be important to have organized leadership and the ability to act quickly and make rules that can be modified as circumstances change. Since the legislative process is not well suited to making rules that may need to be changed rapidly from week to week or month to month, it makes sense for the Legislature to have provided for a procedure whereby rules can be modified in a resilient manner under the management of existing governmental officials using their resources.

The Emergency Management statute satisfies the *Gundy* requirement that the legislation “supplie[s] an intelligible principle to guide the delegee’s use of discretion.” The basic principle is the preservation of lives of Vermonters in the event of an epidemic of a disease that carries the threat of death. The statute provides instructions that the delegated powers are to be used for that purpose through the adoption by the Governor and governmental delegees of enforceable rules that can be implemented quickly and flexibly during the period of the emergency as necessary to save lives. The statute also provides the guidance that the powers are only usable while the emergency exists.

EO 01-20 and the ACCD rules demonstrate the clarity of the principles of the statute and the purpose of its delegated powers. Each extension of EO 01-20 has been limited for a short period of time, which reflects the legislative limitation that any emergency order should not be designed to last longer than the emergency itself. As noted above, the ACCD Work Safe rules call for many different precautions to be followed simultaneously to implement the identified statutory purpose of promoting public health and saving lives. The terms of the extensions and related rules have been modified regularly, illustrating that the legislative purpose is served by a grant of authority that can be exercised in a manner to make changes quickly and flexibly to meet the changing circumstances of the emergency.

Statutes conferring emergency powers must, by their very nature, be non-specific to some degree because they are meant to be exercised under as yet unknown circumstances, but they must also be broad enough to carry sufficient weight to be effective to meet the challenge of the emergency. As United States Supreme Court Justice Jackson observed, when legislation dealing with delegation of emergency powers is challenged, it should be “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343

U.S. 579, 637 (1952) (Jackson, Jr., concurring; a presidential executive order made without authorizing legislation was not within the constitutional power of the President).

In summary, the court concludes that the Emergency Management statute sets forth sufficiently clear guiding purposes, principles and limitations such that its delegation of powers to the Governor does not result in the usurpation of legislative powers by the Governor. Rather, its provisions are designed to implement a legislative purpose of effective and flexible management of emergencies for the protection of Vermonters and preservation of life. Given this conclusion and the presumption of constitutionality, particularly in relation to legislation conferring emergency powers, Defendants have not met the burden to show an overbroad, unconstitutional delegation of legislative authority to the Governor.

Administrative Procedures Act

Defendants argue that the ACCD rules are invalid because they have not been adopted under the rulemaking requirements of the Administrative Procedures Act (APA) set forth in Chapter 25 of Title 3. The Act applies to agencies of government (it is located in Title 3 which applies to the Executive branch of government), and its purpose is to maximize the involvement of the public in the rulemaking process by agencies. 3 V.S.A. §800.

“Agency” is defined as a “State board, commission, department, agency, or other entity or officer of State government, other than the Legislature, the courts, the Commander in Chief, and the Military Department, authorized by law to make rules or to determine contested cases.” 3 V.S.A. §800 (1). The APA has a provision for Emergency Rules, 3 V.S.A. §844, where “an agency believes that there exists an imminent peril to public health, safety or welfare.” Emergency rules “shall not remain in effect for more than 180 days,” and a permanent rule must be proposed at the same time an emergency rule is adopted. *Id.*

The issue is whether the ACCD rules for businesses, which were put in place by the ACCD under the authority delegated to it by the Governor in his Executive Order,³ were required to be adopted pursuant to the rulemaking procedures required by the APA.

Defendants argue that because the business rules were adopted by the ACCD, which is an agency of government, they should have gone through the APA rulemaking process, which would have included notice and a hearing with public participation, in order to acquire the force of law. The State argues that the Emergency Management Statute in Title 20, by its own terms, establishes separate authority for the rules, and that APA compliance is not required.

³ “For the sake of clarity, the requirements for masks or facial coverings or permitted alternatives in specific circumstances shall continue to apply as set forth in the following guidance: Planned Restart Work Safe Guidance issued by the Secretary of the Agency of Commerce and Community Development (ACCD) permitting limited alternatives to face masks in limited workplace settings. . .” (Exhibit 6, Addendum 2 to Amended and Restated Executive Order No. 01-20, dated July 24, 2020, pages 2-3)

The APA is a statute of general applicability that establishes rulemaking procedures for a wide variety of agencies with different responsibilities. The Emergency Management statute is targeted specifically to emergency circumstances that are statutorily defined as “all-hazard events.” It provides specific authority to the Governor with respect to rulemaking, and establishes specific enforcement terms not otherwise available under the APA.

It is a long-standing principle of statutory construction that a statute that is specific as to particular subject matter governs over one that is generally applicable to a wider range of circumstances. *State of Vt. Agency of Nat. Res. V. Parkway Cleaners*, 2019 VT 21, ¶ 40. The Emergency Management statute is particular as to the authority and methods for establishing rules in times of an emergency. It specifically delegates rulemaking authority to the Governor and further authorizes the Governor to delegate to other officials and agencies of government the authority to make rules pertinent to the situation. 20 V.S.A. §9.

These rules can only remain in effect as long as an all-hazards emergency lasts, but they are designed to establish the power of the Governor to respond in a timely and flexible manner to the emergency and to evolving emergency circumstances. The Legislature specified enforcement provisions to ensure compliance that are tailored to emergency needs. The procedural provisions of the APA would not allow for the type of flexibility and modification and real-time amendment of rules called for during an evolving emergency and specifically provided for in 20 V.S.A. § 8 (b)(1), nor does the APA provide for enforcement mechanisms suitable to the emergency situations addressed in the Emergency Management statute.

Because the Emergency Management statute is specifically tailored to the type of rulemaking needed in times of an emergency, the court concludes that the ACCD rules adopted under the authority of the Emergency Management statute were not required to be promulgated under the APA. The terms of the Emergency Management statute supersede the necessity of compliance with the APA. Each of the versions of EO 01-20 admitted into evidence demonstrate that the Governor was specifically relying on the authority conferred on him by the Emergency Management statute, and in doing so he specifically delegated to ACCD the authority to adopt rules for business operations to implement the statutory purpose of preserving lives and protecting public safety. Thus the ACCD Work Safe rules are valid and enforceable under the Emergency Management statute, and do not require separate or additional adoption under the procedures of the APA.

Violation

The State alleges that Defendants violated the following rule included within the ACCD Work Safe rules for businesses:

- Employees must wear face coverings over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or “sneeze guard” is acceptable in lieu of a mask if the employee works alone and does not interact with customers outside the work station.”

Defendants claim that Mr. Desautels is not in violation because he is not a W-2 wage earner and therefore not an “employee.” The rules do not make a distinction between W-2 wage earners and persons working in business, non-profits, or government settings in other capacities. Mr. Brady made clear that the intent of the rule was to include owners of businesses and self-employed persons.

Reading the entire set of applicable Work Safe rules for businesses as a whole (of which the mask requirement is only one), it is clear that all the rules are part of a coordinated multi-part strategy of precautionary measures that must apply to everyone in the work setting in order for the purpose of the rules—slowing/preventing the spread of the virus--to have effect. If the rules only applied to particular individuals depending on their income tax or other status, the intent and effect of the rules would be seriously diminished and would allow for persons to work and serve customers in close proximity to each other in a manner that would fail to deter person-to-person transmission of the virus. Under some circumstances, the term “employee” carries a technical meaning, but it is not used in that manner or for a technical purpose in this context. The court concludes that despite the use of the term “employee,” the rules apply to persons working in business, non-profit, and government work settings irrespective of their technical status.

Moreover, even if a more technical use of the word “employee” is applied, Mr. Desautels has chosen the Limited Liability Corporation form of business entity for the operation of his store. As such, the LLC is the employer, from which Mr. Desautels receives his employment income as employee.

The facts are clear that both the business entity, HNR Desautels LLC, and Mr. Desautels personally were in violation of the ACCD rules on February 18 and 22, 2021, and on other days in which the store was open for business and he was not wearing a face covering over his nose and mouth when in the presence of others.

20 V.S.A. § 40 of the Emergency Management Statute reads in full as follows:

§ 40. Enforcement

- (a) The department of public safety shall have authority to inspect the premises and records of any employer to ensure compliance with the provisions of this chapter and the rules adopted under this chapter.
- (b) A person who violates any provision of this chapter or any rule adopted under this chapter shall be fined not more than \$1,000.00 for each violation. Each day a violation continues shall be deemed to be a separate violation.
- (c) The attorney general may bring an action for injunctive relief in the superior court of the county in which a violation occurs to compel compliance with the provisions of this chapter.

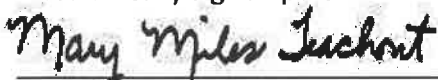
Mr. Desautels stated clearly at the hearing that his intent is to not wear a mask. There is no evidence that he will not be continuing business operations in some manner after this date. With or without evidence of future business operations, injunctive relief is warranted under 20 V.S.A. § 40 (c) to compel compliance with the ACCD rules.

ORDER

For the reasons set forth above,

- 1. the court issues this day a separate Injunction;
- 2. the Temporary Restraining Order is terminated; and
- 3. a status conference will be scheduled to address the State's request for civil penalties.

Electronically signed pursuant to V.R.E.F. 9(d) on March 12, 2021 at 7:47 AM.



Mary Miles Teachout
Superior Court Judge