Coates' Canons Blog: Can Counties and Cities Order “Stay-at-Home”?

By Norma Houston

Article: https://canons.sog.unc.edu/can-counties-and-cities-order-shelter-in-place/

This entry was posted on March 23, 2020 and is filed under Emergency Management, Emergency Ordinances, Emergency Restrictions, Featured Posts Related To COVID-19, Public Health, State Of Emergency

As state and local government officials across the country struggle to respond to the rapidly escalating coronavirus pandemic, some are exploring the need for increasingly stringent measures, including what are being referred to as “stay-at-home” restrictions (I’ll address the important point of how this term is defined below – see this blog for discussion of why the term “shelter-in-place” should not be used in this context). Do local governments in North Carolina have the legal authority to impose “stay-at-home” restrictions? *Because the quarantine and isolation authorities of local health directors may not be used to restrict the movement of entire populations* (see my colleague Jill Moore’s blog post), the answer to this question calls for a careful analysis of the authorities granted counties and cities under the North Carolina Emergency Management Act (G.S. Chapter 166A) to impose restrictions and prohibitions under a locally declared state of emergency. This blog discusses the scope of those authorities and offers a framework for analysis in determining whether “stay-at-home” restrictions (or for that matter, any other restrictions and prohibitions cities and counties in our state might impose) are both legally authorized and imposed and enforced in a legally valid manner. This blog does not offer is any opinion on whether “stay-at-home” restrictions *should* be imposed. That decision must be made by local officials based on their determination, based on guidance from public health officials, of what best serves the public health and safety needs of their communities. Instead, this blog offers a summary of county and city emergency authorities under Chapter 166A, and a framework for analyzing emergency restrictions based on judicial interpretations of the scope of these authorities.

As discussed in my previous blog post addressing emergency restrictions on gaming and sweepstakes establishments, counties and cities are granted broad authorities under Chapter 166A to impose designated restrictions and prohibitions under a locally declared state of emergency (violations of which are a Class 2 misdemeanor). There is no language in Chapter 166A specifically authorizing “stay-at-home,” nor is that term defined within the Act. This lack of definition is significant; without a clear grant of authority to impose “stay-at-home,” or even a definition of what “stay-at-home” actually is, counties and cities must examine the other restrictions and prohibitions they are authorized to impose under existing law. If “stay-at-home” is deemed necessary by local officials, counties and cities would then impose a combination of the restrictions and prohibitions authorized under Chapter 166A in a manner that, taken together, results in “stay-at-home.” Under this approach, the county or city is not actually ordering “stay-at-home.” Instead, a county or city must impose a combination of restrictions or prohibitions in such a manner that the limitations on the public’s movements result in “stay-at-home.”

Specifically, the following restrictions and prohibitions authorized under G.S. 166A-19.31(b) could be imposed in some manner that collectively results in “stay-at-home”:

- Restricting or prohibiting the movement of people in public places;
- Imposing curfews;
- Controlling ingress and egress of an emergency area and the movement of persons within the area (the “emergency area” is the geographical area within the county or city to which a local state of emergency applies; unless specifically limited in the declaration, by default the emergency area is the entire geographic area over which the county or city exercises general police powers ordinance authority (G.S. 166A-19.22(b)(1));
- Closing streets, roads, highways, bridges, public vehicular areas, or other areas ordinarily used for vehicular travel within the emergency area (road closure restrictions cannot apply to emergency responders, transporters of essential goods and utilities services, and other persons necessary for recovery from the emergency; for more information on road closures, see this blog);
- Restricting or prohibiting the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate; and
- Imposing restrictions or prohibitions upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

If "stay-at-home" is deemed necessary by local officials, counties and cities must impose a *combination* of the restrictions and prohibitions described above in a manner that, taken together, results in "stay-at-home." For example, by imposing curfews, restricting access to public places, closing all non-essential businesses, prohibiting all non-essential gatherings and limiting the number of persons at essential gatherings, prohibiting all non-essential travel, limiting entry into the jurisdiction, and other similar restrictions, the result will be that, by and large, residents will be left with little choice but to remain in their homes except for circumstances or activities allowed under the restriction.

However, a "stay-at-home" restriction imposed under the statutory authorities outlined above will be legally valid ONLY IF:

1. The restriction clearly falls within the scope of county and city emergency authorities and is imposed in a legally valid manner by an official with clear legal authority to do so (In other words, the county or city must have clear legal *authority* to impose the restriction); and
2. The restriction, as imposed, is reasonably necessary to respond to the public health or safety threat posed, is based in fact, is not vague or overbroad, and is not imposed in bad faith or with a pretextual motive (In other words, the restriction itself must be *reasonable*).

Appellate courts in our state and across the county have consistently granted broad deference to local officials in emergency situations. See, *United States v. Chalk*, 441 F.2d 1277 (1971). By far the most common situations where emergency restrictions have been challenged are appeals of criminal convictions for curfew violations. While a curfew may be just one of a broader set of restrictions which could be imposed to result in "stay-at-home," these cases nonetheless provide a framework for analyzing whether emergency restrictions and prohibitions of any nature, including the combination of those that result in "stay-at-home," are imposed with proper legal *authority* and are *reasonable.*

FRAMEWORK FOR ANALYSIS

The County or City Must Have Clear*Authority*

The first question to ask is whether the county or city has clear legal authority to impose "stay-at-home" restrictions. Without proper authority, an emergency restriction or prohibition will not be legally valid. Courts in other states have struck down curfew restrictions where the local official who imposed the curfew did not have the legal authority to do so (See, *Municipal Court, Ft. Lauderdale v. Patrick*, 254 So.2d 193 (1971) (invalidating curfew imposed by Mayor where city's charter did not grant Mayor this authority), or where such authority was preempted by state law (See, *Walsh v. River Rouge*, 385 Mich. 623, 189 N.W.2d 318 (1971) (invalidating curfew imposed by Mayor where state law grant of authority to governor preempted local authority). In North Carolina, the provisions of Chapter 166A vesting emergency powers to counties and cities have been held a valid and constitutional delegation of the State's police powers. See, *State v. Allred*, 21 N.C. App. 229, 204 S.E.2d 214 (1974); *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

While Chapter 166A grants counties and cities authority to declare a local state of emergency and impose designated restrictions and prohibitions under that declaration, that authority must be exercised in the manner prescribed in Chapter 166A. Three procedural requirements must be satisfied for a city or county to exercise that power. If these requirements are not satisfied, the county or city has not legally imposed the designated restrictions or prohibitions, thus rendering them unenforceable. I outlined these requirements in a previous blog, but I will repeat them here for the reader's convenience:

1. The restrictions and prohibitions authorized under Chapter 166A must be included in the jurisdiction's local ordinance. G.S. 166A-19.31(a) authorizes counties and cities to "enact ordinances designed to permit the imposition of prohibitions and restrictions within the emergency area during a state of emergency declared pursuant to G.S. 166A-19.22." There is no *direct* grant of authority under Chapter 166A to impose local emergency restrictions or prohibitions; these restrictions and prohibitions *must* be authorized by the jurisdiction's ordinance.
2. A local state of emergency must be declared by the county or city official authorized to do so under the jurisdiction's local ordinance. Emergency restrictions and prohibitions included in the local ordinance can be imposed only pursuant to a lawfully declared state of emergency. G.S. 166A-19.31(a) specifically states that the restrictions and prohibitions authorized under the local ordinance may be imposed "during a state of emergency declared pursuant to G.S. 166A-19.22." No state of emergency exists unless one has been declared, and only those county and city officials delegated authority in the jurisdiction's ordinance to declare a state of emergency

may do so. Without delegation, by default the authority rests with the governing board. Typically, local ordinances delegate this authority to the Chair of the County Board of Commissioners (for counties) and the Mayor (for municipalities).

3. The restriction or prohibition must be specifically stated in the local declaration. While a lawfully declared state of emergency triggers the *authority* to impose restrictions and prohibitions under the jurisdiction's local ordinance, the specific restrictions or prohibitions deemed necessary in response to the circumstances of the emergency are actually *imposed* under the state of emergency declaration itself. This means specifically describing the restrictions or prohibitions being imposed in the text of the declaration (or as amendments to a declaration already in effect).

County and city officials can confirm that the restrictions and prohibitions imposed under a local state of emergency declaration comply with these statutory requirements by answering the following questions:

- Does the ordinance include all the restrictions and prohibitions authorized under G.S. 166A-19.31(b)?
- Does the ordinance properly delegate authority to declare a local state of emergency to an identified official such as the Board Chair or Mayor?
- Did the county or city actually declare a state of emergency and was that declaration issued by the official authorized to do so in the ordinance?
- Does the declaration specifically state the restriction(s) or prohibitions(s) imposed?
- And finally, are the specific restrictions and prohibitions stated in the declaration within the scope of authorities under the local ordinance and consistent with state law?

If the answer to *each* of these questions is "yes," the county or city has established legal authority to impose restrictions or prohibitions under a local state of emergency, including the combination of restrictions or prohibitions which, taken together, result in "stay-at-home."

The Restriction or Prohibition Must Be*Reasonable*

Even if the county or city has established its legal authority to impose "stay-at-home" as discussed above, that does not end the analysis of whether the restrictions (or in the case of "stay-at-home," *combination* of restrictions or prohibitions) imposed are, in and of themselves, legally valid. Despite the breadth of local government emergency powers described above and the deference generally given by courts to the judgment of local officials in a time of crisis, the courts also have ruled that these authorities are not unlimited or beyond judicial review. See, *Raynor v. Commissioners for Town of Louisburg,* 220 N.C. 348, 17 S.E.2d 495, 498 (1941). Because emergency measures such as curfews, mass gathering bans, and travel restrictions have the effect of infringing on constitutional rights, courts have noted the need to strike a balance between infringement of those rights and the legitimate needs of public officials to preserve order and protect public health and safety during an emergency. Where the actions taken by government officials are reasonable in light of the circumstances, courts have generally upheld those actions even where they infringe on constitutional rights. See, *Chalk*, 441 F.2d at 1283; see also, *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

What does it mean for government actions to be "reasonable?"

Courts have held that emergency restrictions and prohibitions must be reasonably necessary to address the public health or safety need presented. While the "reasonableness" standard is not as rigid as the "strict scrutiny" standard of review that courts employ when considering governmental infringements on constitutional rights in other circumstances, the "reasonableness" standard does require local officials to have some basis in fact for imposing the designated restrictions or prohibitions and that they take these actions in good faith and without pretextual motive. See, *Chalk*, 441 F.2d 1277 (1971); *State v. Allred*, 21 N.C. App. 229, 204 S.E.2d 214 (1974); *State v. Dobbins*, 277 N.C. 484, 178 S.E.2d 449 (1971).

The reasonableness analysis includes review of the actual language used in imposing the designated restrictions or prohibitions. *The state of emergency declaration must describe the restrictions and prohibitions with enough specificity to put the public on notice of what is and is not prohibited and ensure uniform and non-discriminatory enforcement.* This is especially important in that violations are punishable as a Class 2 misdemeanor. Courts in other states have struck down restrictions or prohibitions that are vague or overbroad, or which are subject to arbitrary enforcement. For example, a curfew imposed from "dusk to dawn," is vague and overbroad; a curfew imposed from "9:00p.m. to 7:00a.m." is sufficiently clear. See, *Ruff v. Marshall*, 438 F.Supp. 303 (1977) (curfew allowing "activity of necessity" held vague and overbroad); *Hayes v.*

Municipal Court of Oklahoma City, 1971 OK CR 274, 487 P.2d 974 (1971) (curfew prohibiting "loitering and wandering" from "midnight to dawn" held vague and overbroad); *City of Portland v. James,* 251 Or. 8, 444 P.2d 554 (1968) (curfew prohibiting being on streets "without having and disclosing a lawful purpose" held vague and overbroad); *City of Seattle v. Drew,* 70 Wash.2d 405, 423 P.2d 522 (1967) (curfew prohibiting being "abroad under suspicious circumstances" held vague and overbroad); *Shreveport v. Brewer,* 225 La. 93, 72 So.2d 308 (1954) (curfew requiring persons on streets to have a "satisfactory explanation" held vague and overbroad).

While the cases cited above involve challenges of curfews, the legal principles articulated apply to any restrictions or prohibitions imposed under a state of emergency, include those which, combined together, result in "stay-at-home." Emergency restrictions or prohibitions must be:

- Reasonably necessary to preserve order or protect public health and safety in response to an identified threat
- Based in fact
- Imposed in good faith and without pretextual motive
- Sufficiently clear to give notice to the public and avoid arbitrary or capricious enforcement (in other words, not vague or overbroad)

Meeting these standards in the case of a combination of restrictions and prohibitions resulting "stay-at-home" is challenging. The restrictions or prohibitions imposed must sufficiently describe, even define, both what is prohibited and what is still permitted. For example, instead of merely allowing "travel for essential activities," it must define what those "essential activities" are. If "essential businesses" are to remain open, those businesses must be specifically defined. If "non-essential businesses" are to be closed, "non-essential businesses" also must be defined. The restriction cannot merely apply to "residents" but must define who a resident is and consider and address situations such as persons residing in the jurisdiction whose legal residence is outside the jurisdiction (assuming legal residence is the definition of a "resident"), and persons who are homeless. It must consider and address circumstances involving people passing *through* the jurisdiction and under what conditions such through-travel will be allowed or restricted. These are but a few of the considerations that must be addressed clearly in the local state of emergency declaration (for an example of specificity, see the County of Santa Cruz Shelter In Place Order).

Because achieving the result of "stay-at-home" involves imposing a *combination* of restrictions and prohibitions, *each* must be analyzed to determine if the county or city has the legal *authority* to impose it and if so, whether it is *reasonably necessary*.

Finally, if "stay-at-home" is imposed in response to the current COVID-19 emergency, the combinations of restrictions or prohibitions which, taken together, produce this result must be based on valid public health determinations that this degree of restrictions is reasonably necessary to protect public health and safety. This author is not a public health expert, so I am in no position to offer an opinion, nor should this blog in any way be construed to do so, on whether "stay-at-home" is a valid public health measure to mitigate against COVID-19. That determination must be left to qualified public health officials. However, should any city or county officials, based on advice from public health officials, reach the difficult conclusion that "stay-at-home" is necessary, this blog offers a framework for structuring and imposing these restrictions in a legally valid manner.

A final personal note. My thanks to Caitlin Little, Analyst & Research Attorney with the School of Government's Legislative Reporting Service, for her invaluable assistance in researching case law for this blog.

Links

- www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_166A.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_166A/GS_166A-19.31.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_166A/GS_166A-19.22.html
- santacruzhealth.org/HSAHome/HSADivisions/PublicHealth/CommunicableDiseaseControl/Coronavirus/ShelterInPlace.aspx
- www.sog.unc.edu/resources/tools/legislative-reporting-service-daily-bulletin-online