IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BELLINO FIREWORKS, INC., Plaintiff, v. CITY OF ANKENY, IOWA; CITY OF BOONE, IOWA; CITY OF JOHNSTON, IOWA; and CITY OF PLEASANT HILL, IOWA, Defendants.	**No. 4:17-cv-212-RGE-CFB** **ORDER RE: BELLINO'S MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

On June 27, 1931, the downtown district of Spencer, Iowa, erupted in flames after a small spark ignited fireworks ready for sale. Five years later, the City of Remsen suffered a similar fate. These tragedies prompted Iowa to become one of the first states in the nation to ban the sale or use of consumer fireworks. The ban remained in place until May 2017, when Iowa enacted legislation permitting the sale and use of consumer fireworks for two designated periods each year. Shortly thereafter, the cities of Ankeny, Boone, Johnston, and Pleasant Hill enacted various ordinances regulating firework sales within their cities. Now, a Nebraska corporation in the business of selling fireworks, Bellino Fireworks, Inc., brings this lawsuit against the cities, alleging the ordinances are invalid under Iowa law.

Bellino filed a motion for a temporary restraining order and preliminary injunction. ECF No. 8. The matter came before the Court for hearing on June 23, 2017. Prelim. Inj. Hr'g Mins., ECF No. 22. Attorneys Timothy Hill and David Caves represented Bellino. *Id.* Attorneys Janice Thomas and Stephanie Koltookian represented the City of Boone and the City of Johnston. *Id.* Attorneys Hugh Cain and Brent Hinders represented the City of Ankeny and the City of Pleasant

Hill. *Id.* The parties argued in support of their respective positions. *Id.* The issue before the Court is whether Bellino has met its burden to show the necessity of a preliminary injunction under the relevant factors. For the following reasons, the Court grants in part and denies in part Bellino's motion for a preliminary injunction. Under the *Dataphase* factors, Bellino faces some irreparable harm and is likely to succeed on the merits of only some of its claims. The remainder of the *Dataphase* factors are neutral.

II. BACKGROUND

Given the limited purpose of a preliminary injunction "to preserve the relative positions of the parties until a trial on the merits can be held" and "the haste that is often necessary if those positions are to be preserved," the Court's determination on whether to grant an injunction rests on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, the Court's findings of fact and conclusions of law in this order are not binding at trial. *Id.*

On May 9, 2017, the Governor of Iowa signed into law Senate File 489 (SF 489), amending the Iowa Code to allow for the possession, sale, transfer, purchase, and use of consumer fireworks in the state. 2017 Iowa Legis. Serv. S.F. 489 (West); Compl., ECF No. 1 ¶ 1. The law regulates the sale and use of consumer fireworks, such as licensing procedures for wholesalers and retailers, limitations on the dates fireworks may be sold and used, and penalties.

Under SF 489, all consumer firework sellers are required to possess a license issued by the state fire marshal. S.F. 489 § 3. Licensing criteria include adherence to national firework-safety standards, possession of specified amounts of insurance, and restrictions on sale times. *Id.* Sales are permitted only during two specific time periods—June 1 to July 8, and December 10 to January 3. *Id.* The same time and date restrictions apply to the public's use of fireworks. *Id.* § 10.

In addition, SF 489 imposes penalties for selling fireworks to a person under eighteen years of age or using fireworks in contravention of an order by the state fire marshal. *Id.* The law recognizes cities may implement their own restrictions on fireworks use, stating "[a] city council may by ordinance or resolution prohibit or limit the use of consumer fireworks, display fireworks, or novelties." *Id.* § 8 (to be codified at Iowa Code § 364.2(6)).

Soon after SF 489's passage in May 2017, Bellino Fireworks, Inc., applied for licenses to sell consumer fireworks during the 2017 Fourth of July season. Bellino is a Nebraska corporation in the business of retail fireworks sales. ECF No. 1 ¶ 7. On June 15, 2017, Bellino received Iowa Retail Consumer Fireworks Registration licenses from the state fire marshal to sell fireworks in the cities of Ankeny, Boone, Johnston, and Pleasant Hill. *Id.* ¶¶ 34, 50, 59, 69; Memo. Supp. Pl.'s Mot. TRO & Prelim. Inj. 1, ECF No. 8-2. Bellino also signed leases with third parties in the cities to operate temporary sales structures at various locations. ECF No. 1 ¶¶ 34–35, 50–51, 59–60, 69–70.

On May 26, 2017, and as directed by the legislature in SF 489, the state fire marshal adopted rules to regulate fireworks in Iowa. Pl.'s Ex. 3, ECF No. 1-4 (the Emergency Rules). The Emergency Rules became effective on May 31, 2017. *Id.* at 2. Among other provisions, the Emergency Rules establish the permitted selling periods, requirements for consumer fireworks retailers, applicable licensing fees, and possible penalties for violations. *See id.*

In response to SF 489, the cities enacted ordinances to regulate the sale of fireworks within their city limits. ECF No. 1 ¶¶ 31, 44–47, 56, 66. The City of Ankeny enacted Ordinance 1917, which restricts consumer fireworks sales to M-2 Heavy Industrial Districts and requires sellers obtain a special permit. *Id.* ¶ 31; Pl.'s Ex. 7, ECF No. 1-8 (Ankeny City Ordinance 1917). The

City of Boone enacted Boone Code section 41.2, which bans the sale of consumer fireworks.[1] ECF No. 1 ¶ 44; Pl.'s Ex. 9, ECF No. 1-10 (Boone City Code § 41.2). Notwithstanding this ban, Boone Code sections 175.16–18 and 175.24 regulate potential fireworks sales by imposing structural requirements on general retailers in commercial districts. ECF No. 1 ¶¶ 45–47; ECF No. 1-10 (Boone City Code §§ 175.16–18 and 175.24). The City of Johnston enacted Johnston Code section 41.12, which bans the sale of consumer fireworks.[2] ECF No. 1 ¶ 56; Pl.'s Ex. 11, ECF No. 1-12 (Johnston City Code § 41.12). Finally, the City of Pleasant Hill enacted Ordinance 827, which requires sellers obtain a special permit, requires sellers carry insurance in amounts not less than $2 million per occurrence and $5 million in the aggregate, limits fireworks sales to permanent structures, and restricts consumer fireworks sales to I-1, I-2, and I-3 zoning districts. ECF No. 1 ¶ 66; Pl.'s Ex. 13, ECF No. 1-14 (Pleasant Hill Ordinance 827).

Following enactment of the ordinances, Bellino filed a lawsuit against the cities on June 16, 2017, seeking declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. ECF No. 1 ¶¶ 4–5. Bellino asserts the ordinances violate Iowa law and prevent it from selling fireworks at locations in the cities for which it has obtained state retail licenses and signed lease agreements with third parties. *Id.* ¶¶ 3, 34–42, 50–54, 59–63, 69–77. Bellino seeks a declaratory judgment against each of the cities stating the ordinances and any similar regulations restricting fireworks sales are preempted by Iowa law (Counts I–IV). *Id.* at 15–22. Bellino also

[1] On June 22, 2017, the Boone City Council deleted and replaced its law banning sales of fireworks. *See* Def. Boone's Ex. 4, ECF No. 13 (Boone City Ordinance 2237); Def. Boone's Resist. Pl.'s Request Prelim. Inj. and/or TRO 2, ECF No. 13. Boone asserts the new provision "does not regulate the sale of fireworks." ECF No. 13 at 2.

[2] On June 21, 2017, the Johnston City Council repealed and replaced its ban on the sale of consumer fireworks. Def. Johnston's Resist. Pl.'s Request Prelim. Inj. and/or TRO 1, ECF No. 11. These amendments were published—and became effective on—June 23, 2017. *See* Def. Johnston's Ex. 1, ECF No. 20 (Johnston Ordinance 979).

requests injunctive relief prohibiting the enforcement of the ordinances, as well as damages. *Id.* Bellino argues because of the ordinances, it "has suffered, and continues to suffer, monetary and non-monetary damages—including irreparable harm that can only be redressed by emergency relief." *Id.* ¶ 3.

Bellino contends the ordinances are not only preempted by SF 489, but also by House File 295 (HF 295). ECF No. 1 ¶ 3; 2017 Iowa Legis. Serv. H.F. 295 (West). Enacted March 30 2017, HF 295 restricts counties' and cities' regulation of "consumer merchandise." ECF No. 1 ¶¶ 14–16. It is not fireworks specific. House File 295 provides in pertinent part: "A city [or county] shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law." H.F. 295 § 3 (to be codified at Iowa Code § 364.3(3)).

Bellino filed a motion for a temporary restraining order and preliminary injunction prohibiting the cities from enforcing the ordinances. ECF No. 8. At the hearing on the motion for a preliminary hearing, Bellino withdrew its request for a temporary restraining order and stated it seeks a preliminary injunction only. Bellino requests immediate relief from the cities' bans and regulations on fireworks sales, arguing it "incurs significant damages with every day that passes." ECF No. 8-2 at 1.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 provides for preliminary injunctions. When contemplating such an order, the court considers the four *Dataphase* factors: "(1) the threat of irreparable harm to the moving party; (2) the weight of this harm as compared to any injury an injunction would inflict on other interested parties; (3) the probability that the moving party will succeed on the merits; and (4) the public interest." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563

F.3d 312, 316 (8th Cir. 2009) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). "The party seeking a preliminary injunction bears the burden of establishing the necessity of this equitable remedy." *Id.* Also, "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongly enjoined or restrained." Fed. R. Civ. P. 65(c).

IV. DISCUSSION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[T]he burden on the movant is heavy, in particular where, as here, 'granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits.'" *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (second alteration in original) (quoting *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993)). Ultimately, the court "has broad discretion when ruling on requests for preliminary injunctions." *Id.*

Application of the *Dataphase* factors is not a "rigid formula." *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). "No single factor in itself is dispositive; in each case all the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Calvin Klein Cosmetics Corp. v. Lenox Labs.*, 815 F.2d 500, 503 (8th Cir. 1987). The Court first considers the likelihood of success on the merits of Bellino's claims.

A. Likelihood of Success on the Merits

Under the likelihood of success on the merits prong, the court assesses whether the plaintiff has a "substantial likelihood" of prevailing. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (en banc) (citing *Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995)).

In other words, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (quoting *Calvin Klein*, 815 F.2d at 503 (quoting *Dataphase*, 640 F.2d at 113)). This factor "must be considered and balanced with the comparative injuries of the parties." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2948.3 (3d ed. 2017) (citing, e.g., *Fennell v. Butler*, 570 F.2d 263 (8th Cir. 1978)). The likelihood of success on the merits prong is considered "the most significant" factor, though "no single factor is determinative." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (quoting *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013)).

Here, Bellino asserts four claims for declaratory judgment and injunctive relief against the cities, with one claim against each city. *See* ECF No. 1 ¶¶ 78–85 (Count I against Ankeny); *id.* ¶¶ 86–93 (Count II against Boone); *id.* ¶¶ 94–101 (Count III against Johnston); *id.* ¶¶ 102–09 (Count IV against Pleasant Hill). The cities' ordinances, Bellino contends, "impermissibly regulate[] the sale of consumer fireworks." *Id.* ¶¶ 81, 89, 97, 105. Bellino claims "the applicable state law"—i.e., HF 295, SF 489, and the Emergency Rules—preempt these ordinances through the doctrines of express preemption, implied preemption, and conflict preemption. *Id.* ¶¶ 82, 90, 98, 106.

In considering whether Bellino is likely to succeed on the merits of its claims challenging the cities' ordinances, the Court must determine whether the Iowa legislature has expressly or impliedly preempted local action.

1. Home rule amendment and preemption

In 1968, Iowa amended its constitution to recognize the concept of legislative "home rule." *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014). The home rule amendment of the Iowa Constitution states:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government . . . . The rule or proposition that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const. art. III, § 38A. This amendment reversed an earlier power structure between municipalities and the legislature. Iowa previously followed the "Dillon Rule," named after Iowa Chief Justice John F. Dillon, "declar[ing] that municipalities were creatures of the legislature and had only those powers expressly granted by the legislature." *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 n.1 (Iowa 2008). "The purpose of the home rule amendment was to give local government the power to pass legislation over its local affairs subject to the superior authority of the legislature." *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 195 (Iowa 2012) (quoting *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010)). The Iowa Code reaffirms the principle announced in the home rule amendment, stating: "The enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution of the State of Iowa. A city may exercise its general powers subject only to limitations expressly imposed by a state or city law." Iowa Code § 364.2(2). Thus, in Iowa, "municipalities ordinarily have the power to determine local affairs as they see fit unless the [Iowa] legislature has provided otherwise." *Madden*, 848 N.W.2d at 49.

The legislature may "provide[] otherwise" by enacting laws that "preempt" municipalities' authority over certain matters. *Id.* "The preemption doctrine dictates that municipalities cannot act if the legislature has directed otherwise." *Hensler*, 790 N.W.2d at 585; *accord Mall Real Estate*,

818 N.W.2d at 195 ("[U]nder legislative home rule, the legislature retains the unfettered power to prohibit a municipality from exercising police powers, even over matters traditionally thought to involve local affairs." (quoting *Seymour*, 755 N.W.2d at 538)). When the legislature preempts municipal power—and thus asserts its sovereignty—the "legislative power trumps the authority of local government to do the same." *Hensler*, 790 N.W.2d at 585. Yet although "[a] city may not set standards and requirements which are lower or less stringent than those imposed by state law, [it] may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." Iowa Code § 364.3. Simply put, municipalities retain authority to impose laws stricter than those imposed by the state, except where the legislature has preempted such action.

The Iowa Supreme Court has recognized different forms of preemption: express preemption and implied preemption, which includes conflict preemption and field preemption. *Mall Real Estate*, 818 N.W.2d at 195; *Madden*, 848 N.W.2d at 48.

"Express preemption applies when the legislature has explicitly prohibited local action in a given area." *Mall Real Estate*, 818 N.W.2d at 195 (quoting *Hensler*, 790 N.W.2d at 585). This "is consistent with the notion that '[l]imitations on a municipality's power over local affairs are not implied; they must be imposed by the legislature.'" *Id.* (alteration in original) (quoting *Seymour*, 755 N.W.2d at 558). "In cases involving express preemption, the specific language used by the legislature ordinarily provides the courts with the tools necessary to resolve any remaining marginal or mechanical problems in statutory interpretation." *Seymour*, 755 N.W.2d at 538. "Where the legislature seeks to prohibit municipal action in a particular subject area, express preemption offers the highest degree of certainty with the added benefit of discouraging unseemly internecine power struggles between state and local governments." *Id.*

The Iowa Supreme Court has analyzed express preemption on several occasions. For example, in *Mall Real Estate, L.L.C. v. City of Hamburg*, the court found a statute which expressly barred municipalities from enacting ordinances regulating obscene material acted to expressly preempt a local ordinance regulating nude and seminude dance performances and associated businesses. 818 N.W.2d at 195–96. The court reached the opposite conclusion in *Hensler v. City of Davenport*, where the court found a local parental responsibility ordinance was not expressly preempted because the jurisdictional statute "[b]y its terms . . . does not explicitly prohibit the imposition of sanctions by a city on a parent based on a child's alleged delinquency." 790 N.W.2d at 585.

The Iowa Supreme Court has held conflict preemption applies only "where a local ordinance prohibits what a state statute allows or allows what a state statute prohibits." *Seymour*, 755 N.W.2d at 542; *accord Hensler*, 790 N.W.2d at 585. For conflict preemption to apply, an "ordinance must be 'irreconcilable' with state law." *Madden*, 848 N.W.2d at 49 (quoting *Hensler*, 790 N.W.2d at 585). In determining whether state law and a municipal ordinance are "irreconcilable," a court must consider whether "the ordinance cannot exist harmoniously with a state statute because the ordinance is diametrically in opposition to it." *Seymour*, 755 N.W.2d at 538. Similarly stated, the Iowa Supreme Court has interpreted "irreconcilable" as meaning "the conflict must be unresolvable short of choosing one enactment over the other." *Id.* at 541. "[T]he conflict must be obvious, unavoidable, and not a matter of reasonable debate." *Id.* at 539.

"The legal standard for [conflict preemption's] application is demanding." *Id.* The Iowa Supreme Court's conflict preemption doctrine is well established. *See, e.g.*, *Madden*, 848 N.W.2d at 49–51 (holding an Iowa statute, permitting municipalities to enact regulations regulating the maintenance of sidewalks, did not impliedly preempt—under conflict preemption—a municipal

ordinance imposing liability on certain property owners for damages arising from the property owner failing to maintain the sidewalks); *Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 680 (Iowa 2006) (holding an Iowa statute providing that a state governmental agency shall establish certain administrative fees that local authorities will assess impliedly preempted—under conflict preemption—a municipal ordinance authorizing the municipality to charge an additional administrative fee); *James Enters., Inc. v. City of Ames*, 661 N.W.2d 150, 153–54 (Iowa 2003) (holding that an Iowa law allowing designated smoking areas in restaurants impliedly preempted—under conflict preemption—a municipal ordinance prohibiting smoking areas in restaurants). When considering whether conflict preemption applies, a court "presume[s] that the municipal ordinance is valid." *Seymour*, 755 N.W.2d at 539. And a court should make "every effort . . . to harmonize a local ordinance with a state statute." *Id.* at 542.

The doctrine of field preemption "occurs when the legislature has 'so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law.'" *Hensler*, 790 N.W.2d at 585 (quoting *Seymour*, 755 N.W.2d at 539). "[T]he test for field preemption is stringent. Extensive regulation of area alone is not sufficient." *Seymour*, 755 N.W.2d at 539; *accord Hensler*, 790 N.W.2d at 585–86. Instead, "there must be some clear expression of legislative intent to preempt a field from regulation by local authorities, or a statement of the legislature's desire to have uniform regulations statewide." *Hensler*, 790 N.W.2d at 586 (quoting *Seymour*, 755 N.W.2d at 539). The Iowa Supreme Court has further declared: "The notion behind field preemption is that the legislature need not employ 'magic words' to close the door on municipal authority. Yet, courts are not to speculate on legislative intent, even in a highly regulated field. There must be persuasive concrete evidence of an intent to preempt the field in the language

that the legislature actually chose to employ." *Seymour*, 755 N.W.2d at 539; *accord Hensler*, 790 N.W.2d at 586.

2. Statutory interpretation

When analyzing Iowa law and municipal ordinances under any of the above preemption doctrines, the "determination of whether a local ordinance is preempted by state law is a matter of statutory construction." *Seymour*, 755 N.W.2d at 537. If state law includes preemption language in multiple sections, a court is to "look at these statutes together to determine whether state law preempts the [city's] ordinance." *Mall Real Estate*, 818 N.W.2d at 194.

The Iowa Supreme Court also has declared "[u]nless the long-deceased Dillon Rule is resurrected, the notion that the mere failure of the legislature to authorize [municipal action] invalidates municipal action is without merit. . . . In the context of state-local preemption, the silence of the legislature is not prohibitory but permissive." *Seymour*, 755 N.W.2d at 543 (citing *Cameron v. City of Waco*, 8 S.W.2d 249, 254 (Tex. Civ. App. 1928) (holding the statutory interpretation rule *expressio unius est exclusio alterius* does not apply when determining the scope of a municipality's powers under the home rule doctrine). "While legislative silence on [an] issue may be a powerful indicator that the legislature has not [regulated on an issue] *under the statute*, [the Iowa Supreme Court] do[es] not think legislative silence can be interpreted as a *prohibition of local action* under home rule in light of [the] obligation to harmonize and reconcile a statute with an ordinance whenever possible." *Madden*, 848 N.W.2d at 50.

3. The cities' ordinances

Bellino challenges the cities' ordinances as impermissibly regulating consumer fireworks in some manner, claiming the legislature has preempted the cities from enacting these ordinances. *See generally* ECF No. 1. Specifically, Bellino argues each city's ordinance "exceeds [that city's]

legislative authority" and "is preempted by Iowa law." ECF No. 1 ¶¶ 30, 33, 44–45, 49, 56–58, 65, 68.

The Court must determine whether Bellino is likely to succeed on the merits of its claim that Iowa law—based on SF 489, HF 295, and the Emergency Rules—preempts each city's ordinances under the doctrines of express preemption, conflict preemption, or field preemption. The Court first addresses Bellino's field-preemption argument. The Court then addresses Bellino's preemption arguments as applied to the type of municipal regulation (e.g., zoning laws, insurance requirements, etc.), as many of the ordinances regulate substantially similar conduct.

4. Bellino's field-preemption claims

The Court first considers whether the legislature has preempted the field of consumer fireworks regulation such that the cities' ordinances regulating fireworks sales are unlawful under field preemption. Bellino contends "there is a clear expression of legislative intent to preempt local regulation of consumer merchandise that 'sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law.'" ECF No. 8-2 at 9 (quoting H.F. 295 § 3 (to be codified at Iowa Code § 364.3(3)(c)(1))).

As discussed above, field preemption applies "when the legislature has so covered a *subject* by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law." *Seymour*, 755 N.W.2d at 539 (emphasis added). Because Bellino claims this statutory subject matter is the legislature's regulation of *consumer merchandise* and because the cities' ordinances regulate consumer merchandise (i.e., consumer fireworks),[3] the Court analyzes HF 295, SF 489,

[3] House File 295, amending Iowa Code section 364.3, defines "[c]onsumer merchandise" as "merchandise offered for sale or lease, or provided with a sale or lease, primarily but not exclusively for personal, family, or household purposes, and includes any container used for

and the Emergency Rules together to determine whether the legislature has "so covered [the field of consumer merchandise] by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law"—thus preempting the cities' ordinances through field preemption. Bellino also argues in its reply brief that the Emergency Rules adopt the safety requirements in National Fire Protection Association (NFPA) standard 1124, which "reflect[] the comprehensive regulation of the field already in effect by the State of Iowa." ECF No. 19 at 2–3.

Here, the Court finds no "persuasive concrete evidence of an intent to preempt the field in the language that the legislature actually chose to employ." *Seymour*, 755 N.W.2d at 539. House File 295 does not appear to indicate the legislature intended to so cover the field of "consumer merchandise"—or consumer fireworks—as to preempt the field of regulation over this subject. In cases where the Iowa Supreme Court concluded field preemption applied, the legislature spoke far more clearly regarding its intent to occupy a field of regulation. For example, in *Iowa Grocery Industry Association v. City of Des Moines*, the Iowa Supreme Court held the legislature "reserved to itself the general authority to regulate the alcoholic beverage industry in Iowa," while nonetheless "g[iving] limited regulatory powers to local authorities." 712 N.W.2d at 679. There, the relevant section of the Iowa Code provided:

> This chapter shall . . . be deemed *an exercise of the police power of the state*, for the protection of the welfare, health, peace, morals, and safety of the *people of the state*, and all its provisions shall be liberally construed for the accomplishment of that purpose. It is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, *except as provided in this chapter*."

Id. at 679 (quoting Iowa Code § 123.1 (2003)). The Iowa Code chapter then listed a number of exceptions where municipalities retained their home rule powers. *See id.* at 679–80 (quoting and

consuming, carrying, or transporting such merchandise." The parties agreed at the hearing that consumer fireworks are consumer merchandise under this definition.

citing Iowa Code ch. 123). In contrast, the Iowa Supreme Court in *Seymour* found Iowa's traffic regulations and enforcement not sufficiently comprehensive so as to occupy the field. 755 N.W.2d at 543–44. The court found municipalities were thus not preempted from enacting traffic ordinances that do not conflict with state law. *Id.*

The language of HF 295 does not demonstrate a likelihood the legislature intended to occupy the entire field of regulation regarding consumer merchandise. This language is not as sweeping and comprehensive as the language the Iowa Supreme Court analyzed in *Iowa Grocery*. Moreover, the text of HF 295 regarding consumer merchandise—or of SF 489 or the Emergency Rules regarding consumer fireworks—is not as comprehensive as, in comparison, Iowa's traffic regulations and enforcement mechanisms. *Cf. Seymour*, 755 N.W.2d at 533 (holding Iowa's traffic regulations and enforcement mechanisms were not sufficiently comprehensive as to indicate the legislature intended to preempt the entire field of regulation).

The Court therefore concludes Bellino is unlikely to succeed on the merits of its claim that HF 295, SF 489, and the Emergency Rules have "so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law." *Id.* at 539. Accordingly, the Court finds Bellino is unlikely to succeed on the merits of its claim field preemption prohibits the cities from regulating consumer merchandise or fireworks.

5. Boone's and Johnston's fireworks-sales bans

Bellino challenges Boone's and Johnston's ordinances that previously banned selling fireworks within city limits (the fireworks-sales bans). ECF No. 1 ¶¶ 43–63; *see* Pl.'s Ex. 9 at 3, ECF No. 1-10 (Boone City Code § 41.12(2)); Pl.'s Ex. 11 at 3, ECF No. 1-12 (Johnston City Code § 41.12(2)). Bellino contends Iowa law "expressly preempts municipal efforts to ban or regulate the sale of consumer fireworks," ECF No. 8-2 at 7 (emphasis removed), and the fireworks-sales

bans are preempted by state law through express preemption, conflict preemption, and field preemption, *id.* at 7–9, 13–16.

On June 21, 2017, the Johnston City Council repealed and replaced the provision of the Johnston City Code that prohibited selling fireworks. ECF No. 11 at 1. The Johnston ordinance making these changes was published—and became effective on—June 23, 2017. *See* Def. Johnston's Ex. 1, ECF No. 20 (Johnston Ordinance No. 979). Also, Boone claims that on June 22, 2017, the section of the Boone City Code prohibiting selling fireworks "was deleted and replaced" with a new provision that "does not regulate the sale of fireworks." ECF No. 13 at 2.

Based on these facts, Boone and Johnston assert Bellino's challenges to their fireworks-sales bans are moot. *See* ECF No. 13 at 6–7; ECF No. 11 at 5. Boone concedes in its resistance that it "will not enforce the former version of" the Boone Code prohibiting fireworks sales. ECF No. 13 at 4. Boone and Johnston asserted at the hearing on the motion for injunctive relief that, to the extent any municipal code still bans selling consumer fireworks, neither city would attempt to enforce such a ban. Also at the hearing, Bellino accepted Boone's and Johnston's assertions and did not dispute its challenges to Boone's and Johnston's bans on selling consumer fireworks were moot.

Because the parties agree the challenges to Boone's and Johnston's ordinances banning sales of consumer fireworks are moot, the Court does not address these ordinances.

6. Boone's and Pleasant Hill's temporary-structures bans

Bellino challenges Boone's and Pleasant Hill's ordinances that ban selling consumer fireworks from temporary structures (the temporary-structure bans). ECF No. 1 ¶¶ 43–54, 64–77. Bellino contends Iowa law "expressly preempts municipal efforts to ban or regulate the sale of consumer fireworks," ECF No. 8-2 at 7 (emphasis removed), and the temporary-structure bans are

preempted by state law under the doctrines of express preemption, conflict preemption, and field preemption, *id.* at 7–9, 11–14, 16–19. The Court has previously addressed the likelihood of success on the merits under field preemption. Because the Court finds Bellino's challenge to Boone's and Pleasant Hill's ordinances banning selling consumer fireworks from temporary structures are likely to be resolved under the conflict preemption doctrine, the Court does not address whether Bellino's challenges to these ordinances under the express preemption doctrine are likely to succeed on the merits.

Bellino claims SF 489 and HF 295 impliedly preempt—through conflict preemption—Boone's and Pleasant Hill's temporary-structure bans, prohibiting retailers like Bellino from selling fireworks out of temporary structures. *Id.* at 11–12, 14, 17. In response, Boone attempts to characterize its temporary-structures ban as a zoning ordinance. *See* ECF No. 13 at 2. Pleasant Hill responds its temporary-structures ban "is a life safety requirement" and thus "a necessity." ECF No. 12-1 at 16.

In support of its conflict preemption argument, Bellino cites SF 489 which provides, "A license issued to a retailer . . . shall allow the licensee to sell [certain fireworks]." SF 489 § 3 (to be codified at Iowa Code § 100.19(3)(b)). Senate File 489 further provides:

> The state fire marshal shall adopt rules to . . . [p]ermit a retailer . . . issued a license pursuant to this section to sell consumer fireworks . . . at the following locations as specified:
>
> > (1) At a permanent building . . . between June 1 and July 8 and between December 10 and January 3 each year, all dates inclusive.
> >
> > (2) At a temporary structure . . . between June 13 and July 8 each year, both dates inclusive.

Id. § 3 (to be codified at Iowa Code § 100.19(4)(c)). The state fire marshal adopted rules providing for the same: "A retailer . . . may sell the consumer fireworks . . . at a temporary structure between June 13 and July 8 each year, both dates inclusive." Pl.'s Ex. 3, ECF No. 1-4 at 6.

Boone City Code sections 175.16–18 and 175.24 appear to restrict Bellino to selling consumer fireworks only "within a fully enclosed building," thus prohibiting Bellino from selling consumer fireworks from temporary structures. Pl.'s Ex. 9 at 5, 8, 11, ECF No. 1-10. Pleasant Hill Ordinance 827 also bans selling fireworks within temporary structures. Pl.'s Ex. 13 at 3, ECF No. 1-14 (to be codified at Pleasant Hill Municipal Code § 41.11(4)(B)). In short, whereas Iowa law permits licensed fireworks retailers—like Bellino—to sell consumer fireworks from temporary structures, Boone's and Pleasant Hill's ordinances prohibit such sales.

James Enterprises, Inc. v. City of Ames guides this Court's analysis. 661 N.W.2d 150. There, Iowa law specifically allowed persons to smoke in designated smoking sections in restaurants. *Id.* at 152–53 (quoting Iowa Code § 142B.2 (2001) (repealed 2008)). The challenged city ordinance restricted the hours when smoking was allowed in restaurants. *Id.* at 151. The court concluded the city did not impose an additional burden or standard before a person was entitled to smoke in the restaurants; rather, the city specifically banned smoking in restaurants at certain times, an irreconcilable conflict with state law. *See id.* at 153–54. The Iowa Supreme Court thus held the state law allowing smoking in restaurants preempted the city ordinance restricting smoking in restaurants. *Id.*

Similarly here, the Iowa legislature has authorized fireworks retailers with a state-issued license to sell fireworks from permanent structures and temporary structures. Whereas state law permits sales from temporary structures, Boone's and Pleasant Hill's temporary-structures bans prohibit these sales entirely. This "conflict [is] unresolvable short of choosing one enactment over the other." *Seymour*, 755 N.W.2d at 541. This conflict is greater than that posed by the municipal ordinance in *James Enterprises* that restricted a permitted activity (i.e., smoking) to certain times of the day. *See* 661 N.W.2d at 153. Boone's and Pleasant Hill's ordinances ban sales from

temporary structures whole-cloth; there is no additional municipal requirement that would still permit Bellino to sell from temporary structures should it comply with the municipal ordinance.

Because these "local ordinance[s] prohibit[] what [the] state statute allows," *Seymour*, 755 N.W.2d at 542, there appears to be a conflict between the state's and municipalities' laws. The temporary-structure provisions of these laws therefore appear to be irreconcilable with Iowa law. This suggests conflict preemption applies to bar Boone's and Pleasant Hill's ordinances banning the sale of fireworks from temporary structures.

To the extent Pleasant Hill argues its temporary-structures ban "is a life safety requirement" and thus "a necessity," ECF No. 12-1 at 16, the Court knows of no legal reason—nor has Pleasant Hill identified one—that would allow the Court to uphold an otherwise unlawful municipal ordinance. Safety concerns and policy considerations regarding these ordinances and statutes are better left to the people's representatives, not the courts. *Cf. Seymour*, 755 N.W.2d at 539 ("Field preemption is a narrow doctrine that cannot be enlarged by judicial policy preferences."). The legislature and the state fire marshal weighed these concerns when enacting SF 489 and the Emergency Fire Rules, and adopting by reference NFPA standard 1124. It is not this Court's role to substitute another policy preference for a policy chosen by the people's representatives.

7. Ankeny's, Johnston's and Pleasant Hill's additional permits requirements

Bellino asserts Iowa law preempts Ankeny's, Johnston's, and Pleasant Hill's municipal ordinances requiring Bellino to obtain from the relevant city a specific permit in order to sell fireworks (the additional permit requirements).[4] ECF No. 1 ¶¶ 29-42, 64–77; ECF No. 19 at 4.

[4] The Court finds it permissible to address Johnston's additional permit requirement, despite the deficiencies in Bellino's pleadings as discussed below in Part I.A.10, because, in its reply brief,

Bellino contends Iowa law "expressly preempts municipal efforts to ban or regulate the sale of consumer fireworks," ECF No. 8-2 at 7 (emphasis removed), and the additional permit requirements are preempted by state law under the doctrines of express preemption, conflict preemption, and field preemption, *id.* at 7–9, 11–13, 16–19. The Court has previously addressed the likelihood of success on the merits under field preemption. Because the Court finds Bellino's challenges to Ankeny's, Johnston's, and Pleasant Hill's ordinances requiring an additional permit to sell fireworks are likely to be resolved under the express preemption doctrine, the Court does not address whether Bellino's challenges to these ordinances through the conflict preemption doctrine are also likely to succeed on the merits.

Ankeny, Johnston, and Pleasant Hill each enacted additional permit requirements requiring a person who sells fireworks to first obtain a permit or license from the city. Ankeny Ordinance 1917 provides: "Notwithstanding anything contained in this Chapter 132, the sale of [consumer fireworks] shall not be subject to this Chapter but shall require a Special Use Permit in accordance with Ankeny Municipal Code Sections 192.13 and 196.02." Pl.'s Ex. 7 at 3, ECF No. 1-8. Ankeny Municipal Code section 192.13(1)(C), as amended by Ankeny Ordinance 1917, then requires a Special Use Permit to use land as a "Fireworks Retail Sales Facility."[5] *Id.* at 2. Similarly, Johnston Ordinance 979 provides "Consumer fireworks sales facilities shall conform to . . . Chapter[] . . . 173 of the City of Johnston Code of Ordinances." Def. Johnston's Ex. 1 at 6, ECF No. 20.

Bellino cites the specific requirement and provision relating to the additional requirement for selling fireworks in Johnston. *See* ECF No. 19 at 4.

[5] A "Fireworks Retail Sales Facility" is defined as "a retail sales facility for the sale of" certain consumer fireworks. Pl.'s Ex. 7 at 2, ECF No. 1-8.

Chapter 173 then mandates a "Temporary Use Permit" for "temporary uses"[6] on most types of property. Johnston, Iowa, Code § 173.03 (2007). Pleasant Hill Ordinance 827 also bans selling fireworks without a special permit issued from the city: "No person, retailer, consumer group or otherwise shall sell or display any fireworks . . . without possessing a permit as required under Chapter 122 of the Code of Ordinances, City of Pleasant Hill . . . ." Pl.'s Ex. 13 at 3, ECF No. 1-14.

Bellino's express-preemption argument is based on HF 295, which provides: "A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law." H.F. 295 § 3.

The Court concludes this language is likely express-preemption language prohibiting municipalities from adopting ordinances restricted under the statute. Based upon HF 295 section 3, the legislature appears to have "explicitly prohibited local action in a given area." *Mall Real Estate*, 818 N.W.2d at 195 (quoting *Hensler*, 790 N.W.2d at 585). In fact, HF 295's prohibitory language is similar to an Iowa Code provision the Iowa Supreme Court analyzed in another preemption case. *Compare* H.F. 295 § 3, *with Mall Real Estate*, 818 N.W.2d at 194 (quoting Iowa Code § 728.11). In *Mall Real Estate*, the Iowa Supreme Court held a state law—providing "no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials"—expressly preempted municipalities from enacting laws relating to the statute's subject. 818 N.W.2d at 194–95.

[6] "Temporary use" is defined as "[a]ny sales in any nonresidential district including, but not limited to the sales of fresh fruits/vegetables, baked goods, and hand crafted items." Johnston Code § 173.02.

Similarly here, the Court finds HF 295 likely is express-preemption language, barring the cities from adopting certain ordinances. The issue then becomes whether, under this express-preemption language, Ankeny's, Johnston's, or Pleasant Hill's additional permit requirements "set[] standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law." H.F. 295 § 3. More specifically, the Court must determine whether the ordinances "set[] standards or requirements regarding the sale or marketing of" consumer fireworks, as the parties do not dispute consumer fireworks qualify as consumer merchandise. *Id.*

Ankeny Ordinance 1917 provides "the sale of [consumer fireworks] . . . shall require a Special Use Permit in accordance with Ankeny Municipal Code Sections 192.13 and 196.02." Pl.'s Ex. 9 at 3, ECF No. 1-8 (to be codified at Ankeny City Code § 132.21). Johnston Ordinance 979 and Johnston Code section 173.02, together, subject "Consumer fireworks sales facilities" to the requirement that an additional permit must be acquired for any sales in any nonresidential district. ECF No. 20 at 6; Johnston Code § 173.02. The City of Pleasant Hill enacted Ordinance 827, which requires fireworks sellers to obtain a special permit from the city. ECF No. 1 ¶ 66; Pl.'s Ex. 13, ECF No. 1-14.

The Court finds Bellino is likely to succeed on the merits of its claim that HF 295 expressly preempts Ankeny's, Johnston's, and Pleasant Hill's additional permit requirements. House File 295 expressly preempts municipalities from enacting ordinances "set[ting] standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to," requirements under state law. Yet these cities' laws require Bellino, as a consumer fireworks retailer, to acquire additional city-issued permits to sell fireworks. Because these ordinances impose an additional requirement regarding Bellino's sale of fireworks, the ordinances

likely impose a "standard[] or requirement[] regarding the sale or marketing of consumer merchandise that are different from, or in addition to," requirements imposed by state law. H.F. 295 § 3.

Bellino is therefore likely to succeed on the merits of its claim that HF 295 expressly preempts Ankeny's, Johnston's, and Pleasant Hill's ordinances requiring an additional permit to sell fireworks.

8. Pleasant Hill's additional insurance requirement

Bellino also challenges Pleasant Hill's ordinance requiring persons seeking to sell fireworks to first obtain certain amounts of insurance coverage. ECF No. 8-2 at 7–9, 16–19. Bellino contends Iowa law "expressly preempts municipal efforts to ban or regulate the sale of consumer fireworks," *id.* at 7 (emphasis removed), and Pleasant Hill's ordinance establishing higher insurance coverages than those required by the state are preempted by state law under the doctrine of express preemption, conflict preemption, and field preemption, *id.* at 7–9, 16–19. The Court has previously addressed the likelihood of success on the merits under field preemption.

Pleasant Hill Ordinance 827 provides: "No person, retailer, consumer group or otherwise shall sell or display any fireworks . . . without providing evidence of insurance in the amounts not less than $2,000,000 per Occurrence and $5,000,000 in the Aggregate." Pl.'s Ex. 13 at 3, ECF No. 1-14; *see also* ECF No. 1 ¶ 66.

Pleasant Hill responds that "[n]othing prevents [it] from requiring a higher insurance amount than mentioned within [SF 489] or the Fire Marshal's Emergency Rules" and that SF 489's and the Emergency Rules's provision requiring "at least" the specified amounts of insurance, establishes a floor, rather than a ceiling, for municipal action. ECF No. 12-1 at 16. The clear implication of using the phrase "at least," Pleasant Hill contends, "was that a city or municipality

may choose to have a higher number." *Id.* Pleasant Hill's argument appears to undermine Bellino's conflict-preemption argument that by requiring insurance of "at least" $1 million per occurrence and $2 million in the aggregate, the legislature likely did not preempt municipalities from requiring proof of insurance above this range.

Yet Pleasant Hill's insurance requirement is likely to fail based, not on conflict preemption under SF 489, but on express preemption under HF 295. Similar to the discussion above regarding the special-permit requirements, HF 295 likely expressly preempts Pleasant Hill's insurance-requirements ordinance. As discussed above, HF 295 likely is express-preemption language, barring municipalities like Pleasant Hill from adopting certain ordinances. House File 295 prohibits municipal "standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law." Pleasant Hill's insurance-requirements ordinance requires "evidence of insurance in the amounts not less than $2,000,000 per Occurrence and $5,000,000 in the Aggregate." Pl.'s Ex. 13 at 3, ECF No. 1-14 (emphasis added). Senate File 489 requires $1 million and $2 million, respectively.

The Court therefore finds Pleasant Hill's insurance-requirements ordinance is likely a "standard[] or requirement[] regarding the sale or marketing of consumer merchandise that [is] different from, or in addition to, any requirement established by state law." H.F. 295 § 3. Because the legislature has expressly preempted such ordinances, Bellino is likely to succeed on its claim that Pleasant Hill's insurance-requirements ordinance is preempted by state law.

9. Ankeny's and Pleasant Hill's zoning ordinances

Bellino asserts SF 489 and HF 295 expressly and impliedly preempt Ankeny and Pleasant Hill's zoning ordinances. Ankeny Ordinance 1917 limits the sale of consumer fireworks to zone

M-2. Pleasant Hill Ordinance 827 limits the sale of consumer fireworks to zones I-1, I-2, and I-3. Johnston Ordinance 979 requires "a city issued Certificate of Zoning Compliance."[7]

Bellino centers its express preemption argument as to the zoning ordinances on the language of HF 295 amending Iowa Code section 364.3. House File 295 states: "A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any requirement established by state law." Bellino cites the Iowa Supreme Court's decision in *Mall Real Estate v. City of Hamburg*, comparing the language of the express preemption clause in that case, and concluding the language in HF 295 is similarly an express preemption clause and operates to preempt Ankeny's and Pleasant Hill's zoning ordinances. ECF No. 8-2 at 6 (citing *Mall Real Estate*, 818 N.W.2d at 200–01).

Ankeny and Pleasant Hill respond neither SF 489 nor HF 295 restrict their zoning power. The cities rely on the language in Iowa Code chapter 414, which provides for municipal zoning authority, and draw attention to the fact that in neither bill did the legislature amend Iowa Code chapter 414. ECF No. 12-1 at 14. The cities state the ordinances merely exercise the cities' zoning power—a restriction on where fireworks can be sold rather than if fireworks can be sold—which is not restricted by the broad pronouncement in HF 295. *Id.*

Zoning is a well-established municipal function. *See* Iowa Code chapter 414; *accord Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 40 (Iowa 2016) (citing 101A C.J.S. *Zoning and Land Planning* § 2, at 18–19 (2016)). Iowa Code section 414.1(1) "empower[s]" cities to "regulate and restrict . . . the location and use of buildings,

[7] The parties do not provide the Court any further information as to Johnston Ordinance 979. Thus, the Court declines to address Johnston's ordinance under the zoning analysis as it is unclear whether it is in fact a zoning regulation.

structures, and land for trade, industry, residence, or other purpose." The Iowa Supreme Court has repeatedly recognized, "[z]oning decisions are an exercise of the police power to promote the health, safety, order and morals of society." *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 40 (alteration in original) (quoting *Montgomery v. Bremer Cty. Bd. of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980)); *see* Iowa Code § 414.3(1). "Zoning regulations carry a strong presumption of validity" and in light of this presumption, courts "decline to substitute [their] judgment for that of [a] city council" in judging a zoning ordinance. *Residential & Agric. Advisory Comm.*, 888 N.W.2d at 43.

By its terms, neither SF 489 nor HF 295 likely expressly preempts Ankeny's and Pleasant Hill's ordinances as they relate to zoning. The laws do not expressly prohibit or limit the cities' zoning power. Senate File 489 authorizes local action regulating the use of fireworks and contains no express preemption language prohibiting municipal zoning powers.

Bellino urges the Court to apply the statutory interpretation doctrine *expressio unius est exclusio alterius*, meaning the expression of one is the exclusion of another, to SF 489's inclusion of language allowing a municipality to enact an ordinance or resolution as to the *use* of fireworks, with no permission granted for local action as to *zoning*. *See Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016). But the Iowa Supreme Court has refused to apply this statutory canon in implied preemption cases, noting "[u]nless the long-deceased Dillon Rule is resurrected, the notion that the mere failure of the legislature to authorize [municipal action] invalidates municipal action is without merit. . . . In the context of state-local preemption, the silence of the legislature is not prohibitory but permissive." *Seymour*, 755 N.W.2d at 543 (citing *Cameron v. City of Waco*, 8 S.W.2d 249, 254 (Tex. Civ. App. 1928) (holding the statutory interpretation rule *expressio unius est exclusio alterius* does not apply when determining the scope of a municipality's powers under

the home rule doctrine)). "While legislative silence on [an] issue may be a powerful indicator that the legislature has not [regulated on an issue] *under the statute*, [the Iowa Supreme Court] do[es] not think legislative silence can be interpreted as a *prohibition of local action* under home rule in light of [the] obligation to harmonize and reconcile a statute with an ordinance whenever possible." *Madden*, 848 N.W.2d at 50.

In SF 489, the legislature chose to include language allowing municipalities to regulate the use of fireworks. In SF 489 or in HF 295, the legislature could have, but chose not to, include express language as to zoning. The Court will not read into these statutes what the legislature has not provided. The Court therefore concludes neither SF 489 nor HF 295 includes language preempting municipalities from exercising their zoning power.

The Iowa Supreme Court's opinion in *Mall Real Estate* is consistent with this conclusion. 818 N.W.2d 190. In *Mall Real Estate*, the scope of the express preemption language at issue was "broad." *Id.* at 196. First, it contained a uniformity provision, indicating the state statutes are intended to be "the sole and only regulation of obscene material." *Id.* at 194 (quoting Iowa Code § 728.11 (2009)). Neither SF 489 nor HF 295 contains such a statement. Second, section 728.11 prohibited any local regulation "relating to the availability of obscene materials." *Id.* While similar, the language in HF 295 is significantly narrower. It forecloses only local regulations setting "standards and requirements," not any local regulation. *See* H.F. 295. And, the prohibited "standards and requirements" must be "regarding the sale or marketing" of consumer fireworks, not merely "related to" the "availability of" consumer fireworks. *Compare* H.F. 295 *with* Iowa Code § 728.11. These differences in breadth undermine the significance, if any, of the inclusion of an express provision reserving zoning authority to local governments in the statute at issue in *Mall Real Estate* and the omission of one in HF 295. *See Worth Cty. Friends of Agric. v. Worth*

County, 688 N.W.2d 257, 262–63 (Iowa 2004) (finding preemption applied where a statute "broadly preempt[ed] the regulation of a 'condition or activity occurring on land used for the production, care, feeding or housing of animals'" (emphasis removed)).

Based on the text of SF 489, the Court concludes there is no express-preemption language prohibiting municipalities from implementing the contested zoning ordinances. *See Mall Real Estate*, 818 N.W.2d at 195–97; *see also Worth Cty. Friends of Agric.*, 688 N.W.2d at 262–63 (examining a statute preempting regulation to a condition or activity occurring on agricultural land and finding the local action impliedly preempted); *Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 494–97 (Iowa 1998) (examining a statute regulating livestock feeding operations and finding local action was preempted in part).

Likewise, the broad language in HF 295 likely does not operate to expressly preempt Ankeny's and Pleasant Hill's ability to exercise their municipal zoning power. House File 295 prohibits "standards or requirements regarding the sale or marketing of" fireworks. A zoning ordinance is not a "standard[] or requirement[] regarding the sale or marketing of consumer merchandise." Zoning concerns the use of a building, not the sale of a good, and thus falls outside the prohibition of HF 295. *See* Iowa Code ch. 414. Zoning is not expressly preempted under HF 295.

Because of the absence of express preemption language prohibiting Ankeny's and Pleasant Hill's municipal zoning power, Bellino is unlikely to succeed on the merits of its express preemption claim as it relates to zoning. This weighs against the issuance of a preliminary injunction.

Bellino also argues the cities' zoning ordinances are preempted under the doctrines of implied field preemption and implied conflict preemption. The Court has previously addressed the

likelihood of success on the merits under field preemption and found Bellino unlikely to succeed on the merits of their field preemption claim. Relying on the doctrine of conflict preemption, Bellino urges the Court to read SF 489 in conjunction with HF 295. ECF No. 19 at 5. Bellino states the ordinance and state law are in conflict because under state law, Bellino is able to operate their retail locations where the state issued it licenses, but Ankeny's and Pleasant Hill's ordinances step in to prohibit the sale of fireworks at these locations. ECF No. 8-2 at 10; ECF No. 19 at 5. Bellino states this demonstrates HF 295 impliedly preempts the cities' zoning power. *See* ECF No. 8-2 at 10; ECF No. 19 at 5. Bellino suggests SF 489 delegates the determination of where fireworks are sold and in what buildings to the state fire marshal, and the cities' zoning requirements are irreconcilable with this grant of authority in SF 489. *See* ECF No. 19 at 6.

Ankeny and Pleasant Hill argue the ordinances are not irreconcilable with SF 489 and HF 295. To bolster this interpretation of the text of SF 489 and HF 295, the cities point to the debate on the Iowa Senate floor from March 21, 2017, as demonstrating the legislature's intent for SF 489 to keep intact municipal zoning rights. *See* ECF No. 12-1 at 11–12 (citing *Senate Video (2017-03-21): SF 489 Ways & Means*, Iowa Legislature (Mar. 21, 2017, 4:54 PM), http://www.legis.state.ia.us/dashboard?view=video&chamber=S&clip=s20170321144351570&offset=7825&bill=SF%20489&dt=2017-03-21). The cities summarize various interactions from the Iowa Senate floor discussion and conclude it was the legislative intent for cities and counties to "continue to use their zoning restrictions to appropriately restrict fireworks sales." *Id.* at 12 (emphasis removed). Bellino rebuts the cities' recitation of the legislative floor history by stating this legislative history is not persuasive authority and, if it was, the Court should also look to the Senate's rejection of Amendment S-3177 that would have expressly allowed municipalities the power to decide whether to allow the sale of consumer fireworks. ECF No. 19 at 6. Ankeny and

Pleasant Hill conclude the ordinances and SF 489 are not irreconcilable because "[w]hile cities clearly cannot redefine in defiance of the legislature the types of fireworks that can be sold, they have it within their power to determine the zoning districts in which the fireworks can be sold." ECF No. 12-1 at 13. Ankeny and Pleasant Hill state SF 489 and HF 295 do not conflict with the cities' zoning ordinances and can coexist.

The Iowa Supreme Court cautions courts not to consider what the legislature "should or might have said"—a difficulty posed when relying upon legislative history to determine what the legislature intended a statute to mean. *Homan*, 887 N.W.2d at 166 (quoting *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006)). A court should instead look first to the text to determine legislative intent. *See Mall Real Estate*, 818 N.W.2d at 194 (directing that the goal when construing a statute is to ascertain legislative intent, first looking to the language the legislature used); *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 291 (2012) ("In our view," intent for the purposes of federal preemption, "must derive from the text of the federal laws and not from such extraneous sources as legislative history."). Without wading into the muddy waters of legislative history, the text of the statute leads the Court to conclude Bellino is unlikely to succeed on the merits of its conflict-preemption claim.

Ankeny's and Pleasant Hill's ordinances limiting the sale of fireworks to certain industrial zones are likely not "irreconcilable" with SF 489 and HF 295. Under the cities' ordinances, a retailer, community group, or wholesaler may sell fireworks in Ankeny's and Pleasant Hill's industrial zones, pursuant to the other requirements set forth in SF 489 and under the state fire marshal's emergency rules. *See* Iowa Code §§ 100.19, 100.19A (2017); Iowa Admin. Code ch. 661-265 (2017). Senate File 489 does not dictate fireworks must be sold in a city's commercial zones; it allows for sale of consumer fireworks and contains no language expressly or impliedly

limiting a city's zoning power under Iowa Code chapter 414. The ordinances and SF 489 and HF 295 can exist harmoniously. The text of the statute demonstrates the ordinances and the statutory law are likely not irreconcilable.

The Court finds the high bar for conflict preemption is not met based on the text of SF 489 and HF 295 because the state law and the municipal law can coexist and Bellino may comply with both laws harmoniously. *See Seymour*, 755 N.W.2d at 541–42. Thus, Bellino is unlikely to succeed on the merits of its conflict preemption claim. This weighs against the issuance of a preliminary injunction.

10. Johnston Code chapters 155, 159, and 165 to 173

Bellino argued in its reply brief that Johnston's city code "imposes hurdles that are in addition to the requirements established by State law," including "a city-issued Certificate of Zoning Compliance, as well as compliance with all the requirements in Chapters 155, 159, and 165 to 173 of the City of Johnston Code."[8] ECF No. 19 at 4 (citations omitted). These chapters appear to contain Johnston's building, fire, and zoning codes. In its complaint, Bellino fails to reference these chapters, stating only, "Upon information and belief, there may be additional ordinances or laws in the City of Johnston that impermissibly regulate the sale of consumer fireworks in contravention of Iowa law." ECF No. 1 ¶ 57. "Because Bellino did not identify any other ordinance it alleges is unlawful or poses a risk of immediate harm to Bellino," Johnston claims, "any other arguments should be deemed waived." ECF No. 11 at 6.

At the motion hearing, Bellino asserted it had not fully briefed its argument regarding these chapters of Johnston's city code because Johnston previously banned selling any fireworks, and

[8] Bellino's claim challenging Johnston Code section 173.03's additional permit requirement is addressed above in Part I.A.7.

thus it was unnecessary to address the other alleged additional requirements or standards under Johnston's city code. Yet in its response to Johnston's assertion in its resistance that Johnston had rescinded its ban on selling fireworks, Bellino made no further argument regarding the alleged unlawfulness of Ankeny's ordinances besides the argument above.

For purposes of this motion for a preliminary injunction, the Court concludes Bellino has waived its arguments regarding the alleged unlawfulness of Johnston City Code chapters 155, 159, and 165 to 173. While Bellino's decision not to fully brief its challenges to Johnston's other ordinances possibly imposing requirements on fireworks retailers like Bellino when the Johnston City Code banned any sale of fireworks is understandable, Bellino failed to sufficiently argue its position on this issue—after Johnston repealed its fireworks-sales ban and notified Bellino of this repeal—in either its reply or before the Court at the motion hearing.

There are several requirements for Bellino's claim requesting declaratory relief regarding Johnston's ordinances to be properly before the Court. First, Bellino's "claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Second, Bellino's allegations "must be simple, concise, and direct." *Id.* 8(d)(1). Third, Bellino's "motion [for a preliminary injunction] must contain citations to all statutes or rules under which the motion is being made." LR 7(b)(2). And fourth, Bellino's brief supporting its motion must "contain[] a statement of the grounds for the motion and citations to the authorities upon which the moving party[, Bellino,] relies." *Id.* 7(d). Also, the Court typically will not consider arguments raised for the first time in a reply brief. *See Smith v. United States*, 256 F. App'x 850, 852 (8th Cir. 2007) ("[T]he district court did not err in dismissing claims raised for the first time in a . . . reply brief."); *cf. United States v. Williams*, 796 F.3d 951, 958 n.4 (8th Cir. 2015) ("[A]s a general rule we do not entertain arguments that are first raised in a reply brief."), *cert. denied*, 136

S. Ct. 1450 (2016). The burden of proof and persuasion is on the moving party, especially when the moving party requests the "extraordinary remedy" of a preliminary injunction. *Winter*, 555 U.S. at 24.

Here, Bellino's claims challenging Johnston City Code chapters 155, 159, and 165 to 173 are insufficient. Bellino failed to cite the Johnston City Code chapters upon which it now attempts to rely in either its complaint or its motion for a preliminary injunction. In its reply brief, Bellino argues only that Johnston's new ordinance (Johnston Ordinance 41.12) "imposes hurdles that are in addition to the requirements established by State law" and "Johnston requires . . . compliance with all the requirements in Chapters 155, 159, and 165 to 173." ECF No. 19 at 4. Bellino fails to make any other argument regarding its claim and fails to cite the specific provisions to which it refers in these expansive chapters of Johnston's City Code. This allegation is insufficient to put either Johnston or the Court on notice of the authority or basis for Bellino's claim challenging these chapters. The Court therefore finds Bellino waived its argument on these chapters.

For these reasons, the Court finds Bellino's argument that Johnston City Code chapters 155, 159, and 165 to 173 impose additional hurdles on Bellino is waived for purposes of this motion for a preliminary injunction.

11. Conclusion

Accordingly, the Court concludes Bellino is likely to succeed on the merits of its claims challenging 1) Boone's and Pleasant Hill's temporary-structures bans, 2) Ankeny's, Johnston's, and Pleasant Hill's additional permit requirements, and 3) Pleasant Hill's insurance requirements. But Bellino is unlikely to succeed on the merits of its claims challenging Ankeny's and Pleasant Hill's zoning ordinances. Lastly, the Court expresses no opinion on Bellino's likelihood of success on its challenges to 1) Boone's and Pleasant Hill's fireworks-sales bans, as these challenges are

moot, and 2) the provisions under Johnston City Code chapters 155, 159, and 165 to 173, because Bellino failed to properly raise those claims before the Court.

The Court notes that, at this preliminary stage, the standard for the *Dataphase* factor the Court now addresses is merely a likelihood of success on the merits. As previously noted, the Court's findings of fact and conclusions of law in this order are not binding at trial. *See Camenisch*, 451 U.S. at 395.

B. Threat of Irreparable Harm

Having found Bellino has demonstrated a substantial likelihood of success on the merits of some of its claims, the Court turns to the threat of irreparable harm. "To succeed in demonstrating a threat of irreparable harm, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Roudachevski v. All–Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir. 1996)). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp.*, 563 F.3d at 319). "The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full, effective relief." *Kan. City S. Transp. Co. v. Teamsters Local Union # 41*, 126 F.3d 1059, 1066–67 (8th Cir. 1997) (quoting *Ferry–Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984)). Although the likelihood of success on the merits prong carries the most weight in the Court's analysis of the *Dataphase* factors, *see Home Instead*, 721 F.3d at 497, "[w]hen there is an adequate remedy at law, a preliminary injunction is not appropriate," *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

Bellino asserts it "has incurred, and continues to incur, both monetary and non-monetary damages." ECF No. 8-2 at 17. Bellino argues it will incur an aggregate loss of more than $500,000 between the 2017 and 2018 selling periods. *Id.* at 17–18. In addition to monetary losses, Bellino argues it "stands to lose customer goodwill and incur other intangible losses," such as customer familiarity with its brand and locations. *Id.* at 19. Bellino contends "customer goodwill accumulates over time," and so it "will be irreparably harmed and cannot be made whole by monetary damages if it cannot sell consumer fireworks within certain municipalities or at certain locations." *Id.* Bellino also argues there is no legal theory under which it could recover lost profits in the form of money damages. ECF No. 19 at 6–7.

The Court finds Bellino has demonstrated some amount of irreparable harm caused by the Ordinances. "Loss of intangible assets such as reputation and goodwill can constitute irreparable injury." *United Healthcare Ins. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002). The Ordinances prevent Bellino from selling its fireworks over the Fourth of July season in the manner and locations it originally intended. Bellino thus stands to lose goodwill and reputation with its customers. Such intangible harms can at times be quantifiable. *See Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) (questioning the district court's finding that "loss of customers or customer goodwill" cannot be addressed through money damages); *Gen. Motors Corp.*, 563 F.3d at 319 (affirming denial of a preliminary injunction where the district court found harm from "lost customer relationships was equivalent to a claim of lost profits" and "could therefore be" quantified as money damages).

Here, however, the circumstances posed by Iowa's fireworks market raises unique issues such that it is unclear whether Bellino's harm can be properly redressed by money damages if Bellino later prevails on the merits. At this point, Iowa is four weeks into the first fireworks-selling

season. Consumers are purchasing fireworks for the first time in over 80 years. If a fireworks seller is hindered in this early period when purchasers are first exposed to sellers and their products, the seller could suffer irreversible harm to its goodwill and reputation in the community. As the adage goes, there is no second chance to make a first impression.

Moreover, even if such harm is not irreversible, it would be exceedingly difficult to quantify. *See Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir 2003) ("Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars."). And while Bellino has not provided the Court any concrete evidence of this loss of goodwill and reputation, this is not dispositive because "it might take months for a loss of goodwill to become manifest." *United Healthcare Ins.*, 316 F.3d at 742. The Court finds Bellino has shown irreparable injury is not only possible, but "*likely* in the absence of an injunction." *Winter*, 555 U.S. at 22.

The Cities argue Bellino has not suffered irreparable harm because Bellino does not yet have a customer base in Iowa, and so has no goodwill or reputation to lose as a result of the Ordinances. ECF No. 13 at 12–13; ECF No. 12-1 at 16. But this argument ignores the harm posed by the loss of *potential* customers. *See, e.g.*, *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 395 (8th Cir. 1987) (finding evidence was sufficient for jury to find the plaintiff lost potential customers due to the defendant's price discrimination). The Cities further argue Bellino's alleged harm is not irreparable because Bellino has not shown its business will "collapse" if the Ordinances are enforced. ECF No. 12-1 at 17–18. But the financial collapse of one's business is a sufficient, not necessary, condition to support a finding of irreparable harm.

Finally, the Cities argue Bellino has not suffered irreparable harm because Bellino's complaint estimates its losses in excess of $500,000. *Id.* at 16–17. The Cities are correct quantifiable damages are not irreparable. *See Rogers Grp.*, 629 F.3d at 789. But Bellino alleges it

stands to lose not only monetary harms, but also customer exposure, goodwill, and reputation to its business. ECF No. 1 ¶¶ 40–42, 54, 63, 77. Given the unique circumstances posed by the current state of the fireworks market in Iowa, the Court finds Bellino's alleged intangible injuries represent some amount of irreparable harm. For these reasons, this *Dataphase* factor weighs in favor of granting an injunction. However, this factor is of limited relevance when weighed against the likelihood of success on the merits. *See Home Instead*, 721 F.3d at 497 ("While 'no single factor is determinative,' the probability of success factor is the most significant." (citations omitted) (quoting *Dataphase*, 640 F.2d at 113; *Barrett*, 705 F.3d at 320)). The Court next considers the weight of the alleged harm as compared to any injury an injunction would inflict on other interested parties.

C. Balance of Harms

The court must consider "the balance between th[e] harm [to the movant] and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 928–29 (8th Cir. 1994). This factor requires the examination of the harm granting or denying the injunction poses to both parties to the dispute, as well as other interested parties. *See Dataphase*, 640 F.2d at 113–14; *accord Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

Bellino asserts the harm to the Cities from granting an injunction "would be minimal or non-existent." ECF No. 8-2 at 20. Bellino argues it "is *not* challenging any [Cities'] regulations of the *use* of consumer fireworks—only regulation of the *sale* of consumer fireworks." *Id.* Accordingly, Bellino argues, "any public safety concern is not present because the Defendants are free to continue to regulate the use of consumer fireworks as they see fit." *Id.*

Cities in Iowa have a general interest in regulating public safety and enforcing their laws, as emphasized by Iowa's municipal home rule act. *See* Iowa Code § 364.1. In addition, the Iowa Code mandates "[e]ach city shall provide for the protection of life and property against fire." *Id.* § 364.16. The interest of cities and their citizens in restricting the location of the sale of fireworks is not an unjustified precaution, as demonstrated by the Spencer fire of 1931:

> A few days before the Fourth of July, 1931, a young American boy, whose name does not appear in the record, filled with enthusiasm and the desire to demonstrate his patriotism like boys of his age at that time of the year, entered a drug store which had a large display window filled with fire crackers and other explosives used to awaken the patriotism of the people of this country on the Fourth of July. In some way or other, no doubt by crowding or pushing, the young boy came close to the display window. Whether it was a lighted match, a piece of punk, or a torpedo he dropped into the window, probably never will be known. But, before the fire that followed was extinguished, the business section of the beautiful city of Spencer was practically destroyed[.]

Fillgraf v. First Nat. Ins. of Am., 256 N.W. 421, 421 (Iowa 1934).

Bellino's argument the cities have no public safety concern because they are free to regulate the use of fireworks is weakened by the historical record of the Spencer fire, which was sparked in a drugstore's fireworks display. *See id.* The issuance of a preliminary injunction enjoining enforcement of the ordinances would thus harm interests of the cities and the public.

Weighing against these harms are the potentially significant economic harm to Bellino as described above, and the public's interest in enjoying the use of and ease of access to recreational fireworks. The celebration of Independence Day "has been regarded, and has ever been looked upon, as the right and privilege of the American citizen to [] celebrate." *Reinart v. Inc. Town of Manning*, 231 N.W. 326, 326 (Iowa 1930). The Iowa legislature has decided its citizens' celebration may include recreational fireworks for the first time in over 80 years, and the Court recognizes the public's interest in purchasing and using fireworks.

In balancing the harms caused to the parties and the public interest by granting or denying a preliminary injunction, the Court finds there are significant interests on both sides. Accordingly, this factor does not weigh in favor of either party. The Court proceeds to the next *Dataphase* factor, the public interest.

D. The Public Interest

The final *Dataphase* factor directs consideration of the public interest. In order for a court to grant a preliminary injunction, the court must consider whether a preliminary injunction would serve the public interest. *Dataphase*, 640 F.2d at 113. Public interest can include, for example, the impact on the national defense, *Winter*, 555 U.S. at 24; the protection of constitutional rights, *Phelps–Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *rev'd on other grounds Phelps–Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012) (en banc); or the importance of having governmental agencies fulfill their obligations, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011). The court considers both the public interests injured and the public interests served in granting or denying a preliminary injunction. *Sierra Club*, 645 F.3d at 997–98.

Bellino asserts the public interest favors an injunction because the Iowa legislature has given the public the right to purchase and use consumer fireworks in Iowa, and "vindication of the rule of law is in the public interest." ECF No. 8-2 at 20. However, as discussed above, the public also has an interest in ensuring it is protected from potential fire hazards associated with the selling and storing of consumer fireworks in commercial zones. Given these competing interests, the Court finds the public interest factor does not weigh in favor of either party.

VI. CONCLUSION

Weighing the factors outlined above, the Court concludes Plaintiff's Motion for a Preliminary Injunction should be denied in part, and granted in part. Bellino faces some irreparable

harm. However, neither the balance of harms nor the public interest weighs in favor of either Bellino or the cities. The dispositive factor is the likelihood of success on the merits. And Bellino is likely to succeed on the merits of some of its claims. The Court therefore **GRANTS** Bellino's Motion for a Preliminary Injunction as to those claims where it is likely to prevail on the merits. Specifically, the Court issues a preliminary injunction temporarily enjoining:

1) The City of Ankeny from enforcing its laws requiring a special use permit to sell fireworks, as provided in Ankeny Ordinance 1917;

2) The City of Boone from enforcing its laws limiting the sale of consumer fireworks to fully enclosed buildings, and thus prohibiting selling consumer fireworks out of temporary structures, as provided in Boone Municipal Code sections 175.16(1)(A), 175.17(1)(B), 175.18(1)(B), and 175.24(2)(B);

3) The City of Johnston from enforcing its laws requiring a temporary use permit to sell fireworks, as provided in Johnston Ordinance 979 and Johnston Code chapter 173; and

4) The City of Pleasant Hill from enforcing its laws—

    a) prohibiting selling consumer fireworks out of temporary structures, as provided in Pleasant Hill Ordinance 827;

    b) requiring a special sales permit in order to sell fireworks, as provided in Pleasant Hill Ordinance 827 and Pleasant Hill Code chapter 122; and

    c) requiring additional insurance coverage, as provided in Pleasant Hill Ordinance 827.

The Court declines to issue a preliminary injunction on Ankeny's or Pleasant Hill's zoning ordinances. Although Bellino has established some irreparable harm, Bellino has not shown it is

likely to succeed on the merits of those claims. And the Court finds the weight of the balance-of-harms and public-interest factors to be neutral. Bellino's Motion for a Preliminary Injunction as to Ankeny's and Pleasant Hill's zoning ordinances is **DENIED**. Also, the Court finds Bellino's challenges to Johnston's and Boone's fireworks sales bans are moot.

When issuing a preliminary injunction, the Court must require the party that moved for the preliminary injunction to provide a bond or security. Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."). In establishing a bond, the Eighth Circuit Court of Appeals "allow[s a] district court much discretion," but the district court still must not "abuse[] that discretion due to some improper purpose," must "require an adequate bond," and must "make the necessary findings in support of its determinations." *Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991); *accord Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016).

Here, if it is found the cities were wrongly enjoined, the costs and damages they might suffer—and for which a bond would guarantee—are limited. There are two types of damages at issue: 1) the cities' costs and damages arising from an accident that is likely covered by Bellino's insurance and 2) a monetary loss based on Bellino not paying the filing fees associated with Ankeny's, Johnston's, and Pleasant Hill's additional permit requirements.

Iowa law mandates a fireworks retailer "maintain commercial general liability insurance with minimum per occurrence coverage of at least one million dollars and aggregate coverage of at least two million dollars." S.F. 489 § 3 (to be codified at Iowa Code § 100.19(4)(b)); *accord* ECF No. 1-4 at 11 (providing the associated regulation under the Emergency Rules). The

legislature and the state fire marshal considered, at length, the safety and public-welfare concerns surrounding the fireworks regulations and deemed these insurance coverage amounts appropriate—notably, at a time when the cities had not yet enacted their ordinances. Because the legislature and the state fire marshal have reviewed the relevant risks and established the requisite insurance coverage amounts considered appropriate, the Court finds these insurance coverage amounts sufficient to cover any costs or damages to the cities should a city have been wrongfully enjoined and some insurable damage occur.

If Ankeny, Johnston, and Pleasant Hill are wrongly enjoined, they will not collect the fees Bellino would have paid the cities when applying for a permit to sell fireworks. Bellino received Iowa Retail Consumer Fireworks Registration licenses from the state fire marshal to sell fireworks at three locations in Ankeny, one location in Johnston, and one location in Pleasant Hill. *See* ECF No. 1 ¶¶ 34, 59, 69. The cities' ordinances require persons selling fireworks to obtain a permit from the city and pay a filing fee. *See, e.g.*, ECF No. 1-8 (Ankeny Ordinance 1917); ECF No. 20 (Johnston Ordinance 979); ECF No. 1-14 (Pleasant Hill Ordinance 827). Based on the record, it is unclear how much Bellino would have paid the cities in fees to apply for licenses to sell fireworks. The Court finds a $5,000 bond is proper to pay the costs and damages sustained by the cities if they are wrongfully enjoined or restrained from obtaining fees.

IT IS SO ORDERED.

Dated this 29th day of June, 2017.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE