

KANE COUNTY EXECUTIVE ORDER NO. E 2021 – 01 (amended)

**AN EXECUTIVE ORDER DESIGNATING KANE COUNTY AS LOW TRANSMISSION
UNDER THE STATE TRANSMISSION INDEX**

WHEREAS, Novel Coronavirus Disease 2019 (COVID-19) has been characterized by the World Health Organization as a worldwide pandemic caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), a virus that spreads easily from person to person and can cause serious illness or death;

WHEREAS, Lamont Smith, as the Chair of the Kane County Commission at the time, and the Chief Executive Officer of Kane County authorized to declare a local emergency, on March 18, 2021 issued Executive Order No. E 2020-02 which declared a local state of emergency due to the threat of the Coronavirus Disease (COVID-19), which order is incorporated fully herein; and

WHEREAS, the Kane County Commission previously recognized and extended the Local Declaration of Emergency, and subsequently extended it to July 1, 2021 under Kane County Resolution No. R 2020-21; and

WHEREAS, on March 6, 2020, Governor Gary Herbert issued an Executive Order declaring a State of Emergency due to infectious disease COVID-19 Novel Coronavirus, which Executive Order is incorporated fully herein; and

WHEREAS, Governor Herbert issued various additional Executive Orders declaring the regulations, restriction, or guidelines that should be followed by individuals and business during the State of Emergency; and

WHEREAS, the Executive Orders issued under a declared State of Emergency claim legal justification under Utah Code §53-2a-209, in that during the State of Emergency, “all orders, rules, and regulations promulgated by the governor... have the full force and effect of law;” and

WHEREAS, the Utah State Legislature, during the 2020 general session and in subsequent special sessions, extended Governor Herbert’s State of Emergency to June 30, and then again to August 20, and then allowed the order to expire at that time; and

WHEREAS, on August 20, 2020, Governor Herbert began to issue additional Executive Orders (beginning with Executive Order 2020-51) declaring a “new” State of Emergency due to the ongoing COVID-19 Pandemic, reauthorizing the various Executive Orders that promulgated the relevant restrictions, declaring a “new” State of Emergency approximately every thirty days, and similarly reauthorizing the restrictions every thirty days; and

WHEREAS, Kane County does not believe the Governor had the legal authority to reissue a State of Emergency and believes that it terminated when the State Legislature chose not to extend it, and

Kane County believes that any additional declarations of a State of Emergency, and the Executive Orders promulgated thereunder, had no legal validity; and

WHEREAS, the Governor ceased the practice of reauthorizing the State of Emergency and instead the State Department of Health declared a Public Health Emergency under Utah Code §26-23b-104(3) (see State Public Health Order 2020-17 Declaring a Statewide Public Health Emergency on October 14, 2020); and

WHEREAS, the additional authority given to the State Department of Health during a declared Public Health Emergency is only to trigger certain reporting requirements (Utah Code §26-23b-104(3)); and

WHEREAS, the State Department of Health continues to issue various State Public Health Orders such as State Public Health Order 2021-2 regarding masks in schools and State Public Health Order 2021-7 regarding other COVID-19 related restrictions including the State Transmission Index; and

WHEREAS, the stated authority to issue these State Public Health Orders is Utah Code §§ 26-1-10, 26-1-30, and 26-6-3; and

WHEREAS, under these statutes, the State Department of Health has the authority among other things to: 1) promote and protect the health and wellness of the people within the state; 2) investigate and control the causes of epidemic, infectious, communicable, and other diseases affecting the public health; and 3) provide for the detection, reporting, prevention, and control of communicable, infectious, acute, chronic, or any other disease or health hazard which the department considers to be dangerous, important, or likely to affect the public health (Utah Code § 26-1-30(3), (5) & (6) and § 26-6-3(1)); and

WHEREAS, to exercise this authority, the Executive Director of the Department of Health “is empowered to issue orders to enforce state laws and rules established by the department...” (Utah Code § 26-1-10); and

WHEREAS, the “Orders” issued by the Executive Director of the Department of Health cannot create new law but can only enforce “state laws and rules established by the department” (*Id.*); and

WHEREAS, state laws are created by the State Legislature and “rules established by the Department” are not established by orders of the Executive Director of the Department, but are promulgated by the Department through the administrative rule making procedures of the Utah Administrative Rulemaking Act (Utah Code §26-1-5(3)); and

WHEREAS, as a state agency, what constitutes a legal and valid Order or a Rule issued by the Department of Health is clearly defined by state law; and

WHEREAS, an “Order” can only include “agency action that determines the legal rights, duties, privileges, immunities, or other interests of *one or more specific persons, but not a class of persons*” (Utah Code §63G-3-102(14)); and

WHEREAS, a “Rule” is an agency’s “written statement” that “implements or interprets a state or federal legal mandate” and “*applies to a class of persons*” (Utah Code §63G-3-102(19)); and

WHEREAS, Rules and the rulemaking process are required when agency action “*authorizes, requires, or prohibits an action*” and “*applies to a class of persons or another agency*” (Utah Code §63G-3-201(2)); and

WHEREAS, rulemaking is not required and an Order from the Department of Health is sufficient when the agency action 1) applies only to internal agency management; 2) is a standardized agency manual for internal fiscal or administrative details over a governmental entity supervised by the Department of Health; or 3) is a policy that is only advisory, informative, or descriptive (Utah Code §64G-3-102(19)(c) & 201(4)); and

WHEREAS, State Public Health Order 2021-2 and 2021-7, and other similar “Orders,” authorize, require, or prohibit the actions of classes of people, (for example Order 2021-2 requires all school children, with some exceptions, to wear masks on the school bus and at school and Order 2021-7 requires all individuals in the state to wear a mask while in an indoor public setting), and clearly fall within the definition of a “Rule” which requires the rulemaking procedure in order to be legally valid, which has not taken place; and

WHEREAS, these State Public Health Orders have no legal effect and cannot be enforced, yet the State continues to act as if they are legally enforceable upon all individuals and businesses in the state and currently, under State Public Health Order 2021-7 has designated Kane County as a “High Transmission Area;” and

WHEREAS, under Utah Constitution Article V Section 1, individual executive officers of the State cannot be delegated or exercise any legislative authority, including the legislative authority that is purported to exist in order to issue the State Public Health Order’s mentioned herein; and

WHEREAS, Utah Labor Commission emergency rule R614-1-5f requiring employees to wear a mask while at work was legally issued and expired on March 9, 2021; and

WHEREAS, the Kane County Commission, as the body holding the legislative authority for Kane County, together with Commission Chair Andrew Gant, as the Chief Executive Officer of Kane County holding the emergency powers under the current local declaration of a state of emergency, are the governmental entity with the authority to impose or not impose local restrictions regarding the COVID-19 pandemic; and

WHEREAS, the Kane County jail houses approximately 180 state and local inmates and due to the incredible efforts of the Kane County Sheriff's Office to protect jail staff and jail inmates, was the last remaining jail in the state to have no cases of COVID-19; and

WHEREAS, in order to protect the jail from a potential outbreak of COVID-19 the jail has imposed varying levels of restrictions and strict protocols, depending on the circumstances in the community, that include removing all volunteer or other civilian access to inmates, limiting the number of arrestees brought to the jail and other types of jail bookings, moving other Sheriff's Office functions away from the jail, and limiting the movement of inmates; and

WHEREAS, in min February, the jail detected the first case among the jail population and is experiencing its first outbreak of COVID-19, which, as expected, has spread quickly among the jail population; and

WHEREAS, Kane County shows a long term trend of declining case numbers and declining test positivity rates which would qualify Kane County for a designation of Low Transmission under the Transmission Index if the data from the Kane County Jail was excluded from the analysis; and

WHEREAS, excluding the data reported from the Kane County jail, as of March 19, 2021, Kane County has a seven day average positivity rate of 5.2% and a fourteen day case rate of 72.25 per 100,000, with a declining trend; and

WHEREAS, because Kane County has a small population of residents and also has the highest number of contract state inmates per capita in the state, the number of positive COVID-19 cases coming from the jail severely skews the data regarding COVID-19 reported for Kane County communities; and

WHEREAS, Kane County has submitted a petition to Governor Cox and State Department of Health Director Saunders asking them to exclude Kane County Jail data when determining the Kane County Transmission Index Designation; and

WHEREAS, the State partially granted the petition and indicated that it would exclude data regarding only the State inmates housed at the Kane County jail in determining the transmission index for Kane County, but as of today's date, the State has made no change to the transmission index even though the data that includes county inmates would qualify Kane County for at least a Moderate Risk Transmission index; and

WHEREAS, including data from the Kane County Jail and imposing a higher level of restrictions than is necessary creates many problems in communities like those in Kane County, including: 1) local residents and business owners become fatigued by the restrictive conditions and over time become less likely to comply with the conditions when there is not sufficient evidence to support their necessity; 2) strict conditions imposed by the government prevent our local communities from developing a culture of protection that is much more likely to prevent the spread of the disease

over a long period of time; and 3) residents become distrustful of local and state government and are less likely to obey the law; and

WHEREAS, Kane County desires to ensure that individuals are armed with accurate information regarding COVID-19 so that they can take appropriate personal responsibility in ensuring that the individual, their family, and their community are protected from the risks of COVID-19; and

WHEREAS, Kane County has significant inherent protections from COVID-19 due to its rural nature with the largest population in Kane County being Kanab City, which has approximately 5,140 people and density of approximately 350 people per square mile, compared to an approximate 92,800 population and 1,215 people per square mile in Saint George, Utah and significantly higher along the Wasatch front; and

WHEREAS, Kane County has developed the “Above and Beyond Promise” campaign, where individual business owners, particularly those with a significant dependence on tourists, can obtain a designation that they promise to provide a level of protection from COVID-19 that is at or above the current social distancing recommendations promulgated by the State; and

WHEREAS, under the “Above and Beyond Promise” campaign, #KaneCountyStrong campaign, and other community outreach efforts, Kane County is developing a culture of protection where individuals and business owners initiate appropriate and effective safety measures that will protect our communities from the spread of COVID-19, making strict government initiated mandates unnecessary and less effective in the long run; and

WHEREAS, the Kane County Commission passed Resolution No. R 2020-04 which, in the event that the State failed to fully grant the County’s Petition to exclude jail data, delegated the Commission Chair the authority to review Kane County data and designate the appropriate transmission index for Kane County, which action would invalidate the State designation for Kane County; and

WHEREAS, the authorization for this Executive Order are found in Utah Code §53-2a-205, 208 and 209 and §17-53-201 and 301;

NOW THEREFORE, BE IT RESOLVED BY THE KANE COUNTY BOARD OF COMMISSIONERS, IN AND FOR KANE COUNTY, STATE OF UTAH, AS FOLLOWS:

1. Kane County is designated as Low Transmission Area (Low Transmission) under the State Transmission Index as described in the State Public Health Order regarding COVID-19 Restrictions, currently Order No. 2021-7.
2. In accordance with Kane County Resolution No. R 2020-04, this designation of Low Transmission shall apply as the official COVID-19 health recommendations for all residents, businesses, and visitors of Kane County.

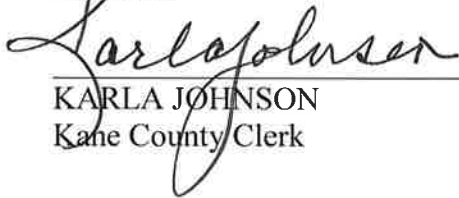
3. Kane County encourages all local businesses to review the recommendations for a Low Transmission Area, review their own business operations, consider the customers that patronize their business, and develop an appropriate plan for COVID-19 precautions. This plan should include adequate signage that will inform customers what precautions they need to take in order to enter the business.
4. Kane County strongly encourages all residents and visitors to review the recommendations for a Low Transmission Area, any additional risks for their own age and health conditions in relation to COVID-19 and take appropriate precautions. Additionally, when patronizing a local business, all individuals should comply with any and all requested precautions regarding COVID-19 put in place by that business.
5. This Order shall be in effect until July 1, 2021, or until further amended, modified, or rescinded, whichever occurs first.

IN WITNESS WHEREOF, I execute this order on this 19th day of March 2021.



Andrew Gant, Chair
Board of Commissioners
Kane County

ATTEST:



KARLA JOHNSON
Kane County Clerk

