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GUIDANCE FOR MUNICIPALITIES

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CC: Katherine Robertson, Chief Counsel/Acting Chief, Opinions
SUBJECT: Use of Power During State of Emergency

As the state of emergency continues related to COVID-19, municipalities are understandably wrestling with individual and, in some cases, unique decisions regarding the preservation of the health and safety of their residents. It is the aim of the Attorney General's Office to provide as much guidance as possible regarding your legal authority during these unprecedented times. Be advised that actions taken by a municipality acting outside of its lawful authority could render the municipality vulnerable to litigation.

Authority

First, municipalities are given specific powers under the Alabama Emergency Management Act. *See* ALA. CODE § 31-9-10(b). Many of these powers are related to the management of employees and operations during a time of emergency. *See id.* Section 31-9-10(b)(5)b gives the "governing body" of each political subdivision the authority to impose and enforce a public safety curfew for its residents. "Curfew" means a specified set of hours during which residents must be off the streets; the word "curfew" should not be used interchangeably with the term "shelter-in-place" or "quarantine." *Curfew*, BLACK'S LAW DICTIONARY (11th ed. 2019). Though the entire State is now under a shelter-in-place order, should the need arise in the future for a municipality to issue a shelter-in-place order, you are advised to follow the Attorney General's "[Guidance for Municipalities](#)" issued on March 25, 2020.

Second, Chapter 47 in Title 11 of the Code of Alabama addresses powers related to health, sanitation, and quarantine generally. Specifically, Section 11-47-131 provides that:

[T]he *councils or other governing bodies* of . . . cities
and towns . . . may provide by *ordinance or resolution*
. . . :

- (1) *to prevent the introduction of contagious, infectious, or pestilential diseases into such cities or towns;*
- (2) to establish and regulate a sufficient quarantine, not inconsistent with the laws of the state, in the towns and cities within the police jurisdiction thereof and to punish any breach of quarantine law;
- (3) to adopt such ordinances and regulations as the council or other governing body may deem necessary to insure good sanitary condition in public places or in private premises in the cities and towns; and
- (4) to prescribe the duties and fix the salaries and compensation for such health officials as they may deem necessary.

Id. § 11-47-131 (emphases added). The powers granted to municipalities in Section 11-47-131 fall under the umbrella of the fairly broad “police powers” that municipalities possess when it comes to protecting the public’s health, safety, and welfare. Section 11-45-1 of the Code of Alabama states:

Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and *to provide for the safety, preserve the health*, promote the prosperity, and improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances.

ALA. CODE § 11-45-1 (emphasis added).

The primary limitation of these broad powers is that a municipality cannot enact an ordinance that is inconsistent with the general laws of the state. ALA. CONST., art. IV, § 89. Whether a municipal ordinance in this context is “inconsistent with” State law must be answered on a case-by-case basis and depends on “whether the municipal law prohibits anything which the State law specifically permits.” *Lanier v. City of Newton*, 518 So. 2d 40, 43 (Ala. 1987) (quoting *Congo v. State*, 409 So. 2d 475, 478 (Ala. Crim. App. 1981)). Merely because an ordinance is more restrictive than the statute does not mean that it is inconsistent “unless the statute limits the requirement for all cases to its own terms.” *Congo*, 409 So. 2d at 478. Put simply, enacting a municipal ordinance that

is more restrictive than a regulation or order issued by the State Board of Health is likely not “inconsistent” or “in conflict with” the laws of the state.

Of course, the exercise of these powers is also limited by constitutional requirements. Any municipal ordinance enacted in response to COVID-19 that is more stringent than the State order should recite the specific circumstances that make more restrictive measures than similar State orders necessary, be limited in duration, and allow for periodic reevaluation in light of new information. *See Pritchett v. Nathan Rodgers Constr. & Realty Corp.*, 379 So. 2d 545, 547 (Ala. 1979) (stating ALA. CODE § 11-47-131 allows a municipality to “regulate for the protection of its citizens’ health” but “is not a license to abuse the police power by applying it arbitrarily and capriciously.”).

Procedure

As the legislative or “governing” body for municipalities, the city or town council is charged with exercising the above authorities during an emergency, with limited exceptions. Sections 11-47-131 and 31-9-10 plainly give the council alone the power to deal with public health emergencies, though Section 22-12-12 specifically grants authority to a mayor, in an emergency, to act independently in proclaiming a quarantine.^[1] ALA. CODE §§ 11-47-131; 22-12-12; 31-9-10. Thus, unless state law specifically gives a mayor authority to act in an otherwise legislative manner, the mayor may not act alone, nor may a council enact an ordinance delegating its authority to the mayor (or another municipal official). Ala. Op. Att’y Gen. No. 94-00012 (Oct. 20, 1993).

Though a council may not *delegate* its legislative power to the mayor, it may authorize, by ordinance, the mayor to carry out its powers under Section 11-47-131. In doing so, the ordinance must provide specific and limited duties to be undertaken by the mayor. *See Walls v. City of Guntersville*, 45 So. 2d 468, 471 (Ala. 1950) (stating “[i]t is no forbidden delegation of power for the [municipal] ordinance to authorize the appointment of some official . . . for the purpose of ascertaining facts to which the legislation is directed and to put into effect the prohibitive features of such ascertained facts” so long as the ordinance does not use language “so vague and indefinite as to furnish no standard of conduct by which the official in charge under the ordinance may be guided.”). The degree to which such an ordinance must be specific and limited was further explored in *Ex parte City of Orange Beach Board of Adjustment*, where the court quoted *Walls*’s finding that:

Ordinances need not always prescribe a specific rule of action[,] some situations require the placing of some discretion in municipal officials, as in cases where it is difficult or impracticable to lay down a definite or comprehensive rule for guidance, or where the discretion

^[1] For a more thorough explanation of powers related to quarantine, see the Attorney General’s “[Guidance for Municipalities](#)” issued on March 25, 2020.

relates to the administration of a police regulation and is essential to the protection of the public morals, health, safety, welfare, etc.

833 So. 2d 51, 54 (Ala. 2001) (quoting *Walls*, 45 So. 2d at 471) (alterations in original omitted). The court in that case ultimately held that an ordinance's grant of enforcement power to the mayor was valid because it provided sufficiently definite guidance. *Id.* at 54, 56.

Put simply, municipalities are advised to err on the side of caution by taking action through the council via ordinance. For a mayor to lawfully carry out any power reserved by law to the city council, the mayor must be acting at the specific direction of the city council, as expressed by ordinance or resolution. To this end, mayoral orders purporting to impose more restrictive mandates on residents and businesses during the present emergency but were not issued in response to specific authorization by the council, may not be enforceable.

Enforcement

As noted in "[Guidance Issued to Law Enforcement](#)" on March 20, 2020, the State Public Health Order is enforceable by local law enforcement under Section 22-2-14 of the Code of Alabama. This section provides that the criminal penalty for a knowing violation of a rule or regulation adopted and promulgated by the State Board of Health is a misdemeanor punishable by a fine of no more than \$500. *Id.* If a violation continues, each day's violation constitutes a separate offense punishable by an additional fine. *Id.* Note that these charges can be brought in district court or municipal court. Most, if not all, municipalities have adopted state misdemeanor offenses via ordinance which allows for these charges to be brought in municipal court. Of course, the enforcement of municipal ordinances is governed by Section 11-45-9, which states that "municipal ordinances may provide penalties of fines, imprisonment, hard labor, or one or more of such penalties for violation of ordinances." ALA. CODE § 11-45-9(a). This section also sets the maximum fine at \$500 and states that "no sentence of imprisonment . . . shall exceed six months."

Conclusion

This guidance is intended to provide a framework for municipal governments as they contemplate exercising local authority in response to the COVID-19 pandemic. To reiterate, during this unprecedented time, municipalities should take care to operate within the parameters of their legal authority and exercise this authority only through the processes prescribed by State law. The Attorney General's COVID-19 Local/County Response Team is available to provide assistance as needed and can be reached at covid19.local-countyofficials@AlabamaAG.gov.