

**MINUTES OF THE SPECIAL MEETING  
OF THE CITY COUNCIL  
OF THE CITY OF FAIRWAY, KANSAS**

The Council of the City of Fairway, Kansas, held a special meeting at 6:00 P.M. at 5240 Belinder Road, Fairway, Kansas, on Thursday, January 13, 2022.

Present: Council Members Jenna Brofsky, David Watkins, Kelly-Ann Buszek, Jason Rogers, Dan Bailey, Joe Levin and Tanya Keys (all via Zoom).

Absent: None.

Presiding: Mayor Melanie Hepperly (via Zoom).

Staff Present: Nathan Nogelmeier, City Administrator; Richard Cook, City Attorney; J.P. Thurlo, Police Chief (all via Zoom).

Visitors: Chris Barbour, 5930 Reinhardt Drive; Jim Kernell, 4323 Brookridge Drive; Blake Marshall, 5331 Norwood; Carl Lange, 5839 Howe Drive; Joy Jacobs, 5408 Mohawk Lane; Brian Bartalos, 5634 Aberdeen Road; Christe Befort, 5407 Neosho; Julie Fern, 6145 Catalina Street; Matt Hastings, 5641 Fairway Road.

**CALL TO ORDER AND ANNOUNCEMENTS**

Mayor Hepperly called the meeting to order.

City Administrator Nogelmeier outlined the virtual meeting rules. During consideration of the New Business item, the Mayor will call on staff to present their report. Following the report and discussion with the Governing Body, Mayor Hepperly will ask for public comment for that specific New Business agenda item. Members of the public that wish to comment should use the raise hand option on their screen and staff will unmute so they may provide their comment. Those making a public comment should be prepared to give their full name and address for the public record. Proper meeting decorum is expected of all attendees and anyone who fails to act properly may be removed from the meeting. The City reserves the right to discontinue a meeting if any improper behavior occurs which prevents the uninterrupted conduct of business.

Council and staff are asked to identify themselves before they make any comments. This guidance is from the Kansas Attorney General's Office to be compliant with the Kansas Open Meetings Act. All votes will be taken by roll call. City Administrator Nogelmeier will call the names of each elected official for their votes. He requested that Councilmembers that wish to comment should raise their hand to be called upon.

City Administrator Nogelmeier stated that he received approximately 12 responses from residents to the Constant Contact email that concerning the

proposed Ordinance and those responses were forwarded to the Governing Body. The responses received were fairly evenly split between those in favor and opposed of the mask mandate.

## NEW BUSINESS

- A. Consider Ordinance #1755 – An Ordinance regulating Public Offenses within the City of Fairway, Kansas; amending Chapter 8 of the Code of Ordinances, City of Fairway, Kansas, to require the wearing of masks or other face coverings during the Covid-19 public health pandemic and recovery.

Mayor Hepperly explained that after mask mandates were implemented by the cities of Mission, Prairie Village and Roeland Park and articles published in the Shawnee Mission Post, the Governing Body began receiving emails from residents, primarily from medical professionals living in Fairway, requesting that Fairway implement a mask mandate. The Governing Body takes those requests seriously and contacted the City Attorney to get more information. The Council was informed of the legal issues and a request was made by several Councilmembers to discuss the topic at a Special City Council Meeting.

Mayor Hepperly explained that she does not personally support mandates; however, having heard from many medical professionals living in Fairway, she agrees that the Council should review the issue. During the pandemic, actions and functions by the medical professionals have been heroic and she thanked them for their work.

Mayor Hepperly asked that City Administrator Nogelmeier report on the timing of the meeting, followed by a discussion by City Attorney Cook concerning the legal issues and then Chief Thurlo concerning the Police Department's responsibilities if the proposed mask mandate is enacted.

City Administrator Nogelmeier explained that before an Ordinance can take effect it must be published in the designated newspaper. The Legal Record only prints on Tuesdays with a deadline for publication by noon on Friday. Recognizing that timing was important, the City decided to conduct the meeting this evening instead of Friday morning to allow more people to participate.

City Attorney Cook explained that when this issue was considered back in September, there were two legislative hurdles that were of concern, one of which was Senate Bill 40. The Bill took effect on March 25, 2021 and only applies to situations where the Mayor of a city declares a local disaster emergency. Senate Bill 40 provides for any aggrieved party who feels they are harmed by the public emergency order to file a civil action and then the District Court must hear the case within 72 hours and issue an Order within 7 days of the filing of the action. Last fall the District Court declared Senate Bill 40 unconstitutional; however, the Kansas Supreme Court last week allowed Senate Bill 40 to remain in place. The Bill only applies to local disaster emergencies that are declared by the Mayor and that is not the current situation. The proposed Ordinance is drafted under the

City's home rule authority and general police powers to regulate public health and safety. The Kansas League of Municipalities has determined that Senate Bill 40 does not apply to most cities in the Kansas because it only applies to cities that are required to have a disaster plan. The Governor has to decide which cities are required to have a disaster plan and no cities currently meet that classification. Therefore, Senate Bill 40 is not a concern.

The other legislation of concern was House Bill 2313, which applies to the owners of any building that maintains a business. House Bill 2313 states that if the business is closed or restricted because of a declared disaster emergency, the owner is allowed a property tax refund for the time that the building is shut down or use is restricted. The proposed Ordinance is drafted so as to not trigger any of the concerns raised by House Bill 2313. The Ordinance applies only to individuals in certain indoor public spaces within the City of Fairway and does not apply to businesses. Only individuals can be cited under this Ordinance.

Councilman Watkins agreed that House Bill 2313 is not a concern and Senate Bill 40 does not apply, he is concerned that a mask provides a pathway for an aggrieved person to file a lawsuit that will need to be defended. He asked if any lawsuits were filed last year against Prairie Village, Roeland Park or Kansas City, Kansas as a result of their mask mandates.

City Attorney Cook responded that he is not aware of any lawsuits filed under Senate Bill 40 as a result of mandates enacted last fall.

Responding to Councilwoman Brofsky's question, City Attorney Cook stated that the Ordinance is written to purposefully avoid any potential legal issues with the two Bills mentioned.

City Administrator Nogelmeier stated that he reached out to a number of businesses asking whether or not they would be supportive of the mask mandate. He heard back from five businesses, two were supportive, two were not supportive, and one business did not state a position.

Chief Thurlo outlined his concerns about implementation of a mask mandate. The first issue is that the Ordinance does not require signage and therefore, he is concerned that people visiting Fairway and its businesses will not know about the Ordinance.

His second concern is that the mask mandate could invite confrontation from those who feel strongly about the mandate. Officers are trained to deescalate confrontations and the plan would be for it not to get that far. The Police Department will support whatever decision is made by the Council.

Responding to Councilman Watkins' question, City Attorney Cook confirmed that the Ordinance being drafted without a sign requirement is to address House Bill 2313 because requiring signage would arguably be regulating businesses as opposed to individuals and that could invite a challenge under that Bill.

Councilman Rogers asked what the Council would be masking against, whether it is cases, vaccinations, hospitalizations or deaths.

Councilman Watkins stated that from emails he received from several Ward 3 residents who are in the medical profession, the mask mandate is being considered to try to deal with the overwhelming numbers of people who are being hospitalized as a result of the Omicron variant.

Councilman Levin stated that he has also received emails from neighbors in the medical profession. He is opposed philosophically to mandates; however, given the number of cases despite people being vaccinated, social distancing and wearing masks, he thinks the issue should be taken seriously. While he wears a mask and many other people do, he believes those people are putting themselves and the public at risk and the City needs to decide what to do about it.

Councilman Bailey thinks it is absurd that this issue is being dealt with on a city-by-city basis rather than at the county, state or national level. If masks really work and masks need to be worn by everyone, then it should happen at Arrowhead this weekend and events like that. He is in favor of passing the mask mandate based on emails the City has received from citizens.

Councilwoman Buszek explained that with the new variant, health care systems are overwhelmed. She believes the Ordinance is a prudent short-term measure and she is in favor of passing the mask mandate.

Councilman Watkins pointed out that the Council should have a thorough discussion on the pros and cons of the mandate. He noted that there are 18 businesses in the City that would be impacted by the mandate. He received one email from a resident who thought that the impact would be positive because people would feel more comfortable coming to Fairway knowing there is a mask mandate. He also heard from other residents who indicate that while they personally wear a mask, they are philosophically opposed to a governmental entity imposing a mandate.

Councilwoman Brofsky explained that she is looking at the issue practically, not philosophically. She knows that nobody wants to wear a mask, but masks are known to stop the spread because they cover the nose and mouth and stop air droplets from spreading. She has heard from many doctors who say masks work and there is no dispute about that. She has also heard from Fairway residents who work in hospitals and indicate supplies are running low and they are short staffed due to Covid. One thing that the Council can do, even if it is a small thing, is to require masks in public places. She understands that will be impactful in some ways, especially for the Police, but everyone is sacrificing and everyone should be in this together to move past the pandemic to get to the point where masks do not need to be worn.

Discussion follows concerning the Ordinance language stating that it expires on February 14, 2022. Councilman Levin believes that is a reasonable period of time and the Council can reevaluate whether to extend the Ordinance. Councilwoman Buszek explained that the Ordinance will not take effect until January 18, 2022, that it should be amended to expire on February 18, 2022. City Attorney Cook noted that the expiration date was intentional because that is the next regularly scheduled City Council meeting. Responding to Councilwoman Brofsky's question, City Attorney Cook confirmed that the Council could consider whether to extend the Ordinance at the February 14, 2022 meeting even if it did not expire until February 18, 2022.

Discussion followed concerning whether the type of masks will be regulated. City Attorney Cook stated that the language concerning types of masks is identical to the language in the Ordinances passed by Roeland Park, Prairie Village and Mission so there is uniformity.

Councilman Rogers asked what baseline the City will use to undo the mandate if it is enacted. He asked whether the City would follow up with the medical community in Fairway for how they feel hospitalizations are going or what that baseline would be.

Councilman Watkins stated that he routinely checks online Covid statistics in Johnson County and other areas. He believes Kansas reports numbers three times a week and Missouri reports every weekday. From his perspective, if the mandate is approved, those numbers can be reviewed to see whether the mandate should continue.

Mayor Hepperly stated that she and City Administrator Nogelmeier attend County Public Health meetings that include Mayors and City Administrators from the area to get updates on the Covid numbers. She heard a spokesperson from KU Medical Center this evening on the local news who stated that he anticipates the variant to peak the latter part of next week. She thinks there are plenty of ways to obtain Covid information as well as reaching out to the medical professionals who have contacted the City over the past few days.

Councilman Rogers responded that if the spokesperson from KU Medical Center thinks that the variant will peak next week and the City implements a mask mandate that begins on January 18, 2022, then the variant is anticipated to peak four or five days after the mandate goes into effect. This would mean the people will be required to wear masks for an additional 25 days before the mandate expires. He asked if data was going to be obtained from the Mid America Regional Council or some site specific to Johnson County because they vary.

Mayor Hepperly explained that she has not reviewed the Mid America Regional Council information and is getting data from the meetings she has attended with the County Health Department.

Councilman Levin suggested that the Council be cognizant of all the various resources available and not rely only on one particular source.

Mayor Hepperly asked for additional discussion. Hearing none, she opened public comment on this item.

City Administrator Nogelmeier explained that public comment is limited to four minutes per speaker. Follow up questions by the same speaker are allowed for an additional one minute.

Chris Barbour, 5930 Reinhardt Drive, wonders how effective a mandate will be given that schools and places of worship are exempt. He is fully vaccinated and thinks that mandates punish the majority of people who followed medical advice, got fully vaccinated and are healthy. He does not think residents support a mask mandate, especially with all the exemptions that are included.

Jim Kernell, 4323 Brookridge Drive, has several concerns with the Ordinance. First, he explained that the last clause in the Ordinance is very broad and states that the City has the health, safety, welfare and economic well-being of residents in mind. He noted that City Attorney Cook stated that the Ordinance is narrowly tailored, but what he is really saying is that the Ordinance is narrowly tailored to escape the state laws so that Fairway does not get sued. He does not think the Ordinance really comes down to health if the City is so afraid about getting cross ways with the state.

Secondly, it bothers him that several Councilmembers already announced how they were going to vote before hearing debate from other Councilmembers or from the public.

Mr. Kernell thinks that if the Ordinance is meant to protect the public, there would not be two pages of exemptions. One of the exemptions refers to persons age 5 but also addresses children age 2. He wondered if this is a typographical error. Another exemption is for persons with medical conditions, mental health conditions or disabilities. He asked how that would be enforced without violating HIPAA. Exemption No. 6 states persons seated at a restaurant or establishment offering food or beverage are exempt while they are eating and drinking. He wondered if that means that people cannot catch the virus while sitting in a restaurant. Exemption No. 10 is for persons engaged in religious services, ceremonies and activities. He stated he could go to church without a mask and sit next people without masks, leave church and go to Hen House and have to wear a mask (even though he could maintain a six foot distance), and finally go to First Watch, walk in, sit down, and take off his mask. He does not think that scenario makes logical sense.

Mr. Kernell stated that no one has addressed what the CDC says about masking and the definition of what a mask should be. The last sentence of paragraph (a)(1) of the Ordinance states that a mask or other face covering may be factory made, sewn by hand or can be improvised from household items such as scarves,

bandanas, t-shirts, sweatshirts or towels. He pointed out that the CDC absolutely states that those types of masks are completely ineffective.

Blake Marshall, 5331 Norwood, stated that he has no objection to businesses requiring masks because patrons can decide whether to support that business or not. He has no objection to individuals wearing masks because that is their individual choice, and he sees many people wearing masks. He agrees with the previous comment that unless the City mandates N95 masks, the mandate is probably not worthwhile. He works in the health care realm and there is no meaningful efficacy with cloth or similar masks. He thinks Councilman Watkins made a good point that a mask mandate would cause an undue burden on businesses because people will patronize businesses outside of Fairway. Finally, he noted that one Councilmember commented in September that implementing a mask mandate is the least the City can do. He finds that comment offensive because it is not the Council's job to dictate what he does with his body, especially with the little evidence shown.

Carl Lange, 5839 Howe Drive, stated that he does not think that the Ordinance goes far enough but is the least that can be done to support the medical community and neighbors. He finds it disheartening that so much of the conversation is about what might happen economically when it is the right thing to do. He noted that the City has many other mandates – tree ordinances, speeding mandates and no smoking mandates – and considering that the house is on fire, he does not think that it is appropriate to discuss when it is safe to cancel the mandate.

City Administrator Nogelmeier noted that Chris Barbour has indicated that he would like to speak a second time and advised that his comment would be limited to one minute pursuant to the Public Comment Policy.

Mr. Barbour disagrees that a mandate is the least the City can do because at the same time, many people are fully vaccinated and have been comfortable and safe without masks. He has not seen anything happening within the City that would cause the need for a mask mandate to be enacted. He also thanked Mayor Hepperly for doing a terrific job.

Joy Jacobs, 5408 Mohawk Lane, stated that she supports the mask mandate because there are children in the community that cannot get vaccinated, and it is important to keep them safe. She hopes the mandate will be approved and continues until it is decided that it is the best time to end it.

Brian Bartalos, 5634 Aberdeen Road, said that he contacted the Johnson County Board of Commissioners asking whether mask mandates will be enacted on a County-wide basis. He was told the County would not issue a mandate because there is not a political will County-wide to do so. That is telling to him. He understands there is a split between those in favor and those against a mandate in Fairway. If the opinions are split, he does not believe a mask mandate is the political will of the community.

Mr. Bartalos said when he hears people say that the City must do something, he thinks that is politically and legislatively untrue. People have to choose whether to wear masks and get vaccinated.

Mr. Bartalos also does not think the Ordinance is serious but is more like a Band-Aid. For example, the Ordinance would allow him to walk into Front Range with a mask on for the first 10 feet and then sit next to a stranger for an hour, both of them being without masks. He does not think that is medically sound. He agrees with Chief Thurlo that the mandate could lead to neighbors turning on each other or confrontations at Hen House. If the Council was serious about a mandate, it would shut down every business in Fairway Shops and every school until the curve flattened; however, the City would never do that.

Mr. Bartalos thinks that citizens should decide for themselves, and this is not the Council's job or why they were elected. Additionally, there is no threshold being set to cancel the mandate. The medical community may have their opinion on it but they are not business owners, economists or CPA's.

Christe Befort, 5407 Neosho, stated that she is in support of the mandate. She knows there is a tremendous amount of uncertainty in cause and effect and whether preventative measures are making an impact. She doubts those questions will ever be answered. The most important thing in making the decision is to listen to medical providers on the front lines who are dealing with the situation. Fairway is a small community and she has a lot of trust and faith in the people in Fairway. Even though she knows opinions on the mandate are divided, she does not think there are going to be a lot of negative unintended consequences to a mandate.

Julie Fern, 6145 Catalina Street, encouraged the Council to pass the mask mandate. She does not understand why it is a divisive topic. She explained that if she walked into Hen House without a shirt on, she would be arrested and she does not think that is any different from wearing a mask. Also, if she got in her car and did not put on her seat belt she is fairly certain that the police would pull her over and give her a ticket for not wearing a seat belt, which has no impact on anything other than her own safety.

City Administrator Nogelmeier acknowledged that Mr. Bartalos had requested to comment and that he was allowed to provide follow up comments for one minute.

Mr. Bartalos noted that no one on the Council can articulate a threshold for timing of the mask mandate so he wondered why there is a rush. As for the previous speaker's comments concerning going topless at Hen House, he stated there could be lots of ludicrous examples, but that does not make implementing a mask mandate right and does not make it the Council's job. As for comparing a mask mandate to tree ordinances, tree ordinances have nothing to do with personal choices about health decisions residents make for their families or decisions business owners make for their business.



City Administrator Nogelmeier stated that Mr. Barbour raised his hand to comment but he has already been granted two opportunities for comment and additional comment would not be allowed pursuant to the City's Public Comment Policy. He asked Mr. Barbour to email his comments to City Administrator Nogelmeier so they could be distributed to Councilmembers.

Matt Hastings, 5641 Fairway Road, stated that he is a physician in the community. He understands that issue is divisive and he knows people see the mandate as infringing on their choices. He explained that many of his colleagues in the medical field are making choices every day, working long hours and getting burned out. He knows masks may be an inconvenience, but he begged everyone to hang on and wear them a bit longer. He hopes the community can step up and look out for those in the medical community the same as the medical community has been looking out for neighbors in the community.

Mayor Hepperly asked for additional public comment. Hearing none, she closed public comment on this item.

Mayor Hepperly asked for additional discussion from the Council.

Councilwoman Brofsky thanked the public for the feedback they provided. She informed that she also received several emails from Fairway residents asking the Council to pass the mask mandate for a limited time.

Councilman Watkins stated that he also received emails and texts and they were split on a mandate. Regarding comments about mandating masks for people who are vaccinated versus people who are not vaccinated and more at risk. He asked City Attorney Cook if it was possible to differentiate in the Ordinance and apply the mask mandate to only those who are unvaccinated.

City Attorney Cook responded that making that differentiation would be similar to a vaccine passport and he would need to research that further to determine how that would be scrutinized by the Court.

Councilman Watkins asked Chief Thurlo whether those cities who previously enacted mask mandates had provided any information concerning how many complaints they received about people violating the mask mandate.

Chief Thurlo responded that he understands there were calls when prior mandates were implemented last fall. He does not know the volume but has asked for that information. The prior mandates allowed a business owner to contact the Police when someone was in their store without a mask and any charge would have been considered trespassing. The current proposed Ordinance allows individuals to contact the Police about another individual, which he thinks may be more divisive.

City Administrator Nogelmeier added that the proposed Ordinance is tailored differently than those passed previously by other cities. He has every confidence

that the Police Department will handle any issues with finesse. The goal is to make sure people are aware of the Ordinance and not to be heavy handed with enforcement.

Mayor Hepperly asked for further discussion from the Council. Hearing none, she asked for a motion.

Councilwoman Keys moved that the Council approve Ordinance #1755 – An Ordinance regulating Public Offenses within the City of Fairway, Kansas; amending Chapter 8 of the Code of Ordinances, City of Fairway, Kansas, to require the wearing of masks or other face coverings during the Covid-19 public health pandemic and recovery.

Councilwoman Buszek requested an amendment to the Ordinance extending the expiration date to February 18, 2022.

Councilwoman Keys accepted the friendly amendment to her motion.

Councilwoman Brofsky seconded the amended motion.

City Administrator Nogelmeier requested a roll call vote.

Councilman Rogers voted no.

Councilwoman Buszek voted yes.

Councilman Bailey voted yes.

Councilman Levin explained that both sides have compelling arguments. While he has expressed that he is essentially opposed to mandates, in order to err on the side of safety, he will vote yes.

Councilman Watkins explained that he does not like mandates and he believes residents have been doing a fabulous job making good decisions for themselves and their families. In addition, most businesses are already voluntarily mandating masks. However, he also understands that the health care community is struggling and thinks that implementing a mask mandate will send a strong message to those in the medical community that Fairway has their back. For those reasons and the fact that the Ordinance includes an expiration date, he will vote yes.

Councilwoman Brofsky voted yes.

Councilwoman Keys voted yes.

City Administrator Nogelmeier noted that the motion carried 6 to 1.

## ADJOURNMENT

Councilwoman Buszek moved to adjourn. Councilman Watkins seconded the motion and the motion carried unanimously.

There being no further business to come before the Council, the meeting was adjourned at 7:31 P.M.

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Mayor Melanie Hepperly

Attest:

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Barb Fox, Recording Secretary