
Coates' Canons Blog: Can Counties and Cities Shut Down Video Gaming and Sweepstakes Establishments During An Emergency?

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As local officials in our state continue to respond to the rapidly evolving and ever-changing COVID-19 pandemic, counties and cities wrestle with difficult decisions about imposing restrictions and prohibitions under a local state of emergency declaration to address the public health and safety needs of their communities. Among the myriad situations currently confronting local jurisdictions in some parts of our state is the significant increase in crowd gatherings and other activities occurring at video poker, gaming, and sweepstakes establishments and business establishments that allow persons to play video games, arcade games, pinball machines or other computer, electronic or mechanical devices for amusement, which I will refer to collectively as “gaming establishments and gaming activities.” Can counties and cities restrict or prohibit the operation of “gaming establishments and gaming activities” in their jurisdictions? In my opinion, counties and cities have the legal authority to restrict or prohibit the operation of “gaming establishments and gaming activities” under a lawfully declared local state of emergency (for more information about county and city authorities under a local state of emergency, see this blog post and other related information on the School of Government’s COVID-19 resource site). Specifically, G.S. 166A-19.31(b)(2) authorizes counties and cities to impose restrictions and prohibitions on “the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate.” Under this statute, counties and cities have the authority to impose restrictions or prohibitions on the operations of “gaming establishments and gaming activities” as would be the case for any other business establishments or places at which people might gather if county or city officials determine doing so is necessary to protect public health and safety (remember that Executive Order No. 118 imposes restrictions and prohibitions on bars and in-person food consumption in restaurants under similar gubernatorial authorities). How might a county or city exercise its emergency authorities to restrict or prohibit the operation of “gaming establishments and gaming activities”?

To impose legally valid and enforceable restrictions and prohibitions on “gaming establishments and gaming activities,” the legal requirements summarized below must be satisfied.

The restrictions and prohibitions authorized under G.S. 166A-19.31(b) must be included in the jurisdiction’s local ordinance. The statute 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.” (G.S. 166A-19.31(a)) 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.

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. Typically, local ordinances delegate this authority to the Chair of the County Board of Commissioners (for counties) and the Mayor (for municipalities).

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 imposed must be included in the local state of emergency declaration itself. Restrictions and prohibitions authorized under a local ordinance are not triggered unless specifically imposed in the state of emergency declaration.

The restriction or prohibition must be described in the state of emergency declaration with sufficient specificity to give clear notice to the public as to what is restricted or prohibited, and to enable law enforcement officials to enforce in a legally valid manner.

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Courts in other states have struck down restrictions or prohibitions that are vague or overbroad, or which are subject to arbitrary enforcement. See, *Ruff v. Marshall*, 438 F.Supp. 303 (1977); *Hayes v. Municipal Court of Oklahoma City*, 1971 OK CR 274, 487 P.2d 974 (1971); *City of Portland v. James*, 251 Or. 8, 444 P.2d 554 (1968); *City of Seattle v. Drew*, 70 Wash.2d 405, 423 P.2d 522 (1967); *Shreveport v. Brewer*, 225 La. 93, 72 So.2d 308 (1954). For example, a curfew imposed from “dusk to dawn,” is vague and over-broad; a curfew imposed from “9:00 p.m. to 7:00 a.m.” is sufficiently clear. In imposing restrictions and prohibitions on “gaming establishments and gaming activities,” I recommend consulting with the Sheriff or other local law enforcement agencies, county or city attorney, and the District Attorney to ensure that the restriction or prohibition accurately describes the types of establishments and/or activities subject to the declaration and avoids unintended consequences. For example, a local state of emergency declaration could “prohibit the operation of all business establishments, including but not limited to, video poker, gaming or sweepstakes establishments, that offer for use or otherwise allow persons to play video games, arcade games, pinball machines or other computer, electronic or mechanical devices for amusement” and order such businesses to cease operations at a date and time certain (such as “5:00 p.m.” on a specific date). Broader language such as simply “prohibiting all video gaming” without further specificity might be misinterpreted to include activities local officials do not intend to prohibit. Finally, where applicable and helpful for clarification, cite statutory definitions.

The restriction or prohibition must be reasonably necessary for the preservation of order or to protect public health and safety. County and city emergency powers, while broad, are not unlimited or beyond judicial review. Courts have held that emergency restrictions and prohibitions must be reasonably necessary to preserve order or address the public health or safety need presented. This means that local officials must have some basis in fact for imposing the restriction or prohibition. See, *United States v. 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). In addition, courts have held that emergency restrictions cannot be imposed in bad faith or with a pretextual motive. This means that county and city officials cannot take advantage of the emergency to shut down “gaming establishments and gaming activities” merely because they do not want these establishments in their communities or are morally opposed to activities they believe to be gambling. Rather, county and city officials must have a legitimate basis for determining that taking this action is reasonably necessary to address an identified public health or safety need. To establish this basis, I recommend consulting with the Sheriff or other local law enforcement officials (for public safety concerns) and the county health director (for public health concerns) to get their advice on the degree to which a public health or safety threat is occurring, or is in imminent danger of occurring, as a result of the operations of these establishments. Although not required by statute, I also recommend including statements in the form of “whereas” clauses in the state of emergency declaration (or amendment to a declaration already issued) describing the public health or safety issues created by the “gaming establishments and gaming activities” occurring within the jurisdiction. Confirming the existence of these conditions with the Sheriff or other local law enforcement officials, and/or the county health director, and describing these conditions in the state of emergency declaration, will provide a legal basis for defending the restriction or prohibition if challenged.

The requirements and measures described above will help ensure restrictions and prohibitions imposed on “gaming establishments and gaming activities” are legally valid and enforceable.

An important note to readers. This blog in no way expresses an opinion on whether such restrictions *should* be imposed. That decision must be made by local officials based on their determination, with guidance from law enforcement and public health officials, of what best serves the public health and safety needs of their communities. Instead, this blog is offered to provide guidance on how to best ensure that the difficult decisions facing county and city officials are made in a legally valid and enforceable manner.

And, a final personal note. My thanks to Eddie Caldwell, Executive Vice President and General Counsel of the North Carolina Sheriffs' Association, and his dedicated team for their guidance and assistance in writing this blog. Their invaluable contributions are most appreciated, as is their service during these challenging times.

Links

- www.sog.unc.edu/resources/microsites/coronavirus-covid-19/emergency-management
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_166A/GS_166A-19.31.html
- files.nc.gov/governor/documents/files/EO118.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_166A/GS_166A-19.22.html



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- ncsheriffs.org/