

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 20-07

Governor's Emergency Management Executive Orders

Question

Because of the COVID-19 health crisis, the Governor has exercised his authority to declare a state of emergency in Tennessee and to issue a series of executive orders governing the State's emergency response to the COVID-19 pandemic. Do these executive orders serve as the exclusive regulation of the State's emergency management in response to the pandemic, and to what extent, if any, may local governmental entities take actions or issue orders that conflict with the Governor's executive orders?

Opinion

The General Assembly has vested the Governor with exclusive responsibility and authority to assume control over all aspects of the State's response to an emergency such as the COVID-19 pandemic. Tenn. Code Ann. § 58-2-107(a)(1). Because the executive orders that the Governor issues pursuant to that authority have the force and effect of law, Tenn. Code Ann. § 58-2-107(a)(2), the Governor's directives in response to an emergency supersede and preempt any action taken by political subdivisions of the State.

Absent an express delegation of power by the Governor, local governmental entities may not take actions that are either more restrictive or less restrictive with respect to the subjects addressed in the Governor's executive orders governing the State's emergency response to COVID-19. Such action would be at cross purposes with the Governor's orders, which are the law of the State, and would constitute an impermissible legal conflict.

Just as the Governor may exercise his authority under Tenn. Code Ann. § 58-2-107(a)(1) to delegate to a local governmental entity or to the local health department "such powers as the governor may deem prudent," the Governor may exercise his emergency powers to expressly authorize, or recognize the authority of, county health departments to take action that may otherwise be inconsistent with his executive orders. Such a delegation of authority may be revoked or modified at any time, § 58-2-107(a)(2), and, absent an express delegation or authorization by the Governor, the local health department or other local governmental entity may not take any action inconsistent with the Governor's executive orders.

ANALYSIS

Because of the COVID-19 health crisis, the Governor has exercised his authority to declare a state of emergency in Tennessee and to issue a series of executive orders governing the State's emergency response to the COVID-19 pandemic.¹ The executive orders are all aimed at diminishing the spread of COVID-19 and ensuring that the State maintains the resources needed to protect the health and well-being of its citizens. Among other provisions, the orders currently require all persons in Tennessee to stay at home unless engaging in essential activity or essential services, and they place restrictions on social gatherings and business operations. Some local governmental entities have issued orders that are either more restrictive or less restrictive than the Governor's executive orders.

The Governor's power to issue these executive orders is grounded in the broad grant of authority—a responsibility and authority that the General Assembly has vested solely in the office of the governor—to assume control over all aspects of the State's response to an emergency such as the COVID-19 pandemic:

The governor is responsible for addressing the dangers presented to this state and its people by emergencies. In the event of an emergency beyond local control, the governor . . . may assume *direct operational control over all or any part of the emergency management functions* within this state *The governor is authorized to delegate such powers as the governor may deem prudent.*

Tenn. Code Ann. § 58-2-107(a)(1) (emphasis added). To exercise this exclusive authority “the governor may issue executive orders, proclamations, and rules and may amend or rescind them. Such executive orders, proclamations, and rules *have the force and effect of law.*” *Id.* § 58-2-107(a)(2)(emphasis added). *See also* Tenn. Code Ann. § 58-2-107(b)(1)(A) (authorizing issuance of executive orders to implement governor's authority).

An “emergency” is defined expressly to include “disease outbreaks and epidemics.” Tenn. Code Ann. § 58-2-101(7). “Emergency management” is defined broadly to cover all stages of dealing with an emergency; it “means the preparation for, the mitigation of, the response to, and the recovery from emergencies and disasters.” Tenn. Code Ann. § 58-2-101(8).²

¹ See Governor's Executive Orders Nos. 17-29 found at <https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee> (last visited April 25, 2020).

² Specific emergency management responsibilities include, but are not limited to:

(A) Reduction of vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural, technological, or manmade emergencies or hostile military or paramilitary action;

(B) Preparation for prompt and efficient response and recovery to protect lives and property affected by emergencies;

(C) Response to emergencies using all systems, plans, and resources necessary to preserve adequately the health, safety, and welfare of persons or property affected by the emergency;

To effectuate emergency management, the General Assembly has given the Governor a broad range of powers. The Governor has the power, among others, to: suspend laws prescribing the conduct of state business; utilize all available resources of the state government and of each political subdivision; commandeer private property; direct and compel an evacuation; control ingress and egress to and from an emergency area; control the movement of persons; control the occupancy of premises; make provisions for temporary emergency housing; and take measures concerning the conduct of civilians. Tenn. Code Ann. § 58-2-107(e).

By giving the Governor “direct operational control over all or any part of the emergency management functions within this state,” the General Assembly has vested in the Governor the exclusive authority to wield these powers to control and limit the acts of political subdivisions in an emergency. Further, when the Governor invokes his emergency management powers, all the “officers and agencies of the State *and political subdivisions . . . shall* cooperate with and extend their services and facilities to the Tennessee Emergency Management Agency,³ as it may require.” Tenn. Code Ann. § 58-2-107(h) (emphasis added). In short, the General Assembly clearly intended the Governor’s emergency management powers to be exclusive and to override any action taken by political subdivisions of the State.

When, as during the occurrence of an emergency beyond local control, the General Assembly intended state law to provide exclusive regulation on a subject, local ordinances on the same subject are preempted. *See Southern Ry. v. City of Knoxville*, 223 Tenn. 90, 99-100, 442 S.W.2d 619, 622 (1968) (“The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict unless the statute limits the requirement for all cases to its own prescriptions.”).⁴ Accordingly, the exercise of any discrete emergency management powers that the General Assembly has given to local governmental entities is limited by and subject to the emergency management powers of the Governor. Thus, orders that a political subdivision might issue pursuant to powers accorded to them by other provisions of the Tennessee Code may not be exercised in conflict with the Governor’s emergency management executive

(D) Recovery from emergencies by providing for the rapid and orderly start of restoration and rehabilitation of persons and property affected by emergencies;

(E) Provision of an emergency management system embodying all aspects of pre-emergency preparedness and post emergency response, recovery, and mitigation; and

(F) Assistance in anticipation, recognition, appraisal, prevention, and mitigation of emergencies which may be caused or aggravated by inadequate planning for, and regulation of, public and private facilities and land use.

Tenn. Code Ann. § 58-2-101(8).

³ TEMA’s director is subject to the direction and control of the governor. Tenn. Code Ann. § 58-2-104(c).

⁴ *Cf. Capitol News Co., Inc. v. Metro Gov’t of Nashville and Davidson Cnty.*, 562 S.W.2d 430, 435 (Tenn. 1978) (“[W]e do not find any expression of legislative intent . . . that the state statutes shall be exclusive or pre-emptive in the field. The General Assembly has provided such pre-emption in certain instances, and could easily do so in the area here under consideration if it should see fit. In our opinion it has not. . .”).

orders, thereby preventing political subdivisions from taking an action that is either more restrictive or less restrictive as to the subjects addressed in the Governor's orders.

In particular, because the Governor's executive orders "have the force and effect of law," Tenn. Code Ann. § 58-2-107(a)(2), local governmental entities may not take actions that are either more restrictive or less restrictive than the executive orders governing the State's emergency response to COVID-19. It is well established that local governments may not adopt ordinances "which infringe the spirit of state law or are repugnant to the general policy of the state." *Capitol News Co., Inc.*, 562 S.W.2d at 434; *Manning v. City of Lebanon*, 124 S.W.3d 562, 565 (Tenn. Ct. App. 2003). Local governments cannot effectively nullify state law on the same subject by enacting ordinances that ignore applicable state laws, that grant rights that state law denies, or that deny rights that state law grants. *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 426 (Tenn. 2013); *421 Corp. v. Metropolitan Gov't of Nashville and Davidson Cnty.*, 36 S.W.2d 469, 475 (Tenn. Ct. App. 2000).

In short, local governments may not act at "cross purposes" with state law on the same subject.⁵ See *id.*; *Capitol News*, 562 S.W.2d at 434. And a local action that conflicts with the law of the State may not stand. See *Southern Ry. Co.*, 223 Tenn. at 96, 442 S.W.2d at 621 ("Municipal ordinances in conflict with and repugnant to a State law of a general character and state-wide application are universally held to be invalid.").

In this instance, the Governor has issued emergency management orders that, among other things, currently require all persons in Tennessee to stay at home unless engaging in essential activity or essential services, and place restrictions on social gatherings and business operations. These orders are set to expire on April 30, 2020.⁶ The Governor could extend all or parts of these orders, or he could let them expire. Regardless of the choice that he might make,⁷ political subdivisions may not take any action that undermines the executive orders. Thus, a political subdivision may not take any action that is either more restrictive or less restrictive as to the subjects addressed in the orders. Such action would be at cross purposes with the orders and, therefore, constitute an impermissible legal conflict.

Moreover, political subdivisions are without power to issue emergency management orders that conflict with the Governor's executive orders because Tenn. Code Ann. § 58-2-118(a) provides:

Upon being authorized by the governor, TEMA, or other state department or agency, the political subdivisions of the state and other agencies designated or appointed by the governor, or in the TEMP,⁸ are authorized and empowered to

⁵ As a general matter to be sure, even when the State law is exclusive on the subject, if the local action "does not authorize anything the statute forbids nor does it forbid anything the statute requires [b]oth the statute and the ordinance can co-exist and be effective." *Southern Ry. Co.*, 223 Tenn. at 99, 442 S.W.2d at 623.

⁶ See note 1, *supra*.

⁷ "Emergency management" specifically includes recovery from emergencies and restoration of affected persons and property. See note 3, *supra*, and accompanying text.

⁸ "'TEMP' means Tennessee emergency management plan." Tenn. Code Ann. § 58-2-101(25).

make, amend, and rescind such orders and rules as are necessary for emergency management purposes and to supplement the carrying out of this chapter, *but which are not inconsistent with* any orders or rules adopted by an EMA⁹ or by any state agency exercising a power delegated to it by the governor or the agency.

As the italicized terms make clear, this statute permits political subdivisions to make orders necessary for emergency management purposes *only if* the Governor authorizes them to do so.¹⁰ And even then, the orders cannot be inconsistent with any orders adopted by an EMA or by any state agency exercising a power delegated to it by the Governor or the agency.

The General Assembly has, however, authorized local health departments to adopt regulations more stringent or restrictive than those provided by state law or regulation. Tenn. Code Ann. § 68-2-601(f)(3) (authorizing adoption of regulations to “protect the general health and safety of the citizens of the county” that “shall be at least as stringent as the standard established by a state law or regulation as applicable to the same or similar subject matter”). And the Commissioner of the Department of Health, acting under statutory authority to promulgate rules to prevent the spread of disease, Tenn. Code Ann. §§ 68-1-201, 68-5-104, has given local health officers confronted with an epidemic the power—indeed, the obligation—to “[e]stablish appropriate control measures which may include examination, treatment, isolation, quarantine, exclusion, disinfection, immunization, disease surveillance, closure of establishment, education, and other measures considered appropriate by medical experts for the protection of the public’s health.” Tenn. Comp. R. & Regs. 1200-14-01-.15. Actions by local health departments under this authority have the force and effect of law in the absence of action by the Governor and when they are neither more restrictive or less restrictive than emergency orders issued by the Governor.

⁹ “‘EMA’ means a local emergency management agency of a political subdivision.” Tenn. Code Ann. § 58-2-101(6).

¹⁰ While the plain language of the statute also provides that TEMA “or other state department or agency” can authorize the political subdivisions to make orders, these departments and agencies all answer to the governor, who is ultimately “responsible for addressing the dangers presented to this state and its people by emergencies.” Tenn. Code Ann. § 58-2-107(a)(1).

Although this rule explicitly contemplates the closure of establishments and orders for isolation, the Governor's emergency executive orders may still preempt a local health department's more restrictive order because the Governor's authority to "assume direct operational control over all or any part of the emergency management functions within this state," Tenn. Code Ann. § 58-2-107, allows the Governor to order the Department of Health to take action contrary to the lawfully-issued orders of local health officials, in which case the conflicting local orders must yield to the Governor's orders. On the other hand, the Governor may exercise his emergency powers to expressly authorize, or recognize the authority of, county health departments to take action that may otherwise be inconsistent with his executive orders, just as the Governor may exercise his authority under § 58-2-107(a)(1) to delegate to a local governmental entity or to the local health department "such powers as the governor may deem prudent." Such a delegation of authority may be revoked or modified at any time, § 58-2-107(a)(2), and absent an express delegation or authorization by the Governor, the local health department or other local governmental entity may not take any action inconsistent with the Governor's executive orders.

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