

The Battle of State & Local Emergency Orders in Maryland

By Kevin J. Best, Esq.

I. Background:

During the present COVID-19 health emergency, a question has been raised as to whether an emergency order of a county executive takes precedence over an emergency order of a municipal mayor. This inquiry could also include conflicts in orders promulgated by state and local health officials. Keep in mind that, except for Baltimore City, and despite enjoying home rule powers, none of the municipalities in Maryland are completely independent of their host counties.

The answer is that in Maryland the emergency order of a municipal mayor would typically preempt the emergency order of the county executive. The same would hold true for conflicts between conflicting rules, orders or regulations issued by a county health officer versus those issued by a municipal health officer should one be duly appointed and serving in a particular incorporated city or town.

In this case, the county executive ordered the use of face masks by the public when using county public transit buses, at grocery stores and at other retail stores throughout the county with no exceptions as to the incorporated areas. The mayor's orders simply closed all municipal buildings and suspended parking meter fees along public ways in town but was silent on the matter of prescribing the use of face masks in public. Both the county executive's and the town mayor's emergency orders have been issued pursuant to a local civil emergencies ordinances enacted for each jurisdiction.

In general, at the State level, the Governor has significant authority to respond to a declared emergency. See PS Art., § 14-107(d). For example, if "necessary in order to protect the public health, welfare, or safety," the Governor may "suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision" or order the "evacuation of all or part of the population from a stricken or threatened area" of the State. PS § 14-107(d)(1)(i), (ii). This general power applies to a wide range of different types of emergencies, including "a public health catastrophe." PS Art., § 14101(c)(2).

The Governor also has broad authority to respond to certain health emergencies under Maryland's Catastrophic Health Emergencies Act ("MCHEA"). This statute applies when the Governor declares a "catastrophic health emergency," as he did on March 5, 2020, defined as "a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a deadly agent." PS Art., § 14-3A-01(b). "[D]eadly agent," in turn, means "anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability." PS Art., § 14-3A-01(c)(1). The MCHEA was passed in 2002 and is based in part of the Model State Emergency Powers Act, which was drafted by the Center for Law and the Public's Health as a template for States considering legislation on the topic. See 100 Opinions of the Md. Attorney General 160 (2015).

Also, pursuant to most municipal charters and § 5-209 of the LG Art. of the Md. Ann. Code, the municipal governing body has the (police) power to pass ordinances to protect and preserve the health of the municipality and its inhabitants. As recently occurred in the City of Seat Pleasant, a municipal governing body also may appoint a public health officer, and define and regulate his or her powers or duties; to inspect, regulate, and abate any buildings, structures or places which cause or may cause unsanitary conditions or conditions detrimental to health provided that none of these powers and duties impair the Md. Secretary of Health and Mental Hygiene, the county board of health, or any public, general or local law relating to the subject of health.

II. The Tillie Frank Law:

The question of whether a charter county in Maryland may use its home rule powers to preempt municipal ordinances, and orders promulgated therefrom, within a municipality has been settled law since the Court of Appeals decided the landmark *Tillie Frank* case in 1983 and the Maryland Municipal League took immediate legislative action to adopt what is now Section 4-111 of the LG Article. 89 Opinion of the Attorney General of Md. 107 (2004); See also 63 Opinion of the Attorney General of Md. 377 (1978).

The General Assembly enacted Chapter 398, Laws of Maryland 1983, for the purpose of “providing the conditions under which legislation enacted by a county does not apply in municipalities located in the county.” The municipal-county conflicts-of-law statute, sometimes known as the Tillie Frank Law, effective January 1, 1984, and was codified at Article 23A, §§ 2(a), 2B, and 2C, and is now codified as Maryland Code, Local Government Art., § 4-111. 81 Opinions of the Attorney General 133 (1996).

The Tillie Frank Law’s purpose was to overturn the decision of the Court of Appeals in *Town of Forest Heights v. Tillie Frank*, 291 Md. 331, 435 A.2d 425 (1981). Until the *Tillie Frank* decision, it was believed by many people that county laws on matters which were within the powers of municipalities in that county were not applicable in the municipalities, at least where the municipal ordinance conflicted with county legislation. See Report of the Tillie Frank Task Force (January 18, 1983) at 1. A Task Force was charged with developing legislation that would reestablish the balance between counties and municipalities, which resulted in Article 23A, §2B, enacted as Chapter 398 of the Laws of Maryland 1983, now codified as Section 4-111 of the LG Art.

As a general rule, county legislation (or orders issued pursuant thereto) does not apply within a municipality if the legislation: (1) conflicts with legislation enacted by the municipal corporation under authority of public general law or its charter, or (2) relates to a matter that the municipality is authorized to address through legislation and, either through an ordinance or charter amendment, the municipality has opted out from the specific county legislation or has exempted itself from all county legislation covering areas in which the municipality has legislative authority.

The relevant portion of the Tillie Frank statute (MD Code, Local Government Article, Section 4-111) is as follows:

...

(b) Except as provided in subsection (c) of this section, legislation enacted by a county does not apply in a municipality located in the county if the legislation:

(1) by its terms, exempts the municipality;

(2) conflicts with legislation of the municipality enacted under a grant of legislative authority provided by public general law or the municipal charter; or

(3)(i) relates to a subject on which a public general law or the municipal charter grants the municipality legislative authority; and

(ii) the municipality by ordinance or charter amendment:

1. specifically exempts itself from the county legislation; or

2. generally exempts itself from county legislation covered by the type of grant of authority to the municipality.

...

III. The Solution—Emergency Orders of Mayors vs. County Executives:

My analysis indicates that the emergency order declared by the county executive does not expressly exempt the town and the county executive's order to wear face masks does not appear to conflict with the mayor's orders thus far. Nor does the mayor's order or the enabling civil emergencies ordinance of the municipality specifically exempt itself from the county legislation or the county's emergency orders.

Therefore, both the mayor's and the county executive's orders should co-exist and remain enforceable within the town's corporate limits. However, the town's police department is not authorized to enforce the county's civil emergency ordinance using its penalty clause for violations of the county executive's orders. Finally, it is worth mentioning that like a state statute the Governor's emergency orders would preempt any local emergency order and could be enforced by any law enforcement officer of the State.

Literally as I finished writing this article, the Governor proclaimed Order Number 20-04-15-01 (Requiring Use of Face Coverings Under Certain Circumstances and Requiring Implementation of Certain Physical Distancing Measures) on April 15, 2020. This new order would substantially preempt or supersede the health officer's order discuss below and the county executive's order discussed herein above, except for the provision that created a county task force committee to be established to provide professional, technical and strategic assistance to the county to successfully combat the current health emergency.

Assuming the Governor's Order Number 20-04-15-01 had never been issued thereby essentially mooting the above-referenced subject matter of this paper, it would probably be best for the municipal mayor to simply issue new emergency orders from time to time that incorporate the county executive's orders prescribing the use of face masks and any other measure deemed to be in the best interest of health, safety and welfare of the public. That way both county and municipal

law enforcement officers could team-up to enforce the emergency safety mandates. As it so happened, however, our fast-acting Governor beat the mayor to it.

IV. A Twist—Conflicts Between Local Health Authorities:

The Governor along with the Secretary of Health command and control the State's health officials, which is a system that reaches deep within the 23 counties and Baltimore City. If medically necessary and reasonable to treat, prevent, or reduce the spread of the disease or outbreak believed to have been caused by the exposure to a deadly agent, the Governor under § 14-3A-03 of the PS Art. may order the Secretary of Health or other designated official to require individuals to submit to medical examination or testing, to submit to vaccination or medical treatment, or require individuals to go to and remain in places of isolation or quarantine until the Secretary or other designated official determines that the individuals no longer pose a substantial risk of transmitting the disease or condition to the public. Furthermore, the Governor may order the evacuation, closing, or decontamination of any facility, and if necessary and reasonable to save lives or prevent exposure to a deadly agent, the Governor may order individuals to remain indoors or refrain from congregating.

The Secretary of Health also has separate statutory authority to regulate health care facilities without an order from the Governor under § 14-3A-03. The Secretary of Health may further require an individual to go to and remain in a place of isolation or quarantine until the Secretary determines that the individual no longer poses a substantial risk of transmitting a disease or condition to the public if the individual. Furthermore, pursuant to COMAR (Code of Md. Regs.) Regulation 10.59.01.06, the Secretary of Health, with assistance from staff at a local health department, local health care facilities, local law enforcement agencies, local social service agencies, or any other local county agencies as needed, may isolate or quarantine in the individual's home an individual who does not require hospitalization or other highly skilled medical care.

Each Maryland county has an appointed health officer who is qualified and appointed pursuant to § 3-202 of the HG Article of the MD Code. The governing body of a county is *ex officio* the board of health for the county unless a code or charter county appoints a separate board of health for the county. A county board of health may adopt and enforce rules and regulations on any nuisance or cause of disease in the county.

The Md. Secretary of Health may delegate duties, powers, and functions as provided in the HG Article to a health officer for a county or other county official authorized to administer and enforce health and environmental laws. The role of county health officer is described in § 3-306 of the HG Article as follows:

...

- (c)(1) The health officer for a county is the executive officer and secretary of the county board of health.
- (2) Except in Montgomery County, the health officer for a county shall appoint the staff of the county health department.

(3) The health officer for a county shall have an office at an accessible place in the county.

(4)(i) The health officer for a county shall enforce throughout the county:

1. Under the direction of the Secretary, the State health laws and the policies, rules, and regulations that the Secretary adopts; and

2. Except as provided in subparagraph (ii) of this paragraph, under the direction of the county board of health, the rules and regulations that the county board of health adopts.

(ii) The health officer for a county shall enforce in each municipality or special taxing district in the county the rules or regulations that the county board of health adopts unless the municipality or district has a charter provision or ordinance that:

1. Covers the same subject matter as the county rule or regulation;

2. Is at least as restrictive as the county rule or regulation; and

3. Includes provisions for enforcement.

(5) A health officer shall perform any investigation or other duty or function directed by the Secretary or the county board of health and submit appropriate reports to them.

According to § 3-202 of the HG Article, in addition to the other powers provided by law and subject to the provisions of said article, each county board of health, which meets in May and October of each year, and at any other time the board considers necessary, may adopt and enforce rules and regulations on any nuisance or cause of disease in the county. As stated above, the county board of health is authorized to exercise those duties in each municipality or special taxing district in the county unless the municipality or district has a charter provision or ordinance that covers the same subject matter, is at least as restrictive as the provision that the county board is required to enforce, and includes provisions for enforcement. (Emphasis added.)

The Governor's Order Number 20-04-05-02 dated April 5, 2020 delegated certain emergency powers to "Authorized Health Officials" in the counties and Baltimore City allowing them to issue such orders as may be necessary to "...require the Unsafe Facility to modify its operations to comply with Social Distancing Guidance; or...designate all or part of the Unsafe Facility as a zone in which the occupancy and use of buildings may be controlled, and prohibit or limit the movement of individuals and/or vehicles into, in, or from the Unsafe Facility, including without limitation, by closing the Unsafe Facility.

At least one county health official, in Anne Arundel County, on April 15, 2020, ordered that customers (and employees) of any retail business deemed essential and permitted to remain open by the Governor's Executive Order No. 20-03-30-01 (as amended) were ordered and directed to wear face coverings when visiting the establishment, except where doing so would inhibit that individual's health or where the individual is under two years of age.

The powers of a municipal corporation, including its police power, may exist concurrently, or be constrained and even preempted, by State law. Maryland Constitution, Article XI-E, §6; Annotated Code of Maryland, LG Art., §5-202 *et seq.* (formerly Article 23A, §2(a)); *see also Allied Vending,*

Inc. v. City of Bowie, 332 Md. 279, 297, 631 A.2d 77 (1993); 62 Opinions of the Md. Attorney General 523 (1977). The Anne Arundel County order of the county health official exercising the Governor's delegated powers and acting as his authorized agent would also preempt a local emergency order.

However, similar to the resolution of conflicts regarding local executive emergency orders provided for by the Tillie Frank Statute (LG Art., §4-111); as already discussed above, Section 3-306 of the HG Art. would similarly resolve conflicts between the orders of county and municipal health officers depending on whether the county health officer is executing powers found in State statutes or emergency orders of the Governor, or is simply enforcing the rules and regulations that the county board of health is permitted to adopt from time to time. If it is the latter and the municipal corporation or taxing district has no comparable charter provision or ordinance allowing for a provision that is at least as restrictive as the county rule or regulation and does not include an enforcement provision, then the county health rule or regulation would also apply within the corporate limits of the municipality.

V. Conclusion

As seen in the situation described above, the battle (if not barrage) of local (and state) emergency orders in Maryland may often become academic questions or non-conflicts since most orders may not regulate the same type or aspect of human behavior. Furthermore, the Governor is the commander-in-chief and the chief executive officer of the State, and the local governments, including the home rule jurisdictions, are merely creatures of the State for which the Governor can readily use his statutory emergency powers and the Common Law of Maryland's doctrines of preemption and concurrent jurisdiction to resolve or prevent any local conflicts.

Even in those more rare cases where local emergency orders do in fact conflict, battles between emergency orders can typically be resolved by applying the statutory provisions found in the Tillie Frank Statute codified in §4-111 of the LG Art. Likewise, in those cases involving local health officers, one can apply § 3-306 of the HG Article of the Md. Ann. Code to resolve the conflict.

Finally, due to disparate economies of scale, differences in scope of local services provided, and more limited resources and smaller geographic areas, few municipal corporations, despite being co-equal political subdivisions of the State of Maryland, in the eyes of the General Assembly and the law, have appointed public health officers like the counties, and their health-related ordinances or regulations, more often than not, compliment similar regulations that are likely to be enforced at the county level. However, it is important to again point out that municipal police and other city or town officers cannot enforce county emergency orders unless there is an agreement in place authorizing such city or town officers to perform this expanded function and act as an agent for the county.

This article was written by Kevin J. Best, Esq. who is a municipal attorney in Maryland with offices in Annapolis, dated 4/15/20 (Revised). The Law Office of Kevin J. Best, all rights reserved, Copyright 2020. See also a similar article by the same attorney entitled "Municipal Emergency Powers in Maryland" dated 4/13/20.